



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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July 27, 2022

BY EMAIL AND USPS EXPRESS MAIL

Mayor Karen Goh
Councilperson Eric Arias
Councilperson Andrae Gonzales
Councilperson and Vice Mayor Ken Weir
Councilperson Bob Smith
Councilperson Bruce Freeman
Councilperson Patty Gray
Councilperson Chris Parlier

cc: City Manager Christian Clegg
City Attorney Virginia Gennaro, Esq.

Dear Mayor Goh and Honorable Councilpersons:

RE: The Public Trust and the Kern River

Water Audit California is a public benefit corporation that acts as an advocate for the public trust. Our scientific advisory committee is chaired by Dr. Peter Moyle, professor emeritus and co-founder of the Center for Watershed Sciences at UC Davis. Information regarding our organization and our various projects to date can be found at WaterAuditCA.org.

This letter concerns the habitual dewatering of the Kern River through the City of Bakersfield (City) by water diversions under the control of the City. It is being sent jointly by Water Audit and concerned Bakersfield residents, including the Kern-Kaweah Chapter of the Sierra Club, Kern Audubon Society, Panorama Vista Preserve, the Kern River Parkway Foundation, and Bring Back the Kern.

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We understand that dewatering is occurring because of the City's diversion of water from the Kern River, primarily for agricultural purposes. The result is a total loss of instream flow through the City proper. Our research indicates that there are alternatives possible to avoid injury to the public trust.

We understand that there have been ineffectual studies, but the City has not reviewed nor formally considered any alternatives to its destructive diversions. **If we have overlooked a commitment to remediation by the City, please consider this a request pursuant to the California Public Records Act, *Government Code section 6250 et seq.*, for copies of all records that evidence any such determination.**

In the absence of a commitment to inquire and remediate, for the reasons set forth below, we have concluded that the City is in violation of its duty under current law to inquire into and review the feasibility of alternative actions to mitigate ongoing injury to public trust resources caused by its diversions of Kern River water.

The applicable principles of water law.

Water used in this state is governed by the *California Constitution, Article X, section 2*, which declares that *all* use of water must conform to the standard of reasonable use. That policy is implemented by the Legislature through enactments contained in the *California Water Code* and administered by the State Water Resources Control Board and the courts.

Ownership of California's water is vested generally in the state's residents, but individuals and entities can acquire "water rights," the right to divert water from its natural course for public or private use. (*Water Code*, § 102.) California maintains a dual system of water rights, which distinguishes between the rights of riparian users and groundwater extractors, and "appropriators," those who hold the right to divert water for use on noncontiguous lands.

For historical reasons, California further subdivides appropriators into those whose water rights were established before and after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian users and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights. Nevertheless, subdivisions of the State, such as the City, may not engage in unlawful conduct that facilitates water delivery of any character that is unnecessarily injurious to the public trust.

We understand that the water diversions made by the City are both venerable and may in part be authorized by the State Water Resources Control Board, but there is no vested right that will allow a continuing injury to the public trust without first considering "... 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." *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, (*Audubon*) at 426.

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More than a century ago, the California Supreme Court held that the public trust cannot be lost through adverse possession. The Court more recently reaffirmed the principle that "property held by the state in trust for the people cannot be lost through adverse possession. The statute of limitations is of no effect in an action by the state to recover such property from an adverse possessor whose use of the property for private purposes is not consistent with the public use." (*People v. Shirokow* (1980) 26 Cal.3d 301 at 311.)

Our review suggests the presence of a lively mix of water rights claimants, however, that is not ultimately relevant to our conclusion: The City is in violation of its duties to people of the State by continuing diversions without considering potential mitigation of injury to the public trust. Both by diverting water for the City's use and by facilitating the diversion of water for other parties without consideration of the public trust, the City is failing to fulfill its trustee duty to do no unnecessary harm by its conduct.

The public trust doctrine.

The public trust doctrine is one of great antiquity, reportedly tracing its origins to Roman law and the English *Magna Carta*. It first appeared in this county two and a half centuries ago in *Harrison v. Sterett*, 4 H. & McH. 540 (Md. Prov. 1774). The United States Supreme Court announced the modern articulation of the public trust doctrine in *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 13 S.Ct. 110.

The basic principle of *Illinois Central*, often reiterated, is this: a State can no more abdicate its trust over public trust property, in which the whole people are interested, so as to leave it under the control of private parties, than it can abdicate its police powers in the administration of government and the preservation of the peace.

In accord, the California Supreme Court has stated that agencies of the state have a duty to protect public trust uses whenever feasible. While appropriation may be necessary for efficient use of water, despite unavoidable harm to public trust values, *an appropriative water rights system administered without consideration of the public trust and consideration of the feasibility of mitigating harm, may cause unnecessary and unjustified harm to trust interests*. "As a matter of practical necessity, the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust." (*Audubon* at 446-47)

While the public trust doctrine originated around the rights of the public with respect to tidelands and navigable waters, the doctrine is not presently so limited. "Whatever the doctrine may have meant in Roman law, in medieval continental Europe, or in English law, the courts in this country have treated the public trust largely as a public property right of access to certain public trust natural resources for various public purposes." (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1360.) The primary function of the common law doctrine is to protect the right of the public to access and enjoy public

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trust lands. (*Audubon*, at 440-441.) In *Marks v. Whitney*, (1971) 6 Cal.3d 251, the California Supreme Court held that the public trust includes the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes in the navigable waters of the state.

The courts have found that the Kern River is subject to public trust considerations. In *People v. Sweetser*, (1977) 72 Cal.App.3d 278, the Fifth District held that the Kern River is a navigable river for purposes of boating and other recreational pleasures by the public. Accordingly, we have concluded that the “recreational pleasures” of the Kern River, as well as other uses and benefits of the river, including aesthetic, mental and physical health, and spiritual benefits, are entitled to public trust protections. The public trust is injured by the dewatering of the Kern River. Accordingly, the City is in breach of its trustee duty to determine and consider the feasibility of remediation of its injury to the public trust.

Fish and Game Code section 5937.

The California *Constitution* Article X, Section 2 states in part: “The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.”

The Legislature has codified part of this legal duty in the Fish and Game Code (FGC). Each of the diversion facilities operated by the City constitutes a “dam.” (FGC § 5900(a).) FGC § 5937 requires operators of dams to provide “sufficient water at all times to pass ... around, or through the dam to keep in good condition any fish ... below the dam.” (FGC § 5937; See *Cal. Trout, Inc. v. State Water Resources Control Bd. et al.* (1989) 207 Cal.App.3d 585, 626.) Section 5937 “is a legislative expression of the public trust protecting fish as trust resources when found below dams.” (*Ibid.*) “Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses. Where that affects a reduction in the amount that otherwise might be appropriated, [section 5937] operates as a legislative choice among competing uses of water.” (*Id.* at 601.)

The complete extirpation of fish caused by the dewatering of the Kern River by the City's diversions clearly implicates section 5937, which in turn implicates the duty of the City to determine what is “sufficient.” The City is in breach of that duty. The determination and provision of sufficient flows to provide suitable habitat for fish will be part of any action to bring the City into compliance with the law.

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The City is obligated to address its ongoing injury to the public trust.

This letter is not intended to be an abstract analysis, but rather a call to action. "The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*Audubon* at 441.)

Any private use of trust property triggers affirmative obligations under the trust doctrine. (*San Francisco Baykeeper, Inc. v. Cal. State Lands Comm'n* (2015) 242 Cal.App.4th 202.) A public trust use is categorically legitimate, while a public non-trust use or private commercial use can be authorized only if it does not impair the trust. (*Baykeeper*, at pp 232-243) This distinction is a vital check on the state trustee's power to administer lands that it holds for the benefit of the public. (*Audubon* at 440.)

Demand for remedy and notice of possible litigation (*Government Code § 910*).

In making this demand, Water Audit is acting on behalf of the public trust and the people of California, and in particular, the Bakersfield area residents whose concurrence in and support of our demands is evidenced by the signature of their counsel below.

We are not seeking damages, but rather the City's compliance with its duties under the public trust. We do not demand blanket impairment of beneficial uses, or that the City return flows to the Kern River in any particular manner. We recognize the City's discretion as to the specific manner of satisfying its public trust duties.

However, the public trust doctrine requires that a diverting authority take public uses into account. (*Audubon* at 434 446-447.) It is the City's duty to properly assess the impacts to public trust resources caused by the City's diversions and to determine the feasibility of measures that would avoid those impacts. It is our considered opinion that for the City to continue its injury to the public trust by its diversions, without analysis of the feasibility of mitigation, is both unlawful and unacceptable.

We respectfully request that the City act quickly to address these issues. Specifically, we demand that on or before September 15, 2022, the City authorize and fund a study, to be completed and made public no later than January 31, 2023, to inquire into and review the feasibility of alternative actions to mitigate the ongoing injury to the public trust caused by the dewatering of the Kern River in the City of Bakersfield.

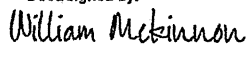
We note the comment on page 26 in *The Kern River Story*: "Most disputes or differences in views on the Kern River have historically been resolved by agreements rather than Court decisions. This is not to say that lawsuits have not been filed in the past to get the other fellow's attention." In accord, if the City fails to authorize such a study on or before September 15, 2022, we will seek judicial assistance without further notice.

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In the unfortunate event that litigation becomes necessary, we will seek preliminary and permanent injunctions against continuing diversions until such time as the study has been completed, made public, and the City has made a firm commitment to a manner and time of remediation.

To discuss any aspect of this matter, please contact Water Audit's General Counsel at his direct dial telephone number, 530-575-5335, or by email to.legal@waterauditca.org

Respectfully yours,

DocuSigned by:

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William McKinnon
General Counsel
Water Audit California

We concur.



Adam Keats
Law Office of Adam Keats, PC
Attorney for:
The Kern-Kaweah Chapter of the Sierra Club
Kern Audubon Society
Panorama Vista Preserve
Kern River Parkway Foundation
Bring Back the Kern

PROOF OF SERVICE

I, Linda Ghiringhelli, declare:

I am a resident of Napa County, California. I am over the age of eighteen years and not a party to the within action. My address is 952 School Street, #316, Napa, California 94559.

On July 27, 2022, I served a copy of the within document(s):

WATER AUDIT CALIFORNIA'S CORRESPONDENCE TO THE MAYOR AND CITY COUNCIL OF CITY OF BAKERSFIELD

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Napa, California, addressed as set forth below.

✓ _____ by placing the document(s) listed above in a sealed USPS envelope, affixing a prepaid air bill, and delivering the envelope to a USPS agent for overnight delivery as set forth below.

_____ by personally delivering the document(s) listed above to the person(s) set forth below.

✓ _____ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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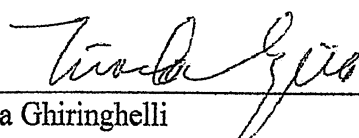
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 27, 2022, at Napa, California.



Linda Ghiringhelli