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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **IN AND FOR THE COUNTY OF KERN**

19 BRING BACK THE KERN, WATER AUDIT  
20 CALIFORNIA, KERN RIVER PARKWAY  
21 FOUNDATION, KERN AUDUBON  
22 SOCIETY, SIERRA CLUB, and CENTER FOR  
23 BIOLOGICAL DIVERSITY,

24 Plaintiffs and Petitioners,

25 vs.

26 CITY OF BAKERSFIELD  
27 and DOES 1 through 500,

28 Defendants and Respondents.

Case No.: BCV-22-103220

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Fish & G. Code § 5937;  
Code Civ. Proc. §§ 526, 527.

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

Hearing Date: September 6, 2023  
Time: 9:00 a.m.  
Dept.: 8  
Judge: Hon. Gregory Pulskamp

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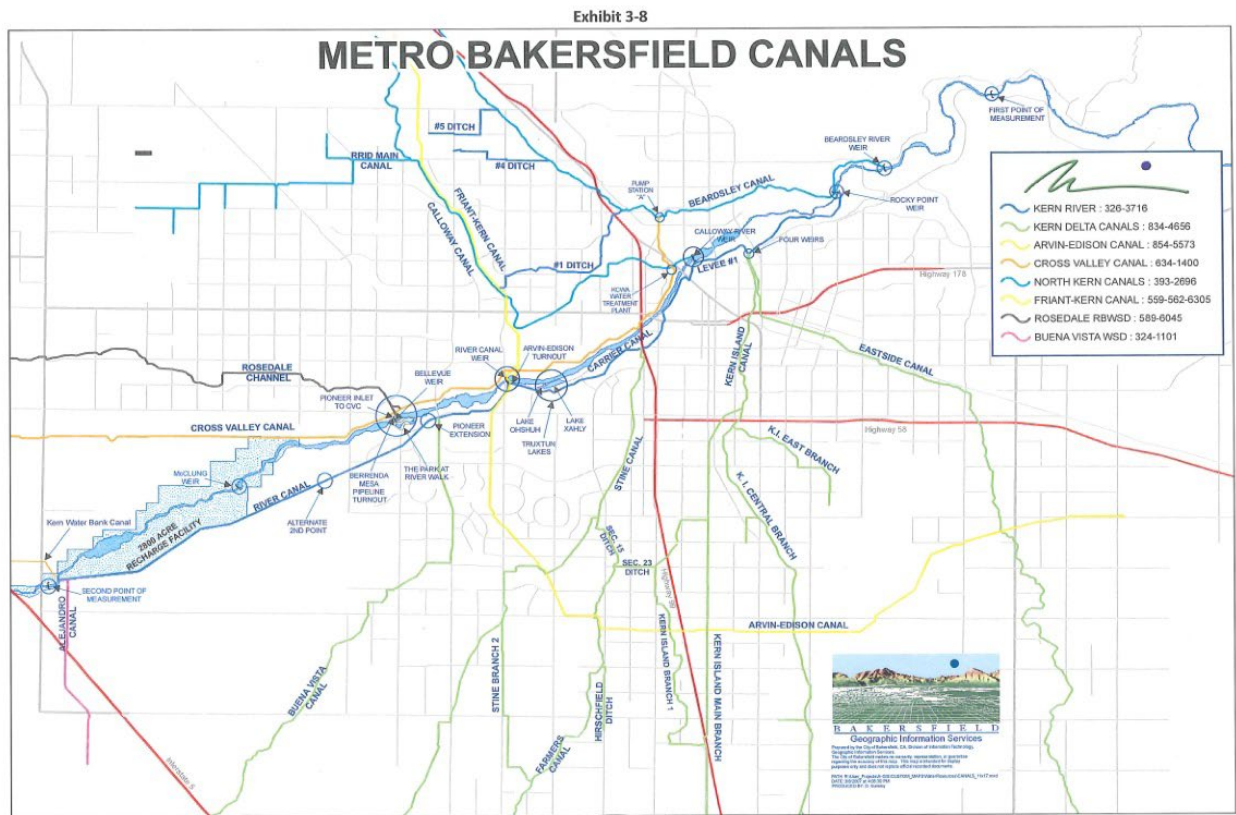
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1 **I. INTRODUCTION**

2 The City of Bakersfield (“City”) diverts water from the Kern River through its operation of six  
3 diversion structures or weirs on the Kern River: the Beardsley Weir, the Rocky Point Weir, the  
4 Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir (hereinafter the  
5 “Weirs”). See Exhibit 1 to Dec. of Adam Keats (“Keats Dec.”), reproduced below:  
6

7 The City fully or partly owns each of the Weirs. The City solely operates the Weirs, either on its



19 own behalf and/or on behalf of several contracting water districts.

20  
21 The Weirs are all in excess of six feet in height, and therefore are all dams (Water Code, §  
22 6003) subject to Fish and Game Code, section 5937. In almost all years, excepting years with  
23 exceptionally high flows, the City’s operation of the Weirs diverts water in quantities such that  
24 sufficient water does not exist to keep in good condition any fish that may be found below all of the  
25 Weirs. In the vast majority of years, the Kern River is a bleak, dry and dusty riverbed devoid of fish.  
26  
27  
28

1 This year is different. As of the filing date of this motion, snowmelt from the High Sierra  
2 continues to flow down the Kern River (“River”) in such quantity that the City’s diversions—as  
3 excessive as they are in most years—have not yet dewatered the River. As of the date of the filing of  
4 this motion, sufficient flows exist below each Weir to keep in good condition any fish that exist in the  
5 River. An injunction is required to preserve the status quo to ensure the City provides sufficient bypass  
6 to keep fish existing below the Weirs in good condition. Failure to provide sufficient bypass will result  
7 in fish being killed and their habitat destroyed in clear violation of the law.

8  
9 The relief sought is narrowly focused. It does not seek to change the City’s management of the  
10 Kern River allocations, but only to restrain the City from diverting water that is required to keep in  
11 good condition the fish that currently exist below each of the Weirs, a clear and unequivocal dictate of  
12 California law. (See *infra*: Fish & G. Code, § 5937; *National Audubon Society v. Superior*  
13 *Court* (1983) 33 Cal.3d 419 (“*Audubon*”); *Cal. Trout, Inc. v. State Water Resources Control Bd. et al.*  
14 (1989) 207 Cal.App.3d 585, 626 (“*Cal. Trout I*”).)

15  
16 Fish exist in the Kern River, as demonstrated in the declarations in support of this Motion. The  
17 evidence proves that the City’s diversions, if allowed to continue in their normal course, will  
18 inevitably result in the drying of reaches of Kern River. Fish will be killed and their habitat destroyed,  
19 causing incalculable damage to the public trust.

20 The title to and property in the fish within the waters of the state are vested in the state of  
21 California and held by it in trust for the people of the state. (*People v. Monterey Fish Products Co.*  
22 (1925) 195 Cal. 548; *People v. Stafford Packing Co.* (1924) 193 Cal. 719.) Fish and Game Code,  
23 section 1600 provides: “The Legislature finds and declares that the protection and conservation of the  
24 fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property  
25 of the people and provide a major contribution to the economy of the state, as well as providing a  
26 significant part of the people’s food supply; therefore their conservation is a proper responsibility of  
27 the state.”  
28

1 The relief sought by Plaintiffs would collaterally address many of the City's violations of its  
2 duties under the Public Trust Doctrine, by reducing much of the harm the City's diversions of Kern  
3 River flows would otherwise cause to trust resources, including the River, its fish, birds, and its  
4 riparian habitat, as well as the recreational and aesthetic uses of the River by the greater Bakersfield  
5 community.

6 Section 5937 of the Fish and Game Code states: "The owner of any dam shall allow sufficient  
7 water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to  
8 pass over, around or through the dam, to keep in good condition any fish that may be planted or exist  
9 below the dam." (Fish & G. Code, § 5937; See *Cal. Trout I.*, *supra*, 207 Cal.App.3d 585, 626.)

10 Plaintiffs are extremely likely to succeed on the merits of their action. The chronically dry  
11 riverbed below each of the City's Weirs is prima facie evidence of the City's ongoing violation of  
12 section 5937 and of the City's violations of its duties under the Public Trust Doctrine. Such plain  
13 violations of clear legal mandates are given great weight in the Court's balancing of interests when  
14 considering whether to issue an injunction, leaving minimal weight, if any, to the City's interest in  
15 continuing its destructive dewatering of the Kern River. But even if the City's interests were given  
16 some consideration, they would be minimally impacted by the requested injunction: the City can  
17 change the point of diversion to a downstream location for all or most of the water it currently diverts,  
18 closer to the River's natural terminus, thereby providing commercial benefit without unreasonable  
19 harm to the public trust.

20 There is no reason for the City to be permitted to sacrifice the Kern River and its fish  
21 populations through its operation of the Weirs, and there is no reason for this injunction not to issue.

## 22 II. STANDARD OF REVIEW

23 Section 526 of the Code of Civil Procedure provides several grounds on which a court may  
24 grant an injunction, including: "(1) When it appears by the complaint that the plaintiff is entitled to the  
25  
26  
27  
28

1 relief demanded, and the relief, or any part thereof, consists in restraining the commission or  
2 continuance of the act complained of, either for a limited period or perpetually; (2) When it appears by  
3 the complaint or affidavits that the commission or continuance of some act during the litigation would  
4 produce waste, or great or irreparable injury, to a party to the action; ... (4) When pecuniary  
5 compensation would not afford adequate relief; [or] (5) Where it would be extremely difficult to  
6 ascertain the amount of compensation which would afford adequate relief.” (Code Civ. Proc., § 526,  
7 subds. (a)(1), (2), (4), and (5).)

8  
9 Code of Civil Procedure, section 527 states in the pertinent part: “(a) A preliminary injunction  
10 may be granted at any time before judgment upon a verified complaint, or upon affidavits if the  
11 complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist  
12 therefor.” (Code Civ. Proc., § 527, subd. (a).)

13 “[T]he decision to grant a preliminary injunction rests in the sound discretion of the trial court.”  
14 (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69, citing *Continental Baking Co. v. Katz* (1968)  
15 68 Cal.2d 512, 527.) The superior court balances two factors when considering such a request: (1) the  
16 likelihood that the plaintiff will prevail on the complaint/petition, and (2) the interim harm that the  
17 plaintiff will face if injunctive relief is denied as compared to the harm that the respondent will face if  
18 the injunction is granted. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d at p. 69; *Smith v. Adventist*  
19 *Health System/West* (2010) 182 Cal.App.4th 729, 749.) The greater the plaintiff’s showing on one  
20 factor, the less need be shown on the other (so long as the court finds some possibility that the plaintiff  
21 will prevail). (*Butt v. State* (1992) 4 Cal.4th 668, 678; *SB Liberty, LLC v. Isla Verde Ass’n, Inc.* (2013)  
22 217 Cal.App.4th 272, 280.)

23  
24  
25 The language of Fish and Game Code, section 5937 is clear, plain and unambiguous, and the  
26 Legislature is presumed to mean what it said. (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th  
27 966, 972; *Cal. Trout I, supra*, 207 Cal.App.3d 585, 599.) “Compulsory compliance with a rule  
28 requiring the release of sufficient water to keep fish alive necessarily limits the water available for



1 appropriation for other uses. Where that affects a reduction in the amount that otherwise might be  
2 appropriated, [section 5937] operates as a legislative choice among competing uses of water.” (*Cal.*  
3 *Trout, I, supra*, 207 Cal.App.3d at p. 601; Wat. Code, §§ 1243 and 106.)

4 Under section 5937, sufficient water must be maintained in streams “... to reestablish and  
5 maintain the fisheries which existed in them prior to its diversion of water.” (*California Trout, Inc. v.*  
6 *Superior Court* (1990) 218 Cal.App.3d 187, 193 (“*Cal. Trout II*”). Remedy can be accomplished by a  
7 simple reiteration of the statutory directive without quantification of the amount of water required to  
8 satisfy the direction. (*Cal. Trout II, supra*, 218 Cal.App.3d at p. 195.) The City has the duty to  
9 determine what is sufficient for supporting the life cycle needs of the existing fish. (*Sierra Club v.*  
10 *California Bd. of Forestry* (1991) 234 Cal.App.3d 299.)

12 “Any consideration to determine the amount of water necessary to comply with the Fish and  
13 Game Code can be addressed by ‘means of interim judicial relief.’” (*Cal. Trout II., supra*, 218  
14 Cal.App.3d at p. 200.) A good faith initial interim estimate of sufficient bypass flow will need to be  
15 properly monitored and measured. (Cal. Code Regs. tit. 23 § 931-937.) The interim estimate of  
16 sufficient flow must be adjusted over time guided by: credible science (Fish & G. Code, § 33); eco-  
17 system-based management (Fish & G. Code, § 43); and adaptive management. (Fish & G. Code, §  
18 13.5.)

### 20 **III. FACTUAL BACKGROUND**

21 The City owns or co-owns, and solely operates, six Weirs in the Kern River channel as it runs  
22 through the City. (Dec. of Adam Keats, Ex. 8, pp. 4-5 [“Request for Admission No. 4: Do you ADMIT  
23 that Bakersfield is an owner of the Beardsley Weir, Rocky Point Weir, Calloway Weir, River Canal  
24 Weir, Bellevue Weir, and McClung Weir? Response to Request for Admission No. 4: [Objection]  
25 Subject to and without waiving the foregoing objection, Bakersfield responds: Admit.”; Keats Dec.,  
26 Ex. 2, p. 0001019 [“[the City] assumed all rights, duties, and obligations with regard to the operation  
27  
28

1 of the Kern River, the diversion of water into the headgates and canals off the river, and the record  
2 keeping function for the river.”]; Keats Dec., Ex. 7, ¶ 30; Keats Dec., Ex. 3, pp. 0000379, 0000404;  
3 Keats Dec., Ex. 4, pp. 11-16, 44, (demonstrating ownership of Beardsley Weir, River Canal Weir,  
4 Bellevue Weir, and McClung Weir]; Keats Dec., Ex. 5, pp. 5-6 (demonstrating ownership of Rocky  
5 Point Weir); Keats Dec., Ex. 6 (demonstrating ownership of Beardsley Weir and Calloway Weir); see  
6 also Keats Dec., Ex. 1.)

7  
8 The City diverts Kern River water through its operation of these Weirs on behalf of area water  
9 districts and on its own behalf. (Keats Dec., Ex. 2, pp. 0001019-1020.) The result is the near-total  
10 dewatering of the Kern River, particularly below the Calloway Weir. Since the mid-20th Century, “the  
11 vast majority of the flow of the Kern River between First Point and the Calloway Weir has been  
12 diverted away from the River, for agricultural use, resulting in a dry riverbed downstream of the  
13 Calloway Weir throughout most of the year.” (Keats Dec., Ex. 3, p. 0000377)

14  
15 Only “during very wet, high-flow conditions” does water usually flow in the river channel  
16 below the Calloway Weir. (Keats Dec., Ex. 3, p. 0000377; Ex. 7, p. 0000603, ¶¶ 68-69.) Before 2023,  
17 water was diverted to the California Aqueduct Intertie, which lies past the McClung Weir (the furthest  
18 downstream of the City’s Weirs), on only seven occasions since the Intertie was constructed. (Keats  
19 Dec., Ex. 3, p. 0000416.)

20  
21 This year, 2023, has been a very-high-flow year; high precipitation levels during the past winter  
22 and spring resulted in deep snowpack and very high River flows. (Dec. of William McKinnon) Despite  
23 the City’s continued operation of the Weirs throughout 2023, sufficient flows have existed below each  
24 Weir to enable the River to flow past all of the City’s Weirs. (Dec. of Matthew Mayry, ¶ 8; Dec. of  
25 Harry Love, ¶ 6; Dec. of Kelly Damian, ¶ 4).

26  
27 On July 27, 2023, fish were observed and videotaped in a reach of the River upstream of the  
28 City, between the Rocky Point Weir and the Calloway Weir. (McNeely Dec., ¶ 4, Exs. 1, 2.) Expert  
opinion is that they are likely California hitch, a native species. (Dec. of Peter Moyle, ¶ 6, 8.) On July

1 27, 2023, fisherman Bill Ritchey caught a fish in the same reach of the River. (McNeely Dec., ¶ 7, Ex.  
2 3.) Expert opinion is that the fish was a 1-2 years old adolescent large-mouth bass in good condition.  
3 Bass is a common and popular California sport fish. (Dec. of Peter Moyle, ¶ 6, 8.)

4 On August 7, 2023, fish were observed in a reach of the River downstream of the City, between  
5 River Canal Weir and Bellevue Weir. (McNeely Dec., ¶ 9, Ex 4.) On August 5, 2023, dozens of fish  
6 were observed jumping further downstream, between the Allen Road and Stockdale Highway bridges,  
7 downstream of the Bellevue Weir. (Damian Dec., ¶ 5, Exs. 1, 2; Dec. of Peter Moyle, ¶ 7, 8)

#### 9 **IV. ARGUMENT**

##### 10 **A. Plaintiffs Are Likely to Succeed on the Merits.**

11 The first factor to be balanced by the Court in considering a request for preliminary injunctive  
12 relief is the likelihood of Plaintiffs prevailing on the merits. (*IT Corp. v. County of Imperial, supra*, 35  
13 Cal.3d at p. 69.) As demonstrated below, Plaintiffs make an extremely strong showing that they will  
14 succeed on their claim that the City has and continues to violate section 5937 of the Fish and Game  
15 Code: (1) The City owns or partly owns each of the six Weirs on the Kern River named above, and  
16 controls the operation of each of them; (2) the City regularly diverts water from some or all of the  
17 Weirs in amounts that do not leave sufficient water in the River to keep in good condition fish that  
18 exist in the River below each Weir; and (3) fish currently exist in the River below the Weirs owned  
19 and controlled by the City. Plaintiffs will clearly be able to prove each of these facts, demonstrating a  
20 prima facie violation of Fish and Game Code, section 5937 and thus likely succeed on the merits of  
21 this claim.  
22  
23

##### 24 **1. The City Owns and/or Co-Owns, and Solely Operates, Each of the Weirs.**

25 The City owns and/or co-owns, and solely operates, each of the Weirs that are the subjects of  
26 this action: the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the  
27 Bellevue Weir, and the McClung Weir. (Keats Dec., Ex. 8, pp. 4-5; Keats Dec., Ex. 2, p. 0001019; Ex.  
28 3, pp. 0000379, 0000404; Keats Dec., Ex. 7, ¶ 30; Keats Dec., Exs. 4, 5, 6.)

1                   **2.     The City’s Operation of the Weirs Leaves Insufficient Flows to Keep Fish in**  
2                   **the River in Good Condition.**

3                   The City regularly diverts water from some or all of the Weirs in amounts that do not leave  
4                   sufficient water in the River to keep in good condition fish that exist in the River below each Weir,  
5                   evidenced by the fact that the River is dry below Rocky Point Weir in all but the highest-flow years.  
6                   (See Mayry Dec. at ¶ 3; McNeely Dec. at ¶ 3; Keats Dec., Ex. 3 at p. 0000377; Keats Dec., Ex. 2, pp.  
7                   0001019-1020; See *Request for Judicial Notice, filed herewith, and Exhibits thereto.*)

8                   **3.     Fish Currently Exist in the Kern River.**

9                   Fish have been observed, filmed, and caught in the stretches of the Kern River between Rocky  
10                  Point Weir and Calloway Weir, between Calloway Weir and the River Canal Weir, and below the  
11                  Bellevue Weir. (McNeely Dec., ¶¶ 4, 7, 9, Exs. 1, 2, 3, 4; Damian Dec., ¶ 5, Exs. 1, 2.) If the water is  
12                  removed from the River, fish in these locations will not continue to exist in good condition. (Dec. of  
13                  Peter Moyle, ¶ 8.)

14                  **B.     The Harm Plaintiffs Will Face if Relief is Denied Is Greater Than the Harm the**  
15                  **City Will Face if Relief is Granted.**

16                  The second factor to be balanced by the Court in considering a request for preliminary  
17                  injunctive relief is a comparison between the harm that Plaintiffs will face if injunctive relief is not  
18                  granted versus the harm that the City will face if the injunction is granted. (*IT Corp. v. County of*  
19                  *Imperial, supra*, 35 Cal.3d 63 at p. 69.) Given the strong likelihood of Plaintiffs’ success on the merits,  
20                  the Court should not assign much weight to this factor, if any at all. (*Butt v. State* (1992) 4 Cal.4th 668,  
21                  678. *King v. Meese* (1987) 43 Cal.3d 1217, 1227 states: “[T]he more likely it is that plaintiffs will  
22                  ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does  
23                  not issue. This is especially true when the requested injunction maintains, rather than alters, the status  
24                  quo.”

25                  The harm sought to be avoided by this injunctive relief is harm to the public, making  
26                  inappropriate the balancing of only the parties’ interests. Herein the public interests must also be part of  
27  
28

1 the court's consideration. In a recently decided matter, the Fifth District Court of Appeal made this  
2 principle clear: "[R]igid application of the usual [balancing of only the parties' interests] would exclude  
3 harm to public interests from the balance of harm inquiry ... [however] ...the standard for granting  
4 injunctive relief involves balancing competing public interests - the harm if an injunction issues versus  
5 the harm if the [harmful act] is allowed to proceed. It is well established that when injunctive relief is  
6 sought, consideration of public policy is not only permissible but mandatory." (*Tulare Lake Canal Co.*  
7 *v. Stratford Pub. Util. Dist.* (F084228, Cal. Ct. App. (Fifth Dist.) 2023 WL 3860885, p. 12-13.)  
8

9 Thus, this Court's inquiry should start and stop with the strong showing by Plaintiffs of the  
10 likelihood of their success on the merits. However, if any balancing is performed, the great harm to the  
11 public interest and the State's clear expression of prioritizing the health and good condition of the fish  
12 in its rivers requires a finding in favor of Plaintiffs. The facts show that Plaintiffs *and the public* will  
13 suffer significantly greater harm if an injunction is denied than the City would if it were granted.  
14

### 15 **1. Plaintiffs Seek to Preserve the Status Quo.**

16 The general purpose of a preliminary injunction is to preserve the status quo pending a  
17 determination on the merits of the action. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)  
18 The current status quo is a flowing river with fish existing in good condition below the Weirs. This  
19 Motion thus seeks prohibitory, not mandatory, relief: preventing the City from taking an action that will  
20 change the status quo of the Kern River in violation of its duties under section 5937 and the Public  
21 Trust Doctrine.  
22

### 23 **2. Plaintiffs and the Public Will Suffer Great Harm if an Injunction Is Denied.**

24 If an injunction is denied, past conduct establishes that the City will divert water from the Kern  
25 River in amounts that will lead to the dewatering of the River, resulting in the killing of all fish and the  
26 destruction of their habitat. The Supreme Court has found this type of environmental injury to be  
27 "irreparable." "[T]he Supreme Court has instructed us that '[e]nvironmental injury, by its nature, can  
28 seldom be adequately remedied by money damages and is often permanent or at least of long duration,

1 i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor  
2 the issuance of an injunction to protect the environment.” (*Lands Council v. McNair* (9th Cir. 2008)  
3 537 F.3d 981, 1004, quoting *Amoco Prod. Co. v. Vill. of Gambell* (1987) 480 U.S. 531, 545.)

4 Plaintiffs do not seek to enjoin the City from all diversions; just diversions greater than required  
5 for the City to comply with its statutory mandate under Fish and Game Code, section 5937. The City  
6 can claim no right to diversions that would violate section 5937: “The right to water or to the use or  
7 flow of water in or from any natural stream or water course in this State is and shall be limited to such  
8 water as shall be reasonably required for the beneficial use to be served, and such right does not and  
9 shall not extend to the ... unreasonable method of diversion of water.” (California Constitution Article  
10 X, Section 2.)

12 Without sufficient flows to keep in good condition the fish in the Kern River, fish will not be  
13 able to sustain life and fishing will not be possible below the Weirs. (McNeely Dec., Exs. 1, 2, 3, and 4;  
14 Damian Dec., Exs. 1 and 2.) But it will not just be the fishermen and the fish who are harmed.  
15 Birdwatchers, including members of Plaintiff Kern Audubon Society who regularly use the river  
16 corridor for birdwatching, will be deprived of being able to view water-dependent species, and those  
17 species will be deprived of much-needed habitat. (Love Dec., ¶¶ 7-8.) The interactive relationship  
18 between a healthy aquatic environment and a sustaining avian community can be seen by the images of  
19 egrets and blue herons, two species that exist in part by capturing small fish, attached to the Love Dec.  
20  
21

22 **3. The City Can Deliver All or Most of the Water It Consumes and Is**  
23 **Contracted to Deliver to Other Agencies While Complying with Section**  
24 **5937.**

25 As set forth in Plaintiffs’ First Amended Complaint at ¶¶ 74-81, the end users serviced by the  
26 City’s existing diversions by the Weirs can be serviced from diversion facilities located downstream.  
27 The City could continue to divert the small amount of water it uses for municipal purposes at its current  
28 diversion locations, while agricultural beneficial users could take their deliveries downstream, suffering

1 no or very little loss of water delivered. There would be very little change to water diverters and the  
2 City would benefit from a living watercourse.

3 The River’s fish are not the only public trust interest engaged. Under the Public Trust Doctrine,  
4 the City may not divert water from the River without first “consider[ing] the effect of such diversions  
5 upon the interests protected by the public trust, and attempt, so far as is feasible, to avoid or minimize  
6 any harm to those interests.” (*Audubon, supra*, 33 Cal.3d 419, 426.) “All navigable waterways are held  
7 in trust by the state for the benefit of the public.” (*Id.* at p. 434.) Water Code, section 1243 provides in  
8 part: “The use of water for recreation and preservation and enhancement of fish and wildlife resources  
9 is a beneficial use of water.”  
10

11 Because of the present high flows of the Kern River, the people of Bakersfield are enjoying the  
12 other benefits of a living river. While human benefits of recreational enjoyment may be subjective  
13 compared to the objective “keep in good condition” standard for the protections of fish under section  
14 5937, the human public trust benefits of recreation are nevertheless also worthy of protection. The  
15 public’s right to use public trust waters for recreational purposes is well established. (*City of Los*  
16 *Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288, 291 (reversed on other grounds: *Summa*  
17 *Corp. v. California ex Rel. Lands Comm’n* (1984) 466 U.S. 198).)  
18

19 “The public’s right to use the navigable waters of this state are extremely broad and encompass  
20 the right to use rivers for all recreational purposes such as boating, swimming, fishing and hunting.  
21 (*Kern River Public Access v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1216 fn. 4 (citation  
22 omitted).) The public trust doctrine also protects the public’s right to use, enjoy and preserve the Kern  
23 River in its natural state and as a habitat for fish. (*Envtl. Law Found. v. State Water Res. Control Bd.*  
24 (2018) 26 Cal.App.5th 844, 857.)  
25

26 Without sufficient flow of water, residents, neighbors, and members of the greater Bakersfield  
27 community will be deprived of a healthy, living, breathing, flowing river with all its benefits,  
28 including a place to picnic and cool off (Mayry Dec., Ex. 1), a river to jump into from a rope swing

1 (Mayry Dec., Ex. 2), and a cool, natural and wild place to swim. (Mayry Dec., Ex. 3.) The community  
2 will not be able to witness and observe the magic of fish jumping and feeding in the River. (Damian  
3 Dec., ¶ 5.)

4 Postponing environmental action can permit bureaucratic and financial momentum to build  
5 irresistibly behind continued infringement of the public trust, “thus providing a strong incentive to  
6 ignore environmental concerns.” (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135,  
7 quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d  
8 376 at p. 395.) Delaying action until after the river has been dried again will "likely become nothing  
9 more than post hoc rationalizations to support action already taken" (*Laurel Heights, supra*, 47 Cal.3d  
10 at p. 394).

## 12 **V. CONCLUSION**

13  
14 The City has a clear statutory duty under Fish and Game Code, section 5937 to allow sufficient  
15 water to pass over, under, or through each of its Weirs to keep fish below those Weirs in good  
16 condition. The city also has a clear mandate under the Public Trust Doctrine to protect trust resources,  
17 including the Kern River and its fish, birds, and habitat.<sup>1</sup>

18 Accordingly, Plaintiffs request that this Court enjoin the Defendant City of Bakersfield and its  
19 officers, directors, employees and agents, and all persons acting on its behalf (collectively “the City”)  
20 from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir,  
21 the Bellevue Weir, and/or the McClung Weir in any manner that reduces river flows below a volume  
22 that is sufficient to keep fish downstream of said Weirs in good condition.  
23  
24  
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<sup>1</sup> For a comprehensive listing of public trust duties see Public Resource Code, section 6009.1.



1 DATED: August 10, 2023

LAW OFFICE OF ADAM KEATS, PC

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5 Adam Keats  
6 *Attorney for Bring Back the Kern, Kern River  
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8 Sierra Club, Center for Biological Diversity*

7 DATED: August 10, 2023

WATER AUDIT CALIFORNIA

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11 William McKinnon  
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