

On saving Mono Lake, 20 years later

by Hap Dunning

Editor's note: 2014 marks the 20th anniversary of California State Water Resources Control Board Decision 1631, commonly known as the decision to "save Mono Lake." We are celebrating the anniversary in the Newsletter this year with a series of articles that take a deeper look at the decision and its importance for Mono Lake. We reprint here Hap Dunning's essay for the 2014 Mono Lake Calendar to illuminate the path that led Mono Lake and its tributary streams to the landmark State Water Board decision twenty years ago.

On September 28, 1994, the California State Water Resources Control Board 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 & Power (DWP). In 2014, the twentieth anniversary of D1631, it is worth reflecting on how D1631 came to be.

DWP 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, DWP sought water rights to divert water from four freshwater creeks tributary to saline Mono Lake north of the Owens Valley. In 1940, DWP was granted those rights.

After DWP 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 fresh water 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 institutes 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 subject to 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 US in the courts of New Jersey

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in disputes over oyster beds. Later the US Supreme Court embraced the idea, and under the rubric of “equal footing” that court decided that by operation of law each new state upon statehood was granted title to the beds of its navigable water, 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 DWP’s facilities in the Mono

Basin on fish in the creeks. They relied on a provision in the California Fish & Game Code, Section 5937, which requires owners and operators of dams in California to keep downstream fish “in good condition.” By 1990, they had obtained a permanent injunction which established minimum flow levels for the creeks in question.

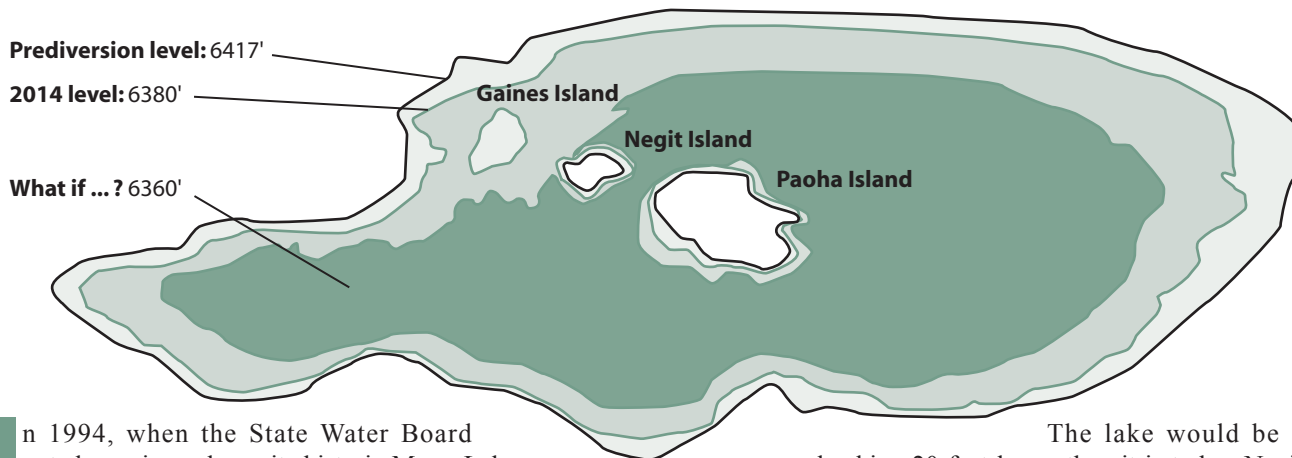
Ultimately, both the public trust doctrine and the Section 5937 aspects of the Mono Basin litigation were referred to the State Water Board. The board issued D1631 and an order regarding both creek flows and the lake’s level. And an important aspect of D1631 is that DWP did not challenge it in court.

D1631 effectively is a compromise. When DWP began its Mono Basin diversions, Mono Lake’s elevation was 6417 feet above sea level. In 1994, the State Water Board 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 State Water Board by a representative of Governor Wilson before the Board’s formal evidentiary hearings began. As of this writing (February 2013), the elevation is 6382’, only ten feet above the historic

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What would Mono Lake have looked like?

by Geoffrey McQuilkin



In 1994, when the State Water Board voted unanimously on its historic Mono Lake decision—with a standing ovation from the audience, no less—the lake itself was 6 feet lower than it is today and just 2 feet higher than its historic, diversion-induced low. Twenty years later, we have to wonder....

What if the people of California had not raised their voices and called for a change? What if the Mono Lake Committee had not been formed? What if the State Water Board had not been involved? What if—in other words—water diversions had continued, undiminished, at their full historic levels?

The lake would be a shocking 20 feet lower than it is today. Negit Island would be a landbridged peninsula, with visible signs of a landbridge to Paoha Island emerging. The west shore would be a vast expanse of mud. The tufa towers of South Tufa would be far from the water’s edge. The lake’s surface area would be 30% smaller in size. But ecologically things would be far worse than that: salinity would be up by 60%, pushing the unique Mono Lake ecosystem into collapse.

The dark green in the figure above represents what Mono Lake might have looked like, if the worst had come to pass.

An appeal for more snow

A poem for a dry year

by Julia Frankenbach

Snow Man, I'm not sure if you're really there,
But on the off chance you are, well, you're being quite spare.

In fact, to be blunt, it just isn't fair
That we're slaving away while the mountains stay bare.

We MLC staff, see, we love Mono Lake
And we want it to rise, for we all have a stake
In a healthy living lake with water enough
That the brine shrimp can live and the birds can stuff
Their bellies on fresh food that keeps them well
And allows them to migrate to the places they dwell.

What's more, as it happens, I'm a canoe tour guide
And I'm having big problems with the lowering tide
See, I'd like to be able to launch these boats,
To declare it from shore to shore—"It floats!"

But this shoreline is shallow and rough to the hull
The scraping has turned our once-bright canoes dull

O woe! These deserving canoes, so abused
By protruding tufa: positively bruised
As I drag them and scrape them over carbonate rock
By golly, we'll soon be in need of caulk

Really, just a foot more of water would do
To go from beached whale to floating canoe
So Snow Man, I entreat you, it really is time!
Let's have us a flurry: a snowstorm sublime
With feet of it up on the high mountain peaks
So in springtime the snowmelt will fill up our creeks
And replenish our lake, bring up its level

So we in a rising lake can revel
Sixty-three eighty and falling fast
We'd do anything, Snow Man, for a snowy forecast
And I mean anything! See, Emma and I, we believe
That maybe you'll yield if we can conceive
Of every superstition and trick in the book
For winning back the snow you forsook.
Just look at our ardor, we've been quite devout
Emma's PJs are backwards and quite inside out
There are spoons under pillows and offerings of ice
We consider these oddities more than fair price
For a good, snowy winter and a rising lake
But if not for the lake, then for all of our sake! ❖



On January 30 Lee Vining got 16 inches of snow. Perhaps the Snow Man heard Julia's poem?

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low of 6372' in 1982.

I have here emphasized the legal strategies that were pursued from 1979 to 1994 to seek to modify DWP's operations in the Mono Basin. But the political, grassroots, 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 three-fold approach to the matter 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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