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CITY OF BAKERSFIELD

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
FOUNDATION, KERN AUDUBON SOCIETY,
17 SIERRA CLUB, and CENTER FOR BIOLOGICAL
DIVERSITY,

18 Plaintiffs and Petitioners,

19 v.

20 CITY OF BAKERSFIELD, and DOES 1 - 500,

21 Defendants and Respondents,

22 BUENA VISTA WATER STORAGE DISTRICT,
23 KERN DELTA WATER DISTRICT, NORTH
KERN WATER STORAGE DISTRICT,
24 ROSEDALE-RIO BRAVO WATER STORAGE
DISTRICT, KERN COUNTY WATER AGENCY;
25 J.G. BOSWELL COMPANY, and DOES 501 – 999,
inclusive,

26 Real Parties in Interest.

Case No. BCV-22-103220-GAP

Assigned For All Purposes To:
Judge: Honorable Gregory A. Pulskamp
Division: J

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CITY OF BAKERSFIELD'S
DEMURRER TO PLAINTIFFS'
VERIFIED THIRD AMENDED
COMPLAINT FOR INJUNCTIVE
RELIEF AND PETITION FOR WRIT
OF MANDATE**

Date: May 9, 2024
Time: 8:30 a.m.
Div.: J
Judge: Hon. Gregory A. Pulskamp
Complaint Filed: November 30, 2022

[Filed Concurrently With: Notice of
Demurrer and Demurrer; Declaration of
Colin L. Pearce; [Proposed] Order]

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1 Defendant and Respondent City of Bakersfield (“Bakersfield” or “City”) submits this
2 Memorandum of Points and Authorities in support of its Demurrer to the Verified Third Amended
3 Complaint for Injunctive Relief and Petition for Writ of Mandate (“TAC”) filed by Plaintiffs and
4 Petitioners Bring Back the Kern, Water Audit California, Kern River Parkway Foundation, Kern
5 Audubon Society, Sierra Club, and Center for Biological Diversity (collectively “Plaintiffs”).

6 I. INTRODUCTION

7 The City brings this demurrer because Plaintiffs have not properly or sufficiently complied
8 with the prior orders of this Court to add certain Kern County water districts (specifically, Buena
9 Vista Water Storage District (“Buena Vista”), Kern Delta Water District (“Kern Delta”), Kern
10 County Water Agency (“KCWA”), North Kern Water Storage District (“North Kern”) and
11 Rosedale-Rio Bravo Water Storage District (“Rosedale”) (collectively, “Districts”) as defendants in
12 this action.

13 This Court previously sustained the City’s demurrer to Plaintiffs’ First Amended Complaint
14 (“FAC”) for failure to join the Districts as indispensable parties. This Court also endorsed the
15 Districts’ motion to intervene in this case, but determined it was moot because of the Court’s ruling
16 on the City’s demurrer. The Court ordered Plaintiffs to add the Districts to the case as defendants.

17 Plaintiffs failed to follow the Court’s direction and failed to bring the Districts into the case
18 as defendants. In the operative TAC, Plaintiffs only identify the Districts as real parties in interest
19 (“RPIs”) in the caption of the pleading, and Plaintiffs identify and describe the Districts in the
20 “parties” section of the TAC. Plaintiffs, however, do not identify or refer to the Districts as
21 defendants, and assert no allegations, claims or causes of action against the Districts. Plaintiffs do
22 not seek any relief against the Districts.

23 Plaintiffs’ failure to name the Districts as defendants is not merely a technical or procedural
24 deficiency. Plaintiffs allege Bakersfield’s “diversion of Kern River water for the City’s use and on
25 behalf of the Districts regularly results in the complete dewatering of portions of the Kern River,”
26 and that Bakersfield diverts water from the Kern River “without having satisfied its duties under the
27 California Constitution, the Public Resources Code, Fish & Game Code, the California Civil Code,
28 and the Public Trust Doctrine.” (TAC, ¶¶ 3, 4.) As this Court recognized, and as established in a

1 recent case involving similar claims against a city for alleged violations of the public trust and
2 unreasonable use based on diversions from a river, the Districts need to be properly and completely
3 included in this case as defendants so that this Court can properly assess and determine the
4 responsibility of all parties, and not just the City, to establish sufficient flows of water for fish
5 populations, and for other public trust needs. (*Santa Barbara Channelkeeper v. City of San*
6 *Buenaventura* (2018) 19 Cal.App.5th 1176 (hereinafter, “*Channelkeeper*”).)

7 If the Districts are not defendants, and are not subject to Plaintiffs’ causes of action and
8 claims for relief, this Court would not have the authority or ability to consider the Districts’ rights,
9 water supply agreements, diversion and use of water, or their impact on the flows of water in the
10 Kern River. This Court would also lack the ability to impose relief on the Districts or to issue
11 rulings, orders or judgments regarding their water rights and supplies.

12 At the very least, the City seeks clarification from this Court on the status of the Districts in
13 this case and the Court’s present authority over the Districts. The City recognizes that the Court, the
14 Plaintiffs and the Districts may maintain that the Court already has authority over the Districts to
15 consider their diversion and use of water, to assess and compare their use of water to the City’s
16 diversion and use of water in determining the reasonableness of the City’s water use, and the City’s
17 satisfaction of public trust obligations.

18 To avoid any uncertainty, doubt, or confusion over the Court’s authority over the Districts,
19 and their water rights and water supply agreements, however, Bakersfield brings this demurrer for
20 failure join indispensable parties, and this Court must again sustain the City’s demurrer, and order
21 Plaintiffs to add the Districts to the case as defendants, and not just RPIs, so that they will be subject
22 to all of Plaintiffs’ claims and causes of action involving the Kern River, and so that the Court has
23 the authority and ability to impose remedies which involve the Districts’ water and contract rights.¹

24
25
26 ¹ The City does not contend that J.G. Boswell Company (“Boswell”) is an indispensable party to this
27 action, but notes that Boswell has indicated that it has intervened in this action as a defendant, and
28 Plaintiffs should therefore additionally amend their TAC to refer to Boswell as a defendant, and not
just an RPI.

1 **II. ARGUMENT**

2 **A. Plaintiffs Failed to Comply with this Court’s Order to Bring the Districts into**
3 **this Action as Necessary and Indispensable Parties**

4 **1. This Court previously found that the Districts were indispensable parties**

5 On April 4, 2023, the City filed a demurrer to Plaintiffs’ FAC based, among other things, on
6 Plaintiffs’ failure to join the other entities that divert and use water from the Kern River as necessary
7 and indispensable parties in the action. On May 3, 2023, before the Court had ruled on the City’s
8 demurrer, the Districts filed a motion to intervene in the action.

9 Following several continuances, this Court held a hearing on the City’s demurrer and the
10 Districts’ motion to intervene on September 6, 2023. On September 18, 2023, the Court issued an
11 order sustaining the City’s demurrer, and a separate order supporting the granting of the motion to
12 intervene, but finding the motion moot in light of the Court’s sustainment of the City’s demurrer,
13 among other reasons, for failure to join the Districts as parties to the action.

14 In its September 18, 2023 order on the City’s demurrer, this Court stated: “In this case, the
15 FAC is flawed because it fails to name necessary and indispensable parties. The relief that Plaintiffs
16 seek here, particularly the injunction against the City’s diversions of water for agricultural purposes
17 (FAC ¶ 152), could directly affect the water rights and contractual interests held by the Proposed
18 **Intervenors. Nevertheless, the Proposed Intervenors are not included as defendants in the FAC.**
19 The absence of these formerly included parties may prejudice their ability to protect their interests in
20 later litigation or leave them exposed to a risk of additional liability or inconsistent obligations.”
21 (September 18 2023 Minute Order on Demurrer (“Demurrer Order”), p. 2 [emphasis added].)

22 This Court also stated: “The fact that Plaintiffs cite authority in their Opposition for the
23 proposition that courts can reconsider water allocations in light of the public trust doctrine and
24 alleged violations thereof makes it more likely that this litigation will impair the water allocations
25 delivered to the Proposed Intervenors.” (Demurrer Order, p. 3.) The Court further stated: “Any
26 judgment in this action may affect the Proposed Intervenors’ rights to use the diverted waters of the
27 Kern River. Failing to include them could lead to inconsistent judgments or obligations, and
28 duplicative litigation as the relief sought by Plaintiffs could affect the contractual agreements

1 between the City and Proposed Intervenors.” (Id.)

2 In its separate September 18, 2023 order on the Districts’ motion to intervene (“Intervention
3 Order”) this Court stated: “The Court is inclined to grant Intervenor-Defendants’ application to
4 intervene in the action. However, in a closely related ruling, the Court sustained Defendant City of
5 Bakersfield’s Demurrer to Plaintiffs’ First Amended Complaint (FAC) for failing to name the five
6 proposed intervenors as necessary and indispensable parties. Therefore, Plaintiffs are required to file
7 a Second Amended Complaint addressing this issue and this motion is now moot.” (Intervention
8 Order, p. 1.)

9 This Court later explained that “the Intervenor-Defendants **will be treated as traditional**
10 **defendants, assuming Plaintiff/Petitioner files the Third Amended Complaint in accordance**
11 **with the Court’s ruling on the demurrer.”** (Intervention Order, p. 3 [emphasis added].) At the
12 end of the Intervention Order, in a section describing the procedures for the hearing on Plaintiffs’
13 Motion for Preliminary Injunction, the Court further noted: “The five **soon-to-be named defendants**
14 will file a single, consolidated opposition brief not to exceed 50 pages.” (Intervention Order, p. 4
15 [emphasis added].)

16 **2. Plaintiffs failed to properly bring the Districts into this case as defendants**

17 Despite the express direction of this Court to add the Districts to the action as defendants, in
18 accordance with the Court’s ruling on the City’s demurrer, Plaintiffs’ current TAC does not identify
19 or refer to the Districts as defendants. Bakersfield is still the only defendant in the action, and
20 Plaintiffs’ allegations and claims are directed entirely against the City, and not the Districts. The
21 Districts are not named, mentioned or subject to any causes of action or claims for relief. The prayer
22 for relief only seeks relief against the City, as Plaintiffs request that the Court issue a writ of
23 mandate and injunction directing the City to maintain sufficient flows below the Kern River weirs,
24 and to take other actions to protect and enforce the public trust.

25 Plaintiffs specifically seek a writ of mandate and/or prohibition, among other things: (a)
26 “Enjoining any and all activity that is in violation of **the City’s** duties under the Public Trust
27 Doctrine;” (b) “Enjoining **the City** from operating the Diversion Structures in any manner that
28 reduces river flows below a volume that is sufficient to keep fish downstream of the Diversion

1 Structures in good condition;” (c) “Compelling **the City** to take such actions as required to bring its
2 operation and maintenance of the Diversion Structures into compliance with Fish and Game Code,
3 sections 5901 and 5937;” and (d) “Compelling **the City** to release water of sufficient volume and
4 with appropriate timing to provide reliable flows in the Kern River through the City, and to provide
5 sufficient fish passage and habitat in the Kern River through the City.” (TAC, Prayer for Relief
6 [emphasis added].)

7 Plaintiffs additionally request an “order for preliminary and/or permanent injunctive relief: a.
8 Enjoining **the City** from operating the Diversion Structures in such a manner that water is diverted
9 from the Kern River in excess of amounts required for: (a) regular and consistent flows of the Kern
10 River; (b) preventing unreasonable harm to trust resources; and (c) providing sufficient water for fish
11 habitat downstream of the Diversion Structures; b. Enjoining **the City** from operating the Diversion
12 Structures in such a manner that dewater the Subject Reach of the Kern River, obstructing the free
13 passage and/or use in the customary manner of the Kern River.” (TAC Prayer for Relief [emphasis
14 added].)

15 **B. The Districts are Not Properly in the Case or Subject to This Court’s Authority**
16 **and Jurisdiction as Real Parties In interest**

17 Simply listing the Districts as real parties in interest does not comply with the express
18 requirements of this Court’s orders, and it otherwise does not make the Districts actual parties to this
19 case. A court’s authority and ability to determine disputed issues and impose appropriate relief is
20 determined, and limited, by the pleadings in a case, and a court cannot impose relief not specifically
21 requested in a case, or issue orders or impose relief on parties who are not subject to claims for
22 relief. Plaintiffs’ failure to name the Districts as defendants or to assert any claims against them as
23 defendants therefore limits and bars the Court from exercising any authority over the Districts’
24 diversion and use of water, and impedes the Court’s ability to impose any remedies or relief on the
25 Districts.

26 **1. Plaintiffs TAC defines and limits this Court’s authority and ability to**
27 **grant relief**

28 Pursuant to Code of Civil Procedure Section 580(a) “the court may grant the plaintiff any

1 relief consistent with the case made by the complaint and embraced within the issue.” Without any
2 allegations, claims or causes of action against the Districts, without any claim or prayer for relief,
3 and without them being named as defendants, it does not appear that the Court can impose any relief
4 or remedies on the Districts. Courts generally do not have authority to invent or create allegations,
5 claims and causes of action against a party to a case, and to do so would not be “consistent” with the
6 allegations in the TAC.

7 “Pleadings are the very foundation of judgments and decrees. A judgment will be void which
8 is a departure from the pleadings.” (*Castaic Clay Mfg. Co. v. Dedes* (1987) 195 Cal.App.3d 444,
9 449.) “A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not
10 upon some other which may be developed by the proofs.” (*Mondran v. Goux* (1875) 51 Cal. 151.)
11 “The primary purpose of section 580 is to insure adequate notice to the defendant of the demands
12 made upon him.” (*Anderson v. Mar* (1956) 47 Cal.2d 274, 282.)

13 Although Code of Civil Procedure Section 452 states that the allegations of a pleading “must
14 be liberally construed, with a view to substantial justice between the parties,” the rule of liberal
15 construction of pleadings does not apply when there is a “total absence” of certain allegations in a
16 pleading. (*Lester v. Isaac* (1944) 63 Cal.App.2d Supp. 851, 854.) In *Garamendi v. Golden Eagle*
17 *Ins. Co.* (2004) 116 Cal.App.4th 694, 708, for example, the court voided the portion of a judgment
18 awarding personal injury damages because “the operative complaint at the time of trial contained no
19 allegations of personal injury,” and “[t]herefore, imposing liability for personal injury damages on
20 these parties without notice that such damages were being claimed would deprive them of due
21 process.”

22 The lack of allegations and any prayer for relief against the Districts also creates a risk that
23 any judgment against or involving the Districts would be “extrajudicial and invalid.” (*Orange*
24 *County Water Dist. v. Colton* (1964) 226 Cal.App.2d 642, 649.) In *Orange County Water District*,
25 the court of appeal rejected a city’s post trial motion to a court with retained jurisdiction over a water
26 system to determine certain water rights because it found that the city “has sought to inject into the
27 action a new issue, involving the determination of a new and different water right than those which
28 were before the court for determination in the action as it was brought and considered by the court at

1 the time of trial.” (*Id.*) The court further explained: “Not only do the parties, but also others whose
2 rights or liabilities might be affected by specific litigation between the parties, have a right to know
3 by reference to the records before, or at least at the time of trial, the issues which can be determined
4 in that particular action.” (*Id.*)

5 **2. The Districts are not subject to claims for relief as real parties in interest**

6 The Districts’ status as real parties does not automatically make them subject to Plaintiffs’
7 claims, nor does it authorize this Court to make substantive rulings or determinations regarding the
8 water rights and supplies of the Districts. In *Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App 4th
9 1430, the owner of a mobile home park sued a city to challenge the city’s denial of a rent increase
10 on its tenants under its rent control authority and also named as “defendants and real parties in
11 interest” several individual tenants of the mobile home park who had attended a hearing to protest
12 the requested rent increase. The real party in interest filed a demurrer for failure to state a claim
13 because the plaintiff had not asserted any allegations against them, and the court agreed and
14 sustained their demurrer for failure to state a claim.

15 Similarly, in *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, the court dismissed
16 individual property owners from an action brought against them by their homeowners’ association
17 because the association sought no relief against the individual property owners. The court noted that
18 although the individual property owners “may be affected by the trial court’s ultimate decision,
19 nothing will happen to them directly as a result of that decision.” (*Id.*, at p. 429-430.) The court
20 further noted: “It is fundamental that a person should not be compelled to defend himself in a
21 lawsuit when no relief is sought against him.” (*Id.*, at 429, quoting from *Weisman v. Odell* (1970) 3
22 Cal.App.3d 494.) The holding in *Duffey* raises similar concerns with the allegations in the present
23 case, and in the TAC, as this Court also determined that the Districts are necessary and indispensable
24 parties to this action because they may be affected by this action, but absent allegations and claims
25 against them “nothing will happen to them” or their water rights or agreements.

26 These cases are also supported by a long line of cases holding that a plaintiff cannot normally
27 recover monetary damages in a greater amount than the plaintiff alleged in its complaint. (See e.g.
28 *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1045 [A defendant “had a right to rely upon the

1 pleading limiting the amount of damages,” particularly when the defendant “may have taken actions
2 and adopted trial strategy in reliance upon that limitation.”].)

3 **C. Plaintiffs Need to Bring the Districts into this Case as Defendants, and Not Just**
4 **as Real Parties in Interest**

5 **1. The water supplies of the Districts, and not just the City, should be**
6 **subject to this Court’s authority**

7 The City diverts Kern River water pursuant to its own rights, primarily for domestic use by
8 City residents. The vast majority of water in the Kern River, however, is diverted and used by the
9 Districts, using the City’s employees and facilities, pursuant to their own water rights or through
10 contracts with the City. If the City is the only defendant in this action, and if Plaintiffs only assert
11 claims against the City and only seek relief against the City, then the vast, expansive Kern River
12 water supplies of the Districts will not be available to satisfy the claims asserted by Plaintiffs.
13 Because the City only physically diverts water from the Kern River on behalf of the Districts, and as
14 a representative of the Districts, Plaintiffs’ claims against only the City do not give this Court
15 authority and jurisdiction over the separate water rights and supplies of the Districts.

16 Plaintiffs allege the City’s diversion and use of Kern River water violates the public trust, is
17 an unreasonable use of water, and is in violation of Fish and Game Code Section 5937. Plaintiffs
18 allege in the first cause of action that “The City has violated and continues to violate its duties under
19 the public trust doctrine by diverting water from the Kern River through its operation of the
20 Diversion Structures without having considered the impacts of these diversions on public trust
21 resources and considered feasible mitigation and/or avoidance measures.” (TAC, ¶ 120.)

22 Plaintiffs further allege: “The City has violated, and continues to violate, its duty under Fish
23 and Game Code, section 5901 to not construct or maintain in any stream in District 3 1/2 any
24 unpermitted device or contrivance that prevents, impedes, or tends to prevent or impede, the passing
25 of fish up and down stream.” (TAC, ¶ 131.) Plaintiffs further allege: “The City has failed, and
26 continues to fail, its duty under Fish and Game Code, section 5937 to at all times allow sufficient
27 water to pass through, over, or around the Diversion Structures to keep in good condition any fish
28 that may be planted or exist below the Diversion Structures.” (TAC, ¶ 132.)

Plaintiffs’ allegations and focus on the City creates a significant risk that the Court will order

1 the City to provide fish flows and to limit diversions to keep water in the Kern River, with no
2 corresponding limit on the Districts' diversion and use of Kern River water. Based on Plaintiffs'
3 current allegations, the Court would not be required to consider whether the Districts' should also
4 limit diversions from the Kern River, limit their receipt of water from the City pursuant to various
5 agreements, or otherwise contribute water for fish flows and other public trust needs and demands.

6 The City has a limited supply of water, and it must provide most of its water supplies to City
7 residents for drinking water and other domestic uses. If the Districts are not defendants or subject to
8 claims, allegations and a prayer for relief, then their water supplies are not at issue, or available to
9 use to satisfy fish flow obligations and other public trust needs. This Court would have no practical
10 or legal ability to issue orders regarding the contracts and water rights of the Districts. The City's
11 water alone would have to provide sufficient water for fish flows and other public trust needs. That
12 amount may not be sufficient, particularly in light of the Court's recognition that the City's domestic
13 demands can take priority over fish flows. (See December 27, 2023 Ruling modifying this Court's
14 Order Granting Plaintiffs' Motion for Preliminary Injunction, p. 2.)

15 The City additionally does not have unilateral authority or power to suspend or limit
16 diversions of water on behalf of the Districts or the delivery of water to the Districts pursuant to
17 various water supply agreements. If the City did that it would certainly be subject to lawsuits or
18 claims from the Districts. That would of course lead to more litigation, which is precisely what this
19 Court indicated it wanted to avoid when it previously sustained the City's demurrer for failure to join
20 indispensable parties.

21 For example, this Court recognized, in its order granting Plaintiffs' motion for preliminary
22 injunction, that "[a]lthough the use of water for agricultural purposes is very necessary and worthy,"
23 the State has determined that other uses, including domestic uses have a higher priority and are more
24 worthy of protection. (Order on Motion for PI, pp. 10-14.) If, however, the Districts are not
25 defendants in this action, and are not actually subject to Plaintiffs' claims and request for relief, it
26 does not appear that the Court would have jurisdiction and authority over the Districts' water rights
27 and water supply agreements sufficient to follow through on and order and implement changes to the
28 Districts' diversion and use of Kern River water based on their lower priority diversion of water for

1 agricultural purposes. In other words, if the Districts are not actually defendants in the case or
2 subject to any claims or requests for relief by Plaintiffs, this Court’s comments and statements about
3 the priority for domestic uses and other uses would be more in the nature of dicta, as opposed to a
4 binding, effective order to properly allocate and assign water supplies held and used by the Districts
5 for higher priority public trust and domestic needs.

6 **2. Channelkeeper establishes that the Court needs to consider all water**
7 **supplies and rights on the Kern River to grant appropriate relief in this**
8 **case**

9 The decision in *Channelkeeper* confirms that this Court cannot consider the reasonableness
10 or lawfulness of the City’s diversion and use of water in a vacuum, but must instead consider all
11 diversions and uses of water from the Kern River, including the diversion and use of water by the
12 Districts. In *Channelkeeper*, an environmental organization filed an action against the City of
13 Ventura, alleging that the city's diversion of water from a local river was “unreasonable” due to its
14 effect on fish during the summer, when water levels are low. Ventura asserted the reasonableness of
15 its own water use as a defense, and also filed a cross-complaint against other parties that divert water
16 from the river, alleging that the other parties’ water diversions were “unreasonable.” (19
17 Cal.App.5th at 1181.) The trial court granted plaintiff’s motion to strike the city's cross-complaint
18 on the grounds that the reasonable use and public trust doctrines do not require the court to examine
19 other specific competing water rights on the river to resolve the relief that plaintiff requested, as the
20 “only transaction at issue” in the case was the reasonableness of the City's water use. (*Id.*, at 1182.)

21 The court of appeal reversed the trial court’s grant of the motion to strike the city’s cross-
22 complaint, as the court of appeal agreed with the city that it “**must consider the diversion and**
23 **pumping activities of competing water users in determining the reasonableness of the City's**
24 **water use.**” (*Id.*, at 1188 [emphasis added].) The court explained that the plaintiff’s “central
25 allegation against the City,” that “the City's pumping and diversion of water during summer months
26 leave too little flow in the river ‘to protect steelhead’ and ‘avoid[] impacts to public trust
27 resources,’” “begs the question whether other water users are at least partially responsible” for the
28 conditions in the river. (*Id.*) The court further explained that the “transaction” at issue in the action
involved the “diversion and pumping of water that leads to allegedly insufficient flow in reaches 3

1 and 4 of the river in summer months,” and the lawsuit should therefore include “all entities
2 potentially responsible for” those conditions. (*Id.*, at 1189.)

3 The court further explained that “the City is entitled to bring these water users into the case
4 so that the trial court can determine whether (at least) junior appropriators should share in any
5 obligation to leave more water in the river during the summer months,” and can also bring in parties
6 “whose rights are senior to the City's,” as “[t]o the extent senior water users are using water in an
7 amount or manner that is unreasonable, they may not take this water, even where vested water rights
8 would otherwise allow it.” (*Id.*, at 1191.)

9 In finding that the Districts are indispensable and necessary parties to this action, this Court
10 agreed with Plaintiffs’ claim that “courts can reconsider water allocations in light of the public trust
11 doctrine and alleged violations thereof,” which “makes it more likely that this litigation will impair
12 the water allocations delivered to the Proposed Intervenors.” (Demurrer Order, p. 3.) If the
13 Districts, however, are not defendants in this action, and are not subject to the same claims, causes of
14 action and claims for relief as the City, the Court lacks the practical authority and ability to consider
15 the Districts’ use of water, or to make any rulings which impact their rights, or their “allocations” of
16 Kern River water.

17 *Channelkeeper* therefore establishes that the Districts need to be in this case in the same
18 position as the City, as defendants, so that this Court can properly assess and determine the
19 responsibility of all parties, and not just the City, to establish sufficient flows of water for fish
20 populations, and to satisfy other public trust needs. Plaintiffs’ allegations and focus on the City
21 otherwise creates a significant risk that the Court will order the City to provide fish flows and to
22 limit diversions to keep water in the Kern River, with no corresponding limits on the Districts’
23 diversion and use of Kern River water. Based on Plaintiffs’ allegations, the Court would not be
24 required to consider whether the Districts should also limit diversions from the river, reduce their use
25 of water, or contribute water for fish flows and other public trust needs and demands.

26 The Districts, in fact, argued that their intervention in the case was necessary because
27 “should the Court grant the relief requested by Plaintiffs, the City would be violating the prior court
28 decisions, decrees, and agreements that it is obligated to abide by in order to comply with the new

1 order sought by Plaintiffs. This would unfortunately result in several new lawsuits and claims.”
2 (Memorandum in support of Motion to Intervene, pp. 12-13.)

3 Plaintiffs’ naming of the Districts as real parties, and not as defendants, however, does not
4 address or correct the risk of new lawsuits and claims. Under the current allegations in the TAC, the
5 Court could grant the relief requested by Plaintiffs, but since the Districts are not defendants in the
6 action, the Districts would not necessarily be bound or restricted by a final judgment, or any related
7 relief, against just the City. Instead, under the current pleadings any Judgment would only be
8 entered against the City, and the Districts could still file separate lawsuits and claims to try to
9 enforce their agreements and water rights against the City.

10 **III. CONCLUSION**

11 For the reasons stated herein, this Court should enforce its prior orders by sustaining the
12 City’s demurrer to the TAC and order Plaintiffs to properly and sufficiently bring the Districts into
13 this case not just as real parties, but as defendants, and subject to all of the claims, causes of action
14 and requests for relief asserted by Plaintiffs against the City. Alternatively, if Plaintiffs remain
15 unwilling, or unable, to bring the Districts into the case as defendants, this Court must dismiss the
16 TAC, and this entire action, pursuant to Code of Civil Procedure Section 389(b) for failure to join an
17 indispensable party. (*Sierra Club v. California Coastal Comm’n* (1979) 95 Cal.App.3d 495, 502.)

18 Dated: April 3, 2024

DUANE MORRIS LLP

19
20
21 By: 

22 _____
Colin L. Pearce
Jolie-Anne S. Ansley
Ashley L. Barton

23 Attorneys for Defendant and Respondent
24 CITY OF BAKERSFIELD

PROOF OF SERVICE

Bring Back the Kern, et al. v. City of Bakersfield, et al.
Kern County Superior Court, Case No. BCV-22-103220-GAP

I am a citizen of the United States, over the age of 18 years, and not a party to interested in the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear Tower, Suite 2200, San Francisco, California 94105. I am readily familiar with this firm’s practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CITY OF BAKERSFIELD’S DEMURRER TO PLAINTIFFS’ VERIFIED THIRD AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE

BY ELECTRONIC SERVICE: I caused the documents to be sent to the person(s) at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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7 I declare under penalty of perjury under the laws of the State of California that the foregoing
8 is true and correct. Executed on April 3, 2024, at San Francisco, California.

9 

10 _____
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