

1 Scott K. Kuney (SBN 111115)  
2 Brett A. Stroud (SBN 301777)  
3 The Law Offices of Young Wooldridge, LLP  
4 1800 30<sup>th</sup> Street, Fourth Floor  
5 Bakersfield, CA 93301  
6 Phone: (661) 327-9661  
7 Fax: (661) 327-0720  
8 Email: [skuney@youngwooldridge.com](mailto:skuney@youngwooldridge.com)  
9 [bstroud@youngwooldridge.com](mailto:bstroud@youngwooldridge.com)

**Exempt from Filing Fees  
Gov. Code, § 6103**

10 *Attorneys for Real Party in Interest North Kern Water Storage District*

11 [additional counsel on next page]

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF KERN

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

19 Plaintiffs and Petitioners,

20 v.

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

23 Defendants and Respondents,

24 BUENA VISTA WATER STORAGE  
25 DISTRICT, KERN DELTA WATER  
26 DISTRICT, NORTH KERN WATER  
27 STORAGE DISTRICT, ROSEDALE-RIO  
BRAVO WATER STORAGE DISTRICT,  
KERN COUNTY WATER AGENCY, and  
DOES 501-999,

28 Real Parties in Interest.

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

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

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

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

1      ***Additional Counsel and Parties***

2	Richard Iger (SBN 263412) General Counsel Kern Delta Water District 501 Taft Highway Bakersfield, CA 93307 (661) 834-4656 <a href="mailto:richard@kerndelta.org">richard@kerndelta.org</a>  6 <i>Attorneys for Real Party in Interest Kern Delta Water District</i>	3      Robert E. Donlan (SBN 186185) Craig A. Carnes, Jr. (SBN 238054) Kevin W. Bursey (SBN 328999) Ellison, Schneider, Harris & Donlan 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a> <a href="mailto:cac@eslawfirm.com">cac@eslawfirm.com</a> <a href="mailto:kbursey@eslawfirm.com">kbursey@eslawfirm.com</a>  8 <i>Attorneys for Real Party in Interest Kern Delta Water District</i>
9	10     Isaac St. Lawrence (SBN 229789) McMurtrey, Hartsock & Worth 2001 22nd Street, Suite 100 Bakersfield, CA 93301 (661) 322-4417 <a href="mailto:isaac@mhwlegal.com">isaac@mhwlegal.com</a>  13 <i>Attorneys for Real Party in Interest Buena Vista Water Storage District</i>	11     12     Amelia T. Minaberrigarai (SBN 192359) General Counsel Kern County Water Agency 3200 Rio Mirada Drive Bakersfield, CA 93308 (661) 634-1400 Email: <a href="mailto:ameliam@kcwa.com">ameliam@kcwa.com</a>  14 <i>Attorneys for Real Party in Interest Kern County Water Agency</i>
15	16     Nicholas A. Jacobs (SBN 210091) Louinda V. Lacey (SBN 275888) Somach Simmons & Dunn A Professional Corporation 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 (916) 446-7979 <a href="mailto:njacobs@somachlaw.com">njacobs@somachlaw.com</a> <a href="mailto:llacey@somachlaw.com">llacey@somachlaw.com</a> <a href="mailto:pmacpherson@somachlaw.com">pmacpherson@somachlaw.com</a> <a href="mailto:jestabrook@somachlaw.com">jestabrook@somachlaw.com</a> <a href="mailto:gloomis@somachlaw.com">gloomis@somachlaw.com</a>  22 <i>Attorneys for Real Party in Interest Kern County Water Agency</i>	17     18     19     20     21     Dan N. Raytis (SBN 218374) Daniel M. Root (SBN 311840) Belden Blaine Raytis 5016 California Avenue, Suite 3 Bakersfield CA, 93309 (661) 864.7826 <a href="mailto:dan@bbr.law">dan@bbr.law</a> <a href="mailto:droot@bbr.law">droot@bbr.law</a>  22 <i>Attorneys for Real Party in Interest Rosedale Rio-Bravo Water Storage District</i>
24	25     Jennifer L. Spaletta (SBN 200032) STOEL RIVES LLP 500 Capitol Mall, Suite 1600 Sacramento, CA 95814 (916) 447-0700 <a href="mailto:jennifer.spaletta@stoel.com">jennifer.spaletta@stoel.com</a>  28 <i>Attorneys for Real Party in Interest Rosedale Rio-Bravo Water Storage District</i>	26     27

### **Notice of Hearing on Demurrer**

2 PLEASE TAKE NOTICE that the demurrer below has been set for hearing on January  
3 31, 2024 at 8:30 a.m. or as soon thereafter as the matter may be heard, in Department J of the  
4 Kern County Superior Court, located at 1215 Truxtun Avenue, in Bakersfield, California.

6 | Dated: January 3, 2024

## The Law Offices of Young Wooldridge, LLP

By: /s/ Brett A. Stroud

Brett A. Stroud

*Attorneys for Real Party in Interest  
North Kern Water Storage District*

10 | Dated: January 3, 2024

Ellison, Schneider, Harris & Donlan LLP

By: /s/ Craig A. Carnes, Jr.

Craig A. Carnes, Jr.

*Attorneys for Real Party in Interest  
Kern Delta Water District*

14 | Dated: January 3, 2024

McMurtrey, Hartsock, Worth & St. Lawrence

By: /s/ Isaac L. St. Lawrence

Isaac L. St. Lawrence

*Attorneys for Real Party in Interest  
Buena Vista Water Storage District*

18 | Dated: January 3, 2024

Somach Simmons & Dunn

By: /s/ Nicholas A. Jacobs

Nicholas A. Jacobs

*Attorneys for Real Party in Interest  
Kern County Water Agency*

22 | Dated: January 3, 2024

## Belden Blaine Raytis

By: /s/ Dan N. Raytis

Dan N. Raytis

*Attorneys for Real Party in Interest  
Rosedale-Rio Bravo Water Storage*

## Demurrer

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

## First Cause of Action

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

### **Third Cause of Action**

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

## Fourth Cause of Action

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

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

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

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

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

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

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

1 Dated: January 3, 2024

Somach Simmons & Dunn

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

6 Dated: January 3, 2024

Belden Blaine Raytis

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

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

## TABLE OF CONTENTS

I.	<b>Introduction</b>	10
II.	<b>Applicable Law</b>	10
III.	<b>Argument</b>	11
A.	<b>The First Cause of Action, for Violations of the Public Trust Doctrine and the Fish and Game Code, Fails to State a Claim</b>	11
1.	<b>The Public Trust Doctrine Does Not Apply to Bakersfield Under the Facts Alleged in the Complaint</b>	11
2.	<b>Traditional Writ of Mandate and Declaratory Relief are Inappropriate for Enforcing the Public Trust Doctrine</b>	14
3.	<b>Fish and Game Code section 5901 only applies to anadromous fish and does not provide for a private right of action</b>	16
4.	<b>Fish and Game Code Section 5937 does not apply to the Diversion Structures because they are not “dams.”</b>	17
B.	<b>The Third Cause of Action, for “Breach of Trustee Duties”, Fails to State a Claim</b>	18
C.	<b>The Fourth Cause of Action, for Public Nuisance, Fails to State a Claim</b>	20
1.	<b>There is no “private attorney general” exception to Civil Code section 3493.</b>	21
2.	<b>Plaintiffs have not alleged special injury under Section 3493.</b>	23
IV.	<b>Conclusion</b>	24

## TABLE OF AUTHORITIES

## Cases

3	<i>Animal Legal Defense Fund v. Olympic Game Farm, Inc.</i> (2019) 387 F.Supp.3d 1202.....	23
4	<i>Associated Industries of New York State v. Ickes</i> (2d Cir. 1943) 134 F.2d 694 .....	22
5	<i>Brown v. Crandall</i> (2011) 198 Cal.App.4th 1 .....	20
6	<i>California Public Records Research, Inc. v. County of Stanislaus</i> (2016) 246 Cal.App. 1432 ..	16
7	<i>California Public Records Research, Inc. v. County of Stanislaus</i> (2016) 246 Cal.App.4th 1432 .....	11
8		
9	<i>Campana v. East Bay Municipal Utility Dist.</i> (2023) 92 Cal.App.5th 494 .....	21
10	<i>Center for Biological Diversity, Inc. v. FPL Group (“CBD”)</i> (2008) 166 Cal.App.4th 1349... 12,	
11	13, 14	
12	<i>Chapman v. Superior Court</i> (2005) 130 Cal.App.4th 261.....	11
13	<i>Citizens for Odor Nuisance Abatement v. City of San Diego</i> (2017) 8 Cal.App.5th 350 .....	23
14	<i>City of Almaty v. Khrapunov</i> (9 <sup>th</sup> Cir. 2020) 956 F.3d 1129.....	23
15	<i>Environmental Law Foundation v. State Water Resources Control Board (“ELF”)</i> (2018) 26	
16	Cal.App.5th 844 .....	13
17	<i>Frieman v. San Rafael Rock Quarry, Inc.</i> (2004) 116 Cal.App.4th 29 .....	22
18	<i>Golden Door Properties, LLC v. Superior Court of San Diego County</i> (2020) 53 Cal.App.5th	
19	733.....	17
20	<i>Gorman v. Tassajara Development Corp.</i> (2009) 178 Cal.App.4th 44.....	23
21	<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553.....	22
22	<i>Guardian North Bay, Inc. v. Superior Court</i> (2001) 94 Cal.App.4th 963 .....	10
23	<i>Hasbrouck v. Cavill</i> (1921) 54 Cal.App. 1 .....	21
24	<i>Helix Land Co. v. City of San Diego</i> (1978) 82 Cal.App. 3d 932.....	20
25	<i>Hudec v. Superior Court</i> (2015) 60 Cal.4th 81.....	21
26	<i>In re C.H.</i> (2011) 53 Cal.4th 94 .....	21
27	<i>Ivanoff v. Bank of America, N.A.</i> (2017) 9 Cal.App.5th 719 .....	20
28	<i>Kaiser Foundation Hospitals v. Belshe</i> (1997) 54 Cal.App.4th 1547 .....	11

1	<i>Knox v. Dean</i> (2012) 205 Cal.App.4th 417 .....	18
2	<i>Koll-Irvine Center Property Owners Assn. v. County of Orange</i> (1994) 24 Cal.App.4th 1036. 20	
3	<i>Ladas v. California State Auto. Assn.</i> (1993) 19 Cal.App.4th 761 .....	23
4	<i>Laidlaw Environmental Services, Inc., Local Assessment Com. v. County of Kern</i> (1996) 44 Cal.App.4th 346.....	22
5		
6	<i>May v. City of Milpitas</i> (2013) 217 Cal.App.4th 1307 .....	11
7	<i>McKenney v. Purepac Pharmaceutical Co.</i> (2008) 167 Cal.App.4th 72.....	10
8	<i>Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board</i> (2022) 76 Cal.App.5th 1 .....	15
9		
10	<i>National Audubon Society v. Superior Court</i> (“National Audubon”) (1983) 33 Cal.3d 419.....	12
11	<i>Noe v. Superior Court</i> (2015) 237 Cal.App.4th 316.....	17
12	<i>Rincon Band of Luiseno Mission Indians etc. v. Flynt</i> (2021), 70 Cal.App.5th 1059 .....	20
13	<i>Santa Barbara Channelkeeper v. City of San Buenaventura</i> (2018) 19 Cal.App.5th 1176.....	10
14	<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i> (2011) 52 Cal.4th 155 .....	22
15	<i>Scenic Hudson Preservation Conference v. Federal Power Commission</i> (1965) 354 F.2d 608 22	
16	<i>Sierra Club v. Superior Court</i> (2013) 57 Cal.4th 157 .....	21
17	<i>Vasquez v. Solo 1 Kustoms, Inc.</i> (2018) 27 Cal.App.5th 84 .....	17
18	<i>Venice Coalition to Preserve Unique Community Character v. City of Los Angeles</i> (2019) 31 Cal.App.5th 42 .....	20
19		
20	<i>Whitten v. California State Board of Optometry</i> (1937) 8 Cal.2d 444 .....	11
21	<b>Statutes</b>	
22	Civ. Code, § 3493 .....	20, 21
23	Civ. Code, § 3494 .....	20
24	Code Civ. Proc., § 1102.....	11
25	Code Civ. Proc., § 1109 .....	11
26	Code Civ. Proc., § 430.10.....	10
27	Code Civ. Proc., § 430.30 .....	10
28	Code Civ. Proc., § 430.50 .....	10

1	Code Civ. Proc., § 589 .....	10
2	Code Civ. Proc., § 731 .....	20
3	Fish and G. Code, § 5901.....	16
4	Fish and G. Code, § 5930.....	17
5	Fish and G. Code, § 5931.....	17
6	Fish and G. Code, § 5937.....	17
7	Fish and G. Code, § 5938.....	17
8	Fish and G. Code, §§ 5980-6028 .....	18
9	Pub. Resources Code, § 6009 .....	18
10	Pub. Resources Code, § 6009.1 .....	18, 19

**11 Constitutional Provisions**

12	Cal. Const., Art. X, § 2 .....	10
----	--------------------------------	----

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. Introduction

3        The California Constitution requires that “the waste or unreasonable use or unreasonable  
4 method of use of water be prevented, and that the conservation of such waters is to be exercised  
5 with a view to the reasonable and beneficial use thereof in the interest of the people and for the  
6 public welfare.” (Cal. Const., Art. X, § 2.) This requirement applies to all uses of water, including  
7 public trust uses. (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19  
8 Cal.App.5th 1176, 1186.) This case must thus be litigated on the foundational rule that all of the  
9 circumstances must be taken into account and all competing claims balanced to achieve the  
10 constitutional mandate. Plaintiffs’ second cause of action, raising this constitutional question, is not  
11 the subject of this demurrer. Instead, this demurrer is addressed to the other three causes of action,  
12 each of which fails as a matter of law. The demurrer should be sustained without leave to amend so  
13 that this case can be litigated on the constitutional standard of reasonable and beneficial use, which  
14 exists to protect all uses of our state’s scarce water resources: domestic use, municipal use, industrial  
use, agricultural use, and public trust uses such as the maintenance of fisheries and recreation

## 15 | II. Applicable Law

16 A demurrer raises an issue of law that “appears on the face” of the Complaint. (Code Civ.  
17 Proc., §§ 430.30, 589.) A general demurrer tests whether the complaint alleges sufficient facts to  
18 state a cause of action. (Code Civ. Proc., § 430.10(e); *Brousseau v. Jarrett* (1977) 73 Cal.App.3d  
19 864, 870-71.) A general demurrer also lies where the complaint itself discloses some defense that  
20 bars recovery. (See e.g. *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963,  
21 971-72.) A demurrer “may be taken to the whole complaint … or to any of the causes of action  
22 stated therein.” (Code Civ. Proc., § 430.50(a).) When it appears from the facts pled and the  
23 judicially noticeable materials that the complaint does not state a cause of action, a general  
24 demurrer should be granted. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th  
72, 77.)

1       **III. Argument**

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

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

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

12       A writ of mandate is proper only where there is “(1) a clear and present duty on the part  
13       of the respondent and (2) a clear, present and beneficial right in the petitioner to the performance  
14       of that duty.” (*Kaiser Foundation Hospitals v. Belshe* (1997) 54 Cal.App.4th 1547, 1558.)  
15       “Mandamus will not lie to control a public agency’s discretion—that is, to force the exercise of  
16       discretion in a particular manner.” (*California Public Records Research, Inc. v. County of*  
17       *Stanislaus* (2016) 246 Cal.App.4th 1432, 1443.) A petition seeking a writ of mandate is “subject  
18       to the general rules of pleading applicable to civil actions.” (*Chapman v. Superior Court* (2005)  
19       130 Cal.App.4th 261, 271.) The use of a general demurrer “to test the legal sufficiency of the  
20       petition for a writ … has always been recognized by the courts of this state.” (*May v. City of*  
21       *Milpitas* (2013) 217 Cal.App.4th 1307, 1323; see Code Civ. Proc., § 1109.) Plaintiffs’ first cause  
22       of action for a writ of mandate fails for two reasons. First, Bakersfield does not act as a trustee  
23       agency when it operates the Weirs. Second, Plaintiffs cannot allege any mandatory duty to  
24       operate the Weirs in a particular way, because the public trust inherently includes discretion to  
25       balance different public trust interests against other interests.

26       **1. The Public Trust Doctrine Does Not Apply to Bakersfield Under the**  
27       **Facts Alleged in the Complaint.<sup>1</sup>**

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

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

1 public trust in all actions and decisions that include or implicate public trust interests.” (TAC,  
2 ¶33.) The public trust doctrine requires the state to consider interests protected by the public trust  
3 in exercising its authority over public trust resources or making discretionary decisions that could  
4 impact public trust resources. (*National Audubon Society v. Superior Court* (“*National  
Audubon*”) (1983) 33 Cal.3d 419, 444.) However, an agency (state or local trustee agency) does  
5 not have public trust obligations simply because its actions may implicate public trust resources.  
6 Instead, the public trust doctrine only imposes a duty on a public agency when exercising  
7 regulatory or police power authority (1) to grant permission to an activity potentially impacting  
8 public trust resources (e.g., the State Water Resources Control Board [“SWRCB”] issuing water  
9 rights permits); or (2) as a trustee agency specifically designated to protect public trust resources  
10 potentially impacted by an activity (e.g. the California Department of Fish and Wildlife  
11 [“CDFW”]).

12 In *National Audubon*, the California Supreme Court discussed how an agency’s  
13 regulatory police power and/or statutory authority directly determines the scope of its public trust  
14 duties. The court explained the SWRCB’s authority expanded over the years and specifically  
15 how the Legislature in the 1950’s enacted various statutes addressing the SWRCB’s authority  
16 over the appropriation of water, including requirements for the SWRCB to consider public trust  
17 resources. (*Id.* at p. 444 [discussing Wat Code, §§ 1243, 1243.5, 1257].) This expanded authority  
18 directly related to the scope of the SWRCB’s public trust duties:

19 Thus, the function of the Water Board has steadily evolved from  
20 the narrow role of deciding priorities between competing  
21 appropriators to the charge of comprehensive planning and  
22 allocation of waters. **This change necessarily affects the board’s**  
23 **responsibility with respect to the public trust. The board of**  
24 **limited powers of 1913 had neither the power nor duty to**  
25 **consider interests protected by the public trust; the present**  
26 **board, in undertaking planning and allocation of water**  
27 **resources, is required by statute to take those interests into**  
28 **account.** (*National Audubon*, 33 Cal.3d 419 at 444, emphasis  
added.)

25 Similarly, in *Center for Biological Diversity, Inc. v. FPL Group* (“CBD”) (2008) 166  
26 Cal.App.4th 1349, the court addressed the proper defendant in an action alleging a violation of  
27 the public trust doctrine. The plaintiffs sued the owners and operators of wind turbines alleging  
28 that operation of the wind turbines injured raptors and other birds in violation of the public trust  
doctrine. The plaintiffs did not sue the public agency responsible for authorizing the operation of

1 the wind turbines (i.e., the county with statutory approval authority) or the statutorily designated  
2 trustee agency responsible for protecting the allegedly impacted species (i.e., CDFW). In  
3 affirming dismissal of the action, the court stated as follows:

4 The concept of a public trust over natural resources unquestionably  
5 supports **exercise of the police power by public agencies**. ... The  
6 interests encompassed by the public trust undoubtedly are  
7 protected by public agencies **acting pursuant to their police**  
8 **power and explicit statutory authorization**. ... Plaintiffs have  
9 not proceeded against the **County of Alameda**, which has  
10 **authorized the use** of the wind turbine generators, or against any  
11 agency such as the **California Department of Fish and Game**  
12 that has been **given the statutory responsibility of protecting the**  
13 **affected natural resources**. ... A challenge to the permissibility  
14 of defendants' conduct must be directed to the agencies **that have**  
15 **authorized the conduct**. (CBD, 166 Cal.App.4th at 1365-67,  
16 1370, emphasis added; see also *Environmental Law Foundation v.*  
17 *State Water Resources Control Board* ("ELF") (2018) 26  
18 Cal.App.5th 844 [County, with police power authority to regulate  
19 groundwater, has a public trust duty when it issues permits for  
20 construction of certain groundwater wells].)

21 Here, the Complaint focuses on Bakersfield's diversions of water from the Kern River  
22 pursuant to (1) its own water rights (purchased from a private corporation) and (2) the Real  
23 Parties' water rights or contractual entitlements (based on Bakersfield's ownership or  
24 management of the Diversion Structures).<sup>2</sup> (TAC, ¶¶2, 79, 81.) Plaintiffs describe how  
25 Bakersfield manages the Diversion Structures pursuant to agreements associated with the  
26 purchase of its water right assets (and associated facilities) and the "law of the river," a series of  
27 agreements, court decisions, and decrees, and other documents which Bakersfield is legally  
bound to follow:

28 "In 1976, the City took ownership to some of the rights of Kern  
29 River water from the corporate descendent of James Haggin's land  
30 empire, Tenneco West. With this purchase, the City took over  
31 ownership and control of the Kern River the multiple diversion  
32 weirs along the river. The City also took over the administration of  
33 Kern River water diversions under the historical "law of the river"  
34 system, which divided up most, and often all, of the river's flows  
35 between various diverters. Since then, the City has staffed  
36 personnel to manage each weir and headgate to deliver water to  
37 irrigation districts based on their claimed rights and water orders,

---

28<sup>2</sup> Plaintiffs acknowledge the validity of the water rights held by Bakersfield and Real Parties in Interest. (TAC, ¶74.)

1 as well as ancillary contractual agreements. The City keeps  
2 detailed records of these diversions and publishes an annual report  
3 of the diversions, summarizing its operation of the Kern River  
4 diversion weirs.” (*Id.* at ¶77.)

5 Bakersfield’s role in operating the Diversion Structures is contractual in nature and not  
6 based on the discretionary exercise of any regulatory police power or statutory authority that  
7 would implicate a public trust duty. This conclusion is evident from the fact that the actions  
8 challenged by the Plaintiffs were undertaken by a private party, Tenneco West, before it sold the  
9 water rights and Diversion Structures to Bakersfield in 1976. (*Ibid.*) The City simply diverts  
10 water pursuant to its proprietary water rights and operates the Diversion Structures as part of  
11 contractual obligations to the Real Parties in Interest that apply to the City as those obligations  
12 would apply to any private contracting party. The City does not authorize or otherwise approve  
13 diversions by the Real Parties in Interest. Thus, the City is not like the SWRCB in *National*  
14 *Audubon* (i.e., the SWRCB issued water rights),<sup>3</sup> nor is it like the county in *CBD* that authorized  
15 the use of wind turbines or the county in *ELF* that issued well permits. The mere fact that  
16 Bakersfield is a public agency does not automatically imbue all its actions potentially relating to  
17 public trust resources with a public trust duty. In the parlance of the court in *CBD*, Bakersfield is  
18 not a “responsible” public agency. (*CBD*, 166 Cal.App.4th at 1367 [a breach of public trust cause  
19 of action must be brought against the “responsible” public agencies, who are the appropriate  
20 representatives of the state as the trustee of the public trust].) The instant action is similar to the  
action dismissed in *CBD* insofar as Plaintiffs did not bring the action against the “responsible”  
public agencies. “[T]he action must be brought against the appropriate representative of the state  
as the trustee of the public trust.” (*Id.* at pp. 1367-68.)

21 **2. Traditional Writ of Mandate and Declaratory Relief are  
22 Inappropriate for Enforcing the Public Trust Doctrine.**

23 Plaintiffs seek to require Bakersfield to take numerous specific actions with respect to its  
24 alleged public trust duties and the Kern River. (TAC, Prayer ¶1.) Even if Bakersfield had public  
25 trust duties with regard to the Diversion Structures, the law does not allow for such relief. A writ  
26 of mandate is not appropriate for enforcement of the public trust doctrine “other than in the

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

1 context of judicial review of administrative decisions.” (*Monterey Coastkeeper v. Central Coast*  
2 *Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22.) The function of a writ of  
3 mandate is to enforce “a mandatory, ministerial duty” of a public agency. (*Id.* at p. 12.) Any  
4 particular application of the public trust doctrine cannot be compelled by mandate because under  
5 the doctrine “public trust resources … need not be protected under every conceivable  
6 circumstance, but only in those where protection or harm minimization is feasible.” (*Id.* at p. 21.)  
7 Declaratory relief is likewise inappropriate. (*Id.* at p. 18.) The public trust doctrine is “inherently  
8 discretionary” and does not allow for judicial intervention of this kind. (*Id.* at 21.)

9 In *Monterey Coastkeeper*, the plaintiffs (like Plaintiffs in this action) sought traditional  
10 mandamus directing the SWRCB to comply with the public trust doctrine, alleging the SWRCB  
11 had a continuing supervisory public trust duty that it violated by failing to avoid or minimize  
12 harm associated with agricultural discharges. (*Id.* at 11.) They also alleged (like Plaintiffs in this  
13 action) that the SWRCB had failed to consider the public trust doctrine. (*Id.* at 18 [“utter failure  
14 of its duty to consider the public trust doctrine”], 21 [“Appellants argue the State Board had a  
15 mandatory duty to apply the doctrine”].) Those plaintiffs sought a writ of mandate directing the  
16 SWRCB to comply with its alleged obligations to protect the public trust. (*Id.* at 11.) In affirming  
17 the trial court’s sustaining of a demurrer without leave to amend, the appellate court noted in  
18 relevant part as follows:

19 **Simply ordering the State Board to apply the public trust  
20 doctrine would be an empty judgment, while actually  
21 determining whether the State Board is properly applying the  
22 doctrine would necessarily require the trial court to consider  
23 the many decisions within the State Board's mandate,  
24 decisions that will typically require the exercise of  
25 administrative discretion and will often require technical  
26 expertise.**

27 When ruling on the demurrer to the first petition, the trial court  
28 stated: “But isn't that just such an open-ended remedy, where I say,  
‘Okay, I order you guys to follow the law,’ and then what? You  
guys come back in two or three months and say, ‘Judge, they're not  
following the law, they're not doing what you told them to do. The  
law says this and they're not following it.’ [¶] I mean, it would be  
ongoing—I would be a receiver. I would be sitting on top of  
them—I'd be—I'd be reviewing everything they did, to make sure  
they're following the law.”

29 The trial court was right. **Traditional mandamus in this case  
30 would make the trial court the effective overseer of the State**

**Board and the regional water boards, making the court one of the most, if not the most, powerful entities in setting water policy. The causes of action here cannot support such a result. (Id. at p. 22, emphasis added.)**

As in *Monterey Coastkeeper*, Bakersfield’s satisfaction of a public trust duty (assuming *arguendo* that it has such a duty) is highly discretionary and it would be improper for a Court to attempt to control the exercise of that duty. “Mandamus will not lie to control a public agency’s discretion – that is, to force the exercise of discretion in a particular manner.” (*California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App. 1432, 1443.) Therefore, Plaintiffs cannot state a cause of action based on the public trust.

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

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

## Section 5901 states:

“Except as otherwise provided in this code, it is unlawful to construct or maintain in any stream in Districts 1, 13/8, 11/2, 17/8, 2, 21/4, 21/2, 23/4, 3, 31/2, 4, 41/8, 41/2, 43/4, 11, 12, 13, 23, and 25, any device of contrivance that prevents, impedes, or tends to prevent or impede, **the passing of fish up and down stream.**”

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

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

1 of action to enforce a statute only if the statutory language or legislative history affirmatively  
2 indicates such an intent. **That intent need not necessarily be expressed explicitly, but if not it**  
3 **must be strongly implied.**” (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 337 [emphasis  
4 added] [internal citations and quotations omitted].) “If the Legislature intended a private right of  
5 action, that usually ends the inquiry. If the Legislature intended there be no private right of action,  
6 that usually ends the inquiry. If we determine the Legislature expressed no intent on the matter  
7 either way, directly or impliedly, there is no private right of action.” (*Vasquez v. Solo 1 Kustoms,*  
8 *Inc.* (2018) 27 Cal.App.5th 84, 90 [internal citations and quotations omitted].) Here, the plain  
9 language of Section 5901 does not expressly or impliedly provide for a private right of action.  
10 The provision simply sets forth certain activities that are unlawful. Real Parties in Interest could  
11 not find one case wherein a private litigant pursued a cause of action for the violation of Section  
12 5901.<sup>4</sup> Therefore, there is no basis for Plaintiffs to assert a private right of action for an alleged  
violation of Section 5901.

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

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

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

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

1 specifically defines a number of other facilities as “conduits” (i.e., something other than dams)  
2 and the Fish and Game Code has numerous provisions treating “conduits” separate from “dams”.  
3 (See, Fish and G. Code, §§ 5980-6028.) Included within the “conduit” definition in Section  
4 5900(b) is, among other things, a diversion structure used for taking water from a river. The  
5 Complaint acknowledges that the weirs are simply diversion structures used for taking water  
6 from the river. (See, Complaint, ¶¶ 2, 77, 79.) Thus, the Complaint affirmatively pleads facts  
demonstrating that the Diversion Structures are not “dams” subject to Section 5937.

7 **B. The Third Cause of Action, for “Breach of Trustee Duties”, Fails to State a  
8 Claim**

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

13 As acknowledged by Plaintiffs/Petitioners, the elements of a cause of action for breach  
14 of fiduciary include (among other elements) the existence of a fiduciary relationship and the  
15 breach thereof. (*Id.* at ¶ 150 [citing *Knox v. Dean* (2012) 205 Cal.App.4th 417, 432].) “Whether  
16 a fiduciary duty exists is generally a question of law.” (*Id.*) Here, Public Resources Code section  
17 6009.1 does not impose a fiduciary duty on Bakersfield under the facts pled by  
18 Plaintiffs/Petitioners.<sup>6</sup> Section 6009.1 addresses how the Legislature’s grant of “public trust  
19 lands” (i.e., tidelands and submerged lands) to local entities creates a fiduciary obligation on the  
20 part of the grantee. (See, Pub. Resources Code, § 6009(c) [“Tidelands and submerged lands  
21 granted by the Legislature to local entities remain subject to the public trust, and remain subject  
22 to the oversight authority of the state by and through the State Lands Commission”], 6009(d)  
23 [“Grantees are required to manage the state’s tidelands and submerged lands consistent with the  
24 terms and obligations of their grants and the public trust, without subjugation of statewide  
25 interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or  
26  
27  
28

---

25  
26 <sup>6</sup> While Plaintiffs/Petitioners specifically reference and rely on Public Resources Code section  
27 6009.1 in their third cause of action, Plaintiffs/Petitioners also reference the “public trust” in the  
supporting paragraphs of this cause of action. To the extent that Plaintiffs/Petitioners are also  
alleging a breach of the public trust in their third cause of action, the third cause of action is  
duplicative of their first cause of action, and it fails for the reasons set forth in Section III.A  
above.

1 excises”] 6009.1(a) [“Granted public trust lands remain subject to the supervision of the state and  
2 the state retains its duty to protect the public interest in granted public trust lands”], 6609.1(b)  
3 [explaining that when public trust lands are granted to local entities, the state acts as trustor and  
4 the local entity grantee acts as trustee], 6009.1(c) [discussing the fiduciary duties of a local entity  
5 grantee].) The legislative history for Section 6009.1<sup>7</sup> confirms that the statute only applies to  
6 **legislative** grants of public trust lands. (8-8-12 Senate Floor Analysis, p. 3 [stating that the bill  
7 defines a “local trustee of granted public trust lands” as a county, city, or district “that has been  
8 granted, conveyed, or transferred by statute, public trust lands **through a legislative grant9 (emphasis added)]; 6-22-12 Senate Natural Resources and Water Analysis, p. 2 [same].) This  
10 legislative history also describes how such legislative grants occurred when the Legislature  
11 “periodically ‘granted’ tide and submerged lands in trust to local or specific governmental entities  
12 for management purposes.” (8-8-12 Senate Floor Analysis, p. 4; 6-22-12 Senate Natural  
Resources and Water Analysis, p. 1.)**

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

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

---

<sup>7</sup> Section 6009.1 was added to the Public Resources Code in 2012 via Assembly Bill 2620.

In 1976, the City took ownership to some of the rights of Kern River water from the corporate descendent of James Haggin's land empire, Tenneco West. **With this purchase, the City took over ownership and control of the Kern River and the multiple diversion weirs along the river.** (TAC, ¶ 77 [emphasis added].)

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

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

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

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

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

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

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

11 **1. There is no “private attorney general” exception to Civil Code section  
12 3493.**

13 As made clear by the Legislature, the ability of a private party to prosecute a public  
14 nuisance cause of action is circumscribed and no exceptions exist - “A private person may  
15 maintain an action for a public nuisance, *if it is specially injurious to himself, but not  
16 otherwise.*” (Civ. Code, § 3493 [emphasis added].) In interpreting this statute, the Court must  
17 give a plain and commonsense meaning to the language therein. (*Sierra Club v. Superior Court*  
18 (2013) 57 Cal.4th 157, 165–166.) The plain language of the statute only provides one  
19 circumstance where a private litigant can prosecute a public nuisance action (i.e., when special  
20 injury exists), and the statute expressly precludes any exceptions thereto via the “but not  
21 otherwise” language. Thus, the statute precludes any private attorney general exception,<sup>9</sup> and  
22 reading such an exception into the statute despite its plain language would eviscerate the statute  
23 and violate a number of statutory interpretation rules. (See, *Hudec v. Superior Court* (2015) 60  
24 Cal.4th 815, 828 [statutory interpretations that render words surplusage must be avoided];  
25 *Campana v. East Bay Municipal Utility Dist.* (2023) 92 Cal.App.5th 494, 500 [statutory  
26 interpretations that render words ineffective must be avoided]; *In re C.H.* (2011) 53 Cal.4th 94,  
27  
28

---

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

1 103 [courts should give meaning to every word of a statute].) Cases addressing public nuisance  
2 claims in the class action context demonstrate that there is no exception to the special injury  
3 standing requirement in situations where one or a few plaintiffs represent a class of people (i.e.,  
4 similar to a private attorney general situation). (See, *Frieman v. San Rafael Rock Quarry, Inc.*  
5 (2004) 116 Cal.App.4th 29, 38-39, 41-42 [court relied on the application of Section 3493's  
6 special injury requirement to deny class certification].)

7 The cases cited by Plaintiffs to support a private attorney general exception to Section  
8 3493's express standing limitation do not address Section 3493 at all and are otherwise  
9 distinguishable and inapplicable.

- 10 • *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965)  
11 354 F.2d 608, 619-620: This case is a non-binding federal case involving the  
12 Federal Power Act, and the relevant portion of the case relied on by Plaintiffs does  
13 not address the critical issue of a party's ability to assert a cause of action but  
14 instead addresses a situation where a non-petitioner offered evidence later relied  
15 on by a petitioner.
- 16 • *Associated Industries of New York State v. Ickes* (2d Cir. 1943) 134 F.2d 694, 704.  
17 This case is a non-binding federal case involving the Bituminous Coal Act that  
18 discusses inapplicable federal statutes providing standing to "aggrieved persons,"  
19 which allow a private individual to vindicate a public interest even if there is no  
20 invasion of any private legally protected interest. Unlike the statutes discussed in  
21 that case, Civil Code section 3493 expressly precludes such an allowance in this  
22 case.
- 23 • *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565. This case is  
24 focused on Code of Civil Procedure section 1021.5, which is an attorneys fee  
25 statute (i.e., it does not address standing) that, unlike Civil Code section 3493,  
26 specifically provides for fee awards to private attorneys general.
- 27 • *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155,  
28 165–166 and *Laidlaw Environmental Services, Inc., Local Assessment Com. v. County of Kern* (1996) 44 Cal.App.4th 346, 354. These cases address the "public  
right/public duty" exception to the requirement that a mandamus petition be  
brought by a "beneficially interested" party. Plaintiffs' public nuisance cause of

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

3 • *Animal Legal Defense Fund v. Olympic Game Farm, Inc.* (2019) 387 F.Supp.3d  
4 1202, 1206-1207. This is a non-binding federal trial court decision addressing  
5 Washington state statutes based on interpretations thereof by Washington state  
6 courts.<sup>10</sup>

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

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

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

16 “Causation is an essential element of a public nuisance claim. A plaintiff must establish  
17 a ‘connecting element’ or a ‘causative link’ between the defendant's conduct and the threatened  
18 harm. . . . A plaintiff must show the defendant's conduct was a “substantial factor” in causing the  
19 alleged harm.” (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th  
20 350, 359; See also, CACI 2020.) “Proximate cause requires ‘some direct relation between the  
21 injury asserted and the injurious conduct alleged.’” (*City of Almaty v. Khrapunov* (9<sup>th</sup> Cir. 2020)  
22 956 F.3d 1129, 1133 [quoting *Holmes v. Secs. Inv'r Prot. Corp.* (1992) 503 U.S. 258, 268 and  
23 finding that the defendant's act of money laundering was not proximate cause of the plaintiff's  
24 voluntary decision to expend funds to track down the laundered money].) In California, “the  
25 general rule [is] that the expenses of litigation are ordinarily not considered tort damages.”  
(*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 83; see also, *Ladas v.*  
26 *California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 776 [investigation and research expenses

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

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

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

23 **IV. Conclusion**

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

26  
27 

---

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

1

2 Dated: January 3, 2024

The Law Offices of Young Wooldridge, LLP

3

By: /s/ Brett A. Stroud

4

Brett A. Stroud

5

*Attorneys for Real Party in Interest  
North Kern Water Storage District*

6

Dated: January 3, 2024

Ellison, Schneider, Harris & Donlan LLP

7

By: /s/ Craig A. Carnes, Jr.

8

Craig A. Carnes, Jr.

9

*Attorneys for Real Party in Interest  
Kern Delta Water District*

10

Dated: January 3, 2024

McMurtrey, Hartsock, Worth & St. Lawrence

11

By: /s/ Isaac L. St. Lawrence

12

Isaac L. St. Lawrence

13

*Attorneys for Real Party in Interest  
Buena Vista Water Storage District*

14

Dated: January 3, 2024

Somach Simmons & Dunn

15

By: /s/ Nicholas A. Jacobs

16

Nicholas A. Jacobs

17

*Attorneys for Real Party in Interest  
Kern County Water Agency*

18

Dated: January 3, 2024

Belden Blaine Raytis

19

By: /s/ Dan N. Raytis

20

Dan N. Raytis

21

*Attorneys for Real Party in Interest*

22

*Rosedale-Rio Bravo Water Storage District*

23

24

25

26

27

28

**Declaration of Brett A. Stroud**

I, Brett A. Stroud, declare as follows:

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

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

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

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

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

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

Date: January 3, 2024

*Bobby J. Moore*

Brett A. Stroud

# Exhibit A

December 29, 2023

**VIA EMAIL**

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

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

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

Dear Messrs. Keats and McKinnon:

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

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

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

First, a writ of mandate and/or prohibition is not appropriate for enforcement of the public trust doctrine “other than in the context of judicial review of administrative decisions.” (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22.) The function of a writ of mandate is to enforce “a mandatory, ministerial duty” of a public agency. (*Id.* at p. 12.) Any particular application of the public trust doctrine cannot be compelled by mandate, because under the doctrine “public trust resources … need not be protected under every conceivable circumstance, but only in those where protection or harm minimization is feasible.” (*Id.* at p. 21.) This “inherently discretionary doctrine” does not allow for judicial

---

<sup>1</sup> Further statutory citations are to the Code of Civil Procedure unless otherwise specified.

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

Second, the public trust doctrine requires the state to consider interests protected by the public trust in exercising its authority over public trust resources or making discretionary decisions that could impact public trust resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 444.) The public trust doctrine applies where the agency has the authority and/or responsibility (pursuant to its police power and/or statute) to: (1) authorize an activity potentially impacting public trust resources; or (2) protect public trust resources potentially impacted by an activity. (See, *National Audubon*, 33 Cal.3d at 444 [explaining that the scope of State Water Resources Control Board's public trust duties is determined by its statutory authority with respect to the public trust]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1366 [“The interests encompassed by the public trust undoubtedly are protected by public agencies acting pursuant to their police power and explicit statutory authorization”]; *Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844 [County, acting pursuant to its police power to manage groundwater resources, may not issue well permits without considering public trust resources].) As acknowledged in the Complaint, Bakersfield manages the weirs on the Kern River according to the “law of the river,” a series of agreements, court decrees, and other documents which Bakersfield is legally bound to follow. (See Complaint, ¶¶75-77.) Thus, Bakersfield’s role in managing diversions is not based on the discretionary exercise of any police power or statutory authority that would implicate a public trust duty.

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

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

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

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

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

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

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

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

## Conclusion

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

Sincerely,

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

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

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

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

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

## PROOF OF SERVICE

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

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

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

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

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

Kristen L. Moen