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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF KERN**

14 BRING BACK THE KERN, WATER AUDIT
15 CALIFORNIA, KERN RIVER PARKWAY
16 FOUNDATION, KERN AUDUBON
17 SOCIETY, SIERRA CLUB, and CENTER FOR
18 BIOLOGICAL DIVERSITY,

19 Plaintiffs and Petitioners,

20 vs.

21 CITY OF BAKERSFIELD
22 and DOES 1 through 500,

23 Defendants and Respondents,

24 BUENA VISTA WATER STORAGE
25 DISTRICT, KERN DELTA WATER
26 DISTRICT, NORTH KERN WATER
27 STORAGE DISTRICT, ROSEDALE-RIO
28 BRAVO WATER STORAGE DISTRICT,
KERN COUNTY WATER AGENCY, and
DOES 501-999,

Real Parties in Interest.

Case No.: BCV-22-103220

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

Complaint Filed: November 30, 2022
First Amended Complaint Filed: March 6, 2023
Second Amended Complaint Filed: October 4,
2023

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

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1 **INTRODUCTION**

2 By its Opposition, the City declares itself ill-informed of the role of a trustee for the public trust.
3 Much of the Opposition is founded on this misunderstanding and is evidence of the City’s failure to
4 satisfy its trust duties imposed by the Public Trust Doctrine and the public trust duty derived from
5 statute (ie. Fish and Game Code, section 5937.)

6 Plaintiffs do not seek to “bar the City from delivering a clean, safe and reliable drinking water
7 supply to Bakersfield’s more than 400,000 residents.” To the contrary, Plaintiffs seek to protect trust
8 resources from destruction due to agricultural diversions, at no harm to the City’s municipal uses. The
9 City’s hyperbole distracts from the actual issue: the highest priority public trust needs of City
10 residents—municipal supply *and* a flowing Kern River—are both being improperly subordinated to
11 the lesser of water priorities, agricultural irrigation.

12 In their Oppositions, both the City and Intervenor-Defendants recite at length the complexities
13 of daily Kern River water operations, but that fact does not excuse their concurrent systemic failure to
14 consider the mandated public trust needs of all California citizens. Those needs must be considered
15 and injury to the public trust must be avoided or mitigated when feasible.

16 Per the Court’s September 18, 2023, ruling, Plaintiffs file this Reply to the City of Bakersfield’s
17 Opposition to Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs are concurrently filing a separate
18 reply to the opposition filed by Intervenor-Defendants Buena Vista Water Storage District, Kern Delta
19 Water District, North Kern Water Storage District, Rosedale-Rio Bravo Water Storage District, and
20 Kern County Water Agency (“Real Parties”).

21 **ARGUMENT**

22 **I. Plaintiffs Seek a Prohibitory Injunction to Preserve the Status Quo, Which Is a Flowing**
23 **Kern River and Fish in Good Condition Below the Weirs.**

24 Plaintiffs seek a preliminary injunction to preserve the status quo of a flowing river pending the
25 resolution of this action. Under clear authority of our Supreme Court, this is a prohibitory injunction,
26 not a mandatory one. The City argues that Plaintiffs seek to “change the status quo by disrupting and
27 barring the City’s regular, established, and mandatory duty and obligation to divert water from the
28 Kern River,” making this a request for a mandatory injunction, not a prohibitory injunction. (City Opp.

1 at 8.) But the status quo is not the City’s pattern and practice of committing violative acts to dewater
2 the Kern Water; it is instead a flowing Kern River, with fish in good condition existing below the
3 City’s diversions. An order prohibiting the City from taking certain actions in the future is a
4 prohibitory injunction, one that “restrains the defendant from repeating its unlawful conduct, while
5 simultaneously requiring some adjustment of the parties’ respective rights, such as an abridgment of
6 the defendant’s claimed property right in continuing its challenged conduct.” (*Daly v. San Bernardino*
7 *Cnty. Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1048 (“*Daly*”).)

8 The Supreme Court in *Daly* identified two prevailing methods of measuring the status quo
9 employed by California courts. One is measured “from the time the order is entered,” and the other is
10 measured “from the last actual peaceable, uncontested status which preceded the pending
11 controversy”; i.e., “before the contested conduct began.” (*Id.* at 1045-46, internal quotations omitted.)
12 The Court did not take sides, but rather noted the first method’s use when the order “offers a remedy
13 for a past violation,” and the second method’s use when the order seeks “to prevent injury from future
14 conduct.” (*Id.* at 1046.) Here, Plaintiffs seek an order to prevent injury that will result from the City’s
15 ongoing and future conduct; they do not seek to remedy past violations. The second methodology
16 should thus be employed. But by neither reasoning is the City’s unlawful conduct the status quo,
17 because even by the first reasoning, the status quo is today, which is a flowing river. The City asserts
18 that it “operates these weirs on a daily basis....” (Maldonado Dec., ¶ 15.)

19 In discussing the second methodology, the *Daly* court paid considerable attention to a much
20 earlier Supreme Court case, *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80
21 (“*United Railroads*”). (*Daly*, 11 Cal.5th at 1044-1046; 1048-1050.) The court explained that its
22 decision in *United Railroads* “recognizes that in some instances, an injunction that is essentially
23 prohibitory in nature may involve some adjustment of the parties’ respective rights to ensure the
24 defendant desists from a pattern of unlawful conduct.” (*Id.* at 1046.) The court continued:

25 The *United Railroads* decision makes clear that an injunction preventing the defendant
26 from committing additional violations of the law may not be recharacterized as
27 mandatory merely because it requires the defendant to abandon a course of repeated
28 conduct as to which the defendant asserts a right of some sort. In such cases, the
essentially prohibitory character of the order can be seen more clearly by measuring the
status quo from the time before the contested conduct began.

1 (*Daly*, 11 Cal.5th at 1046.) The court then approvingly quoted a Court of Appeal decision that
2 cited *United Railroads* “for the proposition that ‘[a]n injunction that restrains *the continuance of*
3 *an act or series of acts* may be just as much a preventive or prohibitory injunction as one that
4 restrains the commission of an act.’” (*Daly*, 11 Cal.5th at 1048, quoting *Jaynes v. Weickman*
5 (2nd Dist. 1921) 51 Cal.App. 696, 699 (emphasis added).)

6 The City quotes *Byington v. Superior Court*, (1939) 14 Cal.2d 68, 70 (“*Byington*”), for the
7 proposition that “[w]hat may appear to be negative or prohibitory frequently upon scrutiny proves to
8 be affirmative and mandatory.” (City Opp. at 9.) The *Daly* court discussed *Byington* at length,
9 questioning its holding. It noted that the *Byington* court “held the order a mandatory injunction
10 because it required the city to surrender a property right (an appropriative water right) it allegedly held
11 at the time the order was made.” (*Daly*, 11 Cal.5th at 1049 (citing *Byington*, 14 Cal.2d at 69-70.) But
12 then the court continued:

13 If we had instead concluded that the status quo were properly measured by reference to
14 conditions preceding the controversial acts that gave rise to the litigation, then we should
15 instead have deemed the order prohibitory, as it merely returned the parties to their
16 positions before San Francisco began storing the extra water, and allowed it to take effect
17 pending the decision on appeal.

18 (*Daly*, 11 Cal.5th at 1049.) The court then followed with an illuminating footnote:

19 We acknowledge that the proper characterization of the injunction at issue in *Byington* is
20 not free from ambiguity. Rather than view the trial court's order there as requiring the
21 affirmative abandonment of a property right, we might with equal plausibility have
22 characterized it as restraining San Francisco from repeating its allegedly unlawful
23 conduct of storing excess water — much as the city in *United Railroads* had been ordered
24 to stop running excess trains on the plaintiff's tracks. That we did not characterize the
25 injunction that way may have had something to do with the fact that the city had
26 prevailed on the merits in an intervening decision on appeal.

27 (*Daly*, 11 Cal.5th at 1050, FN 10 (citing *Byington*, 14 Cal.2d at 72-73.)

28 Plaintiffs seek in this injunction to return the parties “to the last actual, peaceable status
preceding the controversy.” (*Ibid.*) Plaintiffs do not seek to secure an injunction that preserves *the*
broad status quo, with the City’s malfeasance included. The status quo is thus best measured the day
before the “controversial acts that gave rise to this litigation” first started. (See *id.* at 1049.) That date
may be in the 1970’s, when the City acquired control and management of the Diversion Weirs and
first started to divert water from the river in amounts that caused harm to trust resources and/or

1 stopped keeping the fish below each weir in good condition. Or it may be whenever each of the weirs
2 in the City’s current control were first built and operated by the City’s predecessors.

3 The Plaintiffs are agnostic as to the methodology this Court employs to define the status quo
4 that must be maintained. Plaintiffs seek a flowing river and fish in good condition. That is both the
5 “last actual, peaceable status preceding the pending controversy,” i.e., the condition present “before
6 the contested conduct [i.e., the city’s water diversions] began” is *also* the condition of *the river* at “the
7 time the order [will be] entered.” (See *Daly*, 11 Cal.5th at 1045-46, internal quotations omitted). Either
8 way, the status quo is not the City’s violative acts. It is a flowing Kern River that provides good
9 condition to fish that exist below each of the City’s weirs.

10 **II. The Requested Preliminary Injunction Provides an Adequate Standard of Conduct for**
11 **the City to Follow and for the Court to Enforce.**

12 Plaintiffs seek an injunction prohibiting the City from operating the weirs in any manner that
13 reduces river flows below a volume that is sufficient to keep fish downstream in good condition. This
14 is not a vague command nor is it impossible to enforce, as the City argues. It is pursuant to Fish and
15 Game Code, section 5937. The City is the best party to make the daily determination of how much
16 water may be diverted without sacrificing the good condition of the fish below the weirs. It is an
17 experienced water manager, accustomed to adjustment of water flow on a daily basis, and it has eyes
18 on the ground. The City is more than capable of meeting this challenge, as it has proven in its
19 management of the river for private profit for the past five decades. Thus, it can also do so in the
20 public interest.

21 Plaintiffs have proposed an injunction that respects and trusts the City’s expertise to perform its
22 duty, without undue interference or limitation of discretion. An “injunction need not etch forbidden
23 actions with microscopic precision, but may instead draw entire categories of proscribed conduct.
24 Thus, an injunction may have wide scope, yet if it is reasonably possible to determine whether a
25 particular act is included within its grasp, the injunction is valid.” (*People ex rel. Gascon v.*
26 *Homeadvisor, Inc.* (1st Dist. 2020) 49 Cal.App.5th 1073, 1083 (quoting *People v. Custom Craft*
27 *Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681).)

28 The City complains that the proposed injunction does not provide any guidance regarding the
volume of flows required at each weir, and no guidance as to “the City’s course of action ... if

1 sufficient flows are not available upstream...” (City Opp. at p. 11.) Again, the City is the trustee, and
2 whether it likes it or not, it has a duty to protect trust resources in its care. It cannot avoid that duty by
3 requiring courts to micromanage its performance.

4 If this Court determines that more specificity is required in its injunctive order, it can turn to
5 work already performed by the City to identify flow rates that would provide sufficient flows, with
6 sufficient certainty to demonstrate adequate performance of its duties: In 2016, the City prepared and
7 certified the *Water Resources Department Kern River Flow and Municipal Water Program*
8 *Recirculated Draft Environmental Impact Report* (the “Kern Flow EIR”) (see Plaintiffs’ Request for
9 Judicial Notice, filed October 6, 2023, Exhibit F.) The EIR analyzed the environmental impacts of the
10 City utilizing up to 160,000 AF/year to provide a permanent, consistent and regular flow of water
11 through the City, a flow that would collaterally recharge the groundwater basin and allow subsequent
12 municipal extraction of groundwater for municipal purposes. (Kern Flow EIR, p. 2-5.)

13 In addition, Plaintiffs offer the opinion of UC Davis hydrologist Dr. Theodore Grantham, who
14 suggests the use of an initial flow regime based on a percentage of unimpaired flows. (Grantham
15 Dec. at pp. 4-5, filed in support of Plaintiffs’ Motion and Reply herein.) Dr. Grantham proposes 40%
16 of unimpaired flows as an appropriate initial benchmark. (*Ibid.*). The City could then proceed with
17 further analysis and studies in furtherance of its trust duties, as described by Dr. Grantham, to fine-
18 tune and adjust its diversions appropriately. (*Id.* at pp. 5-6.) Forty percent of unimpaired flows as a
19 starting benchmark will not cause the City any harm, as it will not interfere at all with the City’s
20 municipal diversions. (See discussion below.)

21 **III. The City Will Not Be Irreparably Harmed by the Requested Injunction.**

22 The City claims that the proposed preliminary injunction would “enjoin all City diversions of
23 water from the Kern River if necessary,” and that “it is possible, if not likely, that the City would have
24 to immediately stop all diversions of water, including all diversions for the benefit of City residents.”
25 (City Opp. at 14.) The City claims that the “requested injunction would therefore put the public health
26 and safety of 400,000 City residents at risk.” (*Id.* at p. 15.) This alarmist and hyperbolic statement lacks
27 any sufficient evidentiary support. The City cites only the declaration of a City employee, but that
28 declaration itself lacks cites to data or evidence and is based solely on the vague proposition of “limited

1 or interrupted” diversions from the Kern River. (Moldonado Dec., ¶ 18.) The City’s position is false,
2 because in the case of the Kern River, complying with the law does not mean that the City must
3 sacrifice any of its municipal water diversions.

4 First, the City ignores its own plans, expressed in the 2016 Kern Flow EIR, to arrive at its dire
5 conclusion. In the Kern Flow EIR, the City anticipated that providing regular flows in the subject reach
6 “will serve multiple beneficial uses and demands, including demands for water for domestic, municipal
7 and industrial, environmental, recreational, aesthetic purposes; fish and wildlife restoration;
8 underground aquifer enhancement and storage; water quality; public interest; streamflow restoration;
9 and other purposes.” (Kern Flow EIR, p. 2-37, para. 2.) Yet in its Opposition, the City makes no
10 mention of, let alone calculates, the collateral recharge of the groundwater basin and the “subsequent
11 municipal extraction of groundwater for municipal purposes” that would result from a flowing river.
12 The City cannot have it both ways, proving how a flowing river will recharge the aquifer when it suits
13 the City’s goals to obtain newly available surplus flows, but then claiming (without any evidence) that
14 such an act will *prevent* recharge.

15 Second, the City’s dire warning of the collapse of municipal water supplies is inconsistent with
16 the historical record of the river’s flows, which have been measured and recorded since 1893 at the
17 “First Point of Measurement.” (Keats Dec., Ex. 3, p. COB-BBK-0000412; see also Kern Flow EIR, p.
18 2-31.) Between 1983 and 2010, the average annual flow at First Point was 726,000 AF. (*Ibid.*) Average
19 wet year flow (defined as the 75th percentile of median over the period of record, or about 125% of the
20 mean) was 899,000 AF, and the average dry year flow (defined as the 25th percentile of median over
21 the period of record, or about 50% of the mean) was 361,000 AF. The City describes the extreme outer
22 limits of flows as “a high of 2.5 million acre-feet to a low of approximately 138,000 acre feet.” (City
23 Opp. at p. 5.)

24 The City’s needs pale in comparison and are easily and reliably satisfied even while it complies
25 with the law to not dewater the river. Although the City cites in its brief an “overall annual water
26 demand” of approximately 138,000 acre-feet (City Opp. at pp. 14-15), this figure includes all sources
27 of water, not just diversions from the Kern River. *That figure* is much lower: the City lists a minimum
28 obligation of 24,000 AF per year of its river diversions for municipal use: 19,000 AF for its water

1 treatment plant and 5,000 AF for “City Water Feature Amenities.” (Kern Flow EIR at p. 2-33, see also
2 pp. 2-29 – 2-30.)

3 The City claims to be able to maintain a flowing river with 160,000 AF/year, although given the
4 context of the Kern Flow EIR this figure should be viewed as a goal in excess of the minimum
5 requirement, rather than a minimum. The City previously identified between 20,000 and 70,000
6 AF/year that is already available to use toward the goal. (Kern Flow EIR at p. 2-41 (“Source 1
7 Supply”).) Thus, at worst, a flowing river can be accomplished with a total of 90,000-140,000 AF.

8 The Kern River can reliably supply this amount of water and with no impact on the City’s
9 municipal requirements of 24,000 AF/year. The river’s average *dry year flows* are 361,000 AF, and its
10 average and average-wet-year flows are much higher. Only in the most extreme year ever recorded,
11 when flows were measured at approximately 138,000 AF, would there be any need for limiting river
12 flows in order to satisfy the City’s municipal needs.

13 But even then, there is no need to ever infringe on the City’s municipal supplies to satisfy the
14 City’s obligations under section 5937, as 160,000 AF/year is likely a much higher flow than what
15 would be required to keep the fish in good condition. Natural fish populations are adapted to variable
16 flow conditions, assuming that anthropogenic conduct such as impassible stream obstructions or
17 destruction of pools does not prevent upstream movement or retreat into refugia pools as flows
18 decrease.

19 As Dr. Grantham opined, 40% of unimpaired flows would be a fair starting point. (Grantham
20 Dec., p. 5.) That means 60% of the river’s flows would still be available for diversion, for whatever
21 purpose the City sees fit. In an average dry year the City could divert up to 216,600 AF, far in excess of
22 the City’s annual minimal requirement of 24,000 AF, while leaving 144,000 AF in the river. In average
23 and wet years, of course, much more water would be available to divert. Even in the most extreme low
24 flow ever recorded in only one year of record (138,000 AF), 78,000 AF could still be diverted—more
25 than three times the City’s 24,000 AF need.

26 The risk to municipal uses clearly does not qualify as irreparable harm. This is especially true
27 considering the groundwater recharge benefits of a flowing river and the real possibility of the City
28 being able to extract water downstream of the Subject Reach.

1 The logical inconsistencies of the City’s dire predictions of water calamity if the proposed
2 injunction were granted are caused by the City’s attempt to avoid the actual underlying problem: the
3 “Law of the River” allocation of agricultural water without consideration of the public trust.

4 **IV. Plaintiffs Demonstrate a Risk of Harm If the Injunction is Not Granted.**

5 The City argues that Plaintiffs “present no evidence of any risk of immediate, irreparable injury
6 if the Court denies the requested injunction.” (City Opp. at p. 15.) Immediate, irreparable injury is not
7 the standard that Plaintiffs must satisfy. Rather, Plaintiffs must only show that the interim harm they
8 will face if the injunction is denied is greater than the interim harm the City will face if the injunction
9 is granted. (*IT Corp. v. County of Imperial*, (1983) 35 Cal.3d 63, 69; *Smith v. Adventist Health*
10 *System/West* (2010) 182 Cal.App.4th 729, 749.) Even then, this prong is afforded minimal weight, if
11 any, if Plaintiffs can demonstrate a high likelihood of success on the merits. (*Butt v. State* (1992) 4
12 Cal.4th 668, 678; *SB Liberty, LLC v. Isla Verde Ass’n, Inc.* (2013) 217 Cal.App.4th 272, 280.)

13 If the City’s violative acts are allowed to continue, there is an extremely high likelihood that the
14 river will dry up, killing the fish currently living in, and traveling through its waters. Proof of this is
15 found in the declarations of Plaintiffs’ members and supporters who testified to the undeniable fact of
16 the chronically dry riverbed. (See Dec. of Charlie Love, ¶ 4; Dec. of Kelly Damian, ¶ 3; Dec. of
17 Matthew Mayry, ¶ 3; Dec. of Tim McNeely, ¶ 3.)

18 **V. Plaintiffs Have Demonstrated Likelihood of Success on the Merits.**

19 **A. Fish and Game Code Section 5937 Imposes Responsibility on the Dam “Owner.”**

20 Fish and Game Code, section 5937 requires, in part, that: The *owner* of any *dam* shall allow
21 sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient
22 water to pass over, around or through the dam, to keep in good condition any fish that may be planted
23 or exist below the dam.” (Emphasis added.) “Owner” is defined for the purposes of section 5937 as the
24 entity “owning, controlling or operating a dam ...”. (Fish & G. Code, § 5900, subd. (c).) “Dam” is
25 defined as including “all artificial obstructions.” (*Id.*, subd. (a).) Thus, section 5937 imposes a strict
26 duty on any party who owns, controls, or operates an artificial obstruction in a river to allow sufficient
27 water to pass over, around, or through the obstruction to keep in good condition any fish below the
28

1 obstruction. The City’s obligations under the public trust arise from its proprietary operations of the
2 dams.

3 Section 5937 has been described as a legislative expression of the public trust. (*California*
4 *Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 592, 630-631 (*Cal. Trout*
5 *D.*) Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive
6 necessarily limits the water available for appropriation for other uses. Where that affects a reduction in
7 the amount that otherwise might be appropriated, [section 5937] operates as a legislative choice among
8 competing uses of water. (*Cal. Trout I*, supra, 207 Cal.App.3d 585, 601.)

9 Subdivisions of the state, such as the City and Real Parties, share responsibility for protecting
10 our state’s natural resources and they may not approve of activities without giving due regard to the
11 preservation of those resources. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166
12 Cal.App.4th 1349 at 1370, fn. 19.) To the extent that the City owns or controls the weirs (dams), and
13 therefore is an “owner” under the law, the City has the duty to perform the conduct enumerated in Pub.
14 Res. Code, section 6009.1. (See SAC ¶ 57; see also ¶ 59.) The City may be subject to a judicial or
15 administrative proceeding if its water diversions are harming the public trust; however, the City is not a
16 trustee agency with regulatory control over these public trust resources.

17 To the extent and time that the Kern River remains wetted, the status quo can continue, and the
18 Preliminary Injunction remain dormant. The Preliminary Injunction seeks only to retain the status quo
19 and requires no immediate change in operation until such time that it is required to choose between the
20 public trust and the lower priority of irrigation. At that juncture, the public trust and section 5937 must
21 prevail.

22 The City argues that section 5937 does not apply to the City; that only the Department of Fish
23 and Wildlife (“CDFW” or “Department”) can enforce the section. (City Opp. at p. 18.) This is a
24 misreading of the plain language of the statute, which refers to the “the Department” being able to grant
25 permission to a dam owner to dewater *a fishway* when flows are too low, and only then if the dam
26 owner instead provides sufficient bypass by the dam. (Fish & G. Code, § 5937.)

27 The City is making diversions of water that adversely affect public trust uses. Unlike a trustee
28 agency, which is assigned responsibility for protecting the trust from harm by others, the City’s

1 obligation to protect the public trust is to not cause harm by its own actions. (See *National Audubon v.*
2 *Superior Court* (1983) 33 Cal.3 419, 424-25 (*Audubon*) [reciting public trust impacts of City of Los
3 Angeles’ diversions that were alleged to violate the public trust]; See also *Natural Resources Defense*
4 *Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 918: Fish & G. Code, section 5937 “places a
5 single duty on the dam owner, directing the dam owner to maintain” any fish below the dam.)

6 Nothing about that language restricts the ability of the public to enforce its provisions. Trustee
7 regulatory agencies such as the CDFW operate with finite resources and have the discretion to
8 selectively apply those resources to enforcement actions. (*Heckler v. Chaney* (1983) 470 U.S. 821,
9 832.) A private party seeking to protect public trust resources has the option of asking the SWRCB to
10 initiate a proceeding, or to initiate a judicial action against the offender. (*Audubon, supra*, at 33 Cal.3d
11 at pp 449-451.)¹

12 CONCLUSION

13 The opposition of the City should be viewed as admissions of trustee negligence, incompetence,
14 and indifference to the needs of the ordinary residents of Bakersfield. The balance of equities—
15 irreplaceable life balanced on speculated injury—warrants a Preliminary Injunction prohibiting the City
16 from changing the status quo by diminishing the flow downstream of the weirs to less than 40% of the
17 unimpaired flow, or such other amount that shall later be determined by the Court sufficient to keep
18 fish downstream of the weirs in the subject reach in good condition.

19
20
21
22
23 ¹ “Since *Audubon* opened the path to private 5937 enforcement in 1983, eight courts have
24 addressed 5937. [Fn. 329 *CLEAR*, 762 F. Supp. 2d 1214, 1214 (S.D. Cal. 2011); *High Sierra Hikers*,
25 436 F. Supp. 2d 1117, 1117 (E.D. Cal. 2006); *Patterson I*, 791 F. Supp. 1425, 1425 (E.D. Cal. 1992);
26 *CalTrout II*, 266 Cal. Rptr. 788, 788 (Ct. App. 1990); *CalTrout I*, 255 Cal. Rptr. 184, 184 (Ct. App.
27 1989); *Reynolds v. Calistoga*, No. 26-46826 (Cal. Super. Ct. Jan. 26, 2011); *Putah Creek Cases*,
28 Judicial Council Coordination (Cal. Super. Ct. 1996).] Together these cases paint a picture of the
resurrection of a dead law through private litigation. All of these cases were pursued by private parties,
with the State playing, at best, a supporting role as in *Reynolds v. Calistoga*. (Bork, Karrigan and
Krovoza, Joseph and Katz, Jacob and Moyle, Peter, *The Rebirth of California Fish & Game Code*
Section 5937: Water for Fish (April 26, 2018). Available at
SSRN: <https://ssrn.com/abstract=3169409> or <http://dx.doi.org/10.2139/ssrn.3169409>)

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DATED: October 6, 2023

LAW OFFICE OF ADAM KEATS, PC



Adam Keats
*Attorney for Bring Back the Kern, Kern River
Parkway Foundation, Kern Valley Audubon,
Sierra Club, Center for Biological Diversity*

DATED: October 6, 2023

WATER AUDIT CALIFORNIA



William McKinnon
Attorney for Water Audit California

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PROOF OF SERVICE

I, Adam Keats, am over eighteen years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On October 6, 2023, I served the following document(s):

Plaintiffs' Reply to City Of Bakersfield's Opposition to Plaintiffs' Motion for Preliminary Injunction

Plaintiffs' Reply to Real Parties' Opposition to Plaintiffs' Motion for Preliminary Injunction

Declaration of Theodore (Ted) Grantham in Support of Plaintiffs' Motion for Preliminary Injunction

Plaintiffs Request for Judicial Notice in Support of Plaintiffs' Replies in Support of Motion for Preliminary Injunction

on the following parties, via electronic mail to the addresses listed below:

For Defendant City of Bakersfield:

Colin L. Pearce clpearce@duanemorris.com
Jolie-Anne Ansley jsansley@duanemorris.com
Ashley L. Barton abarton@duanemorris.com
Virginia Gennaro vgennaro@bakersfieldcity.us

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James A. Worth jim@mhwslegal.com

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Daniel M. Root droot@bbr.law

For Kern County Water Agency:

Amelia T. Minaberrigarai ameliam@kcwa.com
Nicholas A. Jacobs njacobs@somachlaw.com
Michelle E. Chester mchester@somachlaw.com

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

Executed this 6th day of October, 2023, in San Francisco, California.



Adam Keats