Superior Court of California
County of Kern
Bakersfield Department 8

Date: 10/30/2023 **Time: 8:00 AM - 5:00 PM**

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: Gregory Pulskamp **Clerk:** Stephanie Lockhart

NATURE OF PROCEEDING:

Ruling on Plaintiffs' Motion for Preliminary Injunction; heretofore submitted on October 13, 2023.

RULING:

The Court grants Plaintiffs' Motion for Preliminary Injunction.

DISCUSSION:

The Court considers the current case to be a very significant case on a very significant topic: management of water supplied by the Kern River. It is common knowledge that clean, fresh water is a critical natural resource and a necessary component to establish essentially all aspects of a healthy society. It is therefore not surprising that water management has been, and continues to be, addressed by the State Legislature and is a subject covered by the California State Constitution itself:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water

> as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., Art. X, § 2.)

Consistent with the California Constitution, the legislature has enacted a series of specific statutes governing the use of water and the courts have issued numerous rulings regarding the interpretation and implementation of those statutes. Accordingly, the matter currently before this Court is neither a case of first impression, nor is it a case that affords this Court much – if any – discretion. To the contrary, it is a matter that involves established legal precedent and legislative mandate.

I. Brief Factual and Procedural History

A. Background

The following summary is taken from various documents and publications in evidence: The Kern River originates high in the Sierra Nevada mountain range in the vicinity of Mt. Whitney, draining a 2,420 square mile area of the southern Sierra Nevada. It is approximately 165 miles long. The river generally flows in a northeast to southwest direction through Bakersfield, before historically emptying into the Buena Vista Lake bed. Because of the variability of the Kern River environment, river management approaches have required planning for both severe flooding and drought.

In 1953, the U.S. Army Corps of Engineers (USACE) constructed Lake Isabella to address flood control and water conservation capacity. In order to determine the quantity of water available to various Kern River rights, the City of Bakersfield - on behalf of various Kern River interests - calculates the natural flow based on a series of measurements taken at Lake Isabella. Each day, the Kern River operator determines the flow in the river, the entitlement of each right, and then distributes the water up to the full entitlement.

Water is currently diverted from the Kern River by the City of Bakersfield and other entities pursuant to "pre-1914" appropriative water rights which were initially established through the filing of notices of appropriation around the time of the early settlement of the Bakersfield area (i.e., the 1860's and 1870's). The Kern River water rights now held by the City of Bakersfield were initially recognized in the 1888 "Miller-Haggin Agreement." The Miller-Haggin Agreement memorialized a compromise between the Kern River interests to end years of litigation and controversy on the river. The Miller-Haggin Agreement established two points of measurement of water flow: an upstream "First Point" of measurement and a downstream "Second Point" of measurement. The agreement was later modified by what is known as the "Shaw Decree." In 1976, the City of Bakersfield purchased some Kern River rights and diversion structures in the

river channel. The city and its predecessors in interest have continually measured, determined, and recorded the flow of water in the Kern River on a daily, monthly, and annual basis from 1893 to the present. These flow totals are recorded and reflected in the Kern River flow and diversion records.

The river flows before Lake Isabella was operational can be compared with the flows after it became operational by using a "computed natural flow" approach. The wet-year and dry-year flows at First Point show the large annual variation in discharge on the Kern River. The typical wet-year flow is 899,000 acre-feet and the typical dry-year flow is about 361,000 acre-feet. The monthly totals for median, average, dry-year, and wet-year flows show a similar pattern: the highest flows typically occur from April through June associated with the melting Sierra Nevada snowpack, and the lowest flows occur in September or October.

Flow rates on the Kern River in the Bakersfield area are managed by the mechanical manipulation of constructed weirs. With the exception of the First Point station, the basic function of the weirs is to raise or maintain water surface elevation in the channel to allow gravity to divert flows to specified destinations. The City of Bakersfield currently owns or operates six weirs on the river channel that control, divert, and measure water flow: the Beardsley Weir, Rocky Point Weir, Calloway Weir, River Canal Weir, Bellevue Weir, and McClung Weir. Each weir is unique to its location. All of the weirs require manual operation and require in-field personnel for any change in flow rates.

The First Point of measurement is located just west of the main entrance to Hart Park. The Beardsley Weir is located east of China Grande Loop. Downriver and to the west of the Beardsley Weir is the Rocky Point Weir, which diverts water south of the Kern River into the Carrier Canal. Approximately nine miles downstream of the First Point of measurement is the Calloway Weir. The next weir is the River Canal Weir located just east of Coffee Road, near the Kern River Parkway rest area. The Bellevue Weir is east of Stockdale Highway near The Park at River Walk. Lastly, the McClung Weir, is located west of the residential neighborhood Highgate at Seven Oaks and east of Enos Lane. The Second Point of measurement is located just east of Enos Lane.

Since the mid-20th century, major improvements, such as canal enlargements and concrete linings, were made to the canal systems to increase the diversion of water away from the Kern River. As a result, the vast majority of the Kern River water between First Point and the Calloway Weir has been diverted away from the river for agricultural use. As a result, the riverbed downstream of the Calloway Weir is completely dry throughout most of the year. Water has flowed in the Kern River channel downstream of the Calloway Weir primarily only during very wet, high-flow conditions or when water has been introduced from outside sources,

such as the State Water Project.

B. The Parties

Plaintiffs and Petitioners ("Plaintiffs") are a group of community-based, public benefit entities and other nonprofit organizations. Defendant and Respondent ("Defendant") is the City of Bakersfield. Real Parties in Interest ("RPI") are four local water storage districts that have contractual interests in the waters diverted from the Kern River, along with the Kern County Water Agency.

On November 30, 2022, Plaintiffs filed a verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The City of Bakersfield was named as a defendant and respondent. Buena Vista Water Storage District, Kern Delta Water Storage District, North Kern Water Storage District, and Rosedale-Rio Bravo Water District were named as real parties in interest. Defendant demurred to the complaint and the real parties filed a Motion to Strike and a Demurrer to the complaint. On March 6, 2023, before any hearing on the motions, Plaintiffs filed a verified First Amended Complaint ("FAC") for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The FAC named the City of Bakersfield as a defendant and respondent but omitted the water districts as real parties. On May 2, 2023, the water districts and the Kern County Water Agency filed a Motion for Leave to File an Answer in Intervention. On May 22, 2023, Defendant demurred to the FAC. The hearings on both motions were continued by stipulation and order to September 6, 2023.

On August 10, 2023, Plaintiffs filed this Motion for Preliminary Injunction. On August 17, 2023, upon Defendant's ex parte application, the Court continued the hearing on the motion to October 13, 2023.

On September 29, 2023, the Court sustained Defendant's Demurrer to the FAC with leave to amend on the ground that Plaintiffs failed to name the four water districts and the Kern County Water Agency as necessary and indispensable parties; Defendant's Demurrer to the second cause of action was sustained with leave to amend because Plaintiffs' failed to state a claim for declaratory relief; Defendant's Demurrer to the fifth cause of action on the basis of failure to state a claim was denied. Plaintiffs were granted ten days leave to file a Second Amended Complaint ("SAC").

On October 2, 2023, Defendant filed an opposition, and the RPI filed a joint opposition, to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs filed their SAC on October 4, 2023. Lastly, on October 6, 2023, Plaintiffs filed replies to the oppositions. Oral arguments were presented on October 13, and the matter was taken under submission at that time.

II. Ruling on Evidentiary Issues

A. Requests for Judicial Notice ("RJN")

1. Each RJN filed in this case is granted. The Court finds the documents to be admissible under California Rules of Court Section 3.1306 and one or more provisions of Evidence Code Section 452 and 454.

2. Defendant's objection to Plaintiffs' RJN of the August 2016 "Recirculated Draft

Environmental Impact Report" for the "Kern River Flow and Municipal Water Program" ("RDEIR for the Kern River Flow Program") is overruled. The report was prepared by Defendant and is relevant on a variety of topics presently before this Court.

B. Declarations

1. The declarations (including all attached exhibits) filed in support of, or in opposition to, the moving papers are admitted. The Court finds the information presented to be in admissible format and to be relevant.

2. Defendant's and RPI's objections to the Declaration of Theodore (Ted) Grantham are overruled. Dr. Grantham appears to be well qualified to render opinions on multiple topics that are within the scope of the issues framed by the moving papers and the oppositions thereto. To the extent Dr. Grantham's declaration may lack foundation or contain speculative opinions, the Court finds these concerns impact the issue of weight, not admissibility.

III. Law Regarding Preliminary Injunctions

The parties have raised a number of issues regarding the applicable law, which the Court will address as follows:

A. General Law

The issuance of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Rather, it reflects the conclusion that, upon balancing the respective equities of the parties pending a trial on the merits, the defendant should or should not be restrained from exercising a right that the defendant claims. (*Brown v. Pacific Found., Inc.* (2019) 34 CA5th 915, 925 and *Jamison v. Department of Transp.* (2016) 4 CA5th 356, 361.) When evaluating a motion for preliminary injunction, the court must weigh 1) the likelihood that the moving party will ultimately prevail on the merits and 2) the relative harm to the parties from issuance or non-issuance of the injunction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) In addition, it is clear that the greater a plaintiff's showing on one variable, the less must be shown on the other in order to support the injunction. (See, e.g., *Butt v. State* (1992) 4 Cal.4th 668, 678 ("*Butt*") and *King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228 ("*King*").) An injunction is an equitable remedy that is intended to prevent future harm, as opposed to punish past harm. (See, e.g., *Kachlon v. Markowitz* (2008) 168 CA4th 316, 348 and *Russell v. Douvan* (2003) 112 CA4th 399, 400–401.)

B. Type of Injunction

An injunction may be either mandatory or prohibitory. A prohibitory injunction is "a writ or order requiring a person to refrain from a particular act." (CCP Section 525.) A mandatory injunction requires a person to take affirmative action that changes the parties' position. (CC Section 3367(2).) The distinction between mandatory and prohibitory injunctions may be important because mandatory injunctions generally require a stronger showing by the moving party and because mandatory injunctions are automatically stayed on appeal, while prohibitory injunctions are not. (See, e.g., *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 CA5th 872, 884.) Despite the differences, "[c]ases have long recognized that the mandatory-prohibitory distinction can prove challenging to apply, that it is not always easy to distinguish a restraint from a command, and that there are no magic words that will distinguish the one from the other." (Nature of Injunctive Relief, Cal. Judges Benchbook Civ. Proc. Before Trial § 14.2.) Nevertheless, it is relatively clear that an injunction that is designed to restrain illegal conduct is prohibitory in nature, not mandatory. (See, e.g., *Oiye v. Fox* (2012) 211 CA4th 1036, 1048.) In addition, it is well established that a prohibitory injunction may involve some adjustment of the parties' respective rights to ensure that a defendant desists from a pattern of unlawful conduct. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 C5th 1030, 1046.) As noted by our California Supreme Court:

> "[Our] decision makes clear that an injunction preventing the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated conduct as to which the defendant asserts a right of some sort. In such cases, the essentially prohibitory character of the order can be seen more clearly by measuring the status quo from the time before the contested conduct began." (*Id.*)

In this case, Plaintiffs' are seeking an order that would *prohibit* Defendant from making excessive diversions from the Kern River. Since the conduct to be restrained would prevent Defendant from engaging in a particular behavior, the injunction sought is prohibitory, not mandatory. Nevertheless, this Court would engage in essentially the exact same analysis and reach the same conclusion regardless of whether the injunction is classified as prohibitory or mandatory.

IV. Prevailing on the Merits

The first step in the "weighing" process is to gauge the likelihood that Plaintiffs will eventually prevail on the merits. In order to evaluate this factor, the Court must determine the credibility of Plaintiffs' argument that Fish & Game Code Section 5937 applies to Defendant and requires a certain amount of water to flow past weirs.

A. Application of Fish & Game Code Section 5937 to Defendant

Fish & Game Code Section 5937 reads in full as follows:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Further examination of this statute is required in order to determine if it applies to Defendant's weirs on the Kern River.

1. Definition of Dam

Fish & Game Code Section 5900(a) states that the definition of a "dam" includes "all artificial obstructions." The definition seems straightforward. The Court is not persuaded to use any alternative definition because the definition provided for in Section 5900(a) is in the same chapter as Section 5937 and clearly governs the interpretation of that statute. In this case, the weirs qualify as "dams" because they are "artificial obstructions" that may be used to control the flow of water in the Kern River.

2. Definition of Owner

Fish & Game Code Section 5900(c) states that the definition of "owner" includes "the United States […], the State, a person, political subdivision, or district […] owning, controlling or operating a dam . . ." Once again, the definition is straight-forward. It is undisputed that Defendant is a political subdivision of the State of California. It is also undisputed that Defendant owns or operates all of the weirs at-issue in this case. Defendant's and RPI's contention that Defendant does not have ownership of the Beardsley Weir or the Calloway Weir is of no import because it is conceded that Defendant *operates* those weirs and therefore falls within the legal definition of "owner."

3. Definition of Fish

Defendant and RPI argue that Fish & Game Code Section 5937 applies only to anadromous fish (i.e. those that migrate from freshwater rivers to the ocean and back to spawn in their natal

streams) and that the Kern River has no anadromous fish. The parties base their argument primarily on legislative history. Although anadromous fish were mentioned in the legislative history surrounding Section 5901, the limitation to anadromous fish was omitted from the final statute (Fish & Game Code Section 5901). In addition, this case involves the interpretation and application of Section 5937, not Section 5901. As discussed below, several appellate courts have discussed the applicability of Section 5937 in published cases, and not a single case limited the statute to anadromous fish. Finally, if the legislature intended Section 5937 to apply so narrowly, it would have so specified. Therefore, Section 5937 applies to all fish and not just to anadromous fish.

4. Standing to Enforce Section 5937

Defendant's and RPI's contend that Plaintiff cannot enforce Section 5937 because the California Department of Fish and Wildlife has exclusive enforcement jurisdiction. In this regard, the California Supreme Court held that the public trust doctrine grants the State of California the duty to manage the state's public resources such as water, and that the doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-46 ("*National Audubon*").) Significantly, the Supreme Court specifically held that any member of the general public has standing to assert a claim of harm under the public trust doctrine. (*Id.* at p. 445-48.) Fish & Game Code Section 5937 has been held to be a "specific rule" concerning the public trust doctrine. (*California Trout v. St. Water Resources Ctrl. Bd.* (1989) 207 Cal.App.3d 585, 629-30 ("*CalTrout I*").) Plaintiffs are members of the "general public" and therefore have standing to assert a claim under Section 5937 since that statute is a specific expression of the public trust doctrine. In addition, a plain reading of Section 5937 reflects that the reference to the "department" pertains only to a very limited modification to the general applicability of the statute, not overall enforcement jurisdiction. Finally, as discussed thoroughly below, Section 5937 has already been the subject of many private enforcement actions, so this Court need not consider the matter as one of first impression.

Based on the foregoing, Section 5937 applies to the weirs owned or operated by Defendant on the Kern River and Plaintiffs have standing to enforce the statute.

B. Minimum Flow Requirements of Fish & Game Code Section 5937

1. Express Language of the Statute

Section 5937 certainly has minimum flow requirements. The express language of the statute requires dam owners to pass at least enough water to keep fish in "good condition." Flows of this quantity would also tend to sustain a healthy ecosystem consisting of birds, mammals, plants, natural aesthetics, and quality of life opportunities for residents. (See, e.g., *National Audubon, supra,* 33 Cal.3d at 430-31 ["continued diversions threaten to turn it into a desert wasteland" which "obviously diminishes its value as an economic, recreational, and scenic

resource."].) Therefore, a plain reading of the statute supports Plaintiffs' claim that Section 5937 prevents a dam owner from diverting all the water in a river.

2. Case Law Interpreting Section 5937

Several appellate courts have confirmed that Section 5937 means what it says. In these holdings, the courts have expressly rejected the argument that Section 5937 only applies to water that has not already been appropriated for beneficial uses (i.e. excess water). For example, the court in *CalTrout I* noted that "[t]he dams referred to in section 5937, as imported into section 5946, are dams placed at the point of diversion of the water which is appropriated." (*CalTrout I*, supra, 207 Cal.App.3d at 632.) The court made the following observation:

> "Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses. Where that effects a reduction in the amount that otherwise might be appropriated, section [5937 via 5946] operates as a legislative choice among competing uses of water." (*Id.* at 601.)

The court further noted as follows:

> "[T]he mandate of section [5937 via 5946] is a specific legislative rule concerning the public trust. Since the Water Board has no authority to disregard that rule, a judicial remedy exists to require it to carry out its ministerial functions with respect to that rule. The Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation." (*Id.* at 631-32.)

In follow-up litigation, the same appellate court stated as follows:

> "First, as we said, section [5937 via 5946] takes this case outside the purview of statutes which may allow the Water Board to balance competing beneficial uses of water and to determine the priority of use. For that reason alone the statutory procedures applicable to the balancing of competing uses by the Water Board are not applicable. (citations omitted.) Thus the issues to be resolved in the enforcement of section [5937 via 5946] do not invoke the expertise of the Water Board in 'the intricacies of water law' and 'comprehensive planning' of importance to the *Audubon* court. (citation omitted.)" (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 203 ("*CalTrout II*").)

The court in *CalTrout II* once again emphasized the issue in the following passage:

> "[W]e are at pains to repeat, that the Legislature has already balanced the

> competing claims for water from the streams affected by section [5937 via 5946] and determined to give priority to the preservation of their fisheries. There is no discretion in the Water Board to do other than enforce its requirements." (*Id.* at 201.)

The court in *Natural Resources Defense v. Patterson* (E.D. Cal. 1992) 791 F. Supp. 1425, 1435 ("*Patterson I*"), similarly noted as follows:

> "By its terms, Section 5937 mandates that the owner of a dam allow water to pass over or through the dam for certain purposes [footnote omitted.] Without deciding whether Section 5937 is a water appropriation statute, vel non, the statute's plain language demonstrates that it was intended to limit the amount of water a dam owner desiring to collect water for eventual irrigation may properly impound from an otherwise naturally flowing stream. Thus, it is a prohibition on what water the […] owner of the dam, may otherwise appropriate."

In subsequent litigation, the same court held that the owner of a dam violated Section 5937 by leaving "long stretches of the River downstream […] dry most of the time" and rejected the defendants' technical arguments to avoid application of the statute. (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F. Supp. 2d 906, 925 ("*Patterson II*").) The court noted as follows:

> Thus, the statute's plain meaning, legislative history, and construction by the state's court all point in a single direction and require this court to reject the […] defendants' proposed interpretation of the statute." (*Id.* at 918-19.)

Case law therefore very clearly confirms that Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate. For the foregoing reasons, this Court must conclude that Plaintiffs have a very high likelihood of succeeding on the merits.

V. BALANCING THE HARMS

A. Impact to Defendant

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would bar Defendant from delivering a clean, safe, and reliable drinking water supply to more than 400,000 residents living in the Bakersfield area. In support of their position, Defendant and RPI rightfully point to various legal authorities establishing that domestic use is undisputably a "beneficial use" of the highest

order. For example, Water Code Section 106 provides as follows:

> "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation."

Case law confirms that "domestic purposes" as used in Section 106 includes humans and domesticated livestock, but not commercial herds of livestock maintained for profit. (See, e.g., *Deetz v. Carter* (1965) 232 Cal.App.2d 851, 854-57.) Water Code Section 106.3(a) further emphasis the importance of water for domestic use:

> "It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."

The California Supreme Court addressed the potential conflict between the legal framework of the California water rights system expressed in laws such as a Sections 106 and 106.3(a), and the public trust doctrine:

> "The federal court inquired first of the interrelationship between the public trust doctrine and the California water rights system, asking whether the 'public trust doctrine in this context [is] subsumed in the California water rights system, or ... function[s] independently of that system?' Our answer is 'neither.' The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." (*National Audubon, supra,* 33 Cal.3d at 452.)

Other courts have addressed the potential conflict between the California water rights system and Section 5937 in particular. For example, *CalTrout I* addressed the issue as follows:

> "In 1937, and for many preceding years, the Water Code provisions pertaining to appropriation declared as state policy that the use of water for domestic purposes is the highest use of water and the use of water for irrigation purposes is the next highest use. (citations omitted.) It apparently was assumed in some quarters at the time of adoption of those sections that the appropriation of water for "higher" domestic or irrigation uses must be approved regardless of

> the detriment to "lower" uses, e.g., in-stream use for fishery or recreation purposes. (citations omitted.) Given this assumption, so it is claimed, section 5937 is not meant to operate as a rule affecting the appropriation of water.
> …
> We need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water." (*CalTrout I, supra*, 207 Cal.App.3d at 600-01.)

Similarly, the court in *Patterson II* addressed the issue as follows:

> "Thus, the question becomes whether the state statute, Section 5937, may in fact be implemented in such a way in this case. That question, as the Ninth Circuit recognized, is not a question of facial incompatibility, but rather one of actual application. For this reason, the court affirmed on the facial preemption question and left open the question of preemption at the remedy stage. (citations omitted.) Because the instant motions concern only liability under Section 5937, such a determination must await the remedial phase of this litigation." (*Patterson II, supra,* 333 F. Supp. 2d at 921.)

In this case, like the cases quoted above, the potential conflict between compliance with Section 5937 and providing a safe, clean, and affordable domestic water supply appears to be a theoretical legal issue, rather than a practical factual issue. For example, Defendant's "overall annual water demand" is approximately 130,000 acre-feet of water. (Defendant's Opp. Brief, p. 14-15 and Dec. of Maldonado, parag. 20.) Based on the 130-year record of flows in the Kern River, the all-time high was approximately 2.5 million acre-feet and the all-time low was approximately 138,000 acre-feet. (Defendant's Opposition Brief, p. 5 and Declaration of Maldonado, parag. 5 [lists low figure as 131,000].) Between 1893 and 2010, the typical "wet-year" flow (i.e. 75th percentile) was 899,000 acre-feet; the typical "dry-year" flow (i.e. 25th percentile) was 361,000 acre-feet; the average flow was 726,000 acre-feet; and the median flow was 550,000 acre-feet. (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 7-8 and Exhibit B attached thereto; see, also, RDEIR for the Kern River Flow Program, p. 2-34.) Therefore, it appears that the Kern River has never failed to provide sufficient water for domestic use and, in the "average year," the river provides over five times Defendant's total current use. Accordingly, the present action does not appear to threaten the domestic water supply.

This conclusion is buttressed by the fact that: 1) Defendant does not rely exclusively on the Kern River to satisfy its demand and may have access to water from the State Water Project (Defendant's Opposition Brief, p. 6 and Declaration of Maldonado, parag. 8); 2) a significant percentage of water left to flow in the natural river channel would not be lost, but would be recouped in other forms such as replenished ground water (RDEIR for the Kern River Flow

Program, p. 2-39 and 2-40); and 3) the "overall" demand identified by Defendant may include secondary obligations or uses (such as waste water treatment facilities) for which alternative sources of water may be available. (RDEIR for the Kern River Flow Program, p. 2-36).

It is worth noting that Plaintiffs are not seeking any reductions or modifications to Defendant's current supply-demand profile for domestic use. Therefore, imposing Section 5937's flow requirements on Defendant would likely have no impact on the domestic water supply.

B. Impact to RPI

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would interfere with Defendant's and RPI's contractual obligations regarding the delivery of water for agricultural and other purposes. Once again, Defendant and RPI appropriately cite to legal authority such as Section 106 for the very valid proposition that agricultural use is a well-established "beneficial use" of a very high order. Although the use of water for agricultural purposes is very necessary and worthy, the State Legislature has determined that other uses are also worthy and of significant benefit to society. For example, Water Code Section 1243(a) states as follows:

> "The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, when it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources."

The courts in California have also made very similar findings. For example, the California Supreme Court in *National Audubon* held as follows:

> "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (citations omitted.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (citations omitted), and to preserve, so far as consistent with the public interest, the uses protected by the trust.

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses." (*National Audubon, supra,* 33 Cal.3d at 446-47.)

As discussed in a previous section of this ruling, several courts expanded on the principles set forth in *National Audubon* to establish Section 5937 as a non-discretionary, specific legislative rule reflecting the public trust doctrine. (See, e.g., *CalTrout I*, *CalTrout II*, *Patterson I*, and *Patterson II*.) As such, the courts held that compliance with Section 5937 is compulsory, as is compliance with any other state law. It is well established that contractual obligations do not take precedence over compliance with state law. (See, e.g., *Patterson I*, supra, 791 F. Supp. 1425.)

In this case, the "overall annual water demand" for the RPI is not nearly as apparent as it is for Defendant. Therefore, it is more difficult to determine what impact, if any, compliance with Section 5973 might have on the RPI. What is clear, however, is that the average annual Kern River flows of approximately 726,000 acre-feet is an enormous amount of water that should suffice for the reasonable use of all interested stakeholders. In the words of the State Constitution, our vast water resources should be used in a manner that reflects the "reasonable and beneficial use thereof in the interest of the people and for the public welfare."

C. Impact to Plaintiffs

Plaintiffs' contend that a failure to issue the preliminary injunction will almost certainly result in a completely dry, dead river channel which has been witnessed by the City of Bakersfield's residents and visitors the majority of time during the past few decades. (See, e.g., Dec. of Love, parag. 4; Damian, parag. 3; Mayry, parag. 3; and McNeely, parag. 3.) Plaintiffs' position is simple: no water in the river means no aquatic life, including fish. In addition, declarations filed in support of the moving papers establish that a dry river greatly reduces other forms of life such as birds. (See, e.g., Dec. of Love, parag. 3-10 and McNeely, parag. 11.) The declarations also note that the quality of life for Bakersfield's residents and visitors suffer without a flowing river, such as when the Kern River Parkway Bike Trail has no actual river. (See, e.g., Dec. of Damian, parag. 3, 9; Mayry, parag. 7-12; McNeely, parag. 11.) Therefore, it

appears that significant harm would result to the general population and the environment if the injunction is not issued.

D. Purpose of Balancing the Harms

It is important to note that the Court weighed the potential harms to the respective parties in this case only on the procedural issue of deciding whether a preliminary injunction should issue. This discretionary analysis was not done as part of the process to determine the applicability of Section 5937 as an appropriate use of water. As discussed above, the State Legislature already considered the competing uses of water when they passed Section 5937 and came down on the side of minimum flow requirements. Therefore, this Court has no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue. On that point, compliance with Section 5937 is required as a matter of law. This Court has a duty to uphold the law and has no option to exempt entities from compliance, even if compliance is burdensome. Second, as discussed above, Plaintiffs are very likely to prevail on the merits. Therefore, according to the principles set forth in the *Butt* and *King* cases, the weighing of harms on the procedural issue is given relatively less weight than the analysis regarding whether Plaintiffs are likely to prevail on the merits.

Based on the foregoing, the Court is obligated to issue a preliminary injunction prohibiting Defendant from diverting Kern River flows in a manner that reduces flows below the volume necessary to maintain fish in good condition.

VI. THE PRELIMINARY INJUNCTION

A. Terms and Language of the Injunction

Having determined that a preliminary injunction should issue, the Court is now faced with the task of composing the specific terms of the injunction. One option is to require Defendant to immediately comply with Section 5937 and entrust Defendant and Plaintiff, along with input from subject matter experts, to determine the specifics of the necessary flows. This method is legally permissibly because a dam owner has a non-discretionary, ministerial duty to comply with Section 5937, but is permitted some discretion in how it complies. (See, e.g., *CalTrout I, supra,* 207 Cal.App.3d at 632 [the court ordered compliance with the law and then left as a separate issue "[w]hether and to what extent enforcement proceedings might be necessitated].)

A second option is to require Defendant to immediately comply with Section 5937 and have this Court specify the flows necessary for compliance. This method is also legally permissible as

demonstrated by, for example, *CalTrout II* which expressly held that a dam owner's claim that it could not "readily ascertain the amount of water necessary to comply with its statutory obligation […] may be addressed by means of interim judicial relief." (*CalTrout II*, supra, 218 Cal.App.3d at 200.) Under this scenario, the Court would impose the "best approximate compliance" and then thereafter "proceed with more elaborate study looking to refinement of those rates in subsequent proceedings." (*Id.* at 209.) Either way, the flow standards would be interim standards applicable only to the preliminary injunction. Each option has benefits and risks associated with it.

1. Flow Determined by Defendant and Plaintiff

The determination of flows necessary to keep fish in "good condition" may possibly be a complex undertaking that encompasses a wide variety of topics including the physical, biological, and hydrological sciences. It may also require deep knowledge of the local water systems. In this case, Defendant has an entire Water Resources Department. Plaintiff appears to have access to some of the most highly qualified subject matter experts in the country. (See, e.g., Dec. of Peter Moyle and Ted Grantham.) The resources of the California Department of Fish and Wildlife may also be available. Given these resources, it seems that Defendant and Plaintiff, along with input from subject matter experts, would be in a better position than the Court to quickly develop flow standards in good faith compliance with the law.

2. Flow Determined by Court Order

Court deferral of the specific flow rates may, however, set the stage for unreasonable delays in compliance if Defendant and Plaintiff are not willing to engage in the process in an expeditious and cooperative fashion. This is essentially what occurred in the *CalTrout* cases. The appellate court in *CalTrout I* ordered the dam owner to comply with the law but did not specify precise flow rates because the amount could not "be precisely calculated on the record before us." (*CalTrout I, supra,* 207 Cal.App.3d at 632.) Upon remand, the trial court allowed a multi-year delay for compliance due to several reasons including pending "studies" and because the dam owner requested "guidance . . . in fulfilling its statutory duty." (*CalTrout II, supra*, 218 Cal.App.3d at 194.) The delays led to *CalTrout II, in* which the appellate court held that the trial court "abused its discretion in countenancing this protracted disobedience of the statute" and directed the trial court to "expeditiously consider a request by petitioners that *it* [i.e. the court] set interim release rates." (*Id.*) This Court has no intention of countenancing "protracted disobedience of the statute" and is concerned that entrusting Defendant and Plaintiff to determine the flow rates might be setting the process up for failure. Imposing an immediate, court-ordered flow rate would negate those concerns.

B. Decision Regarding Flow

In evaluating the two options, the Court must consider the fact that Defendant has expressed reluctance to help establish appropriate flow rates. For example, Defendant argued that

"[p]laintiffs provide no details, guidance or data in the proposed order to allow the City, or the Court, to determine whether fish are in 'good condition' downstream of each of the named weirs" and that "[p]laintiffs provide no objective metrics or standards to establish compliance." (Defendant's Opp. Brief, p. 11.) They also note that if the Court were to issue the injunction, they would be left to "guess" about the flow requirements and "would not be able to determine with certainty whether any of its actions were in compliance at any particular time or season." (*Id.*). Finally, Defendant seemed to reject the concept that the flow rates could be "determined through some sort of unspecified interim judicial relief." (*Id.* at p. 12.)

On the other hand, Defendant has previously expressed a desire to see the Kern River flow through Bakersfield:

> "The City of Bakersfield, as Lead Agency under CEQA, proposes this Program to increase and restore more water flows to the Kern River channel with the goals of protecting and preserving the local water supply, environment, and quality of life for City residents." (RDEIR for the Kern River Flow Program, p. v.)

Defendant has apparently made past efforts to have the Kern River flow in its natural channel through Bakersfield:

> "In recent years, the City has worked to increase the flow of water below the Calloway Weir, but there are currently no quantities of water regularly dedicated to stream flow or instream uses below the Calloway Weir." (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 8.)

In addition, counsel for Defendant made statements similar to these quotes during oral arguments on October 13. Defendant clearly has a deeply vested interest in the river and seems to harbor some sentiment that would make cooperation on establishing specific flow rates possible.

Based on the foregoing, the Court intends to proceed with the first option described above. To help facilitate the process, it should be noted that courts can include broad language in preliminary injunctions and do not need to itemize every detail of compliance. Several courts have addressed the issue as follows:

> "'An injunction must be sufficiently definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a standard for the court to use in ascertaining an alleged violation of the injunction.' (*People ex rel. Dept. of Transportation v. Maldonado* (2001) 86 Cal.App.4th 1225, 1234 [citation omitted].) 'An injunction which forbids an act in terms so vague that men of common intelligence must

> necessarily guess at its meaning and differ as to its application exceeds the power of the court.' (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651 [citation omitted].) However, '[t]he injunction need not etch forbidden actions with microscopic precision, but may instead draw entire categories of proscribed conduct. Thus, an injunction may have wide scope, yet if it is reasonably possible to determine whether a particular act is included within its grasp, the injunction is valid.' (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681 [citation omitted].)" (*People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1082-83.)

In this case, as previously noted, the term "good condition" may potentially involve complex issues. However, the language is also subject to a reasonable, common sense interpretation that should guide the discussions between Defendant and Plaintiff regarding flow rates necessary to achieve compliance.

Moreover, Defendant, Plaintiff, and the Court are not without guidance regarding the meaning of "good condition." Multiple courts and regulatory entities have already spent very considerably efforts defining the term. (See, e.g., *CalTrout II, supra,* 218 Cal.App.3d at 209, 210; *Patterson II, supra,* 333 F.Supp.2d at 916; Walker River Irrigation District - SWRCB Order 90-18 (1990), WL 264521; *Putah Creek v. Solano Irrigation* 7 CSPA-294 District, Sacramento Superior Court No. CV515766 (April 8, 1996); Bear Creek - SWRCB Order 95-4 (1995), WL 418658; Lagunitas Creek – SWRCB Order 95-17 (1995), WL 17907885.) There is no reason, therefore, for Defendant, Plaintiff, and this Court to "reinvent the wheel" regarding the meaning of "good condition."

DISPOSITION:

Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition.

Defendant and Plaintiff shall engage in good faith consultation to establish flow rates necessary for compliance with this order.

The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant and Plaintiff are not successful in agreeing to flow rates necessary for compliance, either Defendant or Plaintiff may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the RPI.

This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

Plaintiffs shall prepare a formal order consistent with this ruling for the Court's signature pursuant to California Rule of Court 3.1312.

Copy of minutes mailed to all parties as stated on the attached certificate of mailing.

FUTURE HEARINGS:

No future hearings are currently set.

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD
BCV-22-103220

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Ruling dated October 30, 2023*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: October 30, 2023

Place of Mailing: Bakersfield, CA

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

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: October 30, 2023

By: *Stephanie Lockhart*
Stephanie Lockhart, Deputy Clerk

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