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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **IN AND FOR THE COUNTY OF KERN**

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

19 Plaintiffs and Petitioners,

20 vs.

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

23 Defendants and Respondents,

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

Real Parties in Interest.

Case No.:

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF; VERIFIED PETITION FOR
WRIT OF MANDATE**

Cal. Const. Art. X, sec. 2;
Public Trust Doctrine
FGC §§ 5901, 5937, 5948;
CC §§ 3479, 3480;
PRC § 6009.1; and
CCP §§ 526, 1060, 1085.

1 **INTRODUCTION**

2 1. Plaintiffs and Petitioners Bring Back the Kern, Water Audit California, Kern River
3 Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity
4 (Plaintiffs) bring this action on their own behalf, on behalf of the general public, and in the public
5 interest.

6 2. Defendant and Respondent City of Bakersfield (“City”) regularly diverts water from the
7 Kern River on its own behalf and on behalf of other parties, including the Real Parties in Interest
8 named herein, either pursuant to water rights held by those parties or pursuant to contractual
9 agreements. The City diverts this water, regularly resulting in the complete dewatering of the Kern
10 River, without satisfying its duties under the California Constitution, the Public Resources Code, Fish
11 & Game Code, the California Civil Code, and the public trust doctrine to protect various resources on
12 behalf of the people of California.

13 3. Bakersfield has created a public nuisance by diverting water from the Kern River and its
14 tributary streams without any analysis of the impacts on public trust uses and resources in violation of
15 statutory and common law obligations as set forth below.

16 4. Plaintiffs seek to, with judicial assistance, improve the City’s conduct to comport with
17 the law.

18 **PARTIES**

19 5. Petitioner Bring Back the Kern is a non-profit organization formed by local residents
20 with the mission of restoring flowing water in the Kern River through the City of Bakersfield. Bring
21 Back the Kern works to achieve this through building awareness among the public and encouraging
22 decision makers to change the status quo and put more water in the river. Bring Back the Kern brings
23 this action in its own behalf, and as a private attorney general advocating for the interests of the people
24 of California.

25 6. Petitioner Water Audit California is a California public benefit corporation organized
26 and existing under the laws of the State of California. Water Audit California is a “person” under
27 California Corporations Code Sections 18 (“‘Person’ includes a corporation as well as a natural
28 person”); 15901.02(y) (“‘Person’ means an individual . . . corporation . . .”); and 25013 (“‘Person’

1 means an individual, a corporation...”). Water Audit California brings this action in its own behalf, and
2 as a private attorney general advocating for the interests of the people of California.

3 7. Petitioner Kern River Parkway Foundation is a local non-profit organization working to
4 protect, preserve, and restore the natural riparian and wildlife habitat of the Kern River. The
5 Foundation works with county, city, and community stakeholders to develop and maintain public open
6 space, structures, monuments, and parks that preserve and beautify the Kern River and supports
7 projects that advance educational and scientific knowledge of the Kern River. Kern River Parkway
8 Foundation brings this action in its own behalf, and as a private attorney general advocating for the
9 interests of the people of California.

10 8. Petitioner Kern Audubon Society is a local, independent chapter of the Audubon
11 Society, founded in Bakersfield in 1973 and incorporated in 1979, that works to educate the public
12 about the importance of birds and to protect important bird habitat areas as well as sensitive bird
13 species across Kern County. The Kern River through Bakersfield is a major factor in attracting birds
14 traveling in the Pacific Flyway. Kern Audubon Society has published a popular birding map of the
15 Kern River from the mouth of the Kern Canyon to Enos Lane, including local groundwater recharge
16 basins. Kern Audubon Society has hundreds of members, primarily based in the Bakersfield area who
17 are personally affected by the lack of a flowing river. Kern Audubon Society brings this action in its
18 own behalf, and as a private attorney general advocating for the interests of the people of California.

19 9. Petitioner Sierra Club is a non-profit organization that advocates for environmental and
20 social justice issues. Its local chapter, the Kern-Kaweah Chapter, advocates for these interests in the
21 southern San Joaquin Valley. The Sierra Club works to hold county and city government accountable
22 for actions causing harm to habitat, sensitive species, and disadvantaged communities. The Kern-
23 Kaweah Chapter of the club has several thousand members, a significant portion of whom live in the
24 Bakersfield area in close proximity to the dried-up Kern River. Sierra Club brings this action in its
25 own behalf, and as a private attorney general advocating for the interests of the people of California.

26 10. Petitioner Center for Biological Diversity is a non-profit organization dedicated to
27 saving life on earth through science, law, and creative media, with a focus on protecting the lands,
28 waters and climate that wild animal and plant species need to survive. The Center has offices in

1 California and other states and has more than 1.7 million members and online activists, including
2 members in and around Bakersfield and the Kern River. The Center has a particular interest in
3 protecting, restoring, and enhancing the public trust resources of the Kern River, and returning flows
4 in the lower Kern River to a more natural regime for the benefit of people, wildlife, and native
5 ecosystems. Center for Biological Diversity brings this action in its own behalf, and as a private
6 attorney general advocating for the interests of the people of California.

7 11. The defendant and respondent City is a city authorized by the California Constitution
8 and as set forth in Government Code § 3400 et seq.

9 12. The City is a legal subdivision of the state; references to the “state” includes cities.
10 (Gov. Code, §§ 53208.5, 53217.5 & 53060.1 [setting various limits on benefits for “members of the
11 legislative bodies of all political subdivisions of the state, including charter cities and charter
12 counties”], 8557, 8698, 12650 & 12424 [“political subdivision” includes “any city, city and county
13 [or] county”], 37364, subd. (e) [“[t]he provisions of this section shall apply to all cities, including
14 charter cities”]; *City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 912.)

15 13. Plaintiffs do not know the true names of defendants and respondents DOES 1 to 500,
16 inclusive, and therefore sues them with these fictitious names. Plaintiffs are informed and believe, and
17 based on such information and belief, allege that each of these parties is in some manner legally
18 responsible for the events and happenings alleged herein. Plaintiffs are further informed and believe,
19 and based on such information and belief allege, that at all times mentioned the respondents were the
20 partners, agents, coventurers, and/or employees of their co-respondents and defendants, and in doing
21 the things herein alleged were acting within the course and scope of such agency and employment.
22 Alternatively, the DOES have acted in reliance on permission granted by the City, and their future
23 action must be equitably amended to avoid injury to the public trust. Alternatively, the DOES have
24 acted without permission, and their future action must be equitably amended to avoid injury to the
25 public trust. Plaintiffs will seek leave to amend to insert the true names of the DOES when such parties
26 have been identified.

27 14. The City and DOE defendants/respondents will collectively be referred to as
28 “Defendants.”

1 261–62; *see also* *Center for Biological Diversity* (2008) 166 Cal.App.4th 1349, 1366 [“the public
2 retains the right to bring actions to enforce the trust when public agencies fail to discharge their
3 duty”].)

4 ***California Constitution, Article X***

5 29. Article X, section 2 of the California Constitution states: “The right to water or to the
6 use or flow of water in or from any natural stream or water course in this State is and shall be limited
7 to such water as shall be reasonably required for the beneficial use to be served, and such right does
8 not and shall not extend to the waste or unreasonable use or unreasonable method of use or
9 unreasonable method of diversion of water.”

10 30. The Supreme Court has held that Article X, section 2 “dictates the basic principles
11 defining water rights: that no one can have a protectible interest in the unreasonable use of water, and
12 that holders of water rights must use water reasonably and beneficially.” (*City of Barstow v. Mojave*
13 *Water Agency* (2000) 23 Cal.4th 1224, 1242.)

14 31. “‘Beneficial use’ and ‘reasonable use’ are two separate requirements, both of which
15 must be met.” (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th
16 1176, 1185.)

17 32. “What constitutes reasonable use is case-specific. California courts have never defined
18 ... what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular
19 use depends largely on the circumstances. ... The inquiry is fact-specific, and the answer may change
20 over time. What may be a reasonable beneficial use, where water is present in excess of all needs,
21 would not be a reasonable beneficial use in an area of great scarcity and great need.” (*Ibid*, internal
22 quotation omitted.)

23 33. Water Code § 1243 provides that the “use of water for recreation and preservation and
24 enhancement of fish and wildlife resources is a beneficial use.”

25 34. Concurrent jurisdiction allows for environmental groups or others adversely affected by
26 a violation of the public trust to pursue actions in court directly against the violator. Because the
27 limited budgets of the trustee agencies do not allow these agencies to pursue every violation brought to
28 their attention, such assistance is acknowledged to be invaluable in protecting trust resources

1 statewide.

2 ***California Fish and Game Code § 5901***

3 35. Section 5901 of the Fish and Game Code states “it is unlawful to construct or maintain
4 in any stream [in certain districts, including District 312] any device or contrivance that prevents,
5 impedes, or tends to prevent or impede, the passing of fish up and down stream.”

6 36. The Kern River is located within District 312. (FGC § 11009.)

7 ***California Fish and Game Code § 5937***

8 37. Section 5937 of the Fish and Game Code states: “The owner of any dam shall allow
9 sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient
10 water to pass over, around or through the dam, to keep in good condition any fish that may be planted
11 or exist below the dam.” (FGC § 5937; See *Cal. Trout, Inc. v. State Water Resources Control Bd. et al.*
12 (1989) 207 Cal.App.3d 585, 626.)

13 38. “Compulsory compliance with a rule requiring the release of sufficient water to keep
14 fish alive necessarily limits the water available for appropriation for other uses. Where that affects a
15 reduction in the amount that otherwise might be appropriated, [section 5937] operates as a legislative
16 choice among competing uses of water.” (*Cal. Trout, Inc. v. State Water Resources Control Bd. et al.*
17 (1989) 207 Cal.App.3d 585, 601.)

18 ***California Fish and Game Code § 5948***

19 39. Section 5948 of the Fish and Game Code states: “No person shall cause or having
20 caused, permit to exist any ... artificial barrier, except a dam for the storage or diversion of water ...
21 *permitted by law* ... in any stream in this State, which will prevent the passing of fish up and down
22 stream.” (Emphasis added).

23 **FACTUAL BACKGROUND**

24 40. The Kern River watershed exemplifies the uniqueness of California’s biodiversity, as its
25 climatic conditions result in a Mediterranean climate with warm dry summers and cool moist winters.

26 41. Beginning at its headwaters, northwest of Mount Whitney and tributaries that flow in
27 from around Mount Whitney at 14,505 feet, its outflow is near Bakersfield and historically Buena
28 Vista Lake in the San Joaquin Valley.

1 42. The Kern River’s watershed includes about 3,612 square miles.

2 43. The Kern River currently runs approximately 165 miles to Bakersfield and beyond
3 depending on water availability for surface flows.

4 44. During the 1850s, the Kern River flowed south at what is now Bakersfield.

5 45. A flood in 1867 rerouted the river in what is title “New River.”

6 46. Historically, the Kern River filled two very large but shallow lakes, Kern Lake and
7 Buena Vista Lake, and during very wet years, the river could overflow Buena Vista Lake northward to
8 Tulare Lake, which at times, flowed northward to the San Joaquin River. These lakes and the wetlands
9 that interconnected them were known to be full of abundant fish and they supported large herds of
10 antelope, elk, and thousands of grizzlies. They were also a critical overwintering stopover of the
11 Pacific Flyway, hosting millions of waterfowl each winter before the birds returned to Canada and
12 Alaska for summer breeding.

13 47. Starting in the 1850s and 60s, settlers began to divert flows from the Kern River and to
14 dry up the vast wetlands of the San Joaquin Valley. Under state law, those who reclaimed wetlands or
15 irrigated desert land for agricultural use could take title to the land. This system was abused by the
16 land barons of the time, who found ways around acreage limits to allow them to amass property
17 holdings of hundreds of thousands of acres.

18 48. Expansion in the amount of irrigated acreage and diversion canals in the Kern River
19 alluvial fan coupled with a dry period led to a drying up of the lower Kern River in 1877, initiating a
20 dispute that was eventually resolved by the California Supreme Court in 1886, which held that both
21 prior appropriations and downstream riparian landholders rights to the Kern River were valid. (*Lux v.*
22 *Haggin* (1886) 69 Cal. 255.) This created California’s dual system of appropriative and riparian water
23 rights.

24 49. Rather than wait for the state to reassess all water rights on the Kern River and
25 determine how water would be split between upstream appropriators and downstream riparian rights
26 holders, land barons Henry Miller and James Haggin created the Miller-Haggin Agreement in 1888, a
27 settlement that divided up shares to the Kern River. This agreement forms the basis of what is referred
28 to as the “law of the river.”

1 50. The Miller-Haggin agreement has been expanded and modified several times in the 150
2 years since its signing, including with the 1900 Shaw decree, and amendments to the original
3 agreement in 1930, 1955, and 1964. Neither the original agreement nor any of the subsequent
4 revisions considered impacts to public trust resources of the Kern River.

5 51. In 1976, the City took ownership to some of the rights of Kern River water from the
6 corporate descendent of James Haggin’s land empire, Tenneco West. With this purchase, the City took
7 over ownership and control of the Kern River the multiple diversion weirs along the river. The City
8 also took over the administration of Kern River water diversions under the historical “law of the river”
9 system, which divided up most, and often all, of the river’s flows between various diverters. Since
10 then, the City has staffed personnel to manage each weir and headgate to deliver water to irrigation
11 districts based on their claimed rights and water orders, as well as ancillary contractual agreements.
12 The City keeps detailed records of these diversions and publishes an annual report of the diversions,
13 summarizing its operation of the Kern River diversion weirs.

14 52. The higher elevation reaches of the river remain ecologically and hydrologically intact
15 due to conservation protections (e.g., Sequoia National Park), Wild and Scenic River designations and
16 remoteness including various wilderness areas, at least until these parts of the river system reach the
17 Lake Isabella reservoir.

18 53. From Lake Isabella, the Kern River flows through the steep and rugged Kern River
19 Canyon. After exiting the canyon, Kern River water starts to be diverted in large quantities, first at the
20 Beardsley Weir, then the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue
21 Weir, and the McClung Weir, [“Diversion Structures”], all of which are managed and operated by the
22 City.

23 54. The City diverts Kern River water on behalf of area water districts and on its own
24 behalf. Most of the water diverted by the City is delivered to area water districts, including the Real
25 Parties in Interest named herein, for agricultural purposes. The water districts either hold water rights
26 to this water or have a contract with the City for delivery of water to which the City holds the rights. A
27 smaller portion of the diversions are for the City’s own use, for municipal purposes.

28 55. The Diversion Structures, coupled with the natural infiltration into groundwater, reduce

1 the surface flows in the Kern River to the point where the river flows through the City only on very
2 rare occasions.

3 56. The City admits that the dewatering of reaches of the Kern River, along with increased
4 groundwater pumping in the vicinity of the river by various water districts, has depleted water levels in
5 the groundwater basin.

6 57. The City admits that the loss of the river has severely diminished and threatened the
7 City's surface and groundwater supply, and also resulted in damage and threats to the quality of the
8 river ecosystem and the local environment, including vegetation and fish and wildlife in and around
9 the river, aesthetic and recreational opportunities in and around the river, and air quality in the
10 surrounding area.

11 58. The reduction in riparian and associated wetland and upland habitats has consequently
12 reduced habitat for native wildlife and decreasing their populations.

13 59. Historically at least seven species of fish occupied the lower Kern: Coastal rainbow trout
14 (*Oncorhynchus mykiss irideus*), Hardhead (*Mylopharodon conocephalus*), Riffle sculpin (*Cottus*
15 *gulosus*), Sacramento pike minnow (*Ptychocheilus grandis*), Sacramento hitch (*Lavinia exilicauda*
16 *exilicauda*), Sacramento sucker (*Catostomus occidentalis occidentalis*), and Sacramento perch
17 (*Archoplites interruptus*). These species and others have been largely extirpated from the San Joaquin
18 Valley portion of the Kern River with the historic and contemporary diversion of water.

19 60. If adequate surface flows were maintained within the Kern River and connected to
20 freshwater marsh habitat on the valley floor, these fish species could be reintroduced, and the fishery
21 potentially restored.

22 61. The City has not reviewed nor formally considered the impacts to public trust resources
23 caused by its destructive diversions.

24 62. The Kern River alluvial fan is one of the best recharge areas in California, as water
25 managers assume 90-94% of water recharged into the aquifer from the Kern River channel can be
26 recovered.

27 63. The Kern River has had an annual average outflow of around 720,000-acre feet since
28 records have been kept starting in the late 19th century. As the southernmost major river of the Sierra

1 Nevada range, it is subject to wide fluctuations in annual precipitation, with some instances of up to 2-
2 million-acre feet and drought years with a tenth of that. The river's median outflow is over 500,000-
3 acre feet.

4 **FIRST CAUSE OF ACTION**

5 **Violations of California's Public Trust Doctrine**

6 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

7 64. Plaintiffs incorporate and restate each and every paragraph contained herein as though
8 fully set forth herein.

9 65. A real and present controversy exists between Plaintiffs and the City concerning the
10 obligations of the City to comply with the public trust doctrine.

11 66. The City has violated and continues to violate its duties under the Public Trust Doctrine
12 by impeding flows on the Kern River through its operation of the Diversion Structures that wholly
13 dewater the Kern River at almost all times, year-round.

14 67. The City has violated and continues to violate its duties under the public trust doctrine
15 by failing to conduct a sufficient analysis of the impacts to public trust resources (including the Kern
16 River itself, its associated ecosystems and the people of the City) caused by the existence and
17 operation of the Diversion Structures.

18 68. The City has violated and continues to violate its duties under the public trust doctrine
19 by presiding over a decades-long dewatering of the Kern River and its ecosystem through its
20 ownership and operation of the Diversion Structures, resulting in waste and damage to trust resources.

21 69. The dewatering of the Kern River is harming a navigable waterway. As such, it is a
22 continuing injury to the public trust. (*People v. Sweetser* (1977) 72 Cal.App.3d 278; *Envtl. Law*
23 *Found. v. State Water Res. Control Bd.*, 26 Cal.App.5th 844, 860.)

24 70. The City has a duty to assess the impacts on public trust resources that may be caused by
25 its actions, including any actions that may adversely impact the public trust, before taking those
26 actions. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370.)

27 71. The City may not engage in unlawful conduct that facilitates water delivery of any
28 character that is unnecessarily injurious to the public trust.

1 72. The City's obligations under the public trust arise from its ministerial obligation to
2 provide for free passage of and habitat for public trust fish in the Kern River and otherwise protect the
3 public's interest in the trust resource. The City's failure to perform its statutory duties under the *FGC*
4 is evidence of the violation of its duties to do no unnecessary injury to the public trust.

5 73. The City's duty to consider the impacts to trust resources of its actions and to mitigate or
6 avoid those impacts when feasible is a ministerial act required to comport with the *FGC*.

7 74. The City has admitted no fault and will continue its conduct unless ordered by the Court
8 to do otherwise.

9 75. The injury to the public trust cannot be remedied or mitigated by an award of damages.
10 There is no regulatory process for relief.

11 WHEREFORE Plaintiffs pray for relief as hereinafter set forth.

12 **SECOND CAUSE OF ACTION**

13 **Violations of Article X of the California Constitution**

14 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

15 76. Plaintiffs incorporate and restate each and every paragraph contained herein as though
16 fully set forth herein.

17 77. The City has a clear and mandatory duty to not waste or unreasonably use waters of the
18 Kern River and to not utilize an unreasonable method of use or method of diversion of the waters of
19 the Kern River.

20 78. The City has violated, and continues to violate, Article X, Section 2 of the California
21 Constitution through its unreasonable method of use and/or its unreasonable method of diversion of
22 the waters of the Kern River in a manner that is causing significant harm to the Kern River
23 environment.

24 79. The City diverts more water from the Kern River than is reasonably required for any
25 beneficial use served by the City's or any other party's use of diverted water in light of the harm to the
26 Kern River environment by the City's water diversions.

27 80. The City has failed and continues to fail to manage its water use in a manner that avoids
28 unreasonable harm to the Kern River environment.

1 81. The City is required to comply with the mandatory duties set out in the California State
2 Constitution, including those duties imposed under Article X, Section 2.

3 82. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
4 because the City will continue to violate Article X, Section 2 of the California Constitution unless
5 compelled to comply by this Court.

6 WHEREFORE Plaintiffs pray for relief as hereinafter set forth.

7 **THIRD CAUSE OF ACTION**

8 **Violations of the Fish and Game Code**

9 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

10 83. Plaintiffs incorporate and restate each and every paragraph contained herein as though
11 fully set forth herein.

12 84. A controversy exists between Plaintiffs and the City concerning the obligations of the
13 City to comply with FGC §§ 5901, 5937 and 5948.

14 85. The City has a clear and mandatory duty under FGC sections 5901, 5937, and 5948 as
15 alleged herein.

16 86. The City has violated, and continues to violate, its duty under FGC section 5901 to not
17 construct or maintain in any stream in District 312 any device or contrivance that prevents, impedes,
18 or tends to prevent or impede, the passing of fish up and down stream.

19 87. The City has failed, and continues to fail, its duty under FGC section 5937 to at all times
20 allow sufficient water to pass through, over, or around the Diversion Structures to keep in good
21 condition any fish that may be planted or exist below the Diversion Structures.

22 88. The City has failed, and continues to fail, its duty under FGC section 5948 by
23 maintaining and operating the Diversion Structures and diverting water in a manner not permitted by
24 law, preventing, impeding, and/or tending to prevent or impede, the passing of fish upstream and
25 downstream of the structures.

26 89. An order compelling the City to release water of sufficient size and with appropriate
27 timing to provide flows for fish passage and habitat is appropriate and necessary to avoid irreparable
28 harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

1 90. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
2 because the City will continue to violate the FGC unless compelled to comply by this Court.

3 **FOURTH CAUSE OF ACTION**

4 **Breach of Trustee Duties - Public Resource Code § 6009.1**

5 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

6 91. A trust imposes a fiduciary duty on a trustee. The elements of a cause of action for
7 breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage
8 proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433.) Whether a
9 fiduciary duty exists is generally a question of law. Whether the defendant breached that duty towards
10 the plaintiff is a question of fact. (*Marzec v. Public Employees’ Retirement System* (2015) 236
11 Cal.App.4th 889, 915.)

12 92. The beneficiaries of the public trust are the people of California, and it is to them that
13 the trustee owes fiduciary duties. The trustee deals with the trust property for the beneficiary’s benefit.
14 No trustee can properly act for only some of the beneficiaries – the trustee must represent them all,
15 taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent
16 any of them. (*Bowles v. Superior Court* (1955) 44 Cal.2d 574.) This principle is in accord with the
17 equal protection provisions of the Fourteenth Amendment to the US Constitution.

18 93. A fiduciary relationship creates the highest duty of loyalty known to the law.
19 (Restatement (Third) of Torts § 16 (2020).)

20 94. The City has breached its fiduciary duties by failing to act as a reasonably careful trustee
21 would have acted under the same or similar circumstances.

22 95. The fiduciary duty of loyalty encompasses cases where the fiduciary fails to act in good
23 faith.

24 96. The City has not made a good faith inquiry or effort to determine if the injury that it has
25 caused can be mitigated.

26 97. A trustee has a duty to keep clear and adequate records and accounts and make full
27 disclosure to the beneficiaries. Facts are especially important when public trust assessments must
28 include a balancing of needs between the beneficial use of environmental flows and the beneficial

1 claims of commerce.

2 98. The City has agreed to make diversions and to take beneficial use of Kern River
3 flows without considering the cumulative impact of these decisions on the public trust.

4 99. A trustee's duty requires erring on the side of caution where uncertainty exists. As the
5 level of uncertainty grows, the level of caution must also increase. Trustees can fulfill their duty of
6 caution by halting demands upon public trust resources until the uncertainty can be resolved.

7 100. The trustee's duty of furnishing timely information to beneficiaries, also expressed as a
8 duty to provide an accounting, has implicit within it the requirement that the information be complete,
9 accurate and understandable to the beneficiaries. This procedural duty is critical to the performance of
10 the preeminent substantive duty to protect public trust resources. It is axiomatic that we manage what
11 we measure.

12 101. The City has failed to perform its undertaking of disclosure.

13 102. As a beneficiary of the public trust, Plaintiffs were harmed by the City's negligence of
14 its trustee's duties. The City's conduct was a substantial factor in causing Plaintiffs' harm.

15 103. An order compelling the City to release water of sufficient size and with appropriate
16 timing to provide flows for fish passage and habitat is appropriate and necessary to avoid irreparable
17 harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

18 104. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law
19 because the City will continue to breach its trustee duties unless compelled to comply by this Court.

20 WHEREFORE Plaintiffs pray for relief as hereinafter set forth.

21 **FIFTH CAUSE OF ACTION**

22 **Public Nuisance – CC §§ 3479 and 3480**

23 ***Injunctive Relief – CCP § 526, Declaratory Relief – CCP § 1060, Mandamus – CCP § 1085***

24 105. Plaintiffs incorporate and restate the preceding paragraphs as if set forth in full here.

25 106. The public nuisance doctrine aims at the protection and redress of community interests.
26 (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358.)

27 107. “Unlike the private nuisance — tied to and designed to vindicate individual ownership
28 interests in *land* — the “common” or *public* nuisance emerged from distinctly different historical

1 origins. “The public nuisance doctrine is aimed at the protection and redress of *community* interests ...
2 which the courts have vindicated by equitable remedies since the beginning of the 16th century.”
3 (*People ex Rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103.) “It is this *community* aspect of the
4 public nuisance, reflected in the civil and criminal counterparts of the California code, that
5 distinguishes it from its private cousin, and makes possible its use, by means of the equitable
6 injunction, to protect the quality of organized social life.” (*Id* at p. 110. [Emphasis in original].)

7 108. “No lapse of time can legalize a public nuisance amounting to an actual obstruction of
8 public right.” (CC § 3490.)

9 109. “Anything which ... unlawfully obstructs the free passage or use, in the customary
10 manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street,
11 or highway, is a nuisance.” (CC § 3479.)

12 110. As set forth above, by its water diversions, the City dewateres the proximate reach of the
13 Kern River, obstructing the free passage and/or use in the customary manner of the Kern River.

14 111. “A public nuisance is one which affects at the same time an entire community or
15 neighborhood, or any considerable number of persons, although the extent of the annoyance or
16 damage inflicted upon individuals may be unequal.” (CC § 3480.)

17 112. Although the City knew that it was causing dewatering of the Kern River, no mitigation
18 for injury to the public trust by the City was undertaken.

19 113. Liability for a public nuisance can arise both from the affirmative act of dewatering the
20 river by its extractions, and also from the failure to remedy the problem once it was recognized. The
21 City’s dewatering of the proximate reach of the Kern River was intentional and unreasonable, or
22 alternatively unintentional but negligent. The City is subject to liability for the nuisance it has caused
23 in violation of Civil Code sections 3479 and 3580. The City knows or should know of the condition
24 and the nuisance or unreasonable risk of nuisance involved. After a reasonable opportunity to take
25 remedial actions, the City has failed to abate the condition or to protect the public against it. (*Lelie Salt*
26 *Co. v. San Francisco Bay Conservation* (1984) 153 Cal.App.3d 605 at 619-620; Rest.2d Torts, § 839.)

27 114. An injunction may issue to enjoin the nuisance. (*People v. Truckee Lumber Co.* (1897)
28 116 Cal. 397.)

1 WHEREFORE Plaintiffs pray for relief as hereinafter set forth.

2 **PRAYER FOR RELIEF**

- 3 1. Declaratory relief stating the City is in violation of:
- 4 a. The Public Trust Doctrine;
 - 5 b. Article X, Section 2 of the California Constitution;
 - 6 c. California Fish and Game Code sections 5901, 5937, and 5948;
 - 7 d. Public Resource Code § 6009.1;
 - 8 e. Civil Code sections 3479 and 3480.
- 9 2. A peremptory writ of mandate:
- 10 a. Declaring that the City has violated the Public Trust Doctrine;
 - 11 b. Declaring that the City has violated Article X, Section 2 of the California
 - 12 Constitution;
 - 13 c. Declaring that the City has violated Fish and Game Code sections 5901, 5937, and
 - 14 5948;
 - 15 d. Declaring that the City has violated Public Resource Code § 6009.1;
 - 16 e. Declaring that the City has violated Civil Code sections 3479 and 3480;
 - 17 f. Ordering the City to take such actions as required to bring its operation and
 - 18 maintenance of the Diversion Structures into compliance with Fish and Game Code
 - 19 sections 5901, 5937, and 5948;
 - 20 g. Ordering the City to take such actions as required to bring its operation and
 - 21 maintenance of the Diversion Structures into compliance with the common law and
 - 22 the California Constitution;
 - 23 h. Enjoining any and all activity in violation of the common law and the California
 - 24 Constitution and specifically enjoining the City to change the point of its diversions
 - 25 of water from the Kern River to a point more in accordance with the River's natural
 - 26 terminus;
 - 27 i. Enjoining any and all activity in violation of FGC sections 5901, 5937 and 5948;
- 28 3. An interim peremptory writ of mandate or preliminary injunctive relief:

- 1 a. halting the City from diverting water at the Diversion Structures in a fashion that
2 results in the dewatering of the Kern River through the City of Bakersfield:
3 b. halting the City from diverting water at the Diversion Structures in a fashion that will
4 harm and jeopardize the survival and recovery of fish species in the Kern River.
5 4. For costs of suit;
6 5. For attorneys' fees pursuant to law, including Code of Civil Procedure section 1021.5;
7 and
8 6. For such other and further relief as the Court deems just and proper.
9

10 DATED: November 30, 2022

LAW OFFICE OF ADAM KEATS, PC

11 

12 _____
13 Adam Keats
14 *Attorney for Bring Back the Kern, Kern River
15 Parkway Foundation, Kern Valley Audubon,
16 Sierra Club, Center for Biological Diversity*

16 DATED: November 30, 2022

17 

18 _____
19 William McKinnon
20 *Attorney for Water Audit California*
21
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1 **VERIFICATION**

2 I, Adam Keats, declare that:

3 1. I am an attorney duly admitted and licensed to practice before all courts of this State. I
4 am the attorney of record for the Plaintiffs in this action.


5 2. Plaintiffs have their places of business in Kern, Alameda, and Napa counties, and
6 therefore are absent from the county in which I have my office. I therefore make this verification on
7 behalf of Plaintiffs.

8 3. I have read the foregoing Complaint and Petition for Writ of Mandate and know the
9 contents thereof; the factual allegations therein are stated upon my information or belief, and as to those
10 matters I believe them to be true.

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

13 Executed this 30th day of November, 2022, in San Francisco, California.

14
15 LAW OFFICE OF ADAM KEATS, PC

16
17 By: 
18 _____
19 Adam Keats
20 *Attorney for Bring Back the Kern, Kern River*
21 *Parkway Foundation, Kern Valley Audubon,*
22 *Sierra Club, Center for Biological Diversity*
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