

Appendix R. Legal History of the Mono Lake Controversy

INTRODUCTION

This appendix identifies legal actions relating to Mono Basin and the Mono Lake tributary diversions and summarizes the major legal directives from the court decisions. The objective of this appendix is to describe how those directives relate to the California State Water Resources Control Board's (SWRCB's) proposed revision of the Los Angeles Department of Water and Power's (LADWP's) water right licenses and to this environmental impact report (EIR). This appendix also contains a summary of the legal issues concerning water rights in the Owens River Basin.

A 1928 state constitutional amendment provides that all waters of the state must be put to reasonable and beneficial use (California Constitution Article X, Section 2). Any waters in excess of the reasonable and beneficial use are surplus waters available for use by others, under appropriative water rights administered by SWRCB. A water right is initiated by an application to appropriate water; if SWRCB approves the application, it issues a permit to the applicant to allow construction of the project needed to divert the water according to the terms and conditions of the permit. The applicant must file periodic progress reports with SWRCB regarding application of the water to beneficial use. Following completion of the project, SWRCB may issue a license confirming the right to the appropriation of the water according to the terms and conditions of the license.

SWRCB is proposing to revise the terms and conditions of LADWP's water right licenses to divert water for municipal and power generation from four tributary streams of Mono Lake. SWRCB will base this revision on the establishment of instream flow requirements for the Mono Lake tributaries and on lake surface elevation requirements for Mono Lake, as necessary to comply with California Fish and Game Code Sections 5937 and 5946, the public trust doctrine, and the constitutional requirement of reasonable use. Compliance with these requirements is directly related to the past litigation and recent court orders that concern water diversions from the Mono tributaries. This legal history is presented below, first in summary form, followed by detailed discussion of the Mono Basin and Owens Basin diversions.

SUMMARY

Mono Basin

- # In *National Audubon Society v. Superior Court* 33 Cal.3d 419, cert. denied, 464 U.S. 977 (1983), the California Supreme Court held that the public trust mandated reconsideration of LADWP's Mono Basin water diversions and the diversions' impact on Mono Lake.
- # In *California Trout, Inc. v. State Water Resources Control Board* 207 Cal.App.3d 584 (1989) (*Caltrout I*), the Court of Appeal found that Section 5946 of the California Fish and Game Code applied to LADWP water right licenses for appropriation of the Mono Lake tributaries. California Fish and Game Code Section 5946 states that no license to appropriate water in portions of Mono or Inyo Counties can be issued after September 9, 1953, unless conditioned on full compliance with Section 5937 of the California Fish and Game Code. California Fish and Game Code Section 5937 requires sufficient bypass flows around dams, including diversion dams, to maintain in good condition any fish that may be planted or exist below the dam.
- # In *California Trout, Inc. v. Superior Court* 218 Cal.App.3d 187 (1990) (*Caltrout II*), the Court of Appeal held that its opinion in *Caltrout I* foreclosed any argument that SWRCB had authority to balance the public interest in competing water uses and to set instream flow requirements that are sufficient to maintain fish in good condition. The court directed SWRCB to exercise its ministerial duty to amend LADWP's water right licenses for appropriation of the Mono Lake tributaries to include the condition that, in accordance with Section 5946, the requirements of the California Fish and Game Code, the licenses must comply with Section 5937. Interpreting the application of Section 5937, the court further specified that licenses should require LADWP to "release sufficient water . . . to reestablish and maintain the fisheries that existed in them prior to its diversion of water". SWRCB amended LADWP's licenses to include the specified condition on April 4, 1990. SWRCB did not specify numerical flow rates needed to comply with Section 5937, pending completion of the present process.
- # In *the Matter of Mono Lake Water Rights Cases* (El Dorado County Superior Court Coordinated Proceeding Nos. 2284 and 2288), coordinated action in the El Dorado County Superior Court includes the lawsuits described above and *Dahlgren v. City of Los Angeles* (Mono County Superior Court No. 8092 concerning the adequate flow of water in Rush Creek to sustain fish, pursuant to Section 5937 of the California Fish and Game Code) and *Mono Lake Committee v. City of Los Angeles* (Mono County Superior Court No. 8608 concerning the adequate flow of water in lower Lee Vining Creek to sustain fish, pursuant to Section 5937 of the California Fish and Game Code).

- On August 22, 1989, the court ruled that a preliminary injunction should be issued prohibiting LADWP from causing the level of Mono Lake to fall below 6,377 feet as a result of its diversions for the remainder of the runoff year ending March 30, 1990. This preliminary injunction continued in effect by stipulation of the parties until the court's April 17, 1991 ruling on the motion to extend the preliminary injunction.
- On August 29, 1989, the court issued a stay until completion of SWRCB proceedings or September 1993, whichever comes first, on further litigation on the merits of any of the coordinated cases. This ruling was based on the court's review of SWRCB's Mono Basin work plan, which calls for preparation of this EIR and adoption of a water right decision amending LADWP water right licenses by December 1992.
- On June 14, 1990, pursuant to *Caltrout II*, the court entered a preliminary injunction establishing interim flow rates for Rush Creek, Lee Vining Creek, and two Rush Creek tributaries, Parker and Walker Creeks. The net result of this interim streamflow order compels LADWP to release approximately 60,000 acre-feet (af) of water yearly down the Mono Lake tributaries.
- On April 17, 1991, the court issued a preliminary injunction requiring LADWP to allow sufficient water to pass its diversion facilities to maintain the level of Mono Lake at or above 6,377 feet. In effect, this order renewed the August 22, 1989 preliminary injunction, which required a lake level of 6,377 feet as a condition of LADWP diverting water out of Mono Basin. The parties to the litigation stipulated that the April 17, 1991 order shall remain in effect pending the completion of the SWRCB hearing.
- On December 17, 1992, the court extended the stay order until September 1, 1994 or completion of the SWRCB proceedings, whichever comes first.

Owens Basin

- # In *County of Inyo v. Yorty*, 32 Cal.App.3d 795 (1973), the Court of Appeal held that the California Environmental Quality Act (CEQA) required the City of Los Angeles to prepare an EIR on LADWP aqueduct operations completed in 1970.
- In succeeding years, the city unsuccessfully attempted to satisfy the court order, with the court directing each time that certain further steps must be taken to comply with CEQA (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185 [1977] and *County of Inyo v. City of Los Angeles*, 124 Cal.App.3d 1 [1981]).

- In 1984, the County of Inyo and the City of Los Angeles entered into an interim agreement that suspended litigation and called for cooperative studies and development of a long-term groundwater management plan.
 - In September 1990, pursuant to the interim agreement, a draft EIR was released in conjunction with the long-term groundwater management plan.
- # On May 29, 1991, in accordance with the court directive of the *Caltrout I* and *Caltrout II* decisions, SWRCB amended LADWP's water right license for diversion of water from the Owens River to include the condition requiring, in accordance with Section 5946, compliance with Section 5937 of the California Fish and Game Code (SWRCB Order 91-04). SWRCB did not, however, establish numerical instream fishery protection flow requirements as a condition of the license. SWRCB required that LADWP consult with the staff of SWRCB; the California Department of Fish and Game; and the California Regional Water Quality Control Board, Lahontan Region to determine appropriate instream flows. The consultations are required to include consideration of an appropriate method of restoring flows that will not create unreasonable impacts on instream resources or adversely affect any state-listed or federally listed endangered species.

LEGAL HISTORY OF THE MONO BASIN DIVERSIONS

In 1940, the City of Los Angeles, through LADWP, was granted permits allowing appropriation of the entire flow of four creeks tributary to Mono Lake for municipal use and hydropower generation. However, because LADWP lacked the appropriate conveyance facilities, it could not appropriate and transport the amounts of water that the permits had granted at that time. In 1963, the City of Los Angeles authorized the construction of a new aqueduct to transport the water as contemplated by the permits. The aqueduct was completed in 1970 to be filled from three sources: increased surface diversion from Mono Basin and Owens Basin, reduced irrigation acreage of Los Angeles-owned lands in Mono and Inyo Counties, and increased pumping of groundwater from Owens Basin.

In 1974, SWRCB issued licenses confirming LADWP's right to divert water from Mono Lake tributaries. LADWP has diverted approximately 83,000 af per year of water from Mono Basin since completion of the aqueduct.

***National Audubon Society v. Superior Court* 33 Cal.3d 419, cert. denied, 464 U.S. 977 (1983)**

Background. In 1979, the National Audubon Society (Audubon), along with the Mono Lake Committee, Friends of the Earth, the Los Angeles Audubon Society, and four Mono Basin landowners,

initiated a lawsuit against LADWP seeking to force the city to allow more water to flow into Mono Lake and thereby protect the Mono Lake ecosystem.

Audubon argued that LADWP's diversions of the Mono Lake tributaries violated the state's public trust over navigable water and that LADWP was creating a public and private nuisance. The public trust doctrine's origins can be traced to early English and Roman law. It has been traditionally used to protect the public interest in navigation, commerce, and fishing on navigable waters, and had been extended to protect waters in their natural state for recreation, scientific study, wildlife habitat, and scenery (*Marks v. Whitney* [1971] 6 Cal.3d 251). Audubon argued that the public trust applies when water bodies are altered as a result of water diversions.

Court Decision. In 1983, the California Supreme Court issued the decision on the Audubon lawsuit, focusing on the role of the public trust doctrine in California water law. The court agreed with Audubon that the public trust mandated reconsideration of LADWP's Mono Basin water diversions and the diversion's impact on Mono Lake.

The court stated that Mono Lake is a scenic and ecological treasure of national significance and that the lake's value as a recreational and scenic resource was diminished by recession of the water level. The court found that the water rights enjoyed by LADWP were granted and have continued without any consideration of the impact on this resource. The court held that an objective study and reconsideration of the water rights in Mono Basin were required because the water law of California integrates both the public trust doctrine and the appropriative rights system.

The court found that SWRCB and the courts had concurrent powers to undertake the reconsideration of water rights and the public trust doctrine. The court recognized that within this reconsideration, the concerns of LADWP and "the City's need for water, its reliance upon the 1940 board decision, and the cost both in terms of money and environmental impact of obtaining water elsewhere must enter into the allocation decision". Thus the court ruled that the public trust obligates the state to protect physical environments such as Mono Lake "whenever feasible". The court stated:

The prosperity and habitability of much of this state requires the diversion of great quantities of water. The state must have the power to grant rights to appropriate water even if diversions harm public trust uses. [However,] approval of such diversion without considering public trust values may result in needless destruction of those values. Accordingly, before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

Current Status. On March 23, 1989, the Judicial Council coordinated the Mono Lake case with the Mono Lake tributary cases under the title of "Mono Lake Water Right Cases" in El Dorado County Superior Court, with Judge Finney assigned as the coordination judge.

***California Trout, Inc. v. State Water Resources Control Board* 207 Cal.App.3d 584 (1989)
(*Caltrout I*)**

Background. California Fish and Game Code Section 5946 states that no license to appropriate water in portions of Mono or Inyo Counties can be issued after September 9, 1953, unless conditioned on full compliance with Section 5937 of the California Fish and Game Code. Section 5937 requires releases or bypass of sufficient water around, over, or through dams, including diversion dams, to maintain in good condition any fish that may be planted or exist below the dam.

California Trout, Audubon, and the Mono Lake Committee brought suit against SWRCB to rescind the 1974 water right license held by LADWP that had granted the right to appropriate all the water for streams tributary to Mono Lake. It was argued that SWRCB, in violation of Section 5946 of the California Fish and Game Code, failed to establish bypass requirements at LADWP's diversions in Mono Basin to protect fish that exist below LADWP's points of diversion on the four Mono Lake tributaries. (Another case with similar issues, *National Audubon Society v. the State Water Resources Control Board* [Sacramento County Superior Court No. 336712], was consolidated for appeal with *Caltrout I*.)

Court Decision. The Court of Appeal rejected several arguments of LADWP in finding that Section 5946 of the California Fish and Game Code applied to the water right licenses. The court found that Section 5946 applies to all licenses, even if they purportedly authorized appropriation of all the available water from a stream; the court found that Section 5946 expressly applied to the licenses for the appropriation of the water of the Mono Lake tributaries. The court also found that Section 5946 operates as a legislative choice to protect fish resources in consideration of the competing uses of water, including domestic and hydropower uses. Section 5946 represents the legislative concern over the drying up of the Owens River; it was passed as emergency legislation to avoid the destruction of the fish in the streams and the interference with a recreation-dependent economy that could occur with the proposals for diversion of water of the Mono Lake tributaries.

The court determined that Section 5937 of the California Fish and Game Code was a legislative expression of the public trust to protect fish resources and therefore creates an ongoing duty of SWRCB to protect public trust values when making water allocation decisions. The court found that a variety of public trust interests, including Section 5937, pertain to nonnavigable streams that sustain a fishery; therefore, because the Mono Lake tributaries are capable of sustaining natural fisheries, the public trust interest of Section 5937 applies to the Mono Lake tributaries.

Current Status. Following the issuance of the writ of mandate by the Sacramento County Superior Court, the *Caltrout I* case was transferred on August 29, 1989, by Judge Finney to El Dorado County Superior Court and coordinated with the Mono Lake and Mono Lake tributary cases under the title of "Mono Lake Water Right Cases".

***California Trout, Inc. v. Superior Court* 218 Cal.App.3d 187 (1990) (*Caltrout II*)**

Background. In 1989, California Trout, Audubon, and the Mono Lake Committee petitioned the Court of Appeal challenging the writ of mandate the Sacramento County Superior Court had entered pursuant to *Caltrout I*. The questions presented concerned the content of the conditions that should be added to LADWP water right licenses, the establishment of permanent or long-term numerical instream flow requirements, and the interim instream flow requirements to be maintained pending the establishment of the long-term requirements.

Court Decision. The Court of Appeal entered a writ of mandate that set aside the writ from the trial court. The court stated that its opinion in *Caltrout I* foreclosed any argument that SWRCB had authority to balance the public interest in competing water uses so as to set instream flow requirements that are insufficient to maintain fish in good condition; the court held that the legislature had already balanced the competing water uses when it enacted Section 5946 of the California Fish and Game Code. The court directed SWRCB to exercise its ministerial duty to amend LADWP's Mono Lake tributaries water right licenses to include the following:

In accordance with the requirements of Fish and Game Code Section 5946, this license is conditioned upon full compliance with Section 5937 of the Fish and Game Code. The licensee shall release sufficient water into the streams from its dams to reestablish and maintain the fisheries that existed in them prior to its diversion of water.

The court recognized a division of responsibility between the trial court and SWRCB, and directed the trial court to set interim flow requirements pending the establishment and implementation of long-term release rates by SWRCB.

Current Status. Because the *Caltrout I* case was transferred to El Dorado County Superior Court and coordinated under the title of "Mono Lake Water Right Cases", Judge Finney incorporated the directive of *Caltrout II* within the other Mono Lake issues. On April 4, 1990, SWRCB amended LADWP's water right licenses to include the language specified by the Court of Appeal.

***Dahlgren v. City of Los Angeles* (Mono County Superior Court No. 8092)**

Background. Since the start of LADWP's water diversions in lower Rush Creek, a tributary of Mono Lake, the creek has not contained significant flows. After the heavy rains in the mid-1980s, water and fish spilled over an LADWP dam into the creekbed. To sustain the small population of fish, the plaintiffs, including the Mono Lake Committee and Audubon, brought suit to stop LADWP from reducing the flow of water in Rush Creek, based on Section 5937 of the California Fish and Game Code.

Court Decision. On March 7, 1985, the Mono County Superior Court issued a preliminary order to LADWP to allow flows for fish in Rush Creek of at least 19 cubic feet per second (cfs).

Current Status. In 1986, the parties involved agreed to postpone trial pending completion of fish habitat studies by the California Department of Fish and Game. On March 23, 1989, the case was transferred to El Dorado County Superior Court, assigned to Judge Finney, and coordinated with the Mono Lake and other Mono Lake tributary cases under the title of "Mono Lake Water Right Cases".

Mono Lake Committee v. City of Los Angeles (Mono County Superior Court No. 8608)

Background. Since the start of LADWP's water diversions in lower Lee Vining Creek, another tributary of Mono Lake, the creek has not contained significant flows. After the heavy rains in the mid-1980s, water and about 300 adult trout spilled over the LADWP dam into the creekbed. To sustain the small population of trout, the Mono Lake Committee brought suit to stop LADWP from reducing the flow of water in lower Lee Vining Creek below 20 cfs, based on Section 5937 of the California Fish and Game Code.

Court Decision. On October 22, 1987, the Mono County Superior Court issued a preliminary injunction requiring a water release of 4-5 cfs for fish in Lee Vining Creek.

Current Status. On March 23, 1989, the case was transferred to El Dorado County Superior Court, assigned to Judge Finney, and coordinated with the Mono Lake and other Mono Lake tributary cases under the title of "Mono Lake Water Right Cases".

In the Matter of Mono Lake Water Right Cases (El Dorado County, Superior Court Coordinated Proceeding Nos. 2284 and 2288)

Background. This coordinated action includes the five lawsuits described above. The lawsuits seek various forms of relief, including establishing a minimum water elevation for Mono Lake; providing instream flows on Rush and Lee Vining Creeks, which are tributary to Mono Lake; and amending LADWP's water right licenses to require instream flows. The activities of the coordinated cases are as follows:

- # On March 23, 1989, the Judicial Council coordinated the *National Audubon Society v. Superior Court, Dahlgren v. City of Los Angeles*, and *Mono Lake Committee v. City of Los Angeles* cases and assigned them to Judge Finney in the El Dorado County Superior Court.
- # On August 22, 1989, the El Dorado County Superior Court issued an order granting a preliminary injunction prohibiting LADWP from causing the level of Mono Lake from falling below 6,377 feet for the remainder of the current runoff year ending March 31, 1990.

- # On August 29, 1989, Judge Finney ordered that *California Trout, Inc. v. State Water Resources Control Board* and *National Audubon Society v. the State Water Resources Control Board* be coordinated with the other three cases and issued a stay until completion of SWRCB proceedings or September 1993 (whichever comes first) on further litigation on the merits of any of the coordinated cases. This ruling was based on the court's review of SWRCB's Mono Basin work plan, which calls for preparation of this EIR and adoption of a water right decision amending LADWP water right licenses by December 1992. The court ruled on December 17, 1992 to extend the stay order until September 1, 1994 or completion of the SWRCB proceedings, whichever comes first.
- # On December 6, 1989, the El Dorado County Superior Court entered a preliminary injunction in accordance with the August 22, 1989 order. The court ordered that LADWP must allow sufficient water to pass its diversion facilities on Rush Creek and Lee Vining Creek to maintain the level of Mono Lake at or about 6,377 feet. Water is to be released into Rush Creek at a rate between 85 and 100 cfs. Water is to be released into Lee Vining Creek at 60 cfs or the rate of inflow into LADWP's diversion facility, if it is less.
- # On April 4, 1990, SWRCB amended LADWP water right licenses for the appropriation of Mono Lake tributaries to include the mandated language regarding fish protection flows, pursuant to *Caltrout II* (SWRCB Order 90-3).

Court Decision. On June 14, 1990, pursuant to the *Caltrout I* and *Caltrout II* decisions, the El Dorado County Superior Court entered a preliminary injunction that established interim flow rates for the diverted Mono Lake tributaries (Table R-1). The net result of this interim streamflow order compels LADWP to release approximately 60,000 af of water yearly down Mono Lake tributaries. Because of these new requirements, the prior preliminary injunctions requiring minimum flows were superseded.

On April 17, 1991, the El Dorado County Superior Court issued a preliminary injunction that requires LADWP to allow sufficient water to pass its diversion facilities to maintain the level of Mono Lake at or above 6,377 feet. The court noted that the extra 60,000 af required by the June 14, 1990 order would not sustain the level of Mono Lake at 6,377 feet.

LEGAL HISTORY OF THE OWENS BASIN DIVERSIONS

Summary of Litigation

Owens River drains the Owens Valley, with its headwaters in Long Valley in Mono County and its terminus at Owens Lake. In 1940, the City of Los Angeles, through LADWP, was granted a permit that allowed for the appropriation of water from the Owens River. In 1963, the City of Los Angeles

authorized the construction of a new aqueduct to transport the water as contemplated by the permit; the aqueduct was completed in 1970.

In 1972, the County of Inyo brought suit against the City of Los Angeles, claiming that LADWP operations, in supplying the new aqueduct, were harming the environment of Owens Valley and that CEQA required preparation of an EIR. In 1973, the Court of Appeal held that the City of Los Angeles had to prepare an EIR (*County of Inyo v. Yorty*, 32 Cal.App.3d 795). In succeeding years, the city unsuccessfully attempted to satisfy the court order, with the court directing each time that certain further steps must be taken to comply with CEQA (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185 [1977] and *County of Inyo v. City of Los Angeles*, 124 Cal.App.3d 1 [1981]).

The County of Inyo and the City of Los Angeles in 1984 entered into an interim agreement that suspended litigation and called for cooperative studies and development of a long-term groundwater management plan. The court approved this interim agreement in a court order; a draft EIR, prepared in conjunction with the long-term groundwater management plan, was released in September 1990. The final EIR will be submitted to the court; on certification of the final EIR by LADWP and the County of Inyo, the court may discharge the litigation between the County of Inyo and the City of Los Angeles.

SWRCB issued LADWP a license in 1974 confirming the right for diversion of water from the Owens River at Long Valley Dam. As in the case of the Mono Basin diversion water right licenses also issued in 1974, the Owens River water right license did not contain any terms or conditions requiring bypass of water for any purposes. As described above, the California Court of Appeal ruled that with respect to water right licenses issued after September 9, 1953, SWRCB has a ministerial duty to condition the licenses to require compliance with Sections 5937 and 5946 of the California Fish and Game Code (*Caltrout I* and *Caltrout II*).

On May 29, 1991, SWRCB amended LADWP's water right license for diversion of water from the Owens River to include the condition requiring, in accordance with Section 5946, compliance with Section 5937 of the California Fish and Game Code (SWRCB Order 91-04). SWRCB did not, however, establish numerical instream fishery protection flow requirements as a condition of the license because requirements could be established only "based on an adequate evidentiary record and following notice and opportunity for hearing". Until numerical flow requirements are established, SWRCB requires that LADWP consult with the staffs of SWRCB; the California Department of Fish and Game; and the California Regional Water Quality Control Board, Lahontan Region to determine appropriate instream flows. The consultations should include consideration of an appropriate method of restoring flows that will not create unreasonable impacts on instream resources or adversely affect any state-listed or federally listed endangered species.