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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.: SICV CV 08-46888
	)	
Plaintiffs/Petitioners	)	<b>SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS WITH REFERENCE TO SUPPORTING EVIDENCE OF THE SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION</b>
v.	)	
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	)	Date: TBA Time: TBA Dept.: TBA
	)	
_____ Defendants/Respondents _____	)	Judge: The Hon. Lee Cooper
	)	
CALIFORNIA DEPARTMENT OF FISH AND GAME; and CALIFORNIA STATE LANDS COMMISSION and DOES 51-100	)	
	)	
_____ Real Parties in Interest. _____	)	

Petitioners/Plaintiffs Sierra Club and Owens Valley Committee submit the following Separate Statement of Undisputed Material Facts with Reference to Supporting Evidence in Support of Plaintiffs’ Motion for Summary Adjudication:

**UNDISPUTED FACTS**

**SUPPORTING EVIDENCE**

<p><b>First Cause of Action: Issue: The Adaptive Management Protocol for terrestrial habitat indicator species in the April 28, 2008, Lower Owens River Project Monitoring Adaptive Management and Reporting Plan does not ensure that LORP will be successfully implemented and are not consistent with the requirements of the 1997 Memorandum of Understanding between the City of Los Angeles Department of Water and Power, County of Inyo, California Department of Fish and Game, California State Lands Commission, Sierra Club and the Owens Valley Committee (“1997 MOU”).</b></p>	
<p>1. In 1970, the City and DWP constructed a second aqueduct to export water from Inyo County to the City (the first aqueduct was completed in about 1913). The City and DWP proposed to supply the aqueduct, in part, with ground water produced through increased groundwater pumping in Inyo County (hereafter, the “groundwater pumping project”).</p>	<p><i>County of Inyo v. City of Los Angeles</i> (1977) 71 Cal.App.3d 185; <i>County of Inyo v. City of Los Angeles</i> (1981) 124 Cal.App.3d 1. <i>County of Inyo v. Yorty</i> (1973) 32 Cal.App.3d 795.</p>
<p>2. Initiated in 1970, the groundwater-pumping project has caused significant environmental impacts in Inyo County. The groundwater pumping project reduced groundwater levels, damaged and destroyed springs and seeps, damaged and destroyed meadows, wetlands, and other vegetation, and harmed wildlife. The City began the project prior to complying with CEQA.</p>	<p><i>County of Inyo v. City of Los Angeles</i> (1977) 71 Cal.App.3d 185; <i>County of Inyo v. City of Los Angeles</i> (1981) 124 Cal.App.3d 1. <i>County of Inyo v. Yorty</i> (1973) 32 Cal.App.3d 795.</p>
<p>3. In 1972, the County sued the City and DWP under CEQA to require them to prepare an EIR on their groundwater-pumping project. In 1973, the Third District Court of Appeal held that the City and DWP had violated CEQA and ordered the issuance of a peremptory writ of mandamus that required the City and DWP to prepare an EIR.</p>	<p><i>County of Inyo v. City of Los Angeles</i> (1977) 71 Cal.App.3d 185; <i>County of Inyo v. City of Los Angeles</i> (1981) 124 Cal.App.3d 1. <i>County of Inyo v. Yorty</i> (1973) 32 Cal.App.3d 795.</p>

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<p>Although the City and DWP issued EIRs in 1976 and 1979, the Third District Court of Appeals found both not to be in compliance with CEQA. (</p>	
<p>4. In March 1997, the City, DWP, the County, the State Lands Commission, DFG, OVC, the Sierra Club, and Carla Scheidlinger signed the MOU. Under the MOU, the City 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 successful implementation of LORP. The MOU specified certain requirements that the Plan must contain, and contemplated that the LORP Plan would be completed prior to implementation of the LORP project.</p>	<p>Declaration of Joseph Brajevich in Support of Defendants’ Motion for Summary Adjudication (“Brajevich Decl.”), Exhibit A</p>
<p>5. The MOU augments the description of the LORP in the Inyo-Los Angeles Agreement and the 1991 EIR. The 1991 EIR identified the LORP as compensatory mitigation for significant adverse environmental impacts related to groundwater pumping by DWP from 1970 to 1990 that were difficult to quantify. The MOU specifies the goals of the LORP, the timeframe for development and implementation, and specific actions. It also provides certain minimum requirements for the LORP related to flows, habitats and species to be addressed, and adaptive management and monitoring. The LORP includes the watering of a 60-mile stretch of the Lower Owens River channel below the aqueduct intake, the enhancement of environmental features along and near the river, and in the Owens River Delta, and a pumpback facility near the Owens River Delta. The goal of the LORP is the establishment of a healthy and 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</p>	<p>Brajevich Decl., Exh. A (MOU, § II, A, B, C, E, F, H)</p>

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<p>grazing, agriculture, and other activities. The LORP is intended to create and maintain diverse natural habitats consistent with the needs of specified habitat indicator species in all four physical features of the LORP.</p>	
<p>6. There are four critical physical features of the LORP set forth in the MOU:</p> <p>a. A continuous flow will be established and maintained in the river channel from at or near the intake structure that diverts the Owens River into the Los Angeles Aqueduct, to the pumpback system located near the river delta. A base flow of approximately 40 cfs from at or near the intake to the pumpback system to be maintained year round, as well as seasonal habitat flows of approximately 200 cfs during years of average or above-average runoff in the Owens River watershed are required. (The baseflow has been belatedly established, and on July 22, 2007, this Court signed an Order incorporating a stipulation of the parties establishing protocols for monitoring and reporting baseflows).</p> <p>b. The establishment of the Owens River Delta Habitat Area, which is to enhance and maintain existing habitat consisting of riparian areas and ponds suitable for shorebirds, waterfowl, and other animals and to establish and maintain new habitat consisting of riparian areas and ponds suitable for shorebirds, waterfowl, and other wildlife and fishery resources within the Delta Habitat Area.</p> <p>c. The maintenance and/or establishment of certain off-river lakes and ponds to sustain diverse habitat for fisheries, waterfowl, shorebirds, and other wildlife and fishery resources.</p> <p>d. Creation and maintenance of a 1,500 acre Blackrock Waterfowl Habitat Area.</p>	<p>Brajevich Decl., Exh. A (MOU)</p>
<p>7. DWP did not complete the LORP Draft EIR by June 13, 2000, as required by the MOU. The MOU signatories agreed to several extensions for completion of the Draft EIR. DWP did not complete the LORP Draft EIR by the agreed upon</p>	<p>Plaintiffs' Request for Judicial Notice; <i>Sierra Club v. City of Los Angeles</i>, Inyo County Superior Court, Case No. S1CVCV01-29768</p>

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extensions.	
8. On December 24, 2001, Plaintiffs filed an action in Inyo County Superior Court seeking an order directing DWP to comply with the MOU provisions requiring completion of the LORP Draft EIR and implementation of the LORP by the dates prescribed by the MOU. By stipulation and court order, DWP agreed to complete and release the Draft EIR by August 31, 2002. DWP failed to comply with the Stipulation and Order. On September 12, 2002, this Court issued an Order directing DWP to complete and release the LORP Draft EIR by November 1, 2002. On November 1, 2002, LADWP released the LORP Draft EIR for public review and comment. The public comment period closed on January 14, 2003. Sierra Club, OVC, and DFG all commented on the DEIR. The MOU requires DWP to commence the base flow of 40 cfs in the river channel by June 13, 2003. On June 13, 2003, DWP failed to commence the base flow of 40-cfs in the river channel.	Plaintiffs' Request for Judicial Notice; <i>Sierra Club v. City of Los Angeles</i> , Inyo County Superior Court, Case No. S1CVCV01-29768
9. On June 24, 2005 this Court issued a Statement of Decision finding that the City violated the Order in many respects relating to the City's breach of its duties under the MOU to perform certain tasks by prescribed deadlines.	Plaintiffs' Request for Judicial Notice; <i>Sierra Club v. City of Los Angeles</i> , Inyo County Superior Court, Case No. S1CVCV01-29768
10. The Court determined that the threat of immediate sanctions was necessary to force the City to meet its obligation in a timely manner.	Plaintiffs' Request for Judicial Notice; <i>Sierra Club v. City of Los Angeles</i> , Inyo County Superior Court, Case No. S1CVCV01-29768
11. In August 2005, the Court imposed limitations on groundwater pumping until 40 cfs flows were introduced into the River, ordered the City to pay the County \$5000 per day until 40 cfs flows were introduced into the River, and ordered the establishment of base flows by July 25, 2007.	Plaintiffs' Request for Judicial Notice; <i>Sierra Club v. City of Los Angeles</i> , Inyo County Superior Court, Case No. S1CVCV01-29768
12. By letter dated December 10, 2004 to the MOU signatories, Sierra Club and OVC requested a meeting among the signatories to have dispute resolution with respect to the adequacy of the LORP Ecosystem Management Plan and the Project Description set forth in the final EIR.	Mooney Decl., Exh. A

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<p>13. The Sierra Club and OVC December 10, 2004 letter was supplemented by letters dated December 23, 2004 and January 7, 2005 to the signatories, making additional legal arguments concerning the LORP Ecosystem Management Plan and the Project Description approved by the City.</p>	<p>Mooney Decl., Exhibits B and C</p>
<p>14. By letter dated December 30, 2004 to the signatories, Deputy Attorney General Gordon Burns, notified the signatories that it was joining the letter sent on December 10, 2004 by Sierra Club and OVC, and raised additional issues that should be discussed. One additional issue was that “neither the LORP Plan nor the EIR appear to mention DFG’s role in consulting with the Standing Committee with respect to the habitat flows.”</p>	<p>Mooney Decl., Exh. D.</p>
<p>15. By letter dated September 29, 2006, to Gene Coufal (DWP) and Thomas Brooks (Inyo County Water Department), Sierra Club and OVC commented on the August draft Monitoring, Adaptive Management and Reporting Plan. In that letter Sierra Club and OVC pointed out that the draft document did not comport with the requirements of the MOU, and failed to address the concerns of Sierra Club and OVC that had previously been expressed. Sierra Club and OVC presented in this letter a detailed summary of the views of Drs. Robert Twiss and Duncan Patten, two authorities in adaptive management retained as expert consultants. Sierra Club and OVC received no reply to that letter.</p>	<p>Mooney Decl., Exh. E.</p>
<p>16. By letter dated November 17, 2006, to the legal representatives of the signatories, Sierra Club and OVC submitted additional comments on the draft August, 2006 Monitoring Methodologies, Adaptive Management, and Reporting document, and included the Patten-Twiss report in full.</p>	<p>Mooney Decl., Exh. F.</p>
<p>17. By letter dated February 14, 2007, the County and the City jointly responded to Sierra Club and OVC’s letter of November 17, 2006. The letter reported that “ESI is in the process of preparing</p>	<p>Mooney Decl., Exh. G</p>

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another draft of the LORP Monitoring, Adaptive Management, and Reporting Plan.” The letter offered no responses to the contentions made by Sierra Club and OVC in their letters.

18. A new (fourth) draft Monitoring, Adaptive, Management and Reporting Plan was produced in April, 2007, and was the subject of a *second* request by OVC and Sierra Club for a meeting of the signatories for dispute resolution. In this letter dated August 10, 2007, Sierra Club and OVC identified a number of disputes concerning the adequacy of the April 12, 2007 Adaptive Management, Reporting and Monitoring Plan and the LORP Ecosystem Management Plan. In their letter, Sierra Club and OVC identified the following issues for dispute resolution:

I. The requirement of the MOU that the Department of Fish and Game be consulted by the Standing Committee in connection with implementing the Annual Habitat Flow has again been disregarded in the April 12, 2007 Draft.

II. The LORP Ecosystem Management Plan, as described in the April 2007 Plan Document, is not an Integrated Plan, as required by the MOU.

III. The April 12, 2007 Plan contains no habitat flow management prescriptions that address the hydrologically varying sections of the river channel; the Riverine-Riparian Ecosystem Element of the LORP Plan, (as modified through the April Plan) does not recommend the amount, duration and timing of habitat flows in the hydrologically varying sections of the river channel under varying hydrological scenarios

IV. The April Plan, as it relates to adaptive management is unclear, internally inconsistent, and in some instances, so vague as to be meaningless to serve adaptive management purposes.

V. The LORP Ecosystem Management Plan, as defined in the April 2007 document is not the product of City-County collaborative direction and advice to the consultants

Mooney Decl., Exh. H

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<p>VI. The Consultants gave flawed assumptions concerning the LORP that taint the LORP Plan and that require necessary modifications in any final document.</p>	
<p>19. Sierra Club and OVC pointed out additionally that despite the requirement of the MOU that a LORP Ecosystem Management Plan be completed prior to formulation of the project description in the Draft EIR, this was not done, and that even though the base flows had been implemented, there was still (as of April 2007) no final complete, integrated LORP Ecosystem Management Plan that would serve to guide the City and County in implementing the project.</p>	<p>Mooney Decl., Exh. H</p>
<p>20. By letter dated December 11, 2007, Sierra Club and OVC submitted comments on the September 28, 2007 “Final Monitoring, Adaptive Management, and Reporting Plan.” The issues raised with respect to this document were similar but not identical to those raised in the August 10, 2007 letter.</p>	<p>Mooney Decl., Exh. I.</p>
<p>21. A sixth “Final Draft Lower Owens River Project Monitoring, Adaptive Management and Reporting Plan,” dated February 8, 2008, was distributed to the MOU signatories. By letter dated April 14, 2008 Sierra Club and OVC commented, and raised the following issues, <i>inter alia</i>:</p> <p>I. The Adaptive Management Protocols in the Chapter 3 Draft Final Plan do not ensure LORP will be successfully implemented or that project goals will be attained, as the MOU requires.</p> <p>II. The LORP Final Plan was not prepared according to the procedures described in the LORP Ecosystem Management Plan Action Plan and concept document, as required by the MOU.</p> <p>III. The Final Plan provides no adequate or consistent management protocols for seasonal habitat flows under varying hydrologic conditions or in hydrologically varying sections of the River.</p>	<p>Mooney Decl., Exh. J</p>



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<p>IV. The Plan is internally contradictory concerning the need for Adaptive Management during the first fifteen years of the LORP Project.</p> <p>V. CDFG's [Consultation] role remains ambiguous.</p>	
<p>22. By letter dated May 30, 2008, Sierra Club and OVC reinitiated dispute resolution under Section VI of the 1997 MOU. As previously recited, Sierra Club and OVC had reinitiated dispute resolution by letter dated August 10, 2007 in connection with the LORP Monitoring Methodologies, Adaptive Management, and Reporting Plan (April 12, 2007).</p>	<p>Mooney Decl, Exh. K</p>
<p>23. By letter dated July 30, 2008 Sierra Club and OVC summarized their concerns, as set out in their May 30, 2008 letter requesting reinitiation of dispute resolution.</p>	<p>Mooney Decl, Exh. L</p>
<p>24. At the August 7, 2008 dispute resolution meeting, Sierra Club, OVC, and DFG representatives were presented with a written document, jointly prepared by the City and the County, which summarily rejected Sierra Club's and OVC's contentions, most of which had been continuously raised (and never substantively responded to) since August 2004.</p>	<p>Mooney Decl, Exh. M</p>
<p>25. By letter dated August 18, 2008, Sierra Club and OVC amended their May 30, 2008 Reinitiation of Dispute Resolution letter to include the issues relating to compliance with the habitat indicator species requirements of the MOU raised by DFG at the August 7, 2008 meeting.</p>	<p>Mooney Decl., Exh. N</p>
<p>26. After discussing the issues relating to compliance with the habitat indicator species requirements at the August 7, 2008 meeting, the City and County declined to order revision of the Plan to address the DFG's concerns.</p>	<p>Mooney Decl., Exh. M</p>
<p>27. On September 3, 2008, Sierra Club and OVC sent a dispute resolution letter to the City and County relating to compliance with the habitat indicator species requirements of the MOU.</p>	<p>Mooney Decl., Exh. O</p>

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<p>28. The MOU provides that the Los Angeles Department of Water and Power (“DWP”) and Inyo County “will direct and assist” Consultants in the preparation and implementation of the LORP Ecosystem Management Plan. The MOU provides that the procedures to be followed in the preparation of the plan are described in the LORP Action Plan “based upon the LORP Phase I and LORP Phase II studies which were performed by Mr. Mark Hill, Dr. Bill Platt’s, and others...” The MOU requires the LORP Plan to address the four physical features of the LORP: (1) the Lower Owens River Riverine-Riparian Ecosystem, (2) the Owens River Delta Area, (3) Off River Lakes and Ponds, and (4) the Blackrock Waterfowl Habitat Area. The MOU requires that in the Delta Habitat Area, in Off River Lakes and Ponds, and in the Blackrock Waterfowl Habitat Area, “diverse natural habitats will be created and maintained through flow and land management, to the extent feasible, consistent with the needs of the habitat indicator species.”</p>	<p>Brajevich Decl., Exh. A (MOU, § IIA.)</p>
<p>29. 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.”</p>	<p>Brajevich Decl., Exh. A (MOU, § II B.)</p>
<p>30. The MOU requires the LORP Plan to provide that LORP will be implemented and managed, <i>inter alia</i>;</p> <p>(1) 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</p> <p>(2) to create and maintain diverse natural habitats through flow and land management, to the extent feasible, <i>consistent with the needs of the “habitat indicator species” for the riverine-riparian</i></p>	<p>Brajevich Decl., Exh. A (MOU, § IIC)</p>

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<p><i>system;</i></p> <p>(3) so that the amount, duration and timing of seasonal habitat flows will be determined by the Standing Committee in consultation with Fish and Game</p> <p>(4) to identify monitoring sites and water flow gaging stations to implement a program for data collection, analysis, and reporting, “which will identify pathways to allow feed-back to indicate where adaptive modifications to management are necessary.”</p> <p>(5) to provide that when “the reported information reveals that adaptive modifications to the LORP management are necessary to ensure the successful implementation of the Project, or the attainment of LORP goals, such adaptive modifications will be made.”</p>	
<p><b>Third Cause of Action: Issue: The Plan Fails to Provide for Implementation of the Plan Through Consultation with DFG as required by the 1997 MOU</b></p>	
<p>31. The LORP Plan does not provide for the implementation of the seasonal habitat flows through consultation with DFG by the Standing Committee with respect to amount duration, and timing of flows.</p>	<p>1997 MOU, Brajevich Decl., Exhibits A; LORP Plan, Brajevich Decl, Exh. B; Letters from Marian Moe dated October 28, 2008, and February 27, 2009, Mooney Decl., Exhibits P and Q.</p>
<p><b>Fifth Cause of Action - Issue: The City and County violated the requirements of the 1997 MOU regarding the MOU consultants’ recommendations with respect to the augmentation of seasonal habitat flows.</b></p>	
<p>32. The LORP Project as approved by the City and County, is not consistent with the recommendations of the consultants now contained in the final LORP Plan prepared by the consultants, in violation of section II(I) of the MOU, which provides in relevant part that “the Parties shall not seek through any ...approval...to alter the recommendations of the consultants with</p>	<p>LORP Plan, Brajevich Decl. Exh. B.; 1997 MOU, Brajevich Decl., Exh. A.; LADWP Board Resolution approving the LORP; County Resolution approving the LORP</p>

1	respect to the LORP...”	
2	33. The final LORP Adaptive Management,	LOR Plan at 3-8; Brajevich Decl.
3	Reporting, and Monitoring Plan prescribes as an	Exh. B.
4	adaptive management protocol “modification of the	
5	magnitude of seasonal habitat flows” through	
6	adjusting the amount of “seasonal habitat flow	
	released at the River Intake and/or release water	
	from spill-gates.”	
7	34. In approving the Project, the City and County	LORP Plan; Brajevich Decl., Exh.
8	failed to adopt the recommendations of the	B.
9	consultants embodied in the final integrated LORP	
10	Adaptive Management Reporting and Monitoring	
11	Plan, or the 2002 LORP Ecosystem Management	
	Plan, in violation of section II(I) of the MOU. As	
	such, the City and County violated the requirements	
	of the MOU.	
12	<b>Sixth Cause of Action - Issue: The City and</b>	
13	<b>County breached its obligations under 1997</b>	
14	<b>MOU.</b>	
15	See Undisputed Facts 1 through 34.	

Dated: April 3, 2009

Respectfully Submitted,

CALIFORNIA ENVIRONMENTAL LAW  
PROJECT

By \_\_\_\_\_  
Laurens H. Silver  
Attorney for Sierra Club

LAW OFFICE OF DONALD B. MOONEY

By \_\_\_\_\_  
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Attorney for Owens Valley Committee