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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 COMMITTEE)	Case No.: 05 379 69
)	
Plaintiffs/Petitioners)	COMPLAINT AND PETITION FOR
)	INJUNCTIVE RELIEF AND FOR
v.)	RELIEF BY WAY OF MANDAMUS;
)	AND COMPLAINT FOR
CITY OF LOS ANGELES; LOS ANGELES DEPARTMENT OF WATER AND POWER; BOARD OF COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER; COUNTY OF INYO and DOES 1 - 50)	DECLARATORY JUDGMENT
)	
_____ Defendants/Respondents _____)	
)	
CALIFORNIA DEPARTMENT OF FISH AND GAME; and CALIFORNIA STATE LANDS COMMISSION and DOES 51-100)	
)	
_____ Real Parties in Interest. _____)	

INTRODUCTION

1
2 1. Petitioners/Plaintiffs Sierra Club and Owens Valley Committee (“OVC”) bring this
3 action to enforce the terms of a Memorandum of Understanding (“MOU”), entered into by the
4 County of Inyo, the City of Los Angeles Department of Water and Power (“City” or “DWP”),
5 the Sierra Club, the Owens Valley Committee, the California Department of Fish and Game,
6 the State Lands Commission, and Carla Scheidlinger, and to enforce other commitments of
7 the City and County with respect to the implementation of LORP. The MOU requires the
8 City to undertake a number of obligations in mitigation for damages attributable to its ground-
9 water pumping project initiated in 1970. The principal mitigation feature of the MOU is the
10 Lower Owens River Project (“LORP”). This suit seeks an order from the Court requiring the
11 City and County to direct the preparation of a LORP Ecosystem Management Plan that
12 satisfies the City’s obligation to mitigate for previous environmental harm done in the Owens
13 Valley by successfully implementing the LORP through a LORP Ecosystem Management
14 Plan that is consistent with the MOU. This suit also seeks interim injunctive relief to curtail
15 the City’s ground-water pumping for export until such time as there is a LORP Ecosystem
16 Management Plan that meets the MOU’s requirements.

17 2. As the Court has previously ruled, the City has breached many promises and
18 obligations contained in the MOU. The City has missed all the deadlines in the MOU relating
19 to the LORP. It issued a draft Environmental Impact Report (“EIR”) for the LORP more than
20 two years late, only after this Court ordered it to do so. The City certified a Final EIR for the
21 LORP several years late (in July 2004), and then only under Court Order. The City failed to
22 put water in the river by June 2003, as required by the MOU and, although it has now put 40
23 cubic feet per second (“cfs”) flows into the Lower Owens River, it has not caused a final
24 LORP Ecosystem Management Plan to be produced that comports with the MOU. The MOU
25 contemplates that the LORP Plan must contain certain measures, address certain distinct
26 elements of the Project, through adaptive management to ensure prescribed goals of the
27 Project will be realized, and comport with procedures contained in the Action Plan. This has

1 not been done, and the promises made to Sierra Club and OVC in the MOU, with respect to
2 the LORP Plan, have not been honored.

3 3. As the City and County have failed to abide by their legal duties in connection
4 with directing the preparation of a legally adequate LORP Ecosystem Management Plan,
5 Plaintiffs seek a writ of mandamus and injunctive relief that requires the City and County to
6 comply with the MOU by directing the preparation of a LORP Ecosystem Management Plan
7 that meets the requirements of the MOU, as will be set forth in greater detail below.

8 **PARTIES**

9 4. Plaintiff/Petitioner Sierra Club is a California nonprofit membership organization
10 incorporated under the laws of the State of California in 1892. Currently, the Sierra Club has
11 approximately 500,000 members, approximately one-third of whom live in California. The
12 Sierra Club functions to educate and enlist people to protect and restore the natural and human
13 environment, to practice and promote responsible use of the earth's ecosystems and resources,
14 to explore, enjoy, and protect wild places, and to use all lawful means to achieve these
15 objectives. The Sierra Club participated as *amicus curiae* in litigation between Inyo County
16 and the City to require the City to complete an EIR for its groundwater-pumping project (see
17 *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185), and it is a party to the MOU.
18 The Sierra Club has been involved in litigation, either as an amicus or as a party, concerning
19 the effects of the City's augmented groundwater pumping program and its mitigation (the
20 LORP), since 1975.

21 5. Plaintiff/Petitioner Owens Valley Committee is a California nonprofit corporation.
22 The specific purposes for which the Owens Valley Committee is organized are to monitor and
23 oversee water management activities in the Owens Valley, to educate the public on local
24 environmental issues, and to exercise the rights and obligations as a signatory to the MOU,
25 executed to settle disputes related to preparation of an adequate EIR on the City's augmented
26 ground-water pumping project, initiated in the early 1970's in the Owens Valley. The Owens
27 Valley Committee participated as *amicus curiae* in *County of Inyo v. City of Los Angeles*, and
28 it is a party to the MOU.

1 6. Respondent City of Los Angeles is a municipal corporation under the laws of the
2 State of California. At all times relevant to this petition, except for a period of time in 2005-
3 2007 when this Court enjoined groundwater pumping for export, the City exported and
4 continues to export surface water and groundwater from the Owens Valley for use in the City.
5 The City was a defendant in *County of Inyo v. Los Angeles* and is a party to the MOU.

6 7. Respondent Los Angeles Department of Water and Power (“DWP”) is a political
7 subdivision of the City. Under the City’s charter, DWP manages and controls the City’s
8 assets in the Owens Valley. Defendant Board of Commissioners (“DWP Board”) governs
9 DWP. DWP was a defendant in *County of Inyo v. Los Angeles*; it is a party to the MOU, and
10 it is the lead agency under the California Environmental Quality Act (“CEQA”), Public
11 Resources Code, section 21000 *et seq.*, responsible for the preparation of the EIR for the
12 LORP, for carrying out the LORP Project, for directing and assisting the MOU consultants in
13 preparation of the LORP Plan, that meets the requirements of the MOU, and for implementing
14 LORP as a compensatory mitigation measure for damage done in the Owens Valley as a result
15 of its augmented groundwater pumping project.

16 8. Respondent County of Inyo is a political subdivision of the State of California and
17 a body corporate and politic exercising local government power. Inyo County is a
18 responsible agency under CEQA in connection with the Lower Owens River Project EIR and
19 is responsible for directing consultants in preparation of the LORP Plan, that meets the
20 requirements of the MOU as well as implementing (along with respondent City) some parts of
21 the project relating to monitoring and adaptive management. Inyo County was the plaintiff in
22 *County of Inyo v. Los Angeles* and is a party to the MOU.

23 9. Plaintiffs are unaware of the true names and identities of DOES 1 through 50 and
24 sue such unnamed Respondents by their fictitious names. Plaintiffs are informed and believe,
25 and thereon allege, that fictitiously named Defendants also are responsible for all acts and
26 omissions described in this Complaint and Petition. When the true identities and capacities of
27 Defendants have been determined, Plaintiffs will, with leave of Court if necessary, amend this
28 Complaint and Petition to include such identities and capacities.

1 groundwater pumping and water exports and to identify measures required to mitigate past and
2 future damage to the environment of Inyo County as a result of groundwater pumping. The
3 Agreement described the LORP as a mitigation measure and a feature of the augmented
4 groundwater-pumping project, and it committed the City and DWP to implement the LORP.

5 21. In connection with DWP's augmented groundwater pumping project and the Inyo-
6 Los Angeles Agreement, the City, DWP and the County together completed a third EIR in
7 October 1991 ("the 1991 EIR"). In the 1991 EIR, the City and DWP acknowledged that the
8 groundwater-pumping project had caused significant environmental damage in the Owens
9 Valley.

10 22. The 1991 EIR purported to address all water management practices and facilities
11 associated with DWP's second aqueduct, and projects and water management practices
12 identified in the Agreement.

13 **THE 1991 EIR INCLUDED THE LOWER OWENS RIVER**
14 **PROJECT AS A MITIGATION MEASURE FOR PAST**
15 **ENVIRONMENTAL DAMAGE**

16 23. The 1991 EIR described the LORP as a mitigation measure to compensate for
17 significant environmental impacts caused by the City's groundwater-pumping project between
18 1970 and 1990, and it set forth the nature of these impacts. The LORP would restore flows to
19 about 60 miles of the lower Owens (which has been partly dry since 1913 when the City
20 diverted the river into its first aqueduct), and it would restore wildlife habitat along the sixty-
21 mile riparian corridor, in the Owens Lake Delta, and in other wetland areas near or adjacent to
22 the river.

23 **IN OCTOBER 1991, THE CITY AND DWP COMMITTED TO**
24 **IMPLEMENT THE LORP TO COMPENSATE FOR THE**
25 **ENVIRONMENTAL DAMAGE THAT GROUNDWATER**
26 **PUMPING PROJECT CAUSED**

27 24. On October 15, 1991, the DWP Board passed a resolution in which it certified the
28 1991 EIR and issued findings required by CEQA. On October 18, 1991, the Los Angeles City
Council passed an identical resolution. In the resolutions, the City Council and DWP Board:

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- a. committed to implement the LORP;
- b. found that the LORP would mitigate significant environmental impacts caused by the City’s groundwater pumping project between 1970 and 1990, including impacts to flows and vegetation at certain springs, meadow and riparian vegetation on formerly irrigated lands, and wildlife species dependent upon destroyed or altered vegetation;
- c. found that, as mitigated, the project would no longer have a significant effect on the environment, under Public Resources Code section 21081(a); and
- d. adopted a mitigation “Monitoring Plan” to ensure that the mitigation is actually implemented, pursuant to Public Resources Code section 21081.6.

25. In October 1991, the City and DWP submitted the resolutions and the 1991 EIR to the Court of Appeal and moved for an order discharging the Court’s writ of mandate. Shortly thereafter, the Sierra Club, the Owens Valley Committee, the Department of Fish and Game, and the State Lands Commission, who were participating in the litigation between the County and City as *amici*, raised concerns about the legal adequacy of the 1991 EIR. In 1994, the Court of Appeals denied the County and City’s request to discharge the writ of mandate and ordered the County and LADWP to respond to the issues raised by the *amici* concerning the legal adequacy of the Final EIR.

IN 1997, THE CITY AND DWP SIGNED A MEMORANDUM OF UNDERSTANDING THAT REITERATED THEIR COMMITMENT TO IMPLEMENT THE LORP AND SET SPECIFIC CRITERIA, DEADLINES AND REQUIREMENTS FOR IMPLEMENTATION OF THE LORP AND OTHER MITIGATION MEASURES

26. After three years of negotiations, in March 1997, the City, DWP, the County, the State Lands Commission, the Department of Fish and Game, the Owens Valley Committee, the Sierra Club, and Carla Scheidlinger signed the MOU. The City and DWP agreed that DWP, as the lead agency under CEQA, would release a draft EIR for the LORP by June 13, 2000; that DWP would present a final EIR to the DWP Board by 2002; and that DWP would commence flows of 40 cfs in the lower Owens River by June 13, 2003. Under the terms of the MOU, the City and the County promised to direct consultants in the preparation of a LORP Ecosystem Management Plan which would serve as a template for management and

1 implementation of LORP. The MOU specified certain requirements that the Plan must
2 contain, and contemplated that the LORP Plan would be completed prior to implementation of
3 the LORP project.

4 27. In light of the execution of the MOU, the parties and the *amici* jointly moved the
5 Third District Court of Appeals for discharge of the long-standing (since 1973) writ of
6 mandate requiring the City to prepare a legally adequate EIR in connection with its augmented
7 ground-water pumping project.

8 28. On June 13, 1997, the Third District Court of Appeals accepted the MOU and
9 discharged the writ, in expectation that the provisions of the Long Term Water Agreement and
10 the mitigation projects contemplated in the Final EIR and MOU would be timely and fully
11 implemented, and managed under the LORP Ecosystem Management Plan, in accord with the
12 MOU. The Inyo-Los Angeles Long-term Water Agreement and the MOU became effective
13 upon discharge of the Court's writ.

14 29. The MOU augments the description of the LORP in the Inyo-Los Angeles
15 Agreement and the 1991 EIR. The 1991 EIR identified the LORP as compensatory mitigation
16 for significant adverse environmental impacts related to groundwater pumping by DWP from
17 1970 to 1990 that were difficult to quantify. The MOU specifies the goals of the LORP, the
18 timeframe for development and implementation, and specific actions. (See MOU, § II A, B,
19 C, E, F, H.) It also provides certain minimum requirements for the LORP related to flows,
20 habitats and species to be addressed, and adaptive management and monitoring. (*Id.*)

21 30. The LORP includes the watering of a 60-mile stretch of the Lower Owens River
22 channel below the aqueduct intake, the enhancement of environmental features along and near
23 the river, and in the Owens River Delta, and a pumpback facility near the Owens River Delta.
24 (MOU, § II C.)

25 31. The goal of the LORP is the establishment of a healthy and functioning Lower
26 Owens River riverine-riparian ecosystem, and the establishment of healthy functioning
27 ecosystems in the other physical features of the LORP, for the benefit of biodiversity and
28 threatened and endangered species, while providing for the continuation of sustainable uses,

1 including recreation, livestock grazing, agriculture, and other activities. (MOU, § II B.) The
2 LORP is intended to create and maintain diverse natural habitat consistent with the needs of
3 specified habitat indicator species in all four physical features of the LORP. (MOU, § II B1.)

4 32. There are four critical physical features of the LORP set forth in the MOU:

5 a. A continuous flow will be established and maintained in the river channel
6 from at or near the intake structure that diverts the Owens River into the Los Angeles
7 Aqueduct, to the pumpback system located near the river delta. A base flow of approximately
8 40 cfs from at or near the intake to the pumpback system to be maintained year round, as well
9 as seasonal habitat flows of approximately 200 cfs during years of average or above-average
10 runoff in the Owens River watershed are required. (The baseflow has been established, and
11 on July 22, 2007, this Court signed an Order incorporating a stipulation of the parties
12 establishing protocols for monitoring and reporting baseflows).

13 b. The establishment of the Owens River Delta Habitat Area, which is to
14 enhance and maintain existing habitat consisting of riparian areas and ponds suitable for
15 shorebirds, waterfowl, and other animals and to establish and maintain new habitat consisting
16 of riparian areas and ponds suitable for shorebirds, waterfowl, and other wildlife and fishery
17 resources within the Delta Habitat Area.

18 c. The maintenance and/or establishment of certain off-river lakes and ponds
19 to sustain diverse habitat for fisheries, waterfowl, shorebirds, and other wildlife and fishery
20 resources.

21 d. Creation and maintenance of a 1,500 acre Blackrock Waterfowl Habitat
22 Area.

23 33. The MOU requires DWP and the County to direct and assist Consultants in the
24 preparation and implementation of the LORP Ecosystem Management Plan. (MOU, § II A.)
25 The LORP Plan will consist of a Management Plan for the Lower Owens River Riverine-
26 Riparian Ecosystem, a Wildlife and Wetlands Management Plan, a Habitat Conservation Plan,
27 a Land Management Plan, and a Monitoring and Reporting Plan. (MOU, § II A2.) The
28 Monitoring and Reporting Plan must contain an Adaptive Management component and must

1 contain protocols for data collection, analysis, and reporting (which will identify pathways to
2 allow feedback to indicate where adaptive modifications to management are necessary.
3 (MOU, § II E.)

4 34. The MOU requires that if “reported information reveal[s] that adaptive
5 modifications to the LORP management are necessary to ensure the successful
6 implementation of the project or the attainment of LORP goals, such adaptive modifications
7 will be made.” (MOU, § II E.)

8 35. The MOU requires DWP, as the lead agency, and the County, as a responsible
9 agency, to jointly prepare an EIR for the LORP. Under the MOU, DWP agreed to release for
10 public review the draft EIR by June 13, 2000, and it agreed to complete a final EIR and
11 present it for certification by the DWP Board as soon as possible following the release of the
12 draft EIR (MOU, § II F), but before July 2003, when the base flows were to begin. (MOU, §
13 II H.)

14 36. DWP did not complete the LORP Draft EIR by June 13, 2000, as required by the
15 MOU. The MOU signatories agreed to several extensions for completion of the Draft EIR.
16 DWP did not complete the LORP Draft EIR by the agreed upon extensions.

17 37. On December 24, 2001, Plaintiffs filed an action in Inyo County Superior Court
18 seeking an order directing DWP to comply with the MOU provisions requiring completion of
19 the LORP Draft EIR and implementation of the LORP by the dates prescribed by the MOU.
20 By stipulation and court order, DWP agreed to complete and release the Draft EIR by August
21 31, 2002. DWP failed to comply with the Stipulation and Order.

22 38. On September 12, 2002, the Inyo County Superior Court issued an Order directing
23 DWP to complete and release the LORP Draft EIR by November 1, 2002. On November 1,
24 2002, LADWP released the LORP Draft EIR for public review and comment. The public
25 comment period closed on January 14, 2003.

26 39. The MOU requires DWP to commence the base flow of 40 cfs in the river channel
27 by June 13, 2003. On June 13, 2003, DWP failed to commence the base flow of 40-cfs in the
28 river channel.

1 40. A draft LORP Ecosystem Management Plan was first prepared in May 1999 by the
2 MOU Consultants, Ecosystem Sciences Inc. A revised draft Plan was issued in August 2002.¹

3 41. In September 2003 Ecosystem Sciences released the “Lower Owens River Project
4 (LORP): Draft Report / Baseline Data Methodologies.” This report summarized the
5 methodology of the long-term monitoring program that had been designed and reported on the
6 baseline data that had been collected.

7 42. On July 20, 2004, the Board of Water and Power Commissioners approved the
8 LORP Project and certified the FEIR/EIS. The FEIR/EIS contained adaptive management
9 protocols for LORP that were contained in the Project Description in the FEIR. By resolution
10 dated November 21, 2005 the County also approved LORP and certified the FEIR as a
11 responsible agency.

12 43. In September 2004, Ecosystem Sciences released the “Lower Owens River Project
13 Monitoring Methodologies: Baseline, Second Draft Report.” This was a revision of the
14 September 2003 document.

15 44. By letter dated December 10, 2004 to the MOU signatories, Sierra Club and OVC
16 requested a meeting among the signatories to have dispute resolution with respect to the
17 project approval and the adaptive management component of the LORP Ecosystem
18 Management Plan. When the issues were not resolved through dispute resolution, a related
19 action, *Sierra Club v. City of Los Angeles*, CV 05-37969, was filed in January 2005.

20 45. The Sierra Club and OVC December 10, 2004 letter was supplemented by letters
21 dated December 23, 2004 and January 7, 2005 to the signatories, making additional legal
22 arguments concerning the LORP Ecosystem Management Plan and the Project Description
23 approved by the City.

24 46. By letter dated December 30, 2004 to the signatories, Deputy Attorney General
25 Gordon Burns, notified the signatories that it was joining the letter sent on December 10, 2004
26 by Sierra Club and OVC, and raised additional issues that should be discussed. One

27 1 According to the FEIR (at p. 1-5): “A revised draft LORP Plan was developed in August
28 2 2002, and is available for review.” (See also DEIR at 1-5 (“A revised draft LORP Plan was
 3 developed in August 2002”).)

1 additional issue was that “neither the LORP Plan nor the EIR appear to mention CDFG’s role
2 in consulting with the Standing Committee with respect to the habitat flows.”

3 47. Ecosystems Sciences submitted to the City and County a “third draft” of the LORP
4 Monitoring Adaptive Management, and Reporting Plan by memorandum dated August 11,
5 2006. A copy was distributed to Sierra Club and OVC, but no comments were solicited. The
6 cover memorandum explained that there would ensue a joint meeting of the County and City
7 to discuss the August draft.

8 48. By letter dated September 29, 2006, to Gene Coufal (DWP) and Thomas Brooks
9 (Inyo County Water Department), Sierra Club and OVC commented on the August draft
10 document. In that letter Sierra Club and OVC pointed out that the draft document did not
11 comport with the requirements of the MOU, and failed to address the concerns of Sierra Club
12 and OVC that had previously been expressed. Sierra Club and OVC presented in this letter a
13 detailed summary of the views of Drs. Robert Twiss and Duncan Patten, two authorities in
14 adaptive management retained as expert consultants. Sierra Club and OVC received no reply
15 to that letter.

16 49. By letter dated November 17, 2006, to the legal representatives of the signatories,
17 Sierra Club and OVC submitted additional comments on the draft August Monitoring
18 Methodologies, Adaptive Management, and Reporting document, and included the Patten-
19 Twiss report in full.

20 50. By letter dated February 14, 2007, the County and the City jointly responded to
21 Sierra Club and OVC’s letter of November 17, 2006. The letter reported that “ESI is in the
22 process of preparing another draft of the LORP Monitoring, Adaptive Management, and
23 Reporting Plan.” The letter offered no responses to the contentions made by Sierra Club and
24 OVC in their letters.

25 51. Such a new draft Monitoring, Adaptive, Management and Reporting Plan was
26 produced in April, 2007, and was the subject of a *second* request by OVC and Sierra Club for
27 a meeting of the signatories for dispute resolution. In this letter dated August 10, 2007, Sierra
28 Club and OVC identified a number of disputes concerning the adequacy of the April 12, 2007

1 Adaptive Management, Reporting and Monitoring Plan and the LORP Ecosystem
2 Management Plan. In their letter, Sierra Club and OVC identified the following issues for
3 dispute resolution:

- 4 I. The requirement of the MOU that the Department of Fish and Game be
5 consulted by the Standing Committee in connection with implementing the
6 Annual Habitat Flow has again been disregarded in the April 12, 2007 Draft.
- 7 II. The LORP Ecosystem Management Plan, as described in the April 2007 Plan
8 Document, is not an Integrated Plan, as required by the MOU.
- 9 III. The April 12, 2007 Plan contains no habitat flow management prescriptions
10 that address the hydrologically varying sections of the river channel; the
11 Riverine-Riparian Ecosystem Element of the LORP Plan, (as modified through
12 the April Plan) does not recommend the amount, duration and timing of habitat
13 flows in the hydrologically varying sections of the river channel under varying
14 hydrological scenarios
- 15 IV. The April Plan, as it relates to adaptive management is unclear, internally
16 inconsistent, and in some instances, so vague as to be meaningless to serve
17 adaptive management purposes.
- 18 V. The LORP Ecosystem Management Plan, as defined in the April 2007
19 document is not the product of City-County collaborative direction and advice
20 to the consultants
- 21 VI. The Consultants gave flawed assumptions concerning the LORP that taint the
22 LORP Plan and that require necessary modifications in any final document.

23 52. Sierra Club and OVC pointed out additionally that despite the requirement of the
24 MOU that a LORP Ecosystem Management Plan be completed prior to formulation of the
25 project description in the Draft EIR, this was not done, and that even though the base flows
26 had been implemented, there was still (as of April 2007) no final complete, integrated LORP
27 Ecosystem Management Plan that would serve to guide the City and County in implementing
28 the project.

53. A "Final Draft Monitoring, Adaptive Management and Reporting Plan" dated
September 28, 2007, "as directed by City of Los Angeles, Department of Water and Power,
and Inyo County Water Department," was prepared. The cover page did not bear the name
of Ecosystems Sciences, Inc., the MOU consultant.

1 54. By letter dated December 11, 2007, Sierra Club and OVC submitted comments on
2 the September 28, 2007 “Final Monitoring, Adaptive Management, and Reporting Plan,”
3 The issues raised with respect to this document were similar but not identical to those raised
4 in the August 10, 2007 letter.

5 55. Another “Final Draft Lower Owens River Project Monitoring, Adaptive
6 Management and Reporting Plan,” dated February 8, 2008, was distributed to the MOU
7 signatories.

8 56. By letter dated April 14, 2008 Sierra Club and OVC commented, and raised the
9 following issues, *inter alia*:

- 10 I. The Adaptive Management Protocols in the Chapter 3 Draft Final Plan
11 do not ensure LORP will be successfully implemented or that project
12 goals will be attained, as the MOU requires.
- 13 II. The LORP Final Plan was not prepared according to the procedures
14 described in the LORP Ecosystem Management Plan Action Plan and
15 concept document, as required by the MOU.
- 16 III. The Final Plan provides no adequate or consistent management
17 protocols for seasonal habitat flows under varying hydrologic
18 conditions or in hydrologically varying sections of the River.
- 19 IV. The Plan is internally contradictory concerning the need for Adaptive
20 Management during the first fifteen years of the LORP Project.
- 21 V. CDFG's [Consultation] role remains ambiguous.

22 57. The Final Monitoring, Adaptive management, and reporting Plan, dated April 28,
23 2008 was been filed with this Court by the City.

24 58. By letter dated May 30, 2008, Sierra Club and OVC reinitiated dispute resolution
25 under Section VI of the 1997 MOU. As previously recited, Sierra Club and OVC had
26 reinitiated dispute resolution by letter dated August 10, 2007 in connection with the LORP
27 Monitoring Methodologies, Adaptive Management, and Reporting Plan (April 12, 2007). A
28 copy of the May 30, 2008 letter is attached and incorporated by reference herein as Exhibit A.

1 59. By letter dated July 30, 2008 Sierra Club and OVC summarized their concerns, as
2 set out in their May 30, 2008 letter requesting reinitiation of dispute resolution. Attached was
3 an agenda for a dispute resolution meeting to be held on August 7, 2008.

4 60. At the August 7, 2008 dispute resolution meeting, Sierra Club, OVC, and DFG
5 representatives were presented with a written document, jointly prepared by the City and the
6 County, which summarily (and without prior notice to Sierra Club, OVC, and DFG) rejected
7 Sierra Club's and OVC's contentions, most of which had been continuously raised (and never
8 substantively responded to) since August 2004. A copy of this document is attached as
9 Exhibit B.

10 61. By letter dated August 18, 2008, Sierra Club and OVC amended their May 30,
11 2008 Reinitiation of Dispute Resolution letter to include the issues relating to compliance with
12 the habitat indicator species requirements of the MOU raised by DFG at the August 7, 2008
13 meeting. A copy of this letter is attached as Exhibit C. After discussing the issues relating to
14 compliance with the habitat indicator species requirements, the City and County declined to
15 order revision of the Plan to address the DFG's concerns. On September 3, 2008, Sierra Club
16 and OVC sent a dispute resolution letter to the City and County relating to compliance with
17 the habitat indicator species requirements of the MOU. The letter requested a meeting of the
18 MOU parties within seven days as provided by the MOU.

19 62. The MOU provides that the Los Angeles Department of Water and Power
20 ("DWP") and Inyo County "will direct and assist" Consultants in the preparation and
21 implementation of the LORP Ecosystem Management Plan. (MOU, § IIA.) The MOU
22 provides that the procedures to be followed in the preparation of the plan are described in the
23 LORP Action Plan "based upon the LORP Phase I and LORP Phase II studies which were
24 performed by Mr. Mark Hill, Dr. Bill Platt's, and others..." (*Id.*) The MOU requires the
25 LORP Plan to address the four physical features of the LORP: (1) the Lower Owens River
26 Riverine-Riparian Ecosystem, (2) the Owens River Delta Area, (3) Off River Lakes and
27 Ponds, and (4) the Blackrock Waterfowl Habitat Area. (MOU § II, A, 1.) The overall LORP
28 Plan is to be composed of the following *integrated* plans:

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- a. Management Plan for the Lower Owens River Riverine-Riparian Ecosystem
- b. Wildlife and Wetlands Management Plans
- c. Habitat Conservation Plan
- d. Land Management Plan
- e. Monitoring and Reporting Plan (MOU, § IIA.)

63. The goal of the LORP as stated in the MOU is “the establishment of a healthy, functioning Lower Owens River riverine-riparian ecosystem, and the establishment of healthy, functioning ecosystems in the other physical features of the LORP, for the benefit of biodiversity and Threatened and Endangered Species, while providing for the continuation of sustainable uses including recreation, livestock grazing, agriculture and other activities.” (MOU, § II B.)

64. The MOU requires the LORP Plan to provide that the Riverine-Riparian Ecosystem Area in the LORP will be implemented and managed:

- (1) to provide a continuous 40 cfs flow in the river channel from the intake structure to the pump-back station (MOU, § II C1bi);
- (2) to create and sustain healthy and diverse riparian and aquatic habitats, and a healthy warm water recreational fishery in the Lower Owens Riverine-Riparian System (MOU, § II C1a);
- (3) to create and maintain diverse natural habitats through flow and land management, to the extent feasible, consistent with the needs of the “habitat indicator species” for the riverine-riparian system (MOU, § II C1a);
- (4) to implement an annual habitat flow of up to 200 cfs (MOU, § II C1bii);
- (5) so that the amount of seasonal habitat flows will be determined by the Standing Committee in consultation with Fish and Game (MOU, § IIC1bii);
- (6) to manage the habitat flows based upon the Lower Owens River Riverine-Riparian Ecosystem element of the LORP Plan, which “will recommend the amount, duration and timing of flows necessary to achieve the goals for the system under varying hydrologic scenarios.” (MOU, § II C1bii);
- (7) to identify gaging stations to measure the flow in the river channel and site stations “so that flow can be managed in each of the hydrologically

1 varying sections of the River channel in order to meet the goals and objectives
2 of the LORP” (MOU, § II C1c);

3 (8) to identify monitoring sites and water flow gaging stations to
4 implement a program for data collection, analysis, and reporting, “which will
5 identify pathways to allow feed-back to indicate where adaptive modifications
6 to management are necessary.” (MOU, § IIE);

7 (9) to provide that when “the reported information reveals that adaptive
8 modifications to the LORP management are necessary to ensure the successful
9 implementation of the Project, or the attainment of LORP goals, such adaptive
10 modifications will be made.” (MOU, § IIE)

11 65. In the Delta Habitat Area “diverse natural habitats will be created and maintained
12 through flow and land management, to the extent feasible, consistent with the needs of the
13 habitat indicator species.” (MOU, § II A2.)

14 66. In Off River lakes and Ponds “diverse natural habitats will be created and
15 maintained through flow and land management, to the extent feasible, consistent with the
16 needs of the habitat indicator species.” (MOU, § II A3.)

17 67. In the Blackrock Waterfowl Habitat Area “diverse natural habitats will be
18 created and maintained through flow and land management, to the extent feasible, consistent
19 with the needs of the habitat indicator species.” (MOU, § II A 4.)

20 68. There are a number of Threatened and Endangered species in the four areas of
21 the LORP, which are included in the list of habitat indicator species (MOU, Appendix A,
22 table 1). These T and E species, for the benefit of which LORP must be implemented
23 (MOU, § II B), include:

- 24 a. Willow Flycatcher (listed as endangered under state and federal laws)
- 25 b. Least Bell’s Vireo (listed as endangered under state and federal laws)
- 26 c. Western Snowy Plover (listed as threatened under federal law)
- 27 d. Swainson’s Hawk (listed as threatened under state law)
- 28 e. Western Yellow-Billed Cuckoo (listed as endangered under state law)
- f. Owens Pupfish (listed as endangered under state and federal law)
- g. Owens Tui Chub (listed as endangered under state and federal law)

1 ensure successful implementation and/or the attainment of the project goals by the end of the
2 fifteen-year period in which monitoring, and reporting and adaptive management are required.

3 74. These LORP goals are stated in the MOU:

- 4 a. the *enhancement* of several environmental features along the river.
- 5 b. the establishment of a *healthy*, functioning Lower Owens River riverine-
6 riparian system, for the benefit of *biodiversity and Threatened and*
7 *Endangered Species*.
- 8 c. the *establishment and maintenance* of *diverse* riverine, riparian, and wetland
9 habitats in a *healthy* ecological condition.
- 10 d. the creation and establishment of *diverse natural habitats consistent with the*
11 *needs of habitat indicator species*. (MOU § II, B (emphasis added).)

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

27 76. The objective stated in the LORP Plan is “benefiting the majority of indicator
28 species and guilds by increasing the quantity and quality of their habitat.” (Plan at 3-36.) No
protocol of adaptive management links this objective to the HSI indices, or the predictions of

1 future vegetation or wetland habitat, or with the CWHR indices, set forth in the Plan. (*See*
2 Adaptive Management, Reporting and Monitoring Plan at 3-36, 38, 41.) The objective stated
3 in the LORP Plan is not consistent with the MOU goal of creating and maintaining diverse
4 natural habitats consistent with the needs of habitat indicator species. (MOU § II B.)

5 77. A requirement of the LORP is to create and maintain diverse habitat, to the extent
6 feasible, consistent with the needs of the indicator species, in all four LORP areas. (MOU § II
7 C 1A.) To the extent adaptive management is not called for if “habitat for the majority of
8 indicator species has increased in quantity and quality compared to baseline conditions,” there
9 will be no adaptive management for the remaining (49%) habitat indicator species, even
10 though baseline conditions for those species are not being maintained. Thus, under the plan
11 no consideration need be given (through adaptive management) to improving the quality and
12 quantity of habitat for the (remaining 49%) habitat indicator species.

13 78. The MOU goal, stated *supra*, requires that if the requisite habitats are not being
14 created for any of the habitat indicator species, there must be some address to the problem,
15 through adaptive management, which would consider habitat needs for specific habitat
16 indicator species or guilds, and determine appropriate action, taking into account the habitat
17 needs of other specific habitat indicator species or guilds.

18 79. Whether creation and maintenance of habitats consistent with the needs of the
19 habitat indicator species is feasible or not cannot be known with certainty until adaptive
20 management is attempted. Without such address to the needs of specific habitat indicator
21 species or guilds in the context of adaptive management, the Plan fails to comport with the
22 requirement of the MOU that there be creation and maintenance of diverse habitats for the
23 indicator species, in all four areas of LORP, *to the extent feasible*. (MOU § II, B, 1.)

24 80. To the extent adaptive management is triggered only if “habitat for the majority of
25 indicator species has decreased in quantity and quality compared to baseline conditions,” the
26 LORP will likely not be adaptively managed *for the benefit of Threatened and Endangered*
27 habitat indicator species present in the four LORP areas, in violation of section II B of the
28 MOU. There is no commitment, through adaptive management protocols, that there will be

1 address to the special habitat needs of the T and E habitat indicator species within the LORP
2 planning area if any of those T and E species are in the 49% of indicator species that will not
3 be adaptively managed. (*See* paragraph 68, *supra*, listing the T & E indicator species.)

4 81. Under the Plan, with respect to the objective of creating and sustaining a healthy
5 warm water fishery in the Lower Owens River, if “five years after water quality standards are
6 met, fish populations and habitat have not been maintained *or* improved *compared to baseline*
7 *conditions*” adaptive management is required. (Plan at 3-28 (emphasis added).) The
8 *maintenance of the existing habitat*, “five years after water quality standards have been met”
9 cannot constitute “progress” toward the mandated goal of *creating* and sustaining a healthy
10 warm water fishery in the Owens River, in violation of section II C 1 a, and II C 1 bii of the
11 MOU.

12 SECOND CAUSE OF ACTION

13 **The Final LORP Ecosystem Management Plan Was Not Prepared** 14 **According to the Procedures Described in the LORP Ecosystem** 15 **Management Plan – Action Plan and Concept Document, As** 16 **Required by the MOU. (MOU, Section IIA.)**

17 82. Plaintiffs incorporate by reference paragraphs 1 through 70.

18 83. Section II A of the MOU requires that “the procedures to be followed in the
19 preparation of the Plan are described in the Lower Owens River Ecosystem Management Plan
20 – Action Plan and Concept Document.” Certain procedures set forth in the Action Plan and
21 listed below have not been followed in the LORP Plan.

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

24 a. The LORP Plan does not contain predictions of maximum and minimum
25 extent of riparian vegetation types (taking into account minimum and maximum landform
26 elevations and maximum and minimum stream stages). (Action Plan Work Program, II 4, 5.)

27 b. The LORP Plan does not predict distribution of wetland riparian types in
28 the LORP Planning Area as a time-series. (Action Plan Work Program, II A 7.)

1 c. The LORP Plan does not incorporate time-series predictions using HSI
2 models for wildlife values for all riparian-wetland areas within the Planning Area. (Action
3 Plan Work Program, III B.)

4
5 **THIRD CAUSE OF ACTION**

6 **The LORP Plan Does Not Provide for Implementation of the Plan**
7 **Through Consultation with DFG By The Standing Committee In**
8 **Violation of Section IIC of the MOU.**

9 85. Plaintiffs incorporate by reference paragraphs 1 through 70.

10 86. The MOU requires that the “*LORP Plan will provide* that the four physical features
11 of the LORP will be implemented and managed as set forth below.” (MOU, § II C (emphasis
12 added).) Section II C 1b(ii) requires:

13 “The amount of the annual habitat flow will be set by the
14 Standing Committee in consultation with Fish and Game.”

15 87. Figure 3.1 shows Fish and Game providing advice to the MOU consultant only
16 through the Scientific Team. (Plan at 3-5.)

17 88. The Plan violates the MOU when it relegates Fish & Game to an advisory role,
18 reporting to the Scientific Team, rather than to the Standing Committee, with respect to the
19 magnitude, duration, timing, and ramping of the annual habitat flows. (MOU §II C 1b (ii).)
20 The Plan fails to provide that the LORP will be implemented and managed through
21 consultation by the Standing Committee with Fish and Game with respect to the amount,
22 duration, timing, and ramping of habitat flow, in violation of section II C of the MOU.

23 **FOURTH CAUSE OF ACTION**

24 **The City and the County Must Each Adopt Policies Setting Forth**
25 **Each Entities Responsibilities For Funding LORP and Setting**
26 **Forth the Procedures For Managing the LORP During Post-**
27 **Implementation, As Required in the Final EIR’s Project**
28 **Description and the Final LORP Plan.**

89. Plaintiffs incorporate by reference paragraphs 1 through 70.

90. The Final Plan cites Section 2.2.2.2 of the FEIR, which states:

1 “After adoption of the LORP, the governing bodies of the County and
2 LADWP will adopt a policy that sets forth each entity’s responsibilities for
3 LORP funding during the implementation and post-implementation periods.
4 The policy, will also describe the procedures for managing the LORP *during
the post implementation period.* (Plan at 1-10, quoting FEIR, Section 2.2.2.2
(emphasis added).)

5 91. The LORP Plan characterizes the FEIR as “further defining roles and
6 responsibilities for monitoring and adaptive management decision making.” (Plan at 1-9.) The
7 LORP Plan incorporates by reference the FEIR provisions, relating to post-implementation
8 polices and procedures.

9 92. The provisions of the LORP FEIR quoted in (and made part of) the LORP
10 Ecosystem Management Plan are contained within the LORP Project Description, that was
11 approved by the City in July 2004 and that the City and the County (which has also approved
12 the Project) have an obligation to implement.

13 93. Although the FEIR was certified in 2004, and the project has been implemented
14 for almost two years, the City and the County have failed to adopt procedures for managing
15 the LORP during post implementation and have no agreement concerning funding the LORP.

16 94. California Code of Civil Procedure section §1085 provides that a writ may be
17 issued to compel the performance of an act that the law specifically enjoins. Public Resources
18 Code section 21081.6 requires that public agencies shall provide that measures to mitigate are
19 fully enforceable through agreements, or other measures.

20 **FIFTH CAUSE OF ACTION**
21 **FOR RELIEF BY WAY OF MANDAMUS**

22 **(Failure to Follow Recommendations of Consultants)**

23 95. Plaintiffs incorporate by reference paragraphs 1 through 94, *supra*.

24 96. The LORP Plan is not consistent with the Project Description, as approved by the
25 City and County. The Project as approved by the City and County is not consistent with the
26 recommendations of the consultants now contained in the final LORP Plan prepared by the
27 consultants, in violation of section II(I) of the MOU, which provides in relevant part that “the

1 Parties shall not seek through any ...approval...to alter the recommendations of the
2 consultants with respect to the LORP...”

3 97. The final LORP Plan prescribes as an adaptive management protocol
4 “modification of the magnitude of seasonal habitat flows” through adjusting the amount of
5 “seasonal habitat flow released at the River Intake and/or release water from spill-gates.”
6 This protocol was eliminated from Table 2-19 in the FEIR. Although other measures allow an
7 adjustment in the duration and timing of peak flow of the habitat flow released from the River
8 Intake, no adaptive management option is listed in the Project Description in which water
9 would be released lower in the river to help flush sediments, imitate a more natural flow
10 pattern, or achieve LORP goals (other than as a short term measure to provide a refuge for
11 fish at spill-gates during the first three habitat flow releases.)

12 98. In approving the Project, the City and County did not adopt the recommendations
13 of the consultants embodied in the final integrated LORP Plan, or the 2002 LORP Ecosystem
14 Management Plan, in violation of section II(I) of the MOU.

15 **SIXTH CAUSE OF ACTION**
16 **FOR DECLARATORY JUDGMENT**

17 **(Breach of Memorandum of Understanding)**

18 99. Plaintiffs incorporate by reference paragraphs 1 through 70, *supra*.

19 100. Respondents City, DWP, and County have breached their duties and obligations
20 under the MOU to which Plaintiffs are signatories, as set forth in this Petition and Complaint.

21 101. A present and continuing controversy exists between Plaintiffs and Respondents
22 City, DWP, and County concerning whether Respondents have breached their respective
23 obligations and duties identified in the First through Third and Fifth Causes of Action.
24 Through the joint document submitted at the dispute resolution meeting on August 7, both
25 City and County deny they have allowed a LORP plan to be finalized that violates the MOU.

26 102. Plaintiffs seek a declaration that the Respondents City and DWP, and County are
27 in breach of all or part of their obligations and duties under the MOU as identified in the First
28 through Third Causes of Action.

1 consultation with DFG by the Standing Committee with respect to the amount, duration,
2 ramping, and timing of the seasonal habitat flows, as required by the MOU.

3 4. As to the Fourth Cause of Action Plaintiffs pray that this Court direct the City,
4 DWP and the County forthwith to adopt policies setting forth procedures for managing LORP
5 during post-implementation and for sharing costs.

6 5. As to the Fifth Cause of Action, Plaintiffs pray this Court issue a writ directing the
7 City and County to adopt as part of the LORP Project the recommendations of the Consultants
8 in the Final Plan, concerning augmentation of habitat flows by releases from the spill-gates as
9 an adaptive management measure.

10 6. As to the Sixth Cause of Action, Plaintiffs pray that this Court issue a declaratory
11 judgment, pursuant to Code of Civil Procedure section 1060, that the City, DWP and the
12 County have violated their duties and obligations contained in the MOU as identified in the
13 First through Third, and Fifth Causes of Action, and to declare that the City and County have
14 a legal duty to approve the LORP project in a manner that includes augmentation of habitat
15 flows through adaptive management.

16 7. As to the Seventh Cause of Action, Plaintiffs pray that this Court issue an
17 injunction forbidding the City and DWP from exporting groundwater from the Owens Valley
18 for use in the City of Los Angeles unless and until the City and DWP have caused to be
19 prepared a LORP Ecosystem Management Plan that comports with the MOU. If the Court
20 deems that a complete ban on the export of groundwater is not appropriate, then Plaintiffs
21 respectfully request that the Court issue an injunction reducing the quantity of groundwater
22 exported from the Owens Valley in such a manner to ensure that the City and DWP do not
23 benefit from the delay in completion of the LORP Ecosystem Management Plan, and to
24 ensure that in-valley uses of water are not curtailed as a result of such injunction.

25 8. That this Court retain its jurisdiction over the City and County to supervise the
26 timely preparation of a LORP Ecosystem Management Plan by January 15, 2009 that is
27 consistent with the MOU and to require the City and County, by way of a Return to a Writ, to
28 report to the Court their compliance with this Court's writ with respect to approving a Project

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that reflects the consultant’s recommendations with respect to augmentation of seasonal habitat flows, and with respect to adopting policies and procedures regarding LORP post-implementation.

9. For such other relief including attorneys’ fees, pursuant to Code of Civil Procedure section 1021.5, as is just and proper.

Dated: September 3, 2008

Respectfully submitted,

By: _____
LAURENS H. SILVER
Attorney for Plaintiff Sierra Club

By: _____
DONALD B. MOONEY
Attorney for Plaintiff
Owens Valley Committee