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7 *Attorney for Bring Back the Kern, Kern River*  
8 *Parkway Foundation, Kern Audubon Society,*  
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10  
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14 Napa, CA 94559  
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17 *Attorney for Water Audit California*  
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19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
20 **IN AND FOR THE COUNTY OF KERN**

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<p>BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,</p> <p>Plaintiffs and Petitioners,</p> <p>vs.</p> <p>CITY OF BAKERSFIELD and DOES 1 through 500,</p> <p>Defendants and Respondents,</p> <p>BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999,</p> <p>Real Parties in Interest.</p>	<p>Case No.: BCV-22-103220</p> <p><b>DECLARATION OF WILLIAM MCKINNON IN SUPPORT OF PLAINTIFFS’ COMBINED OPPOSITION TO KCWA’S AND REAL PARTIES’ MOTIONS FOR RECONSIDERATION AND STAY</b></p> <p>Complaint Filed: November 30, 2022 First Amended Complaint Filed: March 6, 2023 Second Amended Complaint Filed: October 4, 2023 Third Amended Complaint Filed: December 1, 2023</p> <p>Date: December 21, 2023 Time: 9:00 a.m. Dept.: 8 Judge: Hon. Gregory Pulskamp</p>
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1 I, WILLIAM McKINNON, declare as follows:

- 2 1. I am an active member of the State Bar of California and the attorney of record for the plaintiff  
3 and moving party Water Audit California. I make this declaration of my own personal  
4 knowledge and upon the facts set forth herein. If called, I could and would testify competently  
5 as set forth below.
- 6 2. Attached hereto as Exhibit 1 is a true and correct copy of an email from Water Audit California  
7 to Colin Pearce, representing the City of Bakersfield, dated December 4, 2023.
- 8 3. Attached hereto as Exhibit 2 is a true and correct copy of an email exchange between Adam  
9 Keats, representing Bring Back the Kern, Kern River, Parkway Foundation, Kern Audubon  
10 Society, Sierra Club, and Center for Biological Diversity, and Colin Pearce, representing the  
11 City of Bakersfield, dated December 6, 2023 and December 8, 2023.
- 12 4. Attached hereto as Exhibit 3 is a true and correct copy of an email from Water Audit California  
13 to attorneys representing the City of Bakersfield, dated December 8, 2023.
- 14 5. Water Audit California has diligently sought the participation of the City and Real Parties in  
15 environmental efforts on the Kern River. (See Stroud Decl., ISO Motion for Reconsideration,  
16 Ex. M.)

17  
18 I declare the forgoing to be true, subject to the penalty of perjury. Executed at Victoria, British  
19 Columbia, Canada, this 8th day of December 2023.

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24 William McKinnon  
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1 PROOF OF SERVICE  
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4 I, Valerie Stephan, declare:

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

7 On December 8, 2023, I served a copy of the within document(s):

8 DECLARATION OF WILLIAM MCKINNON IN SUPPORT OF PLAINTIFFS'  
9 COMBINED OPPOSITION TO KCWA'S AND REAL PARTIES' MOTIONS FOR  
10 RECONSIDERATION AND STAY

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

13  
14 **City of Bakersfield**

Colin L. Pearce  
Jolie-Anne S. Ansley  
Ashley L. Barton  
DUANE MORRIS LLP  
clpearce@duanemorris.com  
jsansley@duanemorris.com  
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**Rosedale-Rio Bravo Water Storage District**

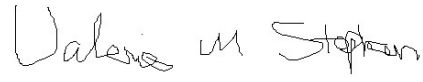
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**Kern County Water Agency**

Amelia T. Minaberrigarai  
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I declare the foregoing to be true, subject to the penalty of perjury. Executed on  
December 8, 2023 at Lincoln City, Oregon.



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Valerie Stephan

EXHIBIT 1



Valerie Stephan <vstephan@waterauditca.org>

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## Kern River flows.

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**Water Audit California** <general@waterauditca.org>

Mon, Dec 4, 2023 at 2:53 PM

To: "Pearce, Colin L." <CLPearce@duanemorris.com>

Cc: Adam Keats <adam@keatslaw.org>, "Ansley, Jolie-Anne S." <jsansley@duanemorris.com>, Virginia Ginny Gennaro <vgennaro@bakersfieldcity.us>

Bcc: vstephan@waterauditca.org

Colin

I have been involved in negotiations with USACE and Isabella Partners to obtain greater bypass flows to avoid the unfortunate consequences of 25 CFS release. Will the City confirm (a) the actual stream loss depletions between the Isabella Dam and the First Point of Measure (and the means of measure) and (b) that the City will bypass all flows without diversion during the "shutdown" period.

Bill

**WATER AUDIT CALIFORNIA** - *A California Public Benefit Corporation*  
952 School Street #316, Napa, CA 94559 / phone: (707) 681-5111

EXHIBIT 2



Valerie Stephan &lt;vstephan@waterauditca.org&gt;

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## Kern River flows.

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**Water Audit California** <general@waterauditca.org>  
To: Valerie Stephan <vstephan@waterauditca.org>

Fri, Dec 8, 2023 at 12:12 PM

----- Forwarded message -----

From: **Pearce, Colin L.** <CLPearce@duanemorris.com>

Date: Fri, Dec 8, 2023 at 9:57 AM

Subject: RE: Kern River flows.

To: Adam Keats <adam@keatslaw.org>, Water Audit California <general@waterauditca.org>

Cc: Ansley, Jolie-Anne S. <JSAnsley@duanemorris.com>, Virginia Ginny Gennaro <vgennaro@bakersfieldcity.us>

Adam,

We do not believe Plaintiffs should blame the City for the role of the US Army Corps of Engineers and various power companies on the operation of the Kern River and the flow of water in the Kern River, nor should Plaintiffs blame the City for the upcoming construction, and the prior lack of information regarding the construction.

The Court ordered us to meet and confer with Plaintiffs to arrive at interim flow rates after the Court granted the motion for preliminary injunction, and we did that. The Order also provides that the parties will “continue to monitor flows of water in the Kern River and commit to sharing information regarding the sufficiency of the Interim Flow Regime.” The City has done that as well by preparing, compiling, and making available detailed information on flows and diversions through a publicly accessible website that the City updates on a daily basis.

We do not agree that the Ruling and Orders have imposed a broad or general “duty to disclose” on the City “during the preliminary injunction proceedings and the subsequent negotiations over the Implementation Agreement,” nor do the Ruling and Orders require the City to immediately respond to each and every question from Plaintiffs’ counsel. The City’s limited duty to share information with Plaintiffs only arose after the Court signed the Implementation Order. Plaintiffs and the City are still in litigation and the appropriate mechanism to obtain information, other than factual questions about the implementation and operation of the new fish flow regime, is still generally through the discovery process.

Our offer to make staff from the City’s Water Resources Department available at a meeting of all parties to answer questions about the river and its operations is still on the table. We have postponed the meeting only due to Plaintiffs’ expert’s unavailability on December 21.



We again point out that the City will not have access to any alternate or additional water supplies for Kern River flows during “the shutdown period,” nor does the City have an independent, unilateral ability to suspend, control or limit the planned construction at Lake Isabella. We are therefore not sure how the City can “ensure” that up to 200 cfs will be in the river channel during the shutdown period. The City will agree to leave all fish flow water in the Kern River channel. In any case, at this point we do not see any compelling need to go back to Court to change the Implementation Order, but Plaintiffs are free to do so, as well as the RPIs.

As far as the remaining questions, we will provide our response in a separate email which we will also send to counsel for the Real Parties in Interest, so that they are aware of the same information.

Thanks, Colin.

 Duane Morris LLP  
[www.duanemorris.com](http://www.duanemorris.com)  
**Colin L. Pearce**  
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E-MAIL | BIO | VCARD

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**From:** Adam Keats <[adam@keatslaw.org](mailto:adam@keatslaw.org)>

**Sent:** Wednesday, December 6, 2023 5:29 PM

**To:** Water Audit California <[general@waterauditca.org](mailto:general@waterauditca.org)>

**Cc:** Pearce, Colin L. <[CLPearce@duanemorris.com](mailto:CLPearce@duanemorris.com)>; Ansley, Jolie-Anne S. <[JSAnsley@duanemorris.com](mailto:JSAnsley@duanemorris.com)>; Virginia Ginny Gennaro <[vgennaro@bakersfieldcity.us](mailto:vgennaro@bakersfieldcity.us)>

**Subject:** Re: Kern River flows.

Colin -

Bill and I have been engaging in extensive discussions with the Army Corps of Engineers and Isabella Partners regarding the planned upcoming shutdown of the Isabella Dam. This shutdown will dewater the river through the canyon and through the City, to a possibly catastrophic extent,

We first want to express our continued dismay with the City's failure to perform its duties as a trustee to protect environmental and public trust flows of the river through the City. We have learned in our discussions that the City has been engaging with the Corps and/or the Isabella Partners for months about this planned shutdown, and yet has a) completely failed to notify Water Audit CA of any of it and b) only vaguely mentioned it in passing to Adam as a possible issue. Based on what we have learned from the Corps and Isabella Partners, it is our opinion that the City has failed to provide Plaintiffs with information that it had a duty to disclose during the preliminary injunction proceedings and the subsequent negotiations over the Implementation Agreement. But most troubling, the City failed to advocate for any environmental flows and apparently signed off on the near-complete dewatering of the river through the planned 25 cfs flow for the 2 or 3 week work period, despite its knowledge of the potentially catastrophic impact such low flows will cause the river and its fish. An opportunity to investigate the effects of diminished flow and mitigation in a timely manner has been lost. Further, we are advised that failure of Isabella Partners and the Corps to consider mitigation is solely due to them not being informed of the Court's preliminary injunction by either the City or the Real Parties. It appears that the only parties unconcerned with the impact of the reduction in flows are those that have trustee duties to the public trust.

In its order granting the Preliminary Injunction the Court ordered the parties to engage in "good faith consultation to establish flow rates. The parties then agreed to "continue to monitor flows of water in the Kern River and commit to sharing information regarding the sufficiency of the Interim Flow Regime" in the stipulated Order for Implementation of Preliminary Injunction. The City's actions regarding the planned shutdown of Isabella Dam do not qualify as good faith consultation. We have been informed of this at the very last minute, when the proverbial ship has nearly already sailed. We are spending great time and effort to turn it around and secure sufficient water to keep the river flowing during the work period, but this is effort that the City should have done in the first instance and should be doing now.

To aid our current efforts, we unfortunately have to follow up on Bill's email from December 4th, below, to which he has received no response or even acknowledgement of receipt. In that email, Bill asked you for "the actual stream loss depletions between the Isabella Dam and the First Point of Measure (and the means of measure)." This information is critical to our understanding of the potential impact of the Corps' planned activity. The City's calculations include a routine deduction of 50 CFS from dam releases to allow for accretion (we have already posed the question of whether "accretion" is the proper term.) If that calculation is accurate, the 25 CFS release will logically result in zero net flow at the First Point. We reiterate this request and emphasize that we consider providing this information to be part of the "good faith consultation" ordered by the Court. We add the need for an additional piece of information: the transit time for water from the dam to the First Point. This will further assist our efforts in determining the possible impacts and working with the Corps to mitigate or avoid these impacts.

Bill's email had another request, which is that the City "bypass all flows without diversion during the 'shutdown' period." This is not a request for information but is rather a good faith request for action by the City to avoid and mitigate what may be catastrophic damage to the river during the planned shutdown. To be clear, we are asking the City to voluntarily deviate from the current Interim Flow Regime that is described in the Implementation Order during the shutdown period and put all river flows into the river to mitigate the harm that the shutdown will cause. These flows will almost certainly be small (if they exist at all); so small that allocating just 40% will not be reasonable. In the event that flows are higher than expected, Plaintiffs would be willing to cap this emergency fish flow at 200 CFS, which appears to be sufficient for the current environment based on the data we have access to. Please let us know if this is acceptable to the City. If you think we need a court order, we will be happy to prepare a joint stipulation modifying the existing order. If the City is unwilling to agree to this, please let us know asap as we will then go ex parte and seek an order modifying the implementation order.

Finally, we notice that the City appears to be diverting all remaining water at McClung Weir, with no flow past the dam. The Court required the City to provide flows *past* McClung Weir, not *to* McClung Weir. Can you provide explanations for these numbers? If it makes sense to adjust the implementation order to reflect the parties' better understanding of the river's flows, we are open to that discussion, but we would like to understand this situation first.

The City is the party with the duty to administer the river for public trust interests, yet as the dewatering issue illustrates, the plaintiffs are doing the trustee's work and trying to drag the City along. Is the City yet capable of participating in an expert discussion of the implementation process? (We distinguish this from the offer of an informal discovery process.) Even the limited data collected in the last three weeks has been more informative than the total absence of data before mid-November. In our opinion it is time for the implementation order to be revisited and thereby put to rest the argument that the interim flow rates are not based on solid data.

To summarize, we have three questions as part of our good faith consultation over the flow rates:

- 1) What are the actual stream loss depletions between the Isabella Dam and the First Point of Measure (and the means of measure)?
- 2) What is the transit time for water from the dam to the First Point of Measure?
- 3) Will the City agree to ensure that all river flows (up to 200 CFS) remain in the river channel, past McClung Weir, during the Corps' shutdown period?
- 4) Can you explain the apparent diversion of all water at McClung Weir?

We look forward to your quick response.

Adam

*Law Office of Adam Keats, PC | San Francisco | 415-964-0070*

[www.keatslaw.org](http://www.keatslaw.org) | [adam@keatslaw.org](mailto:adam@keatslaw.org)

[Quoted text hidden]

For more information about Duane Morris, please visit <http://www.DuaneMorris.com>

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EXHIBIT 3



Valerie Stephan &lt;vstephan@waterauditca.org&gt;

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## Kern River flows.

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**Water Audit California** <general@waterauditca.org>

Fri, Dec 8, 2023 at 12:07 PM

To: "Pearce, Colin L." <CLPearce@duanemorris.com>, "Ansley, Jolie-Anne S." <jsansley@duanemorris.com>, Adam Keats <adam@keatslaw.org>, Virginia Ginny Gennaro <vgennaro@bakersfieldcity.us>

Bcc: vstephan@waterauditca.org

Colin

Water Audit is working diligently to give the City of Bakersfield a living river, to the extent that nature and the law allows. It is inexplicable why the City is so resistant to our efforts. You made your client's position very clear at the hearing of the preliminary injunction when you addressed our entreaty to have the City participate in developing a bypass plan: "Again, our job is to provide water for people. We're not going to save them [the public trust plaintiffs]. We're not going to help them. They need to do their job, and we're going to do our job and provide water to people and then -- and keep the Kern River flowing as best we can given the circumstances, given the weather, given all the conditions, given all the obligations we have to meet each and every day."

Respectfully, we disagree with your position. The City ALSO has the duties of a public trust trustee, which the Legislature has thoughtfully enumerated in PRC 6009.1 and we iterated in the petition/complaint. These include the duties of measuring, monitoring and protecting the public trust, and to avoid conflicts of interest. Those duties are not to the plaintiff, but to all of the people of California. This is already the law of the case.

From your responses it is evident that the City has given no thought to the environmental consequences of the planned reduction in flow from Isabella Dam from 800 CFS down to 25 CFS, an event that the City and Real Parties have known about for weeks, if not months. Clearly the pending event was known when we stood in front of the Court at the preliminary injunction hearing. While sly references were made by defendants' counsel to reduction in flows, an innocent listener would have thought the comments to refer to known natural patterns, not extraordinary mechanical intervention. You could have told Water Audit and the Court what was on the immediate horizon, but you did not, and you are proud of that decision. We'll see how that plays out in time.

The immediate concern is that the Kern River flow is going to crash in a few days, and the City and Real Parties intend to sit back and let it happen. Water Audit will not.

We note for the record that both Isabella Partners and USACE advise that neither the City nor the Real Parties gave them notice of the preliminary injunction. We provided first notice to both. Subsequently we have been involved in intense confidential settlement negotiations with Isabella Partners and USACE, who share our concern at the lack of investigation and concern about the potential dewatering of the River is a most unfortunate oversight, and that the absence of investigation makes the proposed event unacceptably unpredictable. The Court's order to maintain flow may be abruptly violated, which could lead to emergency proceedings that would be unfortunate. From our discussions it appears that neither Water Audit, Isabella Partners nor USACE wish uncontrolled injury to occur. Although flow has been interrupted before, there appears to be no readily available records of the environmental consequences. As the City reach of the river has been habitually dry, these circumstances are unique.

There appear to be no river cross-sectionals. We raised this topic in our email of November 13, and asked that all parties agree on sectional locations. (Stroud Ex. M) Not one party even acknowledged our request, and now evidently not a single cross section exists. Accordingly, it is not possible to predict, even grossly, what flow will be the effect of flow below approximately 200 CFS. As fish studies have not been undertaken, the species, presence and proliferation cannot be determined. We do not know if sufficient refugia will exist. In the absence of good data our experts are unable to offer a good opinion of potential or likely harm.

We do not know the river transit time at the relevant flows, and we do not know how much release will be lost from the dam to the relevant reach. We are flying blind. This is shameful negligence of public trust trustee duties.

As neither the City nor the Real Parties have indicated any willingness to act to avoid public trust injury, we will advise you of the outcome of our discussions shortly. We assume at that point the City and Real Parties will stipulate to perform their roles as needed. Once the immediate concern caused by low flow has passed, we will return shortly to the larger issues of sufficient flow and trustee negligence.

Bill

[Quoted text hidden]