NO. F087487

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

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

v.

CITY OF BAKERSFIELD,
Defendant and Respondent,

BUENA VISTTA WATER STORAGE DISTRICT, et al.,
Real Parties in Interest and Appellants.

APPLICATION BY CALIFORNIA TROUT, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF RESPONDENTS BRING BACK THE KERN, ET AL.

On Appeal from the Superior Court of Kern County
The Honorable Gregory Pulskamp, Judge (Case No. BCV-21-101310)

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Attorneys for *Amicus Curiae*

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

DATED: October 7, 2024 By: 

Amanda Cooper

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE FIFTH DISTRICT COURT OF APPEAL:

Pursuant to Rule 8.200(c) of the California Rules of Court, California Trout, Inc. respectfully requests leave to file the attached *amicus curiae* brief in support of Respondents Bring Back the Kern, et al.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

California Trout ("CalTrout") is a 501(c)3 non-profit organization founded in 1971 and headquartered in San Francisco, California. CalTrout's mission is to ensure healthy waters and resilient wild fish for a better California. CalTrout manages over 60 large-scale freshwater restoration projects throughout the state of California. Our goal is to restore populations of California's native salmon and steelhead trout and preserve California's keystone species for future generations. CalTrout's ten regional offices work to address California's complex natural resource issues driven by climate change and to protect and restore California's unique biodiversity.

HOW THIS BRIEF WILL ASSIST THE COURT

Appellants in this case are irrigation districts that divert water from the Kern River who challenge the validity of the trial court's preliminary injunction order that orders the City of Bakersfield to stop diverting excessive amounts of water from the Kern River. Central to this appeal is a challenge to the trial court's interpretation of California Fish and Game Code Section 5937, specifically how

Section 5937 relates to article X, section 2 of the California Constitution. Appellants argue that the trial court misread the seminal Section 5937 cases, *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 ("*Cal Trout I*") and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*Cal Trout II*") (collectively "*Cal Trout* cases").

As the original plaintiff in the *Cal Trout* cases, CalTrout is uniquely positioned to comment on this matter and offer this Court a perspective on the *Cal Trout* cases Section 5937 not offered by the Parties.

REQUEST FOR LEAVE TO FILE

Because the decision of this Court will affect the application of Fish and Game Code Section 5937 statewide, potentially impacting protections available to fish in the many places that CalTrout works, and because the proposed *amicus* brief brings a unique and important perspective to bear on this matter, CalTrout respectfully requests that the Court grant the filing of this *amicus curiae* brief.[1]

Respectfully Submitted,

DATED: October 7, 2024

By: _____
Amanda Cooper

[1] No Party or counsel in the pending case authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No other person made any monetary contribution intended to fund the preparation or submission of this brief.

By: _____

Walter Collins

Attorneys for Amicus Curiae
California Trout, Inc.

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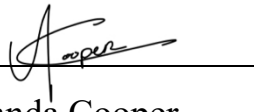
DATED: October 7, 2024 By: 

Amanda Cooper

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BRIEF OF AMICUS CURIAE

INTRODUCTION

This appeal involves a challenge to a preliminary injunction order requiring the City of Bakersfield to bypass sufficient water downstream of their weirs to comply with California Fish and Game Code section 5937 (hereinafter referred to as "Section 5937").[2] As a 501(c)3 non-profit organization with a mission of ensuring healthy waters and resilient wild fish for a better California, California Trout, Inc. ("CalTrout") does not seek to comment on the factual basis for the trial court's preliminary injunction order. This question is well-covered by the Respondents' briefs. Instead, this brief focuses on protecting the long-standing precedent established in *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 ("*Cal Trout I*") and reaffirmed in *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*Cal Trout II*") with respect to Section 5937.

Appellants attack the validity of Section 5937 by arguing that the trial court's interpretation of Section 5937 conflicts with article X, section 2 of the California Constitution. Not only is Appellants'

[2] Real Parties in Interest North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Rosedale Rio-Bravo Water Storage District filed a single Appellants' Joint Opening Brief, described herein as "Joint Br." Real Party in Interest J.G. Boswell Co. filed its own Opening Brief, described herein as "Boswell Br." All Real Parties in interest are collectively referred to herein as "Appellants."

argument inconsistent with existing law, but interpreting Section 5937 as Appellants suggest would remove protections for fish statewide by invalidating Section 5937's strict mandate that owners and operators of dams leave enough water instream to keep fish in good condition.[3]

DISCUSSION

I. The Courts must defer to the Legislature's decision to require all dam operators to bypass water to keep fish in good condition below dams, unless the required instream flows would result in a manifestly unreasonable use of water under Article X, Section 2 of the California Constitution.

Appellants erroneously assert that Section 5937, as interpreted and applied by the trial court, conflicts with article X, section 2 of the California Constitution. Article X, section 2 articulates the Reasonable Use Doctrine as follows:

> "The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water . . . This section shall be self-executing, and **the Legislature may also enact laws in the furtherance of the policy in this section contained**." (Cal. Const., art. X, § 2) (emphasis added).

[3] California Fish and Game Code Section 5937 states that "the owner of any dam *shall allow sufficient water at all times* to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." (emphasis added).

Disregarding the last sentence and the authority it vests in the Legislature, Appellants argue that article X, section 2 requires the courts to perform a balancing, or comparison, of all uses of water when determining what uses are reasonable and unreasonable. (*See* Joint Br. at 30, 39; Boswell Br. at 11.) However, this is the same argument that the Court of Appeal rejected in *Cal Trout I* ((1989) 207 Cal.App.3d 585, 624.)

In that case, Los Angeles Department of Power and Water ("LADWP") argued that "the Legislature may not impose a categorical priority for one use of water because reasonableness of use requires comparison of contending alternative uses which is an adjudicative question that cannot be constrained by statute." (*Id*. at 622.) LADWP based this argument on the premise that "'what is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined in the first instance by the trial court'" (*Id*. at 623) (quoting *Gin S. Chow v. City if Santa Barbara* (1933) 217 Cal. 673, 706).

The Court of Appeal rejected this attempt to narrow or minimize the Legislature's directives set forth in Section 5937, holding that that there is "no preclusion in article X, section 2, of legislative power to make rules concerning what uses of water are reasonable." (*Id*. at 622.) The Court acknowledged that, "ordinarily, the standard of reasonableness is fixed ad hoc," but explained that this "does not impel the view that the Legislature has no power to fashion

rules concerning reasonableness." (*Id.* at 624.)[4] Instead, "[a]rticle X, section 2 explicitly assigns to the Legislature the right and obligation to enact laws in furtherance of its policy." (*Id*. at 625.) This includes the authority "to enact statutes which determine the reasonable use of water." (*Id*.) Here, the plain language of Section 5937 articulates the Legislature's determination that it is reasonable to leave water instream to keep fish in good condition below dams.

Appellants cite several cases which discuss judicial balancing pursuant to article X, section 2 to support their argument that "[t]he determination of what is a reasonable and beneficial use 'of course, depends upon the facts and circumstances of the case.'" (Joint Br. at 29 citing *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567; Boswell Brief at 18 citing *United States v. State Water Res. Control Bd*. (1986) 182 Cal.App.3d 82, 129 ("determination of reasonable use depends upon the totality of the circumstances presented")).[5] However, these cases are not persuasive because the courts do not address what is required when there is a legislative rule in place concerning the reasonableness of a particular

[4] The Court distinguished *Gin S. Chow*, concluding that the Supreme Court in that case "did not consider" whether "the question of reasonableness invariably must be resolved ad hoc, adjudicatively." (*Id*. at 624.) Rather, "[a]ll that the reasoning in *Gin S. Chow* connotes is that *in the absence of an a priori rule* a court may ascertain whether a use of water is unreasonable from the facts and circumstances of particular cases." (*Id*.) (emphasis added).

[5] Appellants also cite *Imperial Irrigation Dist. v. State Water Resources Control Bd*. (1990) 225 Cal. App. 3d 548, 570; *Santa Barabara Channel Keeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185; *Light v. State Water Resources Control Bd*. (2014) 226 Cal.App.4tth 1463, 1479.

use of water. Instead, each of these courts analyzed what is required *in the absence* of such a rule. (*Cal Trout I*, 207 Cal.App.3d at 624; *see* footnote 3, *supra).*

Additionally, as the Court of Appeal explained in *Cal Trout I*, "[o]rdinarily, absent a plain constitutional mandate, a conflict in public policy between the view of the judiciary and the Legislature must be resolved in favor of the latter. Where various alternative policy views reasonably might be held whether the use of water is reasonable within the meaning article X, section 2, *the view enacted by the Legislature is entitled to deference by the judiciary*." (*Id*.at 624-625) (emphasis added).[6]

Therefore, this Court should affirm the trial court's holding that no balancing test was required to satisfy the reasonable use requirement as articulated in article X, section 2 of the California Constitution.

II. Appellants seek to weaken the precedent set in *Cal Trout I* by ignoring the court's reasoning and focusing on California Fish and Game Code section 5946.

Appellants' argument that the trial court misread the *Cal Trout* cases is incorrect and misleading because Appellants improperly restrict the court's reasoning in *Cal Trout I* to Section 5946, and

[6] The Court also held that the Legislature's "broad authority" under article X, section 2 is not unlimited: "If a statute sanctioned a *manifestly unreasonable* use of water, it would transgress the constitution." (207 Cal.App.3d at 625) (emphasis added). However, this limit is a far cry from Appellants' assertion that the determination of reasonableness always requires a judicial balancing test.

erroneously claim that Section 5937 (as interpreted by the trial court based on *Cal Trout I*) conflicts with Section 5946.

A. Nothing in the *Cal Trout I* opinion limits the Court of Appeal's reasoning to Section 5946.

Appellants' assertion that the "discussions of the comparative balancing of different water needs under the constitution in . . . *Cal Trout I* . . . [is] limited to the legislative mandate in Section 5946" (Joint Br. at 35) is inconsistent with the Court of Appeal's opinion in *Cal Trout I.*

Section 5946 states, *inter alia*, that "[n]o permit or license to appropriate water in District 4 ½ shall be issued by the State Water Resources Control Board after September 9, 1953, unless conditioned upon full compliance with Section 5937." (Fish and Game Code § 5946(b)).[7] In the *Cal Trout I* litigation, LADWP claimed that section 5946 did not apply to its water rights licenses, which were issued in 1974, because it obtained water rights *permits* before the effective date of Section 5946. (207 Cal.App.3d at 592-93). The Court of Appeal rejected this argument, noting that Section 5946's mandates apply both to permits and licenses issued after September 9, 1953. (*Id.* at 599-608).

[7] Section 11012 defines Fish and Game District 4 ½ as [t]hose portions of the Counties of Mono and Inyo not included in other districts. The water rights licenses at issue in the *Cal Trout I* litigation were for Los Angeles's diversion facilities on four streams within the Mono Lake watershed. (207 Cal.App.3d at 592).

The Court then turned to LADWP's alternative argument that, in the Court's words, sought "to nullify section 5946 by an implied facial challenge to its constitutional validity. *Embedded in this challenge is the claim that the Legislature lacks the constitutional power to make reasonable determinations of the priority of water uses*." (*Id*.at 593). Part I of this brief discusses this "embedded claim"– that Section 5937's directives violated article X, section 2 of the California Constitution.

It is true that the Court of Appeal's analysis refers to Section 5946, rather than 5937. (*See, e.g., Cal Trout I*, 207 Cal.App.3d at 622 ("We cannot say that section 5946 is unreasonable in requiring a minimal in-stream flow for preservation of fish in the areas it affects."); *id*. at 623 ("[W]e find no arguable merit in the claim that section 5946 would conflict with that constitutional provision because it calls for minimum in-stream flow for preservation of fish.")) However, the Court's focus on Section 5946 was not a limitation on the directive of Section 5937, as Appellants suggest, but rather a necessity because the case arose from the State Water Resources Control Board's failure to comply with Section 5946 by not conditioning LADWP's 1974 licenses on its compliance with Section 5937.

Indeed, it would have been unnecessary for the Court of Appeal to have engaged in an extensive analysis of the Legislature's authority to enact laws in furtherance of the policies of article X, section 2 if its opinion was limited to Section 5946. That statue simply states that specific conditions shall be included in certain water rights permits

and licenses. In contrast, it is Section 5937–the "embedded" statute–that raised the question of the Legislature's "constitutional power to make reasonable determinations of the priority of water uses." (*Id*. at 593).

B. There is no conflict between Section 5937–a broad legislative determination of reasonableness–and Section 5946, which provides an enforcement mechanism for Section 5937 in Inyo and Mono counties.

Appellants' argument that the trial court's interpretation of Section 5937 would render Section 5946 superfluous[8] ignores the fact that the statues bind different parties. Section 5937 applies to dam owners and operators, while Section 5946 applies to the State Water Resources Control Board. "Thus, there is no inherent irreconcilable conflict between the broad 5937, which controls the manner in which owners operate their dams, and the narrow 5946, which requires the waterboard to condition permits on that underlying law."[9] (Bork et al., *The Rebirth of California Fish & Game Code Section 5937: Water for*

[8] Appellants' brief at 36 states that "if section 5937 itself constitutes a legislative determination of the priority of beneficial use as to every stream in the State, the legislature would not have needed to enact section 5946 . . . [because] as interpreted by the trial court, section 5937 would have already established an absolute priority for fished in District 4 ½ . . . and section 5946 would have been unnecessary."

[9] Given the distinction between the statutes, Appellants' argument that it was "a critical distinction" that "petitioners [in Ca*Trout I*] challenged the licenses, not based on Section 5937, but instead on 5946" is nonsensical. (Joint Br. at 32). Petitioners could not have challenged the licenses under Section 5937 because the State Water Board was not the owners or operators of the dams.

Fish, 45 U.C. Davis L. Rev. 809,885 (2012), available at https://ssrn.com/abstract=3169409) Therefore, contrary to what Appellants argue, Section 5946 has nothing to do with the applicability of Section 5937's prioritization of water for fish statewide.

CONCLUSION

This Court's interpretation of Fish and Game Code Section 5937 will have statewide implications. Appellants' claim that keeping fish in good condition below dams is just one of many beneficial uses that must be balanced against one another is contrary to the express directives of Section 5937 and the Court of Appeal's holding in *Cal Trout* I. If adopted, this interpretation would undermine the Legislature's policy of ensuring that *all* dam operators provide instream flows needed to keep the State's fisheries in good condition and would frustrate efforts to protect California's already imperiled fish populations, especially in the time of climate change and increasing competition over the State's water resources.

For these reasons, CalTrout respectfully requests that this Court reject Appellant's arguments regarding Section 5937 and affirm the trial court's decision that (1) Section 5937 is a legislative determination of reasonable use authorized under article X, section 2, that is not subject to a judicial balancing test; and (2) Section 5937 imposes a non-discretionary duty in owners and operators of dams to maintain flows sufficient to keep fish in good condition.

Respectfully Submitted,

DATED: October 7, 2024

By: _____
Amanda Cooper

By: _____
Walter Collins

Attorneys for Amicus Curiae California Trout, Inc.

CERTIFICATE OF WORD COUNT

Cal. Rules of Court, rule 8.204(c)(1)

The text of this Brief consists of 2386 words, as counted by the Microsoft Word software used to generate the Brief.

DATED: October 7, 2024 By: _____

Amanda Cooper

PROOF OF SERVICE

I, Amanda Cooper, am over eighteen years of age and not a party to this action. My business address is 435 Pacific Ave., Suite 200, San Francisco, CA 94133.

On October 7, 2024, I caused to be served the following documents 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:

APPLICATION BY CALIFORNIA TROUT, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF RESPONDENTS BRING BACK THE KERN, ETAL.

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

Executed this 7th day of October, 2024, in Mount Shasta, CA.

By: _____

Amanda Cooper