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Superior Court of the State of California

County of Alameda

Timothy James Dummer)	Case: HG19041020
)	
Petitioner,)	PETITIONER TIMOTHY J.
)	DUMMER’S TRIAL BRIEF
v.)	
)	
San Francisco Public Utilities Commission,)	Hearing Date: August 13, 2021
City and County of San Francisco, Department)	Hearing Judge: Honorable Frank Roesch
of Water Resources, State Water Resources)	Time: 2:00 p.m.
Control Board, Department of Fish and)	Place: Dept. 17
Wildlife, the State of California, Alameda)	
County Sheriff’s Office, Santa Clara County)	Date Action Filed: October 18, 2019
Sheriff’s Office.)	
)	
Respondents.)	

I. INTRODUCTION

 This case seeks to compel Respondents (“City”) to simply comply with well-settled California law and open the Calaveras Reservoir to the public for fishing and recreation. Petitioner (“Dummer”) asks this court to answer the question, how long may the City continue violating the law and the California Constitution? *California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187, 203 (Cal. Ct. App. 1990) answered a similar question about Fish and Game

1 Code (“FGC”) Sec. 5946, a sister statute to Sec. 5943 involved here¹. “The court cannot ignore
2 the ongoing violation of a statutory mandate on the ground that the violation will eventually be
3 halted by untimely administrative action.”

4 It’s undisputed that the water from Calaveras Reservoir is completely treated and fully
5 purified before use,² to the extent required even for bodily contact recreation,³ and therefore
6 meets the requirement for fishing under California law. (Cal. Code Regs. tit. 17 § 7629).⁴
7 (Petitioner is *not* seeking bodily contact recreation.)

8 It’s undisputed that Calaveras Reservoir is a ‘water of State’,⁵ and it meets the definition
9 of “public lands” under California Constitution Art. I, Sec. 25, which protects the “absolute
10 right” to fish in waters of the State on public lands.

11 It’s undisputed that Calaveras Reservoir is navigable,⁶ and meets the California test for
12 navigability which requires the reservoir to be opened under Cal. Const. Art. X, Sec. 4. Unlike

13
14 ¹ “We begin our analysis of this provision by noting that section 5943 is one of a number of
15 statutory provisions in the Fish and Game Code governing the damming of rivers and streams
16 which are naturally frequented by fish. Such provisions include ones which impose affirmative
17 duties on dam owners to take steps to preserve and protect the fish population. (See, e.g., Fish G.
18 Code, §§ 5931, 5933, 5938, 5942.)” *State of Calif. v. San Luis Obispo Sportsman’s Assn*, 22
19 Cal.3d 440, 448 (Cal. 1978)

20 ² See Plaintiff’s Trial Exhibit “A” (Admission 13). *Admitted* that the treatment or purification of
21 drinking water from Calaveras Reservoir includes coagulation, flocculation, sedimentation,
22 filtration, and disinfection before use as drinking water.

23 ³ See examples Cal. Health and Saf. Code §§ 115840(a)(1), 115840.5(a)(1), and 115841(a)(1).

24 ⁴ Cal. Code Regs. tit. 17 § 7629 “[T]he following types of domestic water supply reservoirs may
25 be used for recreational purposes:(1) Reservoirs from which water is continuously and reliably
26 treated by filtration and chlorination; provided that for smaller water systems, under special
27 circumstances satisfactory to the State Board, approved dual chlorination may be acceptable.”

28 ⁵ See Plaintiff’s Trial Exhibit “A” (Admission 15). *Admitted* that Calaveras Reservoir is within
the boundaries of the State of California and contains surface water or groundwater. (Water Code
Section 13050(e) defines “Waters of the state” as “any surface water or groundwater, including
saline waters, within the boundaries of the state.”)

⁶ See Plaintiff’s Trial Exhibit “A” (Admission 3) *Admitted* that officials, workers, employees, or
other person[s] have used oar or motor-propelled craft, including but not limited to row boats,
canoes, motor boats, or barges, on Calaveras Reservoir. “boats are used in the reservoir”.

1 the federal test of navigability when a federal question is involved, the California test (*Mack* test)
2 only requires a body of water to be “capable of being navigated by oar or motor-propelled small
3 craft.” *People ex Rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1050 (Cal. Ct. App. 1971).

4 It’s undisputed that the tributaries to, and the Calaveras Reservoir itself, contain naturally
5 occurring migratory fish.⁷ Regardless of navigability, these fish belong to the People of the
6 State, and the right of the People to access and take the fish in the reservoir and the inland
7 streams has long been settled. “[T]he common right to take fish extends not alone to navigable
8 waters, but exists as to all waters, the lands underlying which are not in private ownership -- in
9 other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this
10 state.” *People v. Truckee Lumber Co.*, 116 Cal. 397, 400 (Cal. 1897).

11 **II. LEGAL ANALYSIS**

12 **A. Calaveras Reservoir and the Surrounding Lands are “Public Lands of the State”** 13 **as Used in California Constitution Article I, Section 25.** 14

15 Unlike in *In re Quinn*, 35 Cal.App.3d at pp. 480–481 (relied on by the City), where the
16 court was concerned with a concrete aqueduct and bridge “40 miles from the area where
17 petitioners were arrested” (*Id.* at p. 479), this case involves the actual *inland streams* described as
18 protected in *Quinn*: “We must conclude that the words ‘public lands’ as used in Article I,
19 section 25, were intended by the framers and voters in 1910 to mean public lands which provided
20 access to fish in the inland streams and coastal waters of the state.” (*Id.* at p. 485).

21 The *Quinn* court did *not* conclude that so called ‘county-owned’ property is not ‘public
22 lands’, only that the bridge and aqueduct 40 miles from the streams weren’t public lands “as
23 those terms are used in article I, section 25 of the Constitution.” (*Id.* at p. 481).

24
25 ⁷ See Plaintiff’s Trial Exhibit “A” (Admission 2) *Admitted* that before construction of the 1913
26 Dam, Alameda Creek and the Arroyo-Hondo, contained naturally occurring migratory fish.

27 See Also Plaintiff’s Trial Exhibit “C”, Pg. 6, line 16 “native fish species” and Pg. 15, line 20.
28 “habitat for those species (including fishing of the threatened Steelhead)”

1 Respondents contend that “The Calaveras Reservoir sits on land owned by the City and
2 County of San Francisco—not the State. (Ramirez Dec. ¶ 4.)”⁸, but this theory has long been
3 rejected. The California Supreme Court in 1916 made clear that so-called county-owned
4 property which is used for a municipal purpose, like the Calaveras Reservoir, is *public property*.
5 “The counties are governmental agencies of the state [citations] and the property intrusted to
6 their governmental management is public property.” *Reclamation District No. 1500 v. Superior*
7 *Court*, 171 Cal. 672, 679 (Cal. 1916). “The proprietary interest in all such property belongs to
8 the public, and if there be a legal title in the county, it is a title held in trust for the whole public.”
9 (*Id.* at p. 679). “All of these rulings are founded upon the proposition that the county (or
10 reclamation or school district) is a mere political agency of the state, that it holds its property on
11 behalf of the state for governmental purposes, and that it has no private proprietary interest in
12 such property as against the state.” (*Id.* at p. 680).

13 “The county holds all its property, therefore, not just highway easements, as agent of the
14 state”⁹ *County of Marin v. Superior Court* (1960) 53 Cal. 2d, 633, 638-639, (“By the same token
15 all property under the care and control of a county is merely held in trust by the county for the
16 people of the entire state.”) (*Id.* at p. 639).

17 California Constitution Article I, Section 25, provides:

18 The people shall have the right to fish upon and from the public lands of
19 the State and in the waters thereof, excepting upon lands set aside for fish
20 hatcheries, and no land owned by the State shall ever be sold or transferred
21 without reserving in the people the absolute right to fish thereupon; and no law
22 shall ever be passed making it a crime for the people to enter upon the public
lands within this State for the purpose of fishing in any water containing fish that
have been planted therein by the State; provided, that the legislature may by

23 _____
24 ⁸ See Plaintiff’s Trail Exhibit “B” pg. 8.

25 ⁹ See also (*County of Los Angeles v. Graves*, 210 Cal. 21, 25 [290 P. 444]; *County of Tulare v.*
26 *City of Dinuba*, 205 Cal. 111, 117 [270 P. 201]; *Reclamation District v. Superior Court*, 171
27 *Cal. 672, 679-680 [154 P. 845]*; *Board of Education v. Martin*, 92 Cal. 209, 215-216 [28 P. 799];
28 *Dillwood v. Riecks*, 42 Cal.App. 602, 607-608 [184 P. 35]; *United States v. Certain Parcels of*
Land, 67 F. Supp. 780, 788; *City of Edwardsville v. Madison County*, 251 Ill. 265 [96 N.E. 238,
37 L.R.A.N.S. 101]; *Harris v. Board of Supervisors*, 105 Ill. 445, 451 [44 Am.Rep. 808].)”

1 statute, provide for the season when and the conditions under which the different
2 species of fish may be taken. (Emphasis added).

3 As the *Quinn* court found, the term ‘public lands’ as used in Article I, Section 25 does *not*
4 extend to man-made aqueducts or bridges *40 miles* from the inland streams (*Quinn*, supra at p.
5 486), rather ‘public lands’ means the inland streams like those making up Calaveras Reservoir.
6 *Quinn* pointed out that 25 Art. I was passed because due to “vigorous development of
7 California's natural resources by individuals and large corporations, many streams were closed to
8 the public and trespass notices warning the public not to fish were displayed to an alarming
9 extent.” (*Id.* at p. 485).

10 Indeed Calaveras Reservoir is a perfect example of that “vigorous development”
11 mentioned in the 1910 ballot proposition and reiterated in *Quinn*. Calaveras Reservoir was built
12 by Respondents’ predecessor owners, Spring Valley Water Company, which was “one of the
13 most powerful private monopolies in the state, Spring Valley was controlled by, and used largely
14 for the benefit of, the local land barons and financiers who authorized the development of a wide
15 variety of often-destructive hydrologic projects.”¹⁰

16 Interestingly *Quinn* was disapproved of for their ‘restrictive interpretation’ of the phrase
17 ‘public lands’: “To the extent that language in *Quinn* suggests a more restrictive interpretation of
18 the words ‘public lands’ than that given here, we disapprove it.” *State of Calif. v. San Luis*
19 *Obispo Sportsman's Assn*, 22 Cal.3d 440, 448 n.6 (Cal. 1978)

20 California Water Code (“WAT”) Section 13050(e) defines “Waters of the state” as “any
21 surface water or groundwater, including saline waters, within the boundaries of the state.” The
22 City admits that Calaveras Reservoir is within the boundaries of the State of California and
23 contains surface water or groundwater,¹¹ and thereby admits that Calaveras Reservoir is a “water
24 of the State”.

25
26 ¹⁰ https://www.foundsf.org/index.php?title=Spring_Valley_Water_Company

27 ¹¹ See Plaintiff’s Trial Exhibit “A” (Admission 15).
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1 Additionally, Calaveras Reservoir and its surrounding lands are “within the State” as that
2 phrase is used in the second clause of 25 Art. I. The second clause provides in relevant part that
3 “no law shall ever be passed making it a crime for the people to enter upon the public lands
4 within this State...in any water containing fish that have been planted...”¹²

5
6 **B. Calaveras Reservoir is Navigable Under the Controlling Mack Test.**

7 The California Constitution Article X, section 4 provides:

8 “No individual, partnership, or corporation, claiming or possessing the
9 frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in
10 this State, shall be permitted to exclude the right of way to such water whenever it
11 is required for any public purpose, nor to destroy or obstruct the free navigation of
12 such water; and the Legislature shall enact such laws as will give the most liberal
13 construction to this provision, so that access to the navigable waters of this State
14 shall be always attainable for the people thereof.”

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¹² See Plaintiff’s Trial Exhibit “D” (June 28th 1934 article in Oakland Tribune) “Black bass were
seined out of a pool in Niles Canyon and placed in to Calaveras Reservoir.”

See also http://www.sonic.net/~sfbayjv/pdfs/Steelhead_Rescue_2-26-08.pdf
“STEELHEAD TROUT GET ANNUAL HELPING HAND UP ALAMEDA CREEK
FOR IMMEDIATE RELEASE. February 26, 2008 .CONTACT: Jeff Miller (510) 499-9185.
Alameda Creek Alliance
Until fish passage projects are completed, fisheries biologists and volunteers have been given
annual permits by the California Department of Fish and Game and the federal agency National
Marine Fisheries Service to move blocked or stranded fish from the Alameda Creek flood control
channel to suitable habitat upstream, and to track them with radio transmitters to learn more
about their migration and habitat needs. The Alameda County Water District (ACWD) and
Alameda County Flood Control District are moving forward with four fish passage projects in
the lower creek, including a fish ladder that will allow fish to bypass the BART weir and middle
ACWD rubber dam, removing ACWD’s lower rubber dam, and installing fish screens at several
water diversions.”

See also https://sfplanning.s3.amazonaws.com/sfmea/2005.0161E_Vol_6.pdf
p 4.5-39, “Steelhead/Rainbow Trout Regulatory Status. The DEIR states that “the resident
rainbow trout that occur in the watershed upstream of the BART weir are not designated as a
listed species nor proposed for listing.” However, NMFS has proposed listing these fish as part
of the CCC steelhead population once adult steelhead have access to Alameda Creek above the
BART weir, under the similarity of appearance provision (71 FR 834; January 5, 2006). In
addition, adult steelhead that are moved annually upstream of the BART weir under a relocation
and monitoring program permitted by NMFS and CDFG are listed CCC steelhead trout.”

See also https://sfplanning.s3.amazonaws.com/sfmea/2005.0161E_Vol_5.pdf
“Fish relocated above the dam.”

1 The term “navigable” in California is predicated on the State test of navigability (the
2 *Mack* test),¹³ and not the federal test urged by the City. The federal navigability test “is no longer
3 the rule in this state.” *People ex Rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1045 (Cal. Ct. App.
4 1971). The *Mack* test says: “Members of the public have the right to navigate and to exercise the
5 incidents of navigation in a lawful manner at any point below high water mark on waters of this
6 state which are capable of being navigated by oar or motor-propelled small craft.” *People ex Rel.*
7 *Baker v. Mack*, supra at p. 1050.

8 “In resolving these issues, the state policy of unimpeded public use of navigable waters,
9 expressed in our Constitution and statutes, must be considered.” *Hitchings v. Del Rio Woods*
10 *Recreation Park Dist*, 55 Cal.App.3d 560, 569 (Cal. Ct. App. 1976). [Citing *People ex rel. Baker*
11 *v. Mack*, supra. at p. 1045.¹⁴

12 The Calaveras Reservoir is “a 4-mile-long reservoir that reaches 200 feet deep...that
13 holds almost 97,000 acre-feet of water, or about 31 billion gallons”¹⁵ Such a body of water is
14 undisputedly “navigable” under the *Mack* test. In fact, the City admits that “boats are used on
15 the reservoir”¹⁶ thereby admitting that the reservoir is navigable in fact.¹⁷

16 The City improperly relies on *Golden Feather Community Assn. v. Thermalito Irrigation*
17 *Dist.* (1989) 209 Cal.App.3d 1276, 1283 [internal punctuation removed] for their proposition that
18 “The public trust doctrine does ‘not extend to nonnavigable streams to the extent they do not
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20 ¹³ Article X, Sec. 4 was added June 8, 1976, by Prop. 14. Res. Ch. 5, (five years after the *Mack*
21 test was established).

22 ¹⁴ “The historical background of the legal definitions of navigability has been explored elsewhere
23 and need not be repeated here. (See *The Daniel Ball v. United States* supra, 77 U.S. at p. 563 [19
24 L.Ed. at p. 1001]; *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1045 [97 Cal.Rptr. 448].)”
Hitchings v. Del Rio Woods Recreation Park Dist, 55 Cal.App.3d 560, 566 (Cal. Ct. App. 1976)

25 ¹⁵ <https://www.eenews.net/stories/1060053463>

26 ¹⁶ See Plaintiff’s Trial Exhibit “A” (Admission 3) “boats are used in the reservoir”.

27 ¹⁷ “[citation] [B]asing a finding of navigability on evidence that ‘boats and barges did at times, at
28 certain seasons of the year, pass up and down’ the stream (*italics added*)” *Hitchings v. Del Rio*
Woods Recreation Park Dist, 55 Cal.App.3d 560, 570 (Cal. Ct. App. 1976).

1 affect navigable waters.’ (*Id.* at p. 1284.) And there is no ‘recognized public trust interest’ where
2 the reservoir is an ‘artificial, man-made body of water.’ (*Id.* at p. 1285-1286.)” This assertion is
3 categorically false for at least three reasons. First, Dummer is not concerned with the streams, so
4 the navigability of them is insignificant.

5 Secondly, “plaintiff as a member of the public has a constitutional right to navigate the
6 [artificial] lake in his boat.”¹⁸ *Pacific Gas Electric Co. v. Superior Court*, 145 Cal.App.3d 253,
7 258 (Cal. Ct. App. 1983).

8 Thirdly, and most importantly, the City failed to acknowledge a crucial aspect of the
9 *Golden Feather* case that doesn’t exist here; there “The parties...agreed that the case does not
10 involve a navigable waterway.” *Golden Feather Community Assn. supra* at p. 1281 n.2.

11 In *Golden Feather*, the court noted that artificial waters can be navigable under
12 California’s small craft (*Mack*) test, since “a waterway need only be usable for pleasure boating
13 to be considered navigable” for the purposes of public access:

14 “In their letters to the court following publication of our original opinion,
15 the Attorney General's Office and the State Water Resources Control Board point
16 out that a waterway need only be usable for pleasure boating to be considered
17 navigable for purposes of the public trust doctrine (*id.*, at p. 435, fn. 17), and they
18 assert that it is highly unlikely that the reservoir behind Concow Dam is not
19 navigable in this sense. Nevertheless, the question of navigability is a factual
20 question. (*Bohn v. Albertson* (1951) 107 Cal.App.2d 738, 742 [238 P.2d 128].)
21 The parties to this litigation agreed that the case does not involve a navigable
22 waterway. Naturally, such a concession binds only the parties to this litigation and
23 those in privity with them. But in resolving the dispute between the parties we are
24 not free to disregard their concessions.” *Golden Feather Community Assn. v.*
25 *Thermalito Irrigation Dist.*, 209 Cal.App.3d 1276, 1281 n.2 (Cal. Ct. App. 1989).

26
27 Considering that it’s undisputed that Calaveras Reservoir is navigable in fact under the
28 California *Mack* test (“boats are used on the reservoir”), it’s clear that the City is violating
Article X, Sec. 4 of the Cal. Const. by obstructing the free navigation thereof.

27 ¹⁸ *Pacific Gas Electric Co. v. Superior Court* involved Lake Shasta, the State’s largest man-
28 made lake, an artificial reservoir like Calaveras Reservoir. “Shasta Lake is man-made” *Osgood v.*
County of Shasta, 50 Cal.App.3d 586, 589 (Cal. Ct. App. 1975)

1 The second clause of Art. X, Sec. 4 requires this Court to construe FGC § 5943 (and
2 other statutes such as Civil Code § 3479) most liberally in favor of Dummer “so that access to
3 the navigable waters of this State shall be always attainable for the people thereof.”

4 **C. Calaveras Reservoir Contains Naturally Occurring Migratory Fish and Must be**
5 **Opened For Fishing and Recreation.**

6 It’s well known and undisputed that Calaveras Dam impounds waters from tributaries
7 containing naturally occurring migratory fish.¹⁹ Because Calaveras Dam impounds waters
8 “naturally frequented by migratory fish”, FGC § 5943 undoubtedly applies to Calaveras
9 Reservoir.²⁰ “Section 5943 requires that a reservoir which results from the damming of waters
10 naturally frequented by fish be opened for fishing.” *State of Calif. v. San Luis Obispo*
11 *Sportsman's Assn, supra* at p. 450.

12 FGC § 5943(a) provides: “(a) The owner of a dam shall accord to the public for the
13 purpose of fishing, the right of access to the waters impounded by the dam during the open
14 season for the taking of fish in the stream or river, subject to the regulations of the commission.”

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16 ¹⁹ See Plaintiff’s Trial Exhibit “A” (Admission 2) *Admitted* that before construction of the 1913
Dam, Alameda Creek and the Arroyo-Hondo, contained naturally occurring migratory fish.

17 See also Plaintiff’s Trial Exhibit “C”, Pg. 6, line 16 “native fish species” and Pg. 15, line 20.
18 “habitat for those species (including fishing of the threatened Steelhead)”

19 See also <https://commissions.sfplanning.org/cpcpackets/2005.0161E.pdf>
20 The Environmental Impact Report (“EIR”) for the Calaveras Dam Replacement Project provides:
21 “Calaveras Reservoir supports a mixture of native stream fishes and introduced species. The
22 native fishes include species such as Sacramento sucker, rainbow trout, and roach, which are
23 capable of inhabiting non-flowing habitats but require flowing streams for part of their life
24 history, in particular for reproduction. These species use tributaries, primarily Arroyo Hondo, for
25 spawning and early rearing.” [Final EIR / January 27, 2011 [page] 4.5-35 2005.0161E /
26 Calaveras Dam Replacement Project.]

24 ²⁰ “It is undisputed that Whale Rock Reservoir impounds the watercourse known as “Old Creek”
25 and its tributaries, the waters of which were naturally frequented by migratory fish. Section 5943
26 is therefore applicable to Whale Rock Reservoir. Thus, the city and the state as statutorily
27 defined owners of the reservoir (Fish G. Code, § 5900, subd. (c)), acting through the Whale Rock
28 Commission, have a duty under section 5943 to accord access to Whale Rock Reservoir for
public recreational fishing.” *State of Calif. v. San Luis Obispo Sportsman's Assn*, 22 Cal.3d 440,
449 (Cal. 1978)

1 FGC § 5943 was enacted in 1957, yet for 64 years the City has avoided compliance.²¹

2 Fishing (recreation) is a promoted “multiple use” of water “(a) ‘Multiple use’ includes ...
3 recreational uses.” (Cal. Health and Saf. Code § 115835). It is the policy of this State to use
4 Calaveras Reservoir for multiple uses, including fishing. “(a) It is hereby declared to be the
5 policy of this state that multiple use should be made of all public water within the state, to the
6 extent that multiple use is consistent with public health and public safety.” (Cal. Health and Saf.
7 Code § 115825.)

8 The water in Calaveras Reservoir must be put to beneficial use *to the maximum extent*
9 *possible* under Cal. Const. Art. X, § 2.²² “The use of water for recreation and preservation and

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11 ²¹ The SFPUC and Calaveras Reservoir have a history of failing to comply with the Fish and
12 Game Code. https://sfplanning.s3.amazonaws.com/sfmea/2005.0161E_Vol_6.pdf
13 “CDFG submitted comments on the PEIR on November 22, 2005, stating that “at this time, both
14 the Alameda Creek Diversion Dam and Calaveras Reservoir are out of compliance with Fish and
15 Game Code 5937 which requires dam owners to release enough water to keep downstream fish
16 populations in good condition,” and that the SFPUC “will need to assess adequate flows for
17 anadromous steelhead trout and will need to renegotiate with DFG such that adequate flows are
18 released to comply with Fish and Game Code 5937.” The EIR should discuss exactly how the
19 proposed operations of the ACDD and Calaveras Dam will come into compliance with §5937.”

20 “The fact that the SFPUC has failed to abide by this agreement for over 12 years does not allow
21 for promised future compliance to be packaged as mitigation for project impacts.”
22 “Since the SFPUC has not complied with this MOU for 12 years there is no reasonable
23 expectation that alleged future compliance can be offered as a feasible “mitigation.””

24 ²² Article X Section 2
25 “It is hereby declared that because of the conditions prevailing in this State the general welfare
26 requires that the water resources of the State be put to beneficial use to the fullest extent of which
27 they are capable, and that the waste or unreasonable use or unreasonable method of use of water
28 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. Riparian rights in a
stream or water course attach to, but to no more than so much of the flow thereof as may be
required or used consistently with this section, for the purposes for which such lands are, or may
be made adaptable, in view of such reasonable and beneficial uses; provided, however, that
nothing herein contained shall be construed as depriving any riparian owner of the reasonable
use of water of the stream to which the owner’s land is riparian under reasonable methods of
diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully

1 enhancement of fish and wildlife resources is a beneficial use of water.” (WAT § 1243(a)). “The
2 Legislature further declares that it is the policy of this state to encourage conjunctive use of
3 surface water and groundwater supplies and to make surface water available for other beneficial
4 uses (emphasis added).” (WAT § 1011.5(a)).

5 Because the water from Calaveras is fully purified, fishing is “not...incompatible with
6 [the] primary purpose” of Calaveras Reservoir as a domestic supply reservoir. (*State of*
7 *California v. San Luis Obispo Sportsman's Assn. supra.* at p. 448). By refusing to allow fishing
8 at Calaveras Reservoir, Respondents are violating Cal. Const. Art. X, § 2, and State policy under
9 WAT § 1011.5(a). (“Conjunctive use”).

10 As part of the Calaveras Dam replacement project, the City was required to, and did,
11 apply for permits to construct a new dam at the Calaveras site. In compliance with WAT § 1396,
12 1397, and 1398, the City was required, upon completion of the dam, to promptly put the
13 reservoir to multiple beneficial uses. “The construction of the work thereafter and the utilization
14 of water for beneficial purposes shall be prosecuted with due diligence in accordance with this
15 division, the terms of the permit, and the rules and regulations of the board.” (WAT § 1396).

16 The Public Access Permit Streamlining Act aids in ensuring prompt public access at the
17 reservoir.²³

18 The City’s failure to act promptly in putting the reservoir to multiple beneficial uses is
19 grounds for revocation of their permit under WAT § 1410(a). “(a) There shall be cause for
20 revocation of a permit if the work is not commenced, prosecuted with due diligence, and
21 completed or the water applied to beneficial use as contemplated in the permit and in accordance
22 with this division and the rules and regulations of the board.”

23
24 entitled. This section shall be self-executing, and the Legislature may also enact laws in the
25 furtherance of the policy in this section contained.

26 ²³ “Within 30 calendar days of receipt of an application for a permit or petition for permit
27 modification pursuant to Section 116525 or 116550, Health and Safety Code, the State Board
28 shall inform the applicant in writing that it is either complete and accepted for filing or that it is
deficient and what specific information or documentation is required to complete the
application.” Cal. Code Regs. tit. 17 § 7626

1 The City simply cannot be allowed to delay putting the reservoir to multiple beneficial
2 uses any longer, it must be opened to the public now!

3
4 **D. Contrary to The City’s Assertion, The Health and Safety Code Does Not Prevent**
5 **Them From Opening the Reservoir, to the Contrary it Requires Respondents to**
6 **Act.**

7 Respondents “are under a duty to provide access to the public for fishing under article I,
8 section 25 of the California Constitution and under section 5943 of the Fish and Game Code.
9 They are also under a duty to protect the purity of the water supplied from the reservoir to
10 domestic users. [HSC 117045].”²⁴ *State of Calif. v. San Luis Obispo Sportsman's Assn*, at p. 452.

11 The City claims that HSC § 117045 prevents it from opening the reservoir until it
12 establishes a “fishing program” and performs environmental review, however sec. 117045 places
13 no such demands on the City. Section 117045 only requires the City to ensure that fishing will
14 not harm the purity of the water, and apply for a ministerial permit.

15 It should be noted that HSC § 117045 (the section relied on by the City) may not even
16 apply to Calaveras Reservoir, see HSC § 117075: “[Section 117045] shall not apply to reservoirs
17 used for domestic or drinking water purposes that are open to fishing or recreational uses on
18 September 11, 1957, or that have been open to fishing or recreational uses prior to that date.”²⁵

19 As *State of Calif. v. San Luis Obispo Sportsman's Assn*, said, the City cannot avoid
20 compliance with FGC § 5943 by hiding behind HSC § 117045. “On the contrary, the statutes are
21 compatible and congruous. Section 5943 requires that a reservoir which results from the

22 ²⁴ The reservoir in *San Luis Obispo* is nearly identical to the circumstances of Calaveras
23 Reservoir, it contains naturally occurring migratory fish, it is navigable, it sits on public lands,
24 and it provides drinking water.

25 ²⁵ See Plaintiff’s Trial Exhibit “E” An archived article from the Los Angeles Evening Citizens
26 News (Hollywood, California) February 10th, 1955 indicating that fishing was allowed at
27 Calaveras Reservoir prior to 1957.

28 "A year-long season also was authorized, with the summer trout limit in effect, for Keswick,
Isabella, Dallas-Werner, Pine Flat, Melones lakes, Calaveras Reservoir and Phoenix and Bass
lakes.”

See also Plaintiff’s Trial Exhibit “D” (June 28th 1934 article in Oakland Tribune)
“City officials have been allowed to fish in the Calaveras Reservoir.”

1 damming of waters naturally frequented by fish be opened for fishing. Section [HSC 117040]
2 makes it clear that an owner or operator of a domestic water supply reservoir has the power to
3 open it to public fishing subject to the restrictions set forth in other provisions of the Health and
4 Safety Code.” *State of Calif. v. San Luis Obispo Sportsman's Assn*, at p. 450.

5 The City is required to and must open the reservoir as soon as possible for fishing and
6 recreation. The City can open the reservoir immediately in its “natural condition” without any
7 fishing program.²⁶

8 **E. California Law Not Only Allows, But Promotes the City Opening the Reservoir**
9 **in its Natural Condition.**

10 The Government Code sections 831.2-831.7 were enacted specifically “to promote public
11 access and encourage public agencies to keep public lands open for recreation.”²⁷ “Public
12 entities have absolute immunity²⁸ for injuries caused by unimproved land in a natural condition,
13 including tide and submerged lands and navigable waters, and injuries on unpaved roads or trails
14 used for recreation.”²⁹

15 FGC § 5944, provides: “The owner of a dam is not liable in damages to any person
16 exercising the right to fish, who suffers any injury through coming in contact with, or tampering
17 with, any of the property of the owner of the dam.”

18 CCP § 846 provides: “An owner of any estate or any other interest in real property,
19 whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or
20 use by others for any recreational purpose or to give any warning of hazardous conditions, uses

21 ²⁶ Vault and pit privies may be used in remote areas where recreational use is limited. The toilets
22 should be set back at least 100 feet from the high water level of the reservoir. When the pit is
23 filled within 18 inches of the floor slab, empty or move the privy and adequately cover the pit.
[https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/dwdocuments/
24 reservoirguidelines-draft-11-15-00.pdf](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/dwdocuments/reservoirguidelines-draft-11-15-00.pdf)

25 ²⁷ CAL. GOV’T CODE §§ 831.2–.7

26 ²⁸ CAL. GOV’T CODE §§ 831.2, 831.4, 831.6; *Armenio v. County of San Mateo*, 28 Cal. App.
4th 413, 416 (1994).

27 ²⁹ [https://www.portsanluis.com/DocumentCenter/View/2947/State-Lands-Commission---Draft-
28 Public-Access-Guide](https://www.portsanluis.com/DocumentCenter/View/2947/State-Lands-Commission---Draft-Public-Access-Guide)

1 of, structures, or activities on those premises to persons entering for a recreational purpose,
2 except as provided in this section.” Interestingly, section 846 does not shield landowners from
3 liability when they obstruct or impede public use of navigable waters.³⁰

4 CCP § 831.2 provides: “Neither a public entity nor a public employee is liable for an
5 injury caused by a natural condition of any unimproved public property, including but not
6 limited to any natural condition of any lake, stream, bay, river or beach.”

7 CCP § 831.2(a) provides: “Public beaches shall be deemed to be in a natural condition
8 and unimproved notwithstanding the provision or absence of public safety services such as
9 lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup
10 services, or signs. The provisions of this section shall apply only to natural conditions of public
11 property and shall not limit any liability or immunity that may otherwise exist pursuant to this
12 division.”

13 CCP § 831.4 protects public agencies from liability associated with trails and unpaved
14 roads.

15 **III. CONCLUSION**

16 California law is clear. The Constitution of this State requires this Court to construe all
17 of the foregoing most liberally in favor of Dummer and against blocking public access. After
18 more than 100 years of thumbing their nose at the law, it’s time to act. “The court cannot ignore
19 the ongoing violation of a statutory mandate on the ground that the violation will eventually be
20 halted by untimely administrative action.” *California Trout, Inc. v. Superior Court*, 218
21 Cal.App.3d 187, 203 (Cal. Ct. App. 1990).

22
23 Date: August 8, 2021

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25 _____
Timothy J. Dummer/Petitioner

26
27 ³⁰ Pac. Gas & Elec., 145 Cal. App. 3d 253, 259 (Holding limited by *Hubbard v. Brown*, 50 Cal.
28 3d 189, 196-97 (1990); see also CAL. CIV. CODE § 3479 (unlawful obstruction of free passage
or use of navigable waterway is a nuisance).