SAVING MONO LAKE
The Road to D1631, Twenty Years and Counting

by Harrison C. “Hap” Dunnag

On September 28, 1994, the California State Water Resources Control Board (SWRCB) issued Decision 1631. That decision, with its accompanying order marked, if not the end, at least a major turning point in many years of judicial and administrative activity regarding challenges to diversions of water in the Mono Basin by the Los Angeles Department of Water and Power (LADWP). In 2014, the twentieth anniversary of D1631, it is worth reflecting on how D1631 came to be.

LADWP diversions in the Mono Basin were an outgrowth of its construction of the Los Angeles aqueduct. That facility diverts water from the Owens River to Los Angeles. Both to augment its water supply from the east side of the Sierra and to provide water for hydropower plants to be built in the Owens Gorge, LADWP sought water rights to divert water from four freshwater creeks tributary to saline Mono Lake north of the Owens Valley. In 1940, they were granted those rights.

After LADWP built its impoundment and diversion facilities in the Mono Basin, as anticipated the level of Mono Lake began to drop. Until a team of undergraduate science students did a study of Mono Lake in 1976, little attention was paid to it, aside from a complaint by a local Sierra Club chapter in 1973.

The students who studied the lake were alarmed about the environmental damage from the diversions, both at that time and those anticipated. Loss of freshwater inflow made the lake ever more saline, putting at risk invertebrate life which was an important food source for various bird species. Other concerns were the potential for air quality degradation as the lake shrank, as well as a land bridge to an island which would allow predator access to a nesting area.

Most scientific research reports do not lead to activism by the scientists. Not so, in the case of Mono Lake. Some of those on the research team joined with others to form the Mono Lake Committee, which was subsequently represented by a major law firm, Morrison and Foerster (MoFo) in a lawsuit to challenge the diversions. One of the claims in that lawsuit related to the public trust doctrine.

Although many authors trace the public trust doctrine to Roman law, in particular to statutes promulgated by a Byzantine emperor, Justinian, its operational significance in Roman and later law is unclear. What matters for us is the public trust doctrine in American law.

The key insight of the public trust doctrine in American law is that, because of their importance to the public, certain natural resources should be held in a special legal regime. The resources most closely associated with the public trust doctrine are the beds of navigable waters and navigable waters themselves. The values historically tied to the public trust doctrine are navigation, commerce and fishing by the public, but in California since the early 1970s environmental values have been included as well.

Central to the legal regime for these special resources has been the notion of state “sovereign” ownership. The idea was initially developed in the U.S. in the courts of New Jersey in disputes over oyster beds. Later the U.S. Supreme Court embraced the idea, and under the rubric of “equal footing” that court decided that by operation of law each shore state upon statehood was granted title to the beds of its navigable waters, as well as the waters themselves. Mono Lake is one such navigable water.

The courts in California embraced the public trust doctrine, which can be thought of as the fiduciary aspect of state sovereign ownership, as early as the 1850s. It was applied initially in tidelands disputes and later to disputes over property rights in the areas between high water and low water around lakes such as Lake Tahoe. But by 1979, when MoFo filed its lawsuit, the public trust doctrine had never been applied to the exercise of water rights. However, in 1983 the Supreme Court of California in its Mono Lake decision held that the public trust doctrine can indeed impact the exercise of water rights. But it also said both that this could happen only when “feasible” and that the public trust doctrine and the historic system of appropriative water rights must in some fashion be accommodated.

After 1983, there were numerous judicial developments. One of particular importance was the opening of a “second front” of sorts, when lawyers for California Trout and others sued over the impact of LADWP’s facilities in the Mono Basin on fish in the creeks. They relied on a provision in the California Fish and Game Code, Section 5937, which requires owners and operators of dams in California to keep downstream fish “in good condition.” By 1990, together with the Mono Lake Committee, they had obtained a permanent injunction which established minimum flow levels for the creeks in question.

Ultimately, both the public trust doctrine and the Section 5937 aspects of the Mono Basin litigation were referred to the SWRCB. The board issued D1631 and an order regarding both creek flows and the lake’s level. And an important aspect of D1631 is that LADWP did not challenge it in court.

D1631 effectively is a compromise. When LADWP began its Mono Basin diversions, Mono Lake’s elevation was 6417 feet above sea level. In 1994, the SWRCB ordered that the elevation be restored to fluctuate around 6392 feet above sea level, a level which would not restore some previously important waterfowl habitat, but which would provide significant environmental benefits. Interestingly, 6392 is only two feet higher than the elevation of at least 6390 recommended to the SWRCB by a representative of Governor Wilson before the SWRCBs formal evidentiary hearings began. As of this writing (February 2013), the elevation is 6382, only ten feet above the historic low of 6372 in 1982.

I have here emphasized the legal strategies that were pursued from 1979 to 1994 to seek to modify LADWP’s operations in the Mono Basin. But the political, governmental, and scientific strategies were equally important. Martha Davis, Executive Director of the Mono Lake Committee for thirteen years during the thick of the battle (1984–1997), took a threefold approach to the nature of lake restoration: “real protection for Mono Lake, locally-developed replacement water supplies for Los Angeles, and the assurance that LA’s water needs would not be transferred to another region.” So the Committee worked ceaselessly both to develop political support in Los Angeles and to help obtain funding for efforts such as water conservation in Los Angeles. That Mono Lake is recovering is an inspiration to all those in California and elsewhere who care about restoration of rivers and lakes which have been damaged by excessive water project development.

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