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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs and Petitioners, vs. CITY OF BAKERSFIELD and DOES 1 through 500, Defendants and Respondents, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999, Real Parties in Interest.	Case No.: BCV-22-103220 **PLAINTIFFS' REPLY TO INTERVENOR-DEFENDANTS' JOINT 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Administrative Proceedings

Public Trust Doctrine

Other Authorities

INTRODUCTION

This reply brief addresses the Opposition Brief filed by "Intervenor-Defendants" Buena Vista Water Storage District, Kern Delta Water District, North Kern Water Storage District, Rosedale-Rio Bravo Water Storage District, and Kern County Water Agency ("Real Parties").

Plaintiffs' Motion seeks an order granting a preliminary injunction enjoining Defendant City of Bakersfield ("the City") and its officers, directors, employees and agents, and all persons acting on its behalf, from diverting water at the Beardsley, Rocky Point, Calloway, River Canal, Bellevue, and McClung Weirs on the Kern River in amounts that result in flows in the Kern River being insufficient to keep in good condition any fish that may exist below each weir, in compliance with Fish and Game Code, section 5937.

Although the Real Parties seek to change the nature of this application into a discussion of their private water rights, the Plaintiffs and this application are emphatically not concerned with that subject; they seek only the sufficient flows to keep fish in good condition required by Fish and Game Code, section 5937, a strict liability statute.

Fish and Game Code, section 5937 is clear, plain, and unambiguous. It states in relevant part: "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." (Fish & G. Code, § 5937; See *California Trout v. St. Water Resources Ctrl. Bd*. (3d Dist. 1989) 207 Cal.App.3d 585, 626 ("*CalTrout I*").)

Fish and Game Code, section 45, defines "fish" as "... a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." Fish have been historically and are currently found in the areas of the Kern River impacted by the City's actions. (Plaintiffs' Second Amended Complaint ("SAC") ¶ 88.)

"'Dam' includes all artificial obstructions." (Fish & G. Code, § 5900, subd. (a).) "'Owner' includes … a person, political subdivision, or district … owning, controlling, or operating a dam …" (Fish & G. Code, § 5900, subd. (c).).

Any sufficient flow regimen must maintain in "good condition" populations of fish and other components of the aquatic ecosystem that may reside, are in transit or may be planted below a dam. The "good condition" requirement for maintaining fish, includes the health of individual fish, the health and diversity of the various populations and their ability to maintain self-sustaining populations, and the health of the entire biotic community.

The criteria for fish in "good condition" has been established in case law. It includes 1) the health of individuals, fish are healthy, free of disease, parasites, etc., and have reasonable growth rates with adequate habitat; 2) diversity and abundance of aquatic populations, diversity of age class, sufficient habitat to support all life stages and support self-sustaining populations; 3) the community, its overall health including co-evolved species and the health of the aquatic ecosystem at several trophic levels. (Bear Creek- SWRCB Order 95-4 at 18 to 22, 1995; *Putah Creek v. Solano Irrigation 7 CSPA-294 District*, Sacramento Superior Court No. CV515766, April 8, 1996); *California Trout I*, supra, 207 Cal.App.3d 585; *California Trout, Inc. v. Superior Court* (3d Dist. 1990) 218 Cal.App.3d 187 ("*CalTrout II*"); and State Board Order WR 95-17, Lagunitas Creek, October 1995. Also see Moyle, et al. 1998.)

"On its face, 5937 does not preclude the use of water for out-of-stream beneficial uses, but only limits the water available for such uses to the water not required to maintain below-dam fish in good condition. … Accordingly, 5937 functions analogously to California's historical relationship between riparians and appropriators — water not needed to satisfy riparian rights is available for appropriation." (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) at p. 886. Available at SSRN: https://ssrn.com/abstract=3169409 or http://dx.doi.org/10.2139/ssrn.3169409.)

Section 5937 plainly declares that the first priority for water in dammed rivers is the public trust *res* of fish, with absolutely no exceptions. All decisions to divert or use water for any other purpose, whether for irrigation or municipal, may be made only on water that is in excess of that required to keep fish that may exist below a dam in good condition. This unambiguous language should engender no debate among the parties in this action.

"Relevant evidence" means evidence … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, section 210.) It is submitted that all evidence and argument of private water rights, relationships between private parties, and historical conduct is simply irrelevant.

Similarly, all argument and evidence directed to the *ultimate* resolution of the issues in dispute is also irrelevant. The only present objective of this application is to keep fish in the subject reach in good condition until this matter is conclusively determined at trial. There is no evidence that current operational protocols accomplish that task, or authority for the Real Parties' proposition that this non-complying condition may legally continue. Accordingly, all of the declarations, and most of the argument is simply irrelevant.

ARGUMENT

I. Plaintiffs' Motion Is Not Contrary to the Law Governing Preliminary Injunctions.

An injunction may be granted when "it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." (Code. Civ. Proc., § 526, subd. (a)(1).) Further, "[a]nything which … unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Civ. Code, § 3479.)

As set forth in Plaintiffs' SAC, by its water diversions, the City unlawfully dewaters the Subject Reach of the Kern River. This is insufficient to keep fish existing downstream in good condition. (See Declaration of Dr. Peter Moyle, filed in support of Plaintiffs' Motion for Preliminary Injunction.) This fact is undisputed by the Real Parties.

Although the City knew that it was causing the dewatering of the Kern River, no mitigation for injury to the public trust was undertaken and no consideration was given to amendment of the rights and contractual agreements which govern the current diversion of Kern River water to mitigate injury to the public trust. (SAC ¶ 199.)

A. The Requested Preliminary Injunction Provides an Adequate Standard of Conduct for the City to Follow and for the Court to Enforce.

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

Plaintiffs have proposed an injunction that respects and trusts the City's expertise to perform its duty, without undue interference or limitation of discretion. Real Parties argue that "the order does not provide any quantitative or objective metric or other information by which the City could assess whether it is ensuring that flows are 'sufficient'." (Real Parties' Opp. at p. 22.) But an "injunction need not etch forbidden actions with microscopic precision, but may instead draw entire categories of proscribed conduct. Thus, an injunction may have wide scope, yet if it is reasonably possible to determine whether a particular act is included within its grasp, the injunction is valid." (*People ex rel. Gascon v. Homeadvisor, Inc*. (1st Dist. 2020) 49 Cal.App.5th 1073, 1083 (quoting *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681).)

Real Parties rely on *Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd*. ((Third Dist. 2022) 76 Cal.App.5th 1, 22 ("*Monterey Coastkeeper*")) in support of its argument, but the case can be distinguished. The claim concerned a petition for mandamus on violations of the public trust doctrine only, seeking to "[s]imply order[] the State Board to apply the public trust doctrine." (*Ibid*.) The holding was based on what the court described as "an inherently discretionary doctrine [that] generally does not allow for intervention by the courts other than in the context of judicial review of administrative decisions." (*Id*. at 21-22.) Given that ruling, the court properly found this to be an "empty judgment" that also interfered with the State Board's administrative discretion. (*Id*. at 22.)

The proposed order here is in stark contrast to that in *Monterey Coastkeeper*. First, the motion has been brought to enjoin future violations of the Public Trust Doctrine as well as Fish and Game Code, section 5937, but only to the extent the two overlap with the specific issue at hand: the need to prevent likely harm to the fish that currently exist in the river. The proposed order is firmly rooted in section 5937, seeking the very specific action the City must take to come into compliance with that law pending judgment in this action. Enjoining the City from diverting water in amounts that would kill the fish in the river (i.e., that would fail to keep fish in good condition below the dams) is a markedly different command than "apply the public trust doctrine" to discretionary actions. Second, section 5937 is not a discretionary doctrine; it is a strict liability statute that affords a dam owner no discretion whatsoever.

As Plaintiffs state in their Reply to the City's opposition, if the Court decides that the City requires more specific guidance, it can first turn to the City's own work its *Water Resources Department Kern River Flow and Municipal Water Program Recirculated Draft Environmental Impact Report* (the "Kern Flow EIR"). (see Plaintiffs' Request for Judicial Notice ("Plaintiffs' RJN"), filed October 6, 2023, Exhibit F.) There, the City analyzed the environmental impacts of utilizing up to 160,000 AF/year to provide a permanent, consistent and regular flow of water through the City, a flow that would collaterally recharge the groundwater basin and allow subsequent municipal extraction of groundwater for municipal purposes. (Kern Flow EIR, p. 2-5.) As explained below, an order requiring the City to refrain from diverting water in amounts greater than what is required to satisfy the flows descried in the Kern Flow EIR would reliably satisfy the City's duties under section 5937 to keep fish below the dams in good condition. It would also be concrete and measurable.

An alternative plan that this Court could employ to also provide more concrete guidance to the City would be that proposed by Dr. Theodore Grantham, who suggests the use of an initial flow regime based on a percentage of unimpaired flows. (Grantham Dec. at pp. 4-5, filed in support of Plaintiffs' Reply to the City's opposition.) Dr. Grantham proposes 40% of unimpaired flows as an appropriate initial benchmark. (*Ibid*.). The City could then proceed with further analysis and studies in furtherance of its trust duties, as described by Dr. Grantham, to fine-tune and adjust its diversions appropriately. (*Id.* at pp. 5-6.) Forty percent of unimpaired flows as a starting benchmark will not

cause the City any harm, as it will not interfere at all with the City's municipal diversions. (See discussion in Plaintiffs' Reply to City's Opposition.)

B. The Status Quo Is the Flowing Kern River.

Plaintiffs seek a preliminary injunction to preserve this status quo pending the resolution of this action. Under clear authority of our Supreme Court, this is a prohibitory injunction, not a mandatory one. Real Parties argue that "the operation of the diversion infrastructure on the Kern River has been administered according to the law of the river on a daily basis for over 120 years," (Real Parties' Opp. at p. 23) and "**[t]hat** is the status quo." (*Id*. at p. 24, emphasis in original.)

The status quo is not the City's pattern and practice of committing violative acts to dewater the Kern Water; it is instead a flowing Kern River, with fish in good condition existing below the City's dams. That is the condition of the river today. An order prohibiting the City from taking actions in the future that will cause the river to dry up is a prohibitory injunction, one that "restrains the defendant from repeating its unlawful conduct, while simultaneously requiring some adjustment of the parties' respective rights, such as an abridgment of the defendant's claimed property right in continuing its challenged conduct." (*Daly v. San Bernardino Cnty. Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1048 ("*Daly*").)

The Supreme Court in *Daly* discussed the difference between mandatory and prohibitory injunctions and the role of identifying the status quo in determining the difference. It identified two prevailing methods of measuring the status quo employed by California courts. One is measured "from the time the order is entered," and the other is measured "from the last actual peaceable, uncontested status which preceded the pending controversy"; i.e., "before the contested conduct began." (*Id*. at 1045-46, internal quotations omitted.) The Court did not take sides, but rather noted the first method's use when the order "offers a remedy for a past violation," and the second method's use when the order seeks "to prevent injury from future conduct." (*Id*. at 1046.) Here, Plaintiffs seek an order to prevent injury that will result from the City's ongoing and future conduct. The second methodology should thus be employed (although, as described below, under either methodology the order is prohibitory).

In discussing the second methodology, the *Daly* court paid considerable attention to a much earlier Supreme Court case, *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80

("*United Railroads*"). (*Daly*, 11 Cal.5th at 1044-1046; 1048-1050.) There, United Railroads obtained an injunction preventing San Francisco from operating excessive municipal railway cars on United Railroads' tracks. (*United Railroads*, 172 Cal. at 81-82.) San Francisco argued that such an injunction was "mandatory in effect" because it was actually "an order directing the city to relinquish its possession of the incorporeal hereditament [the city's right to use the rails] and, therefore, mandatory in character." (*Id*. at 86.) As the *Daly* court described it, San Francisco had argued that "maintaining the status quo during the pendency of the litigation required allowing the city to continue its disputed usage of the tracks." (*Daly*, 11 Cal.5th at 1044.) The Supreme Court rejected this argument, finding such an injunction to be prohibitory. (*United Railroads*, 172 Cal. at 86-87.)

The court explained that its decision in *United Railroads* "recognizes that in some instances, an injunction that is essentially prohibitory in nature may involve some adjustment of the parties' respective rights to ensure the defendant desists from a pattern of unlawful conduct." (*Id*. at 1046.) The court continued:

> The *United Railroads* decision makes clear that an injunction preventing the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated 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.

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

Here, Real Parties describe the status quo as "operations under the historic law of the river." (Real Parties' Opp. at p. 23.) These operations are the continuance of a series of acts just like the continuance of a series of acts by San Francisco in *United Railroads*: in both instances, the activity is ongoing, it preceded the litigation, and was alleged by the plaintiffs to be in violation of the law. (*Daly*, 11 Cal.5th at 1044.) The injunction sought would "restrain[s] the defendant from repeating its unlawful conduct," even if it also "require[es] some adjustment of the parties' respective rights." (*Id*. at 1048.)

Real Parties cite to the 1946 appellate decision of *City of Pasadena v. City of Alhambra* ((2nd Dist. 1946) 75 Cal.App.2d 91 ("*Pasadena*")), a case not cited or discussed by the Supreme Court in *Daly*. Real Parties note that there, the court "held that such an injunction, prohibiting diversions of water under established rights, 'affirmatively compels petitioner to surrender a substantial existing right' and is therefore mandatory in character." (Real Parties' Opp. at p. 24, quoting *Pasadena*, supra, 75 Cal.App.2d at 95-98.) But the injunction in *Pasadena* looked nothing like the prohibitory relief sought here: "In the present case the judgment commands the doing of many affirmative acts, such as requiring the parties to measure and keep records of all production, diversion, and distribution of water, the depth to the water table, to install and maintain in good order devices for such measuring of water, to install facilities for testing said devices, to have records available for inspection by the water master, and to contribute to the expenses of the water master." (*Pasadena*, supra, 75 Cal.App.2d at 95.) Plaintiffs seek no such affirmative acts of the City; they only seek to prohibit future affirmative acts: violative acts of diversion of water from the Kern Water.

The facts of *Pasadena* make it unexceptional and thus it is not surprising the Supreme Court did not cite it in *Daly*. But since it regards water rights, Real Parties appear to regard it as controlling or persuasive. It is not, for the same reason *Byington v. Superior Court*, (1939) 14 Cal.2d 68, 70 ("*Byington*"), relied on by the City in its opposition, is also not. *Byington* is discussed in *Pasadena*, which appeared to find it persuasive for its holding. (*Pasadena*, supra, 75 Cal.App.2d at 97-98.) In *Byington*, San Francisco was sued by riparian rights holders of waters of the Tuolumne River for over-appropriating water to fill the Hetch Hetchy Reservoir. (*Byington*, 14 Cal.2d at 69.) The court ruled that prior cases compelled it to find that "in so far as the injunctive decree of the respondent court undertook to and did preclude the exercise by the city of its appropriative rights in and to the excess waters of the Tuolumne River it was affirmative or mandatory in character." (*Id*. at 73.) This ruling, although seemingly providing support for the City's position, was questioned by the *Daly* court.

The *Daly* court discussed *Byington* at length, noting that the *Byington* court "held the order a mandatory injunction because it required the city to surrender a property right (an appropriative water right) it allegedly held at the time the order was made." (*Daly*, 11 Cal.5th at 1049 (citing *Byington*, 14 Cal.2d at 69-70.) But then the court continued:

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

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

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

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

The *Daly* court did not directly overturn *Byington* but rather placed it in context of the shifting and somewhat conflicting jurisprudence on the question of mandatory vs. prohibitory injunctions:

> We mention these ambiguities not to suggest that either of these decisions was wrongly decided, but only to illustrate the difficulties of application inherent in our traditional mandatory/prohibitory distinction, difficulties that contribute to our belief this area of the law may be ripe for reconsideration or legislative reform. … The point remains, however, that the outcome in *Byington* would certainly have been different had we understood the question before us solely in terms of whether the injunction returned the parties to the last actual, peaceable status preceding the controversy, as opposed to asking more broadly whether the injunction effectively preserved the status quo pending appeal.

(*Daly*, 11 Cal.5th at 1050, FN 10.)

Real Parties declare that "the status quo was the daily operation of the Kern River before Plaintiffs filed its complaint on November 30, 2022, based on the Kern River's more typical, drier conditions." (Real Parties' Opp. at p. 25.) But that definition is of *the broad status quo*, with the City's violative acts included. Here, the proper status quo is measured by "the last actual, peaceable status preceding the controversy." (*Ibid*.) That is before the City—or any other party—started committing the violative acts of dewatering the Kern River.

That date may be over a hundred years ago. But it may also be today. Real Parties admit that "Each day is a new day on the Kern River with new flows, diversions and uses constantly being revised to match the scheduled operations ordered by the respective water users to meet their daily needs." (Real Parties Opp. at p. 24.) In other words, each day the City makes a new decision and takes a new action to divert water from the Kern River. So each day brings a new violative act by the City that disturbs the status quo of a flowing Kern River.

In this sense, it does not matter which methodology this Court employs to define the status quo that must be maintained. Plaintiffs seek a flowing river and fish in good condition. That is both the "last actual, peaceable status preceding the pending controversy," i.e., the condition present "before the contested conduct [i.e., the city's water diversions] began" and is *also* the condition *of the river* at "the time the order [will be] entered." (See *Daly*, 11 Cal.5th at 1045-46, internal quotations omitted). Either way, the status quo is not the City's violative acts. It is a flowing Kern River that provides good condition to fish that exist below each of the City's weirs.

C. Plaintiffs' Motion Is Properly Directed at the City, the Owner of the Dams.

Real Parties claim that the proposed order is fatally defective because it is directed only at the City, and not at "all the affected parties." (Real Parties' Opp. at p. 25.) The City is the "owner" of each of the "dams" at issue in this matter, and an order directed at the City will provide Plaintiffs with complete relief. (Fish & G. Code, § 5900, subd. (a) ["'Dam' includes all artificial obstructions."], subd. (c) ["'Owner' includes … a person, political subdivision, or district … owning, controlling or operating a dam …"].) The acts Plaintiffs seek to prohibit are the City's alone, who is solely in control of and solely operates the weirs. If an injunction is to issue prohibiting the City from diverting excessive amounts of water, and the City then steps aside from operation of certain weirs, allowing other putative "owners" to step in and operate the weirs themselves, Plaintiffs can address that accordingly. But as of now that is mere speculation; no other party controls or operates any of the Diversion Structures that are the subject of Plaintiffs' action and its motion for preliminary injunction.

II. Plaintiffs Are Likely to Succeed on the Merits Because Each of Their Claims Prevails as a Matter of Law.

A. Plaintiffs Are Likely to Succeed on Their Public Trust Claims, Because a Writ of Mandate Is Appropriate to Direct a Public Agency in its Ministerial Duty.

If an agency refuses to perform a ministerial duty, an affected party may seek a writ of mandate. A writ of mandate may be issued by any court to any corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. (Code Civ. Proc., § 1085(a).) Code of Civil Procedure, sections 1085 and 1103 are proper vehicles for compelling or challenging a ministerial act of an agency. (*Morton v. Board of Registered Nursing* (1991) 235 Cal.App.3d 1560, 1566, fn. 5.) "[W]here an issue is one of public right, and the

object of the action is to procure the enforcement of a public duty, it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the duty in question enforced. [Citations omitted].” (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1233.)

A writ of mandate will lie to compel a public official to perform an official act required by law. (Code Civ. Proc., § 1085.) Alternatively, a writ of prohibition may issue to prevent improper conduct. (Code Civ. Proc. § 1103.) A writ of mandate or prohibition will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue to compel an official both to exercise their discretion (if they are required by law to do so) and to exercise it under a proper interpretation of the applicable law. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) “Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [numerous citations omitted] and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [numerous citations omitted].” (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1558.)

A writ of mandate compelling the City to assess the impacts on public trust resources caused by the City’s diversions, and to adopt feasible mitigation and/or avoidance measures, is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public, but need not be the subject of a preliminary writ. A writ of prohibition commanding the City to desist or refrain from diverting water from the Kern River in amounts that would result in injuries to trust resources pending the completion of its assessment of the impacts on trust resources caused by the City’s diversions is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public.

B. The Public Trust Doctrine Applies to Bakersfield Under the Facts Alleged in the Second Amended Complaint.

The dewatering of the Kern River described herein will continue to harm a navigable waterway and the fish within. As such, it is a continuing injury to the public trust. (*People v. Sweetser* (1977) 72 Cal.App.3d 278; *Envtl. Law Found. V. State Water Res. Control Bd.* (Cal. Ct. App. 2018) 26 Cal.App.5th 844, 860.) The City has a clear ministerial duty to assess the impacts on public trust resources that may be caused by its actions, including any actions that may adversely impact the public

trust, before taking those actions. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370 (*FPL Group*).)

The City has violated and continue to violate its duties under the Public Trust Doctrine by diverting water from the Kern River through its operation of the Diversion Structures without having considered the impacts of these diversions on public trust resources and considered feasible mitigation and/or avoidance measures.

The public trust doctrine serves the function in an integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust and imposes a continuing duty on the state to take such uses into account in allocating water resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 452 ("*Audubon*").)

No party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. (*Audubon*, supra, 33 Cal.3d 419, 446–447.) The doctrine applies to all water rights, including riparian and pre–1914 appropriator rights. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106 [in *Audubon* "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 966, ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].) Thus, any water right priorities must yield to the unreasonable use or violation of public trust values. The subversion of a water right priority is justified if enforcing that priority will lead to the unreasonable use of water or result in harms to values protected by the public trust. (*El Dorado*, supra, 142 Cal.App.4th 937, 967, as cited in *Light v. State Water Resources Control Bd.* (2014 226 Cal.App.4th 1463, 1489.)

Real Parties assert that the public trust doctrine imposes a duty on a public agency only when it exercises "regulatory or police power authority (1) to grant permission to an activity potentially impacting public trust resources …, or (2) as a trustee agency specifically designated to protect public trust resources potentially impacted by an activity…." (Real Parties Opp. at p. 26.) This issue was

addressed in *Audubon* and subsequent cases, including *Reynolds v. Calistoga*, discussed below. (See section C, 5, below.)

Further, the public trust imposes a fiduciary duty on any agent of government utilizing public trust resources. The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433.) The beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. The trustee deals with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 Cal.2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

The City has a fiduciary duty pursuant to Public Resources Code, section 6009.1 as the City is a city of the state and thus a grantee of lands by the federal government pursuant to California's entrance into the Union as a state. Alternatively, the City has a common law fiduciary duty as enumerated by Public Resources Code, section 6009.1 as it is a division of the state and thus a grantee of lands by the federal government pursuant to California's entrance into the Union as a state.

The City has breached its fiduciary duties by failing to act as a reasonably careful trustee would have acted under the same or similar circumstances**.**

C. The City Must Comply with Fish and Game Code Section 5937.

1) Early History of Section 5937.

The California Legislature enacted the 1870 Fish Act, which "created a de facto year-round minimum flow requirement for dams with fishways." (Bork, et al., at p. 818.) A similar provision was soon after added to the California Penal Code. (*Ibid*.) Both sections were amended several times over the subsequent years, but "many companies, particularly power companies, refused to comply with the fish passage laws 'because they do not want to allow sufficient water to pass through the ladders to make them operative.' Only a few companies 'made it a rule to allow sufficient water to pass through their dams to keep the fish in good condition during the period of the minimum flow of water in the

streams.'" (*Id*. at p. 821, citations omitted.) In 1915, the California Legislature enacted the 1915 Flow Act, amending the existing codes addressing minimum flow requirements: "the owners or occupants of any dam or artificial obstruction shall allow sufficient water at all times to pass through such fishway to keep in good condition any fish that may be planted or exist below said dam or obstruction." (*Id*. at pp. 822-823.)

These early iterations of Fish and Game Code, section 5937 demonstrated "increasing legislative concern for ensuring fish survival after dam construction," but the Fish and Game Commission "failed to enforce the minimum flow requirement from the very beginning." (*Id*. at p. 824.) There are numerous reasons for this lack of enforcement, but a significant reason is that the State Water Board's "mission stood in direct opposition to [section] 5937; the Water Board itself saw its mission as ensuring the beneficial use of all of California's water and viewed any water not used or stored behind a dam as waste. This sentiment pervaded western thought for much of the twentieth century and serves as an important backdrop to 5937 enforcement efforts." (*Id*. at p. 833.) Despite this lack of enforcement, the California Legislature "continued to expand fish protection with new legislation in the mid-1940s," including adding Water Code sections 6500, 6501, expanding Fish and Game Code section 5900, and adding Fish and Game Code section 5902." (*Id*. at p. 840.) "From this history, the State's intent to protect fish is unmistakable; the minimum flow requirement mandates below-dam flows by all dam owners, including federal entities, to the extent it is not superseded by federal law." (*Id*. at p. 841.)

2) 1947 and 1955 California Attorney General Opinions.

Real Parties cite two Attorney General Opinions, 1947 and 1955. (Real Parties' Opp. at p. 36.) These opinions are critical to their argument that "Private citizens cannot independently prosecute these Fish and Game Code statutes," including section 5937. (*Ibid*.) These opinions are archaic, drafted in an era that predated *any* citizen enforcement of environmental statutes, and predated our Supreme Court's consequential decisions in *Marks v. Whitney* (1971) 6 Cal.3d 25, and *Audubon*. The Attorney General issued another opinion in this same period, in 1951, that even more directly "took the teeth out of 5937. It made the sweeping conclusion that 5937 constituted a mere 'rule for the operation of dams where there will be enough water below the dam to support fish life' and did not apply where dams retained

nearly all water flow," and that "5937 only regulated 'water in excess of what is needed for domestic and irrigation purposes.'" (*Id*. at p. 844.) This Opinion was previously cited and relied on by the City (see Memorandum of Points and Authorities in Support of City of Bakersfield's Demurrer to Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief, February 2, 2023, at p. 15.)

But in 1974, the Attorney General revisited the issue, as described by Bork et al.: "In 1974, the Attorney General issued an opinion ("1974 Opinion") confirming the Water Board's authority to implement minimum flow regulation based on a broad reading of 5937. The 1974 Opinion … argued that changed circumstances of state law required a reexamination of 5937 [and that] 5937 . . . clearly should be given a literal interpretation." The Attorney General recognized that the 1951 Opinion nullified 5937, a position that could "no longer stand in the light of current state policy expressing the urgency of preserving California's important fishery resources." (Bork et al., pp. 853 (citations omitted).) This Court should not rely on these 1950's-era Attorney General opinions; too much has changed.[1]

3) Public Trust Standing for Private Enforcement of Section 5937.

Real Parties seek to negate the import of several cases relied on by Plaintiffs, claiming that each "focused on the obligations and duties of state regulatory agencies (not at issue in this case)." (Real Parties' Opp. at p. 37.) Their argument fails; these are hugely consequential cases and very relevant to this current action. The Supreme Court issued its opinion in *Audubon* in 1983, reflecting the growing recognition in law and in practice of the supremacy of the public's interest in protecting trust resources over private interests in the exploitation of those same resources. As the Court said:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of

[1] Real Parties also cite a 1950 federal court opinion, *Rank v. Krug* (1950) 90 F. Supp. 773, 801, and the more recent *FPL Group*, supra, 166 Cal.App.4th 1349, 1367. (Real Parties Opp. at p. 36.) The *Rank v. Krug* court's opinion that "It is too plain to need argument that a citizen cannot compel compliance where that duty is lodged with regularly selected officials whose duties are clearly defined by statute, any more than a private citizen could step in and assume the duties of a prosecuting attorney or governor, unless they were duly elected as provided in the constitution and laws of the state" is similarly archaic, issued prior to decades of citizen enforcement actions brought to protect the environment. (90 F. Supp. at p. 801.) *FPL Group*, meanwhile, does not stand for the proposition for which it is cited; at best it is a ruling disallowing actions *against private parties in some circumstances* for violations of the Public Trust Doctrine, not a blanket prohibition on citizen enforcement of any Fish and Game Code sections. (*FPL Group*, supra, 166 Cal.App.4th at 1367.)

> tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values (*Marks* v. *Whitney* (1971) 6 Cal.3d 25), the two systems of legal thought have been on a collision course.

(*Audubon*, supra, 33 Cal.3d at p. 425.)

The Court summarized its resolution of this conflict as follows:

> The core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars [Los Angeles Department of Water and Power] or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters. The prosperity and habitability of much of this state requires the diversion of great quantities of water from its streams for purposes unconnected to any navigation, commerce, fishing, recreation, or ecological use relating to the source stream. The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction of those values. Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

(*Audubon*, supra, 33 Cal.3d at p. 426.)

In addition to ruling that "the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water … [and that] the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs" (*Id*. at p. 447), the court also clearly held that members of the public "have standing to sue to protect the public trust." (*Id*. at p. 431, fn 11.)

Audubon has proved greatly consequential for citizen enforcement of the public trust doctrine. It has also proved consequential for citizen enforcement of section 5937: "*National Audubon* resolves any doubt that private parties have standing to sue to enforce the public trust. This expansion in standing allows individual plaintiffs to directly enforce the public trust as embodied by 5937, thus overruling the bar to private 5937 enforcement erected in *Rank v. Krug* [(S.D. Cal. 1950) 90 F. Supp. 773, 801]." (Bork, et al. at p. 859, citing Ruling on Submitted Motion for Reconsideration at 4, *Reynolds v. City of Calistoga*, No. No. 26-46826 (Cal. Super. Ct. 2010); Transcript of Judge's Ruling at 2-3, *Putah Creek Water Cases*, Judicial Council Coordination (Cal. Super. Ct. 1996) (No. 2565) (citing Cal. Fish & G. Code, § 5900.)

4) *CalTrout I*, *CalTrout II*, and Section 5937 as a Legislative Expression of the Public Trust Doctrine.

The Supreme Court's ruling in *Audubon* led directly to two cases that regard section 5937: *CalTrout I* and *CalTrout II*. (*CalTrout I,* supra, 207 Cal.App.3d 585; *CalTrout II,* supra, 218 Cal.App.3d 187.)

CalTrout I concerned licenses granted by the State Water Resources Control Board to the Los Angeles Department of Water and Power to appropriate water from several tributaries of Mono Lake. (*CalTrout I*, supra, 207 Cal.App.3d at p. 591.) Although the court was tasked with interpreting section 5946 of the Fish and Game Code, because section 5946 explicitly requires compliance with section 5937, the court was forced to interpret section 5937, as well. (See Bork, et al., at p. 860.) The result was "three significant holdings concerning 5937." (Bork, et al. at p. 861.)

> First, the *CalTrout I* court gave lie to the tired argument that 'higher' domestic or irrigation uses must be approved regardless of the detriment to 'lower' uses such as instream use for fishery or recreation purposes. The court stressed that the Water Code must be read as a whole, including Water Code section 6501, which incorporated the Fish and Game Code provisions for protection and preservation of fish. The Court further recognized that "[c]ompulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses." Therefore, even under the narrowest reading, the court necessarily held that compliance with 5937 limits water available for appropriations, overturning myriad Water Board holdings to the contrary.
>
> Second, *Cal Trout I* rejected a facial challenge to 5937 that alleged releasing flow for fish violated the reasonableness requirements of California Constitution article X, section 2. The court held that when the Legislature makes a water allocation rule like 5937, it has balanced the competing beneficial uses and made a permissible reasonableness determination, which must receive deference from the judiciary. This finding reinforced the preeminence of legislative determinations of water use decisions.
>
> Finally, the court dismissed arguments that 5946 could not be applied to permits that had already been granted. The court recognized the Water Board's continuing duty to require compliance with 5946 to "maintain fisheries in such streams on an ongoing basis." Absent 5937 language in permits, 5946's continuing duty gave rise to "a continuing violation of the statute as to which no statute of limitations prevents remediation." Further, the court noted that 5946 constitutes "a specific rule concerning the public trust interest," which does not disappear because of the State's prior failure to protect the public trust. Neither independent basis requiring prospective application of 5946 is unique to that law; the same reasoning necessarily applies to 5937. For 5937, as for 5946, "the purpose is to maintain fisheries . . . on an ongoing basis," and the failure to do so constitutes an ongoing violation of the statute. Moreover, 5946 seeks to protect the public trust by requiring compliance with 5937, which indicates that 5937 must also operate as a legislative decision to protect the public trust. Therefore, a failure to enforce 5937 in the past does not amount to a forfeiture of its future enforcement. This holding subjects any dam-related water appropriation to a 5937 suit, if the dam does not maintain fish downstream in good condition, regardless of the age of the dam.

(Bork, et al. at pp. 861-863 (citations omitted).)

The *CalTrout I* plaintiffs returned to court to enforce the *CalTrout I* ruling in *CalTrout II*. There, the court ordered "that the Water Board immediately attach the conditions mandated by section 5946 to L.A. Water and Power's licenses. … [it] further direct[ed] that the superior court expeditiously consider a request by petitioners that *it* set interim release rates pending the Water Board's action." (*CalTrout II*, supra, 218 Cal.App.3d at p. 194.) As Bork et al. describe:

> [T]he court clarified that it was enforcing *CalTrout I* through its concurrent jurisdiction. Under its concurrent jurisdiction, the court appointed the Water Board to serve as the water master, a role with no discretion. Thus, the *CalTrout II* court held that the Water Board loses its normal balancing power when implementing 5937, because the Legislature has already struck the balance on the side of fish.
>
> Second, *CalTrout II* provided the first judicial definition of "good condition" as required by 5937. The court stated that 5937 requires enough water flow to maintain the "pre-diversion carrying capacity of fish" in streams. Thus *CalTrout II* read 5937 to require enough water for restoration of the historical fishery. The court's discussion of 5946 does not dilute this explanation of a "historical fisheries" approach to the flow requirements under 5937. Section 5946 only reiterates that 5937 applies to the streams at issue in the suits; 5937 itself mandates the good-condition requirements.

(Bork et al. at pp. 863-865 (citations omitted).)

Subsequent cases have reaffirmed the holdings of *CalTrout I* and *CalTrout II*. In *Natural Resources Defense v. Patterson*, (E.D. Cal. 1992) 791 F. Supp. 1425 ("*Patterson I*"), the Eastern District of California stated: "By its terms, 5937 mandates that the owner of a dam allow water to pass over or through the dam for certain purposes. … Thus, it is a prohibition on what water the Bureau, as owner of the dam, may otherwise appropriate." (*Patterson I*, 791 F. Supp. at p. 1435.) In 2014, the Eastern District again discussed section 5937, stating that it "codifies one aspect of the public trust doctrine," citing an argument made by the State Water Board in *CalTrout I* that "[S]ection 5937 is a legislative expression of the public trust protecting fish as trust resources when found below dams." (*San Luis & Delta-Mendota Water Auth. v. Jewell* (E.D. Cal. 2014) 52 F. Supp. 3d 1020, 1069 (quoting *CalTrout I*, supra, 207 Cal.App.3d at p. 626.)

5) Reynolds v. Calistoga

Real Parties confuse the practice of "gotcha politics" with the practice of law, filing Requests for Judicial Notice, Exhibit 51, for prior Water Audit pleadings (Opposition p. 27 at line 2), and rather bizarrely, Request for Judicial Notice, Exhibit 52, for an action that preceded the formation of Water

Audit. (Opposition p. 27, fn. 17, *Reynolds v. City of Calistoga* (July 3, 2014, A134190) ___ Cal.App.1st ___). (Plaintiffs' RJN, Exhibit K.) These citations were made to support the proposition that Water Audit, a director, and its counsel have in the past asserted that a party of the status and conduct of the City does not have trustee duties. Setting aside admissibility and relevance, the allegations are false.

"Grant Reynolds, proceeding pro se, brought a public trust action challenging operation of a reservoir by the City of Calistoga … insofar as that operation affected downstream fisheries (the Public Trust Suit)." (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 867.) The *Reynolds* complaint alleged Calistoga failed to ensure sufficient water flowed below the dam to sustain a historic steelhead trout population, in violation of Fish and G. section 5937 and the public trust doctrine. The complaint sought an injunction compelling Calistoga "to maintain an adequate flow of water sufficient to restore and sustain the fishery." *Reynolds v. City of Calistoga*. supra

In December 2009, Calistoga moved for judgment on the pleadings on the public trust claim. Creating a sensation of *déjà vu* herein, Calistoga argued (1) the proper defendant for Reynolds's claim was the Water Board, which authorized Calistoga's water appropriation, and (2) the Water Board determined Calistoga's water appropriation conformed with the public trust when it issued licenses to Calistoga in 2007. The trial court granted the motion, and Reynolds moved for reconsideration.

The Water Board and the Department of Fish and Game (DFG) jointly filed two amicus briefs in support of Reynolds's motion. The briefs argued that Calistoga, as a water diverter and public agency, was legally obliged to adequately protect the public trust in its operation of the dam. The briefs also stated the Water Board had never determined whether Calistoga's diversion of water and operation of the dam complied with the public trust. (Plaintiffs' RJN, Exhibit J.)

"In May 2010, the Napa County Superior Court found that Reynolds, a resident of San Diego, had standing to bring the Public Trust Suit based on allegations that [Calistoga] failed to comply with state law requiring it, as the owner/operator of a dam creating the Kimball Reservoir, to allow sufficient water to bypass the dam to support downstream fisheries. [Citing *National Aududon, supra,* and Fish & G. section 5937]." (Plaintiffs' RJN, Exhibit I)

In August 2011, Calistoga passed a resolution adopting an interim bypass plan for the reservoir (bypass plan). The bypass plan acknowledged Calistoga's obligations pursuant to section 5937 and the public trust and committed to a specific schedule substantially increasing the amount of water to bypass the reservoir and flow below the dam. Prior to Calistoga's adoption of the bypass plan, the Water Board and DFG submitted written comments expressing concern that the bypass plan was not adequate for purposes of section 5937 and the public trust. (Plaintiffs' RJN, Exhibit J)

On appeal Calistoga asserted that it had the authority to reject the SWRCB and CDFW objections, contending that in adopting the Plan it had fully discharged its public trust obligations. In support of this claim, "Calistoga contended that: [The public trust doctrine] and Section 5937 vest the City Council in the first instance with discretion to determine after consultation with other trustee agencies such as [DFW] how much water is sufficient to keep fish in good condition." (*Reynolds v. City of Calistoga*. supra)

In response the SWRCB and CDFW filed a *third* amici brief in the appellate court.

Unlike the trial court amici briefs which dealt with the standing and duty issues, the third brief defined the difference between the trustee duty which a state agency must comply with in its own operations, and a trustee agency, which is legislatively assigned the duty to supervise the conduct of others.

> This argument appears to assume that, as a trustee agency, the City has the same authority as "other trustee agencies" to determine how much water must be left in the stream to maintain fish in good condition. But the City is not a trustee *agency* for all purposes and is not one when it comes to the public trust in water resources. …
>
> As defined in the California Environmental Quality Act (CEQA) regulations ("CEQA Guidelines") (Cal. Code Regs., tit. 14, § 15000, et seq.), "'Trustee Agency' means a state agency having jurisdiction by law over natural resources affected by a project which are held in trust for the people of the State of California." (Cal. Code Regs., tit. 14, § 15386; see also generally Audubon, supra, 33 Cal.3d at p. 437.) The City is not a state *agency* with jurisdiction by law over water resources held in trust for the people of the State of California. … (Emphasis added]
>
> The City's obligations under the public trust arise from its proprietary operations of the dam. (See Audubon, supra, 33 Cal.3d at pp. 449-451 [environmental group may bring suit directly against a diverter alleged to be violating the public trust, without exhausting administrative remedies before the State Water Board]; see also Natural Resources Defense Council v. Patterson (E.D. Cal. 2004) 333 F.Supp.2d 906, 918 [Fish & G. Code, § 5937 "places a single duty on the dam owner, directing the dam owner to maintain" any fish below the dam].) The City is making diversions of water that may adversely affect public trust uses. Unlike a trustee agency, which is assigned responsibility for protecting the trust from harm by others, the City's obligation to protect the public trust is to not

> cause harm by its own actions. (See Audubon, supra, 33 Cal.3d at pp. 424-25 [reciting public trust impacts of City of Los Angeles' diversions that were alleged to violate the public trust].) …
>
> Again, the City is just like any other diverter, public or private. The City may be subject to a judicial or administrative proceeding if its water diversions are harming the public trust; however, the City is not a trustee of those public trust resources.

(Plaintiffs' RJN, Exhibit I)

Accordingly, contrary to the Opposition at p. 27, when Water Audit's director and counsel wrote of the State's delegation to the trustee agencies, it was in the context of having already compelled the City to do its best at producing a bypass plan. Their comments supported the ultimate authority of the state over lesser entities, now endowed with a final decision-making capacity, in an iteration of the truism "no man may judge his own matter." Water Audit will accord the City of Bakersfield the same deference, when, as Calistoga eventually agreed to do, it makes its best efforts at satisfying its public trust duties.

As Professor Bork later wrote:

> Since *National Audubon* opened the path to private 5937 enforcement in 1983, eight courts have addressed 5937. [Fn. 29 CLEAR, 762 F. Supp. 2d 1214, 1214 (S.D. Cal. 2011); High Sierra Hikers, 436 F. Supp. 2d 1117, 1117 (E.D. Cal. 2006); Patterson I, 791 F. Supp. 1425, 1425 (E.D. Cal. 1992); CalTrout II, 266 Cal. Rptr. 788, 788 (Ct. App. 1990); CalTrout I, 255 Cal. Rptr. 184, 184 (Ct. App. 1989); Reynolds v. Calistoga, No. 26-46826 (Cal. Super. Ct. Jan. 26, 2011); Putah Creek Cases, 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*. The State still has yet to take a lead role in enforcing 5937 in court. Nevertheless, these cases suggest that continued private enforcement of 5937 can and likely will be an important part of future protection of California's fish.

(Bork, et al. at p. 873.)

The courts have recognized the State's responsibility to protect public trust uses whenever feasible. (See, e.g., *Audubon*, supra, 33 Cal.3d 419, 435*; Cal. Trout I*, supra, 207 Cal.App.3d 585, 631; *Cal. Trout II*, supra, 218 Cal.App.3d 187, 289.)

All subdivisions of the state "... share responsibility for protecting our natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources." (*FPL Group*, supra, 166 Cal.App.4th 1349, 1371 fn. 19.). "The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state **are of utmost public interest.** (Fish & G. Code, § 1600, emphasis added.) (SAC ¶ 35)

The Public Trust Doctrine applies to all water rights, including riparian and pre–1914 appropriator rights. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106. [in *Audubon* "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado*, supra, 142 Cal.App.4th 937, 966, ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].) Any water right priorities must yield to the unreasonable use or violation of public trust values. The subversion of a water right priority is justified if enforcing that priority will lead to the unreasonable use of water or result in harms to values protected by the public trust. (*El Dorado*, supra, 142 Cal.App.4th 937, 967, as cited in *Light v. State Water Resources Control Bd.* (2014 226 Cal.App.4th 1463, 1489.)

6) Fish and Game Code Section 5937 Applies to All Fish.

Real Parties argue that section 5937 applies only to anadromous fish, based on its analysis of the legislative history of section 5901. (Real Parties' Opp. at pp. 31-32.) First, this motion has been brought pursuant to section 5937, not 5901, making Real Parties' argument *prima facie* irrelevant.[2]

But Real Parties' legislative history of SB 857 (2005) is flawed. SB 857 concerned amendments to the Highway Code that would require the Department of Transportation "to report annually on its progress in locating and remediating barriers to fish passage," with no apparent restriction to barriers affecting anadromous fish. (Real Parties RJN, Ex. 45, p.1.) The language regarding anadromous fish mentions the Fish and Game Code generally and includes *some* language from section 5901 only, while adding on its own the words anadromous fish. (Compare ibid, Fish & G. Code §§ 5901, 5937.) This mere mention in a bill regarding a totally separate statute does not prove anything regarding the Legislature's intent regarding section 5937.

Real Parties' interpretation is also contrary to the plain language of the statute. The courts have established general principles of statutory interpretation:

> We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.

[2] There is also no admissible evidence that the Kern River is not or cannot be home to anadromous fish. While it is true that under the current operational regime the river seldom connects to the ocean, it does occur on occasion, and the genetics of anadromy are believed to remain.

> [Citation.] If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.'" [Citation.]

(*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484-485 [17 Cal.Rptr.3d 88].)

Real Parties provide a list of statutes not addressed in the moving papers. (Real Parties' Opp. At p. 35.) This matter does not concern fishways, hatcheries, or any proceeding concerning the Commission. The preliminary injunction seeks only sufficient bypass to keep fish in good condition pursuant to Fish and Game section 5937, and nothing more. Real Parties have provided no authority or logic to make the statutory detritus listed relevant. The only possible involvement of CDFW that section 5937 invokes is the provision for alternative means of bypass in conditions of low water when the water level is below the head of fishway (not the situation herein, as none of the subject weirs have fishways). None seek to condition sufficient bypass to any conduct whatsoever, and therefore and all are therefore wholly irrelevant to the subject proceedings. (Evid. Code section 210.)

Section 5937 is plain and unambiguous. We must presume the Legislature meant what it said and the plain meaning of the statute must govern.

III. Plaintiffs Have Met Their Burden Regarding Balancing of Harms.

Real Parties argue that Plaintiffs fail to meet their burden of balancing harms, including harms that Real Parties claim they would suffer. (Real Parties' Opp. at p. 39.) First, Plaintiffs' burden is exceedingly light, considering their high likelihood of success on the merits, given the strict liability of Section 5937 and the City's admissions of ongoing and future violative acts. (*Butt v. State* (1992) 4 Cal.4th 668, 678; *SB Liberty, LLC v. Isla Verde Ass'n, Inc*. (2013) 217 Cal.App.4th 272, 280.) But Plaintiffs meet their burden, regardless, demonstrating that the harms they would face if the injunction is not issued—the irreversible death of fish that currently exist below the City's dams—is far greater than any likely harm the City would face, given Plaintiffs' showing that an injunction will not impact the City's municipal water supplies.

Real Parties seek to insert themselves in this harm balancing, but there is no basis for them to do so. Their agricultural interests in Kern River diversions are subservient to both Public Trust needs and Section 5937. (*San Francisco Baykeeper, Inc. v California State Lands Comm.* (2015) 242

Cal.App.4th 202, 237-238; *Audubon*, supra, 33 Cal.3d at 446-447.) The Law of the River is a series of contractual agreements between rights holders concerning how to divvy up water rights that can only be satisfied after satisfaction of the City's public trust and Section 5937 duties. They thus do not factor into this motion, or this lawsuit, which concerns only those duties.

A. The Law of the River Only Regards Water that May be Available in Excess of That Required to Keep Fish Below the Dams in Good Condition.

Neither the SAC nor the Preliminary Injunction is concerned with the private contractual relations expressed in the Oppositions as the "Law of the River." No matter how complex, venerable, profitable or judicially considered those contracts may be, the Opposition offers no evidence they are exempt from the constraints of Fish and Game Code, section 5937 or the public trust doctrine. To the extent that there is surplus water beyond that required to keep fish in the subject reach in good condition, the Plaintiffs have no concern regarding its distribution, and therefore the "Law of the River" is of no relevance to this motion.

B. The City Has Already Determined the Flows Necessary to Wet the Subject Reach.

The City has already done significant work to identify flow rates that would provide sufficient flows, with sufficient certainty to demonstrate adequate performance of its duties: In 2016, the City prepared and certified the *Water Resources Department Kern River Flow and Municipal Water Program Recirculated Draft Environmental Impact Report* (the "Kern Flow EIR") (see Plaintiffs' RJN, Exhibit F.) The EIR analyzed the environmental impacts of the City utilizing up to 160,000 AF/year to provide a permanent, consistent and regular flow of water through the City, a flow that would provide for environmental benefits and collaterally recharge the groundwater basin and allow subsequent municipal extraction of groundwater for municipal purposes. (Kern Flow EIR, p. 2-5.)

Additionally, an operational protocol has been proffered by UC Davis hydrologist Dr. Theodore Grantham, who suggests the use of an initial flow regime based on a percentage of unimpaired flows. (Grantham Dec. at pp. 4-5, filed in support of Plaintiffs' Motion for Preliminary Injunction and in support, Plaintiff's Reply to City's Opposition.) Dr. Grantham proposes 40% of unimpaired flows as an appropriate initial benchmark. The City could then proceed with further analysis and studies in furtherance of its trust duties, as described by Dr. Grantham, to fine-tune and adjust its diversions appropriately. (*Id*. at pp. 5-6.) Forty percent of unimpaired flows as a starting benchmark will not

cause the City any harm, as it will not interfere at all with the City's municipal diversions. (See discussion in Plaintiff's Reply to City Opposition to Preliminary Injunction, filed concurrently.)

C. Plaintiffs Have Standing and Have Met Their Burden of Proof.

As set forth above, pursuant to *Audubon* and its progeny it is well established that Plaintiffs have the standing to protect the public trust and to enforce its statutory expression, Fish and Game Code, section 5937. (See Bork et al, p. 24, supra.)

> The petitioners, having pled and established the facts undergirding a primary right to reestablishment and maintenance of the fisheries … the duty of L.A. Water and Power to release water to maintain the fisheries and its ongoing failure to do so, were entitled to any remedy appropriate remedy enforcement of the right, including interim injunctive relief. (See, e.g., *id.,*§§ 23, 29, pp. 66, 73.) That petitioners originally prayed for a different remedy does not preclude the court from granting an appropriate remedy not made the subject of the prayer. (See, e.g., *id.,* § 447, p. 491; 8 Witkin, Cal. Procedure, *supra,* Extraordinary Writs, § 215, p. 840.)

(*Cal.Trout II,* supra, 218 Cal.App.3d 187, 204.)

> In *California Trout, Inc.* v. *State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 [255 Cal.Rptr. 184] this court directed the respondent superior court to issue appropriate writs commanding the State Water Resources Control Board (Water Board) to attach conditions to licenses which it issued the Department of Water and Power of the City of Los Angeles (L.A. Water and Power) for the appropriation of water from four streams tributary to Mono Lake. The conditions, mandated by Fish and Game Code section 5946, require that, ***pursuant to section 5937***, L.A. Water and Power release sufficient water from its dams into the streams to reestablish and maintain the fisheries which existed in them prior to its diversion of water. (Emphasis added.)

(*CalTrout II*, supra, 218 Cal.App.3d at 193.)

D. The Harm Plaintiffs Will Face if Relief Is Denied Is Greater than the Harm the City Will Face if Relief Is Granted.

Prima facie, the proposed Preliminary Injunction would not cause any change in river flows or operations during melt, storm or flood events, as high flows are greater than the minimum sufficient flows required to sustain fish.

The City's needs pale in comparison and are easily and reliably satisfied even while it complies with the law to not dewater the river. Although the City cites in its brief an "overall annual water demand" of approximately 138,000 acre-feet (City Opp. at pp. 14-15), this figure includes all sources of water, not just diversions from the Kern River. *That figure* is much lower: the City lists a minimum obligation of 24,000 AF per year of its river diversions for municipal use: 19,000 AF for its water treatment plant and 5,000 AF for "City Water Feature Amenities." (Kern Flow EIR at p. 2-33, see also

pp. 2-29 – 2-30.)

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

The Kern River can reliably supply this amount of water and with no impact on the City's municipal requirements of 24,000 AF/year. The river's average "*dry year flows*" are 361,000 AF, and its "average" and "average wet-year" flows are much higher. (Keats Dec., Ex. 3, p. COB-BBK-0000412.) Only in the most extreme year ever recorded, when flows were measured at approximately 138,000 AF, would there be any need for limiting river flows in order to satisfy the City's municipal needs.

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

Although studies specific to the subject reach have not yet been conducted, it is Dr. Grantham's expert opinion that 40% of unimpaired flows would be a fair starting point. (Grantham Dec., at pp. 4-5) That means 60% of the river's flows would still be available for diversion, for whatever purpose the City sees fit. In an average dry year the City could divert up to 216,600 AF, far in excess of the City's annual minimal requirement of 24,000 AF, while leaving 144,000 AF in the river). In average and wet years, of course, much more water would be available to divert. Even in the most extreme low flow ever recorded in only one year of record (130,000 AF), 78,000 AF could still be diverted— more than three times the City's 24,000 AF need.

Considering the facts, the risk to municipal uses clearly does not qualify as irreparable harm. This is especially true considering the groundwater recharge benefits of a flowing river and the real

possibility of the City being able to extract water downstream of the Subject Reach.

E. Maintaining Flows in the Kern River is a Ministerial Act; How Flows are Maintained are a Matter of Discretion.

The City has a ministerial duty to follow section 5937; it must maintain sufficient flows in the Kern River to keep in good condition any fish that may exist below each weir and has no discretion to choose not to. Procedurally, that is to say *how* they accomplish that requirement, is a matter of discretion that the Plaintiffs leave to the City's good faith and best judgment. Suggestion as to the means or manner of remedy are *obiter*, intended to inspire but not constrain.

> [T]hat the mandate of section 5946 is a specific legislative rule concerning the public trust. Since the Water Board has no authority to disregard that rule, a judicial remedy exists to require it to carry out its ministerial functions with respect to that rule. The Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation.

(*Cal. Trout I.,* supra, 207 Cal.App.3d 585, 631-32.)

"The appropriate remedy is wholly prospective and ministerial in effect." (*Cal. Trout I.,* supra, 207 Cal.App.3d 585, 627.)

F. Section 5937 Precludes Any Balancing of Competing Beneficial Interests in Kern River Water.

As discussed above, no conduct was prescribed by Fish and Game Code, section 5946; it simply provided certainty that certain *non-navigable* streams tributary to Mono Lake that then in contention were encompassed under the jurisdiction of Fish and Game Code, section 5937. "The statute directs that 'no permit or license' shall be issued in District 4 1/2 after September 9, 1953, unless the appropriation is compatible with release of sufficient water to keep fish below the dams in good condition." (*CalTrout I,* supra, 207 Cal.App.3d at 625.) No such assurances are required post-*Audubon* on the Kern River, a navigable waterway.

The Court considered the impact of the legislation on the ability of the judiciary to balance competing interests:

> The Legislature's policy choice of the values served by a rule forbidding the complete drying up of fishing streams in Inyo and Mono Counties in favor of the values served by permitting such conduct as a convenient, albeit not the only feasible, means of providing more water for L.A. Water and Power, is manifestly not unreasonable. Accordingly, we have no warrant to override the Legislature's rule in section 5946 concerning that balance.

(*Cal. Trout I,* supra, 207 Cal.App.3d at 625.)

> Wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state. (People v. *Stafford Packing Co.* (1924) 193 Cal. 719, 727 [227 P. 485]; also see e.g. *Geer* v. *State of Connecticut* (1895) 161 U.S. 519 [40 L.Ed. 793, 16 S.Ct. 600] tracing the roots of this doctrine from ancient Greek and Roman law; see generally, Cal. Const., art. I, § 25.) "The title to and property in the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state [citations]." (People v. *Monterey Fish Products Co.* (1925) 195 Cal. 548, 563 [234 P. 398, 38 A.L.R. 1186].) This trust interest is the basis of the holding in People v. *Truckee Lumber Co., supra.* (*People* v. *Stafford Packing Co., supra,*193 Cal. at p. 727.)

(*Cal. Trout I,* supra, 207 Cal.App.3d at 630.)

> Since the rule in section 5946 pertains to a public trust interest no private right in derogation of that rule can be founded upon the running of a statute of limitations, for the same reasons that one may not acquire an interest in public lands by means of adverse possession.

(*CalTrout I,* supra, 207 Cal.App.3d at 629.)

> The common right to take fish extends not alone to navigable waters, but exists as to all waters, the lands underlying which are not in private ownership — in other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this state or the United States not protected by reservation; and since there is no averment that the lands along the [Kern River] are held in private proprietorship, we think the presumption must be that the title remains in the government. [¶] But, in the next place, if this is not the presumption, the case would not be different. The dominion of the state for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits.

(*CalTrout I,* supra, 207 Cal.App.3d at 629.)

Additionally, Real Parties argue that the proposed injunction would violate Article X, Section 2 of the California Constitution. (Rel Parties' Opp. at p. 46.) Real Parties focus exclusively on the first clause of the relevant sentence, that declares that "water resources of the State be put to beneficial use to the fullest extent of which they are capable, " while ignoring the second clause, which states "and that waste and unreasonable use or unreasonable method of use of water be prevented, and that the conservation of waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." (*Ibid*.; Cal. Const., Art. X, § 2.) Taken together, this section is a *restriction* on the use of water, not a mandate that all waters of the state be put to beneficial use, nor a declaration that beneficial use is the highest use of waters of the state.

But even then, Real Parties' focus on Section 106 of the Water Code section 106, in which they claim the Legislature has designated domestic and irrigation uses as the "two highest beneficial uses of water" and ignore Water Code, section 1243, which states: "The use of water for recreation and

preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, when it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." (Wat. Code, § 1243, subd. (a).) Although this section "does not affect riparian rights", it regards appropriative rights and is surely as strong an expression of the Legislatures' intent as section 106. (*Id*., subd. (c); see also Bork, et al. at pp. 830-831.)

Thus, the proposed order cannot be seen as violating Article X, Section 2.

CONCLUSION

The balance of equities – irreplaceable life balanced against speculated injury – warrants a Preliminary Injunction prohibiting the City from changing the status quo by diminishing the flow downstream of the weirs to less than 40% of the unimpaired flow, or such other amount that shall later be determined by the Court sufficient to keep fish downstream of the weirs in the subject reach in good condition.

DATED: October 6, 2023

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DATED: October 6, 2023

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