Superior Court of California
County of Kern
Bakersfield Division J

Date: **2/5/2024** **Time:** **8:00 AM - 5:00 PM**

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: Gregory A. Pulskamp **Clerk:** Inez Trimble

NATURE OF PROCEEDING:

Ruling on Real Parties in Interest's (RPI's) Demurrer to Plaintiffs' Third Amended Complaint (TAC) heretofore submitted on January 31, 2024.

RULING:

1. RPI's Request for Judicial Notice in Support of Demurrer to Plaintiffs' TAC is granted.
2. RPI's Demurrer to Plaintiffs' TAC is overruled as to the first cause of action and sustained as to the third and fourth causes of action. The Court denies Plaintiff leave to amend the third cause of action, but grants 10 days leave to amend the fourth cause of action pursuant to California Rules of Court, Rule 3.1320(g).

DISCUSSION:

I. First Cause of Action

A. Violations of the Public Trust Doctrine

RPI argue that the first cause of action for writ of mandate and/or prohibition for violations of the Public Trust Doctrine fails to state a claim. They argue that the City of Bakersfield (City) is not a trustee agency when it operates the diversion structures (weirs) and that Plaintiffs cannot allege a mandatory duty to operate the diversion structures in a particular way because the Public Trust Doctrine inherently involves discretion.

Plaintiff Water Audit California (WAC) argues that they are not seeking to instruct the City on how to comply with its mandatory statutory and public trust duties. Instead, they assert that

the City does not have the discretion to ignore its statutory and public trust duties. WAC argues that a writ of mandate is appropriate because Fish and Game Code section 5937 is a mandatory ministerial duty as a clear legislative expression of the Public Trust Doctrine.

Similarly, Plaintiffs Bring Back the Kern, et al. argue that the City does not have the discretion to entirely avoid its legal duties and violate the law. They argue that while the Court in *Monterey Coastkeeper* states the Public Trust Doctrine is "inherently discretionary," it did not rule that all actions alleging violations of the Public Trust Doctrine necessarily involve discretionary acts. They further argue that "[t]here should be no question that the City has a duty to consider the public trust interest when making its daily decisions to divert water from the Kern River." As such, they conclude that a writ of mandate is appropriate.

A traditional writ of mandate under Code of Civil Procedure section 1085, like the one sought here by Plaintiffs, is a method used to challenge an agency's failure to perform an act required by law. To obtain writ relief, a Plaintiff must show that: (1) there is no other plain, speedy, adequate remedy in the ordinary course of law (Code Civ. Proc., § 1086); (2) the Defendant has a clear, present, and ministerial duty to act in a particular way (Code Civ. Proc., § 1085(a)); and (3) the Plaintiff has a clear, present, and beneficial right to the performance of that duty (Code Civ. Proc., § 1086).

In *Monterey Coastkeeper*, the appellate court upheld the trial court's decision that traditional mandamus was inappropriate to enforce the public trust doctrine. There, the trial court sustained a demurrer without leave to amend because appellants had not identified a mandatory ministerial duty but instead brought a broad, generalized challenge to an agency's discretionary decisions.

In this case, however, Plaintiffs have identified ministerial duties with which the City must comply, including Fish and Game Code section 5937. While the City operates the diversion structures and manages the Kern River according to historic legal and contractual provisions, the City does not have the discretion to ignore its statutory and public trust duties. As such, a writ of mandate (and possibly a writ of prohibition) is appropriate.

B. Violations of the Fish and Game Code

RPI argue that the first cause of action also fails to state a claim because Fish and Game Code section 5901 applies only to anadromous fish. This Court previously ruled on October 30, 2023, that Section 5937 applies to all fish, not just anadromous fish. Similarly, there is no limitation in the language of Section 5901. If the legislature intended Section 5901 to apply only to anadromous fish, they would have so specified.

RPI next argue that there is no private right of enforcement, or right of action, for violations of Fish and Game Code section 5901. In their Opposition, Plaintiffs Bring Back the Kern, et al. argue that courts

have previously found a private right of action for violations of section 5937, and there is no reason the two sections should be treated differently in terms of enforcement. One section regards the impacts of dams (and other devices or contrivances) on 'passing of fish up and down stream' while the other regards the impacts of dams on the conditions of the fish existing below the dam. (Fish and Game Code §§ 5901, 5937.) Plaintiff WAC similarly argues that *National Audubon* held that any member of the public has standing to assert a claim of harm under the public trust doctrine and "to the extent the waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery." (Citing *Cal Trout I*, 207 Cal.App.3d 585, 630.)

"It is well settled that there is a private right of action to enforce a statute 'only if the statutory language or legislative history affirmatively indicates such an intent. That intent need not necessarily be expressed explicitly, but if not it must be strongly implied.'" (*Noe v. Superior Ct.*, 237 Cal.App.4th 316, 337.) Here, the plain language of Section 5901 does not indicate there is any private right of action to enforce its provision. The section simply states it is unlawful to construct or maintain in any stream in specified districts, any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream. There has been no argument by either party that the legislative history implies there is a private right of action for violations of Section 5901. While there have been private enforcement actions for Section 5937, the same does not appear true for Section 5901. However, "it is an established rule of statutory construction that similar statutes should be construed in light of one another and that similar phrases appearing in each should be given like meanings." (*People v. Tran*, 61 Cal.4th 1160, 1167-1168.)

Therefore, Sections 5901 and 5937 should be treated similarly. They both relate to the presence of dams in waterways and the impact thereof on the condition of fish and their ability to pass up and down streams. As such, it seems appropriate that the Plaintiffs can assert a claim for violations of Section 5901 in addition to Section 5937.

Lastly, RPI argue that Section 5937 does not apply to the City's diversion structures (weirs) because they are not "dams."` According to the RPI, while Section 5900(a) provides a broad definition for "dam," Section 5900(b) specifically defines a number of other facilities are "conduits" (i.e., something other than dams) and the Fish and Game Code has numerous provisions treating "conduits" separate from "dams." Included in the "conduit" definition in Section 5900(b) is, among other things, a diversion structure used for taking water from a river. RPI conclude that because the Complaint acknowledges that the weirs are diversion structures used for taking water from the river, the diversion structures are therefore not "dams" subject to Section 5937.

Plaintiff WAC argues in its Opposition that a weir acts as a barrier that impedes the flow of water. Because the subject weirs are artificial obstructions that provide for the diversion of water, they are subject to section 5937. Plaintiffs Bring Back the Kern, et al. argue that under the Fish and Game Code, a weir can be both a dam and a conduit and the two definitions are not mutually exclusive.

This Court previously ruled that the weirs are "dams" because they are "artificial obstructions" and therefore qualify as "dams" under Fish and Game Code section 5900(a). RPIs' argument that the weirs

are exclusively conduits under Fish and Game Code section 5900(b) is not persuasive. Section (a) defines "dams" as including all artificial obstructions. Logically, this broad definition of a dam would include a conduit (a diversion used for the purpose of taking or receiving water) because it is still an artificial obstruction. Therefore, the City's diversion structures (weirs) in the Kern River qualify as "dams," as that term is used in the pertinent provisions of the Fish and Game Code.

II. Third Cause of Action – Violations of Public Resources Code Section 6009.1

RPI contend that Plaintiffs fail to state a claim for breach of trustee duties under Public Resources Code section 6009.1 because the third cause of action does not allege that the California Legislature granted tidelands or submerged lands to the City (or the RPI). RPI argue that the City received its interest in the weirs and the Kern River from a private corporation, not from a grant of the legislature. They further contend, therefore, that Plaintiffs have failed to allege sufficient facts demonstrating that the City owed a duty under Section 6009.1.

Plaintiff WAC argues that Public Resources Code Section 6009.1 ensures that private trustees of the public trust have the same duties as state actors because in common law, public trust duties are imposed on agencies of the state but not private actors. Further, "by a plain and commonsense reading, Public Resources Code section 6009.1(c) was intended to be an enumeration of the understanding of the duties of a public trustee. A trustee's duties, interpretation and impact have long preexisted the statute." According to WAC, "the California Land Act of 1851 invested all the lands transferred into the hands of the State with the public trust." Plaintiffs Bring Back the Kern, et al. join in WAC's arguments regarding the Public Resources Code.

Public Resources Code section 6009.1 provides that "granted public trust lands" are subject to the supervision of the State and the State has a duty to protect the public interest in those public trust lands. (Pub. Res. Code, § 6009.1(a).) "The state acts both as the trustor and the representative of the beneficiaries, who are all of the people of this state, with regard to public trust lands, and a grantee of public trust lands, including tidelands and submerged lands, acts as a trustee, with the granted tidelands and submerged lands as the corpus of the trust." (*Id.*, § 6009.1(b).) All duties endowed upon a trustee of state lands shall depend upon the terms of the trust, and if there is no provision, express or implied, within the terms of the trust, a statute, or a grant, the trustee's duties shall be interpreted and determined by principles and rules evolved by courts of equity with respect to common trust principles. (*Id.*, § 6009.1(d).)

The California State Lands Commission[1] manages 4 million acres of tide and submerged lands and the beds of natural navigable rivers, streams, lakes, bays, estuaries, inlets, and straits. These lands, often referred to as sovereign or Public Trust lands, stretch from the Klamath River and Goose Lake in the north to the Tijuana Estuary in the south, and the Colorado River in the east, and from the Pacific Coast three miles offshore in the west to world-famous Lake Tahoe in the east, and includes California's two longest rivers, the Sacramento and San Joaquin.

The Commission also monitors sovereign land granted in trust by the California Legislature to approximately 70 local jurisdictions that generally consist of prime waterfront lands and coastal waters. The Commission protects and enhances these lands and natural resources by issuing leases for use or development, providing public access, resolving boundaries between public and private lands. Through its actions, the Commission secures and safeguards the public's access rights to natural navigable waterways and the coastline and preserves irreplaceable natural habitats for wildlife, vegetation, and biological communities.

The Commission's website provides a list of grantees. Grantees include cities and counties in California.

Here, Plaintiffs have not pled or alleged that the City is a grantee of public lands as provided for in Public Resources Code section 6009.1. Plaintiffs do not provide authority for the proposition that the City is the equivalent of the State for purposes of scope and jurisdiction of the Public Resource Code. The TAC does not allege that Section 6009.1 applies to the City or the Kern River. It may be worth noting that neither the City nor Kern County are listed as grantees of public trust lands on the California State Lands Commission website[2]. Therefore, Public Resources Code section 6009.1 does not apply to the City or RPI as alleged in the TAC. Leave to amend is not warranted on this issue because the facts pled establish that the complaint is incapable of a curative amendment. (See, e.g., *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

III. Fourth Cause of Action – Public Nuisance

Lastly, RPI assert that the TAC fails to state a claim for public nuisance because there is no private attorney general exception to the special injury requirement and Plaintiffs have not alleged a qualifying special injury.

[1] Information from California State Lands Commission website. See https://www.slc.ca.gov/about/
[2] The Court takes judicial notice of this resource as information that is not subject to reasonable dispute. (Evid. Code § 452(h).)

Plaintiff WAC asserts that a private attorney general exception is not required under Civil Code section 3493 because "private individuals have been authorized to bring a mandate action to enforce a public duty involving the protection of a public right." They also argue that Plaintiffs have standing because:

> The City has prevented their members from the use, in a customary manner, of the Kern River. Members of these organizations have a unique and specific interest in the fish and wildlife within the Kern River. They have suffered an injury in fact to their public trust interests in the fish and other wildlife of the Kern River when the City unlawfully destroys these resources. These interests in fish and other wildlife include not only the public trust property interest in the fish and other wildlife, but other recreational and ecological values provided by the fish.

Plaintiffs Bring Back the Kern et al. join in WAC's arguments regarding public nuisance.

A nuisance is defined in the Civil Code as follows:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

(Civ. Code, § 3479.)

> A public, as opposed to private, nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) Actions for public nuisance are "aimed at the protection and redress of *community* interests" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103, 60 Cal.Rptr.2d 277, 929 P.2d 596), and therefore, as a general rule, only public prosecutors authorized by statute may sue for a public nuisance on behalf of the community. (Civ. Code, § 3494; Code Civ. Proc., § 731.) However, Civil Code section 3493 provides: **"A *private person* may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."**

(*Rincon Band of Luiseno Mission Indians etc. v. Flynt* (2021) 70 Cal.App.5th 1059, 1100.)

On September 18, 2023, this Court ruled that voluntarily incurred expenses such as those alleged by the Plaintiffs were insufficient to qualify as a special injury necessary for standing in a public nuisance claim. Although the Court went on to overrule the challenge to the fourth cause of action, it noted that because "Plaintiffs bring this action as a private attorney general, it is unclear whether they therefore become exempt from the special injury requirement." Further analysis, as set forth below, establishes that private attorney general actions are in all likelihood not exempt from the special injury requirement despite public policy considerations that support such a conclusion.

To bring a public nuisance claim, a party must have suffered a special injury distinct from the general public. (Civ. Code, § 3493.) The notion of a private attorney general exception is certainly not in the express language of Civil Code section 3493. Although the cases cited by Plaintiff in support of such an exception are interesting from a public policy perspective, they do not address Section 3494 and are not directly applicable. In view of the fact that California apparently has no published opinion supporting such an exception, the legislature's intent as evidenced by the plain statutory language must control. In addition, as noted by the RPI, such an exception would likely swallow the rule since every public nuisance case would, by definition, seem to qualify as a private attorney general case.

Therefore, because there is no established private attorney general exception and the TAC fails to allege an appropriate special injury, the Court sustains the demurrer as to the fourth cause of action for public nuisance. Leave to amend is warranted on this issue because the facts pled do not establish that the complaint is incapable of a curative amendment. (See, e.g., *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.)

DISPOSITION:

RPI 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:

Motion to Intervene scheduled for February 20, 2024.

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 February 05, 2024*** 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: February 05, 2024

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: February 05, 2024

By: *Inez Trimble*
Inez Trimble, Deputy Clerk

MAILING LIST

ADAM KEATS
LAW OFFICE OF ADAM KEATS
303 SACRAMENTO ST 2ND FLOOR
SAN FRANCISCO CA 94111

BRETT A STROUD
THE LAW OFFICES OF YOUNG WOOLDRIDGE LLP
1800 30TH STREET FOURTH FLOOR
BAKERSFIELD CA 93301

WILLIAM A MCKINNON
WILLIAM MCKINNON ATTORNEY AT LAW
952 SCHOOL ST PMB316
NAPA CA 94559

ISAAC L ST LAWRENCE
MCMURTREY HARTSOCK & WORTH
2001 22ND ST #100
BAKERSFIELD CA 93301

COLIN L PEARCE
DUANE MORRIS LLP
1 MARKET SPEAR TWR #2200
SAN FRANCISCO CA 941051127

RICHARD L IGER
KERN DELTA WATER DISTRICT
501 TAFT HWY
BAKERSFIELD CA 93307-6247

DANIEL M ROOT
BELDEN BLAINE RAYTIS LLP
5016 CALIFORNIA AVE #3
BAKERSFIELD CA 93309

VIRGINIA A GENNARO
OFC BAKERSFIELD CITY ATTORNEY
1600 TRUXTUN AVE 4FL
BAKERSFIELD CA 93301

AMELIA THOMAS MINABERRIGARAI
KERN COUNTY WATER AGENCY
3200 RIO MIRADA DR
BAKERSFIELD CA 93308

LOUINDA V LACEY
SOMACH SIMMONS & DUNN
500 CAPITOL MALL SUITE 1000
SACRAMENTO CA 95814

KEVIN W BURSEY
ELLISON SCHNEIDER HARRIS & DONLAN
2600 CAPITOL AVE #400
SACRAMENTO CA 95816

JENNIFER L SPALETTA
STOEL RIVES LLP
500 CAPITOL MALL #1600
SACRAMENTO CA 95814

NICHOLAS ALLEN JACOBS
500 CAPITAL MALL #1000
SACRAMENTO CA 95814

NATHAN A METCALF
HANSON BRIDGETT LLP
1676 N CALIFORNIA BLVD #620
WALNUT CREEK CA 94596

MICHELLE E CHESTER
SOMACH SIMMONS & DUNN
500 CAPITOL MALL #1000
SACRAMENTO CA 95814-4742

FIFTH DISTRICT COURT OF APPEAL
2424 VENTURA ST
FRESNO CA 93721