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

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

19 Plaintiffs and Petitioners,

20 vs.

21 CITY OF BAKERSFIELD, and DOES 1 through
22 500,

23 Defendants and Respondents,

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

Real Parties in Interest.

Case No.:

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF; VERIFIED PETITION FOR
WRIT OF MANDATE**

Cal. Const. Art. X, sec. 2;
CCP §§ 526, 106;
CC §§ 3479, 3480;
FGC §§ 5901, 5937, 5948;
PRC § 6009.1; and
Public Trust Doctrine

1 **INTRODUCTION**

2 1. Plaintiffs and Petitioners Bring Back the Kern, Water Audit California, Kern Audubon
3 Society, Panorama Vista Preserve, Sierra Club, and Center for Biological Diversity (Petitioners) bring
4 this action on their own behalf, on behalf of the general public, and in the public interest.

5 2. Defendant and Respondent City of Bakersfield (“Bakersfield” or “City”) regularly
6 diverts water from the Kern River on its own behalf and on behalf of other parties, including the Real
7 Parties in Interest named herein, either pursuant to water rights held by those parties or pursuant to
8 contractual agreements. **The City diverts this water, regularly resulting in the complete dewatering of**
9 **the Kern River, without satisfying its duties under the California Constitution, the Public Resources**
10 **Code, Fish & Game Code, the California Civil Code, and the public trust doctrine to protect various**
11 **resources on behalf of the people of California.**

12 3. Bakersfield has created a public nuisance by diverting water from the Kern River and its
13 tributary streams without any analysis of the impacts on public trust uses and resources in violation of
14 statutory and common law obligations as set forth below.

15 4. Petitioners seek to, with judicial assistance, improve the City’s conduct to comport with
16 the law.

17 **PARTIES**

18 5. Petitioner Bring Back the Kern is a non-profit organization formed by local residents
19 with the mission of restoring flowing water in the Kern River through the City of Bakersfield. Bring
20 Back the Kern works to achieve this through building awareness among the public and putting
21 pressure on decision makers to change the status quo and put more water in the river. Bring Back the
22 Kern brings this action in its own behalf, and as a private attorney general advocating for the interests
23 of the people of California.

24 6. Petitioner Water Audit California is a California public benefit corporation organized
25 and existing under the laws of the State of California. Water Audit California is a “person” under
26 California Corporations Code Sections 18 (“‘Person’ includes a corporation as well as a natural
27 person”); 15901.02(y) (“‘Person’ means an individual . . . corporation . . .”); and 25013 (“‘Person’
28 means an individual, a corporation...”). Water Audit California brings this action in its own behalf, and

1 as a private attorney general advocating for the interests of the people of California.

2 7. Petitioner Kern River Parkway Foundation is a local non-profit organization working to
3 protect, preserve, and restore the natural riparian and wildlife habitat of the Kern River. The
4 Foundation works with county, city, and community stakeholders to develop and maintain public open
5 space, structures, monuments, and parks that preserve and beautify the Kern River and supports
6 projects that advance educational and scientific knowledge of the Kern River. Kern River Parkway
7 Foundation brings this action in its own behalf, and as a private attorney general advocating for the
8 interests of the people of California

9 8. Petitioner Kern Audubon Society is a local, independent chapter of the Audubon
10 Society, founded in Bakersfield in 1973 and incorporated in 1979, that works to educate the public
11 about the importance of birds and to protect important bird habitat areas as well as sensitive bird
12 species across Kern County. The Kern River through Bakersfield is a major factor in attracting birds
13 traveling in the Pacific Flyway. Kern Audubon Society has published a popular birding map of the
14 Kern River from the mouth of the Kern Canyon to Enos Lane, including local groundwater recharge
15 basins. Kern Audubon Society has hundreds of members, primarily based in the Bakersfield area who
16 are personally affected by the lack of a flowing river. Kern Audubon Society brings this action in its
17 own behalf, and as a private attorney general advocating for the interests of the people of California.

18 9. Petitioner Sierra Club is a non-profit organization that advocates for environmental and
19 social justice issues across the southern San Joaquin Valley. The Sierra Club works to hold county and
20 city government accountable for actions causing harm to habitat, sensitive species, and disadvantaged
21 communities. The club has several thousand members, a significant portion of whom live in the
22 Bakersfield area in close proximity to the dried-up Kern River. Sierra Club brings this action in its
23 own behalf, and as a private attorney general advocating for the interests of the people of California.

24 10. Petitioner Center for Biological Diversity is a non-profit organization dedicated to
25 saving life on earth through science, law, and creative media, with a focus on protecting the lands,
26 waters and climate that wild animal and plant species need to survive. The Center has offices in
27 California and other states and has more than 1.7 million members and online activists, including
28 members in and around Bakersfield, California and the Kern River. The Center has a particular interest

1 in protecting, restoring, and enhancing the public trust resources of the Kern River, and returning
2 flows in the lower Kern River to a more natural regime for the benefit of people, wildlife, and native
3 ecosystems. Center for Biological Diversity brings this action in its own behalf, and as a private
4 attorney general advocating for the interests of the people of California.

5 11. The defendant and respondent City is a city authorized by California Constitution and as
6 set forth in Government Code § 3400 et seq.

7 12. The City is a legal subdivision of the state; references to the “state” includes cities. Gov.
8 Code, §§ 53208.5, 53217.5 & 53060.1 [setting various limits on benefits for “members of the
9 legislative bodies of all political subdivisions of the state, including charter cities and charter
10 counties”], 8557, 8698, 12650 & 12424 [“political subdivision” includes “any city, city and county
11 [or] county”], 37364, subd. (e) [“[t]he provisions of this section shall apply to all cities, including
12 charter cities”]. *City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 912.

13 13. Petitioners do not know the true names of defendants and respondents DOES 1 to 500,
14 inclusive, and therefore sues them with these fictitious names. Petitioners are informed and believe,
15 and based on such information and belief, allege that each of these parties is in some manner legally
16 responsible for the events and happenings alleged herein. Petitioners are further informed and believe,
17 and based on such information and belief allege, that at all times mentioned the respondents were the
18 partners, agents, coventurers, and/or employees of their co-respondents and defendants, and in doing
19 the things herein alleged were acting within the course and scope of such agency and employment.
20 Alternatively, the DOES have acted in reliance on permission granted by the City, and their future
21 action must be equitably amended to avoid injury to the public trust. Alternatively, the DOES have
22 acted without permission, and their future action must be equitably amended to avoid injury to the
23 public trust. Petitioners will seek leave to amend to insert the true names of the DOES when such
24 parties have been identified.

25 14. The City and DOE defendants/respondents will collectively be referred to as
26 “Defendants.”

27 15. Real Party in Interest BUENA VISTA WATER STORAGE DISTRICT is a Water
28 Storage District formed under the California Water District Law, Water Code section 34000, *et seq.*

1 Petitioners are informed and believe that Buena Vista Water Storage District holds a water right or
2 contractual interest, or both, in some water that is diverted from the Kern River by the City, and
3 therefore may have an interest in this litigation.

4 16. Real Party in Interest KERN DELTA WATER STORAGE DISTRICT is a Water
5 Storage District formed under the California Water District Law, Water Code section 34000, *et seq.*
6 Petitioners are informed and believe that Kern Delta Water Storage District holds a water right or
7 contractual interest, or both, in some water that is diverted from the Kern River by the City, and
8 therefore may have an interest in this litigation.

9 17. Real Party in Interest NORTH KERN WATER STORAGE DISTRICT is a Water
10 Storage District formed under the California Water District Law, Water Code section 34000, *et seq.*
11 Petitioners are informed and believe that North Kern Water Storage District holds a water right or
12 contractual interest, or both, in some water that is diverted from the Kern River by the City, and
13 therefore may have an interest in this litigation.

14 18. Real Party in Interest ROSEDALE-RIO BRAVO WATER DISTRICT is a Water
15 Storage District formed under the California Water District Law, Water Code section 34000, *et seq.*
16 Petitioners are informed and believe that Rosedale-Rio Bravo Water District holds a water right or
17 contractual interest, or both, in some water that is diverted from the Kern River by the City, and
18 therefore may have an interest in this litigation.

19 19. DOES 501 to 999, inclusive, are persons or entities presently unknown to the Petitioners
20 who may claim some interest as a real party in interest in the acts that are a subject of this action.
21 Petitioners will seek leave to amend this petition to show the true names and capacities of DOES 501
22 to 999 when such names and capacities become known.

23 **VENUE & JURISDICTION**

24 20. The venue is proper in this court under the California Code of Civil Procedure (“CCP”)
25 §395(a) because the subject reach of the Kern River, the associated diversion works, the waters
26 discussed herein, and the offices of the City, are all within the County of Kern, California.

27 21. Petitioners seek an injunction, (CCP § 526) declaratory relief (CCP § 1060), and a writ
28 of mandate (CCP §1085). Each of these is within the jurisdiction of this court. (California Constitution

1 art. VI, §§ 1 & 4.)

2 22. This Court has subject matter jurisdiction because the causes of action arise, inter alia,
3 under the California Fish & Game Code, (“FGC”); the California Water Code; the Code of Civil
4 Procedure Code (“CCP”); the California Civil Code (“CC”); and the California public trust doctrine.

5 23. Petitioners have performed all conditions precedent to filing suit or is excused from such
6 conditions. (Water Code § 1851.)

7 24. Petitioners have given notice to the City of its intended litigation.

8 LEGAL BACKGROUND

9 *Public Trust Doctrine*

10 25. The courts have recognized the State’s responsibility to protect public trust uses
11 whenever feasible. (See, e.g., *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 435;
12 *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631;
13 *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 289.)

14 26. “The core of the public trust doctrine is the state’s authority as sovereign to exercise a
15 continuous supervision and control over the navigable waters of the state and the lands underlying
16 those waters.” (*Audubon, supra* at p. 425.) Over a century ago the U.S. Supreme Court defined the
17 public trust as property that “is a subject of concern to the whole people of the state.” (*Illinois Central*
18 *R.R. Co. v. Illinois* (1892) 146 U.S. 387, 454 at p. 455.) **The public trust provides that certain natural**
19 **resources, including water resources, are held by the state “as trustee of a public trust for the benefit of**
20 **the people.”** (*Audubon, supra*, at p. 434.)

21 27. The state as sovereign is primarily responsible for administration of the public trust. The
22 City is a trustee for the public trust in all actions and decisions that include or implicate public trust
23 interests.

24 28. Citizens may enforce a state agency’s affirmative duty to comply with the public trust
25 doctrine in court. (*Audubon, supra*, 33 Cal.3d at p. 431 n.11, citing *Marks v. Whitney*, 6 Cal.3d at pp.
26 261–62; *see also Center for Biological Diversity* (2008) 166 Cal.App.4th 1349, 1366 [“the public
27 retains the right to bring actions to enforce the trust when public agencies fail to discharge their
28 duty”].)

1 **California Constitution, Article X**

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

7 30. The Supreme Court has held that Article X, section 2 “dictates the basic principles
8 defining water rights: that no one can have a protectible interest in the unreasonable use of water, and
9 that holders of water rights must use water reasonably and beneficially.” (*City of Barstow v. Mojave*
10 *Water Agency* (2000) 23 Cal.4th 1224, 1242.)

11 31. “‘Beneficial use’ and ‘reasonable use’ are two separate requirements, both of which
12 must be met.” (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th
13 1176, 1185.)

14 32. “What constitutes reasonable use is case-specific. California courts have never defined
15 ... what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular
16 use depends largely on the circumstances. ... The inquiry is fact-specific, and the answer may change
17 over time. What may be a reasonable beneficial use, where water is present in excess of all needs,
18 would not be a reasonable beneficial use in an area of great scarcity and great need.” (*Ibid*, internal
19 quotation omitted.)

20 33. Water Code § 1243 provides that the “use of water for recreation and preservation and
21 enhancement of fish and wildlife resources is a beneficial use.”

22 34. Concurrent jurisdiction allows for environmental groups or others adversely affected by
23 a violation of the public trust to pursue actions in court directly against the violator. Because the
24 limited budgets of the trustee agencies do not allow these agencies to pursue every violation brought to
25 their attention, such assistance is acknowledged to be invaluable in protecting trust resources
26 statewide.

27 **California Fish and Game Code § 5901**

28 35. Section 5901 of the Fish and Game Code states “it is unlawful to construct or maintain

1 in any stream [in certain districts, including District 312] any device or contrivance that prevents,
2 impedes, or tends to prevent or impede, the passing of fish up and down stream.”

3 36. The Kern River is located within District 312. (FGC § 11009.)

4 ***California Fish and Game Code § 5937***

5 37. Section 5937 of the Fish and Game Code states: “The owner of any dam shall allow
6 sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient
7 water to pass over, around or through the dam, to keep in good condition any fish that may be planted
8 or exist below the dam.” (FGC § 5937; See *Cal. Trout, Inc. v. State Water Resources Control Bd. et al.*
9 (1989) 207 Cal.App.3d 585, 626.)

10 38. “Compulsory compliance with a rule requiring the release of sufficient water to keep
11 fish alive necessarily limits the water available for appropriation for other uses. Where that affects a
12 reduction in the amount that otherwise might be appropriated, [section 5937] operates as a legislative
13 choice among competing uses of water.” (*Cal. Trout, Inc. v. State Water Resources Control Bd. et al.*
14 (1989) 207 Cal.App.3d 585, 601.)

15 ***California Fish and Game Code § 5948***

16 39. Section 5948 of the Fish and Game Code states: “No person shall cause or having
17 caused, permit to exist any ... artificial barrier, except a dam for the storage or diversion of water ...
18 permitted by law ... in any stream in this State, which will prevent the passing of fish up and down
19 stream.” (Emphasis added).

20 **FACTUAL BACKGROUND**

21 40. The Kern River watershed exemplifies the uniqueness of California’s biodiversity, as its
22 climatic conditions result in a Mediterranean climate with warm dry summers and cool moist winters.

23 41. Beginning at its headwaters, northwest of Mount Whitney and tributaries that flow in
24 from around Mount Whitney at 14,505 feet, its outflow is near Bakersfield and historically Buena
25 Vista Lake in the San Joaquin Valley.

26 42. The Kern River’s watershed includes about 3,612 square miles.

27 43. The Kern River currently runs approximately 165 miles to Bakersfield and beyond
28 depending on water availability for surface flows.

1 44. During the 1850s, the Kern River flowed south at what is now Bakersfield.

2 45. A flood in 1867 rerouted the river in what is title “New River”.

3 46. Historically, the Kern River filled two very large but shallow lakes, Kern Lake and
4 Buena Vista Lake, and during very wet years, the river could overflow Buena Vista Lake northward to
5 Tulare Lake, which at times, flowed northward to the San Joaquin River. These lakes and the wetlands
6 that interconnected them were known to be full of abundant fish and they supported large herds of
7 antelope, elk, and thousands of grizzlies. They were also a critical overwintering stopover of the
8 Pacific Flyway, hosting millions of waterfowl each winter before the birds returned to Canada and
9 Alaska for summer breeding.

10 47. Starting in the 1850s and 60s, settlers began to divert flows from the Kern River and to
11 dry up the vast wetlands of the San Joaquin Valley. Under state law, those who reclaimed wetlands or
12 irrigated desert land for agricultural use could take title to the land. This system was abused by the
13 land barons of the time, who found ways around acreage limits to allow them to amass property
14 holdings of hundreds of thousands of acres.

15 48. Expansion in the amount of irrigated acreage and diversion canals in the Kern River
16 alluvial fan coupled with a dry period led to a drying up of the lower Kern River in 1877, kicking off a
17 the Lux v. Haggin lawsuit that was eventually resolved by the California Supreme Court in 1884,
18 ruling that both prior appropriations and downstream riparian landholders rights to the Kern River
19 were valid. This created California’s dual system of appropriative and riparian water rights.

20 49. Rather than wait for the state to reassess all water rights on the Kern River and
21 determine how water would be split between upstream appropriators and downstream riparian rights
22 holders, land barons Henry Miller and James Haggin created the Miller-Haggin Agreement in 1888, a
23 settlement that divided up shares to the Kern River. This agreement forms the basis of what is referred
24 to as the “law of the river.”

25 50. The Miller-Haggin agreement has been expanded and modified several times in the 150
26 years since it’s signing, including with the 1900 Shaw decree, and amendments to the original
27 agreement in 1930, 1955, and 1964. Neither the original agreement or any of the subsequent revisions
28 ever took into account any needs of the public trust resources of the Kern River.

1 51. In 1976, the City of Bakersfield took ownership to some of the rights of the Kern River
2 from the corporate descendent of James Haggin’s land empire, Tenneco West. With this purchase, the
3 City took over ownership of the Kern River channel and the multiple diversion weirs along the river.
4 With this transfer of ownership, Tenneco West also handed over responsibility to the city to continue
5 the administration of Kern River water diversions under the historical “law of the river” system, which
6 divided up the entirety of the river’s flows between various diverters. Since then, Bakersfield’s Water
7 Department has staffed personnel to manage each weir and headgate to deliver water to irrigation
8 districts based on their accrued rights and water orders. They keep detailed records of these diversions
9 and publish an annual report of these water diversions summarizing the operation of the Kern River.

10 52. The higher elevation reaches of the river remain ecologically and hydrologically in-tact
11 due to conservation protections (e.g., Sequoia National Park), Wild and Scenic River designations and
12 remoteness including various wilderness areas.

13 53. After exiting the Kern River Canyon, Kern River water is diverted at the Beardsley
14 Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the
15 McClung Weir, [“Diversion Structures”], all of which are managed and operated by the City.

16 54. The City diverts Kern River water on behalf of area water districts and on its own
17 behalf. Most of the water diverted by the City is delivered to area water districts, including the Real
18 Parties in Interest named herein, for agricultural purposes. The water districts either hold water rights
19 to this water or have a contract with the City for delivery of water to which the City holds the rights. A
20 smaller portion of the diversions are for the City’s own use, for municipal purposes

21 55. The Diversion Structures, coupled with the natural infiltration into groundwater, reduce
22 the surface flows in the Kern River to the point where the river flows through the City only on very
23 rare occasions.

24 56. The City admits that the dewatering of reaches of the Kern River, along with increased
25 groundwater pumping in the vicinity of the river by various water districts, has depleted water levels in
26 the groundwater basin.

27 57. The City admits that the loss of the river has severely diminished and threatened the
28 City’s surface and groundwater supply, and also resulted in damage and threats to the quality of the

1 local water supply, the local environment, including vegetation and fish and wildlife in and around the
2 river, and aesthetic and recreational opportunities in and around the river.

3 58. The reduction in riparian and associated wetland and upland habitats has consequently
4 reduced habitat for native wildlife and decreasing their populations.

5 59. With the historic and contemporary diversion of water, most of the native fish species
6 have been extirpated from the San Joaquin Valley portion of the Kern River.

7 60. Historically at least seven species of fish occupied the lower Kern: Coastal rainbow trout
8 (*Oncorhynchus mykiss irideus*), Hardhead (*Mylopharodon conocephalus*), Riffle sculpin (*Cottus*
9 *gulosus*), Sacramento pike minnow (*Ptychocheilus grandis*), Sacramento hitch (*Lavinia exilicauda*
10 *exilicauda*), Sacramento sucker (*Catostomus occidentalis occidentalis*), and Sacramento perch
11 (*Archoplites interruptus*).

12 61. If adequate surface flows were maintained within the Kern River and connected
13 freshwater marsh habitat, these fish species could be re-introduced, and the fishery potentially
14 restored.

15 62. The City has not reviewed nor formally considered the impacts to public trust resources
16 caused by its destructive diversions.

17 63. The Kern River alluvial fan is one of the best recharge areas in California, as water
18 managers assume 90-94% of water recharged into the aquifer from the Kern River channel can be
19 recovered.

20 64. The Kern River has had an annual average outflow of around 720,000-acre feet since
21 records have been kept starting in the late 19th century. As the southernmost major river of the Sierra
22 Nevada range, it is subject to wide fluctuations in annual precipitation, with some instances of up to 2-
23 million-acre feet and drought years with a tenth of that. The river's median outflow is over 500,000-
24 acre feet.

25 **FIRST CAUSE OF ACTION**

26 **Violations of California's Public Trust Doctrine**

27 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

28 65. Petitioners incorporate and restate each and every paragraph contained herein as though

1 fully set forth herein.

2 66. A real and present controversy exists between Petitioners and the City concerning the
3 obligations of the City to comply with the public trust doctrine.

4 67. The City has violated and continues to violate its duties under the Public Trust Doctrine
5 by impeding flows on the Kern River through its operation of the Diversion Structures that wholly
6 dewater the Kern River at almost all times, year-round.

7 68. The City has violated and continues to violate its duties under the public trust doctrine
8 by failing to conduct a sufficient analysis of the impacts to public trust resources (including the Kern
9 River itself, its associated ecosystems and the people of the City of Bakersfield) caused by the
10 existence and operation of the City-owned Diversion Structures.

11 69. The City has violated and continues to violate its duties under the public trust doctrine
12 by presiding over a decades-long dewatering of the Kern River and its ecosystem through its
13 ownership and operation of the Diversion Structures, resulting in waste and damage to trust resources.

14 70. The dewatering of the Kern River is unquestionably harming a navigable waterway. As
15 such, it is a continuing injury to the public trust. (*People v. Sweetser* (1977) 72 Cal.App.3d 278; *Envntl.*
16 *Law Found. v. State Water Res. Control Bd.*, 26 Cal.App.5th 844, 860.)

17 71. The City has a duty to assess the impacts on public trust resources that may be caused by
18 its actions, including any actions that may adversely impact the public trust, before taking those
19 actions. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370.)

20 72. The City may not engage in unlawful conduct that facilitates water delivery of any
21 character that is unnecessarily injurious to the public trust.

22 73. The City's obligations under the public trust arise from its ministerial obligation to
23 provide for free passage of and habitat for public trust fish in the Kern River and otherwise protect the
24 public's interest in the trust resource. The City's failure to perform its statutory duties under the *FGC*
25 is evidence of the violation of its duties to do no unnecessary injury to the public trust.

26 74. The City's duty to consider the impacts to trust resources of its actions and to mitigate or
27 avoid those impacts when feasible is a ministerial act required to comport with the *FGC*.

28 75. The City has admitted no fault and will continue its conduct unless ordered by the Court

1 to do otherwise.

2 76. The injury to the public trust cannot be remedied or mitigated by an award of damages.
3 There is no regulatory process for relief.

4 WHEREFORE Petitioners pray for relief as hereinafter set forth.

5 **SECOND CAUSE OF ACTION**

6 ***Violations of Article X of the California Constitution***

7 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

8 77. Petitioners incorporate and restate each and every paragraph contained herein as though
9 fully set forth herein.

10 78. The City has a clear and mandatory duty to not waste or unreasonably use waters of the
11 Kern River and to not utilize an unreasonable method of use or method of diversion of the waters of
12 the Kern River.

13 79. The City has violated, and continues to violate, Article X, Section 2 of the California
14 Constitution through its unreasonable method of use and/or its unreasonable method of diversion of
15 the waters of the Kern River in a manner that is causing significant harm to the Kern River
16 environment.

17 80. **The City diverts more water from the Kern River than is reasonably required for any**
18 **beneficial use served by the City's or any other party's use of diverted water in light of the harm to the**
19 **Kern River environment by the City's water diversions.**

20 81. The City has failed and continues to fail to manage its water use in a manner that avoids
21 unreasonable harm to the Kern River environment.

22 82. The City is required to comply with the mandatory duties set out in the California State
23 Constitution, including those duties imposed under Article X, Section 2.

24 83. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
25 because the City will continue to violate Article X, Section 2 of the California Constitution unless
26 compelled to comply by this Court.

27 WHEREFORE Petitioners pray for relief as hereinafter set forth.

28

1 **THIRD CAUSE OF ACTION**

2 ***Violations of the Fish and Game Code***

3 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

4 84. Petitioners incorporate and restate each and every paragraph contained herein as though
5 fully set forth herein.

6 85. A controversy exists between Petitioners and the City concerning the obligations of the
7 City to comply with FGC §§ 5901, 5937 and 5948.

8 86. The City has a clear and mandatory duty under FGC sections 5901, 5937, and 5948 as
9 alleged herein.

10 87. The City has violated, and continues to violate, its duty under FGC section 5901 to not
11 construct or maintain in any stream in District 312 any device or contrivance that prevents, impedes,
12 or tends to prevent or impede, the passing of fish up and down stream.

13 88. The City has failed, and continues to fail, its duty under FGC section 5937 to at all times
14 allow sufficient water to pass through, over, or around the Diversion Structures to keep in good
15 condition any fish that may be planted or exist below the Diversion Structures.

16 89. The City has failed, and continues to fail, its duty under FGC section 5948 by
17 maintaining and operating the Diversion Structures and diverting water in a manner not permitted by
18 law, preventing, impeding, and/or tending to prevent or impede, the passing of fish upstream and
19 downstream of the structures.

20 90. An order compelling the City to release water of sufficient size and with appropriate
21 timing to provide flows for fish passage and habitat is appropriate and necessary to avoid irreparable
22 harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

23 91. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
24 because the City will continue to violate the FGC unless compelled to comply by this Court.

25 **FOURTH CAUSE OF ACTION**

26 ***Breach of Trustee Duties***

27 ***Public Resource Code § 6009.1***

28 92. A trust imposes a fiduciary duty on a trustee. The elements of a cause of action for

1 breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage
2 proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433.) Whether a
3 fiduciary duty exists is generally a question of law. Whether the defendant breached that duty towards
4 the plaintiff is a question of fact. (*Marzec v. Public Employees' Retirement System* (2015) 236
5 Cal.App.4th 889, 915.)

6 93. Before a person can be charged with a fiduciary obligation, they must either knowingly
7 undertake to act on behalf and for the benefit of another or must enter into a relationship which
8 imposes that undertaking as a matter of law. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315,
9 1338.) When standing for public office, a candidate declares him or herself willing to faithfully
10 perform the legal duties implied by the office sought. Their election is conditioned upon this
11 affirmation. (Cal Constitution Article XX section 3.)

12 94. The City acts through its elected officials, each of whom has undertaken the aforesaid
13 fiduciary duties.

14 95. The beneficiaries of the public trust are the people of California, and it is to them that
15 the trustee owes fiduciary duties. The trustee deals with the trust property for the beneficiary's benefit.
16 No trustee can properly act for only some of the beneficiaries – the trustee must represent them all,
17 taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent
18 any of them. (*Bowles v. Superior Court* (1955) 44 Cal.2d 574.) This principle is in accord with the
19 equal protection provisions of the Fourteenth Amendment to the US Constitution.

20 96. A fiduciary relationship creates the highest duty of loyalty known to the law.
21 (Restatement (Third) of Torts § 16 (2020).)

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

24 98. The fiduciary duty of loyalty encompasses cases where the fiduciary fails to act in good
25 faith.

26 99. **The City has not made a good faith inquiry or effort to determine if the injury that it has**
27 **caused can be mitigated.**

28 100. A trustee has a duty to keep clear and adequate records and accounts and make full

1 disclosure to the beneficiaries. Facts are especially important when public trust assessments must
2 include a balancing of needs between the beneficial use of environmental flows and the beneficial
3 claims of commerce.

4 **101. The City has agreed to make diversions and to take beneficial use of Kern River**
5 **flows without considering the cumulative impact of these decisions on the public trust.**

6 102. A trustee’s duty requires erring on the side of caution where uncertainty exists. As the
7 level of uncertainty grows, the level of caution must also increase. Trustees can fulfill their duty of
8 caution by halting demands upon public trust resources until the uncertainty can be resolved.

9 103. The trustee’s duty of furnishing timely information to beneficiaries, also expressed as a
10 duty to provide an accounting, has implicit within it the requirement that the information be complete,
11 accurate and understandable to the beneficiaries. This procedural duty is critical to the performance of
12 the preeminent substantive duty to protect public trust resources. It is axiomatic that we manage what
13 we measure.

14 104. The city has failed to perform its undertaking of disclosure.

15 105. As a beneficiary of the public trust, Petitioners were harmed by the City’s negligence of
16 its trustee’s duties. The City’s conduct was a substantial factor in causing Petitioners’ harm.

17 106. An order compelling the City to release water of sufficient size and with appropriate
18 timing to provide flows for fish passage and habitat is appropriate and necessary to avoid irreparable
19 harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

20 107. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
21 because the City will continue to breach its trustee duties unless compelled to comply by this Court.

22 WHEREFORE Petitioners pray for relief as hereinafter set forth.

23 **FIFTH CAUSE OF ACTION**

24 ***Public Nuisance – CC §§ 3479 and 3480***

25 108. Petitioners incorporate and restate the preceding paragraphs as if set forth in full here.

26 109. The public nuisance doctrine aims at the protection and redress of community interests.
27 (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358.)

28 110. “Unlike the private nuisance — tied to and designed to vindicate individual ownership

1 interests in *land* — the “common” or *public* nuisance emerged from distinctly different historical
2 origins. “The public nuisance doctrine is aimed at the protection and redress of *community* interests ...
3 which the courts have vindicated by equitable remedies since the beginning of the 16th century.”
4 (*People ex Rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103.) “It is this *community* aspect of the
5 public nuisance, reflected in the civil and criminal counterparts of the California code, that
6 distinguishes it from its private cousin, and makes possible its use, by means of the equitable
7 injunction, to protect the quality of organized social life.” (*Id* at p. 110. [Emphasis in original].)

8 111. “No lapse of time can legalize a public nuisance amounting to an actual obstruction of
9 public right.” (CC § 3490.)

10 112. “Anything which ... unlawfully obstructs the free passage or use, in the customary
11 manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street,
12 or highway, is a nuisance.” (CC § 3479.)

13 113. As set forth above, by its water diversions, the City dewateres the proximate reach of the
14 Kern River, obstructing the free passage and/or use in the customary manner of the Kern River.

15 114. “A public nuisance is one which affects at the same time an entire community or
16 neighborhood, or any considerable number of persons, although the extent of the annoyance or
17 damage inflicted upon individuals may be unequal.” (CC § 3480.)

18 115. Although the City knew that it was causing dewatering of the Kern River, no mitigation
19 for injury to the public trust by the City was undertaken.

20 116. Liability for a public nuisance can arise both from the affirmative act of dewatering the
21 river by its extractions, and also from the failure to remedy the problem once it was recognized. The
22 City’s dewatering of the proximate reach of the Kern River was intentional and unreasonable, or
23 alternatively unintentional but negligent. The City is subject to liability for the nuisance it has caused
24 in violation of Civil Code sections 3479 and 3580. The City knows or should know of the condition
25 and the nuisance or unreasonable risk of nuisance involved. After a reasonable opportunity to take
26 remedial actions, the City has failed to abate the condition or to protect the public against it. (*Lelie Salt*
27 *Co. v. San Francisco Bay Conservation* (1984) 153 Cal.App.3d 605 at 619-620; Rest.2d Torts, § 839.)

28 117. An injunction may issue to enjoin the nuisance. (*People v. Truckee Lumber Co.* (1897)

1 116 Cal. 397.)

2 WHEREFORE Petitioners pray for relief as hereinafter set forth.

3 **PRAYER FOR RELIEF**

- 4 1. Declaratory relief stating the City is in violation of:
- 5 a. The Public Trust Doctrine;
 - 6 b. Article X, Section 2 of the California Constitution;
 - 7 c. California Fish and Game Code sections 5901, 5937, and 5948;
 - 8 d. Public Resource Code § 6009.1;
 - 9 e. Civil Code sections 3479 and 3480.
- 10 2. A peremptory writ of mandate:
- 11 a. Declaring that the City has violated the Public Trust Doctrine;
 - 12 b. Declaring that the City has violated Article X, Section 2 of the California
 - 13 Constitution;
 - 14 c. Declaring that the City has violated Fish and Game Code sections 5901, 5937, and
 - 15 5948;
 - 16 d. Declaring that the City has violated Public Resource Code § 6009.1;
 - 17 e. Declaring that the City has violated Civil Code sections 3479 and 3480;
 - 18 f. **Ordering the City to take such actions as required to bring its operation and**
 - 19 **maintenance of the Diversion Structures into compliance with Fish and Game Code**
 - 20 **sections 5901, 5937, and 5948;**
 - 21 g. **Ordering the City to take such actions as required to bring its operation and**
 - 22 **maintenance of the Diversion Structures into compliance with the common law and**
 - 23 **the California Constitution;**
 - 24 h. Enjoining any and all activity in violation of the common law and the California
 - 25 Constitution and specifically enjoining the City to change the point of its diversions
 - 26 of water from the Kern River to a point more in accordance with the River's natural
 - 27 terminus;
 - 28 i. Enjoining any and all activity in violation of FGC sections 5901, 5937 and 5948;

- 1 3. **An interim peremptory writ of mandate or preliminary injunctive relief:**
2 a. **halting the City from diverting water at the Diversion Structures in a fashion that**
3 **results in the dewatering of the Kern River through the City of Bakersfield;**
4 b. **halting the City from diverting water at the Diversion Structures in a fashion that will**
5 **harm and jeopardize the survival and recovery of fish species in the Kern River.**
- 6 4. **For costs of suit;**
- 7 5. For attorneys' fees pursuant to law, including Code of Civil Procedure section 1021.5;
8 and
- 9 6. For such other and further relief as the Court deems just and proper.

10
11 DATED: November 30, 2022

LAW OFFICE OF ADAM KEATS, PC

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

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17 DATED: November 30, 2022

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William McKinnon
Attorney for Water Audit California

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