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[GOV. CODE § 6103]

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23 BRING BACK THE KERN, WATER AUDIT
24 CALIFORNIA, KERN RIVER PARKWAY
25 FOUNDATION, KERN AUDUBON SOCIETY,
26 SIERRA CLUB, and CENTER FOR BIOLOGICAL
27 DIVERSITY,

28 Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1 - 500,

Defendants and Respondents,

Case No. BCV-22-103220-GAP

Assigned For All Purposes To:
Judge: Honorable Gregory A. Pulskamp
Dept.: 8

**CITY OF BAKERSFIELD'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Date: October 13, 2023
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Gregory A. Pulskamp

Complaint Filed: November 30, 2022
FAC Filed: March 6, 2023

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1 Defendant and Respondent City of Bakersfield (“Bakersfield” or “City”) submits this
2 Opposition to the Motion for Preliminary Injunction filed by Plaintiffs and Petitioners Bring Back
3 the Kern, Water Audit California, Kern River Parkway Foundation, Kern Audubon Society, Sierra
4 Club, and Center for Biological Diversity (“Plaintiffs”).

5 I. INTRODUCTION

6 Plaintiffs seek to enjoin and bar the City from delivering a clean, safe, and reliable drinking
7 water supply to Bakersfield’s more than 400,000 residents through diversions of water from the
8 Kern River. Plaintiffs’ requested injunctive relief would radically change the status quo by
9 impeding the City’s long established right, and obligation, to divert water from the Kern River for its
10 domestic needs, including to provide drinking water to City residents.

11 Plaintiffs have not met their burden of proof of showing a need or legal basis for the
12 requested injunctive relief. This Court must deny the motion for preliminary injunction because (1)
13 the harm to the City and the City residents if the Court issues the requested injunction and cuts off
14 the City’s ability to provide water service to its residents would be significant and irreparable,
15 particularly in comparison to the lack of harm to the Plaintiffs if the Court denies the motion, (2) the
16 Court cannot impose Plaintiffs’ requested vague and uncertain relief involving undefined flows of
17 water, and (3) Plaintiffs have not demonstrated they will prevail on the merits, as Plaintiffs have
18 failed to demonstrate that the statutes and authority cited by Plaintiffs apply to the Kern River, or
19 that the City violated that authority.

20 II. FACTUAL BACKGROUND

21 A. Relevant Background Regarding the Kern River and the City of Bakersfield’s 22 Reliance on the Kern River

23 The climate and hydrology of the Kern River and its watershed are known for their high
24 degree of annual and seasonal variability, ranging from a high of approximately 2.5 million acre-feet
25 to a low of approximately 138,000 acre-feet over the 130-year record of Kern River flows.
26 (Declaration of Daniel Maldonado [“Maldonado Decl.”], ¶ 5.) This hydrologic variability has
27 required river management approaches that address the potential for both severe flooding at times
28 and drought and a dry river bed at other times within the Kern River. (*Id.*, ¶ 5.)

1 The Bakersfield Water Resources Department is responsible for operating the City’s domestic
2 water service area and providing all of its residents with clean drinking water. The Kern River serves
3 as the primary water source for the City. (Maldonado Decl., ¶ 8.) The domestic water service system
4 utilizes groundwater recharged by the Kern River from its groundwater wells and Kern River surface
5 water through diversions to the Improvement District No. 4 Henry C. Garnett Purification Plant and
6 Cal Water’s Northeast and Northwest Treatment Plants. (*Id.*) The City diverts and uses water from the
7 Kern River based on established water rights and assets which the City acquired in 1976. (*Id.*)

8 The City is obligated to operate the Kern River system for itself and the other Kern River
9 interests. (Maldonado Decl., ¶ 9.) The City also acts as the keeper of Central Records of the Kern
10 River, and works closely with the Kern River interests and the Kern River Watermaster. (*Id.*) In
11 performing its record keeping function, the City receives daily orders from certain local water
12 districts for diversions of a defined flow of water into specific canals off the Kern River or the
13 Carrier Canal that parallels the river. (*Id.*) The City owns and operates many of the head gates and
14 physical facilities along the Kern River, and typically makes adjustments to the facilities to allow the
15 requested quantity of water, or rate of flow, to pass into the canal. (*Id.*)

16 The operation of the Kern River relies on various structures and appurtenances through the
17 entire river system, which check or backup water to allow diversions to canals and allows water to
18 overpour or pass through water down the Kern River channel. (Maldonado Decl., ¶¶ 10–14
19 [describing the Beardsley, Rocky Point, Calloway, River Canal Backup, Bellevue, and McClung
20 weirs].) The City Water Resources Department operates these weirs on a daily basis according to
21 orders placed by Kern River interests and other water districts to the City’s dispatch office. (*Id.*, ¶ 15.)

22 The demands on the City include surface water deliveries to the water treatment plants and
23 groundwater recharge to offset the groundwater pumping necessary to supply more than 400,000
24 City residents. (Maldonado Decl., ¶ 16.) Deliveries to the City’s more than 400,000 residents via
25 the treatment plants are the City’s highest priority to ensure adequate drinking water supplies for
26 residents throughout Bakersfield. (*Id.*) The City maximizes the capacity of these treatment plants to
27 minimize the amount of groundwater pumping occurring throughout the City. (*Id.*) The City then
28 must provide for needs and demands to recharge its Kern River supply throughout the Kern River in

1 the various facilities owned by the City. (*Id.*) The City also has contractual obligations to deliver
2 some portion of its Kern River supply to various water entities, including government agencies and
3 agricultural water districts, under certain conditions and terms. (*Id.*) In addition to direct diversions
4 of surface water to treatment plants, to meet demands from domestic water wells, the City must
5 ensure that groundwater levels are maintained. (*Id.*, ¶ 17.)

6 If Kern River diversions, including diversions throughout south Bakersfield through Kern
7 Delta Water District’s unlined canals, are limited or interrupted, groundwater levels will decline, the
8 underground drinking water supply will be negatively affected and potentially cause undesirable
9 results. (Maldonado Decl., ¶ 18.) Groundwater quality will decrease, arsenic levels will likely
10 increase, water delivery to customers will be impacted because the pumps cannot deliver the required
11 quantity of water or maintain the proper pressure for drinking water, and health and safety issues will
12 arise as the City’s ability to provide a safe and reliable drinking water supply is threatened. (*Id.*)

13 **B. Relevant Procedural History**

14 Plaintiffs filed their original Verified Complaint for Declaratory and Injunctive Relief;
15 Verified Petition for Writ of Mandate on November 30, 2022. Following the filing of demurrers and
16 motions to strike by the City and then-named real parties in interest, Plaintiffs filed a First Amended
17 Complaint (“FAC”) on March 6, 2023. Plaintiffs allege Bakersfield, through its diversions of Kern
18 River water, has caused “the complete dewatering of the Kern River,” and that the City has not
19 satisfied its “duties under the California Constitution, the Public Resources Code, Fish & Game
20 Code, the California Civil Code, and the public trust doctrine to protect various resources on behalf
21 of the people of California.” (FAC ¶¶ 3–4.) Recently, on September 18, 2023, this Court sustained
22 Bakersfield’s demurrer to the FAC on the ground that Plaintiffs failed to name necessary and
23 indispensable parties, and to the second cause of action, giving Plaintiffs 10-days leave to file an
24 amended complaint/petition. Plaintiffs have not yet filed a second amended complaint/petition.

25 **III. LEGAL ARGUMENT**

26 **A. Standard of Review for Preliminary Injunction**

27 The decision to grant a preliminary injunction rests in the sound discretion of the trial court.
28 (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527–528.) The purpose of a preliminary

1 injunction is to preserve the status quo pending a trial on the merits. (*Id.*; *SB Liberty, LLC v. Isla*
2 *Verde Ass’n, Inc.* (2013) 217 Cal.App.4th 272, 280.) The “status quo” is generally defined as “the
3 last actual peaceable uncontested status which preceded the pending controversy.” (*Daly v. San*
4 *Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1045.)

5 Trial courts evaluate two interrelated factors when deciding whether or not to issue a
6 preliminary injunction. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69; *Continental Baking*
7 *Co., supra*, 68 Cal.2d at p. 528.) The first is the likelihood that the plaintiff will prevail on the merits
8 at trial. (*IT Corp., supra*, 35 Cal.3d at p. 69.) The second is the interim harm that the plaintiff is
9 likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to
10 suffer if the preliminary injunction were issued. (*Id.* at pp. 69–70.) To obtain a preliminary
11 injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim
12 harm that it will suffer if an injunction is not issued pending an adjudication of the merits. (*White v.*
13 *Davis* (2003) 30 Cal.4th 528, 554; *Costa Mesa City Employees’ Assn. v. City of Costa Mesa* (2012)
14 209 Cal.App.4th 298, 306.) “*The ultimate goal of any test to be used in deciding whether a*
15 *preliminary injunction should issue is to minimize the harm which an erroneous interim decision*
16 *may cause.*” (*IT Corp., supra*, 35 Cal.3d at 73 [emphasis added]; *White*, 30 Cal.4th at 554.)

17 Plaintiffs carry “the burden of proof and persuasion” on all issues and factors necessary for
18 this Court to issue a preliminary injunction. As explained herein, Plaintiffs have not come close to
19 satisfying their burden of proof. Plaintiffs fail to demonstrate a likelihood that they will prevail on
20 the merits and fail to demonstrate that the balance of harms warrants a preliminary injunction.

21 **B. Plaintiffs Improperly Seek to Change the Status Quo Through a Mandatory**
22 **Injunction**

23 Plaintiffs assert that their motion for preliminary injunction seeks to preserve the status quo
24 as a “prohibitory” injunction. However, Plaintiffs mischaracterize the status quo of the Kern River.
25 Plaintiffs actually seek a “mandatory” injunction to change the status quo by disrupting and barring
26 the City’s regular, established, and mandatory duty and obligation to divert water from the Kern
27 River to provide a domestic water supply for Bakersfield residents, and its diversion of water and
28 operation of Kern River facilities on behalf of local water districts.

1 Injunctions may be classified as either prohibitory or mandatory. (*Daly v. San Bernardino*
2 *County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1035.) “[A]n injunction is prohibitory if it
3 requires a person to refrain from a particular act and mandatory if it compels performance of an
4 affirmative act that changes the position of the parties.” (*Davenport v. Blue Cross of Calif.* (1997) 52
5 Cal.App.4th 435, 446–447; see also *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15
6 Cal.App.5th 872, 884 [holding that order is prohibitory if its effect is to leave parties in same
7 position and mandatory if its enforcement would change the position of the parties and compel them
8 to act].) The substance of an injunction, and not its form, controls. (*Davenport, supra*, 52
9 Cal.App.4th at p. 446 [injunction which compels a party to perform some physical act or surrender
10 property is mandatory].) “What may appear to be negative or prohibitory frequently upon scrutiny
11 proves to be affirmative and mandatory.” (*Byington v. Superior Court* (1939) 14 Cal.2d 68, 70
12 [finding an order dispossessing defendants of the use of water of the stream to be mandatory]; see
13 also *Agricultural Labor Relations Bd. v. Sup.Ct.* (1983) 149 Cal.App.3d 709, 713 [holding an
14 injunction restraining an employer from “refusing to reinstate” certain workers was actually
15 mandatory injunction compelling employer to *rehire*.]; *Paramount Pictures Corp. v. Davis* (1964)
16 228 Cal.App.2d 827, 838 [finding an order requiring the defendant to act contrary to contractual
17 obligations mandatory in character].)

18 Preliminary mandatory injunctions are rarely granted, and subject to stricter review on
19 appeal. (*Teachers Ins. & Annuity Ass’n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) “The
20 granting of a mandatory injunction pending trial is not permitted except in extreme cases where the
21 right thereto is clearly established.” (*Id.*; see also *Brown v. Pacifica Found., Inc.* (2019) 34
22 Cal.App.5th 915, 925.)

23 Here, Plaintiffs unquestionably seek to alter the “status quo” that preceded the current
24 controversy. Plaintiffs argue:

25 This year is different. As of the date of the filing of this motion, sufficient flows exist
26 below each Weir to keep in good condition any fish that exist in the River. An
27 injunction is required to preserve the status quo to ensure the City provides sufficient
28 bypass to keep fish existing below the Weirs in good condition. Failure to provide
sufficient bypass will result in fish being killed and their habitat destroyed in clear
violation of the law.” (Memorandum of Points and Authorities in support of Plaintiffs’
Motion for Preliminary Injunction [“MPA”], p. 6:1-8.)

1 Plaintiffs add that the relief sought is narrowly focused and does not change the City's
2 management of Kern River allocations, but merely restrains the City from diverting water that is
3 required to keep in good condition fish currently below the weirs. (MPA, p. 6:9-12.) Plaintiffs'
4 contentions are erroneous and misleading. Plaintiffs seek to change the operation of the Kern River
5 to perpetuate unprecedented high flows in the Kern River during the pendency of this dispute.
6 Plaintiffs admit that conditions on the Kern River this year are "different" from the "vast majority of
7 years," when the Kern River does not have the same flows and is "devoid of fish." Plaintiffs later
8 admit that they seek an order preserving and creating conditions on the Kern River which are
9 different than the conditions of the river "in almost all years," and in the "vast majority of years."
10 (MPA, p. 5.)

11 Plaintiffs seek to affirmatively limit or bar the City's regular, ongoing diversion of water
12 from and operation of the Kern River. Bakersfield has continuously and consistently diverted water
13 from the Kern River and operated the Kern River structures and facilities on its own behalf and on
14 behalf of local water districts since 1977, after it acquired its Kern River water rights and assets.
15 The Kern River is the primary and typically only source of water for Bakersfield's residents.
16 (Maldonado Decl., ¶ 8.) The "status quo" since 1977 has been the City's regular and ongoing
17 diversion of water from the Kern River for City residents and on behalf of local water districts. (*Id.*,
18 ¶¶ 8-9.) Plaintiffs seek to change the status quo by barring and "prohibiting" the City's diversions,
19 thus interrupting, altering and prohibiting the timing, volume, and quantity of the City's historic,
20 well-established pattern and practice of diversions out of the river to provide a drinking water supply
21 to City residents and to deliver water to local water districts for agricultural use.

22 **C. The Requested Preliminary Injunction is Invalid Because it does not Provide a**
23 **Clear Standard of Conduct for the City to Follow and for the Court to Enforce**

24 Plaintiffs' requested preliminary injunctive relief is impermissibly vague and impossible to
25 enforce, which alone warrants denial of Plaintiffs' motion. "An injunction must be sufficiently
26 definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a
27 standard for the court to use in ascertaining an alleged violation of the injunction." (*People ex rel.*
28 *Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1082.) An injunction cannot be so vague

1 that persons of common intelligence must necessarily guess at its meaning and differ as to its
2 application. (*Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* (2021)
3 71 Cal.App.5th 323, 343; see also *Continental Baking Co., supra*, 68 Cal.2d at p. 534 [An injunction
4 must not be uncertain or ambiguous and a defendant must be able to determine from the order what
5 he may and may not do.].) Such an injunction violates due process of law. (*In re Berry* (1968) 68
6 Cal.2d 137, 156.)¹

7 Here, Plaintiffs seek an order stating:

8 Defendant City of Bakersfield and its officers, directors, employees and agents, and all
9 persons acting on its behalf are hereby prohibited from operating the Beardsley Weir,
10 the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir,
and the McClung Weir in any manner that reduces river flows below a volume that is
sufficient to keep fish downstream of said weirs in good condition. (Proposed Order.)

11 The requested relief provides no guidance to the City or the Court concerning the volume of
12 flows the requested injunction requires the City to bypass at each of the named weirs, i.e., what level
13 of flows are sufficient. Plaintiffs state that they “do not seek to enjoin the City from all diversions;
14 just diversions greater than required for the City to comply with its statutory mandate under Fish and
15 Game Code, section 5937,” but that provides no additional indication of the level of flow Plaintiffs
16 are seeking. (MPA, p. 14:4-6.) The requested relief also provides no direction on the City’s course
17 of action, or ability to comply, if sufficient flows are not available upstream of the named weirs to
18 bypass downstream of the weirs.

19 Finally, Plaintiffs provide no details, guidance or data in the proposed order to allow the City,
20 or the Court, to determine whether fish are in “good condition” downstream of each of the named
21 weirs. Plaintiffs provide no objective metrics or standards to establish compliance. If the Court
22 issued the requested injunction, the City would be left to guess the requirements of the injunction
23 and would not be able to determine with certainty whether any of its actions were in compliance at
24 any particular time or season. Further, enforcement would be impossible, because, like the City, the

25 ¹ For example, in *Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, 65, 92,
26 Plaintiffs sought an injunction that prohibited the state and county parties from enforcing COVID-19
27 restrictions on adult entertainment businesses “subject to protocols that are no greater than is
28 essential to further Defendants’ response to control the spread of COVID.” The injunction did not
identify which protocols were essential and provided little guidance. (*Id.*) The court rejected the
injunction as unreasonably vague, and thus invalid, because it failed to give reasonable notice of the
conduct prohibited. (*Id.*, at pp. 92–93.)

1 Court would have no metrics by which to ascertain compliance.

2 Plaintiffs assert that merely a recitation of Fish & Game Code section 5937 is sufficient, as they
3 claim that the “[r]emedies can be accomplished by a simple reiteration of the statutory directive without
4 quantification of the amount of water required to satisfy the direction.” (MPA, p. 9:6–9.) Plaintiffs are
5 incorrect. A court may not issue a broad injunction to simply obey the law. (*Long Beach Memorial*
6 *Medical Center, supra*, 71 Cal.App.5th at 343 [rejecting order enjoining Kaiser from violating a statute
7 when it was impossible for Kaiser to know the “reasonable and customary value” of emergency medical
8 services because the value was not fixed].)

9 In *California Trout v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585
10 (“*Cal. Trout I*”) the court held that the State Water Resources Control Board (“Water Board”) had a
11 ministerial duty under Fish & Game Code section 5946 to set a condition on water right licenses
12 issued after 1953 (in portions of Mono and Inyo County) to comply with Fish & Game Code section
13 5937. The court also held that Water Board regulations governing standard permit terms and
14 conditions sanctioned a condition on permits, and by analogy licenses, simply reciting the statutory
15 directive without quantification of the amount of water required to satisfy the direction. (*Id.* citing
16 23 Cal. Code Regs. § 782.) However, the “simple recitation” language was not in the context of a
17 preliminary injunction seeking to enforce Fish & Game Code section 5937, but rather it was
18 permissible as a condition on a water right license pursuant to Water Board regulations.

19 Nor does *California Trout, Inc. v. Sup. Ct.* (1990) 218 Cal.App.3d 187, 195 (“*Cal. Trout II*”) support
20 Plaintiffs’ contention that the amount of water necessary to comply with Fish & Game Code
21 section 5937 can be addressed or determined through some sort of unspecified interim judicial relief.
22 (MPA, p. 9:12-13.) The *Cal. Trout II* matter involved conditions on water right licenses required by
23 Fish & Game Code section 5946, a water rights matter over which the court had concurrent original
24 jurisdiction. (*Cal Trout II, supra*, 218 Cal.App.3d at p. 194.) In that case, the court issued a writ
25 commanding the Water Board to immediately condition the water licenses at issue and remanded the
26 matter to the trial court to determine interim stream flow rates, for which the Water Board
27 disavowed interim authority, pending the Water Board’s completion of comprehensive studies and
28 further modification of the licenses to specify final precise flow rates. (*Cal Trout II, supra*, 218

1 Cal.App.3d at p. 212.) The current matter, however, does not involve modification or enforcement
2 of water rights, and Plaintiffs fail to present any studies, reports, or data regarding the requested flow
3 rates or volumes.

4 Plaintiffs also assert that the City, not Plaintiffs, has the duty to determine flows “sufficient
5 for supporting the life cycle needs of the existing fish,” citing *Sierra Club v. California Bd. of*
6 *Forestry* (1991) 234 Cal.App.3d 299, a vacated decision that is not binding or citable. (MPA, p. 9:9-
7 11.) Even if good law, *Sierra Club* is completely inapposite, having nothing to do with section
8 5937. In *Sierra Club*, the court found that the Department of Forestry had authority pursuant to the
9 Forest Practice Act to require timber harvest plans to include surveys of old-growth-dependent
10 wildlife species. (234 Cal.App.3d at pp. 745, 749–750.)

11 Finally, Plaintiffs assert that any interim “sufficient flows” would be subject to monitoring
12 requirements as well as adjustment over time, essentially conceding the uncertain and ambiguous
13 nature of the relief requested. (See MPA, p. 9:14–18.) Again, Plaintiffs’ imposition of some sort of
14 ongoing adaptive management as part of the requested preliminary injunction is unsupported by the
15 authorities cited. The regulations cited establish measurement and reporting requirements for annual
16 water rights reporting to the Water Board. (23 Cal. Code Regs. §§ 931–937.) The Fish & Game
17 Code sections cited are general definitions for “Adaptive management,” “Credible science,” and
18 “Ecosystem-based management,” untethered from any authority regarding “sufficient flows,”
19 responsibility for determining such flows, or interim preliminary relief. (Fish & Game Code
20 §§ 13.5, 33, 43.) Plaintiffs make no attempt to clarify how such adjustments would be made, by
21 what criteria, by what process, or by whom, which raises additional due process concerns.

22 **D. Plaintiffs Have Failed to Satisfy Their Burden of Proof for Preliminary**
23 **Injunctive Relief**

24 **1. The City Would Be Irreparably Harmed by the Requested Injunction.**

25 Plaintiffs claim that the harm sought to be enjoined is harm to the public “making
26 inappropriate the balancing of only the parties’ interest.” (MPA, pp. 12:27–28.) Plaintiffs, however,
27 ignore the irreparable harm to the public, and specifically the residents of Bakersfield, that would
28 result from this Court’s issuance of the requested relief. Plaintiffs therefore fail to satisfy their

1 burden of proof to demonstrate that the harm to Plaintiffs if the Court does not issue the injunction
2 outweighs the harm to the City if the Court issues the injunction.

3 Plaintiffs suggest that City water supplies will not be impacted by the requested injunction,
4 stating that the City could continue to divert water for municipal purposes and water diverters would
5 suffer no or very little loss of water delivered merely by shifting their points of diversion
6 downstream. (MPA, pp. 7:17–18 [“City’s interests” would only be “minimally impacted by the
7 requested injunction”]; 14:24–15:2.) Plaintiffs later state that “Plaintiffs do not seek to enjoin the
8 City from all diversions; just diversions greater than required for the City to comply with its
9 statutory mandate under Fish and Game Code, section 5937.” (MPA, p. 14:4–5.)

10 The notice of motion and proposed order, however, do not contain any allowance or exception
11 for the City’s diversion of water for domestic uses, including to provide a drinking water supply to
12 City residents. Plaintiffs instead seek an order enjoining the City from diverting water from the Kern
13 River “in amounts that result in flows in the Kern River being insufficient to keep in good condition
14 any fish that may exist downstream of said weirs.” (Notice of Motion.) The Proposed Order would
15 “prohibit” the City from “operating” the weirs on a river “in any manner that reduces river flows
16 below a volume that is sufficient to keep fish downstream of said weirs in good condition.”

17 The notice and proposed order indicate Plaintiffs therefore broadly seek to enjoin **all** City
18 diversions of water from the Kern River if necessary to ensure that “sufficient” water flows below
19 the weirs to keep fish in “good condition” below the weirs. Since that amount is not further defined
20 by Plaintiffs, it is possible, if not likely, that the City would have to immediately stop all diversions
21 of water, including all diversions for the benefit of City residents, if the Court grants the motion, so
22 as to not face the risk of being in contempt of a vague, broad order. In short, there is no guarantee or
23 evidence presented that the “City could continue to divert the small amount of water it uses for
24 municipal purpose at its current diversions.” (MPA, pp. 24–28.)

25 In contrast, curtailment of City diversions would cause considerable and irreparable harm.
26 (Maldonado Decl., ¶ 20.) Water supplies from the Kern River historically are extremely variable,
27 requiring careful water management. (*Id.*, ¶ 5.) In many years, and particularly in times of drought,
28 the City’s water rights yield less water than the City’s overall annual water demand (currently

1 approximately 130,000 acre-feet of water). (*Id.*, ¶¶ 5, 20.) The City needs to maintain its ability to
2 divert Kern River water to the surface water treatment plants that serve City residents. (*Id.*, ¶¶ 17,
3 20.) Not all Bakersfield residents can be served by groundwater pumping, so any decrease in surface
4 water diversions to treatment plants directly impacts Bakersfield’s water supply to residents. (*Id.*)
5 Any restrictions on the City’s diversion of water would threaten the City’s ability to deliver water to
6 its residents, particularly in the areas of the City not served by groundwater. (*Id.*) Further,
7 restrictions on diversions will cause declines in groundwater levels with concomitant effects on
8 groundwater quality, and directly impact the supply of groundwater available to serve Bakersfield
9 residents. (*Id.*, ¶¶ 16-18, 20.) The requested injunction would therefore put the public health and
10 safety of 400,000 City residents at risk. (*Id.*, ¶ 20.)

11 Further, the Court must consider the public interest when a party seeks a preliminary
12 injunction against a public agency performing its duties. (*Tahoe Keys Prop. Owners Ass’n v. State*
13 *Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471; Water Code § 106.) Here, the City
14 provides water to its residents, a beneficial use accorded the highest priority under the Water Code,
15 and carefully manages its water supplies to support public health and safety, matters clearly within
16 the public interest. (Water Code §§ 106, 106.3 [right to safe, clean, affordable and accessible
17 water].) A party seeking a preliminary injunction against a public entity performing its public duties
18 would have to make a “significant” showing of irreparable injury. (*Tahoe Keys Prop. Owners Ass’n,*
19 *supra*, 23 Cal.App.4th at p. 1471.) Plaintiffs here fail to show they would suffer any irreparable
20 injury, let alone a showing of significant injury, or any injury that outweighs the irreparable injury to
21 the City and its residents if the Court issues the requested injunction.

22 **2. Plaintiffs Fail to Demonstrate a Risk of Any Irreparable Injury and Thus**
23 **Fail to Meet their Burden Regarding the Balance of Harms.**

24 In contrast to the clear irreparable injury to the City and its residents, Plaintiffs present no
25 evidence of any risk of immediate, irreparable injury if the Court denies the requested injunction.
26 Plaintiffs claim that in 2023, a “very-high-flow year,” sufficient flows exist below each of the weirs as
27 shown by the observation of fish, and if “water is removed from the river, fish in these locations will
28 not continue to exist in good condition.” (See MPA, pp. 10:20–11:8, 12:9–14.) If an injunction is

1 denied, Plaintiffs assert, the harm to the environmental is irreparable. (*Id.*, pp. 13:23–14:3.) However,
2 Plaintiffs present no evidence of imminent, irreparable injury. As Plaintiffs acknowledge, 2023 was an
3 extraordinary year, which followed years of drought. Yet, after one year of high flows, while the City
4 continued to divert water to City residents and operate the weirs, fish reappeared in the Kern River,
5 without any need for judicial intervention, in what Plaintiffs allege is sufficient condition. (MPA, pp.
6 10:20–11:8.) Plaintiffs have not shown that continued, routine, normal operation of the Kern River in
7 the future (going into the rainy season) will cause irreparable injury to Plaintiffs, the public, or even to
8 fish populations in the Kern River. Moreover, if wet year weather conditions with regular, normal
9 diversions from and operation of the river can restore fish, as Plaintiffs concede, there is no urgent
10 need to issue a preliminary injunction pending resolution of this case. In particular, Plaintiffs present
11 no evidence that issuing a mandatory injunction altering decades of the status quo of operations on the
12 Kern River and cutting off the City’s domestic water supply is necessary or justified.²

13 Plaintiffs apparently recognize that they will have trouble showing sufficient harm absent
14 issuance of injunctive relief, and posit several arguments why this Court should not balance harms at
15 all. Plaintiffs argue that the Court should not assign much weight, if any at all, to the balance of
16 harms factor given their alleged strong likelihood of prevailing on the merits. (See MPA, p. 12:17–
17 26; see also p. 7:15–16 [“leaving minimal weight, if any, to the City’s interests”].) Plaintiffs cite
18 *King v. Meese* (1987) 43 Cal.3d 1217, 1227, for the proposition that “[t]he more likely it is that
19 plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the
20 injunction does not issue. This is especially true when the requested injunction maintains rather than
21 alters, the status quo.” (MPA, p. 12:20-26.) As explained below, Plaintiffs have not demonstrated
22 or established they have any possibility of prevailing in this action, and, as previously explained,
23 Plaintiffs’ requested injunction would alter, and not maintain, the status quo.

24 **3. Plaintiffs Have Not Shown a Likelihood of Prevailing on the Merits of**
25 **Their Claims**

26 Plaintiffs have failed to show they will prevail on the merits of their underlying claims

27 ² This is not to say that the City is not concerned with the condition of the Kern River. The City has
28 a long history of taking actions to protect the quantity, quality, reliability, and continued viability of
the local water supply, the Kern River, and the river environment. (Maldonado Decl., ¶ 19.)

1 against the City. Plaintiffs base their request for injunctive relief primarily on alleged violations of
2 Fish and Game Code section 5937, yet Plaintiffs have failed to establish that Section 5937 applies to
3 the Kern River, or to the weirs in the Kern River. Even if Plaintiffs had established section 5937
4 applies in this proceeding, Plaintiffs have failed to establish that the City violated section 5937.

5 **a. Plaintiffs Fail to Establish Section 5937 Applies to this Dispute**

6 Plaintiffs contend that the weirs in the Kern River are “subject to Fish and Game Code,
7 section 5937” because they “are all in excess of six feet in height, and therefore are all dams.”
8 (MPAs, p. 5:22–24.) Plaintiffs, however, cite Water Code section 6003 in support of that
9 contention, but section 6003 only defines what is **not** considered a dam, which includes structures
10 “not in excess of six feet in height, regardless of storage capacity, or which has or will have a storage
11 capacity not in excess of 15 acre-feet.” Section 6003 does not state that all structures in a river in
12 excess of six feet constitute a “dam” under the Fish and Game Code, but only provides exceptions to
13 the broader definition of a “dam” in Water Code section 6002.

14 Plaintiffs fail to provide any evidence that the weirs in the Kern River qualify as dams under
15 the actual definition of dams in Water Code section 6002. Plaintiffs in particular fail to establish that
16 the weirs are “or will be 25 feet or more in height from the natural bed of the stream or watercourse
17 at the downstream toe of the barrier,” or that they “have an impounding capacity of 50 acre-feet or
18 more.” (Water Code § 6002.) The weirs, in fact, range from 10 feet to 18 feet in height from river
19 bottom to the walkway path on each weir, with the exception of the Bellevue Weir, which regulates
20 flows at a height of six feet. (Maldonado Decl., ¶ 10.)

21 Plaintiffs also fail to address Water Code section 6004, which states that an “obstruction in a
22 canal used to raise or lower water therein or divert water therefrom” is not a “dam” under California
23 law. Although the Kern River is not a “canal,” section 6004 further indicates that the definition of a
24 dam in the Water Code was not intended to encompass weirs used solely to regulate, and not
25 obstruct, water by temporarily backing up water for diversion, and not for storage. (Maldonado
26 Decl., ¶ 10.)

27 Further, Fish and Game Code section 5937 does not, on its face, indicate that a court has
28 authority to enforce the statute, or to issue injunctions limiting or barring diversions of water or other

1 public duties to enforce the statute. Instead, section 5937 expressly indicates that the “department,”
2 or the California Department of Fish and Wildlife (“CDFW”) has authority to interpret or apply the
3 statute. Section 5937 expressly states that the CDFW determines compliance with the statute, and
4 determines the amount of water that constitutes “sufficient water” to keep fish in “good condition.”
5 Only the CDFW, in its sole judgment, can make the expert findings required to find a violation of
6 section 5937. (Fish & G. Code, §§ 5937, 5931.) Indeed, CDFW may order alternative solutions
7 where a fishway or hatchery is otherwise impracticable. (Fish & G. Code, §§ 5942, 5938, 5931.)
8 For a court to attempt to apply these broad provisions to the specific facts of a river system would be
9 to usurp the function California law has assigned responsibility for making such determinations, at
10 least in the first instance, to the Commission. (E.g. Fish & G. Code, §§ 5930, 5931; see *Rank v.*
11 *Krug*, 90 F.Supp. 773, 801 (S.D. Cal. 1950).)

12 In addition, as indicated by the “passing of fish up and down stream” language in section
13 5901, the statute only applies to migratory (i.e., anadromous) fish. The FAC does not include any
14 allegations that anadromous fish exist (or existed) in the Kern River, or that the weirs prevent or
15 impeded their migration to/from the ocean.

16 As previously explained, *Cal Trout I* and *II* do not support Plaintiffs’ claim for relief under
17 section 5937. The court’s in those cases specifically limited their application to Fish and Game Code
18 Section 5946 and expressly stated that they need not reach the question of the application of section
19 5937 alone. (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 600–601.) The plaintiffs in *Cal Trout I* and
20 *II* did not seek injunctive relief, and the courts in those cases did not hold or even suggest that a
21 court has authority to issue an injunction to unilaterally enforce Fish and Game Code section 5937,
22 absent the involvement of the Water Board or CDFW.

23 **b. Plaintiffs fail to establish the City violated the Fish and Game**
24 **Code**

25 Plaintiffs submitted a number of declarations in support of the motion, but most of the
26 declarations only generally described the Kern River and the environment in and around the river.
27 Plaintiffs’ witnesses did not provide any evidence that the City’s operation of the weirs has caused or
28 will result in a violation of section 5937.

1 In particular, Plaintiffs failed to provide any evidence, through a declaration or otherwise,
2 that the City or the other Kern River diverters have failed to “allow sufficient water at all times to
3 pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or
4 through the dam, to keep in good condition any fish that may be planted or exist below the dam.”
5 For example, several witnesses described seeing fish in the Kern River, but no witness provided any
6 testimony that the City was doing anything, or intended to do anything, to interfere with or threaten
7 the presence of fish in the Kern River. Instead, water is currently passing through all of the weirs in
8 the Kern River channel within the City limits of Bakersfield, fish can still pass through the weirs,
9 and the City is not taking any steps to prevent water, or fish, from passing through the weirs. (See
10 Maldonado Dec., ¶ 10.)

11 **IV. CONCLUSION**

12 For the reasons stated herein, and in the accompanying declaration, the City respectfully
13 requests that this Court deny Plaintiffs’ Motion for Preliminary Injunction.

14
15 Dated: October 2, 2023

DUANE MORRIS LLP

16
17 By: 

18 _____
Colin L. Pearce
Jolie-Anne S. Ansley
Ashley L. Barton

19
20 Attorneys for Defendant and Respondent
CITY OF BAKERSFIELD

PROOF OF SERVICE

Bring Back the Kern, et al. v. City of Bakersfield, et al.
Kern County Superior Court, Case No. BCV-22-103220-GAP

I am a citizen of the United States, over the age of 18 years, and not a party to interested in the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite 2200, San Francisco, California 94105. I am readily familiar with this firm’s practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

CITY OF BAKERSFIELD’S OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

BY ELECTRONIC SERVICE: I caused the documents to be sent to the person(s) at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.


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19 I declare under penalty of perjury under the laws of the State of California that the foregoing
20 is true and correct. Executed on October 2, 2023, at San Francisco, California.

21 
22 _____
23 Renae Gawsawadikul