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JUN 24 2005

INYO CO. SUPERIOR COURT
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Inyo Co. Water Department

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF INYO

SIERRA CLUB, and OWENES VALLEY
COMMITTEE,

Plaintiffs,

vs.

CITY OF LOS ANGELES, et al,

Defendant,

) Case No.: SICVCV-01-29768
) STATEMENT OF DECISION RE COMPLIANCE
) WITH COURT ORDERS

CALIFORNIA DEPARTMENT OF FISH AND
GAME and CALIFORNIA STATE LANDS
COMMISSION,

Real Parties in Interest
and Cross-Complainants.

COUNTY OF INYO and DOES 51-100

Real Party in Interest

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1 This case is but another skirmish in the ongoing battle over water in
2 the Owens Valley. This particular skirmish began in the early 70's because
3 the City of Los Angeles, through its Department of Water and Power
4 (hereinafter jointly and severally referred to as "DWP"), built a second
5 aqueduct to export water from the Owens Valley to the City without complying
6 with CEQA, as discussed in County of Inyo v. Yorty (1973) 32 Cal.App.3d 795.
7 Additional litigation ensued as follows: County of Inyo v. City of Los
8 Angeles (1977) 71 Cal.App.3d 185; County of Inyo v. City of Los Angeles
9 (1978) 78Cal.App 3d82; and County of Inyo v. City of Los Angeles (1981) 124
10 Cal.App.3d 1. DWP never did comply with the writ ordered in 1973 to provide
11 an adequate E.I.R. concerning that project.

12 Instead the parties, i.e. DWP, county of Inyo (hereinafter, "Inyo"),
13 the Sierra Club, the Owens Valley Committee (hereinafter, "OVC") the
14 California Department of Fish and Game (hereinafter, "Dept. of F & G") the
15 California State Lands Commission (hereinafter, "Commission") and Carla
16 Scheidlinger, in March, 1977, entered into a Memorandum of Understanding
17 (hereinafter, "MOU"), based upon a previously developed Long Term Water
18 Agreement, to develop the Lower Owens River Project (hereinafter, "LORP") as
19 a CEQA mitigation measure resulting from the construction of the second
20 aqueduct. Pursuant to stipulation the writ previously ordered was dissolved.
21 The MOU established deadlines for various things to be accomplished. None of
22 those deadlines were met by DWP, even as thereafter extended by agreement of
23 the parties.

24 On December 4, 2001, this action was commenced by Sierra Club and OVC
25 to compel DWP and Inyo to comply with the MOU provisions requiring completion
of a draft E.I.R. for the LORP. By stipulation dated May 30, 2002, it was

1 agreed that the Draft E.I.R. would be completed and released by August 31,
2 2002. It was not. On September 12, 2002, this court ordered its completion
3 and release by November 1, 2002, which was done.

4 On September 26, 2003, Sierra Club and OVC filed a second amended and
5 Supplemental complaint for Declaratory and Injunctive Relief and for a Writ
6 of Mandate. On December 4, 2003, Dept. of F. and G. and Commission filed a
7 cross complaint for Declaratory Relief and for a Writ of Mandate.

8 These actions seek to enforce the MOU.

9 On February 10, 2004, a stipulation and proposed order "...to resolve the
10 issues raised in the Amended Complaint and the Cross Complaint, and to
11 resolve the issue of the capacity of the LORP pump station" was filed. The
12 proposed order pursuant thereto was executed on February 13, 2004.

13 On May 19, 2004, the court denied DWP's request for more time to
14 complete the LORP E.I.R.

15 On May 24, 2004, DWP announced that it would no longer seek to develop
16 the E.I.R. in consultation with Inyo but, rather, would prepare its own.

17 On July 2, 2004, a document entitled "Final EIR/EIS" was released by
18 DWP. EPA voiced objection to it within days thereafter. On July 30, 2004,
19 the "Final EIR" was approved by DWP's Board of Water Commissions.

20 On September 15, 2004, an amended Stipulation and Order was filed and
21 was executed by the court that day. In paragraph 4, p.5, the stipulation
22 again recites that "The purpose of this Stipulation and Order is to resolve
23 the issues raised in the Amended Complaint and the Cross Complaint, and to
24 resolve the issue of the capacity of the LORP pump station."

25 On the court's own motion, on November 17, 2004, the matter was set for
trial on April 25, 2005. Thereafter, DWP brought the language of the amended

1 stipulation and order to the court's attention, that its purpose was to
2 "...resolve the issues raised in the Amended Complaint and the Cross
3 Complaint...". Accordingly, the trial date was vacated and the matter was re-
4 set on April 25, 2005, for hearing any motions the parties might bring
5 concerning DWP's compliance with the order pursuant to the stipulation
6 previously filed.

7 A three day hearing was held as scheduled. Closing briefs were ordered
8 filed by May 11, 2005, at which time the matter was submitted for decision.

9 Although the focus of the hearing was DWP's compliance with the
10 stipulated orders and whether any delays in compliance were due to
11 circumstances beyond DWP's control, it is important to note that DWP has been
12 and is in violation of CEQA since the early 70's because the mitigation
13 measures it agreed to have not been accomplished as agreed and ordered.

14 Relative to DWP's compliance with the stipulated order, the evidence is
15 clear, convincing and overwhelming that DWP is in violation of its agreements
16 set forth in the stipulations and the court's orders pursuant thereto.
17 Whether the violations were inadvertent, negligent, or intentional seems to
18 me to be irrelevant. A procedure is set forth in the stipulations for DWP to
19 advise the parties in advance of inability to comply, for modification
20 pursuant to agreement, or pursuant to court order. With rare exception, DWP
21 has not utilized the procedures it agreed to and as ordered by the court.

22 It appears that DWP needs the threat of immediate sanctions before it
23 gets busy on the LORP.

24 The evidence in this matter does not support a finding or conclusion
25 that DWP's violations of the stipulated orders and consequential delays for
completion of the LORP were due to circumstance beyond DWP's control.

1 In fact they appear to be more likely caused by the delay by litigation
2 practice described by Gerald Gewe, Chief Operating Officer- Water System,
3 until 2005, who has bragged about the amount of money and water DWP had saved
4 by litigation delay. DWP now responds that it's not in business to make a
5 profit, etc. and that its officers do not benefit financially from such a
6 policy. Be that all as it may, saving money and water benefits the City and
7 makes the officers look good for whatever benefits that may bring.

8 DWP candidly concedes that it cannot meet the stipulated deadline of
9 September 5, 2005 for the initial flows of water in the river.

10 DWP is in violation of the stipulated orders because it did not provide
11 an Administrative Draft of the Final EIR/EIS to the parties and the EPA as
12 required by the Final EIR/EIS schedule, items 14-16. DWP's explanation that
13 it does not know what an administration draft is, and that such a draft is
14 not required by CEQA is disingenuous, it not mendacious. It agreed to
15 provide one and did not in violation of the order. If it had complied,
16 perhaps water could be in the river as ordered.

17 In fact a review of that schedule shows that DWP was required to work
18 closely with EPA and it obviously did not.

19 The stipulated order provides that "LADWP and the county shall complete
20 and release to the parties a Final EIR/EIS addressing the LORP by June 23,
21 2004." DWP is in violation of the order because:

- 22 1. Its "Final EIR/EIS" was done only by DWP.
- 23 2. The document is not a final EIR/EIS because EPA did not approve
24 it as an EIS and has not yet approved it.

25 DWP says that approval of an EIS by EPA is beyond its contract. So
What? DWP agreed to provide a Final EIR/EIS by June 23, 2004. If it had not

1 biddled around trying to play bureaucratic games with EPA and with the
2 parties, about the capacity of the pump back station, for example, thereby
3 losing a year or more, it appears likely they could have complied with the
4 order.

5 DWP is also in violation because it went alone to complete the EIR by
6 June 23, 2004.

7 To my mind the issues of adaptive management and the need for a GAPF
8 are intertwined. The stipulation clearly reflects the fact that Inyo needs
9 the EPA grant funds to meet its obligations to the LORP. The evidence
10 discloses that EPA's GAPF concerns are about the same problem areas as are
11 the parties adaptive management concerns. DWP argues otherwise, however. It
12 appears to me that DWP's failure to develop a GAPF on a timely basis violates
13 the stipulation by failing to proceed with due diligence.

14 DWP argues that many delays were attributed to its consultants. No
15 evidence, however, is before the court as to what efforts DWP made to
16 encourage its consultants to meet deadlines. No explanation has been offered
17 as to why NMH was not utilized sooner or more fully.

18 DWP's explanations about why it did not meet with EPA and share its
19 concerns and learn EPA's concerns appear to be excuses and not reasons.
20 Certainly, when I made inquiry about what EPA's position was regarding the
21 "EIR/EIS" and was advised that it was unknown since no meeting had yet
22 occurred, I was misinformed. The record, however, is now replete with
23 correspondence from EPA expressing its concerns.

24 DWP is in violation of the stipulated order because within seven days
25 of certification by its Board of the "EIR/EIS" it did not submit a "complete"
application to Lahontan Regional Water Quality Control Board. The argument

1 that they thought it was "complete" and were sandbagged when Lahonton said it
2 would enforce all its regulation is not persuasive. Recent correspondence to
3 Lahonton suggests that more delay by litigation may be in the offing.

4 DWP contends correctly that its still has the right to seek an
5 extension of the September 5, 2005, deadline. Their failure to do so long
6 ago is inexplicable. DWP, however, cannot rely on problems or excuses it
7 failed to report to the court and parties on a timely basis.

8 In sum, I find DWP in violation for the reasons stated and because it
9 obviously did not proceed with due diligence.

10 The evidence shows that its approach to the LORP was on an ad hoc basis
11 with no real planning involved.

12 Regarding the Yellow Billed Cuckoo and Hines Springs issues, we are
13 finally seeing some progress. But again, DWP had not complied with agreed
14 deadlines and no explanation has been presented.

15 The conduct of some of the other parties is worthy of comment. There
16 is scant evidence, if any, that the Sierra Club or OVC made any effort to
17 support timely completion of the LORP with any of the permitting agencies
18 involved. Such failure is reprehensible.

19 The question of sanctions will be heard on July 25, 2005, at 9:30 a.m.
20 All position papers in that regard must be served and filed by July 20, 2005.

21
22 Dated: *June 24, 2005*


23 Lee E. Cooper, Jr., Judge
24
25

DECLARATION OF SERVICE
CCP Section 1013
Case Number: (CVCV-01-29768)

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; that my business address is: Courthouse, 168 N. Edwards St., Independence, CA 93526, that on 6/24/05, I served a copy of the foregoing document(s) described as:

STATEMENT OF DECISION RE COMPLIANCE WITH COURT ORDER

(X) BY MAIL and FACSIMILE : I am readily familiar with the County of Inyo's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Independence, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Said copy was mailed as indicated below:

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

Dated: 24 June 2005



P. K. BARTON, Deputy Clerk