

every year. Unanticipated, long-term health implications surface each day. Environmental policy analysts now call for source reduction -- reduction of both hazardous chemicals and their hazardous wastes -- as the best means to combat escalating environmental pollution. Thus, food irradiation takes us a step backward, and if unchecked, will serve to augment the escalating hazardous materials problems and their attendant health risks.

Substituting food irradiation for food petrochemicals and pesticides merely substitutes one inappropriate technology for another. Safe alternatives to food irradiation and chemicals do exist, and scientists can further develop these alternatives in the future. Given food irradiation's inherent dangers and

the industry's blemished safety record, a widespread food irradiation program seems simply absurd.

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Mono Lake Symposium

Mono Lake Update

by Kathy Smith

INTRODUCTION

Now nearing its tenth year, litigation over water appropriation in the Mono Basin began in 1979 when the Audubon Society and several other environmental groups sought to enjoin the City of Los Angeles's water diversions from Mono Lake tributaries. Since that time, the parties have filed numerous lawsuits, and yet, Mono Lake's future is still in doubt. This year, several major events have occurred, adding to the controversy over the lake's future. First, a scientific study conducted for the state legislature and a U.S. Forest Service draft management plan both reported that Mono Lake's condition will deteriorate if the lake's water line drops below its current measurement of 6,377 feet above sea level. Secondly, the United States Court of Appeals, Ninth Circuit remanded the original 1979 Audubon case back to California state court. Finally, the California Court of Appeals ruled that the California State Water Resources Control Board (SWRCB) should revoke the City of Los Angeles's current water permits involving the Mono Basin and should reissue them with provisions to protect downstream fisheries. This continuing and complex legal battle over California water use pits natural resource preservation against economic growth and development.

THE MONO LAKE BASIN AND LOS ANGELES

Mono Lake lies nestled against the snow-capped Sierras, with Yosemite National Park to the west and the Nevada border to the east. Although the lake receives most of its waters from snowmelt, due to

its lack of natural outflow, the lake contains naturally saline water. Part of an ancient ecosystem estimated at least 750,000 years old, the area's unique environment supports brine shrimp and brine flies. These species in turn feed large populations of California gulls, eared grebes, Wilson's phalaropes, and other birds. For these and other reasons, Mono Lake constitutes a scenic and ecological treasure of national significance.

The City of Los Angeles lies south of Mono Lake, with a large population and a great need for water. Early this century, Los Angeles viewed the Mono Basin merely as an area where fresh water flowed into a salty sink and evaporated. To Los Angeles, the Mono Basin constituted tapable water resources. In 1920, Los Angeles began purchasing riparian water rights in the Mono Basin, and in 1940, the Division of Water Resources (predecessor to the SWRCB) granted the Los Angeles Department of Water and Power's (DWP) application to appropriate the entire flow of four out of the five streams feeding Mono Lake. In 1941, the state granted an operating license to DWP, and the first waters were diverted from Mono Lake tributaries into the Los Angeles aqueduct system. In 1970, Los Angeles completed a second aqueduct and Mono Basin water diversions increased approximately fifty percent, totaling an average of 100,000 acre feet per year. (One acre/foot equals the amount of water necessary to cover one acre of land with one foot of water.)

In 1976, a group of college undergraduates received money from the National Science Foundation to study the Mono Lake environment. Their observations on the effects of the lake's declining

water level raised concerns of severe environmental damage: loss of the lake's brine shrimp, loss of migrating and nesting birds, and destruction of the Mono Basin's natural beauty. So in 1978, the students organized the Mono Lake Committee to defend the Mono Basin. One student, David Gaines, developed a slide show and canvassed the California coast for support, convincing local Audubon Society groups to help protect the Mono Basin, containing one of California's last remaining natural wetlands. The National Audubon Society became an important ally in the struggle to preserve Mono Lake.

LITIGATION . . . AND MORE LITIGATION

The students' grass roots efforts produced litigation on three legal fronts. The first legal front utilizes the public trust doctrine to protect Mono Lake itself. The California courts define the public trust doctrine as the state's duty to protect the public trust interests of navigation, commerce, fishing, recreation, aesthetics, and other public uses in the state's navigable waters and the lands underlying those waters. The second approach utilizes the California Fish and Game Code along with the public trust doctrine to protect Mono Lake's tributary streams. This approach focuses on protection of the streams' fisheries. The third legal argument attacks the legality of DWP water licenses. Any of these approaches' success will benefit the entire Mono Basin since the lake and its tributaries are an integrated system. Yet despite these varied legal approaches and ten years of litigation, the controversy defies resolution.

A. First Legal Argument -- The Public Trust Doctrine

A lawsuit filed in 1979 by the National Audubon Society acts as this controversy's legal cornerstone. Utilizing the first legal argument, Audubon sought to enjoin the DWP's water diversions on the theory that the public trust doctrine protects Mono Lake's shores, bed, and waters. DWP removed the lawsuit to federal district court, but the district court remanded the issue of the public trust doctrine's validity in this context back to state court, along with the additional public and private nuisance claims.

In 1983, the case made its way to the California Supreme Court. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977, 104 S.Ct. 413 (1983). The court held that the public trust doctrine applies to Mono Lake's tributary waters and bars the DWP from claiming a vested right to divert those waters once the diversions begin to harm public trust interests. *Id.* at 426, 427. The court held that before the SWRCB approves water diversions, it should consider the diversions' effects upon public trust interests and make attempts to avoid or minimize any harm to those interests. *Id.* at 427. In other words, a public trust "balancing" should occur. This ruling indicated that California water law permitted the SWRCB to objectively study and reconsider Mono Basin water rights after the agency granted the rights.



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When the case returned to federal district court, the district court again remanded the public trust "balancing" and the state law public and private nuisance claims back to state court, but retained jurisdiction over the federal common law nuisance claim based on air pollution. Audubon claimed that the water diversions caused air pollution in the form of alkali dust storms over the approximately 14,000 acres of lake bed exposed by Mono Lake's dropping water level. Both sides appealed, and on October 6, 1988, the United States Court of Appeals, Ninth Circuit decided that Audubon could not properly assert a federal common law nuisance claim based on air pollution. *National Audubon Society v. DWP*, No. 13910 (S.D. Cal. Oct. 6, 1988) (LEXIS, King Hall Library). The court also ruled that the district court appropriately remanded the case because of the strong state interest in the issue. The case now returns to the Mono County Superior Court for the public trust balancing and the resolution of the state law public and private nuisance claims.

B. Second Legal Argument -- California Fish and Game Code and the Public Trust Doctrine

Wet winters in 1982 and 1983 provided the basis for the second legal attack involving Mono Lake tributaries. Increased water volumes in those years forced DWP to make releases into lower Rush Creek, a large Mono Lake tributary. With the influx of water, a once prosperous trout fishery reestablished itself. In 1984, when DWP threatened to once again dry up the creek, an enterprising trout fisherman, Dick Dahlgren, convinced California Trout, Inc. to join him in a lawsuit against DWP. *California Trout, Inc. v. DWP*, No. 8092, *slip op.* (Mono Cty. Sup. Ct., Aug. 17, 1985). Plaintiffs argued that the public trust doctrine protected Rush Creek and that Cal. Fish & Game Code § 5937 (West 1986) required DWP to maintain sufficient water flow below the dam to keep the stream in good condition for fish existing below the diversion. The court endorsed the public trust argument, but sidestepped the Fish and Game Code, reserving that question for trial only if the parties arrived at no

resolution under the public trust doctrine. The court reasoned that constitutional questions raised by the mandatory Section 5937, giving fisheries absolute priority, would become too complex and far-reaching to discuss, especially if the parties could resolve the dispute more simply via the public trust doctrine. *Cal. Trout, supra*, at 15. The court awarded California Trout a preliminary injunction, requiring the DWP to release 19 cubic feet per second (cfs) down Rush Creek in order to maintain the fishery. The upcoming trial will require the balancing of Rush Creek's public trust values versus the City of Los Angeles's municipal needs. The Mono County Superior Court delayed the trial, however, in order to allow the California Department of Fish and Game to complete an instream study.

In 1986, the Mono Lake Committee brought a similar lawsuit to protect Lee Vining Creek. The Mono Superior Court issued a temporary restraining order to maintain a flow of 10 cfs down the creek's lower stretches. *Mono Lake Committee v. DWP*, No. 8356, *slip op.* (Mono Cty. Sup. Ct., Aug 12, 1986). In 1987, the court issued a preliminary injunction for a flow release of no less than 4 cfs and no greater than 5 cfs. *Mono Lake Committee v. DWP*, No. 8608, *slip op.* (Mono Cty. Sup. Ct., Oct. 21, 1987). The California Department of Fish and Game agreed to do an instream flow study in preparation for trial.

C. Third Legal Argument -- Validity of DWP's Water Licenses

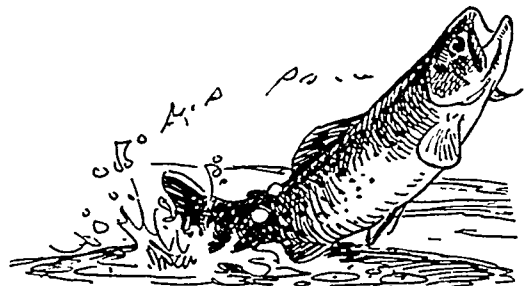
In 1985, frustrated by the courts reluctance to consider Fish and Game Code violations in Rush Creek, the National Audubon Society and California Trout brought a lawsuit attacking DWP water licenses' validity. Both plaintiffs sought mandatory water releases to benefit fish in four Mono Basin creeks. Plaintiffs based their suit on Cal. Fish & Game Code §§ 5937, 5946 (West 1986). In 1986, the superior court held the water licenses valid because the Fish and Game Code sections did not apply to the Mono Basin diversions. On May 23, 1988, however, the California Court of Appeals held the water licenses invalid. *California Trout, Inc. v. SWRCB*, 201 Cal. App.3d 552 (1988). The court held that Section 5946, which applies to all licenses issued after 1953 in Mono and Inyo counties, prevents fisheries destruction by water appropriation for other uses. The DWP's licenses, issued in 1974, do not comply with the Fish and Game Code, and therefore, must be revoked and reissued consistent with Section 5946.

Significantly, this case represents the first time a court has instructed the SWRCB to revoke water diversion permits and reissue them in compliance with state law. The court held that the SWRCB should enforce Section 5946 because the legislature gave special recognition to the extensive destruction of Mono and Inyo Counties' streams and fisheries resulting from water diversions. The DWP filed a petition for reconsideration, which the court granted. The SWRCB has taken no revocation action at this time.

MONO LAKE'S ENVIRONMENTAL HEALTH

Mono Lake's ecological status constitutes one of the central issues in these myriad lawsuits. The lake's current water level is 6,377 feet above sea level. The DWP claims that the lake has adapted to the dropping water levels and will remain healthy even with continued water diversions. The Mono Lake Committee warns of the lake's tenuous status and claims that Mono Lake's adequate preservation requires a minimum water level of 6,388 feet above sea level.

The Department of Water Resources (DWR), the National Academy of Science, a blue ribbon panel for the state legislature, and the U.S. Forest Service have all studied the dropping lake level's effects. As early as 1979, an interagency task force chaired by DWR recommended that Mono Lake be stabilized at 6,388 feet. California Department of Water Resources, *Report of Interagency Task Force on Mono Lake* (1979). In 1987, the National Academy of Sciences reported on the Mono Basin ecosystem in National Academy of Sciences, *The Mono Basin Ecosystem: Effects of Changing Lake Level* (1987). This report states that the major ecological concerns with lake level changes involve the effects of salinity and habitat availability. *Id.* at 206. The study concluded that continued drops in Mono Lake's water level will have severe effects on the basin's wildlife and ecosystem as a whole. D. Patton, Opening Statement at National Research Council Press Conference 2 (Aug. 4, 1987). In 1988, a blue ribbon panel prepared a report for the California state legislature. Community and Organization Research Institute, University of California, *The Future of Mono Lake*, Water Resources Center Report No. 68 (1988). This report states that "serious consequences to the [Mono L]ake ecosystem will occur in the near future if the Los Angeles Department of Water and Power continues to export Mono Basin water in amounts similar to those that have been exported for the last three decades." *Id.* at 22. The report states that a lake level of 6,382 feet above sea level would protect all the lake's key aspects. *Id.* at 19. The report also states that a 6,372 foot lake level would sacrifice substantial bird habitat and threaten wetlands. *Id.* Because of major reductions in brine flies and brine shrimp, the first links in the food chain, a level of 6,362 feet would prove extremely dangerous for Mono Lake. *Id.*





The U.S. Forest Service also contributed an evaluation of Mono Lake's situation. The Forest Service has managed the Mono Basin since the basin's designation as a National Forest Service Scenic Area in 1984. On September 20, 1988, the Forest Service announced its draft management plan. The plan advocates maintaining Mono Lake's water level at 6,377 to 6,390 feet above sea level. The Mono Lake Committee reacted positively to the water level advocated by the Forest Service, stating "this is what Mono Lake needs and this is what will keep it healthy." *Sacramento Bee*, Sept. 21, 1988, at A1, col. 5. DWP responded to the Forest Service plan by commenting "[t]he lake can be at a much lower level and still have a healthy environmental and ecological situation. We believe the lake can continue to decline for a number of years." *Id.*

THE FUTURE OUTLOOK

As the Mono Lake litigation's tenth anniversary approaches, the Mono Lake Committee feels a sense of urgency to protect the lake. Next year could be critical for Mono Lake. The water level has dropped to 6,377 feet, and the lake teeters on the edge of acquiring a deadly salinity level that could destroy the lake's brine shrimp population and fragile ecology. The legal system has proved frustrating. In many of the Mono Basin cases, preliminary legal issues have occupied the courts for years. Ultimately, however, water allocation must come into focus. One side desires to preserve the Mono Basin, including one of California's last remaining wetlands (some estimates indicate that California has lost ninety percent of its wetlands), numerous bird species, and an area of natural and unusual beauty. The other side counters with our free enterprise heritage and the desire to promote growth and development. This side argues that California built its prosperity and habitability on the diversion of great quantities of water from California streams.

The largest municipal utility in the country, DWP functions as a business, selling water and power as commodities. DWP officials consider themselves tough negotiators seeking the most water for the lowest price in order to better serve their customers. DWP's loss of Mono Basin water would cause enormous economic and practical consequences. Mono Basin water costs DWP about one third as much as other supplies, and the water produces hydroelectric power as it travels through the aqueduct. DWP estimates losses of 100,000 acre feet of water per year and power losses of up to 300 million kwh per year, together worth up to \$33 million per year.

The City of Los Angeles is making efforts to conserve water. In May 1988, the Los Angeles City Council approved a mandatory water conservation ordinance. This ordinance should reduce water usage by ten percent, saving 70,000 acre feet per year -- the amount the Mono Lake Committee calculates is necessary to protect Mono Lake.

After almost ten years of litigation, the various legal challenges have not provided a comprehensive solution to Mono Lake's problems. *Audubon* is now in state court for resolution of the state law private and public nuisance claims and the balancing of Los Angeles's municipal needs and Mono Lake's public values under the public trust doctrine. In both the Rush Creek and Lee Vining Creek cases, the Mono City Superior Court issued preliminary injunctions to maintain stream flows pending completion of the Department of Fish and Game's instream studies. These cases provide relief for the lower reaches of two of Mono Lake's tributary streams. The injunctions also provide some 17,000 of the estimated 70,000 acre feet necessary to keep the lake at a functioning level. Finally, the direct attack on DWP's water licences awaits a rehearing by the state court of appeals.

CONCLUSION

Both sides in these cases agree that the DWP appropriations are causing the decline of Mono Lake's water level. The parties disagree, however, on the level required to maintain the lake. One side seeks to protect an irreplaceable natural resource, and the other side to protect a valuable fresh water source. The courts must strike a balance that protects the lake's environmental resources yet provides a reasonable amount of water for the City of Los Angeles. While Los Angeles has recently shown a willingness to negotiate and promote water conservation, private conservation will provide only a partial solution. We must consider the ecological cost of California's rampant growth. We must reevaluate present uses and anticipate future needs, so that we can allocate scarce resources to both preserve the state's unique ecology and allow economic growth.

EDITOR'S NOTE: *On January 26, 1989, the California Court of Appeals ruled on its rehearing of California Trout, Inc. v. SWRCB, finding in Cal Trout's favor. California Trout, Inc. v. SWRCB, No. C000713, slip. op. (Cal. Ct. App. Jan. 26, 1989). The court held that the SWRCB must apply Cal. Fish & Game Code § 5946 (West 1986) prospectively to DWP's water licenses. The Board has a duty to correct the licenses and condition them to comply with the Fish and Game Code provisions, which will require reduced water diversions from the Mono Lake tributary creeks. No one has calculated the amount of reduction yet.*

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