A162590

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CIVIL NO. A162590

COUNTY OF MONO and SIERRA CLUB
Petitioners and Respondents

v.

CITY OF LOS ANGELES, LOS ANGELES DEPARTMENT OF WATER AND POWER; LOS ANGELES DEPARTMENT OF WATER AND POWER BOARD OF COMMISSIONERS
Respondents and Appellants

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
Real Party-in-Interest

On Appeal from the Judgment entered by the Superior Court, County of Alameda,
Case No. RG18923377
The Honorable Evelia Grillo, presiding.

RESPONDENTS' OPPOSITION BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR	COURT OF APPEAL CASE NUMBER: A162590
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 153721 NAME: Donald B. Mooney FIRM NAME: Law Office of Donald B. Mooney STREET ADDRESS: 417 Mace Blvd, Suite J-334 CITY: Davis STATE: CA ZIP CODE: 95618 TELEPHONE NO.: 530-758-2377 FAX NO.: 530-212-7120 E-MAIL ADDRESS: dbmooney@dcn.org ATTORNEY FOR (*name*): County of Mono	SUPERIOR COURT CASE NUMBER: RG18923377
APPELLANT/ PETITIONER: City of Los Angeles, et al. RESPONDENT/ REAL PARTY IN INTEREST: County of Mono and Sierra Club	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): County of Mono and Sierra Club

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 4, 2022

Donald B. Mooney
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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I.

INTRODUCTION

Petitioners/Respondents County of Mono and Sierra Club, ("Petitioners") request this Court affirm the Alameda County Superior Court's ("trial court") ruling finding that the 2018 decision and action by Respondents/Appellants City of Los Angeles, the Los Angeles Department of Water and Power Board of Commissioners, and the Los Angeles Department of Water and Power (collectively, "LADWP" or "City") violated the California Environmental Quality Act ("CEQA"), Public Resources Code, section 21000 *et seq*. and the CEQA Guidelines ("Guidelines"), section 15000 *et seq*.. The trial court correctly found that LADWP's action changing historic land management practices in Mono County, by curtailing and/or eliminating water deliveries to 6,100 acres of LADWP-owned lands in Mono County in order to augment water exports to Los Angeles, constitutes a "project" under CEQA.

For over 70 years, LADWP has leased approximately 6,100 acres of land owned by it in Mono County to agricultural operators ("lessees"), together with an annual average of 25,000-30,000 acre-feet (AF) of water (with annual variation based on water availability from snowpack in the region). (AR 90206, 86773.) The water has diverse beneficial effects on lands within Mono County - creating and maintaining meadow and wetland habitat beneficially used for wildlife (particularly the Bi-State Sage Grouse) and native vegetation. Removal of that water has had and will have potentially significant and

irreparable impacts to wetland and meadow habitat, phreatophytic vegetation, visual/aesthetic resources, and to public health and safety in terms of increased risks of wildfires in Mono County from the creation of dry fire fuel and incursion of invasive species such as cheat grass, tumble mustard, and bull thistle.

LADWP initiated the change to its historic practices in February of 2018 when it offered rancher-lessees new leases for the 6,100 acres. The new leases provided no water and prohibited irrigation of the lands (hereafter the "zero water leases") in order to achieve additional water availability for export to Los Angeles. LADWP pivoted abruptly in April of 2018 when the lack of environmental review accompanying the new leases was questioned by state and local authorities. LADWP then informed the lessees that it was postponing implementation of the leases until environmental review could be conducted and advised the lessees that they would instead be on holdover under expired lease terms entered into in 2010.

In a brazen attempt to bypass environmental review, LADWP sought to accomplish what it concedes it could not have done under its new zero water leases by creatively reinterpreting its expired leases to authorize water reductions to the 6,100 acres unrelated to snowpack or runoff conditions in the region – effectively down to near zero. LADWP informed the lessees on May 1, 2018 that they collectively would receive only 4,600 acre-feet for the entire 2018 irrigation season, despite the snowpack and runoff data showing it to be

78% of a normal year. Historic deliveries to those lands had averaged between 25,000-30,000 AF, except in the driest of years when little or no water was available. Thus, in May 2018, at the beginning of the grazing season, LADWP implemented its project to increase water export to the City, at the expense of habitat in Mono County, while promising environmental review of that very same action at some future date. Then, on August 15, 2018, the day following Mono County's notification to LADWP of its intent to file a petition under CEQA, challenging its actions, LADWP issued a Notice of Preparation ("NOP") of an EIR in connection with what it calls "The New Leases Project."

LADWP did not conduct any environmental review under CEQA prior to its May 2018 decision to provide only 4,600 AF of water to the 6,100 acres for an entire grazing season, despite water being available and thereby increasing the water exported to the City. Never before, over the previous 70 years of leasing its lands for grazing and other purposes, had LADWP severed its determination of the amount of water to be provided for irrigation in Mono County from data regarding hydrological conditions that affect water availability. In doing just that in May of 2018, LADWP increased the amount of water delivered to the City or for other uses not associated with the 2010 leases. Without environmental review, neither the decisionmakers nor the public were provided information regarding the potentially significant impacts that such action would have or how those impacts could be mitigated.

II.

STATEMENT OF APPEALABILITY

On May 3, 2021, the trial court issued its Judgment. (8 JA1572-1575.) The Order/Judgment disposed of all of the issues between the parties. (*Id.*) This matter is appealable. (Code Civ. Proc. § 904.1.) On May 5, 2021, LADWP filed and served a Notice of Appeal. (8 JA1576-1581.)

III.

STATEMENT OF FACTS

A. LADWP'S RANCH LEASES IN MONO COUNTY

In the early twentieth century, Los Angeles surreptitiously acquired land and water rights throughout the Eastern Sierra, including in Mono County, as part of a plan to construct an aqueduct to export water from the Eastern Sierra to the then expanding City of Los Angeles. (S*ee County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 799; *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91.) As a result, LADWP owns over 62,000 acres of land in Mono County and exports vast amounts of water from Mono County to the City. (AR 99, 164792.)

Approximately 6,100 acres of Los Angeles-owned land in the Long Valley and Little Round Valley areas of Mono County have historically been leased and supplied with water by LADWP for sustainable cattle grazing and habitat maintenance. (AR 41, 165021, see also 169018-169019.) In January 2010, LADWP approved the most recent leases in Mono County (the

"Leases"). (AR 168432.0009; 168432.0008.) Because LADWP deemed the leases to be categorically exempt it performed no environmental review. (*Id.*)

Under the Leases, LADWP provides up to 5 AF of water per acre (AF/acre) per year to the lessees to enable them to irrigate for cattle grazing operations, which creates wetlands and meadow habitat. (AR 168432.1403.)[1] The Leases provide "[t]he water supply for a specific lease is highly dependent upon water availability and weather conditions; due to this, delivery of irrigation water may be reduced in dry years." (*Id.*) The Leases require the lessees maintain and manage the lands sustainably for grazing purposes. (AR 168432.1401-168432.1403.)[2] The Leases require the development of land management plans to accomplish the goal of sustainable agriculture. (AR 168432.1401.) The lessees are bound by Resource Management Guidelines, attached to each Lease as Exhibit D. (AR 168432.0626.) The Resource Management Guidelines require lessees to manage the lands sustainably and to

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[1] On January 19, 2010, the LADWP Board of Commissioners approved and executed 60 ranch leases in Inyo and Mono Counties. (AR 168432.001-168432.0005.) Of those 60 ranch leases, nine of them are located in Mono County. As the terms in the ranch leases are identical, the citations in this Brief will be limited to RLM-469 (Lacy Livestock) located at AR 168432.1394.

[2] The 2010 LADWP lease-approval letter from the City Attorney's Office states: "LADWP has an obligation under the 1997 MOU with the County of Inyo and others to create land management plans for all ranch leases. The goal of land management plans is to develop operational guidelines for agricultural land that both protects land resources and permits sustainable agricultural use." (AR 168432.0006.)

protect and conserve soils and riparian habitat. (*Id.*)[3]

Water supplied by LADWP through the Leases is applied to the lands has resulted in the creation, preservation, conservation, and restoration of biological and scenic resources in Mono County, including wetland and meadow habitat. This provides forage and habitat for the Bi-State Sage Grouse and other plant and animal species, and sustain lands which are a scenic asset vital to Mono County's tourism economy, and, importantly, provides a protective buffer against wildfire for adjacent communities.

B. LADWP'S HISTORIC WATER DELIVERIES IN MONO COUNTY

LADWP has provided an average of approximately 25,000-30,000 AF of water to these lands for more than 70 years, with the exception of 2015, the peak of the California drought, when by agreement with the lessees, no water was available nor provided. (AR 14, 67, 86773; 90206.) The historic delivery of irrigation water in non-drought years ranged from 4 AF/Acre to over 5 AF/Acre. (AR 86773.) In 2016, the first year of recovery following the 2015 drought, when supplies had been depleted, and significant amounts of runoff were lost to recharge, LADWP provided only 4,424 AF (0.71 AF/acre, approximately 20% of historic amounts), also by agreement with the lessees. (AR 119, 121, 86773.) However, in typical 80% years such as 2000-01, 2001-02, 2004-05, 2009-10, the amounts provided were 30,464 AF, 21,077 AF,

3 "Sustainability" in environmental science means "the quality of not being harmful to the environment or depleting natural resources, and thereby supporting long-term ecological balance." (Dictionary.com.)

28,816 AF, 26,229 AF, respectively. (AR 86773.)

C. THE BI-STATE SAGE GROUSE

The Bi-State Distinctive Population Segment of the greater sage grouse ("Bi-State Sage Grouse") is a genetically unique meta-population that lives in the far southwestern limit of the species' range in California and Nevada. (AR 166998.) The Bi-State Sage Grouse 's range covers an area approximately 170-miles long and 60 miles wide and includes portions of five counties in western Nevada; and three counties in eastern California, including Mono County. (*Id.*). Sage-grouse depend on a variety of shrub steppe vegetation communities throughout their life cycle and are considered obligate users of several species of sagebrush. (AR 114, 87058, 167000-167001.) While sage-grouse adults may be able to subsist wholly on sagebrush leaves during the winter, the baby birds need the insects found amongst the forbs and grasses in wet meadows and irrigated pastures in the spring and summer. (AR 114, 87058.)

The 6,100 acres of Los Angeles-owned land in the Long Valley area of Mono County, historically irrigated and managed by the lessees, serve as habitat crucial to the conservation of the Bi-State Sage Grouse and support one of only two core Bi-State Sage Grouse populations in the bi-state area, with 30% of the entire population within California. (AR 226, 166998.). A 2012 Bi-State Action Plan identified management actions and goals for the protection of the Bi-State Sage Grouse. (85 Fed.Reg 18,082.) The plan states

that irrigated meadows provide crucial habitat for successful brood rearing. (85 Fed.Reg 18,066; AR 206-207, 226.)

On May 10, 2013, LADWP adopted a Conservation Strategy to protect the Bi-State Sage Grouse. (AR 167024.) The Conservation Strategy allowed LADWP to avoid the United States Fish and Wildlife Service ("USFWS") declaring the Bi-State Sage Grouse "threatened" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* which would designate LADWP's lands critical habitat and give USFWS the ability to determine land management practices on those lands. (AR 166994; AR 166996-167023.) LADWP's Conservation Strategy established the water policy for the pastures in Long Valley. (AR 167006.) The Conservation Strategy identifies the importance of LADWP lessees receiving up to 5 AF/acre to irrigate pastures in Long Valley. (AR 167012.) "LADWP does not expect surface water management practices to change from current practices as described above. Thus, livestock operators will be allotted 5 acre-feet of water per acre per year to irrigate land previously designated as irrigated pasture. In some years, irrigation of some pastures will not be possible due to minimum flow requirements in creeks or due to a lack of head to effectively irrigate." (*Id.*)

In 2015, USFWS decided not to list the Bi-State Sage Grouse as endangered or threatened under the ESA due to the development of a conservation plan by local, state, and federal agencies, non-profit organizations, and local landowners. (See 80 Fed.Reg. 22,828 (Apr. 23, 2005);

AR 87058-87059.)

On May 15, 2018, the a federal District Court overturned the USFWS's decision to withdraw the proposed listing of the Bi-State Sage Grouse as "threatened" under the ESA. (*Desert Survivors, et al. v. U.S. Department of the Interior* (N.D. Cal. 2018) 321 F.Supp.3d 1011.) The court vacated the listing withdrawal and ordered USFWS reinstate the prior proposal to list the Bi-State Sage Grouse as a threatened species and to designate critical habitat. (*Id*. at 1037.) In March 2020, the USFWS again issued a listing withdrawal of the Bi-State Sage Grouse. (85 Fed.Reg. 18,054 (March 31, 2020.) The Federal Register Notice contained scientific papers that considered amounts of water needed to maintain and enhance the wet meadow habitat in Long Valley necessary for the Bi-state Sage Grouse. (85 Fed. Reg. 18,055-18,056.)

D. LADWP'S 2018 DECISION/ACTION TO SIGNIFICANTLY REDUCE OR ELIMINATE WATER DELIVERIES IN MONO COUNTY FOR SUSTAINABLE GRAZING AND OTHER USES

In an attempt to initiate its proposed augmented water export program (the "New Leases" Project described in the NOP), in February 2018, LADWP offered to lessees new five year (renewable) leases for the 6,100 acres of land in the Long Valley and Little Round Valley areas of Mono County, which provided that no irrigation water would be supplied and irrigation not allowed. (AR 95002-95052.) Historically, the leases provided up to 5 AF/acre per year or up to approximately 31,000 AFY in total dependent upon snowpack and other hydrological factors. (AR 91608; 86773.) The New Leases expressly

provided that LADWP would not deliver any water for grazing and other purposes, beginning in the summer of 2018. (AR 95002-95052.) On April 19, 2018, Mono County sent a letter to Mayor Garcetti detailing the potential adverse environmental impacts on the County of LADWP's proposed "zero water" delivery leases. The County's letter pointed out LADWP's obligation to comply with CEQA prior to approving new leases. (AR 91068-90173.)

On May 1, 2018, Mayor Garcetti responded by stating that LADWP would analyze the environmental impacts of the new proposed leases and that LADWP would provide lessees some amount of water to apply to the lands in the meantime (i.e., for the 2018 irrigation season) pursuant to holdovers of the 2010 leases. (AR 124-125.) Mayor Garcetti's letter indicated the quantity of water would be similar to that provided in 2016 (AR 125), which amounted to 4,424 AF (or 0.71 AF/acre) (see AR 118, 121, 86773.) That amount is far lower than the amount historically supplied, which is on average 26,000 AF (AR 82942, 86773) and inconsistent with LADWP's historic practice of providing water for irrigation based upon water availability and snow pack. (AR 62, see AR 168432-0598, 86773.)[4]

Mayor Garcetti stated that the "water supply in the Southwest has become increasingly unpredictable. In response, I set ambitious targets to maximize

4 In 2018, LADWP estimated anticipated runoff to be 78 percent of normal. Based upon that, the deliveries to rancher should have been 3.9 AF per acre or 23,900 AF in total. (*Id.*) In 2016, LADWP provided only 4,424 AF, but that was the first year of recovery following the severe drought of 2015. (AR 119, 121, 86773.)

LA's local water supply." (AR 124.) He further stated "[c]hanging environmental circumstances, including the most recent five year drought, requires us to reevaluate our current water use, including the water historically provided to Eastern Sierra ranches." (AR 125.)

On that same day, implementing Mayor Garcetti's statements, LADWP's Aqueduct Manager, Jim Yannota, emailed Mono County ranchers that the amount of irrigation water for 2018 would be only 4,600 AF, or 0.71 AF of water per irrigated acre (or 0.71 AF/acre). (AR 90196.) Mr. Yannota was silent as to whether the water was being delivered pursuant to the expired 2010 Leases, as annually renewed or pursuant to the new "Zero Water Leases" proposed in February. (*Id*.) This decision, implementing the New Leases Project, as described in the NOP issued on August 15, 2018, was made by LADWP despite 2017 having been the wettest year on record in over 50 years and anticipated runoff for 2018 forecast at 78% of normal. (AR 103, 121.) Thus, LADWP implemented its new augmented water export program (New Leases Project) in May of 2018 without any environmental review to the detriment of Mono County's environment .

On May 3, 2018, the County responded to Mayor Garcetti's letter and requested LADWP continue its practice of providing up to 5 AF/acre, offset based on snowpack and anticipated runoff (78% of anticipated runoff for 2018) as provided in the 2010 Leases. (AR 121.) The County requested LADWP adhere to the historic practice of delivering to Mono County ranchers an

amount of water proportional to the anticipated supply. (AR 121.) LADWP refused and provided only 4,424 AF (or 0.71 AF/acre) for summer 2018, with no indication it would deliver water in accordance with its historic practice in future years. (AR 162, 99-101.)

Following notification by the County and others that LADWP's action would impact the Bi-State Sage Grouse, LADWP decided to deliver and spread an additional 500 AF of water to an area within the 6,100 acres known to support Bi-State Sage Grouse populations, based on its own calculation of when and how much water was needed to protect the species. (AR 15, 16, 84194, 84197, 86464.) This delivery began on June 19, 2018 (AR 69470) and was scheduled to end August 4. (AR 84194.) Subsequently, LADWP stated that it would continue this delivery through the end of August, resulting in a total additional delivery of approximately 1,100 AF. (AR 71740.) LADWP provided no scientific basis for its reduction of irrigation water to 4,600 AF, nor for this minimal increase of delivery of water for the Bi-State Sage Grouse, and conducted no environmental review prior to its decisions/actions. LADWP belatedly announced through a NOP published on August 15, 2018, that it would undertake preparation of an EIR in connection with its "New Leases Project".

By letter dated July 6, 2018, LADWP Board of Commissioners Chairman Mel Levine announced that, in light of climate change (as documented in seven major climatological studies), LADWP was implementing the following

changes:

> As California experiences a new climate reality and increasing cycles of drought, the City of Los Angeles *now must re-evaluate* how our precious and limited water resources are managed—driving innovations in conservation, sustainability, water use efficiency, and local water supply projects is something we must all pursue. To replace the free water provided to a handful of for profit ranchers, LADWP would be required to buy more costly, and less reliable replacement water from the deteriorating Sacramento-San Joaquin River Delta. The amount of free water the commercial ranchers are demanding is enough to serve 50,000 Los Angeles families each year…. Los Angeles would have to spend $18 million to purchase the amount of water requested and the lost hydropower it generates while flowing through the Aqueduct…. We simply can't subsidize free water to commercial ranchers over the interests of local Los Angeles residents…. So, we understand first that *these changes* can be difficult but providing free water to flood irrigate ranch operations at the expense of LA ratepayers is no longer an option. (AR 100.)

E. LADWP'S CLIMATE CHANGE STUDIES COMPLETED AFTER APPROVAL OF THE 2010 RANCH LEASES DEMONSTRATE LADWP'S INTENT TO INCREASE EXPORTS FROM MONO COUNTY

The Climate Change studies funded by the City determined that warming would produce periods of drought and declining stream levels in the Eastern Sierra due to diminished snow pack and likely early snow pack melting.[5]

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[5] The following reports were prepared for LADWP: 1) "Climate Change and Future Climate Scenarios Relevant to Los Angeles Eastern Sierra Watershed" (May 2010) (AR 168220-168379); 2) "LAASM and Hydraulic Analysis of Projected Climate Change On the Operation of the LA Aqueduct" (September 17, 2010) (AR 168099-168218); 3) "Evaluate the Effects of Climate Change on the Hydrology of the Eastern Sierra Watershed" (December 2010) (AR 167604-167840); 4) "Evaluating Climate Change Impacts on Water Quality in the Mono/Owens Basins (December 2010) (AR 167841-168010); 5) "LAASM and Hydraulic Analysis of Projected Climate Change on the Operation of the LA Aqueduct" (March 2, 2011 (AR 167144-167413); 6) "Identification and Analysis of Potential Measures to Address

(AR 168220-168379.) The studies concluded that during extremely dry years the flow to the City is projected to be below historical minimum values and that overall there will be less runoff over the century, resulting in lower flows to the City unless adaptive measures are taken. (AR 167157.) They also addressed changes in the Long Valley Reservoir ("Crowley Lake Reservoir") storage capacity as a major measure to increase export of water from Mono County to the City. (AR167425-167426.)

F. ELIMINATION AND REDUCTION OF WATER DELIVERIES MAY HAVE SIGNIFICANT ENVIRONMENTAL IMPACTS

LADWP's significant curtailment of water deliveries in 2018 to Mono County dried up wetlands and meadows that are dependent on the supply of irrigation water, resulting in potentially significant and irreparable impacts to biological resources, including the Bi-State Sage Grouse and other plant and animal species. (AR 16, 19, 37, 62.). In addition, LADWP's action has had, and will continue to have potentially significant and irreparable impacts to visual/aesthetic resources, and public health and safety due to increased risk of wildfires from the creation of dry fire fuel and the incursion of invasive species such as cheatgrass, tumble mustard, and bull thistle. (AR 67, 110, 116, 118-119.)

On May 17, 2018, John Laird, Secretary of the California Resources Agency, which oversees Real Party in Interest California Department of Fish

Climate Change Impacts on the LA Aqueduct" (December 2, 2011) (AR 167414-167494); and 7) "LA Aqueduct System Climate Change Study Final Report" (June 6, 2011) (AR167030-167143.)

and Wildlife ("CDFW"), wrote to Mayor Garcetti expressing the Agency's concern regarding LADWP's current and proposed water management policies in Long and Little Round Valleys. Secretary Laird described the "significant consequences to wildlife by destroying wetlands and riparian areas, and eliminating habitat for sensitive species such as the bi-state sage grouse." (AR 116, see also AR 72254.) Clearly a disconnect exists between the state agency responsible for wildlife protection and LADWP. LADWP implemented its "New Leases" project without offering any environmental analysis. In the absence of any environmental review to support LADWP's claims, it is erroneous for LADWP to claim water reductions benefit the environment, especially the Bi-State Sage Grouse and its habitat when CDFW states otherwise.

G. THE TRIAL COURT'S DECISION

1. THE TRIAL COURT OVERRULED LADWP'S DEMURRER

The trial court overruled LADWP's Demurrer to the First Amended Petition. (5 JA0824-0831.) The trial court found that "[a] change in water use can be the continuation of a prior project or a new CEQA project." (5 JA0828.) The trial court cited *Yorty*, *supra,* 32 Cal.App.3d 795, holding that the court should read the word "project" broadly and that a change in plans for water acquisition can be a new CEQA project. (5 JA0828.) The trial court also cited *County of Inyo v. City of Angeles* (1977) 71 Cal.App.3d 185, 195, which ruled that a proposed change in water acquisition and use for export to

the City from Inyo County can be a CEQA project. (*Id.*) The trial court found further that LADWP's May 1, 2018, decision/action was arguably a new project. (*Id.*)

The trial court found that, assuming the May 1, 2018 "decision was not a new project, and assuming that the City had published a Notice of Determination following the City's 2010 decision to approve the Ranch Leases, then the City's alleged 5/1/18 decision regarding water use was arguably a substantial change in the project, which arguably would have required CEQA review under Pub Res Code 21166. (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937.)" (5 JA0829.)

The trial court took judicial notice of the Leases, and found that for purposes of defining a CEQA project and the potential for environmental impact, the CEQA baseline is the historical practice regarding water allocation and use, the historical grazing leases, and not the contractually permitted maximum allocation. (5 JA0829.) Following *Communities for a Better Environment v. South Coast Air Quality Management District ("CBE")* (2010) 48 Cal.4th 310, the trial court found that CEQA requires the baseline to reflect "established levels of a particular use," and not the "merely hypothetical conditions allowable under the permits…." (5 JA0829.)

The trial court found that in May 2018, LADWP changed its policy and practice regarding the provision of water for sustainable grazing uses and the

maintenance of Sage Grouse habitat. Citing *CBE*, the court noted that a contract that reserves discretion to use "up to" a certain amount does not preclude a CEQA challenge to a change of policy or practice within a contractual grant of discretion. (5 JA0830.)

Finally, the court found "no authority suggesting that a grant of discretion in a contract can excuse compliance with CEQA." (5 JA0830.) The trial court rejected LADWP's reliance on *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1721, for the proposition that if a contract permits a range of actions then any action within the contractually permitted range is not a new CEQA project, as contrary to the Supreme Court's *CBE* decision. (5 JA0831.)

2. THE TRIAL COURT'S DECISION

The trial court found that LADWP had committed to a definite course of action and that the May 1, 2018 change in water use constituted a project under CEQA. (8 JA1512-1515.) The trial court explained "The anticipated one-year 2018-2019 water allocation reflects the first year of a plan to decrease in water allocations that the proposed leases would implement on a multi-year basis." (8 JA1512.) The trial court found the "proposal of the 2018 leases and the actual 2018-2019 water allocation demonstrates that the LADWP was committed to a definite course of action and had therefore 'approved' the alleged decision/action to significantly reduce or eliminate water deliveries." (8 JA1512-1513.) The trial court further found the August

2018 NOP (AR 40-43) indicated that LADWP had committed to a definite course of action. (*Id.*)

In making this finding, the trial court identified the evidence most relevant: 1) the amount of water released for irrigation purposes from 1992-2018; 2) the December 10, 2013 Conservation Strategy that documents the water requirements to protect the Bi-State Sage Grouse; 3) the proposed (2018) five year leases that stated: "At no time shall water taken from the well(s) be used for irrigation or stockwater purposes" and "Lessor shall not furnish irrigation water to Lessee or the leased premises, and Lessee shall not use water supplied to the lease premises as irrigation water" (AR 95014-95015); and 4) LADWP's May 2018 notification that the lessees would receive 4,200 acre-feet for irrigation year 2018 (AR 83), an amount equivalent to 0.71 AF/Acre for 2018-2019. (8 JA1514-1515.)

Following the precedent set in *Save Our Carmel River v. Monterey Peninsula Water Management District* (2006) 141 Cal.App.4th 677, 695 and *Yorty, supra,* 32 Cal.App.3d 795, the trial court found that changes in water allotments and use can be a CEQA project. (8 JA1515.)

To ensure the *status quo* remains, the trial court issued a peremptory writ of mandate directing LADWP to continue providing water to the 6,100 acres consistent with the annual fluctuations and availability of runoff around the 5-year historical baseline (2016-2021) of approximately 3.2 AF/Acre until

LADWP completes its environmental review of the "New Leases Project". (8 JA1530.)

IV.

STANDARD OF REVIEW

"The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) The appellate court conducts its "own independent review and the conclusions of the superior court and the superior court's disposition of the issues in this case are not conclusive on appeal." (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 622.)

This Court must determine whether LADWP prejudicially abused its discretion by failing to proceed in the manner required by law, as the issue is whether LADWP's action/decision to significantly curtail and/or eliminate water deliveries in Mono County for sustainable grazing and other purposes constitutes a project under CEQA. (§ 21168; and *Laurel Heights Improvement Association v. Regents of the University of California* (*"Laurel Heights I"*) (1988) 47 Cal.3d 376, 392.) This issue involves solely a legal determination as to whether LADWP's decision constitutes a "project" or a change to an existing project within the meaning of CEQA. The court will find the agency prejudicially abused its discretion where either 1) the agency

failed to proceed in a manner required by law, or 2) its determination or decision is not supported by substantial evidence. (*Id.* at 392, fn. 5; § 21168.5.)

Under the compliance with law standard the court determines "de novo" whether the agency has complied with CEQA's legal requirements, scrupulously enforcing all legislatively mandated CEQA requirements. (*Ebbets Pass Forest Watch v. Department of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944.) The determination of whether a proposed action is a project under CEQA is a matter of law. (*Union of Medical Marijuana Patients v. City of San Diego* (2019) 7 Cal.5th 1171, 1198.) If an agency fails to proceed in the manner required by law, the inquiry ends, and the decision must be set aside.

V.

ARGUMENT

LADWP's decision/action to change its historic land management practices and significantly reduce water deliveries to the 6,100 acres of Los Angeles-owned lands in Mono County in order to increase water export to the City constitutes approval of a project that mandates compliance with CEQA, including preparing an environmental document.

A. DETERMINATION OF A PROJECT UNDER CEQA

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. (Pub. Resources Code, §21001.] In enacting

CEQA, the Legislature declared its intention that all public agencies responsible for regulating or carrying out activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Pub. Resources Code, § 21000(g).] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259)." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

CEQA's purposes are to inform government decision-makers and the public about the potential significant environmental effects of proposed projects (Guidelines § 15002(a)(1)); to disclose to the public the reasons for approval of a project that may have significant environmental effects (*id.* § 15002(a)(4); and to mitigate a project's impacts. (*Id.* § 15002(a)(3).) Informed decision making and public participation are the fundamental cornerstones of the CEQA process. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553.)

"When a public agency proposes to undertake an activity potentially within CEQA's scope, CEQA prescribes a three-step process. (Guidelines, § 15002(b) and (k).) First, the agency must decide if the activity is a project' i.e., an activity that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (§ 21065.) Second, if it is a 'project', the agency must decide

whether the project is exempt from CEQA review. (See §§ 21080, 21084(a); Guidelines, § 15300 *et seq*.) Third, if no exemption applies and the project may have a significant environmental effect, the agency must prepare an EIR before approving the project. (§§ 21100(a), 21151(a), 21080(d), 21082.2(d).)" (*Save Berkeley's Neighborhood v. Regents of Univ. of California* (2020) 51 Cal.App.5th 226, 235.) "The agency has an affirmative duty to mitigate or avoid the project's significant environmental impacts where feasible." (§§ 21002.1, 21061, 21081(a); Guidelines, § 15021(a).)" (*Save Berkeley's Neighborhoods, supra,* 51 Cal.App.5th at 235.)

LADWP's 2018 increase in water exports to Los Angeles and associated drying of irrigated pasture and meadows in Mono County triggers the first step of the CEQA process, a determination whether the proposed activity/decision is a project under CEQA. CEQA defines a "project" as "an activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, which constitutes an activity directly undertaken by any public agency." (§ 21065.) The Guidelines further define a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and that is an activity directly undertaken by any public agency which is being approved. (Guidelines, § 15378(a)(1).) (*Id.*, § 15378(c).) The term "approval" refers to a public agency decision that commits the agency to a definite course of action in

regard to a project. (*Id.*, § 15352(a).) The definition of "approval" applies to all projects including actions authorized or carried out by a public agency. (*Id*.)

The test for whether an action constitutes a "project" takes place in the abstract. (*Union of Medical Marijuana Patients, supra,* 7 Cal.5th at 1197-1198.) The "likely *actual* impact of an activity is not at issue in determining its status as a project." (*Id.* at 1199.) Instead, "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur." (*Id.* at 1197.)

B. LADWP'S NOP FOR THE "PROPOSED LEASE PROJECT" CONSTITUTES AN ADMISSION THAT THERE IS A NEW "PROPOSED LEASE PROJECT" REQUIRING PREPARATION OF AN EIR

On August 15, 2018, one day after receiving Mono County's Notice of Intent to File a Petition under CEQA, LADWP issued the NOP advising the public, responsible agencies, and trustee agencies of its intention to prepare an EIR pursuant to CEQA for the New Leases Project. (AR 40-43; 1 JA0039.) (See Guidelines, § 15082.) Preparation of the Draft EIR for the proposed New Lease Project is still ongoing. (AOB 21.) The NOP describes the project as the Mono County Ranch Lease Renewal Project and describes the New Lease Project as changing historic water deliveries to pasture lands in

Mono County and increasing water exports for the use of City residents in light of concerns about sufficient water supply in the LA Aqueduct. (AR 40-43.)

LADWP's NOP constitutes an unequivocal admission that there is a project ("New Leases") and that LADWP will prepare of an environmental document. CEQA requires the Lead Agency to prepare a NOP "immediately" after initiating a "project" prior to initiating preparation of the EIR. (§ 21080.4(a); Guidelines, §§ 15082; 15375.) The environmental document, however, must be prepared and certified prior to implementation of the project. (*Id*.)

LADWP has taken all of these steps for initiating an activity that constitutes a project within CEQA's scope. It proposed and implemented a project of augmenting water exports to the City and reducing water available for irrigated pasture, wetlands and meadows in Mono County. As evidenced by the NOP, LADWP determined that in light of the fact that the "New Leases Project" may make a direct physical change in the environment it is undertaking the preparation of an EIR as required by CEQA. (AR 40.)

An NOP is prepared only after identification of a project. (*Save Berkeley Neighborhoods, supra,* 51 Cal.App.5th at 235; Guidelines, § 15082(a).) LADWP admits that the "EIR for the proposed new leases is still ongoing." (AOB 21.) No evidence in the record, however, indicates what LADWP means by "ongoing." In the absence of any documentation of what LADWP

is doing with respect to an EIR there is no basis upon which this Court can infer that completion of the EIR is imminent.[6]

The project antedates and is independent of the NOP, though its scope is clearly articulated in the text of the NOP. The New Leases Project was formulated with finality by Mayor Garcetti in his May 1, 2018. (AR 124-125.) Mayor Garcetti directed staff to inform the lessees that the amount of water provided in 2018 would be similar to 2016, which was 4600 AF or 0.71 AF/acre. (*Id.*) The Mayor stated that in light of climate change, LADWP had to consider reducing deliveries to Mono County lessees in order to provide more water to the residents of Los Angeles. (AR 125.)

On that same day, LADWP's Aqueduct Manager notified Mono County ranchers that they would receive 0.71 AF of water per irrigated acre as their 2018 allotment of water. (AR 90196.) These concurrent actions on May 1, 2018, constituted an official announcement of and commitment to the long contemplated New Leases Project and its implementation as well. By LADWP's action of allocating only 0.71 AF/acre or a total of 4500 AF to the entire 6,100 acres, LADWP radically departed from its longstanding historic practices by which, consistent with its 2010 Lease terms intended to promote "sustainable" grazing practices, by delivering up to 5 AF/acre of water to its

6 LADWP took over 25 years to prepare a legally adequate EIR in connection with the augmented groundwater project which it incrementally implemented after construction of the second barrel of the LA Aqueduct. (See *County of Inyo v. Los Angeles* (1981) 124 Cal.App.3d 1. The Court of Appeals' writ issued in the 1970s was not discharged until 1997.

lessees proportional to the year's snow pack at a given date and anticipated runoff. The August 2018 NOP confirmed LADWP's undertaking and legally constitutes an admission that the "New Leases Project" exists.

As this Court recently affirmed in *Friends, Artists, and Neighbors of Elkhorn Slough v California Coastal Commission* (2021) ___ Cal.App.5th ___, (November 15, 2021 (Case No. H048088), it is a fundamental principle of CEQA "that a project be preceded by the preparation of a written report containing certain information on the environmental impacts of the project." (*Id.,* citing *Sierra Club v. California State Board of Forestry* (1994) 7 Cal.4th 1215, 1230.) This Court further discussed CEQA's substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures "and that an agency not approve a project for which significant environmental effects have been identified unless the Agency makes specific findings about alternatives and mitigation measures." (*Friends, Artists & Neighbors, supra,* _____Cal.App.5th _____.

LADWP attempts to evade CEQA's fundamental requirement that environmental review precede project implementation by claiming it is providing the .71 AF/acre under holdover Leases, entered into in 2010, and approved on the basis of a categorical exemption. (AOB at 31.) The existence of preexisting holdover Leases cannot immunize LADWP from complying with CEQA with respect to its project to augment water deliveries to the City by reducing water spread on lands in Mono County. During the

course of preparation of the EIR, LADWP has no authority to implement the New Leases Project and allow adverse environmental effects to occur as a result of the project. First the EIR must be completed. Then there can be project implementation.

C. LADWP'S 2018 ACTION/DECISION TO REDUCE WATER SUPPLY TO MONO COUNTY CONSTITUTES A "PROJECT" UNDER CEQA

Even if this Court does not accept that the NOP constitutes an admission that LADWP has partially implemented its "New Leases" Project, and is proceeding with the preparation of an EIR while its Project is ongoing, the facts regarding LADWP's May 2018 action/decision reducing water supply to Mono County demonstrate that LADWP committed to a definite course of action (constituting a "project") in May 2018, when it committed to give the lessees only .71 AF per acre----not an amount sufficient to sustain grazing and habitat management at historic levels relative to hydrological conditions. LADWP argues that in 2018 it did not pre-commit to the new leases without CEQA review since the 2018 water allocation was within the scope of the 2010 Leases and its intent was to release the water under holdover leases. (AOB 28-38.) The record demonstrates otherwise. (See AR 100, 125, 90196, 86773.)

Under the 2010 Leases LADWP delivered water up to 5 AF/acre, to its lands in Mono County for sustainable agricultural ranching purposes. (See AR 168432-0593-168432.0598 [Lacey Livestock Ranch Lease setting forth designated use of the leased land and water for the leased land].) Indeed, LADWP carried out that course of action, so long as water was available,

through and until 2018 under the holdover Leases. (AR 86773.) LADWP's 2018 decision/action changed land and water management practices and committed LADWP to a new course of action that commenced in spring 2018 and was separate and distinct from measures in the 2010 Leases that based delivery of water to the lessees on runoff and other hydrological conditions. Specifically, on May 1, 2018 LADWP reallocated its Mono County water supply dedicated to the lessees by the explicit terms of the 2010 Leases in light of climate change studies and delivered water to the 6,100 acres for grazing and habitat management uses an amount of water totally unrelated to water availability in the Eastern Sierra, based on annual hydrological conditions. (AR 98-101, 124-125.)

1. LADWP's Decision to Increase Exports to the City Mirrors the Facts in *County of Inyo v. Yorty.*

The underlying facts here are, ironically, similar to LADWP's 1970 augmented groundwater pumping program in the Owens Valley for export to the City by means of the Second Barrel of the LA Aqueduct. In *Yorty*, *supra*, 32 Cal.App.3d 795, the court held that LADWP intended to implement its pumping project without preparing an EIR and did so incrementally, without official approval by the LADWP Board of Commissioners. (*Id.* at 814.) The underlying circumstances under which LADWP's respective projects were "approved" are closely analogous, in that neither LADWP's augmented groundwater project in the Owens Valley or LADWP's augmented water

export project in Mono County was formally approved by LADWP's governing body.

In *Yorty,* Inyo County alleged that LADWP's augmented groundwater pumping program would increase water delivered to the Second Barrel of the LA Aqueduct while reducing deliveries of water to ranch lessees, under their existing leases, resulting in harm vegetation in the Owens Valley that relied on groundwater for maintenance, thus turning the Owens Valley into a desiccated wasteland. (*Id.* at 801.) The court found this to be a new project, requiring preparation of an EIR. (*Id.* at 806.) Similarly, here LADWP implemented in May 2018 a new project of augmented water export, involving substantial cutbacks in, and future elimination of surface water deliveries to lessees relative to historical amounts and water availability. (AR 100-101 [providing water to flood irrigate ranch operations at expense of LA ratepayers is no longer an option].) In *Yorty*, the court held that LADWP's augmented groundwater-pumping project that had been administratively implemented through incrementally increasing groundwater pumping constituted a "project" within the meaning of CEQA and that LADWP had the legal duty to prepare an EIR. (32 Cal.App.3d at 800-801, 806.) The court curtailed deliveries to the Aqueduct while LADWP prepared the EIR. (*Id.* at 814-815.)

Relevant to the question here concerning the characterization of LADWP's augmented water export program, together with its proposed

"Waterless Leases", the *Yorty* court characterized LADWP's groundwater pumping project as constantly increasing over years in intensity and scope of actual and projected groundwater withdrawals. (*Id.* at 806-807.) The court found clear evidence that continuance and augmentation of the subsurface water extractions "might have a new significant effect on the environment." (*Id.*)

Notwithstanding that groundwater extractions might have varied and/or been modified, the court viewed LADWP's augmented groundwater pumping project as a new project under CEQA. Similarly here, this Court should similarly view LADWP's "reevaluation and augmented export" project as involving a marked diminution in water supply to the lands in Long and Little Round Valleys relative to historic deliveries, and view it as a separate project involving reductions over time in the amounts of surface water provided for local pastures. Indeed, if water deliveries are no longer tied to water availability in the Eastern Sierra and need not ensure sustainable agriculture then LADWP can reduce deliveries to the 6,100 acres down to zero purportedly under the 2010 Leases, without completing any environmental review. Had LADWP believed that it had the power to deliver to the ranchers such markedly reduced amounts of water, insufficient to ensure sustainable grazing practices, under the 2010 Leases then LADWP would have had no need to published the NOP announcing the "New Leases Project" or, indeed, to pursue that project at all.

Yorty recognized that there had been pre-project groundwater pumping, but nonetheless recognized that the incremental increase in pumping associated with construction of the Second Barrel of the LA Aqueduct constituted a new project. (32 Cal.App.3d at 799.) *Yorty* rejected LADWP'S claims that the augmented groundwater pumping program was not a new project and that any environmental harm would be the result of natural causes such as drought. (*Id*. at 801.) LADWP denied any "irreparable harm and damage will result to the environment of Inyo County by reason of LADWP's pumping operations and claimed that if there was any environmental harm to the County it would be the result of "two consecutive drought years." (*Id*.) *Yorty* rejected these arguments holding significant adverse effect could arise from the City's augmented groundwater pumping. (*Id.* at 814.) *Yorty* concluded that sufficient evidence warranted a determination that the City's augmented groundwater pumping could have a significant effect on the environment and ordered preparation of an EIR. (*Id.* at 806-807.) In *County of Inyo, supra,* 61 Cal.App.3d 91, the court established an interim pumping rate to preserve the *status quo ante*. (*Id.* at 94, 97-98.)

Here, LADWP's significant changes to its land management practices for the purpose of exporting additional water from Mono County to the City for domestic and municipal uses constitutes a new project under CEQA, separable from LADWP's 2010 entry into now-expired grazing Leases pursuant to a categorical exemption. As such, LADWP must comply with CEQA prior to

implementation of the new policies and project. (See *Yorty*, *supra,* 32 Cal.App.3d at 808.)

2. LADWP'S STATEMENTS AND ACTIONS CONSTITUTE A PROJECT UNDER CEQA

In February 2018, LADWP offered lessees in the Long Valley and Little Round Valley areas new proposed leases, which provided that no irrigation water would be supplied to the approximately 6,100 acres of land historically irrigated as pastureland and wet meadow. (AR 95002.) LADWP withdrew these proposed leases when the County advised it that the changes would trigger environmental review under CEQA. (AR 91068-90173.) In place of the withdrawn leases, LADWP accomplished increased water export for the 2018 season by continuing the expired leases on holdover status and then dramatically reducing the amount of water it supplied. LADWP claims the change is not a new project under CEQA.

Mayor Garcetti's May 1, 2018, and Chairman Levine's July 6, 2018, letters to Mono County set forth LADWP's commitment to a new direction regarding export of water from Mono County to the City. (AR 125, 100.) These letters and Mr. Yannota's May 1, 2018 email (sent concurrently with Mayor Garcetti's May 1 letter) informing the lessees that they would only be receiving 0.71 AF/acre of water (AR 90196), committed LADWP to a definite course of action that differed significantly from the 2010 Leases and historic practice under those Leases.

Moreover, in response to Secretary Laird's concern (AR 116) over environmental impacts resulting from the dramatic reduction in water supplied to these lands in Mono County, Chairman Levine stated that a new climate reality and increasing cycles of drought had caused LADWP to change how its water resources are managed. (AR 100.) Mr. Levine stated that it is no longer an option for LADWP to provide "free water" to commercial ranchers in Mono County at the expense of LADWP's ratepayers. (AR 100-101.)

Chairman Levine disclosed that the action Petitioners challenge consists of reducing water deliveries to Mono County with increased deliveries of that water through the LA Aqueduct to the City. (AR 98-101.) Mr. Levine's letter contains no consideration of, nor any intention to consider and evaluate, the ecologically beneficial effects that are and have been created through irrigation to Mono County lands. (*Id*.) Nor does he discuss what steps LADWP intends to take to mitigate any significant effect that curtailment or elimination of water deliveries will have on these Mono County lands. (*Id*.) This is because LADWP conducted no environmental review prior to the decision and thus, no impacts could have been identified and no mitigation measures implemented. The Levine letter lacks candor in declining to acknowledge the habitat benefits created by and now associated with the historical delivery of water. Instead, the letter states a demonstrable untruth: "The free water LADWP has provided to ranchers is separate and unrelated to the water LADWP provides to serve the region's environment." (AR 99; see

AR 94712.) To the contrary, the water LADWP historically provided to ranchers is integrally related to (and beneficially used for) habitat management in Mono County for wildlife (especially the Bi-State Sage Grouse) and the maintenance and restoration of native vegetation. (AR 47, 116-117.)

Chairman Levine announced that before LADWP offers new leases that "could exclude the provision of free irrigation water to commercial ranchers" and that "prior to approving such new leases….[,] LADWP will carefully evaluate any potential environmental impacts and will complete a full Environmental Impact Report…that will fully evaluate any impacts to the Sage Grouse habitat and ensure that these impacts are fully mitigated." (AR 99.) This statement lacks candor and accuracy. During its evaluation of the environmental effects associated with the new leases, LADWP intends to simply continue treating the expired 2010 Leases as holdover leases, which confer, according to LADWP, full rights to the City to curtail ranching deliveries of water all the way down to zero - thereby distorting the "existing conditions" baseline under CEQA. (See Guidelines, § 15125.) LADWP intends to continue to allow holding over under the expired leases during the time it prepares an EIR in connection with its New Ranch Lease project. As discussed above, LADWP implemented this new project when it announced in May 2018 that it would be providing only 4,600 AF of water for the leases and then subsequently determined that it needed to provide an additional 500

AF of water for the Bi-State Sage-Grouse. (See AR 100, 125, 90196.) These amounts are entirely inconsistent with historic practices based upon water availability, yet they are entirely consistent with LADWP's new project to increase exports from the Eastern Sierra to the City. (See AR 86773.)

Mayor Garcetti's letter announced that "Changing environmental circumstances, including the most recent five-year drought, requires us to reevaluate our current water uses, including the water historically provided to Eastern Sierra Ranches. Over the next six months, LADWP will analyze the potential environmental impacts of reducing water on leased land in Mono County. . . ." (AR 124-125.) Yet LADWP implemented water reductions in May 2018 that deviate from more than 70 years of historic practice and significantly impact habitat and resources in Mono County. Thus, LADWP implemented its water export project without any prior environmental review and, therefore, without public disclosure of the potentially significant environmental impacts of its actions or any consideration of possible mitigations, even while acknowledging that the such review was required.

3. PETITIONERS DO NOT CHALLENGE THE 2010 LEASES.

Ignoring its own NOP, LADWP argues that there is no new "project" because it is unilaterally deciding to treat the 2018 reduced deliveries as deliveries under the holdover leases pursuant to the terms of the previously approved 2010 Leases. This decision to treat the 2018 deliveries as occurring under the holdover leases ignores the decisions/actions set forth by Mayor

Garcetti and Chairman Levine in their respective letters regarding changes to the historic management policies and practices relating to grazing lease management in Mono County. (AR 100, AR 125.) LADWP's project involves a major reassessment and reallocation of water deliveries for ranching uses and wildlife management in Mono County. (See AR 100, 125.) For over 70 years LADWP delivered water for ranching uses, preservation of wildlife, and maintenance and restoration of meadow habitat based upon snowpack data in the area of the Eastern Sierra. The 2010 Leases do not allow for curtailment of future water deliveries, during the duration of the leases, for the purposes of increasing water deliveries to Los Angeles' residents or for the resulting elimination of sustainable grazing and land management activities. (See AR 168432.1401-168432.1403.)

The water provided has diverse beneficial effects on lands within the County. Water spreading by lessees on the leased lands has created and maintained meadow and wetland habitat beneficially used for wildlife (particularly the Bi-State Sage Grouse), and has supported native vegetation, enhanced scenic values and mitigated wildfire risk. The 2010 Leases and their historical interpretation and implementation, set forth LADWP's policies and practices with respect to LADWP's water management practices. These practices and policies clearly promote "sustainable" grazing and resource management practices.

The 2010 Leases' express terms demonstrate that the lessees could have

reasonably anticipated water deliveries for sustainable grazing uses over the five-year term of the 2010 Leases during any holdover period. The amount of water deliveries would depend in any one year on the amount available based on snow pack in the watershed. Section 7.1 provides that the amount delivered is "conditioned upon the quantity in supply at any given time." (AR 168432-1401.) Section 8.1.1 provides that "the water supply for a particular lease is highly dependent upon water availability and weather conditions…. [D]ue to this, delivery of irrigation water may be reduced in dry years." (AR 168432-1403.) Section 8.1.3 provides that "when lessee advises lessor that he is ready to irrigate, lessor will provide water to lessee as soon as possible under existing conditions." (AR 168432-1403.)

The lessees, under specific provisions in the 2010 Leases, can receive reductions in their lease water payments when drought conditions exist and water for irrigation-grazing uses is not available. Under section 3.2.4 of the Leases: "Based on the availability of water and if lessor's inspection of the land being leased thereunder indicates a "dry finding" or a necessity to reclassify said land by type or acreage, the rent payable shall also be readjusted to reflect the dry finding or reclassification…" (AR 168432.1398-168432.1399.) This provision relating to reductions in lease payments clearly indicates that the ranchers could have anticipated receiving enough water in wet or normal water years to engage in sustainable grazing uses, and that they would receive adjustments in lease rental payments in drought years, when

water for grazing uses would not be available in quantities received during normal years.

In addition, section 6.1 of the grazing leases states that LADWP "acknowledges its obligation to Club…." (AR 168432.1394.) The 1997 MOU Section III.B sets out basic purposes of the MOU with respect to grazing uses: "While providing for the primary purpose for which LA owns the lands, including the protection of water resources utilized by the citizens of Los Angeles, the [grazing] plans will also provide meet the objectives of the 1997 MOU between the City of Los Angeles Department of Water and Power and the County of Inyo, the California Department of Fish and Game, the State Lands Commission, the Sierra for the continuation of sustainable uses (including livestock grazing, agriculture), will promote diversity, and a healthy ecosystem.

These terms set forth LADWP's applicable management policies and practices to deliver water in Mono County and that such water deliveries were to be adequate to sustainably maintain historic grazing and resource management practices. Specifically, that water would be delivered according to availability based upon snowpack in the appropriate watershed.[7]

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[7] Every contract contains an implied covenant of good faith and fair dealing which prevents one party from unfairly preventing the other party's right to receive contractual benefits expressly set out in the contract. (*Carma Developers v Marathon Development Corporation* (1992) 2 Cal.4th 350, 372.) In *Carma* the Court expressly notes that the covenant applies to commercial leases. (*Id.* at 372.) The Court additionally notes that the "covenant of good

Section 7.3 of the leases reserves a "paramount" right on the part of LADWP "to discontinue" the delivery of water under the Leases and "distribute such water for the use of the lessor and any of its inhabitants." (AR 168432-1402.) This provision is a contingent reservation of a future right, not an imminent exercise of a right during the lease term. This contingent reservation does not give notice to the lessee, given the other lease terms that provide water for sustainable grazing uses and habitat protection relative to water availability as measured by snowpack conditions, that LADWP intended to reverse course and sharply curtail water deliveries for grazing uses. Had LADWP intended to embark on a program of augmenting water deliveries to the City at the expense of the ranchers in 2010, it would have prepared an EIR in 2010 instead of a categorical exemption.

No legal authority suggests that a grant of discretion in a contract can excuse compliance with CEQA. (See 5 JA830; citing *CBE, supra,* 48 Cal.4th 310.) Under *CBE*, had LADWP intended to exercise its reserved right to shut off water deliveries to Mono County in 2010 when it approved the 2010

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faith is read into contracts in order to protect the express covenants or promises made in the contract." (*Id.* at 373.) The Court further recognized that "difficulty arises in deciding whether such conduct, though not prohibited, is contrary to the contract's purposes and the parties *legitimate expectations*." (*Id.* [emphasis added].) Under the 2010 leases the ranchers had legitimate expectations based on years of water deliveries for grazing uses and based on express language in the leases relating to deliveries of water based on hydrological conditions (run off), that they would continue to receive water deliveries for sustainable grazing and resource management uses according to historical practices, and as constrained by hydrological conditions. (AR 168432.1401-168432.1403.)

Leases, it was required to prepare environmental documentation, and could not have proceeded on the basis of a categorical exemption. Thus, the issue is "whether a contractually permitted proposed change requires CEQA because it is a substantial change from an established environmental baseline." (5 JA831.) To the extent that it does, see *CBE, supra*, and since LADWP did not do so in 2010 when it approved the 2010 Leases on the basis of a categorical exemption, it is appropriate to conclude that LADWP did not intend to implement an augmented water export project when it approved the 2010 Leases and that such action was not part of the project approved in 2010.

4. LADWP'S ACTION CONSTITUTES A MATERIAL CHANGE IN THE 2010 LEASES

As demonstrated by LADWP's decision in 2018 to (1) allocate only a small portion of the amount of water it historically allocated to the subject lands under similar hydrologic conditions (2) directly spread a portion of the water itself purportedly to preserve habitat for the Bi-State Sage Grouse impacted by the dramatic reduction in water provided to the lessees, and (3) increase water exports from Mono County to Los Angeles, LADWP adopted new procedures and standards for allocating water to those lands. Thus, if the Court determines that the 2010 Leases is the previously approved project, in 2018 LADWP significantly changed the project from providing water to Mono County for sustainable agricultural uses and grazing to providing additional water exports to Los Angeles.

LADWP has changed the way it determines "the amount and availability of water" under section 7.1 of the expired 2010 Leases and changed its definition of "surplus water" under Section 220(3) of the City Charter, which is incorporated into, and governs, section 7.3 of the approved leases. (AR 168432.0596-168432.0597.) These changes resulted in the delivery of irrigation water being significantly reduced in 2018 - a non-dry year in contravention of the standards and practices for water deliveries described in sections 8.1.1 and 8.1.3 of the Leases, which linked the amount of water deliveries allocated to the ranchers directly to the measurement of snow pack in relevant areas of the Eastern Sierra in Mono County. (See, *e.g.*, AR 168432.0598.) Therefore, regardless of whether the previously approved project is LADWP's original decision more than 70 years ago to spread water on the subject lands in Mono County, or the 2010 Lease Approvals, that project significantly changed in 2018. Such change constitutes a "project" under CEQA. (See *CBE, supra,* 48 Cal.4th at 321; *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (1973) 15 Cal.App.4th 200, 207-208.)[8]

8 See *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955 (baseline for water diversion project was actually existing stream flows, not minimum stream flows set by federal license); *Save Our Peninsula Committee, supra,* 87 Cal.App.4th at 121 (water use baseline for analysis of proposed land development was actual use without the project, not what the applicant was entitled to use for irrigation); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 658 (baseline for proposed expansion of a mining operation must be the "realized physical

LADWP did not conduct any environmental review in approving and executing the Leases in 2010, but relied instead upon the existing facilities categorical exemption. Neither CEQA nor caselaw discusses the need for supplemental or subsequent environmental review when an agency makes substantial changes to a project that was approved in reliance on a categorical exemption. (See § 21166; Guidelines, §§ 15162(a), 15153(a).) That is because CEQA does not apply to projects that are categorically exempt. (§ 21080(b)(9); see *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1101.) A review of CEQA and case law regarding when CEQA requires supplemental environmental review provides guidance in this matter and mandates that LADWP must conduct environmental when it makes substantial changes to a project. The environmental review would not be supplemental or subsequent review, but would be the initial environmental review as LADWP conducted no environmental review under the 2010 categorical exemption.

When an agency makes substantial changes to the original project, and that project had some degree of environmental review there is triggered the need for a subsequent or supplemental EIR. (§ 21166(a); Guidelines, §§ 15162(a) and 15153(a); see *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1077 ["Courts have acknowledged that an increase in the size of a

conditions on the ground, as opposed to merely hypothetical conditions allowable under existing plans").

development project can be a substantial change triggering subsequent environmental review"].) (*Save Berkeley's Neighborhoods, supra,* 51 Cal.App.5th at 237.)

In *Save Berkeley's Neighborhoods,* the "project" analyzed in the EIR included a plan to stabilize University enrollment and projected a modest enrollment increase of 1,650 students between 2005 and 2020. The Regents later made several discretionary decisions to change the project by increasing enrollment beyond 1,650 students. The enrollment increases caused significant environmental impacts that were not analyzed in the 2005 EIR. The court found that the Regents' decisions to increase enrollment beginning in 2007 required environmental review under CEQA. (*Id.* at 237.) If the court determines that the project Petitioners challenge was based upon the 2010 Leases, then LADWP's action and/or decision to modify its practices under those leases constitutes a substantial change in the 2010 project necessitating environmental review under CEQA. (See § 21166; Guidelines, §§ 15162-15163.) These changes could not have been known until LADWP made public announcements through correspondence and other means during the spring and summer of 2018 that it was changing its water management policies for lands in Mono County. As held in *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association* (1987) 42 Cal.3d 929, 939, "if the agency makes substantial changes in a project after the filing of an EIR and fails to file a later EIR in violation of section 21167(a), an action

challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the EIR."

Here, in May 2018, LADWP took action to change its historic land management practices, including curtailing and/or reducing water deliveries to lands in Mono County. (AR 124-125, 98-101.) To the extent LADWP had previously managed land and water deliveries to lands in Mono County based upon Leases approved in 2010 and previously,, LADWP significantly modified that project,, thereby triggering environmental review. (See § 21166; Guidelines, §§ 15162-15163.) It is without dispute that LADWP failed to prepare any environmental document either in 2010 when it approved the Leases, or in 2018 when it change its practices, as required by CEQA.

LADWP argues that its 2018 water allocation was simply implementing the 2010 Leases. LADWP relies upon *City of Chula Vista., supra,* 23 Cal.App.4th at 1720 and *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036, 1045-105, to assert that the water allocation was part of the original project approval. Neither case applies to the instant matter.

Chula Vista involved a hazardous waste contractor that held a state permit to store 3,490 barrels. In 1989 the County approved storage of up to 2,000 barrels; and in 1992 the County entered into a lease that permitted storage of 2,000 barrels. The *Chula Vista* court held that "[b]ased upon the

factual allegations in the City's petition as supplemented by the County's administrative record and the agreement which are judicially noticed, the agreement executed on January 29, 1992 was not materially different from the "project" (i.e., the proposed agreement) approved by the Board of Supervisors on November 28, 1989.*"* (23 Cal.App.4th at 1721.)

In *Van De Kamps*, the court held that the execution of a lease did not constitute "substantial changes" where "the previously identified traffic impacts … had already been identified in connection with the Resolutions, and the execution of the lease therefore did not constitute a substantial change in the original project triggering a new limitations period." (206 Cal.App.4th at 1048.)

The only similarities between those cases and the present matter are that they involve lease agreements. The present matter, however, is actually similar to *Concerned Citizens of Costa Mesa*, *supra,*42 Cal.3d at 937-939*,* where the proposed change in water use constituted a "substantial change." In *Concerned Citizens of Costa Mesa*, there was no prior EIR in the case and as a result LADWP cannot use the section 21166 procedure and examine whether it is a "substantial change." As stated by the trial court here: "there is a world of difference between (1) executing a lease agreement that is consistent with prior environmental review and (2) proposing lease agreements that represent a significant change in historical water use and the water use in the prior lease agreements was itself not subject to environmental review." (8 JA1527.)

The governing case in this matter is *CBE, supra,*48 Cal.4th 310. Under *CBE*, the environmental impact is measured from the CEQA baseline, which is the historical practice regarding water allocation and not the contractually permitted water allocation. To that end, the Supreme Court held that CEQA requires that the baseline reflect "established levels of a particular use," and not the "merely hypothetical conditions allowable under the permits...." (48 Cal.4th at 322.) In the present matter, the record clearly demonstrates that the established use was water allocations based upon hydrologic conditions not augmenting water exports to Los Angeles.

5. THE TRIAL COURT PROPERLY DENIED LADWP'S EFFORT TO AUGMENT THE ADMINISTRATIVE RECORD

LADWP argues that the trial court erred in excluding evidence regarding water allocations in 2019 and 2020. (AOB 36-38.) LADWP, unhappy with the court's Tentative Decision filed a Declaration to augment the administrative record. (8 JA1414-1424; 1507.) The trial court denied the request as it was untimely and not relevant to LADWP's 2018 decision to change the long-term water allocation and water use. (8 JA1508.) The trial court, however, allowed the Declaration with respect to remedy and relied upon it in determining the *status quo*. (*Id.*)

LADWP submitted the Declaration without any formal motion and provided no legal authority to support augmenting the administrative record after issuance of the court's tentative ruling. (8 JA1414-1424.) California Rules of Court, Rule 3.2225(c) provides that unless otherwise ordered by the

court, any request to augment or otherwise change the contents of the administrative record must be made by motion served and filed no later than the filing of that party's initial brief. The Declaration was not accompanied by a motion nor filed at the time of LADWP's opposition brief. (8 JA1414-1424. Alameda County Superior Court, Local Rule, Rule 3.335 provides that motion to supplement administrative record should be filed no later than the deadline for filing of petitioner's opening memorandum of points and authorities in support of the writ. Thus, the filing of the Declaration was untimely.

The Declaration was untimely as it was presented in response to the trial court's Tentative Decision. As it is a general rule that new evidence is not permitted with reply papers, it certainly should not be permitted after the Court issued its Tentative Decision. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.)

The Declaration does not qualify for an exemption under *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559. "[E]xtra-record evidence is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions on the ground that the agency "has not proceeded in a manner required by law" within the meaning of Public Resources Code section 21168.5." (*Id.* at 576.) Any exception for extra-record evidence does not apply to evidence after the agency made its decision. (*Id.*)

The January 20, 2021 Declaration and its exhibits were created after LADWP's decision/action that is the subject of the First Amended Petition, after the briefing concluded and after the court issued its tentative decision. As such, they do not fall within the exception for extra-record evidence as set forth by the Supreme Court in *Western States.*

The Declaration is misleading and inaccurate and does not conform with information in the Administrative Record. Specifically, AR 86773 contains lists quantities of water provided to the 6,100 acres by runoff year and the corresponding percentage of normal runoff for each water year from 1992-1993 through 2017-2018. While the Declaration purports to identify the amount of water provided to the 6,100 acres in the 2019-2020 and 2020-2021, the Declaration does not identify the runoff percentage for normal years as is provided in the AR 086773. (8 JA1417-1421.) AR 86773 also sets forth the amount of irrigated acres of 6091 acres for each of the water years listed. The Declaration, however, does not discuss or disclose the amount of irrigation acreage for each of the referenced runoff years, therefore failing to reveal how the amount (in AF) shown as delivered per acre was calculated. (*Id.*)

Finally, the Declaration is inaccurate. The Declaration states that the diversion in 2019-2020 amounted to 6.6 AF/acre. (8 JA145.). While the Declaration does not disclose the amount of irrigated acreage for those years, if it is based upon the amount of irrigated acres of 6,091, as used in AR 86773, then 38,000 AF is 6.2 AF/acre, not 6.6 AF/acre. If the amount of

delivered water was 6.6 AF/acre, then the overall amount of water delivered would have been 39,725 AF.

D. NO CATEGORICAL EXEMPTION APPLIES TO LADWP'S PROJECT TO AUGMENT WATER DELIVERIES TO LOS ANGELES

LADWP argues in the alternative that the Project qualifies for the Ongoing Project exemption (Guidelines, § 15261) and Existing Facilities exemption (Guidelines, § 15301.) (AOB 49.) Neither exemption applies.

After determining that an action constitutes a project under CEQA, the agency must decide whether the project is exempt from CEQA review. (See §§ 21080, 21084(a); Guidelines, § 15300 *et seq.*; *Save Berkeley's Neighborhood, supra,* 51 Cal.App.5th at 235.) Nothing in the record indicates that LADWP's decision/action to modify 70 years of land management practices by significantly reducing water deliveries to 6,100 acres of land irrespective of water availability in the region, undertaking direct management of portions of those lands itself, and thereby greatly increasing water exports to the City from Mono County qualifies for a categorical exemption.

1. LADWP'S DECISION TO RE-ALLOCATE WATER FOR EXPORT IS NOT PART OF AN ONGOING PROJECT

LADWP argues that since it has been managing the Leased Lands in Mono County for over 70 years any decision regarding water allotments is part of an ongoing project and not subject to environmental review. (AOB 50.) LADWP mischaracterizes this action as a challenge to the 2018 water allotment for the leased lands, claiming that the allotment for that year was

consistent with the previously-approved project (the 2010 Leases). In fact, Petitioners challenge LADWP's decision to augment exports from Mono County by reducing the amount of water historically delivered to LA-owned lands in Mono County. That change to the historic practice makes this a project subject to CEQA and not ongoing implementation of an already-approved project.

Guidelines section 15261 exempts ongoing projects as follows: "(a) If a project being carried out by a public agency was approved prior to November 23, 1970, the project shall be exempt from CEQA unless either of the following conditions exists: (1) A substantial portion of public funds allocated for the project have not been spent, and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project .... (2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment." (*Nacimiento, supra,* 15 Cal.App.4th at 204, 205.)

LADWP mistakenly argues that *Nacimiento* is on point. In *Nacimiento*, the agency built a dam before the enactment of CEQA. Its application for the project provided for the storing and release of water for various uses. The court held that the agency's annual decision to release varying amounts of water to different interests was part of an ongoing project and exempt from CEQA. (*Id.* at 201, 204–208.) The court stated that "[w]hether an activity

requires environmental review depends upon whether it expands or enlarges project facilities or whether it merely monitors and adjusts the operation of existing facilities to meet fluctuating conditions." (*Id.* at 205.) The *Nacimiento* court concluded that since the project *did not entail revisions in procedures* or enlargement of capacity to divert water, but instead continued operations within existing parameters, it fell within the "ongoing project" exemption. (*Id.* at 207-208 [emphasis added].) Here, LADWP revised its historical procedures in order to enhance water exports to the City.

This matter is most similar to *Yorty*, *supra,* 32 Cal.App.3d at 806-807, where the court found that increasing the intensity and scope of groundwater pumping to provide water for the Second Barrel of Los Angeles' Aqueduct program could be deemed a modification of an earlier project requiring environmental review. (See also *Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 Cal.App.4th 1371, 1376 [Irrigation District that sought to expand the project to include consumptive water use, significantly changed focus of project to the extent that it cannot be termed an "ongoing project]."") As such, the ongoing project exemption does not apply. Moreover, LADWP's argument ignores LADWP's admission in its NOP that it is preparing an EIR for the "New Leases Project."

2. LADWP'S DECISION TO RE-ALLOCATE WATER DOES NOT FALL UNDER THE EXISTING FACILITIES EXEMPTION

LADWP argues that the Project qualifies for an existing facilities exemption under Guidelines section 15301. The existing facilities exemption

applies to the operation, repair maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment or topographical features, *involving negligible or no expansion of existing or former use*. (*Id.*) "The key consideration is whether the project involves negligible or no expansion of an existing use. (Guidelines, § 15301.)" (*North Coast Rivers Alliance North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832 867; citing *CBE, supra,* 48 Cal.4th at 26.)

LADWP's reliance on *North Coast Rivers Alliance* is misplaced. In *North Coast Rivers Alliance* there was no change in the project or activity authorized by the interim renewal contracts and the relevant activity came within the scope of the categorical exemption for existing facilities. (*Id.* at 868.) Here, LADWP's May 2018 decision/action changed its historic land management practices without any environmental documentation and does not comport with *North Coast Rivers Alliance*. LADWP's augmentation of exports to Los Angeles at the expense of delivering water to LA-owned lands in Mono County is not a mere negligible expansion of an existing or former use and thus does not fall within the existing facilities exemption. It is a new use of water that previously was allocated for use in Mono County. This change in water use constitutes a new project. (*Yorty, supra*, 32 Cal.App.3d 795; *County of Inyo, supra*, 71 Cal.App.3d at 195.) The existing facilities exemption does not apply. Moreover, the claim that there is an existing facility exemption contradicts LADWP's admission in its NOP that it is

preparing an EIR in connection with the "New Leases Project."

E. PETITIONERS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

LADWP attempts to define this action as a challenge to the approval of the 2010 Leases. This action challenges LADWP's 2018 decision/action to reallocate water from Mono County to the City not based upon available water in the Eastern Sierra, but based instead on the water demand in Los Angeles and anticipated impacts from climate change. (AR 100, 125; 8 JA1525.) LADWP's actions abruptly ended 70 years of historical policy and practice without environmental review.

Section 21167 provides that an action shall be commenced within 180 days from the date a project commences if the project is undertaken without a formal decision by the public agency. In *Yorty*, *supra,* 32 Cal.App.3d 795, the court held that the word "project" should be read broadly and that a change in plans for water acquisition can be a new CEQA project. *County of Inyo, supra,* 71 Cal.App.3d at 195, confirmed that a proposed change in water acquisition (groundwater pumping) and use can be a CEQA project.

The trial court here held that even if the May 1, 2018, decision was not a new project, the decision was a substantial change in the project which requires CEQA review under section 21166. (5 JA826; citing *Friends of College of San Mateo Gardens, supra,* 1 Cal.5th 937.) Petitioners filed the action within 180 days of the time that they knew or reasonably should have known that the City's actions differed substantially from the project. (See

Concerned Citizens of Costa Mesa, supra, 42 Cal.3d at 939.) The record indicates that the earliest Petitioners could have known or reasonably should have known LADWP had finally determined to modify water allocations in Mono County was May 1, 2018, when Mayor Garcetti sent the letter to Mono County indicating that water delivered during that season would be reduced. (AR 125.)

The May 1, 2018 "letter from the LADWP informed the ranchers that they would receive 4,200 AF/acre in 2018, which is 0.71 AF/Acre" (8 JA1525; AR 125), despite the fact that 2017 was the wettest year on record in more than 50 years and runoff for 2018 was forecast at 78% of normal. (AR 90196, 103, 121, 86773.) LADWP's action/decision to implement changed land management practices, including curtailment of water deliveries to the leased lands not based on a lack of water availability, "commenced on or about May 1, 2018." (1 JA191; 8 JA1525.) The commencement of the project was Mayor Garcetti's letter, accompanied by the email notice to the lessees about the markedly reduced water deliveries for 2018. Petitioners filed the case on August 15, 2018, well within the applicable 180-day statute of limitations. (8 JA1525.)

LADWP alternatively argues that the statute of limitations ran in 2016 when LADWP provided the ranchers with an identical Water Allotment (0.7 AF/acre) in a nearly identical water year. (AOB 48.) LADWP , however, fails to reveal that 2016 was the last year of a multi-year drought whereas

2018 followed the wettest year in record in 50 years. (AR 86773.) Thus, the 2016 change was not based upon a change in policy but upon the hydrological conditions and available water-consistent with historical practice. As stated by the trial court, "[a] change in water use can be the continuation of prior project or a new CEQA project." (5 JA828.)

Even if the 2010 Leases applied, LADWP's change of policy and practice in removing water from the lands and habitat constitutes a project under *CBE, supra,* 48 Cal.4th at 320-321. (See 5 JA830.) The change occurred on May 1, 2018 and that is the date from which the applicable statute of limitations began to run.

F. THE TRIAL COURT'S WRIT OF MANDATE IS LEGAL

LADWP argues that the writ directs LADWP how to exercise its discretion, which violates CEQA and the separation of powers. (AOB 53-54.) LADWP's argument is based upon its continuing misunderstanding that this action does not challenge the 2010 Leases and but the 2018 decision to increase water exports to Los Angeles. LADWP admitted that it had undertaken a project to change to reduce the amount of water that it historically delivers to Mono County and to increase exports to the City, and was undertaking compliance with CEQA by preparing an EIR with respect to the "New Leases Project. The writ ensures that the status quo remains in place until adequate environmental review is complete. (8 JA 1570-1571.)

The writ directs LADWP to maintain the status quo of delivering water to the 6,100 acres of leased land in Mono County that is owned by the City of Los Angeles unless and until LADWP complies with CEQA and subsequently approves a change to the historical delivery of water to the 6,100 acres. (8 JA1570-1571.) The trial court found that the status quo consists of LADWP providing water to the 6,100 acres based upon annual fluctuations and availability of runoff around the 5-year historical baseline from 2016-2021, based upon water availability in the Eastern Sierra. (8 JA1571.) The trial court identified the historical baseline as approximately 3.2 AF/acre. (*Id.*)

Section 21168.9 implements, in the context of judicial review, CEQA's requirement that preparation of an EIR precede project implementation. Pursuant to section 21168.9(a)(2), if a court finds that specific project activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project, a writ suspending any or all specific project activities or activities that could result in an adverse change or physical alteration to the environment before completion of the EIR and final approval of the project is appropriate, or a writ, as in the case, intended to maintain the status quo. (*County of Inyo, supra,* 61 Cal.App.3d 91 [court of appeals granted interim relief regulating groundwater pumping at a pumping rate established to preserve the *status quo ante*].)

LADWP argues essentially that under the 2010 Leases, it can in any year, deliver zero water to the lessees for irrigation purposes since annual

determinations are no longer tied to water availability or runoff. (AOB 53.) This is false. LADWP ignores the historic baseline as the 2010 Leases were approved as existing operations and the trial court found that LADWP's changes in policy and practice constitutes a project under CEQA.

If LADWP is not at all constrained by the 2010 Lease terms promoting irrigation water for sustainable grazing practices, and its historical practice of determining base annual deliveries of water based on hydrological conditions in the relevant watershed, then there would have been no need for LADWP to publish its NOP in August 2018 describing the New Leases Project. Announcing the New Lease Project and preparing an EIR for that Project, LADWP acknowledged the applicability of the CEQA statutory/regulatory framework to its augmented water export project, which requires the preparation of an environmental document prior to project implementation. CEQA's regulatory scheme confers on the courts plenary jurisdictional capability to preserve the *status quo ante* while the environmental document is being prepared. (§ 21168.9.) That is what has happened in this case. As LADWP has voluntarily committed itself to proceeding under CEQA with respect to the New Leases Project, it has no basis to challenge the writ maintaining the *status quo* pending preparation of an EIR.

VI.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Court affirm the trial court's Judgment.

Respectfully submitted,

Dated: February 4, 2022

MONO COUNTY COUNSEL

By: /s/
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County of Mono

Dated: February 4, 2022

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By /s/
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Dated: February 4, 2022

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By /s/
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 13,998 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: February 4, 2022

/s/
Donald B. Mooney

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Boulevard, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On February 4, 2022, I served a true and correct copy of

RESPONDENTS' OPPOSITION BRIEF

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 2022, at Davis, California.

/s/
Donald B. Mooney