In the

Supreme Court

of the

State of California

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

v.

CITY OF BAKERSFIELD,
Defendant and Respondent,

and

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

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL · FIFTH APPELLATE DISTRICT
CASE NOS. F087487, F087503, F087549, F087558, F087560, F087702
SUPERIOR COURT OF KERN COUNTY · HONORABLE GREGORY A. PULSKAMP
CASE NO. BCV-22-103220

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amicus curiae* Property and Environment Research Center ("PERC") respectfully requests leave to file the accompanying Proposed *Amicus Curiae* Brief in Support of Appellants North Kern Water Storage District, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kern County Water Agency, and J. G. Boswell Company.[1]

INTERESTS OF *AMICUS CURIAE*

PERC is an independent, nonpartisan, nonprofit research organization that has, for over 45 years, studied the design of conservation institutions—including how property rights, voluntary exchanges, and incentive-based tools can help restore instream flows. PERC's foundational premise is that conservation is most effective and lasting when cooperative arrangements give resource users a stake in stewardship. PERC's research and amicus participation reflect the same approach the California Legislature has adopted: promoting voluntary water transfers and incentive-based instream-flow tools alongside—not in place of—the State's water law framework. (See Wat. Code, §§ 109, 1707.)

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[1] Pursuant to Rule 8.520(f)(4), amicus states that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

PERC's integrated approach to conservation spans research, law and policy, and applied innovation. PERC's work focuses on three core areas: promoting the health of ecologically significant public and private lands, encouraging innovative wildlife and forestry management techniques, and developing market-based solutions for water allocation and management. Recent PERC scholarship in the area of water law and policy includes an evaluation of groundwater conservation easements[2] and an analysis of voluntary water leasing to restore Utah's Great Salt Lake.[3]

PERC also advances its mission through strategic participation in environmental litigation. PERC has filed amicus briefs in the United States Supreme Court[4] and multiple federal

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[2] Wright et al., Groundwater Conservation Easements: Evaluating an Innovative New Tool for Aquifer Sustainability (Mar. 22, 2024) <https://perc.org/2024/03/22/groundwater-conservation-easements/> [as of May 4, 2026].

[3] Wright, Utah's Moonshot: How Voluntary Water Leasing Can Help Restore the Great Salt Lake (Mar. 27, 2025) <https://perc.org/2025/03/27/utahs-moonshot/> [as of May 4, 2026].

[4] See, e.g., Brief for Amici Curiae Property and Environment Research Center and Safari Club International in Support of the Petition for a Writ of Certiorari, *Art & Antique Dealers League of America, Inc. v. Mahar* (U.S. Mar. 17, 2025, No. 24-868), 2025 WL 897356, cert. den. *sub nom. Art & Antique Dealers League of America, Inc. v. Lefton* (2025) ___ U.S. ___ [145 S.Ct. 2732]; Brief Amicus Curiae of the Property and Environment Research Center in Support of Petitioners, *Seven County Infrastructure Coalition v. Eagle County, Colorado* (U.S. Sept. 4, 2024, No. 23-975), 2024 WL 4124954, cert. granted (2025) 605 U.S. 168.

Courts of Appeals[5] in cases that present important questions of environmental law.

This case directly implicates PERC's mission. The outcome will have lasting implications for how California balances competing demands for scarce water supplies while protecting aquatic ecosystems—a challenge that California has long addressed through a combination of constitutional reasonableness review, regulatory oversight, and voluntary, incentive-based solutions.

PERC's proposed brief offers this Court a perspective on why Plaintiff-Respondents' ("BBTK's") categorical interpretation of Section 5937 would harm competing environmental interests, destabilize California's water rights priority system, and undermine the voluntary and cooperative tools the Legislature has expressly endorsed as part of California's water management framework. (See Wat. Code, §§ 109, 1707.) Conservation is most durable when the law and cooperative arrangements reinforce one another. By drawing on PERC's research into real-world

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[5] See, e.g., Property and Environment Research Center's Amicus Brief Supporting Defendant-Appellant/Reversal, *Bear Warriors United Inc. v. Secretary of the Florida Department of Environmental Protection* (11th Cir. Aug. 4, 2025, Nos. 25-11612, 25-11821) <https://www.perc.org/wp-content/uploads/2025/09/PERC_-CA11-ESA-Anticommandeering-Amicus_08042025.pdf> [as of May 4, 2026]; Brief of Amicus Curiae the Property and Environment Research Center in Support of Defendants-Appellants/Reversal, *Defenders of Wildlife v. United States Fish & Wildlife Service* (9th Cir. Sept. 20, 2024, Nos. 22-15529, 22-15532, 22-15534, 22-15535, 22-15536, 22-15537, 22-15626, 22-15627, 22-15628).

implementation costs, regulatory interactions, and the design of voluntary conservation programs, PERC's perspective will assist the Court in crafting a precedent that is legally sound and practical in application throughout California.

For these reasons, PERC respectfully requests that the Court grant leave to file the accompanying Proposed Brief of *Amicus Curiae* in Support of Appellants.

Dated: May 4, 2026

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BRIEF OF *AMICUS CURIAE*

INTRODUCTION

Should this Court reach the merits of BBTK's arguments, the answer to the certified question is "yes." All uses of water in California—including water to benefit fish and other public trust uses—are subject to the factual consideration and balancing required by Article X, Section 2 of the California Constitution ("Section 2"). A showing of compliance with Section 2 is therefore required when seeking preliminary injunctive relief under Fish and Game Code section 5937 ("Section 5937"). Demonstrating a likelihood of success on the merits, which is required for obtaining a preliminary injunction, necessarily requires evaluating whether the amount of water proposed to bypass a dam is reasonable when balanced against all other beneficial uses of that water source.

Restoring flows to California's rivers is an admirable goal, and California law provides several avenues for accomplishing it—including reasonableness review under Section 2 and voluntary water transfers for instream-flow. (See Wat. Code, §§ 109, 1707.) However, BBTK's approach, if accepted, would foreclose under Section 5937 the balancing necessary to allocate limited resources among competing uses and could harm the environment by preventing decision-makers from directing resources where they will do the most ecological good. It would also undermine the certainty California's water management framework provides to all water users—the very certainty on which market-based conservation depends.

On the merits, BBTK's arguments do not withstand scrutiny, for several reasons. First, BBTK's position that the use of water for fish below a dam is categorically exempt from a fact-specific analysis for reasonableness under Section 2 contradicts this Court's holdings that Section 2 applies to *all* water uses. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367 ("*Peabody*") [Section 2's "mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 ("*Audubon*") ["All uses of water . . . must now conform to the standard of reasonable use."]).

BBTK argues that the Legislature undertook that inquiry *statewide* when it enacted Section 5937, and that the statute's text forecloses any further judicial inquiry into reasonableness. (Joint Opening Brief of Plaintiffs & Respondents p. 10 (hereafter "OBOM").) This rigid, one-size-fits-all approach is antithetical to the sound resource management demanded by Section 2 and, critically, would replicate the very kind of categorical priority rule that the 1928 constitutional amendment was enacted to abolish. (See *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, 103.)

Section 2 declares that it is the state's policy to achieve the beneficial use of water to the maximum extent possible, and to prevent waste, unreasonable use, and unreasonable method of use under the circumstances presented. (Cal. Const., art. X, § 2; *In re Antelope Valley Groundwater Cases* (2021)

62 Cal.App.5th 992, 1036 ["California's policy [is] that available water be put to the maximum beneficial use possible, with waste or unreasonable use prevented, under the circumstances presented"]; see also *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584-585 ("*Erickson*") [holding the same].)

Achieving that policy requires a fact-based analysis, not a statewide, blanket rule devoid of a careful balancing of specific costs and benefits. (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 ("*Gin S. Chow*") ["what is a useful and beneficial purpose and what is an unreasonable use [of water] is a judicial question depending upon *the facts in each case*"] [italics added].)

Although Section 2 authorizes the Legislature to enact laws "in the furtherance" of its policy (Cal. Const., art. X, § 2), even that authority "is not unlimited" because a statute "sanction[ing] a manifestly unreasonable use of water . . . would transgress the constitution." (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 625 ("*Cal Trout I*").) Section 5937 and its legislative history contain no findings regarding any particular river system and no consideration of competing beneficial uses on any specific watershed.

BBTK's interpretation of Section 5937 also cannot be reconciled with other water statutes that use similarly categorical language. Water Code section 106 ("Section 106") provides that "the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." Critically, Section 106 and Section 5937 use

materially similar statutory structures: both appear to establish categorical priorities without express reasonableness limitations. If BBTK's categorical reading of Section 5937 were correct, the same logic would require courts to elevate domestic and irrigation uses above all environmental uses under Section 106, regardless of the circumstances. (See OBOM p. 61.)

This Court, however, has rejected precisely that conclusion, holding that no single use of water—not even using water for domestic purposes—has an "absolute priority." (*Audubon*, *supra*, 33 Cal.3d at p. 447, fn. 30.) The Court of Appeal in this case reiterated that rule. (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 366.)

The water diverted from the Kern River is used for domestic and irrigation purposes—the very uses Section 106 declares to be the "highest" and "next highest" uses of water. BBTK cannot have it both ways: if Section 5937's categorical language forecloses balancing, then Section 106's categorical language must do the same, and domestic and irrigation uses would override Section 5937's fish-flow requirements. BBTK's argument thus depends on this Court rejecting a categorical approach to Section 106 while simultaneously embracing it for Section 5937—a result without any textual or rational basis.

Second, BBTK's categorical rule would foreclose consideration of competing environmental demands on the same water resources. Conservation is most effective when it accounts for trade-offs and allocates limited resources where they will do the most ecological good. Yet BBTK's inflexible interpretation of

Section 5937 could require water to be reallocated from ecologically significant habitat upstream from a dam—including habitat supporting native species or critically endangered wildlife—to provide for fish populations downstream from that dam, without any inquiry into the relative ecological value of either use.

Notably, Section 5937 protects "any fish that may be planted or exist below the dam" without distinguishing between native species and invasive populations. (Fish & G. Code, § 5937.) Under BBTK's interpretation, courts would be unable to consider whether releasing water benefits native trout or invasive carp. The fact-based analysis required by Section 2 enables these distinctions; BBTK's interpretation of Section 5937 does not.

Third, BBTK's position would destabilize California's longstanding water rights priority system—the foundation of the certainty and predictability that all California water users depend upon. Under BBTK's interpretation of Section 5937, any unsatisfied downstream junior-priority right holder could sponsor a Section 5937 lawsuit to force the bypass of water past upstream dams. Though such a lawsuit would purport to benefit below-dam fisheries, the ultimate aim could be to reallocate water from senior-priority right holders to downstream junior-priority users. Such incentives could undermine the investment-backed expectations of farms, cities, and water districts, inviting litigation that divides stakeholders rather than bringing them together.

Finally, BBTK's litigation-first approach undermines market-based, voluntary solutions. BBTK's requested relief is not to restore a particular fish species, but to force water past a dam to rewater the Kern River—an instream-flow objective well suited for voluntary transfers. California has declared it the policy of the State "to facilitate the voluntary transfer of water and water rights" (Wat. Code, § 109), and has expressly authorized water right holders to dedicate their water for instream use. (Wat. Code, § 1707.) Cooperative, incentive-driven solutions are often well suited to resolving tradeoffs and producing lasting conservation outcomes, such as rewatering streams.

But as BBTK has stated, "[a]lthough the Real Parties seek to change the nature of this application into a discussion of their private water rights, the Plaintiffs and this application are emphatically not concerned with that subject; they seek only the sufficient flows to keep fish in good condition required by Fish and Game Code, section 5937, a strict liability statute." (11 AA 2484.) Endorsing Section 5937 litigation as an alternative to voluntary arrangements will incentivize lawsuits instead of market-based transfers, potentially harming both the environment and efficient water allocation.

For these reasons, if this Court reaches the merits of BBTK's petition for review, it should hold that Section 5937 uses are subject to Section 2 reasonableness review and remand the case to the trial court to undertake the fact-specific balancing required by the California Constitution. PERC's position does not

prejudge the outcome of that balancing on the Kern River—it may well be that flows sufficient to keep fish in good condition are reasonable in light of all competing uses, and reasonable jurists could differ on how that balance comes out on a particular factual record. But that determination must be made through the fact-specific analysis that Section 2 demands, not through a categorical rule that forecloses this inquiry altogether.

ARGUMENT

I. Article X, Section 2 Requires Fact-Based Balancing of All Beneficial Uses, Including Uses Under Section 5937.

A. Reasonable use is the "cardinal principle" of California water law and management—no water use is absolute.

For nearly a century, all water uses in California have been subject to the reasonable use doctrine. Under the California Constitution, "'[b]eneficial use' and 'reasonable use' are two separate requirements, both of which must be met." (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185 ("*Santa Barbara Channelkeeper*").) As this Court has long recognized, "[i]t is well settled in this state that the law relating to the reasonable and beneficial use of water is to be applied in settlement of all water controversies." (*Miller & Lux v. San Joaquin Light & Power Corp.* (1937) 8 Cal.2d 427, 435.)

Without exception, courts have held that the reasonable use doctrine applies to all water uses in California and to all

branches of government. (*Peabody*, *supra*, 2 Cal.2d at p. 367 [Section 2's mandates "are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."]; see also, e.g., *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 530 [holding an act of the Legislature unconstitutional under Section 2]; *Audubon*, *supra*, 33 Cal.3d at p. 450 [holding "courts have concurrent jurisdiction with . . . administrative agencies to enforce the self-executing provisions of article X, section 2."] [citing *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 200 ("*EDF II*")].)

To exclude one statute here—Section 5937—would mark a dramatic departure from nearly a century of settled California water law jurisprudence. It would also defy basic principles of legislative intent: considering Section 2 has been held applicable in all circumstances, the Legislature's several amendments of Section 5937 occurred against a background expectation that beneficial and reasonable use requirements would apply.

Had the Legislature intended to displace that constitutional baseline and exempt Section 5937 from reasonable and beneficial use balancing, it would have said so expressly; its silence across multiple amendments confirms the opposite. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [the Legislature is deemed to be aware of prior judicial construction when it amends a statute]; *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199 [a statute will be construed in light of

established legal principles unless its language clearly discloses an intention to depart from them].)

From the outset, courts applied the reasonable use doctrine by examining the specific context of each water dispute, including the source of water and competing demands on that source. (See *Gin S. Chow*, *supra*, 217 Cal. at p. 706.) This Court recognized the breadth of Section 2's reasonable use doctrine early on: "[Section 2] is now the supreme law of the state, which the courts are bound to enforce, and it *must be made effectual in all case*[*s*] *and as to all rights* not protected by other constitutional guarantees." (*Id.* at p. 700 [italics added].) "What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case." (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 139 ("*Joslin*") [citing *Gin S. Chow*, *supra*, 217 Cal. at p. 706].)

Section 2 is "self-executing," meaning courts must apply it directly to matters of water allocation. (*Gin S. Chow, supra*, 217 Cal. at p. 700; see also *EDF II*, *supra*, 26 Cal.3d at p. 198 ["The provisions of article X, section 2 of the California Constitution being self-executing . . ., the courts have traditionally enforced the proscriptions against unreasonable uses and unreasonable methods of diverting water."].) Simultaneously, Section 2 provides that "the Legislature may also enact laws in the furtherance of [its] policy . . . ." (Cal. Const., art. X, § 2.)

These two features of Section 2—self-executing and enabling—are complementary, not mutually exclusive. Together, they require a court in any water controversy to (1) give effect to legislative implementation of Section 2, provided such statutes do not conflict with the constitutional standard, and (2) conduct the Section 2 balancing analysis directly when the Legislature has not performed a fact-based balancing for the particular water source at issue.

B. Section 5937 does not address the fact-specific balancing that the Constitution requires.

It is undisputed that water to support fish is a recognized beneficial use in California, and that fish and wildlife are valuable natural resources. (See Wat. Code, § 1243.) But the State—whether acting through the State Water Resources Control Board, a court, or the Legislature—must apply Section 2's balancing to all competing water uses, including public trust uses. (See *Audubon*, *supra*, 33 Cal.3d at pp. 433, 446.) As this Court held in *Audubon*, "[a]ll uses of water, including public trust uses, must . . . conform to the standard of reasonable use." (*Id.* at p. 443.)

If Section 2's reasonableness requirement applies to the public trust doctrine—a legal doctrine predating the State of California by nearly one-and-a-half millennia—it certainly applies to Section 5937. (See *id.* at pp. 434-435.) Like *Audubon*'s command to protect public trust resources to the extent "feasible" (*id.* at p. 446), a court applying Section 5937 must consider the

reasonableness of any mandate and its scope for streamflow to bypass a dam.

Viewed in isolation, Section 5937's text appears to establish a categorical rule. The statute directs that the owner of a dam "shall allow sufficient water . . . to pass" to keep below-dam fish in good condition, and it contains no express reasonableness qualifier or balancing instruction. (Fish & G. Code, § 5937.) But Section 5937 does not exist in isolation. It must be read against Section 2's overriding constitutional command, which by its terms admits of "no exception" and applies to "all water, under whatever right the use may be enjoyed." (*Peabody, supra,* 2 Cal.2d at p. 367.) When the two mandates are read together, as they must be, the apparent categorical force of Section 5937 gives way to the fact-based reasonableness inquiry the Constitution requires.

The Court of Appeal's holding in *Cal Trout I* is consistent with this point. There, the court found that the Legislature exercised its authority to determine reasonable use at a specific location through the enactment of Fish and Game Code section 5946 ("Section 5946")—not Section 5937. (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 593.)

Section 5946 narrowly applies to Mono and Inyo Counties and was enacted in 1953 in response to a particular emergency: the drying up of the Owens River and streams entering Mono Lake. (See *id.* at pp. 593-599.) "Embedded in this challenge is the claim that the Legislature lacks the constitutional power to make reasonable determinations of the priority of water uses. We

uphold the power of the Legislature to make such choices." (*Id.* at p. 593.) But that power was exercised through Section 5946's source-specific determination, not Section 5937's general directive.

Cal Trout I is explicit that Section 5946, not Section 5937, reflects the Legislature's balancing of competing uses: "Where that effects a reduction in the amount that otherwise might be appropriated, section 5946 operates as a legislative choice among competing uses of water." (*Id.* at p. 601.) The court expressly stated it did "not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water." (*Ibid.*)

The Ninth Circuit recently observed that the *Cal Trout* cases do not establish that Section 5937 itself reflects a legislative balancing of competing water uses. It explained that the balancing language in *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*Cal Trout II*") concerned Section 5946, not Section 5937, and that Section 5946 incorporates Section 5937—not vice versa. (*San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590, 602.) The critical distinction is that Section 5946 reflected a balancing of competing uses and interests concerning a specific watershed—one that had been subject to extensive legislative study—whereas Section 5937 does not reflect a source-specific analysis.

While isolated language from the *Cal Trout* opinions might appear to suggest, when read out of context, that Section 5937 itself reflects a completed legislative balancing, the holdings of those cases do not go that far. *Cal Trout I* expressly disclaimed

reaching "the application of section 5937 alone as a rule affecting the appropriation of water" (*Cal Trout I, supra,* 207 Cal.App.3d at p. 601), and the balancing language on which BBTK relies is tied to Section 5946's source-specific findings concerning Mono and Inyo Counties—not to Section 5937's general directive. (See OBOM pp. 58-59.) Treating language concerning a watershed-specific statute as a categorical statewide judgment about Section 5937 would extend *Cal Trout I* well beyond what those courts decided and would import into Section 5937 a balancing the Legislature never performed.

Even Section 5937's language raises questions that require fact-specific resolution: which "fish" must be protected? (Fish & G. Code, § 5937.) What constitutes "good condition"? (*Ibid.*) A court interpreting Section 5937 could reasonably conclude that "good condition" requires consideration of the needs of native versus invasive species, or that "any fish that may be planted or exist below the dam" encompasses different ecological priorities in different watersheds. (*Ibid.*) A court might also consider, in interpreting "good condition," the broader consequences of requiring water to pass through the dam. (*Ibid.*) If water were plentiful or other uses were of low value, a court could presumably be more protective of downstream fish. By contrast, it could presumably accept more risk to downstream fish if necessary to prevent grave harm upstream (e.g., cutting off domestic supply to a disadvantaged community).

There are surely many rivers and watersheds in California where "achiev[ing] maximum beneficial use of water" requires

leaving water in a river to sustain a fishery in good condition. (*Erickson, supra*, 22 Cal.App.3d at p. 585.) But BBTK points to no evidence—nor can it—that the Legislature considered the conditions of the Kern River, or any other specific river system, when it enacted Section 5937. The statute predates the 1928 constitutional amendment, and there is no indication in the legislative history that subsequent reenactments were intended to constitute a statewide reasonableness determination.

C. BBTK's interpretation may cause unintended environmental harm.

BBTK's interpretation of Section 5937 could harm, rather than help, environmental conservation. If courts are required to enforce a statute's categorical language similar to that in Section 5937 regardless of consequence, other statutes would elevate consumptive uses over environmental uses. California's ecosystems could thus lose the very protection that reasonable use balancing can provide.

Water Code section 106 ("Section 106") illustrates this danger. That statute provides "[i]t is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Wat. Code, § 106.)

This Court in *Metropolitan Water Dist. of Southern Cal. v. Marquardt* (1963) 59 Cal.2d 159, 184-185, examined Section 106's categorical language and concluded that such a broad policy statement does not specify "under what circumstances" it applies, "what weight it is to be given," and that "even as to applications

for appropriation of water the policy is not conclusive[.]" The same principle applies to Section 5937: categorical statutory language—whether framed as "policy" or "duty"—does not displace Section 2's constitutional requirement that all uses of water be reasonable under the circumstances presented.

BBTK cites other Water Code sections to attempt to show that the Legislature has made statewide reasonable use determinations elsewhere. (See OBOM p. 61.) But these sections do not eliminate fact-specific balancing: they require it. Section 13550, for instance, provides that use of potable domestic water for nonpotable purposes is unreasonable only "if recycled water is available which meets" several conditions. (Wat. Code, § 13550(a).) This statute also mandates a factual inquiry into the availability of recycled water and "all relevant factors." (Wat. Code, § 13550(a)(1).)

Similarly, Section 13553 provides that use of potable domestic water for toilets is unreasonable only "if recycled water, for these uses, is available to the user and meets the requirements set forth in Section 13550, as determined by the state board after notice and a hearing." (Wat. Code, § 13553(a).) In both instances, the Legislature expressly conditioned the reasonableness determination on a factual inquiry—precisely the kind of analysis that Section 2 demands.

In short, BBTK's attempt to exempt Section 5937 from Section 2's reasonableness requirement lacks support in the constitutional and statutory text and this Court's precedent.

D. The fact-specific balancing required by Section 2 must occur at the preliminary injunction stage.

When deciding whether to grant a preliminary injunction, a court must consider "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

In the context of Section 2, both prongs require fact-specific balancing: a court cannot assess the likelihood of success on a Section 5937 claim without determining whether that use of water is reasonable under the circumstances, and it cannot weigh the balance of hardships without accounting for competing beneficial uses of the Kern River's limited water supply. The preliminary injunction standard thus reinforces what the Constitution already demands.

II. BBTK's Interpretation of Section 5937 Would Foreclose a Balancing of Competing Environmental Demands.

BBTK's reading of Section 5937 as a categorical mandate would also preclude courts from weighing one *environmental* use against another. Conservation decisions involve trade-offs, and sound environmental stewardship requires allocating limited resources where they will do the most ecological good. Yet given a limited supply of water for environmental needs, BBTK's demand that water pass a dam would give no consideration to higher-value ecological use of that water supported by the dam.

For example, a dam may serve to divert water into ecologically significant wetlands that provide critical habitat for migratory birds and threatened species in a state that has lost more than 90 percent of its historical wetland habitat. (See generally *Kirkorowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 994.) Under BBTK's interpretation, if a Section 5937 lawsuit targets a dam on the same river system, a dam owner must release water to keep fish below the dam in "good condition," regardless of whether those fish are native or invasive, and regardless of the consequences for habitats that may be sustained by the dam. (Fish & G. Code, § 5937.)

The Ninth Circuit recently confronted a similar tension, vacating a preliminary injunction that would have required the release of water from Lopez Dam in San Luis Obispo County to improve steelhead trout habitat in Arroyo Grande Creek, but risked harm to other protected species in the same watershed. (See *San Luis Obispo Coastkeeper, supra*, 161 F.4th at p. 594.) There, the court observed that Section 5946's incorporation of Section 5937 "cannot be mapped onto section 5937" to create an absolute priority. (*Id.* at p. 602.)

That case's approach illustrates how Section 5937 should operate if this Court deems it privately enforceable: a court must weigh all relevant facts—including the ecological value of different habitats, the species affected, and competing public trust considerations—to determine whether, on balance, additional bypass from an upstream dam is reasonable to keep downstream fisheries in "good condition." (Fish & G.

Code, § 5937.) This real-world example demonstrates that BBTK's categorical approach could produce perverse environmental outcomes, such as water being reallocated from high-value ecological habitat to lower-value uses because a statute was read to strictly foreclose a constitutionally required balancing of uses.

This problem extends beyond isolated examples. Water supplied from reservoirs operated for the State Water Project and Central Valley Project is delivered to diverse users including wildlife refuges. (See generally *San Luis & Delta-Mendota Water Authority v. Locke* (9th Cir. 2014) 776 F.3d 971, 981-987; Central Valley Project Improvement Act, Pub.L. No. 102-575, § 3406(d) (Oct. 30, 1992) 106 Stat. 4722.) These interests must be balanced against the ecological water demands downstream of those dams within the Bay Delta. (See generally *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 129-130.) The reasonable use doctrine, applied through Section 2's balancing framework, provides the flexibility necessary to navigate these competing demands.

An approach requiring Section 2 reasonable use balancing under Section 5937 does not disfavor environmental protection; it ensures that environmental resources are allocated where they will do the most good. A fishery supporting native, threatened species may thus receive priority over one dominated by invasive carp, and wetlands providing critical habitat for endangered birds may receive priority over in-stream habitat of limited ecological value. The reasonable use doctrine enables these

distinctions; BBTK's categorical interpretation of Section 5937 does not.

III. BBTK's Position Threatens to Destabilize California's Water Rights Priority System.

The consequences of BBTK's reading of Section 5937 extend beyond environmental harms: it also jeopardizes the priority system that has governed California water rights for over a century. California has long administered surface water according to the principle of priority. Senior water right holders are satisfied first during shortages, and junior right holders receive water only after senior rights have been fulfilled. (See generally *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241; *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 102, 131, fn. 25.)

In the water-scarce West, the priority system provides the certainty and predictability upon which billions of dollars in agricultural, municipal, and industrial investments depend. "[O]nce rights to use water are acquired, they become vested property rights" that "cannot be infringed by others or taken by governmental action without due process and just compensation." (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 101.) Property rights, including water rights, are essential to functioning markets—and functioning markets are essential to voluntary conservation.

While Section 5937 has long existed alongside the water rights priority system, an absolute-priority rule for instream flows for below-dam fisheries would incentivize junior-priority

water users to support or pursue a Section 5937 lawsuit to force the curtailment of senior upstream diversions for purported below-dam fishery benefits, with the released water then flowing downstream to benefit the junior users. The consequences for senior-priority right holders could be severe and costly. Farms, cities, and water districts that have relied on the certainty of senior priority could find their rights subject to attack by junior users sponsoring a Section 5937 lawsuit.

BBTK's interpretation would remove the reasonableness inquiry that currently provides senior right holders with a meaningful defense, leaving them to choose between defending costly litigation and surrendering water they are legally entitled to. The priority system exists precisely to prevent such instability. Without the certainty the priority system provides, water users cannot make reasoned, informed decisions about infrastructure investments, crop selection, or urban development, and water markets cannot function effectively.

The reasonable use doctrine, properly applied, avoids these consequences. Under Section 2's balancing framework, courts must consider all beneficial uses of water—including the interests of senior right holders—when evaluating Section 5937 claims. (See *Las Posas Valley Water Rights Coalition v. Ventura County Waterworks District No. 1* (2026) 118 Cal.App.5th 1170, 1186, reh'g denied (Apr. 1, 2026), review filed (Apr. 14, 2026) ["A court cannot . . . change the priorities among water rights holders nor eliminate vested rights . . . without first considering them in relation to the reasonable use doctrine."].) Balancing thus

protects priorities, and protecting priorities preserves the conditions under which voluntary, market-based conservation can thrive.

IV. Section 2 Balancing Preserves the Complementary Role of Voluntary, Market-Based Instream-Flow Tools.

The interpretation of Section 5937 also shapes the role voluntary, market-based instream-flow tools can play in California's water management framework. Under Section 2 balancing, courts weigh the instream needs of below-dam fish against other beneficial uses on the facts of each case. Voluntary transactions operate alongside that framework as a complementary mechanism—one that can move additional water to instream uses when willing parties place a higher value on it than competing users place on alternative uses.

Well-designed water markets move water to higher and better uses through voluntary exchange, and when a party is willing to pay for water to support a particular use, that willingness signals the relative value of that water and can inform the reasonableness determination. (See Gregory, *Groundwater and Its Future: Competing Interests and Burgeoning Markets* (1992) 11 Stan. Env't L.J. 229, 249 ["voluntary transfers of water can promote efficient uses and discourage waste, thus ameliorating water scarcity," because a "developed water market reduces water scarcity by increasing the value some place upon water"].)

Market transactions thus generate information about competing demands that command-and-control mandates cannot replicate—information that is essential to sound resource management. (See Scarborough, Environmental Water Markets: Restoring Streams Through Trade (2010) p. 13 <https://www.perc.org/wp-content/uploads/2010/04/ps46.pdf> [as of May 4, 2026] ["the best way to restore dewatered streams and improve flows is by reducing the amount of water being diverted" through "voluntary contracting with offstream water users"]; see also Garner et al., *The Sustainable Groundwater Management Act and Water Rights* (2020) 38 UCLA J. Env't L. & Pol'y 163, 169-170, 197 [explaining that well-designed water markets serve as "an efficient and voluntary means of reallocating water in the context of an increasingly limited supply," reveal the relative value of competing uses, and add flexibility "by authorizing transfers of allocations between lower and higher value uses," thereby incentivizing conservation].)

The Legislature has also recognized the value of voluntary transfers, both generally (Wat. Code, § 109 ["[i]t is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights"]) and in-stream flow transfers specifically. (Wat. Code, § 1707 [permitting dedication of water rights for instream flow purposes]; see also *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1135 ["California has . . . adopted a policy of voluntary water transfers."].)

Voluntary transfers under Water Code sections 109 and 1707 depend on engaging with private water rights—identifying willing sellers, valuing competing uses, and negotiating terms that respect existing entitlements. A categorical Section 5937 rule that sets those rights to one side forecloses the fact-specific reasonableness inquiry and narrows the space in which these complementary, voluntary arrangements can operate.

Decades of research confirm, moreover, that putting markets to work for conservation is often more efficient, effective, and collaborative than litigation. Between 1987 and 2007, state, federal, and private entities restored more than ten million acre-feet of water to streams through voluntary leases, donations, and permanent transfers—completing more than 2,800 transactions exceeding $530 million in value. (Environmental Water Markets: Restoring Streams Through Trade, *supra*, p. 17.)

In California specifically, the Scott River Water Trust, for example, has demonstrated how low-volume, low-cost water leases can enhance environmental flows. From 2008 to 2011, water leases improved more than 50 miles of spawning habitat in the Scott River watershed for Coho salmon, increasing the number of adult salmon five-fold—illustrating how voluntary arrangements can add incremental water to instream uses when willing participants emerge. (Watson, Tapping Water Markets in California: Six Policy Reforms (2016) pp. 7-8 <https://www.perc.org/wp-content/uploads/2016/10/TappingWaterMarketsinCalifornia_SixPolicyReforms_PERC_2016.pdf> [as of May 4, 2026].)

In sum, an interpretation of Section 5937 that incorporates Section 2 balancing preserves both the constitutional command that courts consider all beneficial uses on their facts and the complementary role of voluntary transactions that can add further water to instream uses where willing parties value it more there. BBTK's categorical alternative forecloses both—it supplants the fact-specific reasonableness inquiry with a judicial decree and narrows the space in which constructive, voluntary arrangements can operate. The Court should reject that categorical interpretation of Section 5937 because it conflicts with Section 2's balancing requirement, threatens greater harm to the environment, and displaces the very framework within which voluntary, market-based tools operate.

CONCLUSION

For the reasons set forth above, if this Court reaches the merits of the petition for review, PERC respectfully urges the Court to hold that Section 5937 uses are subject to Section 2 reasonableness review and to remand the case to the trial court to undertake the fact-specific balancing required by the California Constitution.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Application and Proposed Amicus Brief is produced using 13-point or greater Roman type, including footnotes, and contains 5,564 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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