Civil No. S290840

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

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)

Appeal from Superior Court of Kern County,
Case No. BCV-22-103220; Hon. Gregory Pulskamp Presiding

ANSWER TO PETITION FOR REVIEW

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Introduction

This Court should deny Plaintiffs'[1] request for review of the opinion of the Court of Appeal in *Bring Back the Kern, et al. v. City of Bakersfield* (2025) 110 Cal.App.5th 322 ("Opinion").[2] The issue presented in Plaintiffs' Petition is whether a party seeking an injunction under Fish and Game Code section 5937[3] must show that the injunction would comply with article 10, section 2 of the California Constitution ("1928 Amendment"). The Opinion correctly answered "yes." Its reasoning is consistent with prior precedential decisions, including those cited by Plaintiffs, such as *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*"). The Opinion does not address an unsettled question of law, nor does it create a conflict of authorities. Therefore, review by this Court is unnecessary.

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[1] The Plaintiffs in the trial court were Respondents in the Court of Appeal and are Petitioners in this Court. For simplicity, they are referred to here as **"Plaintiffs."** Likewise, the parties filing this Answer are Real Parties in Interest in the trial court, were Appellants in the Court of Appeal, and are Respondents in this Court. For simplicity, they are referred to here as **"Real Parties."**

[2] Real Parties here follow Plaintiffs in citing the April 2, 2025 slip opinion, which is attached to the Petition for Review.

[3] Further statutory references are to the Fish and Game Code unless otherwise specified.

Argument

I. The Opinion is consistent with the text of the 1928 Amendment and the existing case law interpreting it and therefore does not create a conflict of authorities.

The Petition first argues that the Opinion "disregards" the plain text of the Constitution. (Petition, 25-31.) That argument fails because it mischaracterizes the Opinion and misapplies the law.

Real Parties have never contested that the legislature has authority under the constitution to "enact laws in the furtherance of the policy" of the 1928 Amendment. (Cal. Const., art. 10, § 2.) They have disputed Plaintiffs' assertion that section 5937 constitutes a "legislative determination[] of reasonable use" under this constitutional authority. (Petition, p. 25.) They therefore argue that the Court of Appeal, by holding that a trial court must consider whether an injunction sought under section 5937 would be consistent with the 1928 Amendment, "effectively concluded that Section 2's self-executing clause overrides its explicit grant of authority to the Legislature" and "render[ed] Section 5937 a second-class statute." (Pet., pp. 21, 27.) This is wrong for two reasons. First, section 5937 is not an exercise of the legislature's power under the 1928 Amendment. Second, even if it were, Plaintiffs' proposed interpretation of section 5937 would render it unconstitutional.

A. Section 5937 cannot be an exercise of the legislative power granted by the 1928 Amendment, as the 1928 Amendment did not exist when section 5937 was enacted.

The 1928 Amendment declares that, in light of "the conditions prevailing in this state," all uses of water, including public trust uses, are to be measured against the standard of reasonable and beneficial use. (Cal. Const., art. 10, § 2; see *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443.) Prior to the 1928 Amendment's enactment, "[n]either a court nor the legislature" had power to balance the reasonableness of competing beneficial uses in a stream system and prevent the waste of California's precious water resources. (*Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81, 101–02.) The 1928 Amendment changed that, through both a self-executing rule and a grant of legislative authority to "enact laws in the furtherance of the policy" of reasonable and beneficial use. (See *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 700–03 ("*Gin Chow*".) While no party here disputes that the legislature currently has this authority, what is now Section 5937 was enacted in 1915, **when the legislature had no such power**. (Stats. 1915, ch. 491, p. 820.) Furthermore, Plaintiffs have provided no citation demonstrating that the Legislature has conducted an evaluation balancing the competing beneficial uses on any stream system when it passed section 5937.

B. The Court of Appeal correctly rejected an interpretation of section 5937 that would violate the 1928 Amendment.

Even if section 5937 had been enacted by the legislature purporting to exercise its power under the 1928 Amendment, the Court of Appeal's decision would be correct. The legislature has "power to make rules concerning what uses of water are reasonable, at least **so long as those rules are not themselves unreasonable**." (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 622, emphasis added.) That authority "is not unlimited," and a statute that "sanctioned a manifestly unreasonable use of water … would transgress the constitution." (*Id*. at p. 625.)

Plaintiffs have taken the position that section 5937 is a "strict liability statute" and that "fish will get the water first … in every situation where there is a dam." (Augmented Trans., p. 14.) This absolutist position, excluding all judicial discretion (see 12 AA 2773), is untenable in light of the 1928 Amendment. The rule in *Herminghaus*, which the amendment rejected, was that one beneficial use (there, riparian use) was "not limited by any measure of reasonableness." (*Herminghaus*, *supra*, 200 Cal. at pp. 100–01). California rejected that rule in the 1928 Amendment. (*Gin Chow*, *supra*, 217 Cal. 673 at p. 700.) "All uses of water, **including public trust uses**, must now conform to the standard of reasonable use." (*National Audubon Society*, *supra*, 33 Cal.3d at p. 443, emphasis added.)

Plaintiffs' position, if accepted, would create a new rule analogous to *Herminghaus*, with in-stream fish flows given absolute priority and privilege, rather than riparian uses. A rule

cannot be "in furtherance of the policy" of the 1928 Amendment if it reinstates the kind of rule the amendment was intended to abolish. The Opinion properly rejected that rule: "no particular use of water is per se reasonable in all circumstances, and therefore reasonableness must always be evaluated before a court orders any particular water use." (Opinion, p. 27.) The Court of Appeal correctly reasoned that section 5937 and the 1928 Amendment must be read harmoniously: "Together, these two legal authorities provide that the in-stream use of water to keep fish in good condition is required to the extent that use is reasonable." (*Id.*, p. 26.)

Accordingly, contrary to the Petition, the Opinion **does not** raise an important question of law, because the Opinion properly applied already settled principles of law according to the 1928 Amendment.

II. Plaintiffs' interpretation of the *Cal Trout* and *Patterson II* cases is incorrect, and the Opinion does not conflict with those decisions.

Plaintiffs claim that review is warranted because the Opinion "squarely conflicts with *CalTrout I*, *CalTrout II*, and *Patterson II*." (Pet., p. 12.) Real Parties extensively briefed the proper interpretations of *Cal Trout I* and *Cal Trout II*, which are consistent with the Opinion. (See Appellants' Joint Opening Brief, pp. 31–37; Appellants' Reply Brief, pp. 12–15.) As the Opinion noted, those cases concerned the application of section 5946, which applies only to stream systems in District 4½ (i.e., portions of Mono and Inyo County). (Opinion, p. 30.) The *Cal Trout I* court specifically disclaimed any broader application of its holding to

section 5937. (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601 ["We need not reach the question of the application of section 5937 alone…."].) Plaintiffs nonetheless argue that the court's "reasoning applies equally to Section 5937." (Pet., p. 34.) But *Cal Trout I*'s reasoning was that section 5946 was passed after the legislature's consideration of specific circumstances in defined stream systems in District 4½. (*Cal Trout I*, 207 Cal.App.3d at pp. 596–97.) No such consideration was given to the circumstances and reasonability of competing uses of water from the Kern River or any other stream system in enacting section 5937 in 1915. The Opinion reached this same conclusion:

> Thus, section 5946 does reflect a consideration of the specific tradeoffs applicable to "streams in *that* district [i.e., District 4 1/2]" and ultimately a choice to prioritize fisheries in that area. Just because section 5946 reflects the Legislature's balancing of the specific, localized needs pertaining to the streams of District 4 ½ does not mean the Legislature engaged in a similar determination as to all waterways statewide under section 5937.

(Opinion, p. 30, original italics.) Plaintiffs acknowledge that, in *Cal Trout II,* it was established that "the Legislature has already balanced the competing claims for water *from the streams affected by Section 5946* and determined to give priority to the preservation of *their fisheries*." (Petition, p. 33 [quoting *Cal Trout II*, 218 Cal.App.3d at 201] [emphasis added].) As a result, there is no need for this Court's review to "secure uniformity of decision," because

there are valid distinctions in the rules that apply in sections 5937 and 5946, as the Opinion properly recognizes.

Plaintiffs also rely on *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F. Supp. 2d 906, 918–19 ("*Patterson II*"). *Patterson II* does not conflict with the Opinion, because it does not address the same issue. The *Patterson II* opinion discusses the interaction of Section 5937 with the Central Valley Project Improvement Act and Section 8 of the Reclamation Act of 1902. (333 F. Supp. 2d at p. 919–21.) It did not address the relationship of section 5937 to the 1928 Amendment. (Opinion, p. 30.) It is also not disputed that *Patterson II*, as a United States District Court case, is not binding on California courts as to state law. (See *Nunez v. Nevell Group, Inc.* (2019) 35 Cal.App.5th 838, 847–48.) Therefore, it is not necessary to ensure "uniformity of decision" between *Patterson II* and the Opinion, because *Patterson II* is not binding authority, even in federal court. Further, because the Opinion is consistent with *Cal Trout I* and *Cal Trout II*, the binding California cases are in agreement. Other persuasive authorities from a district court and from the State Water Resources Control Board, which unlike *Patterson II* address the issue of the 1928 Amendment, support the Opinion and Real Parties' positions. (See J.G. Boswell Co.'s Opening Brief, pp. 32–33.)

III. The Opinion does not create a conflict with existing law, because the Court of Appeal properly assigned the burden of proof to the party seeking relief.

Plaintiffs object to the Opinion's conclusion that the 1928 Amendment's self-executing clause "mandated this balancing of uses and interests before an injunction could issue," and that "[t]he

Opinion strongly suggests that the party seeking an injunction bears the burden of showing that compliance with Section 5937 is 'reasonable' when 'balanced' against other competing uses of water." (Pet., pp. 10, 29.) But this holding is consistent with existing case law on the application of the 1928 Amendment and on injunctive relief.

Courts are bound to apply the Constitution. After the 1928 Amendment was enacted, this Court held,

> "The amendment is now the **supreme law** of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights not protected by other constitutional guarantees." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 700, emphasis added.)

In *Water Replenishment Dist. of Southern California v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1069–70, the Court of Appeal clearly stated that a trial court "not only has the power, but also has the duty to exercise its power to work out a solution consistent with the policy to beneficially use water." This is consistent with the general rule that "the courts have traditionally enforced the proscriptions against unreasonable uses and unreasonable methods of diverting water" in cases where they apply. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 198, citing *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 148; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351.)

Plaintiffs claim that the effect of the Opinion is to "invert[] the usual burdens on the parties in constitutional challenges."

(Pet., pp. 11, 29–30.) Not so. Two of the authorities cited by Plaintiffs merely hold that a **plaintiff** bringing a constitutional challenge bears the burden of proof. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084–85.) The third merely states the general rule that a defendant must prove its affirmative defenses. (*Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1419.) The Opinion applied the 1928 Amendment in the context of the well-established burden of proof in proceedings for an injunction: the moving party "must show not only that they are entitled to [an] injunction, but also that they are entitled to the particular breadth of injunctive relief sought." (Opinion, p. 32, citing *Anderson v. Souza* (1952) 38 Cal.2d 825, 843 [permanent injunction]; see also *Drakes Bay Oyster Co. v. California Coastal Com.* (2016) 4 Cal.App.5th 1165, 1172 [preliminary injunction]; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 [preliminary injunction].)

The Court of Appeal reasoned, correctly, that section 5937 and the 1928 Amendment must be read harmoniously: "Together, these two legal authorities provide that the in-stream use of water to keep fish in good condition is required to the extent that use is reasonable." (Opinion, p. 26.) Plaintiffs are claiming that the defendant did not, and should be ordered to, provide in-stream flows sufficient to keep fish in good condition. Therefore, they have the burden of proving, consistent with the 1928 Amendment, that those in-stream flows would be reasonable under the totality of the circumstances.

Maintaining this correct allocation of the burden of proof is crucial in this case for two reasons. First, the alternative approach suggested by Plaintiffs allowed them to demand and receive an injunction with no discernable parameters (i.e., a "comply with the law" injunction), making it impossible for the defendant and the real parties to analyze its reasonableness according to the 1928 Amendment. (See Appellants' Joint Opening Brief, pp. 46–53.) Second, in this action seeking a writ of mandate against a public agency, "it is presumed that the agency regularly performed its official duty." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335; *Inzana v. Turlock Irrigation Dist. Bd. of Directors* (2019) 35 Cal.App.5th 429, 441; *Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 285.) Therefore, if it were true that fish along a reach of the Kern River system were not being maintained in good condition (which has not been proven), the presumption must not be that the defendant violated section 5937 but that it instead has applied the "supreme law", the 1928 Amendment, prohibiting flows which, under the totality of the circumstances, are unreasonable. In short, it is the plaintiffs' burden to prove that existing conditions are contrary to the law.

The Court of Appeals here properly applied the law applicable to burdens of proof in the preliminary injunction context, and review by the Court is not warranted.

Conclusion

The Opinion clarifies existing law without creating any conflict of authorities. The Opinion should not be disturbed, and the Petition for Review should be denied.

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The text of this Brief consists of 2,538 words as counted by the Microsoft Word software used to generate the Brief.

Date: June 2, 2025 /s/ Brett A. Stroud

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Proof of Electronic Service

The undersigned declares:

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On the date set forth below, I served the foregoing document on the parties to this action, whose attorneys are listed in the TrueFiling© service directory for this matter, and the Superior Court, by submitting an electronic version of the document(s) to TrueFiling©, through the user interface at www.truefiling.com.

Date: June 2, 2025 /s/ Patricia B. Banda

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