

California Fish and Game Code Section 5937 and CalTrout: Models for Fish Conservation in Nevada

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I. INTRODUCTION

Over the last century, extensive damming and water projects across California have decimated native fish populations. *California Trout, Inc. v. State Water Resource Control Board (CalTrout)* and California Fish and Game Code Section 5937 have given California native fish a fighting chance to come back from the brink of extinction. This article will first explore the *CalTrout* litigation – its natural and historic pre-conditions, the court’s decision and its lasting impacts, and its current role in California environmental law. The second portion will differentiate Nevada’s fish protection statutes from California’s, analyze the feasibility of implementing *CalTrout*’s legal strategy in Nevada, and advocate for legislative action as a more promising avenue for fish conservation in Nevada.

II. HISTORICAL AND NATURAL CONDITIONS LEADING TO THE *CALTROUT* LAWSUIT

A. *The Kutzadika’a People, Mono Lake Basin Geology, and the Rise of the Los Angeles Aqueduct*

The *Caltrout* decision is a result of California’s unique geology and history. The northern third of California holds 75 percent of the state’s water (due to high amounts of rain and snowfall in the Sierra Nevada mountains and northern coast during the winter months), yet 80 percent of the state’s water is consumed in the southern two-thirds of the state.¹ Most of that demand comes from Southern California population centers and Central Valley agriculture.²

The Mono Lake basin and Owens Valley are the home of Mono Lake. Located in the high desert hundreds of miles northeast of Los Angeles (L.A.), Mono Lake and its tributaries became a prime candidate for water prospectors seeking to transport water to quench the domestic and agricultural water demand in the southern portion of the state.³ Mono Lake sits on a fault line adjacent to the

¹ *CALIFORNIA WATER 101*, WATER EDUC. FOUND. (Apr. 2021), <https://www.watereducation.org/photo-gallery/california-water-101> (last visited Oct. 1, 2022).

² *Id.*

³ *Construction of the Los Angeles Aqueduct*, WATER AND POWER ASSOCIATES, INC., (2022), https://waterandpower.org/museum/Construction_of_the_LA_Aqueduct.html (last visited Oct. 21, 2022) (“In March of 1905, William Mulholland recommended to the Board of Water Commissioners

towering, volcanic-formed, and glacier-carved Eastern Sierra Nevada mountains.⁴ The Mono Lake basin itself is a high-elevation desert basin caused by the basin and range movement of tectonic plates.⁵ Most of the water from Mono Lake comes from snowmelt from the Sierra Nevada mountains.⁶ The arid Mono Lake basin results from the rain shadow effect—clouds release all their water once they reach the edge of the Eastern Sierras, leaving no moisture to fall by the time clouds reach Mono Lake, creating a dry, expansive desert fed only by Sierra snowmelt.⁷ Despite the lack of rain, Mono Lake is a large (albeit saline) lake that supports an unexpected array of wildlife.⁸ The lake is a migratory stopping point for thousands of birds, supports a vast brine shrimp population, and protects a large breeding colony of California gulls.⁹

Despite its unforgiving climate, the Mono Lake basin has always attracted people to the valley. The Kutzadika'a people of the Northern Paiute have called the Mono Lake basin home for thousands of years, following the seasons to hunt and harvest what the harsh desert land had to offer.¹⁰ White farmers and miners pushed the Kutzadika'a people from their native land during a period of rapid westward colonization driven by the California gold rush.¹¹ Most of the Kutzadika'a people perished from disease, war, and forced migration and assimilation, with few Kutzadika'a people remaining in the basin today.¹² In the early 20th century, the Los Angeles Department of Water and Power (L.A. Water), the municipal water utility for the city of Los Angeles, began buying much of the land in the Mono Lake basin and destroying any hunting and foraging grounds left for the Kutzadika'a people in the interest of water appropriation.¹³ Despite this long history of brutality, the Kutzadika'a remain stewards of the Mono Lake basin and continue to live by Mono Lake and the surrounding regions.¹⁴

that the Owens Valley was the only viable source of supplemental water for the City's fast growing population.").

⁴ *Geology*, MONO LAKE COMMITTEE (2022), <https://www.monolake.org/learn/aboutmonolake/naturalhistory/geology/> (last visited Oct. 21, 2022).

⁵ *Id.*

⁶ *Climate of the Sierra Nevada*, Yosemite Field Station, University of California Merced (2022), <https://snrs.ucmerced.edu/natural-history/climate> (last visited Oct. 21, 2022).

⁷ *Id.*

⁸ *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d 419, 424 (1983).

⁹ *Id.*

¹⁰ *Kutzadika'a People*, MONO LAKE COMM., <https://www.monolake.org/learn/aboutmonolake/humanhistory/kutzadikaapeople/> (last visited Oct. 1, 2022).

¹¹ *Kutzadika'a People*, *supra* note 11; Nannette Kelley, *Mono Lake Kutzadika'a Paiute Tribe Takes Another Step Toward Federal Recognition*, Native News Online, Sept. 25, 2020, <https://nativenewsonline.net/currents/mono-lake-kutzadika-a-paiute-tribe-takes-another-step-toward-federal-recognition>.

¹² *Kutzadika'a People*, *supra* note 11.

¹³ *Id.*; Nannette Kelley, *supra* note 13.

¹⁴ *Id.*

Mono Lake sits over 6000 feet above sea level, while Los Angeles sits only 305 feet above sea level.¹⁵ This elevation difference, coupled with copious amounts of cheap water, incentivized L.A. Water to build the Los Angeles Aqueduct (L.A. Aqueduct) in 1913.¹⁶ The L.A. Aqueduct follows a route from Owens Valley to Los Angeles, using only gravity to efficiently and cheaply pump water to Southern California. Furthermore, the aqueduct generates hydroelectricity.¹⁷ The L.A. Aqueduct is characterized as both an engineering marvel providing drinking water to millions and a destroyer of the ecosystem and economy of the Owens Valley and the Mono Lake basin.¹⁸

B. *The California Water Wars*

The California water wars refers to the competition between interests in different parts of the state over water resources primarily concentrated in the north—a competition enabled by water diversion projects such as the L.A. Aqueduct. *CalTrout* can be understood as a continuation of the water wars between Los Angeles and Owens Valley. A brief history of the water wars follows.

In 1853, the California Supreme Court recognized appropriative water rights in California.¹⁹ Appropriative water rights establish that the first entity to use water for a beneficial source is entitled to priority use of that water in the future.²⁰ California's lack of water and recurring droughts led to a movement to quickly dam and appropriate any water sources for future use.

In 1905, L.A. Water began secretly obtaining land and appropriative water rights around the Owens Valley to feed the growing population in Southern California. Eleven years later, L.A. Water received a state permit to appropriate the Owens River—leading to more than 100 years of water wars between L.A. Water and the people of Owens Valley.²¹

In 1915, the California legislature passed a statute that would eventually become Section 5937, one of the two statutes at issue in the *CalTrout* litigation.²² Section 5937 is a downstream flow requirement, providing that “[dam owners]

¹⁵ *State of the Lake*, MONO LAKE COMM, <https://www.monolake.org/learn/stateofthelake/> (last visited Oct. 1, 2022).

¹⁶ WATER AND POWER ASSOCIATES, *supra* note 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *Irwin v. Phillips*, 5 Cal. 140 (1855).

²⁰ See *id.* at 147.

²¹ Louis Sahagún, *L.A. Took Their Water and Land a Century Ago. Now the Owens Valley is Fighting Back*, L.A. TIMES, (July 13, 2017); *California Trout*, 207 Cal. App. 3d at 593.

²² CAL. FISH & GAME CODE § 5937 (1957); Karrigan Börk, *Targeting Public Trust Suits*, 29 ENV'T L. LAW NEWS, Spring 2020 at 3, 4 [hereinafter *Targeting Public Trust Suits*].

shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.”²³ However, Section 5937 was largely forgotten or ignored by the executive branch from the time of passage in 1915 until the *CalTrout* litigation over 70 years later.²⁴

In 1928, the California Constitution was amended to limit the amount of water an entity can appropriate to an amount “reasonably required for beneficial use.”²⁵ Despite this reasonable use requirement, the sprawling state water projects to transport water to California’s Central Valley and the population centers in Southern California clearly showed that domestic and agricultural uses dominated California’s priority water use.²⁶ When asked about the diversion of the Owens River, President Theodore Roosevelt stated, “It is a hundred—or a thousand-fold more important to the state and more valuable to the people as a whole if used by the city (of Los Angeles) than if used by the people of Owens Valley.”²⁷ Unsurprisingly, after ignoring water flow protections under Section 5937 and the California Constitution, L.A. Water exhausted the water from Owens Lake by the late 1930s and turned the area into a lifeless “alkali flat.”²⁸

After depleting Owens Lake, L.A. Water turned its thirsty gaze towards Mono Lake. In 1940, L.A. Water received Permit Nos. 5555 and 5556, providing for the appropriation of water in the Mono Lake basin “to the amount which can be beneficially used.”²⁹ The California State Water Resource Control Board (Water Board) approved L.A. Water’s permits to appropriate “virtually the entire flow of four of the five streams flowing into [Mono Lake]” to the L.A. Aqueduct to be used in Southern California for domestic purposes.³⁰ Before the completion of the dams on the four tributaries to Mono Lake, native trout populations flourished in the streams and were “extensively fished by the public.”³¹ These streams became the basis for the *CalTrout* litigation decades later.

The state executive branch ignored the instream flow requirements of Section 5937 from the time of passage in 1915 until the *CalTrout* litigation over 70 years

²³ CAL. FISH & GAME CODE § 5937 (1957).

²⁴ Börk, *Targeting Public Trust Suits*, *supra* note 24.

²⁵ CAL. CONST. art. X, § 2.

²⁶ *The California Water System*, Cal. Dep’t. of Water Resources, <https://water.ca.gov/water-basics/the-california-water-system> (last visited Nov. 1, 2022).

²⁷ Les Standiford, *William Mulholland: L.A.’s Original Champion of Water Conservation*, L.A. TIMES, Apr. 13, 2017, <https://www.latimes.com/opinion/op-ed/la-oe-standiforth-mulholland-drought-response-20150414-story.html>.

²⁸ *Nat’l Audubon Soc’y*, 33 Cal. 3d at 427.

²⁹ *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 595 (1989).

³⁰ *Nat’l Audubon Soc’y*, 33 Cal. 3d at 424.

³¹ *Cal. Trout*, 207 Cal. App. 3d. at 596.

later.³² Dam builders, L.A. Water, and the Water Board prioritized agriculture and domestic uses of water over environmental uses, so Section 5937 became an unenforced, dead statute.³³ L.A. Water, with permission from the Water Board, appropriated, dammed, and transferred any available water in the Mono Lake basin and made no known attempts to enforce the instream flow requirements of Section 5937.³⁴

However, the California legislature did not take kindly to having Section 5937 ignored by dam owners, L.A. Water, and the Water Board. In 1953, the California legislature passed Section 5946, which expressly “forbids the issuance of a “permit or license [after September 9, 1953] to “appropriate water in District 4 ½ [the Owens Valley and Mono Lake basin area] . . . unless conditioned upon full compliance with Section 5937.”³⁵ Despite this clear mandate by the legislature, Section 5946 was also ignored until *CalTrout* litigation forced its execution.³⁶

C. Revival of the Public Trust Doctrine in California

The revival of the public trust doctrine in California eventually allowed private litigants to enforce Section 5946. The public trust doctrine is an ancient common law doctrine, and provides that the sovereign holds all navigable waters in public trust for the use and enjoyment of all citizens.³⁷ Common public trust uses are boating, fishing, or use for commerce.³⁸ In 1971, the California Supreme Court issued its landmark decision in *Marks v. Whitney*, holding that private individuals have standing to bring litigation to enforce the public trust.³⁹ A decade later in *National Audubon Society*, the Court extended the public trust doctrine to include an affirmative duty of the government to protect the public trust.⁴⁰ Notably, that decision also expanded the public trust to non-navigable waterways, including the tributaries to Mono Lake that are the subject of *CalTrout*.⁴¹ The private environmental groups in *CalTrout* relied on these two cases to establish standing to compel the Water Board to enforce Section 5937 and Section 5946 to protect California fish populations in the non-navigable tributaries to Mono Lake.⁴² This

³² Börk, *Targeting Public Trust Suits*, *supra* note 24.

³³ *Id.*; *See Nat'l Audubon Soc'y*, 33 Cal. 3d. at 447 n.30.

³⁴ *See Nat'l Audubon Soc'y*, 33 Cal. 3d. at 424.

³⁵ CAL. FISH & GAME CODE § 5946 (1957).

³⁶ Börk, *Targeting Public Trust Suits*, *supra* note 24, at 9 n.15.

³⁷ Timothy A. Heydinger, *The Mono Lake Controversy and the Evolution of California's Public Trust Doctrine*, 13 U.C. DAVIS ENV. L. AND POL'Y JOURNAL, 3 (1990).

³⁸ *Id.*

³⁹ *Marks v. Whitney*, 6 Cal. 3d 251, 261 (1971).

⁴⁰ *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d at 441.

⁴¹ *Id.* at 437.

⁴² *See Börk, Targeting Public Trust Suits*, *supra* note 24 at 5-6.

line of cases giving regulatory teeth to the public trust doctrine is largely missing in Nevada, as will be explored later in Section VI.⁴³

III. SUMMARY OF CALIFORNIA TROUT, INC. V. STATE WATER RESOURCES CONTROL BOARD

A. *Background and Procedural Posture*

California Trout, Inc (CalTrout), the National Audubon Society, and the Mono Lake Committee (Plaintiffs) were public interest environmental organizations that filed suit to command the Water Board to rescind licenses 10191 and 10192.⁴⁴ The Water Board issued the licenses to L.A. Water in 1974, reaffirming L.A. Water's appropriative rights as secured by Permit 5555 and Permit 5556 in 1940.⁴⁵ In essence, the licenses confirmed that L.A. Water had appropriative rights to the water they diverted using their dams on the four Mono Lake tributaries. This water was diverted via the L.A. Aqueduct and eventually funneled to Southern California.⁴⁶ Before L.A. Water constructed these dams, extensive public fishing in the tributaries and native fish populations flourished.⁴⁷ However, the dam diversions decimated downstream fish populations.⁴⁸

In response, Plaintiffs sued to enforce Section 5946, "which directs that '[n]o . . . license to appropriate water [in portions of Mono and Inyo Counties] shall be issued . . . after September 9, 1953, unless conditioned upon full compliance with Section 5937.'" ⁴⁹ Section 5937 requires that "[t]he owner of any dam shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."⁵⁰ Plaintiffs sought to enforce Section 5937 through the enforcement of Section 5946 and filed petitions for writs of mandate to command the Water Board to rescind licenses 10191 and 10192. The trial court denied the petitions, holding that Section 5946 does not apply to water appropriated by dams constructed before September 9, 1953, the effective date of Section 5946.⁵¹ Plaintiffs appealed.

⁴³ The public trust doctrine has been criticized for allowing states to take land and rights away from indigenous tribes. For more information, see Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003).

⁴⁴ *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 207 Cal. App. 3d 585, 592-598 (1989).

⁴⁵ *Id.* at 592.

⁴⁶ *Id.* at 598.

⁴⁷ *Id.* at 596.

⁴⁸ *Id.*

⁴⁹ CAL. FISH & GAME CODE § 5946 (1957).

⁵⁰ CAL. FISH & GAME CODE § 5937 (1957).

⁵¹ *Cal. Trout*, 207 Cal. App. 3d at 592.

B. L.A. Water's Arguments that Section 5946 Does Not Apply to Licenses 10191 and 10192

On appeal, L.A. Water made five arguments to support its claim that Section 5946 does not apply to licenses 10191 and 10192. First, L.A. Water argued that Section 5946 does not apply when licenses appropriate all the water from a tributary.⁵² Second, L.A. Water argued that Section 5946 cannot be applied retroactively to water rights appropriated before the effective date of Section 5946: September 9, 1953.⁵³ L.A. Water received appropriative rights to these four tributaries well before 1953.⁵⁴ Third, L.A. Water argued that the state is estopped from applying Section 5946 because L.A. Water agreed to create a hatchery in return for diverting the tributaries.⁵⁵ Fourth, L.A. Water argued that Section 5946 is unconstitutional because the legislature lacks the power to determine the priority uses of water.⁵⁶ Lastly, L.A. Water argued that the statute of limitations bars Plaintiff's claims.⁵⁷

C. The Court Rejected all of L.A. Water's Arguments

The court analyzed each of L.A. Water's five arguments, rejecting each one in favor of the Plaintiffs.

The Court held that the express language of Section 5946 applies to licenses that appropriate all water from a stream, including licenses 10191 and 10192.⁵⁸ Section 5946 expressly states that a license cannot be issued after 1953 unless fully compliant with the downstream flow requirements of Section 5937.⁵⁹ L.A. Water contended that the downstream flow requirements only applied to dams, not to the appropriation of streams that have already been dammed.⁶⁰ The court rejected this argument, holding that the express language and legislative history of Section 5946 demonstrated the legislature's intent to compel the executive branch to implement Section 5937.⁶¹

The Court held that L.A. Water gained no pre-1953 right to the appropriated water.⁶²

L.A. Water argued (1) that Section 5946 cannot be retroactively applied to its

⁵² *Id.* at 599.

⁵³ *Id.* at 603.

⁵⁴ *Id.*

⁵⁵ *Id.* at 621.

⁵⁶ *Id.* at 622.

⁵⁷ *Id.* at 628.

⁵⁸ *Id.* at 604.

⁵⁹ *Id.* at 603.

⁶⁰ *Id.* at 604.

⁶¹ *Id.* at 605.

⁶² *Id.* at 625.

new licenses because its 1916 and 1934 permits already appropriated all of the water in the Owens Valley, (2) that Section 5946 only applies to the construction of dams after 1953, while the dams in question were constructed pre-1953, and (3) that retroactively applying Section 5946 to water that was completely appropriated before the passing of the statute is unfair.⁶³

The court rejected all of L.A. Water's arguments, holding that (1) Section 5947 applies to all new licenses or permits issued after 1953, regardless of the appropriation date of the water, (2) the downstream flow requirement of Section 5946 applies to the construction of dams after 1953 and requires the downstream flow requirement of Section 5937 to be fulfilled for the issuance of new licenses to any dams, including those built before 1953, and (3) that the water projects did not use the full amount of water for beneficial use under its pre-1953 licenses and therefore L.A. Water cannot claim to have appropriated the entirety of the water.⁶⁴

The court next held that equitable estoppel does not bar the application of Section 5946. L.A. Water argued that the state cannot enforce Section 5946 because L.A. Water agreed to fund the creation of a hatchery in Hot Creek in return for permits to dam the tributaries.⁶⁵ The court rejected this argument, holding that a bargain between the Water Board and L.A. Water cannot bind the California legislature and preclude the legislature from passing laws contrary to an agreement to which they were not a party.⁶⁶

The court held that the California legislature has the constitutional power to determine the priority use of water.⁶⁷ The California Constitution Article X Section 2 requires that water use be limited to an amount that can be "reasonably required for beneficial use."⁶⁸ L.A. Water argued that the California legislature could not impose a priority water use for native fish populations over domestic or agricultural use because of this reasonable use requirement.⁶⁹ The court rejected this argument, holding that Article X Section 2 does not prohibit the legislature from making decisions regarding priority uses of water and that the decision to prioritize healthy fish populations is reasonable.⁷⁰

The court held that the public could not be barred from bringing suit due to a statute of limitations if the nature of the right being asserted is based on the public trust.⁷¹ The Water Board argued that the Plaintiffs failed to bring their claims

⁶³ *Id.* at 608-12.

⁶⁴ *Id.*

⁶⁵ *Id.* at 621.

⁶⁶ *Id.*

⁶⁷ *Id.* at 625.

⁶⁸ CAL. CONST. art. X, § 2.

⁶⁹ *CalTrout*, 207 Cal. App. 3d at 622.

⁷⁰ *Id.* at 625.

⁷¹ *Id.* at 630.

within the three-year statute of limitations.⁷² The court rejected this argument, holding that Section 5946 is an ongoing obligation to maintain fish populations held in the public trust, and failure to adhere to the downstream flow requirement is a continuing violation, of which no statute of limitations can prevent a remedy.⁷³

After rejecting all five of the defendants' arguments, the court reversed the lower court's judgment and ordered the trial court to require the Water Board to apply the minimum flow requirements of Section 5946 to licenses 10191 and 10192 for the tributaries to Mono Lake.⁷⁴ This required L.A. Water to leave sufficient water in the tributaries to Mono Lake at or above the minimum flow requirement levels to allow native fish populations in the creeks to survive.

IV. THE ENDURING LEGACY OF THE *CALTROUT* LITIGATION

The most direct impact of *CalTrout* is the enforcement of Section 5937 and Section 5946 to replenish native fish populations in the four tributaries to Mono Lake and across California as a whole. Following the litigation of *CalTrout*, L.A. Water was required to return adequate downstream flow to support the "pre-diversion carrying capacity" of the fish populations to the tributaries of Mono Lake.⁷⁵

The same environmental groups filed *California Trout v. Superior Court (CalTrout II)*, a successive lawsuit that culminated in the "Mono Basin Decision," a historic agreement between the environmental plaintiffs, L.A. Water, and the Water Board.⁷⁶ The agreement required upgrades to the Mono Lake dams to allow for fish passage, a minimum downflow stream requirement, and significant restoration efforts across all four creeks.⁷⁷

After the success of the *CalTrout* suit, environmental groups across California began suing the Water Board to attach Section 5937 requirements to all new licenses issued to dam owners. Because of *CalTrout*, the Water Board was finally compelled to enforce Section 5937 through Section 5946.⁷⁸ Every time a fish swims downstream of a dammed river in California, it could be swimming freely because of the *CalTrout* litigation.

V. THE *CALTROUT* LITIGATION AS A REFLECTION OF THE NATURAL

⁷² *Id.* at 628.

⁷³ *Id.*

⁷⁴ *Id.* at 632-33.

⁷⁵ Börk, *Targeting Public Trust Suits*, *supra* note 24.

⁷⁶ Karrigan Börk et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 U.C. DAVIS L. REV. 809, 859 (2012) [hereinafter *The Rebirth of Section 5937*].

⁷⁷ *Id.* at 877.

⁷⁸ See Börk, *Targeting Public Trust Suits*, *supra* note 24); Börk et al., *The Rebirth of Section 5937*, *supra* note 75.

CONDITIONS AND POLITICAL LANDSCAPE OF CALIFORNIA

California has a predominantly Mediterranean climate.⁷⁹ The state is dry throughout most of the year, with the majority of precipitation falling in the winter as rain on the coasts or snow in the mountains.⁸⁰ Further, most of the state's water is located in the northern third of the state, while the vast majority of the demand for water for domestic and agricultural uses originates in the southern two-thirds of the state.⁸¹ This rain-starved climate, coupled with population and agriculture centers in the state's south, has led to California's obsession with damming, storing, and transporting water. California currently has constructed approximately 43,580 dams for this purpose, with projects such as the L.A. Aqueduct moving water hundreds of miles to support the tens of millions of thirsty customers and the California Aqueduct, diverting the Sacramento River to the Central Valley to support millions of dollars' worth of agriculture production.⁸²

A. Shifting Attitudes across California Regarding the Priority Use of Water

Since the 19th century, California's water resource strategy heavily prioritized water capture and control for domestic or agricultural uses. However, with the legislature's passage of Section 5946 in 1953, California's attitude towards water began to shift. For the first time, Californians prioritized environmental health as an important aspect of water regulation. For example, the California legislature formally recognized the benefits of preserving fish populations in 1957, requiring the Water Board to consider the need to preserve fish in appropriation decisions in 1959, and passed the California Wild and Scenic Rivers Act in 1972.⁸³ Both *CalTrout I* and *CalTrout II* demonstrate a shift in California's water use priorities to include environmental concerns such as the health of native fish populations.

This paradigm shift was taking shape across the entire country in the 1960s and 1970s, most notably with the passage of modern federal environmental statutes such as the Clean Water and Clean Air Acts and the creation of the Environmental Protection Agency.⁸⁴ It should be noted that Nevada did not undergo the same environmental revolution as California. Nevada is historically less environmentally progressive and has fewer and less powerful environmental

⁷⁹ *The Climate of California*, WEATHER U.S. (2021), <https://www.weather-us.com/en/california-usa-climate>.

⁸⁰ *Id.*

⁸¹ WATER EDUCATION FOUNDATION, *supra* note 2.

⁸² Karrigan Börk & Amber Manfree, *Rewatering Napa's Rivers*, 36 NAT. RES. & ENV. 32, 33 (2021).

⁸³ CAL. PUB. RES. CODE § 5093.50 (1972); Börk et al., *The Rebirth of Section 5937*, *supra* note 75 at 848.

⁸⁴ See Kepner, W., *EPA and a Brief History of Environmental Law in the United States* (June 25, 2016), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430.

advocacy groups than neighboring California.⁸⁵

B. CalTrout as a Framework for Private Groups to Bring Public Trust Lawsuits

CalTrout provides a guide for how private individuals can compel the enforcement of state laws to protect the public trust. Private groups have successfully used the public trust framework utilized in *CalTrout* to sue for stronger enforcement of Section 5937 and other unenforced environmental laws in California.⁸⁶ However, many states, such as Nevada, do not have a robust public trust doctrine that the public has standing to enforce, preventing private environmental groups in these states from bringing similar lawsuits.⁸⁷

With its strong public trust doctrine, environmental groups in California regularly pursue litigation to revitalize public trust ecosystems across the state. For example, in *Natural Resources Defense Council v. Patterson* and *Natural Resources Defense Council v. Houston*, the plaintiffs successfully mobilized a *CalTrout*-style public trust framework to rewater significant portions of the San Joaquin River in California's Central Valley over federal preemption arguments by the Federal Bureau of Reclamation.⁸⁸ Currently, Section 5937 is trimming the excessive water waste of California's wine industry, with lawsuits in Napa Valley challenging the lack of adequate flow through the numerous dams across the grape-growing region.⁸⁹ However, the wheels of government continue to churn slowly. As of 2019, the California Department of Fish and Wildlife (CDFW) has completed flow recommendations for only one stream and has begun drafting only two more.⁹⁰ At this rate, many fish will be extinct by the time California correctly applies Section 5937 to all the dams across the state.

VI. THE NEVADA LEGISLATURE SHOULD FOLLOW CALIFORNIA'S LEAD IN
PROTECTING NATIVE FISH POPULATIONS AND PASS A DOWNSTREAM FLOW

⁸⁵ See discussion *infra* Section VI.

⁸⁶ Börk, *Targeting Public Trust Suits*, Environmental Law News, (Spring 2020), *supra* note 25 at 3.

⁸⁷ *Id.*

⁸⁸ Nat. Res. Def. Council v. Patterson, 791 F. Supp. 1425 (E.D. Cal. 1992) (Patterson I); Nat. Res. Def. Council v. Patterson (2004), (333 F.Supp. 2d 906 (Patterson II); Nat. Res. Def. Council v. Houston, 146 F.3d 1118 (9th Cir. 1998).

⁸⁹ Karrigan Bork & Amber Manfree, *Rewatering Napa's Rivers*, 36 NAT. RES. & ENV. 32, 32 (2021).

⁹⁰ *Id.* at 34.

REQUIREMENT LIKE CALIFORNIA'S SECTION 5937

A. *State of Native Fish Populations in Nevada*

Just as climate change does not impact only a single state, fish extinction is not just a California issue. Waterways do not adhere to state borders, and California shares many rivers and lakes with its largest neighbor: Nevada. For example, the Truckee River, Carson River, and Walker River all have their headwaters in the Sierra Nevada mountains of California and terminate in various desert lakes in Nevada.⁹¹ The Truckee River is dammed by the Derby Diversion Dam, the Carson River by the Carson River Diversion Dam, and the Walker River is dammed to create Nevada's Topaz Lake and is heavily diverted by private Nevadan landowners for agricultural use.⁹² Nevada has 657 official dams across the state (and likely many more unofficial dams), and 53 percent of Nevada's waterways have been altered.⁹³ In total, 96 percent of major rivers, 64 percent of streams, and 36 percent of headwaters in Nevada have been altered.⁹⁴

Damming, pollution, and invasive species have caused significant declines in Nevada's native fish populations. The iconic Lahontan Cutthroat Trout, once the king of ancient Lake Lahontan that stretched from California to Utah, was listed as an endangered species in 1970.⁹⁵ Despite intense conservation efforts by local indigenous people and mainstream conservation groups alike, the Lahontan Cutthroat Trout is still listed as a threatened species today.⁹⁶ For thousands of years, chinook and sockeye salmon flourished across Northern Nevada—but the completion of Oregon's Owyhee Dam caused their populations to decline drastically.⁹⁷ A 2011 study found 58 percent of the 26 historically sampled

⁹¹ *Nevada Lakes and Rivers Map*, GIS Geography (May 25, 2022), <https://gisgeography.com/nevada-lakes-rivers-map/>; Heki et. al., *Return of a giant: DNA from archival museum samples helps to identify a unique cutthroat trout lineage formerly thought to be extinct*, ROYAL SOCIETY OPEN SCIENCE, 6 (Nov. 2017), https://www.researchgate.net/publication/321079153_Return_of_a_giant_DNA_from_archival_museum_samples_helps_to_identify_a_unique_cutthroat_trout_lineage_formerly_thought_to_be_extinct.

⁹² STATE OF NEVADA DIVISION OF WATER RESOURCES (2021), <http://water.nv.gov/DamsQuery.aspx>; *History of Walker Lake*, Walker Basin Conservancy (last accessed Nov 1, 2022), <https://www.walkerbasin.org/oldhistoryofwalkerlake>.

⁹³ Benjamin Spillman, *High Hazard Nevada Dams Lack Emergency Plans*, RENO GAZETTE JOURNAL (Feb. 17, 2017), <https://www.rgj.com/story/news/2017/02/17/high-hazard-nevada-dams-lack-emergency-plans/98059560/>; CAP Public Lands Team, *Nevada's Disappearing Rivers*, CENTER FOR AMERICAN PROGRESS 1-3 (2018), <https://disappearingwest.org/rivers/factsheets/DisappearingRivers-NV-factsheet.pdf>.

⁹⁴ Center for American Progress Public Lands Team, *supra* note 94 at 2.

⁹⁵ *Lahontan Cutthroat Trout*, WESTERN NATIVE TROUT INITIATIVE (2019), <http://westernnativetrout.org/lahontan-cutthroat-trout/> (last accessed Oct. 20, 2022).

⁹⁶ *Id.*

⁹⁷ Larry Hyslop, *Nevada's Salmon Fishing, Remembered*, ELKO DAILY, (May 5, 2018), <https://elkodaily.com/lifestyles/nature-notes-nevada-s-salmon-fishing->

surveyed locations around Lake Tahoe showed a decline of native species or no native species at all.⁹⁸ In essence, Nevada's native fish populations are declining, and something must be done to save them.

B. *The Public Trust in Nevada*

Nevada courts have not recognized standing for private entities to compel enforcement of state statutes based on violations of the public trust, as the California courts recognized in *Marks v. Whitney*.⁹⁹ Therefore, Nevada does not allow private entities to sue for public trust violations, such as for a lack of downstream flow killing native fish populations. Until relatively recently, Nevada did not even recognize the public trust doctrine.

In 2011, the Nevada Supreme Court finally recognized the public trust doctrine in *Lawrence v. Clark County*.¹⁰⁰ The court held that any navigable waters held by the state since statehood were held for the benefit of the public and the state cannot dispose of such property when it is not in the public's interest.¹⁰¹ Subsequently, the Walker River Paiute Tribe and Mineral County (home of Walker Lake) attempted to use the newly recognized public trust doctrine to restore the Walker River Basin and Walker Lake, a large desert lake that is the terminus of many tributaries carrying Sierra Nevada snowmelt.¹⁰²

The Walker Basin is a 3,000-square-mile basin that begins in California and stretches to Nevada, with tributaries draining into Nevada's Walker Lake.¹⁰³ Walker Lake has shrunk in size by over 50 percent since 1882.¹⁰⁴ Water diversion from Walker Lake has created such a high salt concentration that native fish can no longer survive in its waters.¹⁰⁵ As a result, Walker Lake has ceased to be a migratory bird stopover location.¹⁰⁶ A once thriving tourism and fishing industry

remembered/article_4b8ea2e9-0fd4-5584-b89d-8b45d6d2b3e6.html.

⁹⁸ Ngai et. al., *NICHES: Nearshore Indicators for Clarity, Habitat and Ecological Sustainability Development of nearshore fish indicators for Lake Tahoe*, University of Nevada Reno and Miami University (Jan. 2010), https://lands.nv.gov/uploads/documents/License_WQ_Nearshore_Indicators_for_Clarity,_Habitat_and_Ecological_Sustainability.pdf.

⁹⁹ Börk, *Targeting Public Trust Suits*, *supra* note 25.

¹⁰⁰ *Lawrence v. Clark Cty.*, 127 Nev. 390, 391, 254 P.3d 606 (2011).

¹⁰¹ *Id.* at 400.

¹⁰² *Min. Cnty. v. Lyon Cnty.*, 136 Nev. 503, 507 (2020).

¹⁰³ *Science in the Walker Basin*, UNITED STATES GEOLOGICAL SURVEY (2021), https://www.usgs.gov/centers/nv-water/science/science-walker-river-basin?qt-science_center_objects=0#qt-science_center_objects.

¹⁰⁴ *Id.*

¹⁰⁵ *Walker Basin, Nevada*, UNITED STATES GEOLOGICAL SURVEY (2021), https://www.usgs.gov/centers/fort-collins-science-center/science/walker-basin-nevada?qt-science_center_objects=0#qt-science_center_objects.

¹⁰⁶ *Id.*

around Walker Lake has all but ceased to exist.¹⁰⁷

If this all sounds familiar, it is eerily similar to California's famous Mono Lake and *Audubon* case discussed earlier, in which litigation over dammed Mono Lake tributaries and declining lake levels resulted in California's recognition that private individuals have standing to sue for violations of the public trust. However, unlike in *Audubon*, it is not Los Angeles but rather upstream farmers and ranchers who have appropriated the tributaries of Walker Lake, causing the lake's decline in health and size.¹⁰⁸ And unlike the California Supreme Court, the Nevada Supreme Court declined to extend the public trust to allow for private lawsuits.

In a 4-2 decision in *Mineral County v. Lyon County*, the Nevada Supreme Court held that the public trust doctrine could not defeat the appropriative rights of private individuals upstream.¹⁰⁹ The court noted the "tragic decline of Walker Lake" and the destruction of the downstream wildlife, environment, and economy of Mineral County. However, the court declined to "use the public trust doctrine as a tool to uproot an entire water system."¹¹⁰ The court reasoned that since Nevada has held all waterways in the public trust since statehood any water legally appropriated after statehood must have been done in accordance with the public trust doctrine and the public's interest at the time.¹¹¹ Therefore, the public trust doctrine does not conflict with Nevada's appropriative rights system.¹¹²

The court did expand the public trust doctrine to include all waters within Nevada, not just navigable waterways. However, because the public trust doctrine must yield to appropriative rights in Nevada, this broadening of the public trust is not particularly useful to expanding downstream flow requirements to Nevada waters for native fish populations.¹¹³ How can fish populations be returned to Nevada waters if the public trust doctrine has been rendered toothless by the Nevada Supreme Court?

C. Nevada Fish Statutes Similar to Section 5937

Nevada does have similar, albeit much weaker, statutes in the books similar to California's Section 5937. Nevada Revised Statute (NRS) 503.400 requires, "Every person who has erected . . . any dams . . . or other obstructions to the free

¹⁰⁷ Brian Bahouth Walker Lake, *The Legal Saga Continues with the Endgame in Question*, SIERRA NEVADA ALLY, (September 29, 2020), <https://www.sierranevadaally.org/2020/09/29/walker-lake-the-legal-saga-continues-with-the-end-game-in-question/>.

¹⁰⁸ *Min. Cnty. v. Lyon Cnty.*, 136 Nev. 503, 516 (2020).

¹⁰⁹ *Id.* at 518.

¹¹⁰ *Id.* at 519.

¹¹¹ *Id.* at 512.

¹¹² *See id.* at 519.

¹¹³ *See id.* at 517-18.

passage of fish in . . . waters of the State of Nevada shall construct and keep in repair . . . fishways or fish ladders at all such dams . . . so that at all seasons of the year fish may ascend above such dams . . . to deposit their spawn.”¹¹⁴

NRS 503.420 requires the use of fish screens (artificial screens that stop fish from entering diverted areas of water where they may be accidentally killed) on all waterways fish inhabit.¹¹⁵ NRS 503.584 is an explicit finding by the Nevada legislature that the State has an obligation to conserve and protect native fish populations in Nevada and calls on the Nevada Department of Wildlife (NDW) to establish programs to conserve native fish.¹¹⁶ Under NRS 535.020, the State Engineer must require new and existing dams to conform to the fishway or fish ladder requirements of NRS 503.400 before approving plans for the creation or modification of a dam.¹¹⁷

D. The Inadequacy of Nevada’s Fish Protection Statutes

While headed in the right direction, NRS 503.400 and the ensuing statutes have not been enough to save Nevada’s rapidly declining fish populations. Nevada’s fish conservation statutes are unenforced, weak, and ineffective even when enforced.

First, the fishway requirements of NRS 503.400 are poorly enforced, like the ones in Section 5937. For example, a fishway should have been installed when Numana Dam was built in 1971 on Nevada’s lower Truckee River. The Pyramid Lake Paiute advocated for dam modifications to promote fish passage since the dam was first constructed, but the tribe was unable to secure enough funding for a fish passage until 2022.¹¹⁸ Furthermore, the Derby Diversion Dam was built in the early 1900s on the upper Truckee River.¹¹⁹ According to a Bureau of Reclamation Report, the State was aware that dam diversions were causing a decline in the Lahontan trout population, especially near Pyramid Lake near the Derby dam.¹²⁰ Although the dam purportedly had fishways since the 1900s, there

¹¹⁴ NEV. REV. STAT. ANN. § 503.400 (2003). Nevada has had a similar fishway statute on the books since 1949, *see* NCL §3035.29 (1949).

¹¹⁵ NEV. REV. STAT. ANN. § 503.420 (2003).

¹¹⁶ NEV. REV. STAT. ANN. § 503.584 (1969).

¹¹⁷ NEV. REV. STAT. ANN. § 535.020 (1969).

¹¹⁸ Kaleb Roedel, *Nevada Tribe Tries to Recover Native Fish Amid Impacts of Dams, Climate Change*, KUNC (June 21, 2022), <https://www.kunc.org/regional-news/2022-06-21/nevada-tribe-tries-to-recover-native-fish-amid-impacts-of-dams-climate-change> (last accessed Oct. 20, 2022).

¹¹⁹ *Nevada: Derby Diversion Dam*, U.S. Nat’l Park Serv., <https://www.nps.gov/articles/nevada-derby-diversion-dam.htm> (last accessed Nov. 2, 2022).

¹²⁰ Rick Christensen and Brent Mefford, *A Struggle of Needs: A History of Bureau of Reclamation Fish Passage Projects on the Truckee River, Nevada*, in JUST ADD WATER: RECLAMATION PROJECTS AND DEV. FANTASIES IN THE UPPER BASIN OF THE COLO. RIVER 209, 212 (Stephen C. Strurgeon ed. 2008).

is no data about their efficacy or how long they were functioning.¹²¹ Finally, in 2020, new fishways and fish screens were installed at the Derby Diversion Dam.¹²² Data is unavailable on how many of the other 655 dams across Nevada actually have functioning fishways or fish ladders, but if it wasn't until 2020 and 2022 that the major dams on Truckee River received functioning fishways, it is extremely likely that many of the smaller dams across Nevada also have inadequate or nonexistent fishways.

Second, NRS 503.400 and the ensuing fish protection statutes are weaker than California's Section 5937. While Section 5937 necessitates downstream flow requirements to "keep [downstream fish populations] in good condition," NRS 503.400 has no such explicit requirement.¹²³ The statute simply states that a fishway or fish ladder must be constructed to allow for fish to travel downstream—there is no requirement for the fishways to successfully keep the downstream fish populations healthy.¹²⁴ A public interest group could argue that NRS 503.400's prohibition against an "obstruction to the free passage of fish" could include insufficient water or a dry riverbed as "an obstruction." However, any lawsuit brought under NRS 503.400 will likely fail due to the gutted public trust doctrine in Nevada after *Mineral County*. Under the holding in *Mineral County*, public trust obligations by the state have already been fulfilled and cannot limit the appropriators causing the declining water levels. Further, any litigant would likely lack standing to bring a lawsuit to enforce NRS 503.400 because Nevada has not recognized a private right to sue for violations of the public trust (as the court did in *Audubon* for Californians).

Lastly, fishways and ladders are often ineffective mechanisms for fish migration even when properly installed.¹²⁵ Therefore, even if NRS 503.400 was enforced and compelled dam owners across Nevada to install fish ladders, ineffective fish ladders are likely not sufficient to revitalize native fish populations in Nevada.

¹²¹ *Id.* at 211.

¹²² *Id.*

¹²³ NEV. REV. STAT. ANN. § 503.400 (West 2003); CAL. FISH & GAME CODE §5937.

¹²⁴ *Id.*

¹²⁵ See John Waldman, *Blocked Migration: Fish Ladders On U.S. Dams Are Not Effective*, YALE ENVIRONMENTAL 360, YALE SCHOOL OF THE ENVIRONMENT, (Apr. 4, 2013), https://e360.yale.edu/features/blocked_migration_fish_ladders_on_us_dams_are_not_effective (finding that only 3% of American shad successfully use fish ladders); see Amy Kraft, *Upstream Battle: Fishes Shun Modern Dam Passages, Contributing to Population Declines*, SCIENTIFIC AMERICAN (Feb. 20, 2013), <https://www.scientificamerican.com/article/upstream-battle-fishes-shun-modern-dam-passages-population-declines/> (finding that shad, herring, and Atlantic salmon have low levels of success using fish ladders and even lower rates of using ladders to migrate downstream after spawning).

C. *The Nevada legislature needs to pass strong instream flow requirement legislation to save Nevada's native fish populations.*

What can be done to save native fish across Nevada? Private environmental groups could sue the state of Nevada and NDW to enforce NRS 503.400, just as environmental groups in *CalTrout* did to enforce Section 5937. However, the successful *CalTrout* litigation relied upon a strong court-recognized public trust doctrine and recognition of a private standing to sue to enforce the public trust—elements lacking in Nevada. Unlike the California Supreme Court, the Nevada Supreme Court has effectively gutted the public trust doctrine in *Mineral County* and has yet to weigh in on whether private individuals have standing to bring lawsuits for violating the public trust. Private environmental groups could sue the state of Nevada for failure to protect the public trust when the state recognized appropriative rights, similar to the approach taken by environmental groups in *Audubon*.¹²⁶ If Nevada courts are willing to extend standing for violations of the public trust to private individuals and hold that no statute of limitations precludes bringing a public trust lawsuit over a hundred years after Nevada established a system of appropriative water rights, then this may be a winning argument. The case law is unclear until environmental groups in Nevada bring this type of lawsuit.

Another solution may be to enact “instream flow requirements” by the Nevada legislature to be enforced by the NDW. Instream flow is the amount of water needed in a body of water to maintain the ecosystem’s health, and instream flow requirements are specific minimum levels of flow required to maintain an ecosystem’s health.¹²⁷ The release or blockage of water impacts the instream flow from dams upriver and the amount of water diverted for human use. If dam owners and diverters follow instream flow requirements and allow enough water to flow through a waterway, the ecosystem’s health should not be negatively impacted.

Many other states do not appear to have an unenforced Section 5937 or a robust public trust doctrine to protect native fish. Instead, some states have enacted statutes requiring state agencies to determine and implement minimum instream flow requirements to protect native fish populations.¹²⁸ Nevada should do the same to protect its native fish populations.

Oregon has been at the forefront of this movement.¹²⁹ In 1987, Oregon passed

¹²⁶ See *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d at 441.

¹²⁷ *Frequently Asked Questions*, INSTREAM FLOW COUNCIL (May 13, 2019), <https://www.instreamflowcouncil.org/faq/>.

¹²⁸ See OR. REV. STAT. 537.332 - 537.360 (1987); see *Instream Flow & Water Management Rules*, DEP'T OF ECOLOGY STATE OF WASH. (2022), <https://ecology.wa.gov/Water-Shorelines/Water-supply/Protecting-stream-flows/Instream-flow-implementation>; see N.H. REV. STAT. ANN. § 483:9-c (2016).

¹²⁹ *Flow Restoration in Oregon*, OREGON WATER RESOURCES DEPARTMENT (2021), <https://www.oregon.gov/OWRD/programs/WaterRights/IS/FlowRestoration/Pages/default.aspx>.

the Instream Water Rights Act.¹³⁰ The act both protects instream flows in Oregon and gives state agencies, such as the Oregon Department of Fish and Wildlife (ODFW), the tools to institute minimum required water flow in Oregon waterways.¹³¹ ODFW rule 635-400-0015-8(a) specifies that an instream flow requirement “shall be no less than the highest instream flow or water service elevation required by any of the fish or wildlife species of management interest during that period.”¹³² In essence, this is a Section 5937 provision, although it came into effect 50 years after Section 5937 was passed in California and required no similar *CalTrout* litigation for enforcement. This is likely because the statute was passed in 1987 when the environmental movement firmly took hold in Oregon. Therefore, enforcing Rule 635-400-0015-8(a) was uncontroversial, unlike Section 5937 was in California in the early 20th century.

The Instream Water Rights Act has been a massive success in Oregon. By 2017, the ODFW had rehabilitated over 500 of the state’s rivers and streams to have adequate water flows to support healthy fish populations, approved applications for other state agencies to convert another 900 streams to adequate water flows, and started a program where private individuals could convert streams on private property to have adequate water flows.¹³³ As a result, Oregon’s native fish populations are recovering.¹³⁴

If Nevada’s legislature were to pass a law like Oregon’s Instream Water Rights Act, fish in Nevada would stand a fighting chance. The Nevada legislature is headed in the right direction with the current fish protection statutes in place, but these statutes are not enough as Nevada’s fish populations continue to decline. The time is ripe for the Nevada legislature to act to conserve native fish populations. The public trust doctrine was recognized in Nevada in 2011. The federal government just completed a large fishway project on the Truckee River to the celebration of local environmentalists and recreational fishermen.¹³⁵ The logical next step with this conservation momentum is for the Nevada legislature to pass an inflow stream requirement act as Oregon did in 1987. The Nevada legislature needs to use this momentum to pass legislation to save Nevada’s fish population before they become extinct from Nevada waters.

VII. CONCLUSION

California’s water-scarce climate, vast population, and agricultural centers in

¹³⁰ Or. Rev. Stat. Ann. § 537.332-537.360; *Flow Restoration in Oregon*, *supra* note 125.

¹³¹ Or. Rev. Stat. Ann. § 537.336.

¹³² Oregon Dep. Of Fish and Wildlife Ch. 635 Division 400 Sec. 8(a).

¹³³ *Flow Restoration in Oregon*, Oregon Water Resources Department (2021).

¹³⁴ *See id.*

¹³⁵ Sonner, *supra* note 128.

the south of the state led to the extensive damming of waterways across the state. *CalTrout* was an environmental success story on how private litigation can be used to protect California's native fish populations after this extensive damming. *CalTrout* can best be understood as the culmination of California's shifting view on water to include environmental conservation. The success of the *CalTrout* litigants was only possible because of the robust public trust doctrine recognized by California courts. Nevada has no such robust court-recognized public trust doctrine or strict fish conservation statutes and will need the state legislature to act to pass strong instream flow requirements if Nevada's native fish populations are to have a realistic chance at survival.