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12 [additional counsel on next page]

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF KERN

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

20 Plaintiffs and Petitioners,

21 v.

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

24 Defendants and Respondents,

25 BUENA VISTA WATER STORAGE
26 DISTRICT, KERN DELTA WATER
27 DISTRICT, NORTH KERN WATER
28 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-GAP
Assigned to Hon. Gregory Pulskamp

**REAL PARTIES IN INTEREST'S
OPPOSITION TO MOTION TO
COMPEL COMPLIANCE WITH
PRELIMINARY INJUNCTION**

Date: May 9, 2024

Time: 9:30 a.m.

Dept.: J

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SAC Filed: October 4, 2023

TAC Filed: December 1, 2023

Trial Date: None Set

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1 **I. Introduction**

2 Real Parties in Interest (“Real Parties”) submit this opposition to the “Motion to Compel
3 Compliance with Preliminary Injunction” (“Motion”) filed against Defendant City of Bakersfield
4 (“City”) by Plaintiffs Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon
5 Society, Sierra Club, and Center for Biological Diversity (collectively “BBTK”).¹ BBTK
6 acknowledges that “Plaintiffs, the City of Bakersfield, and Real Parties in Interest engaged in
7 good-faith consultation to establish flow rates necessary for compliance with the orders, as
8 instructed by the Court.” (Motion, p. 4.) Nonetheless, BBTK says, “the parties have been unable
9 to establish a mutually agreeable interim flow regime” and that its “experts have developed a
10 proposed interim flow regime,” which it now asks the Court to impose. The facts, science and
11 law all require that the Court reject BBTK’s assertions and deny the Motion. As shown in section
12 II.A below, BBTK has not met its burden of proof for the relief it is requesting. And as shown in
13 section II.B below, the actual scientific evidence shows that the current flow regime is sufficient
14 to keep fish in good condition pending the outcome of this case.

15 **II. Argument**

16 **A. BBTK Has Failed to Meet Its Burden of Proving that the Current**
17 **Interim Flow Regime Is Inadequate to Keep Fish in Good Condition**

18 The moving party has the burden of proof with regard to the facts on which the motion is
19 based. (Evid. Code, § 500; *People v. Lopez* (1997) 52 Cal.App.4th 233, 251.) The first reason
20 that the Court should deny the Motion is that BBTK has failed to meet this burden. BBTK asserts
21 that the City is “diverting excessive quantities of water from the Kern River and not allowing
22 enough water to flow past the lower weirs to keep fish in the river in good condition.” (Motion,
23 p. 5.) BBTK has failed to prove its assertion in three ways: 1) they have not evaluated the
24 conditions below each of the first five weirs, focusing only on McClung; 2) they have
25 misunderstood the records regarding ‘computed natural flow’ and misstated the flows available
26
27

28 ¹ The Motion is filed by Mr. Keats on behalf of these Plaintiffs. Plaintiff Water Audit California, represented by Mr. McKinnon, is not a moving party.

1 at First Point; and 3) they have submitted no competent evidence assessing the condition of fish
2 below McClung, relying instead on improper lay opinion and speculation.

3 *1. BBTK's evidence addresses only one of the six weirs and therefore*
4 *cannot provide a basis for restricting diversions at any other*
5 *weirs.*

6 BBTK bases their arguments on the differences between flows at Beardsley (i.e. the most
7 upstream weir) and McClung Weir (i.e., the most downstream weir). (Motion, pp. 7-9.) BBTK
8 claims that “diversions, primarily for agriculture, are the primary cause of its dewatering between
9 First Point and McClung Weirs,” but fails to evaluate the condition of fish below each weir and
10 whether existing flows are sufficient. (Motion, p. 8.) BBTK only argues that flows are insufficient
11 below McClung Weir, asserting that flow obligations are to be satisfied by reducing diversions
12 from weirs upstream of McClung Weir. (*Id.* at pp. 6-11.) This approach improperly treats the six
13 weirs and any associated obligations under Fish and Game Code section 5937² collectively,
14 rather than assessing whether each weir bypasses sufficient water to keep fish in good condition
15 below **that** weir.³

16 Assuming, for the sake of argument, that Section 5937 applies to the weirs,⁴ obligations
17 under that section do not apply to the weirs collectively. The Court must assess Section 5937
18 obligations on a weir by weir basis, evaluating the area **immediately** downstream of each weir
19 to determine whether flows are sufficient to keep fish in good condition in **that** area. The
20 language of the statute demonstrates that the Court must assess each weir individually, and that
21 the assessment is limited to the area “below” the dam:

22 “The owner of any dam shall allow sufficient water at all times to
23 pass through a fishway, or in the absence of a fishway, allow
24 sufficient water to pass over, around or through **the dam**, to keep in
25 good condition any fish that may be planted or exist **below the**
dam.” (§ 5937, emphasis added.)

26 ² All further statutory references are to the Fish and Game Code unless stated otherwise.

27 ³ Plaintiffs’ proposed flow regime (the merits of which are addressed below) treats the weirs
28 collectively by requiring the operation of **all** of the weirs to maintain proposed flow levels below
McClung Weir. (Motion, p. 12:12-13; Shelton Decl. ¶ 11(A), (B); Proposed Order, ¶ 2.)

⁴ Real Parties respectfully disagree with the Court’s prior ruling that the diversion weirs are dams
under Section 5937.

1 Plaintiff Water Audit California’s (“WAC”) experts, whom BBTK cite with approval,
2 have provided guidance on what it means to keep fish in good condition “below” a dam. In 2014,
3 Dr. Peter Moyle and Dr. Theodore Grantham published “Assessing Flows for Fish Below Dams:
4 A Systematic Approach to Evaluate Compliance with California Fish and Game Code 5937,”
5 which “presents an evaluation approach to identify dams in California where flow modifications
6 and/or other management actions may be warranted to comply with Section 5937.” (Request for
7 Judicial Notice (“RJN”), Exh. 2 [“5937 Compliance Report”], p. x.) Relevant statements from
8 the 5937 Compliance Report include the following:

9 **“The primary goal of this study was to develop an approach to**
10 **identify and evaluate California dams that have impaired**
11 **downstream fish communities associated with altered flow**
12 **regimes.** The evaluation follows a systematic, six-step process that
13 focuses on the inventory, characterization, and selection of dams
14 **where environmental flows may be warranted under Section**
15 **5937** (Figure 3). First, a database of dams is compiled and used to
16 define their distribution and characteristics. Next, hydrologic
17 conditions **below** dams are assessed to quantify the extent to which
18 flows may deviate from natural, unimpaired conditions. Third,
19 **condition of native fish near each dam is evaluated.”** (*Id.* at p. 10,
20 emphasis added.) ...

21 **“To assess the degree of hydrologic alteration below** dams in
22 California, we examined USGS flow gaging records **at, or near**
23 **(within 1 km downstream) dams.”** (*Id.* at p. 15, emphasis added.)
24 ...

25 **“A total of 209 USGS flow gages were identified at or immediately**
26 **downstream of dams.”** (*Id.* at p. 22, emphasis added.)

27 Thus, as described by WAC’s experts, an assessment of compliance with Section 5937 is
28 focused on the area below and “near” or “immediately below” a dam. This position is reasonable
in light of Section 5937’s objective to protect specific fish below discreet dams.

BBTK’s Motion, however, improperly necessitates that the operator of each weir is
obligated to bypass sufficient water to keep fish in good condition all the way to the ‘historic
terminus’ of the river, regardless of distance. There is no legal authority, and BBTK does not
attempt to cite any, for this proposition nor for its proposition that the obligations under Section
5937 are to be imposed collectively on multiple weirs. Interpreting Section 5937 to mean that the

1 most upstream weir on a river must release enough water to keep fish in good condition beyond
2 the most downstream weir to the terminus of the river would lead to an absurd result. For any
3 river system that does not constantly connect to the ocean, it would mean that all diversions from
4 the stream would be completely prohibited in an attempt to reach the ocean even if there is no
5 practical way for that to occur. Any additional amount of water bypassed could only keep fish in
6 good condition slightly further downstream until inevitably all water is exhausted (and any
7 remaining fish die). The ordinary rules of statutory construction prohibit such an absurd
8 interpretation. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) And even if the statute did
9 mean that, it would clearly be an unreasonable use and waste of water prohibited by the California
10 Constitution, Article X, Section 2. The canon of constitutional avoidance thus requires the Court
11 to reject this interpretation as well. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1110.)

12 Based on the above, the Court must: (1) assess Section 5937 obligations for each weir
13 separately; and (2) evaluate compliance with Section 5937’s flow obligations in the area that is
14 “near” or “immediately below” a weir. Any obligation that the City may have under Section 5937
15 relating to Beardsley Weir does **not** extend to weirs located miles downstream (i.e., the City
16 cannot be required to change its operations at Beardsley Weir to ensure that flows reach a
17 mandated level 20 miles⁵ downstream, past the other five weirs). Thus in assessing the City’s
18 Section 5937 compliance for Beardsley Weir, the Court is limited to evaluating the City’s actions
19 at Beardsley Weir and whether sufficient water is passing **that** weir to keep fish in good condition
20 immediately below **that** weir.⁶ This independent evaluation must be done separately for each
21 weir.⁷ It is clear that BBTK has not satisfied its burden, given that they have not attempted to
22

23 ⁵ See, Venkatesan Declaration (Paragraphs 17-18) providing that the McClung Weir is located
24 20.01 miles downstream of Beardsley Weir.

25 ⁶ BBTK’s other legal theories, such as the public trust doctrine and the reasonable use doctrine,
26 may require a different analysis to address flows downstream from each weir, but this Motion
27 regarding compliance with the preliminary injunction is based **solely** on section 5937. (Ruling
28 on Plaintiffs’ Motion for Preliminary Injunction (10/20/2023), p. 6 [assessing likelihood of
prevailing on the merits by evaluating Section 5937].)

⁷ That Section 5937 requires a weir by weir assessment is even more evident in this case because
under natural hydrologic conditions the Kern River experiences significant periods of dry back
above many of the weirs. (See, Collison Decl. ¶¶ 9-11.) The collective treatment of the weirs

1 present any competent evidence of both flow and fish conditions for any reach of the Kern River
2 except below McClung Weir.

3 2. *BBTK misconstrues the records of ‘computed natural flow’ and*
4 *misstates the flows available at First Point*

5 BBTK asks this Court to issue a new order mandating that “flows of forty percent (40%) ...
6 of the Computed Natural Flow (“CNF”) at First Point, shall remain in the Kern River to flow past
7 McClung Weir.” (Proposed Order, ¶ 2.) This request is based solely on the recommendation of
8 BBTKs expert, John Shelton. (Shelton Decl., ¶ 11.) While Mr. Shelton correctly recites how the
9 daily CNF is computed, he completely misunderstands why and what the CNF computation actually
10 represents. (*Id.*) Mr. Venkatesan provides a detailed summary of the background and purpose of the
11 CNF. (Venkatesan Decl., ¶¶ 4-9.) Since 1953, it has been necessary that the daily natural flow of
12 the Kern River be calculated, because all natural flow entering Lake Isabella is regulated in storage.
13 (*Id.*, ¶ 6.) The CNF is only used to apportion Kern River water right entitlements, not to specify
14 operational flows downstream. (*Id.*, ¶ 7.) Importantly, the CNF is **not** the same as the daily Kern
15 River flow measured as passing the First Point or any downstream weir as BBTK presumes. Only
16 regulated flows (not natural flows) released from storage through outlets operated by the USACE at
17 Isabella Dam are available in the Kern River channel downstream. (*Id.*, ¶ 9.)

18 The fundamental fallacy in BBTK’s Proposed Order is illustrated by the April 26 Kern River
19 Operations Record. (Venkatesan Decl., Exh. A.) Under the Proposed Order, BBTK asks this Court
20 to compel that 1,240cfs (40% of the CNF for April 26) to pass the McClung Weir, which is located
21 approximately 24.08 miles downstream of the First Point of Measurement. (Proposed Order, ¶ 2;
22 Venkatesan Decl., ¶¶ 12, 18.) However, on April 26 there was only 1,090cfs of Kern River flow
23 passing First Point. (Venkatesan Decl., Exh. A.) According to Mr. Venkatesan, in order for there to
24 be 1,240cfs passing McClung Weir it would necessitate that an additional 1,240cfs of Kern River
25 water must be taken out of storage and released from Isabella Dam. (*Id.*, ¶ 16(d).) The additional
26 flow would increase flows passing McClung Weir by a factor 250 times greater (approximately 5cfs

27 _____
28 would mandate the creation of unnatural conditions (i.e., a wetted channel in areas that would be
dry under natural conditions).

1 to 1,240cfs) than Kern River flows on April 26. (Venkatesan Decl., Exh. A.) Under the Proposed
2 Order, the City would be compelled to increase its releases from storage behind Isabella Dam by
3 1,240cfs to meet BBTKs request. (Venkatesan Decl., ¶¶ 12, 14, 16(d).) However, BBTK has failed
4 to establish two key elements for its Motion. First, BBTK fails to prove that the City's existing
5 interim flows are insufficient under the Court's existing order to comply with Section 5937. Second,
6 the Motion fails to establish that the increased flows are necessary as a matter of science and the
7 law.

8 3. *Even as to the reach below McClung Weir, BBTK has failed to*
9 *provide competent evidence that fish are not in good condition.*

10 The only evidence BBTK submits arguing that fish are not in good condition comes in
11 the form of two declarations, one by John Shelton and one by Jonathan Vegas. Neither
12 declaration provides evidence sufficient to satisfy BBTK's burden of proof.

13 Mr. Shelton is described as a "systems ecologist" and states that during his time as an
14 employee of the Department of Water Resources he was "involved in multiple discussions within
15 and between the regulatory agencies ... regarding Section 5937." (Shelton Decl., ¶¶ 2, 6.)
16 However, his declaration does not lay any foundation that he has either expertise or experience
17 as a fisheries biologist or in assessing whether fish populations are in good condition. Mr. Shelton
18 also does not lay sufficient foundations for his conclusions. For example, he states the following
19 conclusion:

20 "The current flows of the Kern River, though likely to support fish
21 populations upstream of the City of Bakersfield, are likely to
22 continue to adversely impact any fish in the lower reaches due to
23 insufficient depths and velocities, and related temperature impacts
24 as days become longer and daytime highs increase. During the
25 January 2024 field trip, I observed several reaches, including the
26 reaches above and below McClung Weir, with poorly connected
pools and extremely low flows that are unlikely to support fish as a
consequence of extreme high water temperatures during the day and
corresponding low oxygen levels over night as ambient
temperatures increase." (Shelton Decl., ¶ 7.)

27 However, he does not provide any evidence of what species of fish are to be found in the
28 river and what their specific needs are with respect to depth, velocity, and temperature. In fact,

1 he makes clear that he does not know what species are present, speculating that “fishery experts,
2 especially those that have worked on the other rivers in the San Joaquin Valley floor, can predict
3 many of the fish species that are likely to re-establish populations within the lower reaches of the
4 River if adequate flows are restored.” (Shelton Decl., ¶ 8.) Mr. Shelton’s speculation also
5 purports to be based on flow depths and velocities, as well as water temperature and dissolved
6 oxygen levels. (*Id.*, ¶ 7.) However, he provides no testimony or evidence demonstrating that he
7 measured flow depths, velocities, water temperature, or dissolved oxygen. (*Id.*) Nonetheless,
8 BBTK claims in its Motion that “low flows at McClung Weir are causing harm to the river’s
9 fish.” (Motion, p. 6.) Proving that would require evidence of the condition of actual fish currently
10 in the Kern River, not hypothetical populations. The only evidence before the Court regarding
11 the condition of the current fish population is the evidence from Mr. Fitzer discussed below
12 showing actual fish in good condition above and below McClung Weir. Thus, Mr. Shelton’s
13 premise that “[i]n the absence of site-specific data” his proposed flow regime should be imposed
14 cannot be supported. (Shelton Decl., ¶ 9.) There is site specific data, and it shows that the current
15 flow regime is keeping fish in good condition.

16 Mr. Shelton also supports his recommended flow regime by stating that he relies upon and
17 agrees with Dr. Grantham’s October 5, 2023 declaration. (Shelton Decl., ¶ 11.) However, that
18 Declaration was made several months prior to when the City began implementing the modified
19 preliminary injunction. More importantly, Dr. Grantham’s declaration was also made without
20 any direct observation and study of actual Kern River conditions, including but not limited to
21 flow conditions, fish presence, and fish condition. (See Real Parties’ Joint Objections to Reply
22 Evidence Filed in Support of Motion for Preliminary Injunction (10/12/2023).) Additionally,
23 Mr. Shelton cites his “direct observation of the lower Kern River” made on January 30 as well
24 as the “data provided by the City.” (*Id.*, ¶¶ 4, 11.) However, these two citations provide only
25 scant detail of actual Kern River conditions, and neither provides any scientific data supporting
26 Mr. Shelton’s recommendation “that 40% of computed natural flows be maintained in the Kern
27 River as an interim flow requirement.” (*Id.*, ¶ 11.)

28 Mr. Vegas describes himself as an “avid cyclist and angler,” but his declaration does not

1 lay any foundation for expertise in fishery science. (Vegas Decl., ¶¶ 2, 13.) In short, Mr. Vegas
2 is a lay witness, but BBTK relies on his opinion testimony as follows: “In my opinion, the Kern
3 River below McClung Weir is currently not able to support fish populations capable of being
4 caught by anglers.” (*Id.*, ¶ 13, see also ¶ 14 [“I do not believe that adult fish can survive in these
5 stretches of the Kern River with the current flows.”].) The Court is well aware that providing fish
6 populations “capable of being caught by anglers” is not the standard in Section 5937 or in the
7 Court’s order, and it is unclear what such a “standard” means and whether it has any scientific
8 validity. As discussed below, scientific evidence collected by experienced fishery biologists
9 indicates that existing flows below McClung **are** sufficient to keep fish in good condition using
10 the correct definition.

11 **B. The City Is Not Failing to Keep Fish Below Each Weir in Good**
12 **Condition**

13 The best available scientific information demonstrates that the City’s current flow regime
14 is providing sufficient water to protect fish below each weir while the parties conduct further
15 scientific investigation to determine more refined flow metrics and related actions.⁸

16 *1. First Point to Rocky Point Weir*

17 The attributes of this reach include a wetted channel with variable velocities and depths
18 (e.g., glides, gentle riffles, pools), hydrologic connectivity for areas visited, substrate consisting
19 of cobbles below the weir transitioning to sand and consolidated clays; small amounts of wood
20 debris, and riparian vegetation. (Fitzer Decl., ¶ 8, Exhibit C.) These conditions provide aquatic
21 habitat sufficient to keep fish in good condition. (*Id.*)

22 *2. Rocky Point Weir to Calloway River Weir*

23 The attributes of this reach include a wetted channel with variable velocities and depths
24 (e.g., glides, gentle riffles, pools), hydrologic connectivity for areas visited, substrate consisting
25 of cobbles below the weir transitioning to sand and consolidated clays; small amounts of wood
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27 ⁸ Please review the Declaration of Chris Fitzer and Andrew Collison for a detailed explanation
28 of the scientific investigation undertaken by the Real Parties and the competent scientific
assessment of the flow conditions below each of the six weirs. Summaries of the relevant
conclusions are included herein.

1 debris, and riparian vegetation. (*Id.*) These conditions provide aquatic habitat sufficient to keep
2 fish in good condition. (*Id.*)

3 3. *Calloway River Weir to River Canal Weir*

4 The attributes of this reach include a wetted channel with variable velocities and depths
5 (e.g., glides, gentle riffles, pools), hydrologic connectivity for areas visited, substrate consisting
6 of cobbles below the weir transitioning to sand and consolidated clays; small amounts of wood
7 debris, and riparian vegetation. (*Id.*) These conditions provide aquatic habitat sufficient to keep
8 fish in good condition (*Id.*)

9 4. *River Canal Weir to Bellevue Weir*

10 The attributes of this reach include a wetted channel with variable velocities and depths
11 (e.g., glides, gentle riffles, pools), hydrologic connectivity for areas visited, substrate consisting
12 of cobbles below the weir transitioning to sand and consolidated clays; small amounts of wood
13 debris, and riparian vegetation. (*Id.*) These conditions provide aquatic habitat sufficient to keep
14 fish in good condition, confirmed by the current presence of fish in this reach. (*Id.*)

15 5. *Bellevue Weir to McClung Weir*

16 The attributes of this reach include a wetted channel with variable velocities and depths
17 (e.g., glides, gentle riffles, pools), hydrologic connectivity for areas visited, substrate consisting
18 of cobbles below the weir transitioning to sand and consolidated clays; small amounts of wood
19 debris, and riparian vegetation. (*Id.*) These conditions provide aquatic habitat sufficient to keep
20 fish in good condition, confirmed by the current presence of fish in this reach. (*Id.*)
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6. *Below McClung Weir*

The attributes of this reach also include a wetted channel with variable velocities and depths (e.g., glides, gentle riffles, pools), providing aquatic habitat that may keep fish in good condition. During the April 22, 2024 site visit (walking approximately 0.75 mile downstream of McClung Weir) Mr. Fitzer observed several fish swimming in pools, including multiple unidentified species ranging in size from 2-4 inches in length and approximately 10-12 individuals that appeared to be largemouth bass representing two size classes (2-4 inches and 6-8 inches in length). (*Id.*)

Based on all of the above, the evidence before the Court demonstrates that the City is complying with the preliminary injunction and ensuring sufficient flow below each weir.⁹

C. The BBTKs’ Proposed Flow Regime is Not Supported by the Law or the Best Available Science.

1. The best available science requires an individualized assessment of the Kern River to set required flows under Section 5937.

The best available science does not support the imposition of a 40% fish flow on the Kern River based on a flow metric developed for an unrelated stream system. Since the imposition of the preliminary injunction over five months ago, Plaintiffs have done little to nothing in terms of scientific investigation and evaluation of the Kern River’s hydrology, ecology, and fisheries.¹⁰ Now, BBTK complains about the lack of site-specific data and seeks to rely on flow metrics developed for an entirely different stream system. (See, Shelton Decl, ¶¶ 9, 11, 13.)¹¹ To appropriately establish

⁹ This conclusion is consistent with the BBTKs’ own public statements. On April 10, 2024 (only five days before BBTK filed the subject motion), a representative from the BBTK spoke before the Bakersfield City Council and thanked them for the City’s current flow regime. (See, [City of Bakersfield - City Council Meeting - 4/10/24 \(youtube.com\)](#), at time mark 2:26:15 [Rich O’Neil thanking the City Council].) BBTKs’ representative did not raise any concern or issue of dissatisfaction with the City’s current flow regime.

¹⁰ The BBTK’s dilatory actions are in stark contrast to the actions of the RPI to investigate and evaluate the Kern River. (See, Fitzer Decl., ¶¶ 5-6; Collison Del., ¶¶ 5-6.)

¹¹ BBTK’s Motion also relies on its proposed “Interim Flow Regime for the Kern River” which like Mr. Shelton’s declaration mandates a 40% metric based on the Computed Natural Flow. (See, Keats Decl., Exh. “N”.) While that proposal does list “References”, not a single one of the cited sources mentions, let alone evaluates, the actual conditions of flows or fish in the Kern River.

1 ecological flows on a stream system, especially one as unique as the Kern River, scientific
2 investigation of the actual stream system is necessary. (Fitzer Decl., ¶ 4.) BBTK’s expert
3 acknowledges the lack of scientific support for their proposed flow regime where, after describing
4 the regime, he states that the “interim flow plan **may or may not** be sufficient to maintain fish in
5 good condition” (Shelton Decl., ¶ 13 [emphasis added].)

6 BBTK inappropriately relies on flow metrics imposed on the Lower San Joaquin River and
7 its tributaries as part of the 2018 updates to the Bay-Delta Plan.¹² (See Motion, p. 12; Shelton Decl.,
8 ¶ 11; Grantham Decl., p. 5.) However, as described by Plaintiff WAC’s experts and the trial court
9 that reviewed the 2018 updates to the Bay-Delta Plan, such borrowing of flow metrics from an
10 entirely different stream system is not scientifically supported. In their 5937 Compliance Report,
11 Dr. Grantham and Dr. Moyle (i.e., Plaintiff WAC’s experts) stated the following with respect to
12 setting 5937 flows for a watercourse:

13 “While these cases [*California Trout I* and *California Trout II*; *NRDC*
14 *v. Patterson*] provide useful illustrations of the application of Section
15 5937, **specific flows requirements to maintain fish in good**
16 **condition are highly context-dependent.** For example, large
17 regulated rivers that support salmon and other anadromous species
18 below dams will have substantially different flow needs than streams
19 in upper watersheds that support resident native species. Under
20 Section 5937, all waterways below dams that would naturally have
21 perennial flows should have sustained minimum flows needed to
22 support a “living stream” (Moyle et al. 1998). However, the magnitude
23 and timing of flow releases needed to support fish will require
24 consideration of the natural flow regime and ecological requirements
25 of the species present (or potentially present under restored conditions)
26 **within the river of interest.**” (RJN, Exhibit 2, p. 8, emphasis added.)

27 Similarly, the trial court reviewing the 2018 updates to the Bay-Delta Plan confirmed that
28 individualized watercourse assessment is necessary to impose defensible flow requirements. In
order to set the flow requirements as part of the updates to the Bay Delta Plan, the SWRCB

¹² The Bay-Delta Plan is water quality control plan for the San Francisco Bay/Sacramento-San
Joaquin Delta Estuary. As part of updates to the plan in 2018, the State Water Resources Control
Board (“SWRCB”) adopted flow Standards for the Lower San Joaquin River and its three
eastside tributaries. (RJN, Exhibit 1 [“Order on Merits of Petitioners’ Claims”], p. 2.)

1 modeled¹³ the effects of various flow levels “**on each** of the three eastside tributaries and the
2 LSJR.” (RJN, Exhibit 1 [emphasis added], pp. 34, 35.) The trial court, in upholding the SWRCB’s
3 assessment, noted that “[t]he modeling results are complex and **vary by river.**” (*Id.*, emphasis
4 added.) Additionally, in reviewing and rejecting a challenge that the SWRCB improperly
5 determined the flow requirements for the Lower San Joaquin River (and its tributaries) distinct
6 from the flow requirements for the Sacramento River, the trial court stated in relevant part as
7 follows:

8 **“[T]he Board’s watershed-based strategy accounts for the**
9 **‘unique and distinct characteristics of the San Joaquin River**
10 **watershed relative to the Sacramento River watershed and**
11 **other Delta tributaries.’** [Citation] The Board also stated that the
12 SJR watershed now only supports fall-run Chinook salmon and that
13 the general timing of important life stages of these salmon differ
14 from the fall-run Chinook in the Sacramento River.” (*Id.* at 85-89,
15 emphasis added.)

16 Also, unlike many California Central Valley rivers, including the San Joaquin River, the
17 Kern River does not drain to the ocean and hence does not support fish species that must migrate
18 from the ocean to rivers to spawn (i.e. anadromous fish species) such as Chinook salmon,
19 steelhead, green sturgeon, and Pacific lamprey. (Fitzer Decl., ¶ 4.) Kern River flows are highly
20 variable due to varying weather conditions each year. The mean monthly flows in the Kern River
21 peaked in late spring or early summer pre-Lake Isabella, before dropping in the late summer and
22 fall. (Collison Decl., ¶ 8.) These highly variable conditions result in many years where the total
23 computed natural flow of the river would result in the river drying back to points above McClung
24 weir. As noted by Dr. Collison, the data from the last 21 years show that in 71% of years the
25 Kern River would dry back to a point upstream of McClung weir.

26 ¹³ The SWRCB did not do as BBTK suggests here, to compel releases of the Lower San Joaquin
27 River (and its tributaries) as a lab test to assess impacts of varying flow levels. Instead, the
28 SWRCB modeled the results for various flow levels, an effort approved by the trial court. The
29 SWRCB’s use of modeling directly refutes BBTK’s position that “it is not possible to determine
30 the legally required flows” without actually varying flows on the Kern River. (Shelton Decl.,
31 ¶ 13.) As discussed above, the Real Parties will be evaluating different flow approaches on the
32 Kern River using modeling. (Fitzer, Decl. ¶ ; Collison Decl., ¶6.)

1 Based on the above, the best available science does **not** support adopting the 40% flow
2 metric developed for the Lower San Joaquin River and applying it to the Kern River.

3 3. *The proposed flow regime would violate the California*
4 *Constitution.*

5 BBTK has blindly adopted a flow regime from a completely separate and unique
6 watercourse and applied it to the Kern River without any site-specific assessment of the Kern River's
7 unique environmental characteristics violating Article X, Section 2 of the California Constitution,
8 which prohibits the waste and unreasonable use of water. BBTK's expert admits that the proposed
9 flow regime may not protect fish or could impose a flow level that is higher than necessary to protect
10 fish. (Shelton Decl., ¶ 13.) BBTK is simply taking a shot in the dark. The California Constitution
11 does not countenance such a gamble with limited water resources. (See, SWRCB Order WR 95-4,
12 p. 19 ["A release of water that is much in excess of the amount needed to keep the fish in good
13 condition, however, could be unreasonable within the meaning of California Constitution Article X,
14 section 2 if there would be adverse effects on other beneficial uses of the water"].)

15 4. *The proposed flow regime would unlawfully require the release of*
16 *stored water from Lake Isabella.*

17 The Proposed Order mandates that 40% of the "computed natural flow" shall pass the
18 McClung Weir located over 24 miles downstream of First Point. (See, Shelton Decl., ¶ 13; Proposed
19 Order, ¶ 2; Venkatesan, ¶ 18.) BBTK's requested reoperation of Isabella Dam¹⁴ would constitute a
20 significant change from existing conditions. (Venkatesan, ¶16(d).) As discussed above, while the
21 CFN is used to determine water entitlements under the Law of the River, all water associated with
22 those entitlements is stored and regulated in Lake Isabella until authorized, directed and scheduled
23 to be released from storage. (See, Venkatesan Decl., ¶¶ 6-7, 9, 13.) The Proposed Order would
24 compel significant releases of stored water from Isabella Dam to flow past McClung Weir. (See, *Id.*
25 at ¶¶ 15-16.) An order imposing such a flow regime is unlawful and improper.

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27
28 ¹⁴ The BBTK Motion and Mr. Shelton's Declaration completely fails to include any evaluation of the impact of the Proposed Order on the fishery and related public trust resources existing at Lake Isabella or the associated region both above and below Lake Isabella.

1 An injunctive order mandating releases from Isabella Dam is beyond the jurisdiction of this
2 Court. This litigation does not challenge operations of Isabella Dam or Lake Isabella. Moreover,
3 Isabella Dam and Lake Isabella are owned and operated by the United States, so an action
4 compelling changes to existing operations cannot be pursued in state court and the federal
5 government likely enjoys sovereign immunity. (See, *City of Fresno v. California* (1963) 372 U.S.
6 627; *Dugan v. Rank* (1963) 372 U.S. 609; *County of San Joaquin v. State Water Resources Control*
7 *Bd.* (1997) 54 Cal.App.4th 1144.) Plaintiffs have clearly admitted this limitation of the scope of this
8 action, including in WAC’s opposition to J.G. Boswell’s motion to intervene, in which BBTK
9 joined:

10 “[N]o order of the court will control the flows of water released from
11 Isabella Dam. ... The subject action and the associated orders concern
12 only waters that flow by the First Point of Measure (*sic*) on the Kern
13 River, not the waters that inflow into Lake Isabella. In essence, the
14 litigation concerns the distribution of water already in the stream and
15 does not and cannot change those flows in the manner suggested.
16 Plaintiffs have not sought to influence the operation of the Isabella
17 Dam, which is owned by the US government and operated by USACE.
18 ... Neither the US nor its agency are within the jurisdiction of the
19 superior court. Neither the government nor the USACE are named
20 defendants in the subject action, or any other pending action brought
21 by the plaintiffs.” (Opp. to Mot. for Leave to File Ans. in Interv.
22 (2/5/2024), p. 4; Bring Back the Kern et al.’s Joinder (2/6/2024).)

18 **III. Conclusion**

19 Based on all of the above, the Motion must be denied and the proposed flow regime
20 requested by BBTK rejected. The Motion is not supported by evidence and does not meet the burden
21 of proof, and the Real Parties have now provided the Court with evidence that the current interim
22 flow regime is indeed keeping fish in good condition, even downstream of McClung Weir.

24 Dated: April 26, 2024

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