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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF KERN**

11 BRING BACK THE KERN, WATER AUDIT
12 CALIFORNIA, KERN RIVER PARKWAY
13 FOUNDATION, KERN AUDUBON
14 SOCIETY, SIERRA CLUB, and CENTER FOR
15 BIOLOGICAL DIVERSITY,

16 Plaintiffs and Petitioners,

17 vs.

18 CITY OF BAKERSFIELD
19 and DOES 1 through 500,

20 Defendants and Respondents,

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

28 Real Parties in Interest.

Case No.: BCV-22-103220

**BRING BACK THE KERN, ET AL.'S
COMBINED REPLY IN SUPPORT OF
MOTION TO COMPEL COMPLIANCE
WITH PRELIMINARY INJUNCTION**

Complaint Filed: November 30, 2022
Third Amended Complaint Filed: Dec. 1, 2023

Hearing Date: May 9, 2024
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Courtroom: Division J
Judge: Hon. Gregory Pulskamp

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1 **INTRODUCTION**

2 Plaintiffs and Petitioners Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon
3 Society, Sierra Club, and Center for Biological Diversity (“Bring Back the Kern”) submit this
4 combined reply to: (a) the City of Bakersfield’s Response and Partial Opposition; (b) Real Parties in
5 Interest’s Opposition, and (c) Real Party J.G. Boswell Company’s Joinder in the Real Parties’
6 Opposition. Bring Back the Kern filed the Motion to Compel pursuant to this Court’s direction: “If
7 after good faith consultation, Defendant, Plaintiffs, and Real Parties in Interest are not successful in
8 agreeing to flow rates necessary for compliance, any party may file a request for this Court to make a
9 determination regarding compliance, impose specific flow rates, or make any other legal determination
10 pertinent to the order, after reasonable notice to all the parties.” (Order Granting Plaintiff’s Motion for
11 Preliminary Injunction, November 9, 2023, as modified by order dated December 27, 2023.) With no
12 mutual agreement having been reached, Bring Back the Kern requests that this Court impose minimum
13 flow rates to enforce its Preliminary Injunction.

14 The City and Real Parties argue that it is Bring Back the Kern’s burden to show that their
15 proposal will keep the fish in the Kern River in good condition. This is not Plaintiffs’ burden, who are
16 not seeking to alter the status quo, but rather preserve it. The injunction does not require water be
17 *added* to the Kern River; it places limits on how much water *may be diverted* from the river. Plaintiffs
18 already met their burden to show that the City has and will continue to divert excessive quantities of
19 water; that is why the injunction was issued. It is the City’s burden, if it wishes to divert any water
20 from the Kern River at any of the subject weirs, to show that it will not divert water in excess of that
21 required to keep the fish below the weirs in good condition. All of the filings to date demonstrate how
22 the City has failed to make that showing. The lack of data *supports Bring Back the Kern’s argument*,
23 not the City’s or Real Parties’. In the absence of evidence supporting the City’s diversions, this Court
24 cannot allow them to continue in violation of the law.

25 Bring Back the Kern has proposed a reasonable compromise proposal that is based on the best
26 available science for the exact question this Court must answer: in the absence of sufficient historical
27 records and scientific data regarding the river’s fish, how much water is available for diversion on any
28 given day? The answer is simple and enforceable: flows should be set as close as possible to a

1 percentage of natural flows, providing water for both the river’s fish and for domestic and agricultural
2 purposes. Maximum flows should still be set to prevent flooding. And minimum flows should be set to
3 prevent the river from drying up (a necessity given the lack of fish ladders and other methods of
4 passage that prevent fish from retreating upriver if and when the river “dries back” during extreme low
5 flows.)

6 Bring Back the Kern’s proposal, a version of which this Court previously ordered with the
7 City’s consent in late 2023, may be fully implemented by the City without any adjudication of water
8 rights or contractual disputes. The preliminary injunction was issued primarily pursuant to Fish and
9 Game Code section 5937, which this Court properly identified as being superior to any claimed water
10 rights or contractual obligations.¹ The City argues that it cannot possibly comply with Bring Back the
11 Kern’s proposal because it is required to operate the diversion weirs pursuant to the Real Parties’
12 orders, since it is a mere “agent” of the water districts or bound by existing contracts. This argument
13 ignores the Court’s ruling on the preliminary injunction, improperly elevating water rights and
14 contracts above the strong legislative commandments of section 5937. The City continues to be stuck
15 in a mindset that is in direct conflict with this Court’s instructions and the law.

16 The City and Real Parties fret about the possibility that Bring Back the Kern’s proposal would
17 sometimes be impossible to satisfy due to low flows at First Point caused by low releases from Isabella
18 Reservoir. Bring Back the Kern’s proposal only sets minimum flow rates as a percentage of natural
19 flows above which the City may not divert; it does not mandate any specific minimal flow. Again, *the*
20 *injunction does not order that water be placed into the river*. If flows at First Point or at any of the
21 weirs are below the minimum flow rates (i.e., if 40% of computed natural flows is a higher number
22 than what is actually flowing at First Point), whether because of natural fluctuations or because of
23 intentionally reduced releases from Lake Isabella, the City would not have to add water to the river (by
24 releasing more water from Lake Isabella or any other means). It would only be prevented from
25

26
27 ¹ The injunction was also issued pursuant to the Public Trust Doctrine, but the Court’s order closely
28 match the specific requirements of Fish and Game Code section 5937. To the extent Bring Back the
Kern’s proposal deviates from the base requirements of section 5937 (i.e., in its call for maximum and
minimum flows), these deviations are more than justified as enabling and ensuring the City’s
compliance with its public trust duties during the pendency of the litigation.

1 diverting water in excess of that amount, and only if the diversion is not required due to dire necessity
2 to sustain human consumption through the domestic water supply.

3 The parties have not been able to develop a mutually acceptable flow regime. The City and Real
4 Parties have failed their burden to demonstrate that the City's current diversion regime keeps the fish
5 in the Kern River in good condition, while Bring Back the Kern has more than adequately
6 demonstrated how the City's current flow regime does not do so. Additional Court action is required,
7 and Bring Back the Kern urges this Court to adopt its compromise proposal during the pendency of
8 this action. The remainder of this Combined Reply addresses the City's, Real Parties, and J.G.
9 Boswell's specific arguments.

10 ARGUMENT

11 **I. City of Bakersfield's Response.**

12 The City makes two main arguments: (a) the City alone cannot provide the relief sought by
13 Bring Back the Kern (and co-plaintiff Water Audit California) because the lawsuit does not target the
14 Real Parties' water rights; and (b) the City is complying with the injunction.

15 **A. The City Is the Only Proper Defendant.**

16 This argument is addressed more fully in the context of the City's Demurrer to Plaintiffs' Third
17 Amended Complaint. In short, the City seeks to resolve in the context of this litigation its long-running
18 water rights and contract disputes with various water districts. But this lawsuit does not concern water
19 rights or delivery contracts; it concerns the City's operation of six weirs. The City is the only operator
20 of those weirs. It is the only party controlling those weirs. There may be multiple owners of some of
21 the weirs, but no party has suggested that their part-ownership of any weir makes them the operator or
22 controller of the weir. As this Court already found, the City is the proper defendant in an action
23 regarding the operation of the weirs. (Order Granting Plaintiff's Motion for Preliminary Injunction,
24 November 9, 2023, at p. 7 [the "contention that Defendant does not have ownership of the Beardsley
25 Weir or the Calloway Weir is of no import because it is conceded that Defendant *operates* those weirs
26 and therefore falls within the legal definition of 'owner'"] (italics in original); Fish and Game Code §
27 5900(c).) Plaintiffs have chosen to sue the City alone, as it their right. If whatever remedy is ordered
28

1 within this lawsuit—that will necessarily be confined to the City’s operation of the weirs—ends up
2 being insufficient, Plaintiffs can seek redress against other responsible parties at that time.

3 The City’s argument is rooted in its flawed perspective regarding the relationship between
4 section 5937, the Public Trust Doctrine, and the various water rights and contractual relationships that
5 are improperly referred to as the “the law of the river.” This Court explained this relationship clearly:
6 the legislature determined the order of priority when it enacted section 5937, placing the health of the
7 fish at the top: “the courts have expressly rejected the argument that Section 5937 only applies to
8 water that has not already been appropriated for beneficial uses (i.e. excess water).” (Order Granting
9 Plaintiff’s Motion for Preliminary Injunction, November 9, 2023, at p. 9.) “[W]e are at pains to repeat,
10 that the Legislature has already balanced the competing claims for water from the streams affected by
11 section [5937 via 5946] and determined to give priority to the preservation of their fisheries.” (*Id.* at
12 pp. 9-10, quoting *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 201 (“*CalTrout*
13 *II*”).)

14 What this means is simple: for each of the subject weirs, the City must assess how much water
15 is needed to pass the weir to keep the fish below in good condition. All the water that physically exists
16 at each weir, no matter what rights may be associated with that water, must be part of the City’s
17 assessment. If the water exists at the top of the weir, section 5937 requires the City to let enough of it
18 flow past the weir to keep the fish below in good condition. Only after doing so may the City detain
19 and/or divert excess water, on its own behalf or on behalf of anybody else. And only at that point
20 should the City consider who has rights to what portion of that excess water. Distribution of the excess
21 water is a question for the accountants, not the fish. And not this Court, in this action.

22 The City embraced this flawed perspective by agreeing to the interim flow plan proposed by the
23 Real Parties, “which calls for different sources of water for fish flows during different time periods.”
24 (City Response at p. 6.) This plan is not a flow proposal, but rather an agreement regarding allocating
25 priority of water rights. It pays lip service to an “adequate supply of water (from the most junior rights
26 in order of priority) ... for fish flow so that a variable amount of water passes the McClung Weir,” but
27 is in fact focused on setting the order of priority, not setting a minimum flow to ensure the fish are
28 kept in good condition. (See Exhibit C to Declaration of Colin Pearce at p. 2.) Mr. Pearce claims that

1 the plan “varies according to the time of year,” (Pearce Dec. at ¶ 21) but admits that the only variation
2 is “the source of the water allocated for fish flows, not the quantity of water in the Kern River.”
3 (Pearce Dec. at ¶ 23.) The City’s mistaken focus on water rights pervades its Response: “The City is
4 currently using a substantial portion of *its available water supplies* to provide water for interim fish
5 flows. ...[it] has contributed approximately 45.1% of *its total Kern River water supply* to fish flow
6 allocations.” (City Response at p. 6, italics added.) “If the Districts are not defendants or subject to
7 claims, allegations and a prayer for relief, then *their water supplies* are not at issue, or available to use
8 to satisfy fish flow obligations and other public trust needs.” (*Id.* at p. 13, italics added.)

9 Again, this gets it all backwards. The City, as operator of each subject weir, must ask how much
10 water is required to keep the fish in good condition below each weir and allow that much water to pass
11 the weir. If the water above the weir is lower than that minimum needed, it must allow *it all* to pass
12 (except for that required by dire necessity to sustain human consumption through the domestic water
13 supply). These decisions and actions must be made regardless of any water rights or contractual
14 agreements. Then and only then, the City may decide whether and how to distribute whatever excess
15 water may be available. That determination can be based on whatever water rights and contractual
16 agreements the City has made and believes it bound by. But by placing water rights and contractual
17 agreements first, and improperly placing the entire burden for “satisfying fish flows” on “its available
18 water supplies,” the City ensures its continued violation of this Court’s preliminary injunction and
19 reveals its complicity in the systematic dewatering of the Kern River. If the City really wants a
20 flowing river, all it need do is follow the law.

21 **B. The City is Not Complying with the Preliminary Injunction Order.**

22 **1. The City Has the Burden, Not Bring Back the Kern.**

23 The City castigates Bring Back the Kern for not providing “sufficient evidence or scientific data
24 to support their request for increased flows.” (City Response at p. 14.) The City’s expert, Dr. Hanson,
25 “was struck by the lack of scientific support, analyses, and linkage to flow-habitat relationships that
26 typically are presented in support of an instream flow proposal.” (*Id.* at p. 15; Hanson Dec. at ¶ 10.)
27 Bring Back the Kern did not attempt to develop an “instream flow proposal.” Nor is Bring Back the
28 Kern “requesting increased flows.” They are not seeking to put water into the river; they are seeking to

1 prohibit the City from taking too much of it out. They seek enforcement of this Court’s order limiting
2 the City’s excessive diversions and have demonstrated that the City’s diversions are excessive and are
3 failing to keep the fish below the weirs in good condition. It is not Bring Back the Kern’s burden to
4 develop an “instream flow proposal”; it is the City’s burden to develop a *diversion proposal* that
5 demonstrates that its diversions will leave enough water in the river passing each weir to keep fish
6 below each weir in good condition. They admit that they are not collecting the data required for such a
7 proposal. (See Response at p. 14, n. 1.)

8 Dr. Hanson’s opinion is based on a *draft proposal* prepared by Bring Back the Kern that was
9 provided to the other parties as part of the good faith consultation ordered by this Court. (See Hanson
10 Dec., ¶¶ 6, 10-11.) That is not the proposal presented by Bring Back the Kern in its Motion; the
11 proposal before this Court is contained in the Declaration of John Shelton. (Motion at pp. 11-12; see
12 also pp. 4-5.) Bring Back the Kern’s draft proposal might not disclose in its two pages the scientific
13 support Dr. Hanson seeks, but Mr. Shelton’s recommendation does. As he states, it is based on his
14 expertise, experience, and observations, and builds on the specific recommendation of Dr. Ted
15 Grantham, the state’s foremost authority on developing flow regimes for California rivers when
16 fisheries data is lacking. (*Id.*) Mr. Shelton’s proposal is supported by and based on the best-available
17 science given the lack of fisheries-specific data for the lower Kern River. As Mr. Shelton declares:

18 Best available science consistently and continually affirms that the establishment of
19 variable flows, especially those related to the river’s natural flow regime, is critical to
20 supporting healthy river ecosystems. In the absence of site-specific data that reveal the
21 flows required to maintain fish in good condition in the Kern River, a variable flow rate
22 that mimics the natural seasonal flow patterns should be established as an interim flow
23 regime.

24 (Shelton Dec. at ¶ 9.)

25 Bring Back the Kern offers a compromise proposal developed by California’s foremost expert
26 on this exact question, a proposal adjusted to add maximum and minimum flows by an eminently
27 qualified systems ecologist. It is quite admittedly a compromise proposal, offered in the absence of a
28 full analysis that will be required before the City adopts a permanent diversion plan for its operation of
the subject weirs. Bring Back the Kern has satisfied whatever burden it has regarding this compromise
proposal.

1 **2. The City Has Not Satisfied Its Burden for Its Diversion Proposal.**

2 The City has not met its burden to show that its diversions are not excessive or that it is
3 allowing enough water to pass each weir to keep the fish below the weirs in good condition. Dr.
4 Hanson admits that he was “not able to find data on the abundance or species composition of the fish
5 community inhabiting the lower Kern River or their geographic distribution downstream of Lake
6 Isabella.” (Hanson Dec. at ¶ 8.) He admits that “[t]he 40% of FNF has been identified as a generic
7 ‘rule of thumb’ criteria and is not specific for the species assemblage inhabiting the lower Kern
8 River,” data for which he admits is absent. (*Id.* at ¶ 12.) Dr. Hanson also admits that resident rainbow
9 trout are expected to “occasionally reside in the lower river,” but that “summer water temperatures are
10 expected to be elevated resulting in highly stressful or unsuitable habitat for over-summering resident
11 trout.” (*Id.* at ¶ 12.) He doesn’t explain or acknowledge how the City’s diversions may effect summer
12 water temperatures, or how the City’s current flow regime keep those “occasional” resident rainbow
13 trout in good condition. On a very basic level, a lot of factors influence a river’s water temperature, but
14 one of those is most certainly flow rates that are directly affected by the City’s operation of the subject
15 weirs. (See Shelton Dec. at ¶ 7.) The City provides no support for a conclusion that its diversions are
16 not causing and will not cause harmful increases in water temperature.

17 While Dr. Hanson laments that “there is no scientific site-specific basis for concluding that the
18 proposed instream flows will provide suitable habitat quality for the native fish assemblage,” he offers
19 no authority or scientific evidence in support of the City’s current operations. (Hanson Dec. at ¶ 12.)
20 Dr. Hanson’s declaration is devoted to an attempt to knock down Bring Back the Kern’s compromise
21 proposal; none of it is in support of the City’s current operation of the subject weirs. The City claims
22 otherwise: “Dr. Hanson explains that he believes that flows in the range of 5 to 20 cfs below McClung
23 Weir, which the current interim flow plan is able to achieve, is sufficient to keep fish populations
24 below the weir in good condition....” (City Response at p. 16.) This greatly overstates Dr. Hanson’s
25 opinion. He does not declare that flows of 5-20 cfs are sufficient to keep the fish in good condition; in
26 fact, he offers no opinion at all regarding “good condition.” (Hanson Dec. at ¶ 13.) Instead, he opines
27 about typical living stream conditions “for warm water fish species within a very limited habitat area.”
28 (*Id.*) This is not an opinion regarding the current flows (or lack thereof) at McClung Weir and the

1 ability of those flows to keep the fish below that weir *in good condition*—whether they be the warm
2 water fish he acknowledges “have been reported” in “the existing pool below McClung Weir” or the
3 resident rainbow trout he admits are expected to “occasionally reside” in the lower river. Dr. Hanson
4 says nothing about what is required to keep fish in good condition in the Kern River.

5 **3. The City Is Not Keeping the Fish Below Each Weir in Good Condition.**

6 Nothing in the City’s Response suggests that it has considered what “good condition” means.
7 This Court previously discussed the term, suggesting that flows that keep fish in good condition
8 “would also tend to sustain a healthy ecosystem consisting of birds, mammals, plants, natural
9 aesthetics, and quality of life opportunities for residents.” (Order Granting Plaintiff’s Motion for
10 Preliminary Injunction, November 9, 2023, at p. 8; see also p. 18 [“Multiple courts and regulatory
11 entities have already spent very considerably efforts defining the term [citations]. There is no reason,
12 therefore, for Defendant, Plaintiff, and this Court to ‘reinvent the wheel’ regarding the meaning of
13 ‘good condition’.”].)

14 Plaintiffs previously offered a definition that has support in the scientific community and has
15 been endorsed by courts. (See Plaintiffs’ Reply to Intervenor-Defendants’ Opposition to Motion for
16 Preliminary Injunction, October 6, 2023, at p. 6.) It includes: 1) the health of individuals (fish are
17 healthy, free of disease, parasites, etc., and have reasonable growth rates with adequate habitat); 2)
18 diversity and abundance of aquatic populations, diversity of age class, sufficient habitat to support all
19 life stages and support self-sustaining populations; and 3) the overall health of the community,
20 including co-evolved species and the health of the aquatic ecosystem at several trophic levels.

21 Providing only enough water to barely maintain the presence of a few individual warm water
22 fish in the pool directly below McClung Weir—which is a charitable interpretation of what Dr.
23 Hanson believes the City’s current flow regime accomplishes—is not in any way satisfying any of the
24 above criteria for keeping fish in good condition. Again: the City has the burden to develop a *diversion*
25 *regime* that assesses what flows are required to keep the fish below each weir in good condition and
26 then what flows may be available for diversion. Without such a proposal, and the research and data
27 required to prepare it, the City should not be permitted to divert any water. It not only has failed its
28 burden but it denies it entirely. It should not be rewarded for its intransigence.

1 The evidence provided by Bring Back the Kern, including Mr. Shelton’s declaration, stands in
2 stark contrast, clearly demonstrating that the current flows are not keeping the fish in good condition:
3 Mr. Shelton has “observed several reaches, including the reaches above and below McClung Weir,
4 with poorly connected pools and extremely low flows that are unlikely to support fish as a
5 consequence of extreme high water temperatures during the day and corresponding low oxygen levels
6 over night as ambient temperatures increase.” (Shelton Dec. at ¶ 7.) These poorly connected pools and
7 extremely low flows are a direct result of the City’s current operation of the subject weirs. Mr.
8 Shelton’s recommendation “would represent a substantial improvement to the current, static low flows
9 being maintained in the Kern River by the City. Given the lack of data regarding the river’s hydrology,
10 ecology, and especially its fish, a 40% of CNF represents a scientifically defensible approach for
11 establishing interim flows for the Kern River.” (*Id.* at ¶ 13.)

12 Dr. Hanson also touches on a critically important factor in any assessment of Kern River flows:
13 their natural variation and tendency to “experience dry-backs as surface flows recede upstream leaving
14 lower reaches of the rivers temporarily dry until later in the year when precipitation and runoff are
15 sufficient to re-establish surface water connectivity.” (Hanson Dec. at ¶ 7; see also ¶¶ 13-14.) But Dr.
16 Hanson does not address what this means for the Kern River’s fish: while resident fish tend to relocate
17 upstream to better habitat as a river experiences dry-backs, they can do so only until they encounter a
18 dam that obstructs their passage, like the subject weirs. Sure, the Kern River may naturally dry-back
19 for a few weeks a year, two or three out of every four years. But what does that mean for its fish if
20 they can’t swim upstream of a weir to follow the water?

21 That is where section 5937 comes in, and why it was enacted in the first place, as sort of a
22 corollary to existing laws that required suitable passage for fish around dams, via fishways. (See Bork,
23 Krovoza, Katz, and Moyle, “The Rebirth of California Fish & Game Code Section 5937: Water for
24 Fish,” April 26, 2012, at p. 817-822. Available at
25 https://www.law.berkeley.edu/files/CLEE/Bork_2012_UCDLR_RebirthOf5937.pdf; see Fish and
26 Game Code §§ 5901, 5931, 5932, 5935, 5936, 5938, 5942.) An early version of section 5937 was
27 specifically connected to fishways: dam owners “shall allow sufficient water at all times to pass
28 through *such fishway* to keep in good condition any fish that may be planted or exist below said dam.”

1 (See Bork et al., *supra*, at p. 822, quoting 1915 Cal. Stat. 820.) Thus, in the presence of adequate
2 fishways around dams, “good condition” might permit and anticipate periodic drying back of a river,
3 with disconnection and even drying up of pools, in order to follow the river’s natural hydrology. But
4 without that adequate fish passage, a flow regime that allows drying back of the river is not going to
5 keep fish below obstructions in good condition. It should not be used as an excuse for the City’s
6 current low flow regime.

7 Action by this Court is necessary. Whether it is to adopt Bring Back the Kern’s reasonable
8 proposal or something else, Bring Back the Kern requests this Court take further action to enforce its
9 order.

10 **II. Real Parties’ Opposition.**

11 Real Parties in Interest (all real parties with the exception of J.G. Boswell) raise three main
12 arguments, some of which overlap with the City’s Response: (a) Bring Back the Kern fails to satisfy
13 its burden; (b) the City is not failing to keep fish below each weir in good condition; and (c) Bring
14 Back the Kern’s proposal is not supported by the law or best available science.

15 **A. Bring Back the Kern Satisfied Its Burden.**

16 **1. Bring Back the Kern Correctly Focuses on the Conditions Below McClung** 17 **Weir.**

18 Real Parties first argue that Bring Back the Kern improperly treats the six subject weirs
19 collectively, rather than assessing each weir individually. (Real Parties’ Opp. at p. 4-6.) As part of this
20 argument, Real Parties claim that Bring Back the Kern’s motion “improperly necessitates that the
21 operator of each weir is obligated to bypass sufficient water to keep fish in good condition all the way
22 to the “historic terminus” of the river, regardless of distance.” (Real Parties’ Opp. at p. 5.) But Bring
23 Back the Kern never makes this argument, and this language appears nowhere in the motion. Instead,
24 Bring Back the Kern makes clear that it requests “the Court establish flow rates for the Kern River
25 between First Point of Measurement and Second Point of Measurement...,” which is the start and stop
26 of the City’s jurisdiction over the Kern River.

27 Real Parties offer another straw man argument regarding a river that does not flow to the ocean.
28 (*Id.* at p. 6.) Section 5937 does not require releases sufficient to accomplish this goal if there is no

1 practical way for a river to reach the ocean, and Bring Back the Kern does not argue otherwise. The
2 scope of the City’s duties under section 5937 are governed by a site-specific determination of what the
3 fish below each weir require to be kept in good condition, the definition of which is discussed above.
4 “Good condition” for fish in a river that naturally terminates will be different than good condition for
5 fish in a river that flows to the ocean, just as good condition for fish in a river that “dries back” will be
6 different than good condition for fish in a river that perennially flows its entire length.

7 Similarly, the City cannot order the Army Corps to release specific amounts of water from Lake
8 Isabella and Bring Back does not seek that. And the City cannot be responsible for intervening
9 obstructions downstream from its dams causing harm to the river’s fish. But that does not mean that
10 the City can limit its focus only to the length of the reach below each weir and pass only just enough
11 water by each of its weirs to keep the immediate area below each weir wet; “good condition” requires
12 a consideration of the entirety of the river’s flow. This is an academic question, however; the City
13 controls all of the weirs between First Point and Second Point and is thus responsible for the entire
14 flow of the river in this reach.

15 Real Parties’ seek limit the scope of section 5937 even more radically, arguing that it requires
16 just enough water to keep a pool of water in “the area that is ‘near’ or ‘immediately below’ a weir.”
17 (*Id.*) There is no support for this proposition, and it is directly contradicted by this Court’s prior ruling
18 and the prior court decisions discussing the meaning of “good condition,” as discussed above. There is
19 no reason under the law that a dam operator’s obligations under section 5937 cannot extend 20 miles
20 downstream of a dam. What matters is what the fish below that dam need to be kept in good condition.

21 Real Parties seek support in past statements by Drs. Moyle and Grantham. (See Real Parties’
22 Opp. at p. 5.) But these statements were made in the context of a study whose primary goal was “to
23 develop an approach to identify and evaluate California dams that have impaired fish communities
24 associated with altered fish regimes.” (*Id.*) As part of that identification process, the authors identified
25 209 USGS flow gaging records “at, or near (within 1 km downstream) of dams.” (*Id.*) This in no way
26 suggests any limit to the scope of section 5937; it is a protocol for winnowing a list of more than 1400
27 dams to a more digestible number of “high-priority sites to further assess the condition of fish based
28 on evidence of hydrologic and biological impairment.” (See Ex. 2 to Real Parties’ RJN, at p. xi.) The

1 protocol serves no purpose here since the weirs have already been identified and their impairment of
2 fish below the weirs adjudicated in the context of the preliminary injunction.

3 Ultimately, Bring Back the Kern chose to focus its analysis of the flow data on Beardsley Weir
4 and McClung Weir not in an attempt to avoid presenting competent evidence regarding the weirs in
5 between, but rather because that evidence has not been consistently provided by the City. (See Ex. G
6 to Keats Dec., p. 16 [measurements not accurate or missing at River and Bellevue Weirs].)

7 **2. Bring Back the Kern Does Not Misconstrue “Computed Natural Flow.”**

8 As discussed above, Bring Back the Kern has proposed a compromise proposal that sets interim
9 flows as a percentage of computed natural flow. The purpose is to approximate, as closely as possible,
10 the natural flow that would exist at First Point if Lake Isabella did not exist. The dam and the lake do
11 exist, of course, and so the CNF may sometimes not align with the outflow from the lake. Because
12 Bring Back the Kern’s proposal is not a mandated minimum flow, but rather a minimum flow required
13 for diversions to occur, if actual flows at First Point are lower than the CNF, the City would have to
14 allow all the water present to pass through (except for that needed by dire necessity to sustain human
15 consumption through the domestic water supply). Under no circumstances would any party be
16 required to take water out of storage and release it from Isabella Dam; that is beyond the scope of this
17 Court’s jurisdiction and beyond the scope of this action.

18 **3. Bring Back the Kern Satisfied Its Burden Regarding McClung Weir.**

19 Like the City, Real Parties ignore the uncontested flow measurements that show the systematic
20 failure of the City to allow sufficient water to pass over McClung Weir. (See Exs. C-H to Keats Dec.)
21 This uncontested evidence shows how little water the City has allowed to flow over McClung Weir,
22 including 22 days in March where no water at all was recorded passing the weir. (See Ex. H to Keats
23 Dec.) A flow of 0 cfs on 22 days in one month is on its face insufficient to keep the fish below that
24 weir in good condition.

25 Bring Back the Kern also offers the testimony of John Shelton, a systems ecologist, who
26 declares that those flows, recorded by the City and confirmed by his own observation, are not
27 sufficient to keep fish below the weir in good condition. (See Shelton Dec. at ¶¶ 4, 5, 7.) And Bring
28 Back the Kern offers the declaration of local angler Jonathan Vegas, not as an expert but as a lay

1 witness, who observed a stagnant pool below McClung Weir with no living fish observable but a
2 pervasive smell of dead fish. (Vegas Dec. at ¶ 8.) Included in his declaration are photos he took in the
3 Kern River channel (*not* in side canals as claimed by Real Parties) that show a dry riverbed and dead
4 fish. (*Id.* at ¶¶ 9-13.) Mr. Vegas is eminently qualified to testify as to his experience as an angler on
5 the Kern River, which speaks directly to the “quality of life opportunities for residents” that this Court
6 previously identified as being associated with flows that keep fish in good condition.

7 **B. The City is Failing to Keep Fish Below Bellevue Weir and McClung Weir in Good**
8 **Condition.**

9 Real Parties observe that Bring Back the Kern’s motion is focused on the flows over McClung
10 Weir. They are partially correct; the evidence of little to no water flowing over McClung necessitates
11 and justifies a focus on that weir, but it also demonstrates low flows immediately above the weir. Due
12 to the total lack of data of flows at Bellevue Weir, it is not possible to demonstrate that flows at
13 Bellevue are equally insufficient, but it is a valid presumption given the data. (See Exs. C-H to Keats
14 Dec.) John Shelton testified specifically about the reaches below and above McClung Weir. (Shelton
15 Dec. at ¶ 7.) And Jonathan Vegas testified about and provided photos of the reaches above and below
16 McClung Weir. (Vegas Dec. at ¶¶ 10-12.)

17 Real Parties submit the declaration of Chris Fitzer for support of its argument that fish below
18 each weir are being kept in good condition. While Mr. Fitzer opines that “it is scientifically reasonable
19 to conclude that the interim flows appear to provide aquatic habitat conditions (wetter channel with
20 variable velocities and depths, hydrologic connectivity) that *would be expected to support fish in good*
21 *condition,*” he does not testify that these flows *are in fact keeping the fish in good condition.* (Fitzer
22 Dec. at ¶ 8, italics added.) Regarding the reach below Bellevue Weir, Mr. Fitzer is less confident,
23 testifying that the conditions “*would be expected to support fish in good condition*” but “*warrants*
24 *additional assessment.*” (*Id.* at p. 9, italics added.) And with regards to McClung Weir, Mr. Fitzer is
25 even less confident, opining that the conditions there “*may support fish in good condition; however,*
26 *additional assessment is warranted.*” (*Id.*, italics added.) This is not persuasive evidence that the
27 current flows at Bellevue Weir and McClung Weir are in fact keeping the fish below those weirs in
28 good condition.

1 Moreover, Mr. Fitzer does not define “good condition.” He identifies aquatic habitat conditions
2 that *would be expected to support* fish in good condition (“wetter channel with variable velocities and
3 depths, hydrologic connectivity”) but this is not a definition of the good condition of the fish; it is an
4 observation of the habitat conditions that would be expected to keep them in good condition, whatever
5 that might be. Nothing is stated that establishes Mr. Fitzer’s definition of “good condition,” and there
6 is no basis to conclude that he includes the health of individuals, the diversity and abundance of
7 aquatic populations, the diversity of age class, sufficient habitat to support all life stages and support
8 self-sustaining populations, and the overall health of the community, including co-evolved species and
9 the health of the aquatic ecosystem at several trophic levels in that definition. (See discussion above.)

10 Mr. Fitzer readily admits the limitations of his observations and testimony: “As described
11 above, further analysis is necessary to better understand habitat suitability under the existing interim
12 flow conditions and across a range of flows to determine limiting factors and possible flow and/or
13 other habitat action refinements.” The question is whether the status quo as evidenced by the City’s
14 own flow measurements should remain while that further analysis is conducted, or whether Bring
15 Back the Kern has presented enough evidence to demonstrate a need for further action by this Court.

16 **C. Bring Back the Kern’s Compromise Proposal Is Supported by the Best Available**
17 **Science.**

18 Real Parties argue that it is inappropriate to look at uses of the CEFF process in neighboring
19 rivers like the San Joaquin to develop interim flow regimes for the Kern River. (Real Parties’ Opp. at
20 p. 13.) Both Dr. Grantham and Mr. Shelton address this concern directly, and in both experts’
21 opinions, neighboring rivers can provide guidance for establishing an interim flow regime based on a
22 percentage of natural flows, while a full instream flow proposal (a diversion proposal) is prepared by
23 the City that includes analyses specific to the Kern River. (Grantham Dec., Oct. 6, 2023, at pp. 3-6;
24 Shelton Dec. at pp. 9-13.)

25 Bring Back the Kern’s compromise proposal is based on the best available science. It was
26 proposed and is supported by Dr. Grantham, the state’s foremost authority on developing minimum
27 flow regimes for rivers that lack current fisheries and hydrological data. (Grantham Dec., October 6,
28 2023, at pp. 3-6.) It is supported by Bring Back the Kern’s expert, Mr. Shelton, who has years of

1 experience with restoring flows on California’s rivers. (Shelton Dec. at pp. 9-13.) It is a science-based,
2 reasonable, and enforceable proposal that will enable the City and Real Parties to divert significant
3 quantities of water from the river, as well as utilize significant quantities of water in the form of
4 recharged groundwater (the apportionment of which the City and Real Parties have already negotiated.
5 (See City Response, Ex. C.) And it will ensure in the short term that a reasonable amount of water will
6 flow past each weir to best keep the river’s fish in good condition, while being able to be adjusted after
7 further data collection.

8 **III. J.G. Boswell’s Joinder.**

9 J.G. Boswell drained and then planted crops in a lakebed that has since turned into a floodplain.
10 It argues that the Court’s preliminary injunction should be reconsidered given that it was imposed
11 without consideration of the risk of flooding of these floodplains and former lakebeds. And it argues
12 that any interim flow regime must prevent flooding of its property. These arguments are not supported
13 by law or fact. J.G. Boswell’s property is subject to natural flooding due to its location at the terminus
14 of a river, in a historical lakebed and floodplain. That is the status quo. The weirs are not flood control
15 dams, and J.G. Boswell cannot require their continued operation for flood control purposes. J.G.
16 Boswell must accept the conditions of the river that occupies the lands in which it chose to plant its
17 crops. An order enforcing the preliminary injunction is not an order that places water into the river; it
18 is an order that limits diversions that J.G. Boswell has no control over and no claim to. Regardless,
19 Bring Back the Kern’s compromise proposal would enable the City and other water diverters to divert
20 significant quantities of water throughout the entire length of the Kern River, providing more flood
21 control than J.G. Boswell would have in the absence of any diversions.

22 **CONCLUSION**

23 For the above reasons, Bring Back the Kern respectfully requests that this Court establish
24 minimum flow amounts for the Kern River between First Point and Second Point, below which the
25 City would be prohibited from diverting water from the river. Bring Back the Kern offers its
26 compromise proposal as a reasonable and enforceable plan based on the best available science.

27 DATED: May 2, 2024

28 

Adam Keats

1 **PROOF OF SERVICE**

2 I, Adam Keats, am over eighteen years of age and not a party to this action. I am employed in the
3 county where the mailing took place. My business address is 2489 Mission St., Suite 16, San Francisco,
4 CA 94110.

5 On May 2, 2024, I served the following document(s):

6 **BRING BACK THE KERN, ET AL.'S COMBINED REPLY IN SUPPORT OF MOTION
7 TO COMPEL COMPLIANCE WITH PRELIMINARY INJUNCTION**

8 on the following parties, via electronic mail to the addresses listed below:

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

Executed this 2nd day of May, 2024, in San Francisco, California.



Adam Keats