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Superior Court
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OFFICE OF COUNTY COUNSEL
INDEPENDENCE

INYO CO. SUPERIOR COURT
NANCY A MOXLEY, CLERK
BY *J. Shultz* DEPUTY

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

SIERRA CLUB and OWENS VALLEY)
COMMITTEE,)

Case No. SICV CV 08-4688

Plaintiffs/Petitioners,)

vs.)

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;)

STATEMENT OF DECISION RE
LOWER OWENS RIVER PROJECT
(LORP) MONITORING, ADAPTIVE,
MANAGEMENT, AND REPORTING PLAN,
DATED APRIL 28, 2008

Defendants/Respondents.)

CALIFORNIA DEPARTMENT OF FISH AND)
GAME; CALIFORNIA STATE LANDS)
COMMISSION; and DOES 51 - 100;)

Real Parties in Interest.)

In order to resolve years of litigation, mistrust, and misunderstanding the Inyo County/Los Angeles Long Term Water Agreement (hereinafter: the "LTWA") was approved in October, 1991. The LTWA included provisions for rewatering the portion of the Lower Owens River between an area near Big Pine to the Owens Dry Lake where the water would be returned to the Los Angeles Aqueduct for delivery to the City of Los Angeles. This project is known as the Lower Owens River

BH

1 Project (hereinafter: the "LORP") and is basically defined in a Memorandum Of Understanding
2 (hereinafter: the "MOU") between the City of Los Angeles Department of Water and Power
3 (hereinafter: the "DWP"), the County of Inyo (hereinafter: "INYO"), the California Department of Fish
4 and Game (hereinafter: the "DFG"), the California State Lands Commission (hereinafter: the
5 "Commission"), the Sierra Club (hereinafter: the "Club"), the Owens Valley Committee (hereinafter:
6 "OVC"), and Carla Scheidlinger executed in April, 1997. A recitation of the voluminous history of
7 litigation before and after this agreement was executed is unnecessary for an understanding of the
8 issues presented in this case, which is the fourth in a series of cases regarding the LORP assigned
9 to me.

10 As set forth in Section II.B. of the MOU, the goal of the LORP is "the establishment of a
11 healthy functioning Lower Owens riverine-riparian ecosystem, and the establishment of healthy
12 functioning ecosystems in the other physical features of the LORP, for the benefit of biodiversity and
13 Threatened and Endangered Species, while providing for the continuation of sustainable uses
14 including recreation, livestock grazing, agriculture and other activities." Although this goal is
15 amplified by other sections of the MOU, it provides the primary criteria for evaluating the adequacy
16 of the LORP *Monitoring, Adaptive Management and Reporting Plan* (hereinafter: the "Plan") required
17 by the MOU, the adequacy of which is the issue in this case. Each side has filed motions for
18 summary adjudication/judgment, contending that the Plan does or does not comply with the
19 requirements of the MOU. The parties appear to agree that this issue is essentially an issue of
20 contract interpretation and compliance. I concur in that evaluation.

21 On July 29, 2009, the parties filed a stipulation, which I made an order of the court,
22 establishing a procedure for conducting the summary adjudication hearing, which procedure was
23 followed at the hearing.

24 My conclusions are as follows:

25 1. **First Cause of Action:** Plaintiffs contend that the Plan is not consistent with the MOU because the
26 adaptive management protocol for terrestrial habitat indicator species does not ensure that the
27 LORP will be successfully implemented. The consultants, exercising their independent judgment as
28 required, concluded that adaptive management will be instituted if a majority of the indicator species
has decreased. Plaintiffs interpret this as meaning that adaptive management will not be instituted if
there is a decrease in the minority of the indicator species. This interpretation, as strongly
emphasized in plaintiffs' points and authorities, is obviously premised on plaintiffs' long standing
distrust of DWP and belief that DWP will not work toward the success of the LORP. The
Standing Committee established by the MOU, obviously exists to ensure that the goals of the LORP
are followed and enforced, with court action if necessary! I think the consultants are absolutely
correct in their conclusion that for the LORP to succeed, there must be flexibility in its management
and that the Plan cannot be made inviolate, but must rather be adaptable based on experience.

1 There is no evidence in this record that supports establishing an unchangeable plan at this time.
2 PLAINTIFFS" MOTION FOR SUMMARY JUDGMENT/ADJUDICATION OF THEIR FIRST
3 CAUSE OF ACTION IS DENIED. DEFENDANTS" MOTION FOR SUMMARY
4 JUDGMENT/ADJUDICATION OF THE FIRST CAUSE OF ACTION IS GRANTED.

5 2. **Second Cause of Action:** Plaintiffs contend that the Plan is not consistent with the MOU
6 because the Plan does not comply with the LORP action plan, primarily because it does not predict
7 vegetation development in a time series and, accordingly, does not calibrate progress toward the
8 goals of the LORP. Contrary to plaintiffs' contentions, it appears to me that the consultants have
9 done a masterful job of prognosticating the evolution and development of the LORP, given the
10 paucity of data on which to base estimates of future development. There is no evidence in this
11 record that anyone has ever rewatered and redeveloped more than 50 miles of river in an arid and
12 semiarid environment that has been dry for about a century. To comply with plaintiffs' interpretation
13 of the requirements of the MOU would require the consultants to engage in pure speculation
14 unsupported by any reliable data. Even plaintiffs' expert, in his improperly verified declaration,
15 agrees with that conclusion. According to both, the correct approach now that water is in the river
16 is to develop baseline data based upon what we actually see happening and then decide what, if
17 anything, should be done. Experience suggests that nature, having created many successful rivers
18 including the Owens before DWP, is going to do pretty much as it pleases regardless of how we
19 interfere. PLAINTIFFS" MOTION FOR SUMMARY JUDGMENT/ADJUDICATION OF THEIR
20 SECOND CAUSE OF ACTION IS DENIED. DEFENDANTS' MOTION FOR SUMMARY
21 JUDGMENT/ADJUDICATION OF THE SECOND CAUSE OF ACTION IS GRANTED.

22 3. **Third Cause of Action:** Plaintiffs contend that the Plan does not comply with the MOU because
23 the Plan does not provide for the implementation of seasonal habitat flows in consultation with the
24 DFG regarding the amount, duration, timing, and ramping of the seasonal habitat flows. Defendants
25 contend that the MOU only requires consultation by the Standing Committee concerning the amount
26 of the annual habitat flow. The relevant portion of the MOU, Section II.C.1(b)(ii), pp. 11-12, provides
27 that "...The amount of the annual habitat flow will be set by the Standing Committee, subject to any
28 applicable court orders concerning the discharge of water onto the bed of Owens Lake and in
consultation with DFG, and be based on the Lower Owens River Riverine-Riparian 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."

Obviously, "... the Lower Owens River Riverine-Riparian Ecosystem element of the LORP
Plan" cannot and does not recommend the amount, duration, and timing of flows necessary to
achieve the goals for the system..." If it did, consideration and consultation by the Standing
Committee would be unnecessary and irrelevant. The question is as to what does the clause
"which will recommend" refer? If the sentence is rewritten deleting unnecessary language it would

1 read *The amount of the annual habitat flow will be set by the Standing Committee...in consultation*
2 *with DFG...which will recommend the amount, duration and timing of flows....* Judicial notice, as
3 requested by DFG, has been taken of the August, 2002, Ecosystem Management Plan.

4 Consequently, it does not appear to me that the Plan complies with the MOU concerning DFG's
5 participation concerning habitat flows. **PLAINTIFFS' MOTION FOR SUMMARY**
6 **JUDGMENT/ADJUDICATION AS TO THE THIRD CAUSE OF ACTION IS GRANTED.**
7 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/ADJUDICATION AS TO THE THIRD**
8 **CAUSE OF ACTION IS DENIED.**

9 4. **Fourth Cause of Action:** No motions for summary judgment/adjudication were made.

10 5. **Fifth Cause of action:** Plaintiffs contend that defendants have violated the MOU because they
11 have not adopted the consultants' recommendation concerning amending the LORP Project
12 Description re augmentation of seasonal habitat flows, have not amended the Project Description,
13 and have not obtained Board approval of a proposed amendment. Defendants respond that a
14 simple addendum to the Project Description re augmentation of seasonal habitat flows will suffice
15 and that no additional CEQA analysis is required. Such an addendum, revised July, 2009, has been
16 prepared and, although promised last March, was submitted at the hearing on July 14. Plaintiffs
17 contend such analysis is required. To my mind neither side has adequately analyzed or briefed the
18 issue, particularly regarding as to what CEQA analysis, if any, is required concerning varying flows
19 in a river. Is a CEQA analysis regarding the impact of a major rain storm or snow melt required? I
20 doubt it, but I think the issue needs to be specifically briefed. Incidentally, I share plaintiffs' concern
21 about the need for Board approval to avoid delay in implementation of Seasonal Habitat Flows.

22 **RULING ON THE MOTIONS FOR SUMMARY JUDGMENT/ADJUDICATION IS RESERVED**
23 **PENDING FURTHER BRIEFING.** (The parties should work out a briefing schedule among
24 themselves, but if they can't, I will issue orders. I expect this to be accomplished within the next 30
25 days, however.)

26 6. **Sixth Cause of Action:** Only plaintiffs filed motions concerning this cause of action. Technically,
27 since I have found noncompliance and ruled for plaintiffs in the Third Cause of Action, plaintiffs are
28 entitled to a ruling in their favor in this Cause of Action, but I am reserving a formal ruling until the
Fifth Cause of Action is decided.

7. **Seventh Cause of Action:** Given the foregoing rulings, the remedy sought is obviously greatly
disproportionate to the violations found. I would, however, urge DWP to immediately correct the
deficiencies found so we do not again have to resort to sever sanctions. **RULING AS TO THE**
SEVENTH CAUSE OF ACTION IS RESERVED.

If anyone thinks I have overlooked any significant matters, further input will be considered,
since I have not yet made a final disposition of these motions. Everyone,

1 incidentally, is reminded of the one judgment rule.

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3 Dated: 8/28/09

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6 LEE E. COOPER
7 Judge of the Superior Court

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DECLARATION OF SERVICE

CASE NUMBER: SICVCV 08-46888

I, the undersigned, say: I am a citizen of the United States, a resident or employed in the County of Inyo, over the age of eighteen years, and not a party to the within action or proceeding; that my residence or business address is: Courthouse, 168 N. Edwards, Independence, California 93526, that on, September 1, 2009, I served a copy of the indicated papers, to wit:

**STATEMENT OF DECISION RE LOWER OWENS RIVER PROJECT (LORP)
MONITORING, ADAPTIVE, MANAGEMENT, AND REPORTING PLAN, DATED
APRIL 28, 2008**

By depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mailbox in the town of Independence, California, addressed as follows:

Joseph Brajevich, Esq.
Assistant General Counsel
City of Los Angeles
111 North Hope Street, Suite 340
Los Angeles, CA. 90051-0100

Randy Keller, Esq.
Inyo County Counsel
PO Box M
Independence, CA 93526

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Mill Valley, CA 94941

Donald B. Mooney, Esquire
Law Office of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

Marian Moe, Esq.
Deputy Attorney General
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA. 94244-2550

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: September 1, 2009



Paul Shults, Deputy Clerk