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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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,

v.

CITY OF BAKERSFIELD, and DOES 1 through 500,

Defendants and Respondents,

Case No. BCV-22-103220
Assigned for all purposes to Hon. Gregory Pulskamp

INTERVENOR-DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: October 13, 2023
Time: 9:00 a.m.
Dept.: 8

Complaint Filed: November 30, 2022
Trial Date: None Set

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Memorandum of Points and Authorities

I. Introduction

Intervenor-Defendants North Kern Water Storage District ("North Kern"), Kern Delta Water District ("Kern Delta"), Buena Vista Water Storage District ("Buena Vista"), Kern County Water Agency ("KCWA"), and Rosedale Rio-Bravo Water Storage District ("Rosedale") (collectively "Intervenor-Defendants") submit this Opposition to the Motion for Preliminary Injunction ("Motion") filed on August 10, 2023 by the Plaintiffs in this action. As discussed below, the Motion seeks an order against the City of Bakersfield ("City"), and any such order would not be binding on the Intervenor-Defendants but would have immense impact on them. On September 18, 2023, the Court sustained the City's demurrer on the grounds that the Intervenor-Defendants are necessary parties and must be named by the Plaintiffs in an amended pleading. As of the filing of this Opposition, that amended pleading has not been filed. Thus, these parties are styled as Intervenor-Defendants. Plaintiffs have created this procedural morass through their strategic decision to amend their original complaint to exclude the Intervenor-Defendants from this litigation, despite making a direct attack on their Kern River rights.

Plaintiffs' Motion for a Preliminary Injunction purports to ask the Court merely to "preserve the status quo" on the Kern River, which they define as "sufficient bypass to keep fish existing below the Weirs in good condition." (Motion at p. 6:5-6.) In reality, however, Plaintiffs are asking the Court to set aside the enormously complex set of court decrees, agreements, and other arrangements that provide for the daily operation of the Kern River (known as the "Law of the River") and to step in as the daily administrator of the river "until the conclusion of trial and any subsequent appeals."[1] (Plaintiffs' Proposed Order at p. 2.) That is not preserving the status quo. The status quo is the continued administration of daily operations according to the Law of the River.

The Proposed Order submitted by Plaintiffs would provide that the City be "prohibited from operating the [various diversion weirs on the Kern River] in any manner that reduces river

[1] As discussed below, this is not the proper scope of a preliminary injunction, which can only be effective through trial court judgment.

flows below a volume that is sufficient to keep fish downstream of said weirs in good condition." No specific flows are identified, nor any particular fish species. Without any doubt, such an ambiguous order would result in almost daily disputes that would require further court intervention.

While Plaintiffs' incorrect definition of the status quo and the ambiguous nature of the Proposed Order would each be sufficient grounds to deny the Motion, this Opposition also sets forth two further reasons. First, Plaintiffs have no likelihood of success on the merits, because the causes of action on which they base their Motion fail as a matter of law. Second, the balance of the harms requires that the Motion be denied. Plaintiffs have provided no substantial evidence of harm if it is denied, but if it is granted the results could be disastrous for Intervenor-Defendants and the entire Bakersfield area that relies on their diversions of Kern River water.

II. Factual Background

A. Kern River Hydrology

The Kern River system originates high in the Sierra Nevada Mountains and drains a large portion (about 2,074 square miles) of the Southern Sierras. (Venkatesan Decl., ¶ 3; Exh. 5.)[2] The flow of the Kern River's North Fork joins the South Fork at Isabella Dam and Reservoir, where it is impounded for purposes of flood control, conservation storage, and recreation. (*Id.*, Exh. 3, pp. 4–6.) The river then flows downstream through the canyon and into the eastern part of the City of Bakersfield. (*Id.* at ¶ 3.)

Records of the natural flow of the Kern River, measured and recorded daily at the "First Point of Measurement" have been maintained since the fall of 1893, providing a 128-calendar-year record of the Kern River. (*Id.* at ¶ 5.) The annual, natural flow is highly variable and unpredictable, ranging from a maximum of nearly 2.5 million acre-feet (1983) to a low of approximately 139,000 acre-feet (2015). (*Id.* at ¶ 6.) Kern River flows are highest during the spring snowmelt (April to July) and lowest during the fall and early winter (August to March). (*Id.* at ¶ 8.) It is anticipated that the extraordinary hydrologic conditions in the Kern River system

[2] For the Court's convenience, the parties opposing the motion have prepared a Joint Appendix of Exhibits, a hard copy of which will be lodged with the Court.

experienced in 2023 will be recorded as one of the three wettest years in Kern River history. (*Id.* at ¶ 9.)

B. The "Law of the River"

Each day, the natural flow of the Kern River is measured, apportioned, distributed for beneficial use, and recorded in accordance with a complex set of court decisions and agreements collectively known as the 'Law of the River,' which governs the daily storage and apportionment of water in the Kern River system. (Venkatesan Decl., ¶¶ 10–16.) When a Kern River right holder wants to exercise its Kern River rights, the process for diverting the water and conveying it into their boundaries is as follows: (1) the right holder notifies the City of Bakersfield's Hydrographic Unit staff of its intended diversions; (2) the City staff places a daily order with the USACE, who controls releases from Lake Isabella; and (3) the City staff diverts water from the River (via the Weirs) and operates the headgates of the pertinent canals to ensure that the right holder receives delivery of the ordered water. (Teglia Decl., ¶ 13.)

1. *Lux v. Haggin* (1886) and the Miller-Haggin Agreement (1888)

The first appropriations on the Kern River began at least as early as 1870, and in 1886 a controversy between appropriative and riparian claimants led to the landmark decision in *Lux v. Haggin* (1886) 69 Cal. 255. After the California Supreme Court's remand for a new trial, the parties settled their remaining disputes in the 1888 "Contract and Agreement between Henry Miller and others of the first part, and James B. Haggin and others of the second part," or "Miller-Haggin Agreement" ("MHA"). (Exh. 1.) The MHA provides that the flow of the river be measured at two points of measurement, known as "First Point" and "Second Point", and apportions the natural flow of the river based on those measurements. In the months of March through August ("Miller-Haggin season"), all flows above 300 cubic feet per second ("cfs")[3] are divided each day, with one third of the flow at First Point (undiminished by losses) apportioned to the parties known as the "Second Point Parties" (i.e., Buena Vista) and the remaining two thirds apportioned to the "First Point Parties" (i.e., City of Bakersfield, North Kern, and Kern

[3] The first 300 cfs are apportioned to the "Kern Island 1st" right, which is held by Kern Delta Water District.

Delta). From September to February ("Non-Miller-Haggin season"), the majority of the flow is apportioned to the First Point Parties, with nuances not relevant to this Motion. (Exh. 1, pp. 8–11.) The MHA has been amended periodically, but the basic structure of the original MHA remains the foundation of the "Law of the River."

2. The Shaw Decree (1900)

In 1900, an *inter se* dispute among the First Point Parties resulted in the judgment in *Farmers Canal Co., et al. v. J.R. Simmons, Henry Miller, et al.,* which is known as the "Shaw Decree" after the author, Judge Lucien Shaw. (Exh. 2.) The Shaw Decree confirmed the apportionment of First Point water as between the different canal rights and confirmed the MHA, including both the order of priority and the rate of flow to which each right is entitled consistent with the MHA. (*Id*. at pp. 2–11, 19–20.) Those diversion amounts and priorities are reflected in the daily Flow and Diversion Records prepared by the City of Bakersfield to record the distribution, diversion, and use of Kern River water. (Exh. 9.)

3. Kern River Water Rights and Storage Agreement (1962)

In 1962, the First Point and Second Point parties entered into the "Kern River Water Rights and Storage Agreement" with other historic diverters north of Highway 46 ("Lower-River Parties", now the Kern County Water Agency). (Exh. 3A.) That agreement provides that certain flows and rights of storage be apportioned to Lower-River Parties in January through March when the cumulative natural flow exceeds 250,000 acre-feet and in April through July when the cumulative natural flow exceeds 600,000 acre-feet (or 550,000 acre-feet in a year following a year in which the April-July flow equals or exceeds 600,000 acre-feet). (*Id.* at pp. 2–3.)

4. Lake Isabella Water Storage Contract (1964)

Following construction of the Lake Isabella Dam and Reservoir, the United States entered into a permanent contract with certain water agencies (i.e., successors-in-interest to parties to the MHA, Shaw Decree, and other rights to use Kern River water) for the purposes of flood control (under the direction of the United States Army Corps of Engineers), conservation storage, and recreation. (Exh. 3, pp. 4–6.) That agreement incorporated the separate "Kern River Water Rights and Storage Agreement" discussed above as well as the "Agreement for Establishment and

Maintenance of Minimum Recreation Pool of 30,000 Acre-Feet in Isabella Reservoir" between the water districts and the County of Kern. (Exhs. 3A, 3B.) These Kern River interests agreed to pay the United States Four Million Five Hundred Seventy-Three Thousand Dollars ($4,573,000.00) for the right to use storage capacity in Lake Isabella, in exchange for "the perpetual right to the exclusive irrigation use of the storage capacity of the Project." (Exh. 3, pp. 7–8.)

5. Bakersfield's Acquisition of Water Rights (1976)

Prior to 1976, the Law of the River was administered by the Kern County Land Company and then by its successor-in-interest, Tenneco West, Inc. In 1976, Bakersfield first acquired Kern River rights in a contract with Tenneco West, Inc., which confirmed that Bakersfield's purchase of water assets was "subject to the terms, conditions, restrictions and reservations set forth in or arising from the instruments listed in Exhibit A." (Stroud Decl., ¶ 5, Exh. 4, p. 11.) The "Exhibit A" referenced in Agreement 76-36 lists a large number of deeds, contracts, decrees, judgments, and other instruments by which Bakersfield is bound, including the MHA (as amended), the Shaw Decree, the 1952 Agreement with North Kern discussed below, the 1961 Kern River Water Service Agreement with Rosedale discussed below, and the 1964 Lake Isabella Water Storage Contract (which includes both the incorporated 1962 Water Rights and Storage Agreement, and 1963 Lake Isabella Recreation Pool Agreement.) (*Ibid.*)

C. First Point Parties

The First Point Parties are the successors-in-interest to the "parties of the second part" in the MHA, holders of various senior pre-1914 appropriative rights.[4] The current First Point Parties are Kern Delta, North Kern, and Bakersfield. Bakersfield intends to separately oppose the Motion.

1. Kern Delta Water District

Kern Delta is a California Water District organized and operating under the California

[4] Pre-1914 appropriative rights are "senior" water rights that pre-date the effective date of the Water Commission Act in December 1914 and the State Water Resources Control Board's ("SWRCB") permitting authority over water diversions. A surface water diverter with a pre-1914 appropriate right does not need a SWRCB permit or other approval from the SWRCB.

Water Code. (Teglia Decl., ¶ 2.) Kern Delta's service area covers approximately 129,000 acres of land in Kern County, situated south of the City of Bakersfield, with some overlay of the city. (*Id*. at ¶ 3.) Kern Delta primarily supplies water for agricultural beneficial uses on approximately 90,000 acres of land within its boundaries. (*Id*. at ¶ 4.) Additionally, Kern Delta supplies water (in the form of recharged groundwater) to domestic water purveyors who serve disadvantaged communities within Kern County. (*Id*. at ¶¶ 4, 18, 22.)

Kern Delta acquired its Kern River water rights in 1976 by purchase from the City of Bakersfield. (*Id*. at ¶¶ 2, 6.) Kern Delta's Kern River water rights are commonly referred to as the Kern Island 1st, Kern Island 2nd, Buena Vista 1st, Buena Vista 2nd, Stine, and Farmers rights, after the canal companies that previously held them. (*Ibid*.) Following extensive litigation that ended in the early 2000's, Kern Delta's water rights were adjudicated and Kern Delta was left with what is referred to as its "Preserved Entitlement." (*Id*. at ¶¶ 7, 8.) Kern Delta's Preserved Entitlement includes the following pre-1914 Kern River appropriative rights:

1. **Kern Island 1st** – first 300 cubic feet per second ("cfs") from the Kern River.
2. **Buena Vista 1st** – up to 80 cfs starting at a river stage of 330.5 cfs.
3. **Stine** – up to 150 cfs starting at a river stage of 550.5 cfs.
4. **Farmers** – up to 150 cfs starting at a river stage of 730.5 cfs.
5. **Buena Vista 2nd** – up to 90 cfs starting at a river stage of 2,426.5 cfs.
6. **Kern Island 2nd** – up to 56 cfs starting at a river stage of 3,106.5 cfs.

Following the aforementioned forfeiture litigation, some of these rights include caps in certain months. (*Id*. at ¶ 8.) Kern Delta also has rights to store and regulate water in Lake Isabella. (*Id*.at ¶ 12.)

Kern Delta's facilities include primary and lateral canals (and related facilities such as turnouts) that are used in conveying water from the Kern River into and throughout the District's service area for beneficial use. (*Id*. at ¶¶ 9, 10.) Kern Delta also has an ownership interest in Rocky Point River Weir. (*Id*. at ¶ 9.) Additionally, Kern Delta has approximately 1,000 acres of groundwater recharge facilities that it uses as part of its local groundwater management efforts. (*Id*. at ¶ 11.)

2. North Kern Water Storage District

North Kern is a California Water Storage District organized to develop, operate, and manage a water storage, distribution, and delivery project for the public purpose of providing water for irrigation of lands within its boundaries. (Hampton Decl., ¶ 2.) The District is located in the region north of the Kern River on the eastern side of the southern San Joaquin Valley. (*Id*. at ¶ 3, Exh. 20.)

Following its formation and the adoption of its public water project, in 1952 North Kern entered into an agreement entitled the "Agreement for Use of Water Rights" ("1952 Agreement") with the Kern County Land Company, providing North Kern with the perpetual right to divert, transport, and use the Kern River water accruing to certain First Point water rights, listed by name, priority date, and quantity (given in cubic feet per second) in the 1952 Agreement. (*Id*. at ¶¶ 4–5, Exhs. 16, 21–22.) Additionally, North Kern is a party, on its own behalf and as representative for the First Point Parties, to the three agreements which govern the daily management of Isabella Reservoir. (*Id*. at ¶ 7, Exh. 3.) As detailed below, the record of North Kern's diversion and use of Kern River water for irrigation and groundwater replenishment has been maintained consistently for over 70 years. (*Id*. at ¶¶ 9–24.)

The Motion incorrectly represents to the Court that "City owns and/co-owns, and solely operates, each of the Weirs that are the subjects of this action: Beardsley Weir … Calloway Weir." (Motion, p. 11.)[5] At the time of filing the Motion, Plaintiffs were aware that the City's June 6, 2023 response to Request for Admission No. 4 was incorrect, because it was previously provided copies[6] of certified and recorded quitclaim deeds from the City to North Kern proving that title of the Beardsley River Weir and Calloway River Weir and all appurtenances are owned by North Kern. These conveyances were made in compliance with a separate contract with North

[5] The Motion relies on a June 6, 2023 response to Request for Admission No. 4 (Keats Decl., Exh. 8), in which the City inadvertently but **incorrectly** "admitted" to ownership of the Beardsley and Calloway Weirs. While the City does hold certain capacity, operational, and financial interests relating to its use of the Beardsley and Calloway Weirs and Canals, it does not **own** the Beardsley Weir or the Calloway Weir.

[6] North Kern provided Plaintiffs these certified copies of the recorded quitclaim deeds on May 26, 2023 in response to their May 5, 2023 public records request. (Stroud Decl., ¶ 4)

Kern, known as Agreement 76-89, entered into between North Kern and Bakersfield after the execution of Agreement 76-36. (Exh. 17, pp. 17–20.) Specifically, the February 28, 1978 "Quitclaim of Canal Easements, Including Certain Appurtenances Thereto and Interests in Real Property" conveyed property to North Kern including "the Beardsley Main Canal … together with all appurtenances thereto, including but not limited to … the Beardsley River Weir" and "the Calloway Canal, Central Division … together with all appurtenances thereto … including but not limited to … the Calloway River Weir." (Exh. 18.[7]) Although Bakersfield continues to operate these weirs, these deeds provide that it does so as "agent of North Kern." (*Ibid*.) The City has no discretion to operate these facilities inconsistent with North Kern's title and directions nor contrary to the governing "law of the river."

D. Second Point Party: Buena Vista Water Storage District

Buena Vista is a California Water Storage District organized and existing under the California Water Storage District Law. (Ashlock Decl., ¶ 3.) The service area of Buena Vista is located entirely within Kern County, California, and encompasses approximately 50,000 acres, including the Buttonwillow Service Area located around the community of Buttonwillow, California and the Maples Service Area located southwest of Bakersfield, California. (*Id.* at ¶ 4.) As a Water Storage District, Buena Vista's primary purpose is to provide water to the lands within its boundaries. (*Id.* at ¶ 3.) Formed in the 1920s, Buena Vista has consistently relied on the variable flows of the Kern River to meet the demands of its landowners. In addition to surface deliveries, Buena Vista utilizes its water supplies to recharge the groundwater within, and on land adjacent to, its boundaries in compliance with SGMA and for the beneficial use of the community of Buttonwillow, and homes and farms within its boundaries. (*Id.* at ¶ 5.)

Buena Vista is the successor-in-interest to the "parties of the first part" in the MHA, referred to as the Second Point rights. (*Id.* at ¶ 6.) Under the terms of the MHA, the Second Point water is to be provided to the Second Point diverters at the Second Point of Measurement

[7] On July 16, 1980 a "Correctory Quitclaim of Canal Easement, Including Certain Appurtenances Thereto and Interests in Real Property" was executed, delivered and recorded confirming the conveyance of title of the Calloway River Weir to North Kern. (Exh. 19.) That instrument corrected for an error in the original deed language that is not relevant here.

"without diminution by reason of percolation or seepage of any interference whatsoever of or by [First Point divertors]." (Exh. 1.) This is a pre-1914 appropriative water right, as acknowledged by Petitioners and through the various orders, decrees, and agreements forming the Law of the River. Buena Vista's predecessors-in-interest caused the formation of Buena Vista and then, in November of 1927, conveyed the water rights and related distribution facilities to the newly formed district, including the vast majority of the Second Point Kern River water right. (Exh. 35.) Since that time, and continuously thereafter, Buena Vista has put its Second Point Kern River entitlement to beneficial use for irrigation and replenishment of the underlying groundwater basin for subsequent use. (Ashlock Decl., ¶ 7.)

Given the highly irregular flows of the Kern River, water conveyance and storage facilities have been essential. (*Id.* at ¶ 8.) In fact, the MHA included provisions to allow Second Point parties to make better use of their allotments of water, providing for the parties to jointly pay for the construction of various structures to turn Buena Vista Lake into a more efficient storage reservoir. (Exh. 1.) These improvements included the construction of levees to deepen Buena Vista Lake for better storage, as well as constructing large canals to take water northwesterly for the irrigation of lands that today are in the Buena Vista boundary. (Ashlock Decl., ¶ 9.) This storage facility provided Miller & Lux with a more regular water supply, allowing them to capture the irregular flows of the Kern River in wet years, store them, and use the water in subsequent dry years. (*Id.* at ¶ 10.) Buena Vista also has storage rights in Isabella Reservoir under the Water Rights and Storage Agreement. (*Id.* at ¶ 11; Exh. 3A.)

Throughout its history, Buena Vista has expended enormous sums of money to maintain and improve its facilities, including the Second Point of measurement, miles of canals and pipelines, various weirs and turnouts, multiple groundwater recharge facilities, and recovery wells. (*Id.* at, ¶ 12.) Additionally, Buena Vista has acquired capacity rights in the River Canal and Kern Water Bank Canal. (*Id.* at ¶ 12.) Through these facilities, as well as facilities owned or operated by other parties, Buena Vista is able to make transfers and move water in a manner that reduces waste and losses while meeting the demands of the people within Buena Vista in both high flow and low flow Kern River environments. (*Id.* at ¶¶ 12–14.)

E. Lower River Party: Kern County Water Agency

KCWA is a special act district formed under Act 390 of the California Water Code Uncodified Acts. (See Deering's Ann. Water – Uncodified Acts, Act 390.) KCWA has broad powers associated with the development of water resources and water rights, including:

> (a) to appropriate and acquire water and water rights;
> (b) to store water in surface or underground reservoirs within or outside of the agency for the common benefit of the agency;
> (c) to conserve and reclaim water for present and future use within the agency;
> (d) to import water into the agency and to conserve and utilize, within or outside of the agency, water for any purpose useful to the agency or the member units thereof ….

(Stats. 1961, ch. 1003, West's Ann. Wat. – Appen., ch. 99, § 4.3.) KCWA also has specific powers to control and conserve flood waters by percolating the same into the soil. (*Id.*, § 4.1.)

KCWA's operations provide broad benefits to municipal, industrial, and agricultural water users throughout Kern County. (Bauer Decl., ¶ 2.) KCWA is the second largest State Water Project ("SWP") contractor and holds a contract with the California Department of Water Resources to receive approximately one-million acre-feet annually from the SWP. (*Id.* at ¶ 3.) KCWA has contracts with 13 local water districts throughout Kern County, called member units, to deliver SWP water. (*Id.* at ¶ 4.) KCWA's member units include: Belridge Water Storage District; Berrenda Mesa Water District; Buena Vista Water Storage District; Cawelo Water District; Henry Miller Water District; Kern Delta Water District; Lost Hills Water District; Rosedale-Rio Bravo Water Storage District; Semitropic Water Storage District; Tehachapi-Cummings County Water District; Tejon-Castac Water District; West Kern Water District; and Wheeler Ridge-Maricopa Water Storage District. KCWA manages and/or is a participant in multiple groundwater banking projects, including the Kern Water Bank (KWB), the Pioneer Project, and the Berrenda Mesa banking projects. (*Id.* at ¶ 5.)

In addition to its contractual right to water from the SWP, KCWA owns the Kern River "Lower River Right" ("LRR"). (*Id.* at ¶ 6.) KCWA purchased the LRR in 2001, for substantial consideration including $10,000,000 and the perpetual obligation to deliver 10,000 acre-feet of water annually to one of the sellers. (*Id.* at ¶¶ 6–7; Exh. 36.) The key operational details of the

LRR are found in the Kern River Water Rights and Storage Agreement of 1962. (Exh. 3A.) The 1962 Agreement built upon the earlier agreements and allocations between the First Point and Second Point diverters, and incorporated the rights of the "Lower River" diverters, which are referred to as the "Downstream Group" in the 1962 Agreement. At the time the 1962 Agreement was entered, the Downstream Group comprised Hacienda Water District and Tulare Lake Basin Water Storage District ("TLBWSD"). In 2001, KCWA purchased Hacienda Water District's interest in the LRR, which includes the right to perpetually lease the TLBWSD allocation. (Bauer Decl., ¶ 7; Exhs. 37–38.) Today, KCWA owns/controls the entire LRR, which also includes the right to rent storage space in Lake Isabella. (Exh. 3A, § 9.) There are additional terms, duties and conditions of the LRR, but its operational entitlement is found in the 1962 Agreement, which allocates Kern River flows accordingly. (Bauer Decl., ¶ 8.)

KCWA also owns and operates the Cross Valley Canal ("CVC"). (Bauer Decl., ¶ 9.) KCWA constructed the CVC in 1975 to convey SWP water from the California Aqueduct to Bakersfield and certain agricultural districts. (*Ibid.*) KCWA contracted with various water districts (the "CVC Participants"), for water deliveries, construction financing, and operation of the CVC. (*Ibid.*) The CVC Participants include various KCWA Member Units and Central Valley Project ("CVP") Friant contractors and CVP CVC contractors that receive Delta water supplies conveyed by the California Department of Water Resources. (*Ibid.*) The CVC consists of a partially concrete-lined (74,000 feet) and partially unlined (36,000 feet) canal extending 21 miles from the Greater Bakersfield Turnout, located upstream of Check 29 in the California Aqueduct, to a terminus just east of the siphon under-crossing of Golden State Avenue. (*Id.* at ¶ 10.)

Constructed by local water districts to bring a supplemental water supply into Kern County to compensate for groundwater overdraft and provide a surface supply of drinking water to metropolitan Bakersfield, the CVC makes direct deliveries and serves as the primary water conveyance facility for bringing high-flow water from the SWP into Kern County groundwater banking programs. (*Id.* at ¶ 11.) The entire capacity of the CVC is fully allocated to the existing CVC Participants. (*Ibid.*.) Additionally, the CVC can be operated in reverse flow, from east to west, to return banked groundwater or other water supplies to other lands within Kern County

via direct delivery to district turnouts and/or the California Aqueduct. (*Id.* at ¶ 12.)

F. Rosedale-Rio Bravo Water Storage District

Formed in 1959, Rosedale is a water storage district that encompasses about 44,000 total acres. (Bartel Decl., ¶ 4.) Rosedale is generally located west of the of the City of Bakersfield and north of the Kern River and the CVC. (*Id*., Exh. 39.) Approximately 30,000 acres of the land within Rosedale is developed to irrigated agriculture (more than one-half of which is planted to permanent crops), and most of the rest of the land within Rosedale is in residential, commercial, and industrial development. (*Ibid*.)

Rosedale owns and operates the Rosedale Headgate on the Kern River, from which it directly diverts water from the Kern River and into the District's primary conveyance facility, the Gooselake Canal. (Bartel Decl., ¶ 5, Exh. 39.) Water from the Gooselake Canal is delivered to landowners and recharge facilities located throughout the Rosedale area. (*Ibid*.) Kern River water is primarily delivered into Rosedale in order to recharge the groundwater basin to support overlying uses. (*Ibid*.) The Rosedale Headworks are located immediately adjacent to the Bellevue Weir, which is one of the weirs that is the subject of this Action. (*Ibid*.)

Prior to the formation of the district in 1959, lands within Rosedale historically depended on Kern River supplies that flowed into the district area and/or were recharged into the groundwater basin. (*Id*. at ¶ 6.) Since 1995 (and likely long before), the majority of supplies delivered into Rosedale's boundaries have come directly from the Kern River. (*Ibid*.)

Rosedale and the City's predecessor-in-interest to its Kern River rights entered into the Kern River Water Service Agreement (the "1961 Agreement") for the permanent sale and delivery of Kern River water and the furnishing of water transportation services to Rosedale. (*Id*. at ¶ 7; Exh. 40.) The parties to the 1961 Agreement recognized that "there is and for some years has been a shortage of water in Kern County, and because of such shortage, [Rosedale] needs an additional permanent source of water." (*Id*., p. 3, ¶ G.) The 1961 Agreement obligates the City to a minimum sale and delivery of 10,000 acre-feet of Kern River water to Rosedale, based upon a cumulative annual average. (*Id*., p. 3, ¶ 1.) The 1961 Agreement was later amended to provide Rosedale with rights to the delivery and acquisition of additional Kern River supplies. (Exh. 41.)

All Kern River water sold by the City to Rosedale under the 1961 Agreement shall be delivered to Rosedale at the Rosedale Headworks. (Exh. 40 at pp. 4–5, ¶ 1, subd. (c).)

Rosedale was also one of the original participants that funded the construction of the CVC in the 1970's. (*Id*. at ¶ 8, Exh. 42.) As a participant in the CVC and a signatory to certain agreements relating to the same, Rosedale possesses the right on a first priority basis to use its own designated capacity in the facility for itself and its assigns. (*Id*., Exh. 43 at ¶ 5, subd. (a).) Rosedale also has lower priority rights to use the capacity of other participants in the CVC. (*Id*. at ¶¶ 5–9.) The CVC was constructed for the primary purpose of conveying water off of the California Aqueduct through the Department of Water Resource's State Water Project. (*Id*., Exh. 43, second and third recitals.) The CVC has been (and remains) critical to Rosedale's receipt of SWP supplies under Rosedale's contract with KCWA. (*Id*. at ¶ 8.)

III. Plaintiffs' Motion Is Contrary to the Law Governing Preliminary Injunctions

A. The order Plaintiffs request is vague and impossible to enforce.

Plaintiffs seek a preliminary injunction that prohibits the City "from operating the [Weirs] in any manner that reduces river flows below **a volume that is sufficient to keep fish downstream of said weirs in good condition**." (Proposed Order, p. 2 [emphasis added].) The ambiguity of this language is sufficient reason to deny the Motion, because

> **[a]n injunction must be definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it.** An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application exceeds the power of the court. [Citations.]

(*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651 [emphasis added].) Put another way, an injunction must be "narrowly drawn" to give "reasonable notice" to the enjoined party of what conduct is prohibited. (*Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal.App.4th 1068, 1074 (quoting *Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 979).) An injunction that does not do so is "presumptively void." (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 859.) Plaintiffs assert that their requested "[r]emedy can be accomplished by a

simple reiteration of the statutory [i.e., Section 5937] directive without quantification of the amount of water required to satisfy the direction." (Motion, p. 9:6–9.) Plaintiffs cite *California Trout, Inc. v. Superior Court (1990)* 218 Cal.App.3d 187 ("*Cal Trout II*") for this conclusion, but that opinion does not support their position.[8] The court in that case does *not* hold (at Plaintiffs' page 195 pin cite or elsewhere) that an order or judgment enforcing Section 5937 can simply recite the language of the statute. On page 195 of *Cal Trout II*, the court discusses its opinion in *California Trout, Inc. v. State Water Resources Control Bd*. (1989) 207 Cal.App.3d 585 ("*Cal Trout I*")[9], and specifically the requirements of Section 5946[10] of the Fish and Game Code. *In the context of Section 5946*, the court states that " … the [SWRCB] regulations (Cal. Code Regs., tit. 23, § 782) sanction such a condition **on permits for the appropriation of water, and by analogy to licenses**, by a simple reiteration of the statutory directive without quantification of the amount of water required to satisfy the direction." (*Cal Trout II*, *supra*, 218 Cal.App.3d at p. 195 [emphasis added].) This statement is limited to the issue of reciting Section 5937's requirement in a SWRCB-issued permit or license as directed by Section 5946, and it does not address whether a court order or judgment enforcing Section 5937 can simply recite the

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[8] Plaintiff's also attribute the following quote to *Cal Trout II*, but Intervenor-Defendants have been unable to locate that specific language in the opinion:

> "Any consideration to determine the amount of water necessary to comply with the Fish and Game Code can be addressed by 'means of interim judicial relief.'"

Cal Trout II, *supra*, 218 Cal.App.3d at p. 200; cited at Motion, p. 9:12–15.) Similarly, Plaintiffs assert that "[a] good faith initial interim estimate of sufficient bypass flow will need to be properly monitored and measured." (*Id*. at p. 9:14–16.) However, the authority Plaintiffs cite (i.e., Cal. Code Regs., tit. 23, §§ 931–937) addresses *diversion* measurements and reporting to the State Water Resources Control Board.

[9] As discussed in Section IV.B.4 below, the *Cal Trout* cases do not address the application of Section 5937 on its own.

[10] Section 5946 applies in District 4 1/2, in Mono and Inyo Counties, and states in relevant part as follows:

> No permit or license to appropriate water in District 4 1/2 shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned upon full compliance with Section 5937. Plans and specifications for any such dam shall not be approved by the Department of Water Resources unless adequate provision is made for full compliance with Section 5937.

(Wat. Code, § 5946.)

requirement of the statute. Such an order or judgment would be so vague as to be unenforceable.

Here, the injunction sought by Plaintiffs would require the City to take a number of daily actions to ensure flows in the Kern River remain at "a volume that is sufficient to keep fish downstream of said weirs in good condition." (Proposed Order, p. 2.) However, 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."[11] The quoted standard is extremely vague and further definition is dependent on scientific information that is not before the Court. Thus, the critical issues of compliance with and enforcement of a preliminary injunction would be left to the guesses of the City and the Court. The Court would also be left in the position of overseer and constantly called upon to address disputes as to whether the City was complying with the proposed "follow the law" injunction. Courts decline to put themselves in such positions.

> When ruling on the demurrer [i.e., sustaining] to the first petition, the trial court stated: "But isn't that just such an open-ended remedy, where I say, 'Okay, I order you guys to follow the law,' and then what? You guys come back in two or three months and say, 'Judge, they're not following the law, they're not doing what you told them to do. The law says this and they're not following it.' [¶] I mean, it would be ongoing—I would be a receiver. I would be sitting on top of them—I'd be—I'd be reviewing everything they did, to make sure they're following the law."
>
> The trial court was right.

(*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22 ("*Monterey Coastkeeper*") [considering a writ petition to require the SWRCB to apply the public trust].) Therefore, in addition to the other reasons set forth herein for denying Plaintiffs' requested preliminary injunction, the Court cannot issue the injunction because it is

[11] Plaintiffs are expected to argue that "good condition" means " '... to reestablish and maintain the fisheries which existed in them prior to its diversion of water.' " (MPAs, p. 9:4–7.) But this equally ambiguous, qualitative standard is no more administrable than "good condition." There is no evidence before the Court or available to the City to allow a determination of the amount of water that would reestablish and maintain any fisheries, even assuming for the sake of argument that were the standard.

unenforceable.[12]

B. Plaintiffs mischaracterize the 'status quo.'

The purpose of a preliminary injunction is to "preserve the status quo …" (*Brown v. Pacifica Foundation, Inc.* (2019) 34 Cal.App.5th 915, 925.) Therefore, preliminary injunctions that are mandatory in character are rarely granted (only in "extreme cases") and are subject to much stricter scrutiny. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625.) Plaintiffs claim that the purpose of the proposed preliminary injunction is to "preserve the status quo pending a determination on the merits of the action" and that the relief they seek is prohibitory rather than mandatory in character. (Motion, p. 13:15–21.) Seeking to avoid this higher standard, Plaintiffs mischaracterize the 'status quo' relevant to this Motion:

> As of the date of the filing of this motion, sufficient flows exist below each Weir to keep in good condition any fish that exist in the River. An injunction is required to preserve the status quo to ensure the City provides sufficient bypass to keep fish existing below the Weirs in good condition. (*Id.*, p. 6:3–6.)

By characterizing the status quo as 'water in the river' rather than 'operations under the historic law of the river', Plaintiffs attempt to minimize the impact of what they are asking for. But whether a preliminary injunction is considered mandatory is determined not by the form of words but by the substance of the injunction. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446–447.) As described above, the operation of diversion infrastructure on the Kern River has been administered according to the law of the river on a **daily** basis for over 120 years.[13]

Each and every day, the total flow of the Kern River is measured (both natural flow and

[12] The order Plaintiffs are requesting is also beyond the scope of a "preliminary injunction." (Motion, p. 1; Proposed Order, p. 2.) Plaintiffs erroneously request that the Proposed Order "remain in place until the conclusion of trial *and any subsequent appeals*." (Proposed Order, p. 2.) A preliminary injunction is dissolved automatically upon final judgment. (*City of Oakland v. Superior Court* (1982) 136 Cal.App.3d 565, 569.)

[13] The daily measurement, apportionment and distribution of the natural flow of Kern River water at the First Point of Measurement in conjunction with the scheduling, orders, diversion, use, and reporting of Kern River operations in daily, monthly, and annual records of Kern River flow has been administered in a substantially similar manner beginning with the Miller-Haggin Agreement of 1888 up until the present. (Venkatesan Decl., ¶ 5.)

any requested release from storage in Isabella Reservoir) as well as all accretions into the Kern River downstream of Isabella Dam and Reservoir, water orders are obtained from each of the parties with rights to Kern River water for beneficial use, necessary adjustments are made to the essential diversion facilities (weirs, canals, etc.) to assure timely delivery of the amount of water requested for diversion, and then the actual flows, diversions, and use are reported in daily, monthly, and annual records. (Venkatesan, ¶¶ 10–16, Exhs. 8, 10.) Each day's operation, as detailed in a Kern River Operations record, is the combined result of a myriad of factors including the natural flow conditions, required operations of Isabella Dam and Reservoir, the sum of each of the independent decisions of each water user requesting Kern River water to satisfy beneficial uses (irrigation, municipal use, etc.) apportioned in accordance with their respective rights (water rights, contract rights, etc.) detailed in the court decision and agreements[14] governing the use of Kern River water, and the implementation of these requirements as reflected in each day's operation of Kern River facilities. (*Ibid.*) 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 to beneficially use Kern River water. (*Ibid.*) **That** is the status quo. The injunction Plaintiffs are requesting would require Bakersfield to disregard the law of the river by not making diversions according to the framework established in the MHA, the Shaw Decree, and other documents.[15] In *City of Pasadena v. City of Alhambra* (1946) 75 Cal.App.2d 91, 95–98 ("*Pasadena*"), the Court of Appeal held that such an injunction, prohibiting diversions of water under established rights, "affirmatively compels petitioner to surrender a substantial existing right" and is thus mandatory in character. (*Id.* at p. 98.)

[14] Including the California Supreme Court decision in *Lux v. Haggin* (1886) 69 Cal. 255, the 1888 Miller-Haggin Agreement (as amended), 1900 Shaw Decree, 1952 Agreement for Use of Water Rights, 1961 Kern River Water Service Agreement, 1962 Water Rights and Storage Agreement, 1963 Lake Isabella Recreation Pool Agreement, and the 1964 Lake Isabella Water Storage Contract, referred to as the "law of the river." (Exh. 1, 2, 3, 3A, 3B, 16, 40.)

[15] The City and Intervenor-Defendants have shown the Court that the City neither controls nor determines Kern River flows. It administers prescribed operations according to the daily conditions and legal requirements governing the Kern River. (*Ibid.*) Except with regard to its independent decisions limited exclusively to its separate Kern River water supply, the City's actions are mandatory not discretionary. (*Ibid.*)

Furthermore, though the 2023 Kern River conditions are exceptional, they are not representative of the average conditions on the Kern River that exist most years. (Venkatesan, ¶¶ 9, 17–21.) (See *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1184 [status quo means the last actual peaceable, uncontested status which *preceded* the pending controversy].) 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.

C. Plaintiffs' Motion is directed only to Bakersfield, which does not have the power to do what they are requesting the Court to order.

Another fatal defect of Plaintiffs' Motion is that it is not directed to all the affected parties. The Motion seeks to enjoin **Bakersfield** from operating the diversion weirs in a certain, undefined manner. But Bakersfield operates those diversion weirs not only under its own rights but also on behalf of other water right holders, acting as an agent for those parties. For instance, Bakersfield operates the Beardsley and Calloway Weirs as the "agent of North Kern." (Exh. 18.) "It is a cardinal principle of agency law that a principal who employs an agent always retains the power to revoke the agency." (*Woolley v. Embassy Suites, Inc.* (1991) 227 Cal.App.3d 1520, 1529.) Therefore, an injunction against Bakersfield would not be sufficient to actually prevent the diversions, as North Kern or another party for whom Bakersfield acts as agent could elect to make the diversions itself. An injunction does not prohibit the conduct of parties to whom the order is not directed. (*Kirby v. San Francisco Sav. & Loan Soc.* (1928) 95 Cal.App. 757, 759.) Therefore, by their strategic gamesmanship of leaving the water right holders themselves out of their lawsuit at the time they filed their Motion (and thus out of the Motion), Plaintiffs have rendered the injunction they are seeking futile.

IV. Plaintiffs Are Not Likely to Succeed on the Merits, Because Each of Their Claims Fails as a Matter of Law

In a motion for preliminary injunctive relief, the burden of proof is on the moving party to show all the elements required for an injunction, including the likelihood that they will succeed on the merits. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481 ("*O'Connell*"); *Anderson v. Souza* (1952) 38 Cal.2d 825, 843.) Plaintiff's Motion only addresses two theories:

the public trust doctrine and Fish and Game Code section 5937.[16]

A. Plaintiffs are not likely to succeed on their public trust claims, because a writ of mandate is not appropriate where a public agency has discretion.

Plaintiffs are not likely to succeed on their theory that Bakersfield has violated, or failed to the consider, the public trust doctrine. This theory will not succeed because they cannot even state a cause of action on that theory, for two reasons. First, Bakersfield does not have public trust duties with regard to its administration of the Kern River diversions. Second, neither a writ of mandate nor declaratory relief are appropriate to enforce the public trust doctrine.

1. The Public Trust Doctrine Does Not Apply to Bakersfield Under the Facts Alleged in the Complaint.

Plaintiffs assert, without any citation of authority, that Bakersfield "is a trustee for the public trust in all actions and decisions that include or implicate public trust interests." (FAC, ¶ 25.) The public trust doctrine requires the state to consider interests protected by the public trust in exercising its authority over public trust resources or making discretionary decisions that could impact public trust resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 444 ("*National Audubon*").) However, a public agency does not have public trust obligations simply because its actions may implicate public trust resources. Instead, the public trust doctrine imposes a trustee duty on a public agency when exercising regulatory or police power authority (1) to grant permission to an activity potentially impacting public trust resources (e.g., the State Water Resources Control Board ["SWRCB"] issuing water rights permits); or (2) as a trustee agency specifically designated to protect public trust resources potentially impacted by an activity (e.g. the California Department of Fish and Wildlife ["CDFW"]). Plaintiff Water Audit California has previously recognized the limited scope of the trustee duties under the public trust

[16] The other two statutory violations alleged in the FAC (Fish and Game Code sections 5901 and 5948), and the other two theories alleged in the FAC (unreasonable use and public nuisance), are not the basis of the Motion. Sections 5901 and 5948 and the nuisance theory are not even mentioned. The only mention of Article X, Section 2 of the California Constitution, which prohibits the unreasonable diversion and use of water, is a citation, without argument, made in support of the proposition that, "The City can claim no right to diversions that would violate section 5937." (Motion, p. 14.) For purposes of this Motion, therefore, the only claims at issue are the public trust claim and the claimed violation of Fish and Game Code section 5937.

doctrine.[17]

> To provide for the protection and administration of this resource there has developed the legal principle of a "public trust," whereby the **sovereign (or state)** is held to be a trustee for the public's interests. In California the elected representatives of the people have **delegated that responsibility to *two* trustee agencies**. The **State Water Resources Control Board** and its various subdivisions are responsible for the administration of water itself, and the **Department of Fish and Wildlife** has the duty to protect the life forms that inhabit the waters of the state. Both agencies enjoy prosecutorial discretion.

(RJN, Exh. 51, ¶ 4 [emphasis added].) In *National Audubon*, the California Supreme Court discussed how an agency's regulatory police power and/or statutory authority directly determines the scope of its public trust duties. The court explained the SWRCB's authority expanded over the years and specifically how the Legislature in the 1950's enacted various statutes addressing the SWRCB's authority over the appropriation of water, including requirements for the SWRCB to consider public trust resources. (*National Audubon*, *supra*, 33 Cal.3d at p. 444 [discussing Wat. Code, §§ 1243, 1243.5, 1257].) This expanded authority directly related to the scope of the SWRCB's public trust duties:

> Thus, the function of the Water Board has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters. **This change necessarily affects the board's responsibility with respect to the public trust. The board of limited powers of 1913 had neither the power nor duty to consider interests protected by the public trust; the present board, in undertaking planning and allocation of water resources, is required by statute to take those interests into account**.

(*Id.* at p. 444 [emphasis added].) Similarly, in *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349 ("*CBD*"), the court addressed the proper defendant in an action alleging a violation of the public trust doctrine. The plaintiffs sued the owners and operators of

[17] In another case involving a city water diverter with facts very similar to those before the Court, Plaintiff Water Audit California's counsel (on behalf of his client, then the director of Plaintiff Water Audit California) even stated that his client agreed that "the city is merely a water diverter, **not a trustee agency**." (RJN, Exh. 52, p. 1[emphasis added].)

wind turbines alleging that operation of the wind turbines injured raptors and other birds in violation of the public trust doctrine. (*Id.* at p. 1354.) The plaintiffs did not sue the public agency responsible for authorizing the operation of the wind turbines (i.e., the county with statutory approval authority) or the statutorily designated trustee agency responsible for protecting the allegedly impacted species (i.e., CDFW). In affirming dismissal of the action, the court stated as follows:

> The concept of a public trust over natural resources unquestionably supports **exercise of the police power by public agencies**. [¶] The interests encompassed by the public trust undoubtedly are protected by public agencies **acting pursuant to their police power and explicit statutory authorization**. [¶] … [¶] A challenge to the permissibility of defendants' conduct must be directed to the agencies **that have authorized the conduct**. (*CBD*, *supra*, 166 Cal.App.4that p. 1365–67, 1370 [emphasis added]; see also *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844 ("*ELF*") [County, with police power authority to regulate groundwater, has a public trust duty when it issues permits for construction of certain groundwater wells].)

Here, the Complaint focuses on Bakersfield's diversions of water from the Kern River pursuant to (1) its own water rights (purchased from a private corporation) and (2) the Intervenor-Defendants' water rights or contractual entitlements (based on Bakersfield's ownership or management of the Weirs).[18] (FAC, ¶¶ 2, 61, 62.) Plaintiffs describe how Bakersfield manages the Weirs pursuant to agreements associated with the purchase of its water right assets (and associated facilities) and the "law of the river," a series of agreements, court decisions and decrees, and other documents which Bakersfield is legally bound to follow:

> "In 1976, the City took ownership to some of the rights of Kern River water from the corporate descendent of James Haggin's land empire, Tenneco West. With this purchase, the City took over ownership and control of the Kern River and the multiple diversion weirs along the river. The City also took over the administration of Kern River water diversions under the historical "law of the river" system, which divided up most, and often all, of the river's flows between various diverters. Since then, the City has staffed personnel to manage each weir and headgate to deliver water to irrigation

[18] Plaintiffs acknowledge the validity of the water rights held by Bakersfield and Defendant Intervenors. (FAC, ¶ 56.)

> districts based on their claimed rights and water orders, as well as ancillary contractual agreements. The City keeps detailed records of these diversions and publishes an annual report of the diversions, summarizing its operation of the Kern River diversion weirs."

(*Id*. at ¶ 59.) With the exception of how it uses its own Kern River water supplies, Bakersfield's role in managing the Weirs is contractual in nature and **not** based on the discretionary exercise of any regulatory police power or statutory authority that would implicate a public trust duty. This conclusion is evident from the fact that the actions challenged by the Plaintiffs were undertaken by a private party, Tenneco West, before it sold its water rights and Weirs to Bakersfield in 1976. (*Ibid*.) The mere fact that Bakersfield is a public agency does not automatically imbue all its actions potentially relating to public trust resources with a public trust duty. In the parlance of the court in *CBD*, Bakersfield is not a "responsible" public agency. (*CBD*, *supra*, 166 Cal.App.4th at p. 1367 [a breach of public trust cause of action must be brought against the "responsible" public agencies, who are the appropriate representatives of the state as the trustee of the public trust].)

2. Traditional Writ of Mandate and Declaratory Relief are Inappropriate for Enforcing the Public Trust Doctrine.

Plaintiffs seek to require Bakersfield to take numerous specific actions with respect to its alleged public trust duties and the Kern River. Even if Bakersfield had trustee duties under the public trust doctrine with regard to the Weirs, the law does not allow for such relief. A writ of mandate is not appropriate for enforcement of the public trust doctrine "other than in the context of judicial review of administrative decisions." (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22 ("*Monterey Coastkeeper*").) The function of a writ of mandate is to enforce "a mandatory, ministerial duty" of a public agency. (*Id.* at p. 12.) Any particular application of the public trust doctrine cannot be compelled by mandate because under the doctrine "public trust resources … need not be protected under every conceivable circumstance, but only in those where protection or harm minimization is feasible." (*Id.* at p. 21.) Declaratory relief is likewise inappropriate. (*Id*. at p. 18.) The public trust doctrine is "inherently discretionary" and does not allow for judicial intervention of this kind. (*Id.* at p. 21.)

In *Monterey Coastkeeper*, the plaintiffs (like Plaintiffs in this action) sought traditional mandamus directing the SWRCB to comply with the public trust doctrine, alleging the SWRCB had a continuing supervisory public trust duty that it violated by failing to avoid or minimize harm associated with agricultural discharges. (*Id*. at p. 11.) They also alleged (like Plaintiffs in this action) that the SWRCB had failed to consider the public trust doctrine. (*Id*. at pp. 18 ["utter failure of its duty to consider the public trust doctrine"], 21 ["Appellants argue the State Board had a mandatory duty to apply the doctrine"].) Those plaintiffs sought a writ of mandate directing the SWRCB to comply with its alleged obligations to protect the public trust. (*Id*. at p. 11.) In affirming the trial court's sustaining of a demurrer without leave to amend, the appellate court noted in relevant part as follows:

> Traditional mandamus in this case would make the trial court the effective overseer of the State Board and the regional water boards, making the court one of the most, if not the most, powerful entities in setting water policy. The causes of action here cannot support such a result.

(*Id*. at p. 22.) As in *Monterey Coastkeeper*, Bakersfield's satisfaction of any trustee duty it has under the public trust doctrine (assuming for the sake of argument that it has such a duty) is highly discretionary and it would be improper for a Court to attempt to control the exercise of that duty. "Mandamus will not lie to control a public agency's discretion—that is, to force the exercise of discretion in a particular manner." (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1443.) Therefore, Plaintiffs cannot state a cause of action based on the public trust.

B. Plaintiffs are not likely to succeed on their claim under Fish and Game Code section 5937, because it depends on misinterpretations of the code and because the Department of Fish and Wildlife has exclusive jurisdiction over those matters.

1. Even if section 5937 applied, the City does not have the burden under section 5937 to determine the flows necessary to keep fish in "good condition."

With respect to section 5937, Plaintiffs incorrectly assert that "[t]he City has the duty to determine what is sufficient for supporting the life cycle needs of the existing fish." (Motion, p.

9.) In support of this position, Plaintiffs cite *Sierra Club v. California Bd. of Forestry* (1991) 234 Cal.App.3d 299 ("*Sierra Club*"). At the outset, it should be noted that the *Sierra Club* decision cited by Plaintiffs was vacated at 4 Cal.App.4th 942. A vacated decision has no precedential authority. (*Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, 845.) Aside from being vacated, the *Sierra Club* opinion also does not address Section 5937 at all, let alone the issue of who has a duty under that provision for determining flows "sufficient" to keep fish in "good condition."

However, another case cited by Plaintiffs demonstrates that the City does **not** have the duty to determine the level of flows sufficient to keep fish in good condition under Section 5937. This issue was addressed in *Cal Trout II, supra*, 218 Cal.App.3d 187. In *Cal Trout II*, the real party in interest, which was a city water department and owner of dams, specifically raised the issue of needing guidance on the flows necessary to satisfy section 5937 (as applicable through Section 5946). (See *Cal Trout II, supra* 218 Cal.App.3d at pp. 194, 209.) The court did **not** hold or even suggest that it was the dam owner's duty to determine the flows necessary to satisfy Section 5937. It placed that primary responsibility on CDFW:

> We note that in the statutory scheme by which the [SWRCB] is to consider the means by which to protect fisheries the Department of Fish and Game is recognized as having a primary expertise. (See Wat. Code, § 1257.5; Pub. Resources Code, §§ 10000–10004.) That makes resort to its judgment peculiarly appropriate in this case.

(*Id*. at p. 210.) Thus, even if the City did have obligations under section 5937 with regard to the weirs, the City is neither equipped to, nor obligated to, undertake an analysis of flow requirements for protection of fisheries. Plaintiffs have provided no clue as to what levels of flow they think are sufficient for those purposes. Thus, as discussed above in section III.A, the Proposed Order would be impossible for the City to comply with.

2. Section 5937 only applies to anadromous fish.

Plaintiffs assert that the City has violated Fish and Game Code section 5937 by not leaving enough water in the Kern River to keep fish below the Weirs in good condition. (Motion, p. 11:15–20.) However, Section 5937 only applies to protect anadromous fish (i.e., fish that migrate upstream in a river from the ocean to spawn), and no such fish exist in the river. Only

anadromous fish migrate as contemplated by these statutes, i.e., fish that would naturally migrate up and down stream in the absence of a dam or by using a fish ladder. (Fish & G. Code, §§ 5901, 5931.) Legislative history confirms Section 5937 (and related statutes) target the "passage of anadromous (migratory) fish." (RJN, Exh. 45, p. 1.) Plaintiff Water Audit California, based on filings in prior litigation addressing Section 5937, appears to agree with this limitation of Section 5937. Plaintiffs asserted that in order "[f]or fish to be maintained in good condition streams must have … unimpaired passage to and from the ocean." (RJN, Exh. 51, ¶ 4.) "The intention of … Section 5901 is to make it unlawful to impede migrating fish. The addition of districts to the current list in … Section 5901 would add consistency to the code by including the districts, not currently listed, where such fish are found." (RJN, Exh. 46, p. 4.)[19] Section 5901 *et seq*., including section 5937, apply to the listed Fish and Game districts, but only insofar as those districts are naturally frequented by anadromous fish.

Here, Kern County lies within Districts 1 and 3 1/2, which span much larger areas of the state. (Fish & G. Code, §§ 11001, 11009.) These districts may contain streams within which anadromous fish migrate; however, Plaintiffs do not allege the Kern River is one of those streams. In fact, Plaintiffs acknowledge that the Kern River's historic terminus is at Buena Vista Lake (i.e., it does not flow to the ocean). (FAC, ¶ 81.) Further, the evidence presented by Plaintiffs in support of their motion for preliminary injunction does not demonstrate the existence of anadromous fish in the Kern River. Plaintiffs' motion must therefore fail.

3. The Weirs are not "dams" within the definition cited by Plaintiffs.

Plaintiffs assert that "[t]he Weirs are all in excess of six feet in height, and therefore are all dams (Water Code, § 6003) subject to Fish and Game Code, section 5937." (MPAs, p. 5:22–24.) Plaintiffs are again incorrect. Section 6003 of the Water Code states that:

> Any such barrier which is or will be not in excess of six feet in height, regardless of storage capacity, or which has or will have a storage capacity not in excess of 15 acre-feet, regardless of height,

[19] S.B.857 amended Fish and Game Code section 5901 to prevent Caltrans, "the single largest owner of fish passage barriers in the state", from hindering anadromous migration in additional Fish and Game districts as provided by existing law. (RJN, Exh. 47, p. 2.)

> shall not be considered a dam.

(Wat. Code, § 6003.) Despite Plaintiffs' assertion to the contrary, this section does not state that any barrier in excess of six feet is a "dam." Instead, Section 6003 details *exceptions* to the "dam" definition set forth in Section 6002 that reads as follows:

> "Dam" means any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either (a) is or will be 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, as determined by the department, if it is not across a stream channel or watercourse, to the maximum possible water storage elevation or (b) has or will have an impounding capacity of 50 acre-feet or more.

(Wat. Code, § 6002.) Thus, if an artificial barrier meets the definition of a "dam" under Section 6002, it may be excepted from that definition pursuant to Section 6003. For example, an artificial barrier that is 5 feet tall and impounds 55 acre-feet of water would constitute a "dam" under Section 6002 because the barrier impounds over 50 acre-feet of water. However, Section 6003 would except such a barrier from the definition of a "dam" (even though it impounds more than 50 acre-feet) because the barrier is not taller than 6 feet. Regardless, the provisions do not stand for the simple proposition proposed by Plaintiffs—that any artificial barrier over 6 feet tall is a "dam."

Importantly, Plaintiffs have offered no evidence determining the size, "storage" capacity, etc. of the Weirs to establish that they constitute "dams" under Water Code section 6002. As the moving party, it is their burden to make that showing. Moreover, even if the Plaintiffs had offered such evidence, the Weirs are likely excepted from the definition of a "dam" pursuant to Water Code section 6004. Section 6004 includes further exceptions to the definition of a "dam" under 6002, and one of those exceptions is "[a]n obstruction in a canal used to raise or lower water therein or divert water therefrom," which is the purpose and function of the Weirs. Therefore, Plaintiffs have not proven that the Weirs constitute "dams" under section 6002.

4. Section 5937 does not apply, and Plaintiffs do not have standing.

Plaintiffs conclude they "are extremely likely to succeed … [regarding] the City's

ongoing violation of section 5937," based on their assertion that the City's diversions from the Weirs "do not leave sufficient water in the River to keep [fish] in good condition …." (MPAs, pp. 7:11–12, 11:17–19.) To arrive at that conclusion, however, Plaintiffs have distorted the plain meaning and application of Section 5937 and its place within the surrounding legislative scheme.[20] Plaintiffs completely omit the second sentence of Section 5937, which provides:

> 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. *During the minimum flow of water in any river or stream, permission may be granted by* [*CDFW*] *to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of* [*CDFW*]*, it is impracticable or detrimental to the owner to pass the water through the fishway*.

(Fish & G. Code, § 5937 [italics added].) The second sentence qualifies the first. Assuming CDFW has already ordered "sufficient" or "minimum" flows to keep fish "in good condition" below a dam on the river (which they have not), the owner may pass those pre-determined flows through, over, or around the dam if passing through the fishway is impracticable or detrimental to the owner as determined by CDFW. Thus, Section 5937 assumes CDFW has (i) examined a particular dam's relationship to fish naturally frequenting the stream and either (ii) ordered a fishway be provided at the site, or (iii) absent a fishway, ordered certain sufficient flows through, over, or around the dam to keep those fish below the dam in good condition.[21] Reading the first sentence of Section 5937 in isolation disregards CDFW's role and involvement in investigating and resolving these necessarily technical questions.

This is confirmed by reading Section 5937 within the context of its surrounding legislative framework, which Plaintiffs have entirely ignored. (Fish & G. Code, Div. 6, Part 1,

[20] Statutes cannot be construed using a single word or sentence. (*MCI Communications Services, Inc. v. Cal. Dept. of Tax & Fee Administration* (2018) 28 Cal.App.5th 635, 643.) Statutes must be read in harmony with the entire statutory scheme of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.)

[21] If a fishway is ordered, flows must pass through the fishway unless CDFW grants the owners permission to pass flows through, over, or around the dam.

Ch. 3.) Fish flows are protected but subject to CDFW's exclusive discretion in administering Chapter 3 generally as follows:

- CDFW decides when to examine dams in streams naturally frequented by fish (§ 5930);[22]
- If, after examination, the Fish and Game Commission ("Commission") determines there is not free passage over or around a dam, CDFW shall begin plans for a suitable fishway (§ 5931);
- If, after examination, no fishway is required by the Commission, sufficient water must instead pass through, over, or around the dam to keep fish that may be planted or exist below the dam in good condition (§ 5937);
- If, after examination, the Commission determines a hatchery is more practicable than a fishway to protect fish, the Commission may order the dam owner to equip a hatchery, with dwellings, traps, and other necessary equipment to be operated by CDFW (§ 5938);
- The hatchery shall not be larger than necessary to supply the stream or river with a reasonable number of fish (§ 5939); and
- After examination, the Commission may, in lieu of a fishway or hatchery, order the dam owner to plant, under CDFW's supervision, the young of fish that naturally frequent the stream, at such time, places, and numbers as the Commission may order (§ 5942).

None of these provisions, including Section 5937, may be implemented without CDFW and the Commission's prior examination of a dam, the stream, the flow levels, fish (if any), and their condition. Until CDFW orders a fishway and/or sufficient minimum flows for fish naturally frequenting a stream, Section 5937 does not apply. The Attorney General has concluded the

[22] CDFW has discretion to prioritize streams to ensure environmental flows. (Pub. Res. Code, § 10001.) But CDFW is not required to examine a specific stream at any particular time. CDFW's duty to determine minimum flows is also subject to funding made available by the Legislature to initiate studies for a particular stream. (Pub. Resources Code, § 10004.) The Court must leave this process to CDFW and the Legislature, especially since these decisions require technical expertise. (See *Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at p. 22.)

same:

> These sections are interrelated in that they deal with the subject of fishways and hence must be construed together. … **[I]f the Fish and Game Commission is of the opinion that a dam does not prevent the free passage of fish, no need arises for the invocation of these sections**. Consequently, [these sections are] applicable only in those cases where (1) fish naturally frequent the stream, and (2) the commission finds that the dam prevents the free passage of fish, and that agency takes affirmative action by ordering a fishway or, in lieu thereof, a hatchery or the planting of fish.

(25 Ops.Cal.Atty.Gen. 245 (Apr. 1955), 247 [emphasis added].[23])

> As shown by your letter, the Fish and Game Commission has not taken affirmative action under [these sections] with respect to the dam [at issue]. And from the facts you have detailed it would appear that there may be no occasion for the Commission to do so since the stream dries up to its source in the summer and there would be no water in that particular area were it not for the presence of the dam. [Thus], **we conclude that until the aforesaid sections of the Fish and Game Code are invoked [the river] is not subject to [these sections]**.

(8 Ops.Cal.Atty.Gen. 311 (Jan. 1947), 312 [emphasis added].[24])

Plaintiffs' reading of Section 5937 robs the related statutory scheme of its intended effect and would require the Court to invade the Legislature and CDFW's policy-making roles in managing stream flows. These roles involve the exercise of discretion by CDFW and cannot be controlled by the Court. (*Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at pp. 21–22.) Private plaintiffs cannot independently prosecute these Fish and Game Code statutes.[25] (*Rank v. Krug* (1950) 90 F.Supp. 773, 801; *CBD*, *supra*, 166 Cal.App.4th at p. 1367.) Only CDFW may initiate enforcement proceedings in administering the Fish and Game Code.[26] (Fish & G. Code, § 702.)

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[23] See Exh. 48.

[24] See Exh. 49.

[25] Private persons have recourse through mandamus to force CDFW to consider Section 5937 *after* the Commission has invoked the process under Section 5931. But there is no cause of action against the City.

[26] Only the Commission, because of the authority delegated to it by the Constitution and Legislature, may administer and enforce these statutes, which is intended in part to ensure any flow regulations are based on scientific knowledge rather than self-interested pressure groups. (Cal. Const., Art. IV, § 20, subd. (b); 17 Ops.Cal.Atty.Gen. 72 (Mar. 1951), p. 3–7, see Exh. 50.)

The Legislature did not intend the absurd result proffered by Plaintiffs, namely that private citizens can unilaterally prosecute Section 5937 against dam owners and seek preliminarily injunctions without CDFW involvement based solely on their own opinion that flows are "insufficient." This is CDFW's job. Allowing plaintiffs to prosecute in this manner would also defeat public policy favoring informal resolution of environmental conflicts by CDFW before going to court. (Fish & G. Code, § 1017.)

Ultimately, there is nothing to prosecute, since Section 5937 does not apply and the City has not violated any CDFW order concerning the Weirs. The Declarations offered by the Plaintiffs are, as a result, irrelevant. (Motion, p. 12:1–14.) Plaintiffs' motion must be denied because their construction of the statute is untenable and leads to absurd results, and they will lose on the merits.

5. *Cal Trout I, Cal Trout II,* and *National Audubon* do not support Plaintiffs' motion.

Plaintiffs also stretch the impact of *Cal Trout I*, *Cal Trout II*, and *National Audubon* as authority for their requested preliminary injunction. Plaintiffs improperly rely on these cases, which in relevant part focused on the obligations and duties of state regulatory agencies (not at issue in this case). (*McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38 ["cases are not authority for propositions not considered"].)

Cal Trout I upheld the issuance mandamus against the SWRCB for failing to carry out its ministerial duty under a very specific statute, Fish and Game Code section 5946 (quoted above), in the context of its water rights permitting authority. *Cal Trout I* did not address enforcement of Section 5937 on its own against a dam owner without the involvement of CDFW and/or the SWRCB, stating "[w]e need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water." (*Cal Trout I, supra*, 207 Cal.App.3d at p. 601.) The case was limited to the application of Section 5946, which applies only to SWRCB permits (and

That the State has exclusive law enforcement power is confirmed in a similar statutory scheme preventing obstructions to stream flows, which confers such power only in the Attorney General or local District Attorneys, and only after a complaint is raised by CDFW. (Fish & G. Code, § 1615, subd. (d).)

licenses), and no injunction was issued or discussed. Plaintiffs attempt to slip this fact by the Court by replacing "5946" with "5937" in the following quote:

> "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 5946 **[NOT section 5937]** operates as a legislative choice among competing uses of water." (*Cal. Trout, I, supra*, 207 Cal.App.3d at p. 601; Wat. Code, §§ 1243 and 106.)

(Motion, pp. 8:24–9:3 [emphasis added].) However, as noted by the court and quoted above, the decision does not address the application of Section 5937 by itself as a rule impacting appropriations. Plaintiffs' attempt to mislead the Court should be rejected and considered in weighing the credibility of Plaintiffs' other arguments.

Cal Trout II, which involved further proceedings of the parties in *Cal Trout I*, also only addressed Section 5946 in the SWRCB's water rights permitting context. *Cal Trout II* stated that a court may fashion a remedy to enforce the SWRCB's ministerial duty under section 5946, as appropriate under the circumstances, including through interim injunctive relief. (*Cal Trout II*, 218 Cal.App.3d at p. 204.) The court's decision to "set interim release rates pending the [SWRCB's] action" was made "in view of [the specific facts of that case] and the concurrent jurisdiction of the courts over compliance proceedings involving section 5946." (*Id*. at 194.) *Cal Trout II* relied on *National Audubon* for this conclusion, which held that the courts and SWRCB have concurrent jurisdiction to determine water rights issues as designed by the specific statutory scheme set forth in Water Code section 2000 et seq. (i.e., the reference statutes). *National Audubon*, *supra*, 33 Cal.3d at p. 451; see also *CBD*, *supra*, 166 Cal.App.4th at p. 1368 [explaining that the particular Water Code sections at issue in *Audubon* conferred concurrent jurisdiction].)

The Fish and Game Code, however, does not confer authority on courts to fashion remedies under Section 5937. All remedies are exclusive to CDFW. Nowhere in the statutory scheme does the Legislature contemplate concurrent jurisdiction to issue the preliminary injunction requested by Plaintiffs. CDFW has not examined the Weirs, nor issued any orders against the City. There simply is no violation to remedy or prevent.

V. Plaintiffs Have Not Met Their Burden Regarding the Balance of Harms, Because They Ignore Significant Harms to Bakersfield and the Other Defendants

A. Plaintiffs have the burden of proof.

As the plaintiffs and petitioners in this action, Plaintiffs have the burden of proof to substantiate their causes of action. (Evid. Code, § 500; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 861 ["the 'party desiring relief' bears the burden of proof"].) More specifically, "the burden [is] on [P]laintiffs, as the parties seeking injunctive relief, to show all elements necessary to support issuance of a preliminary injunction." (*O'Connell*, *supra*, 141 Cal.App.4th at p. 1481; see also *Savage v. Trammell Crow Co*. (1990) 223 Cal.App.3d 1562, 1571; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) As detailed above, Plaintiffs are unlikely to prevail on the merits at trial, but the Motion should also be denied based on the balance of hardships.

To obtain injunctive relief in a motion for preliminary injunction, a moving party must show that the harm it will suffer if the injunction is not granted will greatly outweigh the harm that the preliminary injunction will cause to the opposing party. (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 856; *Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838). On this issue, Plaintiffs, as the moving parties, bear the burden of proof and persuasion. (*Drakes Bay Oyster Co. v. California Coastal Com.* (2016) 4 Cal.App.5th 1165, 1172). Applying the balancing test, the contrast between Plaintiffs' alleged "harm" and the potential damage to Intervenor-Defendants is stark.

B. Plaintiffs have not shown that irreparable harm will occur in the absence of an injunction.

In their motion, Plaintiffs argue that they, and the public, will suffer great irreparable harm if the Court denies their Motion for a Preliminary Injunction. Specifically, Plaintiffs assert that if an injunction is denied, "past conduct establishes that the City will divert water from the Kern River in amounts that will lead to the dewatering of the River, resulting in the killing of all fish and the destruction of their habitat." (Motion, p. 13:23–26.) Plaintiffs make similar arguments concerning bird sanctuaries and recreational activities along the Kern River.

California Code of Civil Procedure section 526, subdivision (a)(2) requires proof of

irreparable harm to be suffered by the Plaintiff caused by acts of the Defendant for the court to grant a preliminary injunction (*Ibid.).* Injunctive relief "is an extraordinary remedy and courts have consistently proceeded with great caution in exercising their power, and have required a clear showing that the threatened and impending injury is great, and can be averted only by injunction." (*Wilkins v. Oken* (1958) 157 Cal.App.2d 603, 606). The mere possibility of irreparable harm is insufficient to support the entry of the drastic remedy of a preliminary injunction (*Arc of California v. Douglas* (E.D. Cal. 2013) 956 F.Supp.2d 1113, 1117.) "There must be clear and immediate danger or threat of real, not merely apprehended' interference." (*Redlands Foothill Groves v. Jacobs* (S.D. Cal. 1940) 30 F.Supp. 995, 1000 (citing *Northport Power & Light Co. v. Hartley* (1931) 283 U.S. 568).) "In the absence of a *verified* showing of threatened harm by the moving party, a trial court exceeds its jurisdiction by granting a preliminary injunction. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640 [original emphasis].)

Here, Plaintiffs are required to provide evidence demonstrating that: (1) the Kern River will go dry; (2) fish and fish habitat in the river will be destroyed as a result; and (3) that Numbers 1 and 2 will occur before Plaintiffs' action can be heard on the merits. These issues involve matters of a highly scientific nature (e.g., hydrology, fisheries, etc.) beyond the common person's experience, and thus necessitate expert evidence. (See Evid. Code, § 801, subd. (a).) Plaintiffs have not provided any evidence, let alone competent expert evidence, that the river is going to be dewatered any time soon or that such dewatering is going to result in the killing of all fish and destruction of their habitat prior to Plaintiffs' action being decided on the merits. Further, even assuming arguendo that Plaintiff presented evidence that the Kern River will go dry in certain reaches in the future (which they did not), Plaintiffs fail to provide the court with sufficient evidence that irreparable harm will result from those conditions. Plaintiffs' witness declarations, photographs, and documentary evidence in support of their motion, if anything, undermine Plaintiffs' claims of irreparable harm. Plaintiffs admit that the Kern River channel is dry more often than not (Motion, pp. 5:27, 12:5.) This is the status quo and the history of the Kern River based on hydrologic variability and frequent droughts in the region. Notwithstanding, Plaintiffs

claim "irreparable harm" if the Kern River channel once again becomes dry through Bakersfield. This "harm" is hardly "irreparable." After extreme droughts in 2021 and 2022, there was no water in the Kern River channel through and west of Bakersfield. Yet, according to Plaintiffs' own declarations, "fish habitat" returned within a few months after record precipitation in the spring of 2023.

The fact that birds and fish may have been spotted in historically dry areas as a result of the extreme water year does not establish the existence of viable bird and fish habitats or the likelihood of future irreparable harm. Nor does the fact that, in dry years, members of the general public have fewer recreational opportunities in the river. (Motion, p. 15:28). The conditions present in 2023 occur only in extremely wet years, and when the river returns to its more typical dry conditions, that natural change does not constitute "harm." These are unavoidable realities of the local climate, sandy soil, and irregular regional precipitation. (Venkatesan Decl., ¶¶ 5–9, 19–21.)

Plaintiffs also fail to recognize the "recreational pool" of 30,000 acre-feet of water set aside for fish and bird habitat and recreational use in Lake Isabella, or that there is normally sufficient Kern River water to support fish and wildlife habitat at Lake Ming, at Hart Park, in upstream reaches of the Kern River, and in through eastern Bakersfield. Plaintiffs also ignore the potential impacts to Mill Creek Park, in Central Bakersfield, which would not have water for fowl habitat or recreation but for the very diversions Plaintiffs seek to enjoin. (Teglia Decl., ¶¶ 10, 22.) The fact is, the Kern River flows as water permits, and the habitat of fish, birds, and wildlife adapts accordingly. This year-to-year change is not "irreparable harm." It is just the nature of the Kern River.

C. Plaintiffs' proposed injunction would cause severe and irreparable harm to Defendants and to numerous other water users, which Plaintiffs completely ignore.

As detailed above (section III. A), the Proposed Order is overly vague without discernable objective standards stating the rate of flow, year type, duration, point of measurement, meaning of the term "sufficient", nor the total amount of Kern River water making the request unenforceable. (Proposed Order, p. 2.) However, in light of Plaintiffs' contentions regarding the

status quo, it is reasonable to assume Plaintiffs seek an order which preserves, during the pendency of this litigation, hydrologic conditions in the Kern River channel similar to those in 2023, which they contend are necessary to maintain fish in good condition. (Motion, p. 16; Proposed Order, p. 2.)

The actual record of Kern River flow at the downstream-most weir (i.e., McClung Weir) during the period of March through August 2023 provides hydrologic data to give some definition to the requested preliminary injunction. (Venkatesan Decl., ¶¶ 17–21.) These hydrologic conditions are extraordinary. Most years, the natural flow of the Kern River is below the historic average and median. (*Id.* at ¶ 20, Exhs. 6–7.) The last time Kern River flows passed McClung Weir in the amounts recorded in 2023 was 49 years ago in 1983—the wettest year in 128 years of records. (*Ibid*.) Maintaining such flows in drier years is simply not physically possible.

For over a century, Intervenor-Defendants and citizens of Kern County have relied on the flows of the Kern River to sustain the groundwater basin, grow crops, water livestock, and replenish the water sources for small communities and homes in rural areas. Agriculture has an important role in the local economy, and it depends on Kern River water being used in accordance with the Law of the River. Intervenor-Defendants have invested incredible sums of money, time, and effort to obtain and maintain their water rights under the Law of the River and ensure its beneficial use in accordance with the law. Preventing the exercise of those long-established rights would cause substantial and irreparable crop and livestock losses. These losses would severely impact farmers, ranchers, landowners, and small communities within the boundaries of Intervenor-Defendants.

North Kern has provided the Court with a detailed description of the potential impact of the Proposed Order on its ability to meet agricultural water requirements necessary to irrigate the permanent and annual crops grown in the District. (Hampton, ¶¶ 25–30.) Prohibiting all diversion of Kern River water from its Beardsley and Calloway River Weirs except when conditions are exceptionally wet like 2023, would materially alter existing water management operations equivalent to the worst drought conditions. (*Ibid*.) Such an order would necessitate significant increases in groundwater pumping exacerbating groundwater conditions in the critically

overdrafted Kern County Subbasin. (*Ibid.*) The requested order would significantly impede the Intervenor Defendants groundwater management plans contrary to the State's objectives and requirements of SGMA. (*Ibid.*)

Kern Delta has explained that the Proposed Order will likely require Kern Delta to release water from Isabella Reservoir for additional flows, both causing significant harm to Kern Delta and its water users. (Teglia Decl., ¶¶ 18, 19, 20.) The exact amount of reduced diversions and stored releases is very difficult to identify given the number of variables involved in such a determination (e.g., required flow levels, weather, Lake Isabella storage levels, natural flow, other flow contributions, etc.) However, there is no question that the amounts would be significant in all but the wettest years such as 2023 given the variable natural flow conditions in the Kern River. (*Id*. at ¶¶ 19, 20.) The end result of Plaintiffs' requested injunction would leave both farmers and disadvantaged communities with significantly less water to put to the two highest beneficial uses, domestic and irrigation.[27] (*Id*. at ¶¶ 20, 21.) The harm to farmers within Kern Delta's boundaries will include, but not be limited to, increased costs from relying on groundwater, reduced crop yields, fallowed land, and even bankruptcy in severe circumstances. (*Id*. at ¶ 20.) This harm to farmers will create larger societal impacts, including higher food costs. (*Ibid*.) The disadvantaged communities who receive their domestic water supply from water purveyors that pump groundwater supplied and/or benefited by Kern Delta's operational recharge will also be impacted if the Court grants Plaintiffs' requested relief. (*Id*. at ¶ 21.) Similar to farmers, the domestic water purveyors are likely to be faced with increased costs, which they will pass on to customers. (*Ibid*.) Finally, with less surface water available to it, Kern Delta will be severely limited in its ability to recharge groundwater into the Kern County Subbasin (a high-priority subbasin in critical overdraft) as part of its local groundwater management efforts. (*Id*. at ¶¶ 5, 17.) Thus, efforts in the Kern County Subbasin by Kern Delta and all of the Intervenor Defendants to correct overdraft and sustainably manage the subbasin will be hampered potentially resulting in further adverse impacts to an at-risk subbasin.

[27] Additionally, members of the public would be harmed to the extent they enjoy the recreational amenities at Mill Creek Linear Park associated with the presence of Kern River water in Kern Delta's Kern Island Main Canal. (See Teglia Decl., ¶¶ 10, 22.)

Buena Vista, its landowners, and the community of Buttonwillow would also suffer extensive harm if Plaintiffs' Proposed Order were to be granted. Since the early 1900's, farmers within Buena Vista have relied on diversion and storage of Kern River water (Ashlock Dec., ¶¶ 6–7). The Proposed Order would fundamentally change this status quo and limit Buena Vista's ability to store water in Isabella Reservoir by requiring releases in an unknown amount. (*Id*. at ¶ 23.) Additionally, the Proposed Order would interfere with Buena Vista's ability to utilize the diversion weirs to supply water to the Maples Service Area, and execute exchanges with other water districts (*Id*., ¶¶ 18, 23.) If granted, the Proposed Order would result in less water available for farmers and communities within Buena Vista and increase waste of Kern River water. (*Id*. at ¶ 23.) Damages to landowners could be substantial, including loss of permanent crops, inability to feed and water livestock, and an increased reliance on groundwater, which is already dangerously scarce. (*Id*. at ¶ 23.) As the agency responsible for compliance with SGMA for the areas within Buena Vista's boundaries, Buena Vista has adopted a Groundwater Sustainability Plan, which relies on its Second Point Kern River right. (*Id*. at ¶ 5.) The restrictions on diversions requested in the Proposed Order would severely impair Buena Vista's ability to comply with SGMA and maintain groundwater sustainability. (*Id*. ¶ 23.)[28]

D. Bakersfield cannot simply reroute the river through the CVC.

In the FAC, Plaintiffs assert that the impacts of the reductions in diversion they are seeking will be negligible, because "[f]acilities exist downstream of the [Weirs] that would allow all current recipients of Kern River water diverted by the City to obtain all or most of the water they would otherwise obtain from the City's diversions." (FAC, ¶ 75.) Petitioners allege various scenarios whereby water could run down the Kern River and then be returned for upstream uses via the CVC. (FAC, ¶¶ 77–85.) As discussed above, Defendant KCWA owns and operates the CVC.

[28] Rosedale also owns and operates a groundwater storage project, which depends on its continued diversion of Kern River Water. (Bartel Decl., ¶¶ 4–6). Similar to the other Intervenor-Defendants, water recharged in Rosedale is used for agricultural, domestic, and industrial purposes. (*Id.* at ¶ 4). Therefore, the type and quality of harm to Rosedale is the same as that which would be suffered by the other Intervenor-Defendants.

Despite the CVC's flexible operations, it cannot do what Petitioners allege in the FAC. (Bauer Decl., ¶ 12.) KCWA has provided the Court with Exhibit 44, which is a map of the CVC and related facilities. (*Id.* at ¶ 13.) One proposal was to run water down the entire length of the Kern River and into the California Aqueduct via the Intertie for subsequent recovery and return via the CVC. (FAC, ¶ 81.) As the Court can discern from review of Exhibit 44, the Intertie connects to the California Aqueduct several miles downstream from the CVC. (Bauer Decl., ¶ 13.) Thus, it is physically impossible to use the CVC to return water discharged into the California Aqueduct via the Intertie. (*Ibid*.) On a more basic level, the CVC is a fully-subscribed facility. (*Id.* at ¶ 14.) The full capacity of the CVC is allocated to the participant parties that have paid for its construction and operation. (*Ibid.*) And even if the capacity of the CVC were available for Plaintiffs' hypothetical program, the capacity of the canal is nowhere near enough to carry all Kern River water that would have been diverted upstream. (*Ibid.*) In other paragraphs, Petitioners describe other proposed exchanges, "collaborative swapping," and/or changes in points of diversion. That hypothetical relief involves numerous entities that are not party to this lawsuit, such as many of the public agency CVC Participants. For instance, the FAC assumes the availability of the Arvin-Edison canal (FAC, ¶ 79), which is owned by Arvin-Edison Water Storage District and cannot simply be commandeered by Kern River diverters. The Court cannot order various public agencies—particularly those not named as parties to this lawsuit—to enter hypothetical contractual agreements for use of their water infrastructure and the water diverted by them under legal, prior right. As described in more detail above, this remedy is not available and certainly is beyond the scope of any preliminary injunction.

VI. Plaintiffs' Proposed Order Is Contrary to the Public Interest

In addition to the likelihood of success on the merits and the balance of the relative harms to the parties, the Court must also consider whether an injunction would be in the public interest or whether it would be contrary to public policy. (*O'Connell*, *supra*, 141 Cal.App.4th at p. 1471.) The Proposed Order sought by Plaintiffs would contravene two important public policies: the constitutional policy of applying water to reasonable and beneficial use and the critical public interest in flood control.

A. The proposed injunction would violate Article X, Section 2 of the California Constitution.

Article X, Section 2 of the California Constitution states in relevant part as follows:

> **It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable**, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such 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.

(Cal. Const., Art. X, § 2 [emphasis added]; see also Wat. Code, § 100.) "Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1244 (quoting *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925); see also *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 436; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 370–371.)

As discussed above, it is clear that: (1) Plaintiffs' suggested use of the CVC to remediate harm to Intervenor-Defendants from the issuance of Plaintiffs' requested injunction is completely unworkable, both legally and practically; and (2) to satisfy Plaintiffs' request that the City maintain the current flows in the Kern River Intervenor-Defendants will be forced to (among other things) release and bypass significant amounts of water that was previously diverted for domestic and irrigation uses, which the Legislature has designated as the two highest beneficial uses of water. (Wat. Code, § 106 ["It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation"].) The adverse impacts of Plaintiffs' requested injunction are exponentially increased by the fact that Plaintiffs seek an injunction (and river flow levels) based on the "status quo" of current river levels attributable to significant regulated water releases from Isabella Reservoir in one of the wettest years in recorded history. In essence, Plaintiffs seek a "remedy" aimed at maintaining anomalously high river levels resulting from one of the wettest years on record when the natural hydrology of the river varies substantially from year to year. Thus,

instead of maximizing the beneficial use of water for the two highest uses, Plaintiffs' requested injunction ensures that valuable water is wasted in contravention of Article X, Section 2 of the California Constitution.

B. The Proposed Order would interfere with the paramount public interest of flood control.

The Plaintiffs' Motion completely fails to consider and provide for the paramount public interest of flood control operations as directed by the United States Army Corps of Engineers ("USACE"). The Isabella Dam and Reservoir was authorized under the Flood Control Act of 1944. (Exh. 3, p. 2.) While the project was authorized for flood control, conservation storage, and recreation purposes, its flood control function is the paramount purpose. (Venkatesan Decl., ¶ 22, Exh. 3, p. 6.) Conditions in 2023 vividly illustrate why there is a paramount interest of flood control in the Kern River system, spanning from Isabella Dam and Reservoir through the Kern River canyon, along the entire Kern River channel within the City of Bakersfield, and beyond. At various times, beginning in February 2023 and continuing until today, the USACE has taken control and directed, for flood control purposes, both the rate of flow and the total amount of Kern River water that it has allowed to be stored in Isabella Reservoir, as well as the timing and rate of flow that it has ordered to be released from Isabella Dam. (*Id.* at ¶ 23.) Likewise, the USACE has directed the rate and timing of Kern River flows that were required to be managed within the Kern River channel downstream of Isabella Dam, through the Kern River Canyon, and continuing through the City of Bakersfield, into the Kern River-California Aqueduct Intertie, and further downstream. (*Id.* at ¶ 24.) The USACE flood control directions and orders are intended to protect the public from flooding that results during extreme snowmelt runoff in the months of March to August and also to prevent flooding during potential rain flood events later in the fall and the early months of 2024. (*Id.* at ¶ 23.) In addition to several grounds detailed above, the Plaintiffs' request for the Proposed Order should be denied by the Court because it fails to consider and provide for necessary flood control management which is a paramount interest of the public.

VII. Conclusion

The Motion is fundamentally flawed in at least six ways. It is not directed to all of the proper parties. It seeks an order so ambiguous as to be unenforceable. It incorrectly defines the status quo to conceal that it seeks a mandatory injunction. It is based on claims that fail as a matter of law. It fails to meet Plaintiffs' burden to show a probability of harm if the Motion is denied. It fails to address the major harms that granting the Motion would cause to the Intervenor-Defendants and others. For each and all of these reasons, the Court should deny the Motion.

Dated: October 2, 2023 — The Law Offices of Young Wooldridge, LLP

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