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OWENS VALLEY COMMITTEE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF INYO

SIERRA CLUB, and OWENS VALLEY	)	Case No.: SICV CV 08-46888
COMMITTEE)	
)	
Plaintiffs/Petitioners	)	PLAINTIFFS' MEMORANDUM OF
	)	POINTS AND AUTHORITIES IN
v.	)	OPPOSITION TO DEFENDANTS'
	)	MOTION FOR SUMMARY
CITY OF LOS ANGELES; LOS ANGELES	)	ADJUDICATION
DEPARTMENT OF WATER AND)	
POWER; BOARD OF COMMISSIONERS)	
OF THE DEPARTMENT OF WATER AND)	
POWER; COUNTY OF INYO and DOES 1	)	Date: TBD
- 50	)	Time: TBD
	)	Dept.: TBD
<u>Defendants/Respondents</u>)	
	)	Judge: The Hon. Lee Cooper
CALIFORNIA DEPARTMENT OF FISH)	
AND GAME; and CALIFORNIA STATE)	
LANDS COMMISSION and DOES 51-100)	
)	
<u>Real Parties in Interest.</u>)	
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I.

INTRODUCTION

Plaintiffs/Petitioners’ Sierra Club and Owens Valley Committee oppose Defendants’ Motion for Summary Adjudication on the grounds that the April 28, 2008, Lower Owens River Project Monitoring Adaptive Management Reporting Plan fails to comply with the requirements of the 1997 Memorandum of Understanding between the City of Los Angeles Department of Water and Power, County of Inyo, California Department of Fish and Game, California State Lands Commission, Sierra Club and the Owens Valley Committee sets forth the criteria for the Adaptive Management Plan.

II.

STATEMENT OF FACTS

Plaintiffs adopt and incorporate by reference the Statement of Facts in Plaintiffs’ Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Adjudication (“Plaintiffs’ Memo in Support of MSA”).

III.

LEGAL ARGUMENT

A. The City and County are Not Entitled to Summary Adjudication with Respect to Plaintiffs’ First Cause of Action

The City and County did not respond in full to Paragraphs 73, 74 and 75, which are part of the First Cause of Action of the Complaint. Paragraph 73 of the complaint alleges:

The adaptive management protocols set forth in the Plan with respect to terrestrial habitat in all four areas of LORP and warm water fishery (Riverine-Riparian area) do not ensure successful implementation and/or the attainment of the project goals by the end of the fifteen-year period in which monitoring, and reporting and adaptive management are required.

Paragraph 74 states:

These LORP goals are stated in the MOU:

- a. the enhancement of several environmental features along the river.
- b. the establishment of a healthy, functioning Lower Owens River riverine-riparian system, for the benefit of biodiversity and Threatened and Endangered Species.

1 c. the establishment and maintenance of diverse riverine, riparian, and
2 wetland habitats in a healthy ecological condition.

3 d. the creation and establishment of diverse natural habitats consistent with
4 the needs of habitat indicator species. (Declaration of Joseph Brajevich in
5 Support of Motion for Summary Adjudication, Exhibit A (1997
6 Memorandum of Understanding (“MOU”) § II, B (emphasis added)).)

7 Paragraph 75 alleges:

8 With respect to the LORP objective of establishing diverse natural habitats
9 consistent with the needs of the habitat indicator species, the Plan protocol
10 relating to terrestrial habitat states that if the (terrestrial) habitat for the
11 majority of indicator species has “increased in quantity and quality
12 compared to baseline conditions” continued monitoring will be performed.
13 (Plan at 3-36.) *Adaptive management is only required if at the end of
14 some unspecified period “habitat for the majority of indicator species has
15 decreased in quantity and quality compared to baseline conditions.” (Id.)
16 This adaptive management protocol applies to all four areas of LORP. No
17 adaptive management is required if there is maintenance of baseline
18 conditions.* Maintenance of baseline conditions for habitat indicator
19 species does not ensure realization of the project goals, set out in
20 paragraphs 64-67, insofar as it does not ensure the creation and
21 establishment of new habitat relative to baseline conditions. To perform
22 adaptive management only when the habitat for the majority of indicator
23 species in each LORP component has “decreased in quantity and quality
24 compared to baseline conditions,” does not ensure that there will be
25 creation and establishment of diverse natural habitats consistent with the
26 needs of habitat indicator species” in each component area of the LORP,
27 as required by the MOU. (Emphasis added.)

28 In Plaintiffs’ “Memorandum in Support of Motion for Summary Judgment, OVC and
Sierra Club argue that the adaptive management protocol¹ for terrestrial habitat species
violates specific provisions of the MOU requiring that the LORP Ecosystem Management
Plan ensure the success of the Project. (See Plaintiffs’ Memo in Support of MSA at pp. 20-
23.) Plaintiffs’ argument in this regard is *not* addressed to their allegations concerning that
aspect of the protocol that appears to limit adaptive management to only 51% (the majority) of
the habitat indicator species. Plaintiffs’ argument addresses instead that part of the protocol

¹ The terrestrial habitat protocol states that adaptive management will take place in each of
three LORP areas only if the habitat for a majority of the indicator species decreases in
quantity and quality at unspecified monitoring intervals. (Plan at Table 3.12. A copy of the
Plan is attached as Exhibit B to the Declaration of Joseph Brajevich in Support of Defendants’
Motion for Summary Adjudication.)

1 that triggers adaptive management only upon a *decrease of terrestrial relative to baseline*
2 *habitat* and is based upon their allegations set forth in paragraphs 73, 74, 75 of the First Cause
3 of Action..

4 The City and the County’s Motion for Summary Adjudication focuses solely on
5 Plaintiffs’ allegations with respect to management for the *majority* of habitat indicator species,
6 management of Threatened & Endangered species (as indicator species), and the adaptive
7 management protocol for a warm water fishery. (County’s and City’s Memorandum of Points
8 and Authorities in Support of Motion for Summary Adjudication (henceforth Defendants’
9 “MSA”), at 9-19.)

10 Summary adjudication, with respect to Plaintiffs’ First Cause of Action, however,
11 cannot be granted, where it does not address *all* of plaintiffs’ claims within that Cause of
12 Action. “A motion for summary adjudication...shall be granted only if it completely disposes
13 of a cause of action. – CCP § 437(f)(1).” (Defendants’ “MSA” at 3; *see also* Defendants’
14 MSA at 4, lines 22-24; *see also R.J. Lad and Assocs. Construction Co. v. Kiewit-Shea* (1999),
15 69 Cal.App.4th 416 (summary adjudication granted if the adjudication completely disposes of
16 a causes of action, or an issue of duty.); *see* Defendants’ MSA at 4, lines 3-7.)

17 Since Defendants’ MSA fails to address Plaintiffs’ allegation in the First Cause of
18 Action that establishing an adaptive management protocol for three areas of LORP (Riverine-
19 Riparian, Blackrock, and the Delta) that is triggered *only* upon a decrease of quality or
20 quantity habitat at unspecified monitoring periods is in violation of requirements of the MOU,
21 Defendants’ request for summary adjudication on Plaintiffs’ First Cause of Action cannot be
22 granted.

23 **B. Defendants Are Not Entitled to Summary Adjudication as to Plaintiffs’ Second**
24 **Cause of Action**

25 Plaintiffs’ Second Cause of Action claims, *inter alia*, that:

26 The LORP Plan does not appear to have been prepared in accord with
27 the procedures set forth in the Action Plan and Concept Document, in
that:

28 a. The LORP Plan does not contain predictions of maximum and
minimum extent of riparian vegetation types (taking into account

1 minimum and maximum landform elevations and maximum and
2 minimum stream stages). (Action Plan Work Program, II 4, 5.)

3 b. The LORP Plan does not predict distribution of wetland riparian
4 types in the LORP Planning Area as a time-series. (Action Plan Work
5 Program, III A 7.) (Complaint, ¶84(a) and (b)).

6 Plaintiffs submit to the Court a declaration of Professor Duncan Patten, an expert on
7 adaptive management, who concludes in his Declaration that the LORP Plan “does not
8 contain actual predictions of maximum and minimum extent of riparian types by river reach.”
9 (Declaration of Duncan Patten (“Patten Decl.”) at 6, lines 22-23.) Professor Patten also
10 concludes:

11 The LORP Plan does not predict distribution of wetland riparian types
12 in the LORP Planning Area as a time series, as required in the Action
13 Work Plan Program, III, A.7.” (Patten Decl. at 7, lines 12-13.)

14 Defendants’ attempt to refute Plaintiffs’ allegations in the Second Cause of Action by
15 quoting numerous passages scattered throughout the LORP Monitoring, Adaptive
16 Management, and Reporting Plan. (*See* Defendants’ MSA at pp 20-31.)

17 The City’s and County’s “interpretation” of the LORP Plan differs from Plaintiffs’
18 experts’ view. Thus, there exists contraverted issues of fact, relating to the interpretation of
19 the LORP Plan in connection with Plaintiffs’ allegations that the LORP Plan is not
20 consistent with the Action Plan (which is incorporated by reference into the MOU as a
21 document binding on the signatories).²

22 Defendants bear the burden of persuasion that there is no triable issue of material fact.
23 A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to
24 find the underlying fact in favor of the party opposing the motion. (*Aquifer v. Atlantic*
25 *Richfield Co.* (2001) 25 Cal.App.4th 826, 850; *see also* Plaintiffs’ MSA at 4-5.)

26 Professor Patten is well-qualified to deliver these views. (Patten Decl., ¶ 2.) He and a
27 colleague (Robert Twiss) have prepared studies on previous versions of the LORP
28 Monitoring, Adaptive Management, and Reporting Plan. (*See* Plaintiffs’ Memo in Support

² Professor Patten further interprets the Action Plan requirements at issue here in Paragraphs 18, 19, and 20 of his Declaration. These paragraphs demonstrate another factual dispute concerning the meaning of the Action Plan requirements.

1 of MSA at p. 21-22.) Dr. Patten has been commenting upon and reviewing the various
2 drafts of Plan since 2006. (*Id.*)

3 Plaintiffs have sufficiently demonstrated that, with respect to the Second Cause of
4 Action, triable issues of material fact exists relating to LORP Plan compliance with the
5 Action Plan, as required by the MOU. (MOU II A). For that reason, Defendants are not
6 entitled to summary adjudication on plaintiffs' Second Cause of Action.

7 **B. Summary Adjudication on Plaintiffs' Third Cause of Action Cannot be Granted**

8 Plaintiffs' Third Cause of Action alleges that the LORP Plan does not include provision
9 for consultation with the Standing Committee by DFG with respect to the "amount, duration,
10 and timing of flows necessary to achieve the goals for the system under varying hydrological
11 scenarios." (Complaint at ¶¶ 85-88; *see also* Brajevich Decl., Exh. A (MOU II (1bii)).) With
12 respect to this Cause of Action, the City and the County make two arguments. Although they
13 admit that Figure "3.1 of the Plan shows the Advisory Committee (of which DFG is a
14 member) providing advise to the MOU consultants through the Scientific Team and not to the
15 Standing Committee, they also point out that the Plan, page 3-5 states:

16 The MOU *alludes* to the Standing Committee to determine annual
17 seasonal habitat flows in consultation with the Department of Fish and
18 Game..." (Emphasis added.)

19 Secondly they promise:

20 ...the LORP Post Implementation Agreement will include procedures
21 for the consultation with the Dept. of Fish and Game regarding the
22 setting of the amount of seasonal habitat flows in compliance with the
23 referenced section of the MOU. (Defendants' MSA at 32.)

24 Plaintiffs' Third Cause of Action alleges that since the MOU requires that the "*LORP*
25 *Plan will provide* that the four physical features of the LORP will be implemented and
26 managed as set forth below," (MOU, §1C (emphasis added)), *it is the LORP Plan* that must
27 describe the scope of the consultation and prescribe the procedures of the consultation.

28 Defendants' assertion that in any post-implementation agreement (which, through first
appearing in draft form in the 2002 LORP DEIR, has still to date *not* been agreed upon) the
matter of DFG consultation will be spelled out does not, *ipso facto*, address Plaintiffs'

1 allegation that the MOU requires that the LORP Plan *will provide* for the specifics of post-
2 implementation management, which includes consultation with DFG by the Standing
3 Committee with respect to the amount, duration, and timing of seasonal habitat flows
4 necessary to achieve the goals for the system.

5 As for Defendants' claim that the LORP Plan meets the MOU requirement that it provide
6 for consultation as to the amount, duration, and timing of the seasonal habitat flows through
7 the quoted sentence "alluding" to the MOU requirement relating to consultation with DFG,
8 their claim is clearly belied in light of the unambiguous depiction, in Figure 3.1, of the Plan,
9 which shows DFG providing advice to the MOU consultant (ESI) through an Advisory
10 Committee composed of OVC, Sierra Club, State Lands, DFG, and the lessees (who are not
11 MOU signatories). (*See* MSA at 31.) Figure 3.1 unequivocally equates DFG's advisory role
12 with respect to the setting of the annual habitat flows with that of non-signatories to the MOU
13 (the lessees) and relegates DFG's consultation to providing advice to the post-implementation
14 consultant. The Plan clearly does not provide DFG direct access to the Standing Committee,
15 which is the deliberative body that makes final decisions as to the seasonal habitat flows.

16 Defendants fail to demonstrate that the Plan provides for DFG consultation with the
17 Standing Committee as to the timing, duration, and amount of the seasonal habitat flows. Nor
18 does Defendants' promise to include such consultation in their long promised post-
19 implementation agreement constitute compliance with the MOU requirement. These are
20 issues that this Court must address in the context of Plaintiffs' Motion for Summary
21 Adjudication. Therefore, Defendants are not entitled to summary adjudication on this cause
22 of action.

23
24 **C. Defendants Are Not Entitled To Summary Adjudication As To The Fifth Cause Of
Action.**

25 Plaintiffs' Fifth Cause of Action alleges that the LORP project approved in 2004
26 contained no provision for adaptive management through augmentation of the seasonal habitat
27 flows through the spill-gates. (Complaint ¶¶ 95-98.) The final LORP Plan contains an
28 adaptive management protocol relating to augmentation of the seasonal habitat flows when

1 conditions on the River so warrant. Plaintiffs claim that the project as approved in 2004 is not
2 consistent with the consultants' recommendations contained in the Plan in violation of the
3 MOU provision that requires the County and City to follow the recommendations of the
4 Consultant. (MOU II, 1.)

5 Defendants assert they are entitled to summary adjudication on this claim because the
6 "City is preparing an addendum to the FEIR which will be issued within the next thirty
7 days."³ (Defendants' MSA at 34.) The FEIR addendum to date has not been finalized.
8 Defendants further state that "with the preparation of the addendum to the FEIR the
9 referenced adaptive management measure as outlined by the MOU consultant will become
10 part of the project description, and plaintiffs'/petitioners' claim becomes moot." (Defendants'
11 MSA at 34.)

12 The mere *preparation* of an addendum, however, without some official action by the
13 County and City, does not change the 2004 LORP project description. (*See Santa Teresa*
14 *Citizen Action Group v. City of San Jose* (2003), 114 Cal.App.4th 689, 702. ("The decision-
15 making body shall consider the addendum, with the final EIR...prior to making a decision on
16 the project.")) The City and the County must take action through a formal decision to amend
17 the project description to include augmentation of the seasonal habitat flows as an adaptive
18 management modality. The preparation and approval of an addendum only provides the
19 environmental documentation required by CEQA in connection with a final decision.

20 Until Defendants approve an addendum and take formal action through a "decision",
21 Defendants are not entitled to summary adjudication on Plaintiffs' Fifth Cause of Action.

22 **V.**

23 **CONCLUSION**

24 For the foregoing reasons, Defendants are not entitled to summary adjudication as to any
25 of plaintiffs' Causes of Action and Plaintiffs respectfully request that Court deny the Motion
26 for Summary Adjudication in its entirety.
27

³ Defendants' Memorandum was signed on February 4, 2009.

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Dated: April 3, 2009

Respectfully submitted,

CALIFORNIA ENVIRONMENTAL LAW
PROJECT

By: _____

LAURENS H. SILVER
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LAW OFFICE OF DONALD B. MOONEY

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