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Supreme Court of California
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NO. S290840

IN THE SUPREME COURT OF CALIFORNIA

BRING BACK THE KERN, et al.,
Plaintiffs and Respondents,

v.

CITY OF BAKERSFIELD,
Defendant and Respondent,

NORTH KERN WATER STORAGE DISTRICT, et al.,
Real Parties in Interest and Appellants.

After a Decision by the Court of Appeal, Fifth Appellate District
Case No. F087487 (and consolidated cases)
Appeals from Kern County Superior Court
The Hon. Gregory Pulskamp (Case No. BCV-21-101310)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING PLAINTIFFS AND RESPONDENTS; AMICUS BRIEF OF CALIFORNIA WATER IMPACT NETWORK

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING PLAINTIFFS AND RESPONDENTS

Pursuant to California Rules of Court, rule 8.520(f), the California Water Impact Network (CWIN) requests permission to file the attached amicus curiae brief in support of Plaintiffs and Respondents Bring Back the Kern et al.

The California Water Impact Network is a California nonprofit organization formed in response to pressing issues of water scarcity and justice in California. CWIN and its membership have been advocating for the just and environmentally sustainable use of California's water, including instream flows, since 1993. This advocacy extends to seeking enforcement of the requirements of environmental protection laws and requirements. Those include, among numerous others, the interrelationships between the reasonable use requirements in Article X, Section 2 of the California Constitution, the public trust doctrine, and Fish and Game Code section 5937.

CWIN's core purposes include the protection and restoration of fish and wildlife resources, scenery, water quality, recreational opportunities agricultural uses, and other natural environmental resources and uses of California's rivers and streams, watersheds, and groundwater resources. Public interest litigation is among the key tools which CWIN employs to fulfill these core purposes.

In addition to advocating for flow requirements protecting instream and public trust uses, CWIN and its members and counsel have been at the forefront of decades of efforts to protect fisheries, habitats and communities from dangerous reliance on "paper water" from oversubscribed watersheds and to promote transparency and accountability

in decision-making of major water agencies (See, e.g., *Westlands Water District v. All Persons Interested* (2023) 95 Cal.App.5th 98 [declining to validate Westlands Water District's materially uncertain permanent repayment contract]; *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.3d 892, 915 ["paper water" worth little more than "a wish and a prayer"].)

CWIN sent a letter supporting the successful petition of Plaintiffs and Respondents Bring Back the Kern et al. seeking this Court's review of the Court of Appeal's Opinion in *Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322 ("Court of Appeal Opinion" or "Opinion").

Drawing from decades of expertise in related areas, CWIN's amicus brief will assist the Court in resolving this matter by succinctly highlighting the devastating practical consequences which would ensue if the Opinion were affirmed. Far from expanding or promoting fidelity to the protection Court of Appeal adopted a reading of article X, section 2 of the California Constitution ("Article X, section 2") that would eliminate any role or the Legislature in setting rules governing the reasonable diversion and use of water to protect public fisheries. Far from improving actual enforcement of Article X, section 2 it would do precisely the opposite, replacing a workable two-part test with a wildly unworkable "everything everywhere all at once" approach that would enable the same appropriators which have chronically drained the river to "flood the zone" and run out the clock on any credible prospect of fisheries protection. It would would effectively nullify Section 5937, replacing its requirement of "good condition" at all times to a reality of "good riddance." While lawyers argue, the river will run dry.

DATED: March 4, 2026

LAW OFFICE OF ROGER B. MOORE

By:

Roger B. Moore

AMICUS BRIEF OF CALIFORNIA WATER IMPACT NETWORK

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rules 8.488 and 8.208 of the California Rules of Court.

INTRODUCTION

There used to be a river here
Running deep and wide…
Then somebody stole the water
Another politician lied.
Merle Haggard, "Kern River Blues"

If undisputed facts could ever support an injunction under the plain terms of section 5937, this was that case. Other than in extreme wet conditions, dam operation left no water for fish so often that the Kern River flowed past the City's weirs "only once" in the half century before 2023. After the superior court issued its injunction order, the Plaintiffs secured an agreement with the dam operator, the City of Bakersfield, on a court-approved implementation order.

But the Opinion, siding with water district appellants, reversed the injunction and implementation order based on the novel premise that the "self-executing" nature of

Article X, section 2 prevented an injunction from even issuing without a further balancing of uses and interests.

Reducing Section 5937 to merely "one expression of the Legislature's policy preferences" the Court of Appeal effectively rendered its fish protection requirements presumptively unconstitutional, assigning to Plaintiffs the further burden of first demonstrating that leaving that amount of water in the river is reasonable and beneficial in relation to all other uses and interests. Instead of enabling a more inclusive approach to reasonable use protection, the Opinion would give appropriates a new tool to weaponize the "self-executing" track in Article X, section 2, so that it invites obstruction of legislative action in furtherance of that provision and upends the normal burden of proof for litigants arguing that the statute cannot be constitutionally applied as written. This would predictably thwart reasonable use protection, not promote it.

I. THE COURT OF APPEAL'S OPINION, IF AFFIRMED, WOULD WEAKEN RATHER THAN BROADEN ENFORCEMENT OF ARTICLE X, SECTION 2.

The Opinion irreconcilably conflicts with state and federal decisions holding that Section 5937 is constitutionally authorized, mandatory, and enforceable. The Legislature's authority to determine that maintaining instream flows for fish is a reasonable use of water is already firmly established in leading cases addressing the relationship between California's fish protection requirements and Article X, section 2. (See *CalTrout I, supra,* 207 Cal.App.3d at 624-626; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*CalTrout II*.")

As Plaintiffs have shown, while these cases chiefly addressed Fish and Game Code section 5946, their conclusions that the statutory terms reflect the Legislature's determination of constitutional reasonable and beneficial use pertains equally to Section 5937. Because the Legislature's mandate to keep fish in good condition was not "manifestly unreasonable," the court had "no warrant" to conclude otherwise. (*CalTrout I,* 207 Cal.App.3d at 625.)

Contrary to the assumption that the Plaintiffs needed to first make a further showing engaging the trial court in ad hoc determinations of reasonableness, the Legislature "has already balanced the competing claims" and given the "priority" to fisheries. (*CalTrout II*, 218 Cal.App.3d at 201.) In concluding otherwise, the Opinion improperly relied on *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706, which did not address any *a priori* rule analogous to Section 5937. (Opinion, p. 28, fn. 18.) In *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1484 and fn. 10, the court rejected the argument that reasonableness must always be determined "in the first instance by the trial court," noting that *Cal Trout I* held "precisely the opposite." See also DFW Letter, p. 5 (discussing *Light* and *CalTrout I*).

The Opinion also irreconcilably conflicts with federal law decisions which have drawn from California authorities in applying Section 5937. The Answer fails entirely to address *San Luis & Delta-Mendota Water Authority v. Haugrud* (9th Cir. 2017) 848 F.3d 1216, 1234, which held that the plain language of Section 5937 "not only allows but requires" compliance despite other provisions of state water

law. (See Petition, pp. 35, 39.) The Answer also fails to persuasively distinguish *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 920-925.) While not addressing Article X, Section 2 directly, *Patterson* construed the plain meaning and context of Section 5937 to require "the release of sufficient water to keep fish alive" in its decision requiring the Bureau of Reclamation to comply with Section 5937.

Like this existing case law contrary to the Opinion, legal scholars addressing the relationship of Section 5937 to constitutional reasonable use requirements have cited the statute, including the provisions at issue here, as a textbook example of the Legislature exercising its constitutional authority under X, Section 2 to "declare that certain environmental uses of California's water resources are reasonable." B. Gray, *The Reasonable Use Doctrine in California Water Law and Policy*, in A. Lassiter, ed., SUSTAINABLE WATER CHALLENGES AND SOLUTIONS FROM CALIFORNIA 83, 89-90 (2015); see also *id*. at p. 90 (noting that *CalTrout I* "upheld the legislature's authority to make these types of categorical declarations of reasonable use" and "rejected" the claim that Section 5937 violated article X, section 2).

II. THE OPINION'S NOVEL AND RADICAL DEPARTURE FROM EXISTING LAW MUST BE REJECTED.

Addressing questions about the relationship between two bedrock principles of California law: Fish and Game Code section 5937 and Article X, section 2 of the California Constitution, the Opinion needlessly threw this relationship into doubt by allowing a clear misreading of the latter to thwart effective enforcement of the former.

The Plaintiffs met all traditional requirements for a preliminary injunction and had little difficulty convincing the superior court of a "very high likelihood of succeeding on the merits" under Fish and Game Code Section 5937's requirement that dam owners and operators "shall allow sufficient water at all times" to pass over, around, or through its dam to keep fish in the river below the dam "in good condition."

Turning the "self-executing" provision in Article X, section 2 on its head, the Opinion wrongly compels making relief unavailable to Plaintiffs that have otherwise fully supported injunctive relief under Section 5937 unless they clear a further hurdle of balancing statutory compliance against all other water uses and interests on the river, effectively nullifying the statutory provision. Requiring this would weaken Article X, Section 2 as well as statutory protection. Article X, section 2's "self-executing" language also includes a coequal provision expressly providing that "the Legislature may also enact laws in the furtherance of the policy in this section contained."

The Real Parties in Interest baselessly argue that Legislative Article X, section 2 cannot apply because it became effective in 1928 and "did not exist" in 1915, when the Legislature adopted the predecessor to Section 5937. As Plaintiffs show in their briefs, this argument is beyond what the Opinion addresses and misapplies law and history. Because the dams at issue did not include "fishways," the focus of the 1915 statute, the operative language took effect in 1937 amendments expanding statutory protections. The Legislature acted within its authority under Article X, Section 2 during recodifications and revisions after 1928. (See, e.g,, *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal. 5th 844, 862-863.)

Under existing law, which the Opinion would upend if affirmed Section 5937 falls within Article X, section 2's ambit of Legislative authority while still amply protecting constitutional safeguards. (See, e.g., *California Trout, Inc. v. State Water Resources Control Bd*. ("*CalTrout I*") (1989) 207 Cal.App.3d 585, 624-626).) Far from seeking an injunction with no discernible parameters or one which requires analysis in a vacuum, Plaintiffs adhere to existing law in presuming Section 5937's constitutionality unless opponents demonstrate its application is "manifestly unreasonable." (*CalTrout I*, 207 Cal.App.3d at 625.) Should Appellants still wish to attempt such a showing, it can be addressed as applied when the time comes to set a flow regime complying with the trial court's injunction.

Requiring Plaintiffs to overcome a further balancing of uses hurdle after they have already demonstrated injunctive relief is needed for compliance with Section 5937 would effectively shift to them the burden of disproving unconstitutionality. That would be contrary to well-established case law placing the burden of evincing supporting facts on the party challenging constitutionality, even if that party is a defendant or a real party in interest. (See, e.g., *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 765, 780 [statutes receive presumption of constitutionality]; DFW Letter, p. 5 [same].)

CONCLUSION

For the reasons described above, CWIN requests that the Court reverse the Court of Appeal's Opinion.

DATED: May 4, 2026 By: _____/s./_____

Roger B. Moore Attorney for Amicus Curiae California Water Impact Newtork

CERTIFICATE OF WORD COUNT

This brief complies with the type-volume limitation of California Rules of Court Rules 8.204(c), 8.520(b)(1), and Rule 8.520(f) because this reply contains 4312 words as counted by Microsoft Word, excluding the parts of the brief exempted by Rule 8.520(c)(3).

PROOF OF SERVICE

I, Roger B. Moore, am over eighteen years of age and not a party to this action. I am employed in the county where the service took place. My business address is 337 17th Street, Suite 211, Oakland, CA.

On May 4, 2026, I caused to be served the following document on the parties in this action, whose attorneys are listed in the True-Filing service directory for this matter, by utilizing the e-filing service offered by True-Filing:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 4th day of May , 2026, in Oakland, California.

By:_____/s/_____

Roger B. Moore

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Case No. S290840
California Supreme Court

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.Executed on May 4, 2026, in Oakland, California.

Roger B. Moore

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Lower Court Case Number: **F087487**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/4/2026

Date

/s/Roger Moore

Signature

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