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WATER AND POWER OF THE CITY OF LOS ANGELES

10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF INYO**

12 CITY OF LOS ANGELES; DEPARTMENT
13 OF WATER AND POWER OF THE CITY
OF LOS ANGELES,
14 Plaintiffs,
15 vs.
16 BOARD OF SUPERVISORS OF THE
17 COUNTY OF INYO; THE COUNTY OF
18 INYO; JOHN K. SMITH, COUNTY
19 ADMINISTRATIVE OFFICER; INYO
COUNTY WATER COMMISSION; AND
DOES 1 THROUGH 50,
20 Defendants.

Case No. 12908
REPLY BRIEF
**ISSUE SUBMITTED TO DISPUTE
RESOLUTION PURSUANT TO
STIPULATION AND ORDER FOR
JUDGMENT**

21
22 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**
23 **PLAINTIFFS, CITY OF LOS ANGELES ACTING BY AND THROUGH ITS**
24 **DEPARTMENT OF WATER AND POWER,** hereby submits its Reply Brief to Inyo
25 County's Response Brief, pursuant to Stipulation and Order for Judgment as follows:

1 I. THE COUNTY'S REQUEST TO THIS PANEL, AND ITS SUPPORTING
2 ARGUMENTS, SEEK TO UNDERMINE THE TERMS AND INTENT OF THE
3 WATER AGREEMENT

4 The overarching intent of the Water Agreement was to create an operational
5 committee, the Technical Group, with an oversight board, the Standing Committee, to
6 ensure that LADWP could reliably pump groundwater while maintaining environmental
7 conditions in the Owens Valley. In order to accomplish the goal and principles of the
8 Water Agreement, the parties crafted a document that compelled them to substantively
9 cooperate when engaging in environmental monitoring and analysis of vegetation
10 conditions in the Owens Valley. The reason for the Water Agreement's forced
11 cooperative structure is obvious: the County and LADWP have competing interests.
12 LADWP's mission is to provide a reliable supply of clean, safe drinking water to its
13 customers in Los Angeles. The County's mission, meanwhile, is to ensure that
14 LADWP's groundwater pumping does not adversely affect vegetation conditions within
15 Inyo County. The differing missions, and competing interests, create a understandable
16 tension that the drafters of the Water Agreement sought to ameliorate.

17 To achieve the cooperative intent of the Water Agreement, rules and protocols were
18 developed that forced LADWP and the County to work cooperatively and jointly when
19 evaluating impacts to vegetation that are allegedly caused by LADWP's groundwater
20 pumping. Those rules force LADWP, through the Technical Group, to substantively
21 engage in vegetation analysis and monitoring in areas that allegedly have been
22 adversely impacted by groundwater pumping, whether LADWP believes such an
23 analysis is warranted or not. Conversely, the Water Agreement forces the County to
24 jointly cooperate with LADWP, as a member of the Technical Group, when it alleges a
25 negative impact to vegetation based on groundwater pumping. The result is a system

1 where neither LADWP, nor the County, can escape an open, transparent, joint analysis
2 of vegetation when such an allegation is premised on groundwater pumping.

3 In executing the Water Agreement, each party relinquished some measure of control
4 it might otherwise have enjoyed. In the absence of the Water Agreement, for example,
5 the County would be free to evaluate and analyze vegetation impacts, using any means
6 or methods it deemed prudent, and bring a lawsuit if it determined that LADWP's
7 pumping caused harm. Likewise, in the absence of the Water Agreement, LADWP
8 could refuse to engage with the County relating to any vegetation analysis, and would
9 have no need to collect or maintain data relating to vegetation. Neither party wanted
10 that adversarial result.

11 Therefore, the compromise Water Agreement was born. If this panel accepts the
12 County's position, however, it will essentially rewrite the Water Agreement in a way that
13 will fundamentally undermine the cooperative spirit and intent of the document.
14 Moreover, the County's position would effectively terminate the role of the Technical
15 Group and Standing Committee as they relate to environmental monitoring in the
16 Owens Valley. If the County's position is accepted, never again will the parties come
17 to the table to review a given issue related to vegetation monitoring and analysis.
18 Instead, a new paradigm will exist, a paradigm wherein both the County and LADWP
19 will act unilaterally, in their capacity as independent agencies, in all vegetation
20 monitoring and analysis, and the Technical Group will be relegated to simply elevating
21 disputed questions, which will arise in every instance, to future arbitration panels and
22 courtrooms.

23 The County's argument asks this panel to reject the cooperative intent of the Water
24 Agreement and, in essence transform the Technical Group into a ministerial voting
25 entity, and thereby transfer the Technical Group and Standing Committee's

1 responsibilities to future arbitration panels and the courts. Such is not the intent of the
2 Water Agreement.

3 To its misplaced position, the County's Response Brief Submitted to Mediation
4 Arbitration Panel ("CRB") makes five arguments: 1) First, the County argues that the
5 Water Agreement vests LADWP and the County with the authority to unilaterally, and
6 independently, analyze impacts to vegetation, produce an independent report for
7 submission to the Technical Group and that the only responsibility of the Technical
8 group is to vote, up or down, on those conclusions and determinations, thereby
9 triggering dispute resolution to resolve any disagreements; 2) Second, the County
10 argues that it followed Water Agreement and Green Book protocols in the creation of
11 the ICWD Report, and therefore this panel should compel the Technical Group to
12 accept its conclusions; 3) Third, the County argues that the ICWD Report followed the
13 three-step mitigation-significance procedure for determining impacts to vegetation, and
14 therefore, by submitting the ICWD Report to the Technical Group for a vote, the County
15 has complied with the Water Agreement and acted in conformity with its duties as a
16 Technical Group Member; 4) Fourth, the County argues that the 1991 EIR did not
17 consider the ICWD Report's alleged impacts to vegetation at Blackrock 94 and,
18 therefore, additional mitigation is permitted; 5) Fifth, the County argues that the ICWD
19 Report complied with Water Agreement and Green Book protocols relating to
20 measurability, attributability and significance in concluding that Blackrock 94 has
21 experienced an impact to vegetation, and therefore mitigation is required. As discussed
22 in LADWP's Opening Brief, further explained in LADWP's Response Brief, and
23 explained below, each of the County's arguments fails.

24 **II. THE COUNTY MISCHARACTERIZES TECHNICAL GROUP ACTION.**

25 Beginning on page 4 of the CRB, the County attempts to provide this panel with an
26 explanation of "How the Technical Group Fulfills its Responsibilities", in an effort to

1 justify its unilateral creation of the ICWD Report. Without citing to any provision of the
2 Water Agreement or Green Book, the County states that the "LTWA, the Green Book
3 and the 1991 [EIR] allow either party, as a Technical Group member, to conduct
4 monitoring, collect data, analyze the data and present the results to the Technical
5 Group for consideration along with a request that the Technical Group take appropriate
6 action." CRB, pg. 6, ln. 17-19. The County then concludes that the "Technical Group
7 acts by agreeing to take the [unilaterally] requested action, agreeing to some other
8 action or disagreeing with the requested action." Id., ln. 23-26.¹ Unfortunately, the plain
9 language of the Water Agreement does not support the County's contentions.

10 **A. The County's Analysis of Technical Group Responsibilities is Flawed**

11 LADWP'S Opening Brief, Section VI.B, provides a thorough examination of the
12 Technical Group's responsibilities relating to vegetation monitoring and analysis under
13 the Water Agreement. Without reciting the entire argument, the Water Agreement's
14 threshold mandate for Technical Group action, as it relates to vegetation monitoring and
15 analysis, is that all such monitoring and analysis be performed jointly by both the
16 County and LADWP acting together through the Technical Group [Water Agreement
17 Section III.D]. Green Book Section I, page 1, paragraph 1, explicitly requires joint action
18 pursuant to the impact determination procedures of Green Book Section I.C: "Unless
19 otherwise specified, determinations, decisions, or actions called for in this section will be
20 made by the Technical Group." The 1991 EIR explained that "The Agreement and the
21 Green Book provide that groundwater and vegetation monitoring will be jointly
22 conducted by Inyo County and LADWP." [1991 FEIR, Vol. I Response to Comments on
23 September 1990 Draft EIR, response PD-7, page 2-15]. There is no mechanism in the

24 ¹ While either party may engage in unilateral analysis of vegetation conditions in the
25 Owens Valley, or anywhere else for that matter, such evaluation and analysis is not
26 magically deemed Technical Group action by simply submitting such unilateral findings
27 to the Technical Group for a vote.

1 Water Agreement or the Green Book for either party to circumvent the plain language of
2 those documents and act unilaterally when evaluating alleged impacts to vegetation at
3 Blackrock 94, or anywhere else in the Owens Valley or Inyo County, and deem its
4 activities Technical Group action.

5 The County however, instead of providing an argument that is supported by the
6 terms of the Water Agreement, instead attempts to justify its unilateral creation of the
7 ICWD Report, and its subsequent attempt to characterize the creation of that report as
8 Technical Group action, by misconstruing the manner in which the Technical Group
9 performs its duties under the Water Agreement.² Without meaningful citation, and
10 without any supporting evidence, the County states:

11 Since its inception in 1982, the Technical Group has customarily conducted its
12 work in one of two ways. Under the first, one Party presents data or analysis to
13 the Technical Group for consideration and requests action based upon the data
14 or analysis submitted. The Technical Group then either reaches consensus and
15 agrees on a course of action, or disagrees and takes no action. In the event there
16 is a lack of consensus, under the LTWA, either Party may to submit the issue in
17 question to the dispute resolution process (LTWA Section XXVI). The second
18 way that the Technical Group may act is for an issue to be placed on the
19 Technical Group agenda and Technical Group then reaches consensus on how
20 to proceed.

21 Essentially, the County asserts that the Technical Group accomplishes its work
22 under the Water Agreement in two ways. First, either LADWP or the County engage in
23 some unilateral activity, present that activity to the Technical Group and the Technical

24 ² Contrary to the County's assertion that the customary practice of the Technical Group
25 is for either Los Angeles or Inyo County to present unilaterally prepared analysis to the
26 Technical Group for a vote of agreement or disagreement, the past precedent of the
27 Technical Group used in circumstances of environmental evaluations is to first prepare
28 a protocol or procedure describing evaluation methods and procedures. These
Technical Group protocols are developed and agreed upon prior to the commencement
of an evaluation and describe the data to be used, how additional data will be collected,
and the analytical procedures to be used, including the statistical and modeling methods
(see Exhibits 34 – 37, referenced below, for four examples of these Technical Group
protocols developed prior to environmental evaluations).

1 Group either accepts the activity or dispute resolution is triggered. Second, an activity
2 is proposed and the Technical Group “reaches consensus” and pursues the activity.

3 The County’s explanation relating to “how” the Technical Group accomplishes its
4 work, however, fails to provide any justification for its conclusions that is based on the
5 terms found in the Water Agreement. For example, the County only provided one
6 citation to the Water Agreement in support of its position, and that citation relates to the
7 dispute resolution process, which is not contested in this proceeding. [COB, pg. 5, ln.
8 10] Rather than discuss and address the specific sections of the Water Agreement,
9 Green Book and 1991 EIR that allegedly support its arguments, the County instead
10 argues that custom and precedent support its position that either party may act
11 unilaterally and then trigger dispute resolution over that unilateral action. Unfortunately,
12 the County does not provide one piece of evidence to support its position that
13 “precedent” and “custom” permit unilateral activity, despite specific Water Agreement
14 language to the contrary.

15 Moreover, instead of providing evidence or analysis to support its position relating to
16 Blackrock 94, the County suggests that Technical Group responsibilities relating to new
17 well evaluations should inform this panel’s decision.³ The County’s position is wholly
18 misplaced.

19 ³ Contrary to the assertion made in the County’s brief on page 5, lines 16-25, LADWP
20 did not conduct a unilateral analysis of proposed new wells. LADWP only provided
21 information to the County to be used in the Technical Group analysis of the proposed
22 new wells and made no determinations as to the effects of operating the new wells (see
23 generally Exhibit 32, 33 for examples of new well evaluations). The County confirmed it
24 understood that the Technical Group would conduct an environmental evaluation of the
25 proposed new wells in its July 12, 2011 correspondence: “*The Technical Group will still
26 need to determine the aquifer test procedures and agree on the water level and
27 vegetation monitoring in the area of the new wells, as required by Water Agreement
28 Section VI and Green Book Sections IV.B.1.b and IV.B.2.c.*” (Exhibit 33, page 1,
paragraph 1).

1 As the County is aware, Water Agreement provisions related to new wells are very
2 different from those relating to vegetation monitoring and analysis. For example, the
3 Water Agreement provides that LADWP is solely responsible for the installation of new
4 wells. The Technical Group's responsibility relating to new wells is limited to the
5 evaluation of potential impacts associated with operating of those wells. The Technical
6 Group, though, has no ability to prevent the installation of a new well. To be clear, there
7 is no circumstance in which the Technical Group can act to prevent LADWP from
8 installing a new well based on its evaluation under the Water Agreement, even if such
9 evaluation were performed unilaterally by LADWP.

10 The Technical Group, however, is empowered to turn-off groundwater wells if it
11 determines, following joint monitoring and analysis of vegetation conditions, that a
12 measurable, significant impact has occurred to vegetation that is attributable to LADWP
13 groundwater pumping. In such an instance, a joint evaluation and analysis provides a
14 check and balance to ensure that the Technical Group wields its authority in a
15 responsible and scientifically supportable fashion. This circumstance is a clear
16 juxtaposition with Water Agreement provisions relating to new well construction,
17 including the design of new wells, because the Technical Group has no authority to
18 deny a well, and therefore it does not necessarily require County involvement. The
19 Technical Group's sole function relating to new well installation is to "evaluate" the
20 potential environmental effects of the proposed wells by developing information on
21 hydrologic conditions at the proposed wells site, inventorying and classifying vegetation
22 that could be affected, and to identify "new sites for monitoring". The Technical Group
23 has no approval, or denial, authority.

24 To the contrary, when the Technical Group engages in vegetation monitoring and
25 analysis, it has the power to prevent groundwater pumping. Therefore, the Technical
26 Group must perform that activity jointly. It is through this joint collaboration, performed

1 in an open and transparent process, that LADWP and the County achieve the
2 necessary checks and balances intended by the drafters of the document.

3 **B. Technical Group Precedent Supports LADWP's Position**

4 Even if this panel looks to past Technical Group practices to inform its decision
5 relating to the practical application of Water Agreement terms to the operation of the
6 Technical Group, it must find that the Technical Group did not adhere to the Water
7 Agreement with respect to the ICWD Report. In at least four instances, between 1993
8 and 2009, the Technical Group has endeavored to evaluate impacts to vegetation
9 conditions relating to LADWP's groundwater pumping. In each of those four instances,
10 the County and LADWP jointly collaborated to develop comprehensive work plans that
11 were subsequently used to evaluate and analyze vegetation impacts allegedly resulting
12 from groundwater pumping. A brief examination follows.

13 In 1992, the Technical Group agreed to evaluate the effects of groundwater pumping
14 from certain wells in the Five Bridges area of the Owens Valley. [Exhibit 34]. In order to
15 accomplish the evaluation, LADWP and the County, acting jointly through the Technical
16 Group, prepared and adopted a "study protocol". [Exhibit 1, page 34]. The resulting
17 study protocol outlined the goal and scope of the evaluation. It also detailed relevant
18 scientific experiments to be performed, timing of experiments, methods of data
19 collection and all methods that would be used to analyze any data, including selection of
20 statistical methods. [Exhibit 34, pages 2-6].

21 Likewise, similar work plans were developed in 1) 1996 for evaluation of wells in the
22 Thibaut-Sawmill area [Exhibit 35], 2) 2004 for evaluation of Reinhackle Spring
23 Operation Test [Exhibit 36], and 3) 2009 for evaluation of Well 416 in Lone Pine [Exhibit
24 37]. In each of these instances, the Technical Group jointly developed work plans that
25 set forth, in advance of any vegetation monitoring or analysis, the goals, methods and
26 analytical tools that would be used to accomplish the Technical Group's evaluation.
27 Moreover, in each of the examples noted above, the Technical Group undertook all

1 monitoring and analysis and LADWP and the County cooperated, as Technical Group
2 members, in generating reports with results from the given evaluations.

3 The Technical Group's past practices relating to vegetation monitoring and analysis,
4 in the face of impact allegations, are a clear juxtaposition from the County's
5 interpretation of "how the Technical Group works." In this case, the County seeks to
6 ignore the Water Agreement, but also ignores the plain history of Technical Group
7 evaluation of vegetation under that agreement. It is clear that the Water Agreement
8 requires that the Technical Group act jointly in the evaluation of vegetation impacts
9 allegedly due to groundwater pumping, and, time after time, the Technical Group's own
10 history demonstrates the practical implementation of that requirement. Therefore, this
11 panel should find that, again, the County's unilateral creation of the ICWD Report was
12 not a Technical Group activity and reject its conclusions.

13 **III. THE COUNTY DID NOT FOLLOW TECHNICAL GROUP PROTOCOLS**
14 **AND ITS SIGNIICANCE-MITGATION ANAYLSIS IS INVALID**

15 The County's second and third arguments, which are essentially a critique of
16 LADWP's Opening Brief, are not supported by any evidence and do not provide this
17 panel with legal foundation to accept the County's ICWD Report. While the vast
18 majority of the County's critique is addressed in LADWP's previous briefing, there are
19 two fundamental errors that prohibit acceptance of the ICWD Report. First, the County
20 refused to permit the Technical Group to jointly monitor and analyze vegetation
21 conditions at Blackrock 94, therefore its analysis found in the ICWD Report is invalid.
22 Second, even if the County were authorized to unilaterally evaluate vegetation
23 conditions at Blackrock 94, its monitoring program failed to conform with the
24 requirements of the Water Agreement.

25 //

26 //

1 4. The past Technical Group's past precedent, which is founded on the
2 procedures and protocols of the Water Agreement, is to jointly develop
3 protocols for vegetation evaluations prior to conducting such activities.
4 [See Exhibits 34-37] To the extent the County argues that its initial
5 "cleaning up" of certain data sets represented a joint vegetation monitoring
6 plan, its arguments are misplaced and not factually supported.

7 Here, there has never been a jointly developed vegetation monitoring plan or Impact
8 Determination Protocol for Blackrock 94. Although the County would like this panel to
9 accept its ICWD Report, this panel cannot take such action. The Water Agreement is
10 clear, and despite its cumbersome nature, the County is bound by its terms.

11 **B. Even if the County was Authorized to Execute a Unilateral Monitoring**
12 **Program at Blackrock 94, its Methods Did Not Conform with the Water**
13 **Agreement.**

14 Even if this panel finds that the County was somehow authorized to monitor and
15 evaluate vegetation impacts at Blackrock 94, on behalf of the Technical Group, and
16 subsequently generate the ICWD Report, this panel must reject that report because the
17 County failed to follow the requirements of the Water Agreement and Green Book in
18 completing its evaluation and analysis.

19 The Water Agreement and Green Book provide specific requirements that the
20 Technical Group must follow when evaluating vegetation impacts. Among the
21 requirements, the Water Agreement requires specific data collection procedures in
22 order to preserve the integrity of any analysis. For example:

- 23 1. Green Book Box I.C.1.a.ii (2) requires that in cases of suspected
24 vegetation change, vegetation cover and composition values will be
25 established using vegetation sampling technique conducted in a similar

1 manner to the line-point method used during LADWP's 1984-87 initial
2 inventory. [Green Book page 22].

- 3 2. A description of how the 1984-87 initial inventory was conducted begins
4 on Section II, page 34, of the Green Book and the specific procedure used
5 in conducting vegetation transects for the initial inventory is described
6 under Green Book Section II.A.2.d, page 37.
- 7 3. As described by Green Book Section II.A.2.d, the initial inventory
8 specifically focused vegetation transects choosing lines that appeared to
9 cover "representative units of vegetation within a parcel" and which
10 avoided "transitional areas" [Green Book pages 37 and 38].
- 11 4. Mr. Brian Tillemans participated in the 1984-87 vegetation inventories and,
12 as stated in his declaration, LADWP avoided low cover and bare areas
13 during the initial inventory transect and instead focused on units of
14 representative cover.
- 15 5. Inyo County's method of vegetation monitoring locates transects
16 randomly, sometimes in areas of representative cover, sometimes in
17 areas of low cover, sometimes in bare areas, a violation of the Green
18 Book.
- 19 6. As stated by Inyo County itself, "Lack of homogeneity within many of the
20 vegetation parcels can result in the randomly located line-point transects
21 providing biased data" [CWD 2001 Report: *Classification of Re-Inventoried*
22 *Vegetation Parcels According to the Drought Recovery Policy*, page 6,
23 paragraph 4].
- 24 7. Comparison of vegetation cover and composition data obtained from
25 LADWP's initial vegetation inventory with data obtained from the County's
26 random method results in an apples to oranges comparison.

1 8. LADWP has objected to Inyo County's random monitoring method since
2 1992.

3 While the County attempts to overcome the above referenced facts by claiming that
4 the Technical Group "agreed" to the County's method in 1992, the County's
5 characterization is mistaken. It is true that the Technical Group discussed vegetation
6 monitoring during that and other meetings, however, the Technical Group never voted
7 on or approved any variation to the requirements found in the Green Book or Water
8 Agreement. Instead, the Technical Group merely voted to approve minute from those
9 meetings, which included a recitation of the discussion relating to the methods. [Exhibit
10 38] Without agreement between the County and LADWP, achieved through a vote, the
11 County's data collection program is void. The Water Agreement page 7, paragraph 1
12 provides:

13 "Neither the Technical Group nor the Standing Committee shall make any
14 determination or recommendation as called for in this Stipulation and
15 Order, the Green Book, or the EIR without first obtaining agreement
16 among the Department's representatives and the County's
17 representatives. Regardless of the number of representatives from either
18 party in attendance at a Standing Committee or Technical Group meeting,
19 Inyo County shall have only one (1) vote, and Los Angeles shall have only
20 one (1) vote."

21 Water Agreement Section XXV then provides:

22 "If, as a result of information gained from ongoing research or cooperative
23 studies, or for other reasons as may be necessary to better achieve the
24 goals of this Stipulation and Order, or for purposes of improving the
25 monitoring and evaluation activities, the Department and Inyo County
26 Board of Supervisors, by agreement, may modify: 1) any provision of the
27 Green Book, including its provisions for monitoring sites, the type of
28 monitoring, and the interpretation of monitoring results..."

Here, the Inyo County Board of Supervisors and LADWP made no agreement to
modify the type of monitoring specified in Green Book Box I.C.1.a.ii and described by

1 Green Book Section II.A.2.d to be used in cases of suspected vegetation change,
2 therefore the parties are **obligated** to use the methods specified by the Water
3 Agreement. Consequently, because the ICWD Report is fundamentally premised on
4 vegetation data that was collected using methods that were unapproved by the
5 Technical Group and inconsistent with the Green Book, this panel must reject the
6 County's report in its entirety.

7 **IV. THE COUNTY FAILS TO REFUTE THAT THE 1991 EIR ALREADY**
8 **ADDRESSED THE IMPACTS ALLEGED IN THE ICWD REPORT**

9 The County wholly fails to provide any relevant supporting evidence to refute the fact
10 that the 1991 EIR already considered the exact impacts that are being alleged in the
11 ICWD Report. Instead, the County simply makes a series of conclusions that the
12 vegetation impacts alleged in the ICWD Report were not considered in the 1991 EIR
13 and that the vegetation mitigation found in the 1991 EIR did not addresses vegetation
14 impacts at Blackrock 94. The County's conclusions, however, are not buttressed with
15 any evidence to support their adoption. To the contrary, the 1991 EIR specifically
16 addressed the exact impacts that the County alleges in the ICWD Report, and therefore
17 cannot form the basis for new mitigation.

18 **A. Impacts 9-13 & 9-17 Each Address Blackrock 94**

19 The County states in its CRB, on page 30, line 13-17, that the 1991 EIR addressed
20 only water resource impacts at Blackrock 94, but does not address the vegetation
21 impacts at Blackrock 94. The County's argument, however, is unsupported by the 1991
22 EIR.

23 The 1991 EIR, Impact 9-13, states that "Continuous pumping between 1970 and
24 1990 for fish hatchery supply has lowered groundwater levels and eliminated spring
25 flow, with no significant impact on water resources." The document goes and stating:
26

1 "Figures 9-24 and 9-25 show hydrographs of deep wells 224 and 339⁴
2 which are in the vicinity of the Fish Springs and Blackrock hatcheries
3 respectively. It can be seen that the continuous pumping to supply the
4 hatcheries, even in above average runoff years, has caused a lowering of
5 water levels. The recovery in wet years that is observed elsewhere in the
6 Valley has not occurred in these areas because of the continuous
7 pumping. Only a partial recovery of groundwater levels was seen in these
8 two areas. The continuous groundwater pumping to supply these
9 hatcheries has lowered groundwater levels and eliminated flow in Fish
10 Springs, and Little and Big Blackrock Springs. **The changes to water
11 levels themselves are not judged to be significant, although the
12 consequences to vegetation could be significant. This issue is
13 addressed in Chapter 10, Vegetation.**

9 The County completely ignores the final sentence that plainly indicates that the 1991
10 EIR considered and mitigated for vegetation impacts at Blackrock 94. Instead of
11 addressing the issue, the County claims that there is no nexus between Well 339 and
12 Blackrock 94. Well 339, however is essentially the same distance from the Blackrock
13 Hatchery Wells, the very wells that are alleged to have caused impacts in the ICWD
14 Report, as Blackrock 94 vegetation parcels. [Exhibit 39] Therefore, the mitigation
15 measures related to vegetation impacts at Blackrock 94 are the exact same impacts
16 that are alleged by the County and have already been addressed by the 1991 EIR.

17 Likewise, Impact 9-17 also identified potential serious impacts to vegetation. Like
18 Impact 9-13, the 1991 EIR addressed that mitigation in Chapter 10. Like Impact 9-13,
19 Impact 9-17 concerned the area of Blackrock 94 and potential impacts to vegetation
20 caused by the Blackrock Hatchery Wells, the same wells that have allegedly caused
21 impacts in the ICWD Report. Again, additional evidence that the 1991 EIR considered
22 vegetation impacts at Blackrock 94.

23 **B. All Impacts to Vegetation at Blackrock 94 that Were Not Addressed by the**
24 **1991 EIR Were Considered in the Statement of Overriding Considerations**

25 ⁴ See Exhibit 39 for a map depicting the location of Well 339 and its relationship to
26 Blackrock 94 and Blackrock Springs wells.

1 Even if Chapter 10 of the 1991 EIR did not specifically address all potential impacts
2 to vegetation at Blackrock 94, or if one were to accept the County's argument that the
3 meadow in vegetation parcel Blackrock 94 wasn't associated with the groundwater
4 pumping that affected Blackrock Spring and its associated meadow vegetation, the
5 1991 EIR definitively documented that Blackrock Hatchery pumping had suppressed the
6 water table at well 339, which is located near vegetation parcel Blackrock 94 and a
7 similar distance from the hatchery as Blackrock 94.

8 The 1991 EIR also documented that Blackrock Hatchery pumping had suppressed
9 the water table as far south as Oak Creek, which is 6 miles south of Blackrock Hatchery
10 and 4 – ½ miles south of Blackrock 94. [1991 EIR, Impact 9-11, pages 9-63 and 9-64].
11 Moreover, the 1991 EIR identified several studies which concluded that at least 25,000
12 additional acres of land were subject to changes in vegetation cover and composition
13 between 1970 and 1990; all changes that were not specifically mitigated in the 1991
14 EIR. [1991 EIR, page 10-46, paragraph 4] The 1991 EIR continues, "The studies
15 described above conclude that there has been a reduction in vegetation cover or a
16 change in the species composition of vegetation since 1970. As stated in the pre-project
17 setting section, a baseline survey of vegetation of sufficient detail to document
18 vegetation conditions in the pre-project period does not exist". [1991 EIR, page 10-47,
19 paragraph 2]. With regard to the permanency of the vegetation changes between 1970
20 and 1990 the 1991 EIR states: "For practical purposes such changes must be regarded
21 as permanent. Even if water management were to revert to pre-project operations, the
22 affected vegetation could require a time period of many decades to return to the pre-
23 1970 conditions" (1991 EIR, page 10-49, paragraph 1). The Board did not adopt specific
24 mitigation measures for much of the vegetation significantly impacted by groundwater
25 pumping that is noted above. However, the Board approved a statement of overriding
26 considerations to address these impacts, fully cognizant that thousands of acres of

1 groundwater dependent vegetation were significantly affected by groundwater
2 drawdown induced by groundwater pumping at the Blackrock Fish Hatchery and from
3 other area wells.

4 Moreover, even if LADWP didn't identify and mitigate impacts to Blackrock 94 or
5 accept a statement of overriding considerations for these impacts, LADWP analyzed the
6 pumping from Blackrock Hatchery and other area wells between 1970 and 1990 in the
7 1991 EIR. If Inyo County believes that impacts to Blackrock 94 should have been
8 included in the EIR, it should have provided relevant comments and objections in the
9 draft EIR and filed suit within 180 days of the EIR being finalized. Instead the County
10 approved the EIR as a responsible agency, despite the evidence that was addressed in
11 the statement of overriding considerations.

12 **V. THE ICWD REPORT DOES NOT DEMONSTRATE A MEASURABLE,**
13 **SIGNIFICANT CHANGE IN VEGETATION AT BLACKROCK 94 THAT IS**
14 **ATTRIBUTABLE TO LADWP'S GROUNDWATER PUMPING**

15 LADWP's Opening and Response Briefs thoroughly discuss the range of flaws in the
16 ICWD Report that conclude that there has been a measurable, significant change to
17 vegetation at Blackrock 94, which is attributable to LADWP's groundwater pumping.
18 See LADWP Opening Brief Section VI.⁵ While it is unnecessary to repeat those
19 arguments here, there are two primary flaws in the ICWD Report, each of which
20 prevents this panel from accepting its conclusions. 1) The County did not use proper or
21 approved control sites; 2) The ICWD Report's conclusions are based on a comparison
22 to "baseline" vegetation without recognizing that LADWP has no obligation to maintain
23 baseline conditions, and which fail to consider climatic conditions as required by the
24 Water Agreement.

25 ⁵ For a condensed summary explaining the specific errors in the County's Response to
26 LADWP's critique of the ICWD Report see Dr. David Martin's Declaration. [Exhibit 40].

1 Green Book Section I.C also makes clear that LADWP is not required to prevent
2 vegetation from changing due to factors other than groundwater pumping or changes in
3 surface water management practices:

4 "Among the primary goals of the Agreement are to manage groundwater
5 pumping and surface water management practices as follows: 1) to avoid
6 causing significant decreases in live vegetation cover; 2) to avoid
7 changing a significant amount of vegetation from one classification to a
8 lower (alphabetically) classification..." (Green Book Section I.C, page 19,
9 paragraph 2).

10 The Green Book requires the Technical Group to only consider impacts caused
11 by groundwater pumping or changes in surface water management practices:

12 "Once it has been determined that there has been a measurable
13 vegetation decrease or change, it must be determined whether the impact
14 is attributable to groundwater pumping or to changes in surface water
15 management practices" (Green Book Section I.C.1.b, page 23).

16 And Green Book Section I.C.1.b.v requires the Technical Group to determine and
17 rule out the extent to which other factors unrelated to groundwater pumping or changes
18 in surface water management practices have contributed to vegetation change or
19 decrease:

20 "Evaluation of the extent to which other factors unrelated to the effects of
21 groundwater pumping may have contributed to the vegetation change or
22 decrease. Such factors include drought, wet/dry climatic cycles, flooding,
23 fungal blight, range management practices, wildfire, and off-road vehicles"
24 (Green Book Section I.C.1.b.v, page 24).

25 The ICWD Report fails to recognize that the period prior to 1984-87 vegetation
26 inventory was a very wet period marked by high precipitation and snowpack runoff.
27 Snowpack runoff between 1979 and 1986 averaged over 130% of normal requiring
28 LADWP to spread surface water when it exceeded the capacity of the Los Angeles

1 Aqueduct. [Exhibit 41] Additionally during this period, LADWP turned off many of its
2 wells because surface water was available in excess of aqueduct capacity and local,
3 Owens Valley, needs. The high levels of precipitation, surface water spreading resulting
4 from operational needs, and increased infiltration of surface water into the groundwater
5 table substantially increased both soil moisture available to vegetation, and raised the
6 water tables. The plentiful amounts of water made available during this period resulted
7 in high levels of vegetation growth and abundant vegetation during the 1984-87
8 vegetation inventories. However, LADWP isn't required to maintain these vegetation
9 levels, which resulted from increased precipitation and snowpack runoff. LADWP's
10 obligation is only to avoid impacting vegetation due to its groundwater pumping or
11 changes in surface water management practices. During these wet periods, LADWP
12 did not change either its pumping or surface water management practices.

13 The County bases its ICWD Report on data collected from 1991 and 2009, a period
14 marked by severe drought, beginning in 2007 and ending in 2011, which was evidenced
15 by drought Proclamations from the Governor of California. [Exhibit 42] Water
16 Agreement Section I.D, page 8, recognizes that factors other than groundwater
17 pumping affect vegetation and Green Book Section I.C requires the Technical Group
18 make its determinations of "attributability" and "significance" based only upon
19 groundwater pumping (or changes in surface water management practices). Further,
20 Green Book Section I.C.1.b.v, page 24, requires the Technical Group to identify and
21 rule out the extent to which "other factors", including drought and wet/dry cycles, may
22 have contributed to vegetation cover and composition change. The County however,
23 failed to adequately consider the role of "other factors" in its ICWD Report, and
24 completely ignored the effects to vegetation at Blackrock 94 caused by the wet periods
25 from 1978-1986 and 1995-1998, and also completely ignored the impacts to vegetation
26 at Blackrock 94 caused by the severe drought conditions that existed from 2007-2011,

1 which is also the period in which the County collected its vegetation data that formed
2 the basis of the ICWD Report. [Exhibit 43] Consequently, any comparison to baseline
3 conditions, without substantive accounting for climatic conditions, both at baseline and
4 at all other points of data collection, is invalid and must be rejected by this panel.

5 **VI. THIS PANEL MUST REJECT THE ICWD REPORT BECAUSE IT IS**
6 **INCONSISTENT WITH THE COUNTY’S REQUEST TO THE STANDING**
7 **COMMITTEE**

8 The foundation of the County’s request to this panel is the ICWD Report. That
9 report contains the entire universe of vegetation data and analysis used by the County
10 to formulate its conclusions relating to Blackrock 94. The conclusion of ICWD Report is
11 that a change in vegetation cover and composition occurred between 1986 (or 1987)
12 and 1991 (or 1990 - the alleged years vary in both the County’s 2011 report and
13 subsequent briefs). Specifically, the ICWD Report states:

14 “The Water Department has evaluated conditions in vegetation parcel
15 Blackrock 94...data indicate a measurable vegetation change since
16 baseline has occurred in Blackrock 94, both in terms of vegetation cover
17 and species composition. These changes occurred between baseline and
18 1991 and have persisted in time. Vegetation composition has changed
19 toward increasing shrub proportion and a decrease in grass cover. **While**
20 **the proportion of shrubs in Blackrock 94 has not yet caused the**
21 **parcel to change from Type C to Type B vegetation, changes in**
22 **species composition for perennial species suggest a change in Type**
23 **is occurring...The factors...indicate that a significant change is**
24 **occurring in Blackrock 94”** (ICWD 2011 Report, page 4, last paragraph).

25 While the County’s 2011 report stated that a “significant change **is occurring**”,
26 the County’s September 26, 2012 request to the Standing Committee was substantially
27 different:

28 “That the Standing Committee agree that **there has been a significant**
impact to Blackrock 094 and direct the Technical Group to prepare a
mitigation plan for the area” (September 26, 2012 motion to the Standing
Committee).

1 The County now attempts to reconcile its two differing conclusions by stating:
2

3 "As previously noted, the [ICWD February 2, 2011] report states that such
4 measurable decreases and changes were caused by groundwater
5 pumping by 1991, but due to continued groundwater pumping and
6 reduced surface water diversions in the vicinity of Blackrock 94 such
7 changes became significant since the 1987-1991 period" (Inyo County's
8 September 3, 2013 Brief, page 36, paragraph 3).

9 To summarize the County's assertions, pumping between 1986 (or 1987) and 1990
10 (or 1991) had allegedly caused measurable changes to vegetation within Blackrock 94.
11 While these changes were not yet significant by 2011, the County's analysis was
12 evidently sufficient to "suggest a change in Type is occurring" and that the "factors...
13 indicate that a significant change is occurring in Blackrock 94." However by 2012, the
14 change had allegedly become significant, **although no further evidence analysis was
15 provided to support this latest conclusion.**

16 To take the County's allegations at face value, groundwater pumping between 1986
17 (or 1987) and 1990 (or 1991) had caused measurable changes. These changes were
18 not significant when they occurred, however twenty years later, by 2011, they were
19 becoming significant and sometime between 2011 and 2012 they had become
20 significant. More troubling, the County's newest conclusion, that a significant change in
21 vegetation actually occurred between 2011 and 2012, is not supported by any additional
22 evidence outside the ICWD Report.

23 Here, the County unilaterally generated its ICWD Report and found that a significant
24 change might be occurring, but that it had not yet come to fruition. Unfortunately, the
25 County asked the Standing Committee, and now this panel, to find that an actual
26 change had already occurred, without providing any relevant, additional evidence.
27 Therefore, this panel must reject the County's request to find that a significant change
28 has occurred because there is no evidence, even assuming the ICWD Report is

1 scientifically supportable, that any change in vegetation actually exists at Blackrock 94.
2 Moreover, the County seeks a resolution of a different matter that that which was
3 presented to the Standing Committee. Therefore, this panel must reject the County's
4 request.

5 **VII. THIS PANEL MUST APPLY THE TERMS OF THE WATER AGREEMENT**
6 **AND FIND THAT THE TECHNICAL GROUP MUST PERFORM AN**
7 **EVALUATION OF VEGETATION CONDITIONS AT BLACKROCK 94.**

8 Throughout the County's briefing, it returns to a theme that the County must be
9 allowed to unilaterally examine vegetation conditions and unilaterally perform the
10 significance – mitigation determination because otherwise the process would become
11 lengthy, costly and burdensome. According to the County, the Technical Group need
12 not act jointly in conducting vegetation monitoring and analysis because "if such a
13 requirement were to be imposed, a Party could not conduct an investigation or analyze
14 data unless the Technical Group were to agree in advance on the applicable
15 procedures on how the Parties would jointly conduct the activity or analysis." CRB, pg.
16 6, Ins. 4-6. The County goes on to argue that if the Technical Group must jointly
17 perform all its duties it would result in a "fractured" process that could be "deliberately
18 stalled in an intermediate series of disputes were it in one of the party's interest that an
19 issue remain unresolved." In essence, the County argues that it must be empowered to
20 act unilaterally because LADWP might interfere and refuse to engage, as a Technical
21 Group member, in a vegetation analysis under the Water Agreement. The County's
22 argument has no merit.

23 As noted by County, every contract has a duty of good faith and fair dealing. As
24 discussed above, both LADWP and the County ceded certain rights when they entered
25 into the Water Agreement. LADWP relinquished its right to refuse to participate in
26 vegetation monitoring and analysis as a means of regulating groundwater production,

1 and the County ceded its right to unilaterally monitor and analyze vegetation conditions.
2 In lieu of those ceded rights, both LADWP and the County took on certain duties.
3 LADWP acknowledged a duty to fully and honestly participate in vegetation monitoring
4 and analysis, irrespective of any internal belief relating to the merits of such monitoring
5 or its necessity. The County assumed the duty to cooperate and jointly perform
6 vegetation monitoring through the Technical Group mechanism. Therefore, under the
7 County's scenario in which LADWP obstructs or interferes with Technical Group
8 actions, or in those instances in which LADWP refuses to participate in the good faith
9 development of a joint plan to execute vegetation monitoring and analysis, LADWP
10 would violate the covenant of good faith and fair dealing, thereby protecting the
11 County's interest.

12 Here, the County has provided absolutely no evidence, and has made no allegation,
13 indicating that LADWP has refused to participate in vegetation monitoring, as a member
14 of the Technical Group, at Blackrock 94. LADWP has not objected to evaluating
15 conditions at Blackrock 94, LADWP has not interfered with the development of a joint
16 plan to evaluate vegetation conditions at Blackrock 94, and LADWP has not impeded or
17 "deliberately stalled" any Technical Group action or activity. Quite the opposite is true.

18 In the case of Blackrock 94, LADWP has repeatedly insisted that the Technical
19 Group engage in a comprehensive evaluation of vegetation conditions. LADWP has
20 repeatedly requested that the County engage in the development of a joint monitoring
21 and analysis plan. The County, however, has refused to participate in any joint effort at
22 Blackrock 94. Instead, it has steadfastly held the position that the only role the
23 Technical Group must play is one of voting, up or down, on its unilaterally generated
24 ICWD Report.

25 //

26 //

1 **VIII. CONCLUSION**

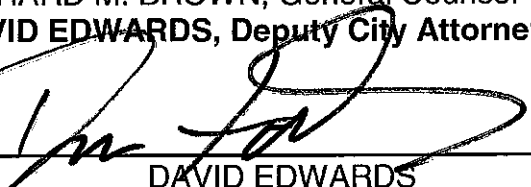
2 Although LADWP has presented ample evidence demonstrating that the ICWD
3 Report is scientifically unsupportable, this panel need not reach that issue. Rather, this
4 panel should reject the County's request because the County failed to adhere to the
5 terms, protocols and procedures relating to vegetation monitoring found in the Water
6 Agreement, Green Book and 1991 EIR in creating the ICWD Report. This panel should
7 find that the County refused to engage as a Technical Group member in the creation of
8 the ICWD Report, that it acted unilaterally in contravention of the Water Agreement and,
9 finally, it should find that all vegetation monitoring and analysis must be performed
10 jointly by the Technical Group under the terms of the Water Agreement.

11 Failure to make such a finding will render the Water Agreement useless. It will
12 create a scenario in which the Technical Group and the Standing Committee are
13 stripped of their management mandate and it will relegate those bodies to simply
14 executing ministerial votes on competing, unilateral, vegetation reports and, more
15 troubling, it will strip the Water Agreement of the cooperative management principles
16 under which it was conceived.

17 Dated: September 20, 2013

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