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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,

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,

Real Parties in Interest.

Case No. BCV-22-103220
*Assigned to Hon. Gregory Pulskamp*

**REAL PARTIES' NOTICE OF DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND PETITION; DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF BRETT A. STROUD**

Date: January 31, 2024
Time: 8:30 a.m.
Dept.: J
Judge: Hon. Gregory Pulskamp

Complaint Filed: November 30, 2022
FAC Filed: March 6, 2023
SAC Filed: October 4, 2023
TAC Filed: December 1, 2023
Trial Date: None Set

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| | |
|---|---|
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**Notice of Hearing on Demurrer**

PLEASE TAKE NOTICE that the demurrer below has been set for hearing on January 31, 2024 at 8:30 a.m. or as soon thereafter as the matter may be heard, in Department J of the Kern County Superior Court, located at 1215 Truxtun Avenue, in Bakersfield, California.

Dated: January 3, 2024

The Law Offices of Young Wooldridge, LLP

By: /s/ Brett A. Stroud
Brett A. Stroud
*Attorneys for Real Party in Interest*
*North Kern Water Storage District*

Dated: January 3, 2024

Ellison, Schneider, Harris & Donlan LLP

By: /s/ Craig A. Carnes, Jr.
Craig A. Carnes, Jr.
*Attorneys for Real Party in Interest*
*Kern Delta Water District*

Dated: January 3, 2024

McMurtrey, Hartsock, Worth & St. Lawrence

By: /s/ Isaac L. St. Lawrence
Isaac L. St. Lawrence
*Attorneys for Real Party in Interest*
*Buena Vista Water Storage District*

Dated: January 3, 2024

Somach Simmons & Dunn

By: /s/ Nicholas A. Jacobs
Nicholas A. Jacobs
*Attorneys for Real Party in Interest*
*Kern County Water Agency*

Dated: January 3, 2024

Belden Blaine Raytis

By: /s/ Dan N. Raytis
Dan N. Raytis
*Attorneys for Real Party in Interest*
*Rosedale-Rio Bravo Water Storage District*

**Demurrer**

Real Parties in Interest Kern Delta Water District ("Kern Delta"), North Kern Water Storage District ("North Kern"), Buena Vista Water Storage District ("Buena Vista"), Kern County Water Agency ("KCWA"), and Rosedale-Rio Bravo Water Storage District ("Rosedale") demur to the following causes of action in the Third Amended Complaint in this action (filed on December 1, 2023) on the following grounds:

**First Cause of Action**

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

**Third Cause of Action**

2. The Third Cause of Action fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

**Fourth Cause of Action**

3. The Fourth Cause of Action fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

Dated: January 3, 2024

The Law Offices of Young Wooldridge, LLP

By: /s/ Brett A. Stroud
Brett A. Stroud
*Attorneys for Real Party in Interest*
*North Kern Water Storage District*

Dated: January 3, 2024

Ellison, Schneider, Harris & Donlan LLP

By: /s/ Craig A. Carnes, Jr.
Craig A. Carnes, Jr.
*Attorneys for Real Party in Interest*
*Kern Delta Water District*

Dated: January 3, 2024

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*Kern County Water Agency*

Dated: January 3, 2024

Belden Blaine Raytis

By: /s/ Dan N. Raytis
Dan N. Raytis
*Attorneys for Real Party in Interest*
*Rosedale-Rio Bravo Water Storage District*

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Introduction

The California Constitution requires 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.) This requirement applies to all uses of water, including public trust uses. (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1186.) This case must thus be litigated on the foundational rule that all of the circumstances must be taken into account and all competing claims balanced to achieve the constitutional mandate. Plaintiffs' second cause of action, raising this constitutional question, is not the subject of this demurrer. Instead, this demurrer is addressed to the other three causes of action, each of which fails as a matter of law. The demurrer should be sustained without leave to amend so that this case can be litigated on the constitutional standard of reasonable and beneficial use, which exists to protect all uses of our state's scarce water resources: domestic use, municipal use, industrial use, agricultural use, and public trust uses such as the maintenance of fisheries and recreation

### II. Applicable Law

A demurrer raises an issue of law that "appears on the face" of the Complaint. (Code Civ. Proc., §§ 430.30, 589.) A general demurrer tests whether the complaint alleges sufficient facts to state a cause of action. (Code Civ. Proc., § 430.10(e); *Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 870-71.) A general demurrer also lies where the complaint itself discloses some defense that bars recovery. (See e.g. *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971-72.) A demurrer "may be taken to the whole complaint … or to any of the causes of action stated therein." (Code Civ. Proc., § 430.50(a).) When it appears from the facts pled and the judicially noticeable materials that the complaint does not state a cause of action, a general demurrer should be granted. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 77.)

## III. Argument

### A. The First Cause of Action, for Violations of the Public Trust Doctrine and the Fish and Game Code, Fails to State a Claim

The first cause of action in the TAC is expressly one for a writ of mandate or prohibition. But the TAC does not state a cause of action for either of these two extraordinary writs.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." (Code Civ. Proc., § 1102.) Yet the TAC does not allege any "proceedings" by Bakersfield exercising any "judicial function" that could be restrained by prohibition, and therefore a writ of prohibition is not appropriate. (*Whitten v. California State Board of Optometry* (1937) 8 Cal.2d 444, 445–446.)

A writ of mandate is proper only where there is "(1) a clear and present duty on the part of the respondent and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." (*Kaiser Foundation Hospitals v. Belshe* (1997) 54 Cal.App.4th 1547, 1558.) "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.) A petition seeking a writ of mandate is "subject to the general rules of pleading applicable to civil actions." (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271.) The use of a general demurrer "to test the legal sufficiency of the petition for a writ … has always been recognized by the courts of this state." (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1323; see Code Civ. Proc., § 1109.) Plaintiffs' first cause of action for a writ of mandate fails for two reasons. First, Bakersfield does not act as a trustee agency when it operates the Weirs. Second, Plaintiffs cannot allege any mandatory duty to operate the Weirs in a particular way, because the public trust inherently includes discretion to balance different public trust interests against other interests.

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

Plaintiffs assert, without any citation of authority, that Bakersfield "is a trustee for the

[1] Instead of asserting that Bakersfield is diverting water in violation of the public trust doctrine and requesting that the *Court* perform public trust balancing, Plaintiffs allege that the City itself has a duty to perform public trust balancing. As explained herein, such a duty does not arise under the facts pled by Plaintiffs.

public trust in all actions and decisions that include or implicate public trust interests." (TAC, ¶33.) 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* ("*National Audubon*") (1983) 33 Cal.3d 419, 444.) However, an agency (state or local trustee agency) does not have public trust obligations simply because its actions may implicate public trust resources. Instead, the public trust doctrine only imposes a 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"]).

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. (*Id*. 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.** (*National Audubon*, 33 Cal.3d 419 at 444, emphasis added.)

Similarly, in *Center for Biological Diversity, Inc. v. FPL Group* ("*CBD*") (2008) 166 Cal.App.4th 1349, 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 wind turbines alleging that operation of the wind turbines injured raptors and other birds in violation of the public trust doctrine. 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**. … Plaintiffs have not proceeded against the **County of Alameda**, which has **authorized the use** of the wind turbine generators, or against any agency such as the **California Department of Fish and Game** that has been **given the statutory responsibility of protecting the affected natural resources**. … A challenge to the permissibility of defendants' conduct must be directed to the agencies **that have authorized the conduct**. (*CBD*, 166 Cal.App.4th at 1365-67, 1370, emphasis added; see also *Environmental Law Foundation v. State Water Resources Control Board* ("*ELF*") (2018) 26 Cal.App.5th 844 [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 Real Parties' water rights or contractual entitlements (based on Bakersfield's ownership or management of the Diversion Structures).[2] (TAC, ¶¶2, 79, 81.) Plaintiffs describe how Bakersfield manages the Diversion Structures 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 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 districts based on their claimed rights and water orders,

[2] Plaintiffs acknowledge the validity of the water rights held by Bakersfield and Real Parties in Interest. (TAC, ¶74.)

> 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 ¶77.)

Bakersfield's role in operating the Diversion Structures 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 the water rights and Diversion Structures to Bakersfield in 1976. (*Ibid*.) The City simply diverts water pursuant to its proprietary water rights and operates the Diversion Structures as part of contractual obligations to the Real Parties in Interest that apply to the City as those obligations would apply to any private contracting party. The City does not authorize or otherwise approve diversions by the Real Parties in Interest. Thus, the City is not like the SWRCB in *National Audubon* (i.e., the SWRCB issued water rights),[3] nor is it like the county in *CBD* that authorized the use of wind turbines or the county in *ELF* that issued well permits. 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*, 166 Cal.App.4th at 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].) The instant action is similar to the action dismissed in *CBD* insofar as Plaintiffs did not bring the action against the "responsible" public agencies. "[T]he action must be brought against the appropriate representative of the state as the trustee of the public trust." (*Id.* at pp. 1367-68.)

**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. (TAC, Prayer ¶1.) Even if Bakersfield had public trust duties with regard to the Diversion Structures, 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

[3] It is interesting to note that the diverter in *National Audubon* was also a public agency (i.e., the Los Angeles Department of Water and Power) and the court in that case did not discuss any public trust duties of that public agency based on the fact that its diversions impacted public trust resources.

context of judicial review of administrative decisions." (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22.) 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 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 11.) They also alleged (like Plaintiffs in this action) that the SWRCB had failed to consider the public trust doctrine. (*Id*. at 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 11.) In affirming the trial court's sustaining of a demurrer without leave to amend, the appellate court noted in relevant part as follows:

> **Simply ordering the State Board to apply the public trust doctrine would be an empty judgment, while actually determining whether the State Board is properly applying the doctrine would necessarily require the trial court to consider the many decisions within the State Board's mandate, decisions that will typically require the exercise of administrative discretion and will often require technical expertise.**
>
> When ruling on the demurrer 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. **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, emphasis added.)

As in *Monterey Coastkeeper*, Bakersfield's satisfaction of a public trust duty (assuming *arguendo* 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. 1432, 1443.) Therefore, Plaintiffs cannot state a cause of action based on the public trust.

**3. Fish and Game Code section 5901 only applies to anadromous fish and does not provide for a private right of action.**

Plaintiffs allege "[t]he City has violated, and continues to violate, its duty under Fish and Game Code section 5901 to not construct or maintain in any stream in District 3 1/2 any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream." (TAC, ¶ 131.) This claim must fail based on a plain reading of the statute.

Section 5901 states:

> "Except as otherwise provided in this code, it is unlawful to construct or maintain in any stream in Districts 1, 13/8, 11/2, 17/8, 2, 21/4, 21/2, 23/4, 3, 31/2, 4, 41/8, 41/2, 43/4, 11, 12, 13, 23, and 25, any device of contrivance that prevents, impedes, or tends to prevent or impede, **the passing of fish up and down stream**." (Fish and G. Code, § 5901 [emphasis added].)

The plain text limits section 5901 to migratory anadromous fish, i.e., those fish capable of "passing up and down stream." Legislative history confirms this, stating section 5901 proscribes "any device or contrivance that prevents or impedes the passage of *anadromous (migratory) fish*". (Request for Judicial Notice ("RJN"), Exhibit 1, p. 1/4 (italics added).) Plaintiffs fail to allege migratory anadromous fish exist (or existed) in the Kern River, or that the weirs prevent or impede their migration to and from the ocean. Indeed, Plaintiffs concede the Kern River ends (and has historically ended) in the San Joaquin Valley floor and does not reach the ocean. (TAC, ¶ 100 [noting that the Kern River terminates at Buena Vista Lake].)

Even assuming arguendo that Section 5901 was not limited to anadromous fish, Section 5901 does not provide Plaintiffs a private right of action. "A violation of a state statute does not necessarily give rise to a private cause of action. … It is well settled that there is a private right

of action to enforce a statute only if the statutory language or legislative history affirmatively indicates such an intent. **That intent need not necessarily be expressed explicitly, but if not it must be strongly implied**." (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 337 [emphasis added] [internal citations and quotations omitted].) "If the Legislature intended a private right of action, that usually ends the inquiry. If the Legislature intended there be no private right of action, that usually ends the inquiry. If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action." (*Vasquez v. Solo 1 Kustoms, Inc*. (2018) 27 Cal.App.5th 84, 90 [internal citations and quotations omitted].) Here, the plain language of Section 5901 does not expressly or impliedly provide for a private right of action. The provision simply sets forth certain activities that are unlawful. Real Parties in Interest could not find one case wherein a private litigant pursued a cause of action for the violation of Section 5901.[4] Therefore, there is no basis for Plaintiffs to assert a private right of action for an alleged violation of Section 5901.

**4. Fish and Game Code Section 5937 does not apply to the Diversion Structures because they are not "dams."**

Fish and Game Code section 5937 requires the owner of a dam, under certain circumstances, to allow flows around or through the dam "to keep in good condition any fish that may be planted or exist below the **dam**." (Emphasis added.) However, the Diversion Structures identified in Paragraph 79 of the Complaint (i.e., the six weirs) do not constitute "dams" under Section 5937.[5] While Section 5900(a) provides a broad definition for "dam," Section 5900(b)

[4] The lack of private enforcement authority pursuant to Section 5901 makes sense given that the California Department of Fish and Wildlife has the responsibility and discretion to determine when it examines an obstruction and whether a fishway or any alternative solution would be proper. (See, Fish and G. Code, §§ 5930, 5931, 5938.) In such a case (i.e., "when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency"), "the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action." (*Noe*, 237 Cal.App.4th at p. 337.)

[5] Plaintiffs may assert that the Court's prior ruling on Plaintiffs' motion for a preliminary injunction resolved this issue and is "law of the case." However, that position is incorrect. First, "[T]he law-of-the-case doctrine does not apply to trial court rulings." (*Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 53 Cal.App.5th 733, 788.) Second, the issue was not fully briefed because Plaintiffs' moving papers for their preliminary injunction incorrectly argued that a provision other than Fish and Game Code section 5900 defined "dam" for purposes of Section 5937. Thus, the Real Parties in Interest have not had a chance to fully brief this issue for the Court.

specifically defines a number of other facilities as "conduits" (i.e., something other than dams) and the Fish and Game Code has numerous provisions treating "conduits" separate from "dams". (See, Fish and G. Code, §§ 5980-6028.) Included within the "conduit" definition in Section 5900(b) is, among other things, a diversion structure used for taking water from a river. The Complaint acknowledges that the weirs are simply diversion structures used for taking water from the river. (See, Complaint, ¶¶ 2, 77, 79.) Thus, the Complaint affirmatively pleads facts demonstrating that the Diversion Structures are not "dams" subject to Section 5937.

### B. The Third Cause of Action, for "Breach of Trustee Duties", Fails to State a Claim

Plaintiffs' third cause of action entitled "Breach of Trustee Duties – Public Resource Code §6009.1" alleges that Bakersfield is in breach of fiduciary duties as a trustee according to Public Resources Code section 6009.1. (TAC, ¶¶ 149-166.) However, this cause of action fails because Section 6009.1 is inapplicable to the facts pled by Plaintiffs/Petitioners.

As acknowledged by Plaintiffs/Petitioners, the elements of a cause of action for breach of fiduciary include (among other elements) the existence of a fiduciary relationship and the breach thereof. (*Id*. at ¶ 150 [citing *Knox v. Dean* (2012) 205 Cal.App.4th 417, 432].) "Whether a fiduciary duty exists is generally a question of law." (*Id*.) Here, Public Resources Code section 6009.1 does not impose a fiduciary duty on Bakersfield under the facts pled by Plaintiffs/Petitioners.[6] Section 6009.1 addresses how the Legislature's grant of "public trust lands" (i.e., tidelands and submerged lands) to local entities creates a fiduciary obligation on the part of the grantee. (See, Pub. Resources Code, § 6009(c) ["Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission"], 6009(d) ["Grantees are required to manage the state's tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or

[6] While Plaintiffs/Petitioners specifically reference and rely on Public Resources Code section 6009.1 in their third cause of action, Plaintiffs/Petitioners also reference the "public trust" in the supporting paragraphs of this cause of action. To the extent that Plaintiffs/Petitioners are also alleging a breach of the public trust in their third cause of action, the third cause of action is duplicative of their first cause of action, and it fails for the reasons set forth in Section III.A above.

excises"] 6009.1(a) ["Granted public trust lands remain subject to the supervision of the state and the state retains its duty to protect the public interest in granted public trust lands"], 6609.1(b) [explaining that when public trust lands are granted to local entities, the state acts as trustor and the local entity grantee acts as trustee], 6009.1(c) [discussing the fiduciary duties of a local entity grantee].) The legislative history for Section 6009.1[7] confirms that the statute only applies to **legislative** grants of public trust lands. (8-8-12 Senate Floor Analysis, p. 3 [stating that the bill defines a "local trustee of granted public trust lands" as a county, city, or district "that has been granted, conveyed, or transferred by statute, public trust lands **through a legislative grant**" (emphasis added)]; 6-22-12 Senate Natural Resources and Water Analysis, p. 2 [same].) This legislative history also describes how such legislative grants occurred when the Legislature "periodically 'granted' tide and submerged lands in trust to local or specific governmental entities for management purposes." (8-8-12 Senate Floor Analysis, p. 4; 6-22-12 Senate Natural Resources and Water Analysis, p. 1.)

Here, Plaintiffs/Petitioners do not allege that the Legislature granted tidelands or submerged lands to Bakersfield (or the Real Parties in Interest) that would establish as a matter of law a trustee (i.e., fiduciary) duty under Section 6009.1. Instead, Plaintiffs/Petitioners assert that, "[t]he City has a fiduciary duty pursuant to Public Resources Code, section 6009.1 **as it is a city of the state and thus a grantee of lands by the federal government pursuant to California's entrance into the Union as a state**." (TAC, ¶ 153 [emphasis added].) Thus, according to Plaintiffs/Petitioners, Section 6009.1 applies to every city in California as a "city of the state" regardless of whether a city has received a legislative grant of public trust lands. There is no language in Section 6009.1 to support Plaintiffs/Petitioners position, and Plaintiffs/Petitioners' allegation does not otherwise establish a legislative grant of public trust lands to the City.

Further, Plaintiffs/Petitioners have pled facts demonstrating as a matter of law that Section 6009.1 does not create a fiduciary duty in relation to the City's operation of the Kern River or the Weirs. As described above, a trustee duty only arises under Section 6009.1 when the Legislature grants public tidelands or submerged lands and the grantee becomes a trustee with respect to said lands. Here, Plaintiffs/Petitioners acknowledge that that City received its interests in the Weirs and the Kern River from a private corporation, not from a grant of the Legislature.

[7] Section 6009.1 was added to the Public Resources Code in 2012 via Assembly Bill 2620.

> 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**. (TAC, ¶ 77 [emphasis added].)

Based on the above, Plaintiffs/Petitioners have failed to allege sufficient facts demonstrating that Bakersfield owed a fiduciary duty under Section 6009.1 or that Bakersfield breached said duty. Moreover, Plaintiffs/Petitions have pled facts demonstrating as a matter of law that the City does not have a fiduciary duty under Section 6009.1. Therefore, Plaintiffs/Petitioners' third cause of action fails and RPI's demurrer to that cause of action should be sustained without leave to amend.

### C. The Fourth Cause of Action, for Public Nuisance, Fails to State a Claim

Plaintiffs/Petitioners' fourth cause of action is entitled "Injunctive Relief – Code Civ. Proc. §§ 526, 527; Public Nuisance – CC §§ 3479 and 3480."[8] (TAC, ¶¶ 167-188.) Plaintiffs fail to state a cause of action for public nuisance because they fail to allege facts sufficient to establish standing in accordance with Code of Civil Procedure section 430.10(e). Where the complaint demonstrates that plaintiffs lack standing as to a cause of action, it is subject to demurrer for failure to state a cause of action. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8.)

"Actions for public nuisance are aimed at the protection and redress of community interests and therefore, as a general rule, only public prosecutors authorized by statute may sue for a public nuisance on behalf of the community." (*Rincon Band of Luiseno Mission Indians etc. v. Flynt* (2021), 70 Cal.App.5th 1059, 1100, citing Civ. Code, § 3494; Code Civ. Proc., § 731.) "A private party has standing to bring an action for public nuisance only if the alleged nuisance is 'specially injurious' to himself." (*Rincon Band of Luiseno Mission Indians,* 70 Cal.App.5th at 1102; see also, Civ. Code, § 3493.) Further, "[t]he damage suffered must be different in kind and not merely in degree from that suffered by other members of the public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040; *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App. 3d 932, 949 ["[A] private party does not have a cause

[8] "An injunction is a remedy, not a cause of action. Therefore, it may not be issued if the underlying causes of action are not established." (*Venice Coalition to Preserve Unique Community Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 54; See also, *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 734.) Thus, Plaintiffs' fifth cause of action is for public nuisance.

of action on account of a public nuisance unless he alleges fasts showing special injury to himself in person or property, and of a character different in kind from that suffered by the general public"]; CACI 2020 [elements of public nuisance include, among others, that a plaintiff "suffered harm that was different from the type of harm suffered by the general public".) A private citizen, who has no other right than that enjoyed by the public, cannot abate a public nuisance. (*Hasbrouck v. Cavill* (1921) 54 Cal.App. 1, 5.)

Here, Plaintiffs allege two grounds for standing to maintain a public nuisance cause of action – (1) Plaintiffs are acting as a private attorney general and thus the special injury requirement does not apply (TAC, ¶¶ 181-184); and (2) Plaintiffs have suffered a special injury different in kind from other members of the public (*id*. at ¶¶ 185-188). Both of Plaintiffs' grounds fail as a matter of law.

**1. There is no "private attorney general" exception to Civil Code section 3493.**

As made clear by the Legislature, the ability of a private party to prosecute a public nuisance cause of action is circumscribed and no exceptions exist - "A private person may maintain an action for a public nuisance, ***if*** **it is specially injurious to himself,** ***but not otherwise***." (Civ. Code, § 3493 [emphasis added].) In interpreting this statute, the Court must give a plain and commonsense meaning to the language therein. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166.) The plain language of the statute only provides one circumstance where a private litigant can prosecute a public nuisance action (i.e., when special injury exists), and the statute expressly precludes any exceptions thereto via the "but not otherwise" language. Thus, the statute precludes any private attorney general exception,[9] and reading such an exception into the statute despite its plain language would eviscerate the statute and violate a number of statutory interpretation rules. (See, *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828 [statutory interpretations that render words surplusage must be avoided]; *Campana v. East Bay Municipal Utility Dist.* (2023) 92 Cal.App.5th 494, 500 [statutory interpretations that render words ineffective must be avoided]; *In re C.H.* (2011) 53 Cal.4th 94,

[9] The Legislature knows how to provide authority to private attorney generals when it desires to do so. (See, Code Civ. Proc. § 1021.5 [authorizing attorney's fees recovery for private attorney generals]; Labor Code §§ 2698, et seq. [Labor Code Private Attorneys General Act of 2004].) Here, the Legislature included language in Civil Code section 3493 that precludes private attorney general standing for a public nuisance claim.

103 [courts should give meaning to every word of a statute].) Cases addressing public nuisance claims in the class action context demonstrate that there is no exception to the special injury standing requirement in situations where one or a few plaintiffs represent a class of people (i.e., similar to a private attorney general situation). (See, *Frieman v. San Rafael Rock Quarry, Inc*. (2004) 116 Cal.App.4th 29, 38-39, 41-42 [court relied on the application of Section 3493's special injury requirement to deny class certification].)

The cases cited by Plaintiffs to support a private attorney general exception to Section 3493's express standing limitation do not address Section 3493 at all and are otherwise distinguishable and inapplicable.

- *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965) 354 F.2d 608, 619-620: This case is a non-binding federal case involving the Federal Power Act, and the relevant portion of the case relied on by Plaintiffs does not address the critical issue of a party's ability to assert a cause of action but instead addresses a situation where a non-petitioner offered evidence later relied on by a petitioner.
- *Associated Industries of New York State v. Ickes* (2d Cir. 1943) 134 F.2d 694, 704. This case is a non-binding federal case involving the Bituminous Coal Act that discusses inapplicable federal statutes providing standing to "aggrieved persons," which allow a private individual to vindicate a public interest even if there is no invasion of any private legally protected interest. Unlike the statutes discussed in that case, Civil Code section 3493 expressly precludes such an allowance in this case.
- *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 565. This case is focused on Code of Civil Procedure section 1021.5, which is an attorneys fee statute (i.e., it does not address standing) that, unlike Civil Code section 3493, specifically provides for fee awards to private attorneys general.
- *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165–166 and *Laidlaw Environmental Services, Inc., Local Assessment Com. v. County of Kern* (1996) 44 Cal.App.4th 346, 354. These cases address the "public right/public duty" exception to the requirement that a mandamus petition be brought by a "beneficially interested" party. Plaintiffs' public nuisance cause of

action is not a mandamus action and, more specifically, Civil Code section 3493 expressly precludes such an exception in this case.

- *Animal Legal Defense Fund v. Olympic Game Farm, Inc*. (2019) 387 F.Supp.3d 1202, 1206-1207. This is a non-binding federal trial court decision addressing Washington state statutes based on interpretations thereof by Washington state courts.[10]

Thus, there is no private attorney general exception to the standing requirement set forth in Civil Code section 3493 (i.e., the statute means what is expressly states), and Plaintiffs must allege special injury to establish standing to pursue a public nuisance cause of action.

**2. Plaintiffs have not alleged special injury under Section 3493.**

Plaintiffs allege they have suffered a special injury under Section 3493 because they voluntarily chose to spend time and money on education, investigation, and other work regarding the City's alleged conduct in relation to the Kern River. (TAC, ¶¶ 186-188.) However, Plaintiffs' voluntary expenditures are not cognizable injuries under Section 3493, and even if they were, such expenditures do not constitute special injury.

"Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm.. . . A plaintiff must show the defendant's conduct was a "substantial factor" in causing the alleged harm." (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359; See also, CACI 2020.) "Proximate cause requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" (*City of Almaty v. Khrapunov* (9th Cir. 2020) 956 F.3d 1129, 1133 [quoting *Holmes v. Secs. Inv'r Prot. Corp*. (1992) 503 U.S. 258, 268 and finding that the defendant's act of money laundering was not proximate cause of the plaintiff's voluntary decision to expend funds to track down the laundered money].) In California, "the general rule [is] that the expenses of litigation are ordinarily not considered tort damages." (*Gorman v. Tassajara Development Corp*. (2009) 178 Cal.App.4th 44, 83; see also, *Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 776 [investigation and research expenses

[10] Resorting to non-binding opinions addressing other states' laws on public nuisance standing is unnecessary and will result in various conclusions based on differing interpretations of law in each state. (See, e.g., *Rhodes v. E.I. du Pont de Nemours and Co*. (2011) 636 F.3d 88, 97-98 [interpreting West Virginia law and concluding that there is no class action exception to the special injury rule].)

not recoverable].) Here, Plaintiffs voluntarily incurred the expenditures listed in Paragraph 187 of the TAC based on choices made by Plaintiffs in their sole discretion.[11] Such expenditures do not constitute damages under California law. (*Gorman,* Cal.App.4th at 83; *Ladas,* 19 Cal.App.4th at 776.) Further, absent Plaintiffs' discretionary decisions and actions, the alleged harm would not exist regardless of the City's alleged conduct. There simply is no "direct relation" between the City's alleged conduct and Plaintiffs' purported injury. As such, the City's alleged conduct cannot be a proximate cause of Plaintiffs' alleged harm, and Plaintiffs' public nuisance cause of action must fail.

Further, even assuming arguendo that there is cognizable causation between the City's alleged conduct and the Plaintiffs' alleged harm, which there is not, Plaintiffs cannot allege that the harm is different in kind from anyone else given that any member of the public could make the same discretionary decisions to expend time and funds on the types of activities listed in Paragraph 187 of the TAC. In *Koll-Irvine*, the court found that plaintiffs' proximity to an airport's jet fuel storage tank, and allegations of loss of property value, higher insurance premiums and constant fear of fire and toxic exposure did not constitute "special injury." The court reached this conclusion despite the fact that plaintiffs were in close proximity to the airport and had a greater a fear of injury or damage because those risks applied to all the homes and businesses in the area of the airport. (*Id*. at 1040-1041.) The court noted that plaintiff's "proximity arguably exposes it to a higher degree of these damages, but not to a different kind altogether. Because it has failed to allege damages different from the general community, it cannot maintain an action for public nuisance." (*Id*.) Thus, the fact that Plaintiffs voluntarily chose to incur expenses and thus had a higher degree of "damages" does not change the fact that any member of the public could put itself in the same situation that Plaintiffs chose to in this case. Therefore, Plaintiffs' alleged injury is not special and their public nuisance cause of action must fail.

## IV. Conclusion

For the above reasons, the Real Parties respectfully ask the Court to sustain the demurrer to the first, third, and fourth causes of action without leave to amend.

[11] The Court already concluded in its ruling on the City's demurrer to Plaintiffs' First Amended Complaint that Plaintiffs' voluntarily incurred expenditures do not constitute "special injury" sufficient to constitute standing to assert a public nuisance cause of action. (9-18-2023 Ruling on City of Bakersfield's Demurrer to Plaintiffs' First Amended Complaint, p. 10.)

Dated: January 3, 2024 — The Law Offices of Young Wooldridge, LLP

By: /s/ Brett A. Stroud
Brett A. Stroud
*Attorneys for Real Party in Interest*
*North Kern Water Storage District*

Dated: January 3, 2024 — Ellison, Schneider, Harris & Donlan LLP

By: /s/ Craig A. Carnes, Jr.
Craig A. Carnes, Jr.
*Attorneys for Real Party in Interest*
*Kern Delta Water District*

Dated: January 3, 2024 — McMurtrey, Hartsock, Worth & St. Lawrence

By: /s/ Isaac L. St. Lawrence
Isaac L. St. Lawrence
*Attorneys for Real Party in Interest*
*Buena Vista Water Storage District*

Dated: January 3, 2024 — Somach Simmons & Dunn

By: /s/ Nicholas A. Jacobs
Nicholas A. Jacobs
*Attorneys for Real Party in Interest*
*Kern County Water Agency*

Dated: January 3, 2024 — Belden Blaine Raytis

By: /s/ Dan N. Raytis
Dan N. Raytis
*Attorneys for Real Party in Interest*
*Rosedale-Rio Bravo Water Storage District*

**Declaration of Brett A. Stroud**

I, Brett A. Stroud, declare as follows:

1. I am an attorney duly licensed to practice law before all courts of the State of California. I am a partner in The Law Offices of Young Wooldridge, LLP, attorneys of record for Real Party in Interest, North Kern Water Storage District ("North Kern") in the above-entitled action. The following matters are within my own personal knowledge, and if called as a witness, I could testify competently thereto.

2. This declaration is submitted in support of the Demurrer of the Real Parties in Interest, Kern Delta Water District, North Kern Water Storage District, Buena Vista Water Storage District, Kern County Water Agency, and Rosedale-Rio Bravo Water Storage District (collectively, "Real Parties in Interest"), to the Third Amended Complaint filed by Plaintiffs and Petitioners Bring Back the Kern, Water Audit California, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity (collectively Plaintiffs/Petitioners").

3. On December 29, 2023, the Real Parties in Interest sent to legal counsel representing the Plaintiffs/Petitioners, Mr. Adam Keats and Mr. William McKinnon, a meet and confer letter under Code of Civil Procedure sections 430.41 and 435.5 detailing the grounds for the filing of a demurrer under Code of Civil Procedure section 430.10, a true and correct copy of which is attached as Exhibit "A" hereto.

4. On January 2, 2024, counsel for the Real Parties in Interest and counsel for the Plaintiffs met and conferred by telephone. The parties were unable to resolve any of the issues presented in this demurrer informally.

5. Based on the above information, counsel for both the Real Parties in Interest and Plaintiffs/Petitioners are in agreement that they all have engaged in a good faith to meet and confer to resolve objections to the Complaint prior to filing the demurrer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: January 3, 2024

Brett A. Stroud

Exhibit A

December 29, 2023

**VIA EMAIL**

Adam Keats (adam@keatslaw.org)
*Attorney for Plaintiffs and Petitioners Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity*

William McKinnon
(legal@WaterAuditCA.org)
*Attorney for Plaintiff and Petitioner Water Audit California*

Re: Meet and Confer Regarding Demurrer and Motion to Strike
*Bring Back the Kern, et al. v. City of Bakersfield*
Kern County Superior Court Case No. BCV-22-103220

Dear Messrs. Keats and McKinnon:

The undersigned represent North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Rosedale-Rio Bravo Water Storage District ("Real Parties"), which are the real parties in interest in the above-captioned action. This letter is our attempt to meet and confer with you under Code of Civil Procedure sections 430.41 and 435.5[1] regarding the "Verified Third Amended Complaint for Injunctive Relief and Petition for Writ of Mandate" ("Complaint"). The Complaint is subject to both a general demurrer under section 430.10 and a motion to strike under section 437.

**Demurrer to First Cause of Action (Writ of Mandate and/or Prohibition – Public Trust Doctrine and Fish and Game Code sections 5901 and 5937)**

Plaintiffs' first cause of action seeks a Writ of Mandate and/or Prohibition for alleged violations of California's public trust doctrine and Fish and Game Code sections 5901 and 5937. (Complaint, ¶¶108-136.) This cause of action fails to state a claim upon which relief may be granted with respect to the public trust doctrine for at least three separate reasons.

First, a writ of mandate and/or prohibition 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.) 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.) This "inherently discretionary doctrine" does not allow for judicial

[1] Further statutory citations are to the Code of Civil Procedure unless otherwise specified.

intervention, and a court cannot grant the requested declaratory relief or mandamus as a matter of law. (*Id.* at 14, 21-22.)

Second, 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.) The public trust doctrine applies where the agency has the authority and/or responsibility (pursuant to its police power and/or statute) to: (1) authorize an activity potentially impacting public trust resources; or (2) protect public trust resources potentially impacted by an activity. (See, *National Audubon*, 33 Cal.3d at 444 [explaining that the scope of State Water Resources Control Board's public trust duties is determined by its statutory authority with respect to the public trust]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1366 ["The interests encompassed by the public trust undoubtedly are protected by public agencies acting pursuant to their police power and explicit statutory authorization"]; *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844 [County, acting pursuant to its police power to manage groundwater resources, may not issue well permits without considering public trust resources].) As acknowledged in the Complaint, Bakersfield manages the weirs on the Kern River according to the "law of the river," a series of agreements, court decrees, and other documents which Bakersfield is legally bound to follow. (See Complaint, ¶¶75-77.) Thus, Bakersfield's role in managing diversions is not based on the discretionary exercise of any police power or statutory authority that would implicate a public trust duty.

Third, to the extent Plaintiffs' public trust action is brought against Bakersfield and/or the Real Parties based on their actions (i.e., diversions from the Kern River) allegedly harming public trust resources, Plaintiffs cannot maintain a public trust action against the City or Real Parties. (*Center for Biological Diversity, Inc.,* 166 Cal.App.4th at 1370-1371 [while a breach of public trust cause of action may exist against those who have discretionarily authorized an activity, it does not lie against the actors who are allegedly impacting the public trust].) "The action must be brought against the appropriate representative of the state as the trustee of the public trust." (*Id*. at p. 1367.) As discussed above, and as evidenced in the facts set forth in the Complaint, neither Bakersfield or the Real Parties act as trustees of the state with respect to their Kern River operations.

This cause of action also fails to state a claim upon which relief may be granted with respect to Fish and Game Code sections 5901 and 5937. Fish and Game Code section 5901 provides, "Except as otherwise provided in this code, it is unlawful to construct or maintain in any stream in Districts 1, 13/8, 11/2, 17/8, 2, 21/4, 21/2, 23/4, 3, 31/2, 4, 41/8, 41/2, 43/4, 11, 12, 13, 23, and 25, any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream." The Complaint fails to state a cause of action under this statute. First, as indicated by the "passing of fish up and down stream" language in Section 5901, the statute only applies to migratory (i.e., anadromous fish). The legislative history for the statute confirms that its applicability is limited to protecting migratory fish. (See, SB 857 (2005-2006) Legislative History [discussing Section 5901, as it existed and as amended, as applying to protect anadromous fish].) The Complaint does not include any allegations that anadromous fish exist (or existed) in the Kern River or that the weirs prevent or impeded their migration to/from the ocean. Second, Section 5901 does not provide for a private right of action given that the Legislature has not manifested

any intent to create a private right of action. (See, *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 336–337.)

Fish and Game Code section 5937 requires the owner of a dam, under certain circumstances, to allow flows around or through the dam "to keep in good condition any fish that may be planted or exist below the dam." However, the Diversion Structures identified in Paragraph 80 of the Complaint (i.e., the six weirs) do not constitute "dams" under Section 5937. While Section 5900(a) provides a broad definition for "dam," Section 5900(b) specifically defines a number of other facilities as "conduits" (i.e., something other than dams) and the Fish and Game Code has numerous provisions treating "conduits" separate from "dams". (See, Fish & Game Code, §§ 5980-6028.) Included within the "conduit" definition in Section 5900(b) is, among other things, a diversion structure used for taking water from a river. The Complaint acknowledges that the weirs are simply diversion structures used for taking water from the river. (See, Complaint, ¶¶ 2, 78, 80.) Thus, the Complaint affirmatively pleads facts demonstrating that the Diversion Structures are not "dams" subject to Section 5937.

**Demurrer to Third Cause of Action (Writ of Mandate and/or Prohibition – Breach of Trustee Duties)**

Plaintiffs' fourth cause of action is for alleged violations of "public trust duties." (Complaint, ¶¶149-166.) This cause of action appears to be duplicative of the first, which is addressed above. It also cites Public Resources Code section 6009.1, but it does not state a cause of action under that section. Section 6009.1 does not apply to the City or Real Parties. The text of the statute clearly applies to legislative grants of "public trust lands." The Complaint does not allege that the California Legislature granted any tidelands or submerged lands to the City or Real Parties. In fact, the Complaint acknowledges (as it must) that the City acquired the property at issue in this case (i.e., Kern River water and the Weirs) from a private corporation. Thus, Section 6009.1 does not apply to create a fiduciary duty. The Complaint similarly cannot and does not allege the breach of any such duty.

**Demurrer to Fourth Cause of Action (Injunctive Relief – Public Nuisance)**

Plaintiffs' fourth cause of action is for an alleged public nuisance. (Complaint, ¶¶167-188.) It fails to state a cause of action for want of standing. A private party has standing to bring an action for public nuisance only if the alleged nuisance is "specially injurious to himself, *but not otherwise*." (Civ. Code, § 3493 [emphasis added]; *Rincon Band of Luiseno Mission Indians etc. v. Flynt* (2021) 70 Cal.App.5th 1059, 1102.) "The damage suffered must be different in kind and not merely in degree from that suffered by other members of the public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040.) The statute is clear and precludes any 'private attorney general' standing exception. The Complaint does not include any allegations of specific injury to any of the plaintiffs. Where the complaint demonstrates that the plaintiff lacks standing as to a cause of action, it is subject to demurrer for failure to state a cause of action. (*Brown v. Crandall* (2011) 198 Cal.App.4th 1, 8.) Moreover, as explained above, neither the City nor Real Parties owe a duty to Plaintiffs as alleged in the Complaint, and demurrer must lie as a result. (See *Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, fn. 9.)

**Conclusion**

We are prepared to meet and confer by telephone at your earliest convenience regarding the defects identified above. If we have not reached agreement that Plaintiffs will file an amended complaint prior to January 2, 2023, we will need to prepare the demurrer and motion for filing, absent a further extension of the pleading deadline.

Sincerely,

__/s/ Brett Stroud_____
Brett Stroud
*Counsel for North Kern Water Storage District*

__/s/ Craig A. Carnes, Jr._____
Craig A. Carnes, Jr.
*Counsel for Kern Delta Water District*

__/s/ Isaac St. Lawrence___
Isaac St. Lawrence
*Counsel for Buena Vista Water Storage District*

__/s/ Daniel Raytis_____
Daniel Raytis
*Counsel for Rosedale-Rio Bravo Water Storage District*

__/s/ Nicholas A. Jacobs___
Nicholas A. Jacobs
*Counsel for Kern County Water Agency*

## PROOF OF SERVICE

The undersigned hereby declares that I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

I served by email the document entitled **REAL PARTIES' NOTICE OF DEMURRER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND PETITION; DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF BRETT A. STROUD** on the interested parties in this action as listed on the following service list:

| | |
|---|---|
| Adam F. Keats adam@keatslaw.org | ***Attorneys for Plaintiff:*** *Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity* |
| William McKinnon legal@waterauditca.org<br>Linda Ghiringhelli Linda.asc@sbcglobal.net<br>Valerie Stephan vstephan@waterauditca.org | ***Attorneys for Plaintiff:***<br>*Water Audit California* |
| Colin L. Pearce clpearce@duanemorris.com<br>Jolie-Anne S. Ansley jsansley@duanemorris.com<br>Ashley L. Barton abarton@duanemorris.com<br>Matthew S. Collom mcollom@bakersfieldcity.us<br>Blanca A. Herrera baherrera@duanemorris.com | ***Attorneys for Defendant:***<br>*City of Bakersfield* |
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| Isaac St. Lawrence isaac@mhwslegal.com<br>James A. Worth jim@mhwslegal.com<br>Lupe Gonzalez lupe@mhwslegal.com | ***Attorneys for Intervenors:***<br>*Buena Vista Water Storage District* |
| Daniel N. Raytis dan@bbr.law<br>Daniel M. Root droot@bbr.law | ***Attorneys for Intervenors:***<br>*Rosedale-Rio Bravo Water Storage District* |
| Amelia T. Minaberrigarai ameliam@kcwa.com<br>Nick A. Jacobs njacobs@somachlaw.com<br>P. MacPherson pmacpherson@somachlaw.com<br>Louinda V. Lacey llacey@somachlaw.com<br>jestabrook@somachlaw.com<br>gloomis@somachlaw.com | ***Attorneys for Intervenors:***<br>*Kern County Water Agency* |

On the date set forth below, I caused the document to be sent to the persons at the e-mail addresses listed on the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 3, 2024, at Bakersfield, California.

Kristen L. Moen

Kristen L. Moen