



# CALIFORNIA INDIAN LEGAL SERVICES

Sacramento ♦ Escondido ♦ Eureka ♦ Bishop  
INYO-MONO SENIOR LEGAL PROGRAM  
EASTERN SIERRA LEGAL ASSISTANCE PROGRAM

BISHOP OFFICE:  
873 N. Main St., Suite 120, Bishop CA 93514  
Telephone: (760) 873-3581 ♦ Fax: (760) 873-7461

December 22, 2022

## SENT VIA US & ELECTRONIC MAIL

Mr. E. Joaquin Esquivel, Chair  
Ms. Eileen Sobeck, Executive Director  
California State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95814  
Joaquin.Esquivel@waterboards.ca.gov

### Re: Support for Emergency Action at Mono Lake Due to Low Lake Level

Dear Mr. Esquivel and Ms. Sobeck,

I am writing on behalf of the Mono Lake Kutzadika'a (also spelled Kootzaduka'a or Kutzaduka'a) Tribe to support the request from the Mono Lake Committee that the State Water Resources Control Board (SWRCB) immediately issue an emergency regulation to halt the export of water diverted from Mono Lake's tributary streams by the Los Angeles Department of Water and Power (LADWP). Specifically, the Tribe echoes the Committee's request that **all diversions be halted until the Lake reaches a level of at least 6384' above sea level**, at minimum, in order to prevent further deterioration of the Tribe's cultural connection with the lake. This action is also necessary to alleviate the current emergency threats to the nesting gull colony and violations of water and air quality standards, which are also of great importance to the Tribe.

The requested action is critical and necessary, and would only begin to remedy the nearly three (3) decades of damage caused by the Lake remaining below the level that the Board found necessary in 1994 to protect the public trust. Additionally, the SWRCB failed to meaningfully consider the Tribe's cultural resources or connection with the Lake before issuing Order D1631, and though there is some overlap, the public trust does not encompass these things. The Board's prompt action is separately critical and necessary to protect the Tribe's previously unconsidered cultural resources and connection with the Lake, though much more is needed beyond this emergency action request.

### THE CULTURAL SIGNIFICANCE OF KOOTZABAA'A (MONO LAKE)

Mono Lake and the five (5) creeks that feed it have indisputable cultural significance for the Mono Lake Kutzadika'a people. In the words of the Tribe, "Kootzabaa'a (Mono Lake) is the physical, cultural and spiritual center of the Kootzaduka'a people."



The Tribe's subsistence relationship with the lake has been passed down by tribal elders from generation to generation to this very day and is well documented by renowned anthropologists, historians, naturalists, and ethnologists. As early as 1901, C. Hart Merriam, a naturalist, linguist, and, late in life an anthropologist, recorded encounters with the Tribe and writes of the Kutzadika'a people's alkali fly (*Ephedra bians*) harvesting process. Merriam provides a description of the tribal members' collection and preparation of the fly pupae on the shores of Mono Lake which they "take their name from." Pioneer historian Ella Cain, born in the late nineteenth century, was a school teacher in Bodie and, in "The Story of Early Mono County", wrote a detailed description of the collection and preparation of "ko-cha-bee," writing that the fly pupae "were considered to be the greatest delicacy of the Piute world. The real test of an Indian's friendship for you was for him or her to offer you a piece of pine nut or acorn bread sprinkled with ko-cha-bee." She also recounts and describes that "Gambling games (played with sticks for counters), singing and dancing were in progress during the nights of each harvesting ... Each festival or pow-wow of course was held at the scene of the harvesting; the ko-cha-bee festival at Mono Lake being the biggest." Mono Lake's abundance of "ko-cha-bee" was life-sustaining to tribal members, who relied on the processed fly pupae as a source of protein to get them through the long cold winters.

### **EXCESSIVE DIVERSIONS THREATEN THE TRIBE'S CONNECTION TO MONO LAKE**

As a result of the LADWP's decades of water diversions, the surface of Mono Lake sits today at the alarmingly low 6,378.4 feet above sea level. When lake levels are artificially low from excessive diversions, this adversely impacts the alkali flies that are so vital to the Tribe in two related but distinct ways.

First, the low lake level increases salinity. There is no question that water quality / salinity adversely affects the culturally significant alkali flies. Numerous scientific studies<sup>1</sup> have found that the productivity of alkali flies at Mono Lake, and thus the abundance of alkali fly pupae available for gathering, is correlated to the salinity of Mono Lake. While the saline water conditions natural to Mono Lake are favored by alkali flies, the high salinities that exist due to the artificial lowering of the lake cause reduction of body size and overall population productivity in the alkali flies. Excessively high salinities would create conditions at which the lake's alkali fly population could not survive. Similar trends are seen with the lake's brine shrimp population.

Second, the low lake level threatens the ability of the Lake's alkali flies to reproduce by decreasing the available littoral hard substrate where they reproduce. This is especially true in the shallows near the groves of tufa columns when the water drops below the bottom of the columns, **as is now the case for many (but not all) of the Lake's tufa column groves**. As described below, this is the area where the Tribe harvests kootzabe and locates its subsistence connection to the Lake, and it is disappearing as a result of water diversions.

The tufa columns are the most important fly breeding and egg-laying habitat in Mono Lake. The female alkali fly crawls down the tufa column and deposits her eggs at the base of the column. As she crawls into the water a bubble of air encapsulates her so that she can breathe the air within the bubble while submerged. Once finished with egg-laying, she releases her hold of the tufa and immediately floats to the surface where the air bubble bursts and she is on top of the water and can fly away at that

---

<sup>1</sup> See, e.g., The Mono Basin Ecosystem: Effects of Changing Lake Level. 1987. Pages 90-92, 188-190.

point. The eggs hatch and the larvae feed on the algae growing on the submerged portion of the tufa column. Regardless of the Lake chemistry, the alkali fly must have access to tufa columns that are both exposed at the top and submerged at the bottom so that she can climb down the tufa to submerge herself underwater to lay eggs.

These tufa grove shallows are where the Tribe harvests kootzabe, as waves dislodge the puparium from the columns so that they float in the shallows and become available for harvest. The areas with the right combination of exposed-submerged tufa columns are the areas where the most abundant quantities of kootzabe would be found and would correspondingly be the areas where traditional harvesting would occur. However, when the lake level recedes below the bottom of the tufa column, the flies cannot go underwater to lay eggs, and the Tribe cannot then harvest the fly pupae in the shallows.

When the lake drops below the tufa, as it has in many cases, this cuts off the Tribe's connection to a vital cultural resource that has sustained the Tribe since time immemorial.

### **DECADES OF DAMAGE TO CULTURAL RESOURCES AND THE FLOUTING OF D1631**

Salinity is a water quality consideration directly correlated with the surface elevation of the lake and the lake's resulting volume. The SWRCB considered multiple studies that linked salinity to surface elevation during over four months of hearings in 1993 and 1994 and encompassing over 125 witnesses as part of the Board's evaluation of water license conditions necessary to protect Mono Lake public trust values.

The SWRCB made a determination in 1994 of an elevation level consistent with the public trust: "Based on the evidence presented, the SWRCB concludes that a water level in Mono Lake at or near 6,390 feet will maintain the aquatic productivity of the lake in good condition" (Mono Lake Basin Water Right Decision 1631, page 82). Ultimately, the SWRCB chose 6,392 feet as the sustainable management level:

"This decision ... amends Los Angeles's water right licenses to include specified water diversion criteria which are intended to gradually restore the average water elevation of Mono Lake to approximately 6,392 feet above mean sea level in order to protect public trust resources at Mono Lake." (D1631 § 6.7, p. 195.)

Moreover, the diversion criteria were based in part on "the need to reach a lake level that is consistent with protection of public trust resources in Mono Basin **in a reasonable amount of time**" (D1631 § 6.8, p. 158, emphasis added).

Mono Lake has never reached its public trust level since D1631 and, as of November 1, 2022, was **6378.4 feet - more than thirteen (13) feet below the management level mandated by the SWRCB**. Although Mono Lake has never come close to the public trust level mandate set out in 1994 in D1631, Los Angeles is able to typically divert 16,000 acre feet annually, and 4,500 acre feet at the current low level, under the plan that set out the "transition period" (i.e. while the lake is rising to 6,392 feet). D1631 § 6.8, pp. 156-57.

The Tribe, having members living in the Mono Basin, is additionally concerned about worsening air quality due to wind-borne particulates that are wind-swept from exposed alkaline lake beds, into the air. These particles are known to be carcinogenic and constitute a severe health threat to the Tribe as

well as the nontribal community. Curtailing water diversion to inundate exposed alkaline lakebeds is the only lasting solution to protect the health of people and wildlife.

As the SWRCB stated in its 1994 order:

“Based on the evidence discussed in previous sections, the SWRCB concludes that maintaining an average water elevation sufficient to result in compliance with federal air quality standards [i.e., 6,392 feet] will also provide appropriate protection to public trust resources at Mono Lake[, including]: air quality in the Mono Basin; water quality in Mono Lake; the Mono Lake brine shrimp and alkali fly which provide food for migratory birds; secure, long-term nesting habitat for California gulls and other migratory birds; easily accessible recreational opportunities for the large number of visitors to the Mono Lake Tufa State Reserve; and the panoramic and scenic views which attract many people to the Mono Basin.” (D1631 § 6.7, p. 155.)

The SWRCB recognized the limits of the computer modeling available in 1994 and anticipated the possibility of future hydrologic conditions differing significantly from historical conditions. (D1631, § 6.8, p. 158.) In doing so, the SWRCB anticipated adjusting diversion criteria in the future to account for these divergences: If “future conditions vary substantially from the conditions assumed in reaching this decision,” then “the SWRCB could adjust the water diversion criteria in an appropriate manner under the exercise of its continuing authority over water rights.” (Id.)

While the most egregious environmental and cultural destructions that would have taken place without D1631’s limitations on LADWP stream diversions have been mostly avoided, there has been no “transition” to an acceptable lake level. An acceptable lake elevation must protect the Tribe’s cultural uses of the Lake – which have never been meaningfully considered by the Board, and be, at a minimum, consistent with the public trust (as determined by this Board in D1631). LADWP should not be allowed to continue to divert water each year when the lake has failed to even once reach its public trust level over the past 28 years, and all diversions must immediately cease until the Lake rises out of its current crisis.

### **A LONG TERM SOLUTION IS NEEDED**

At this time, the requested emergency regulation is critically necessary. However, such an action would only provide short term relief, and would not come close to bringing the lake to the level established nearly three decades ago and ordered in D1631. More importantly however, the process by which the Board issued Order D1631 in 1993 and 1994 – as well as the 2021 Stream Restoration Order (2021-86) – failed to formally or meaningfully involve the Tribe, and as a result the Tribe’s perspective was absent from hearings and resulting order. The Tribe has not had a seat at the table and as a result, neither D1631 nor 2021-86 discuss or reflect a lake elevation that is meaningful to the Tribe. However, it is obvious that the Lake is in crisis and that an immediate cessation of water diversions is necessary for many reasons.

A longer term solution must meaningfully involve the Tribe. This will necessarily involve the Board holding hearings and taking testimony from tribal representatives, and the Tribe looks forward to participating in that process in the future. However, for any long term solution involving a determination of a suitable lake elevation and revisions to LADWP’s diversion licenses to meaningfully involve the Tribe, the Board should allow the process (currently underway) of assessing

and designating Tribal Beneficial Uses for Mono Lake to take its course. Accordingly, the Tribe believes a hearing at this time to determine long term solutions for Mono Lake would be premature.

The Tribe is currently working closely with the Lahontan Regional Water Quality Control Board (Lahontan Waterboard) on their Tribal Beneficial Uses Designation Project. As this Board is aware, the designation of Tribal Beneficial Uses (TBU) is a way to acknowledge and protect Tribal cultural and subsistence uses of waterbodies in California. This process involves the Lahontan Waterboard amending its Basin Plans to incorporate TBU designations, which takes time.

Although the Lahontan Waterboard has given area tribes until February 2023 to request TBU designations, the board notified the Tribe on October 20, 2022 that it had modified its project plan and decided to move forward with the Basin Plan Amendment process to designate Mono Lake and its tributaries. This was welcome and exciting news to the Tribe.

The Tribe invited the senior leadership of the Lahontan Waterboard to a field visit on August 17, 2022 where tribal members went out to select locations on the shores of Mono Lake to explain and visually point out their tribal uses and values. It was also an opportunity for the Tribe to articulate threats to their cultural heritage and practices stemming from the effects of water diversion and a hotter and dryer climate. The senior leadership was so impressed with the insights they gained, that they requested the Tribe hold a similar field visit at Mono Lake for their full staff. The Tribe arranged a second field visit on November 3, 2022 with approximately 50 to 60 of the Lahontan Waterboard staff who were able to participate. The participating staff left with a similar appreciation of the tribal perspectives and concerns, which media in any format cannot adequately convey. The Tribe has scheduled a government-to-government consultation meeting with the Lahontan Waterboard in January of 2023 to formally engage in the TBU process.

From a tribal perspective, it is important to allow this TBU process to complete before moving forward with a hearing to attempt long term solutions for Mono Lake. The Tribe has never had to consider what constitutes meaningful protections of cultural resource values at Mono Lake because formerly there has never been an opportunity to do so, and because the Tribe was not meaningfully included in former efforts to protect Mono Lake. Participation in the TBU process will help the Tribe assess and communicate its traditional cultural uses and values, in preparation for a future hearing to discuss long term solutions at Mono Lake. To move forward with a hearing to discuss long term solutions at Mono Lake, before the conclusion of the TBU process, would put the Tribe at a great disadvantage in that the Tribe would not be prepared to present its cultural values and could potentially be overshadowed by better organized and financed entities, such as LADWP, who have the means and opportunities to not only present their needs, but also to undermine tribal values perceived as conflicting with their expressed needs.

Accordingly, the Tribe respectfully requests that the Board allow the TBU designation process to conclude before it considers appropriate long-term changes to the orders set forth in D1631.

### CONCLUSION

The Tribe's request for an immediate cessation of all stream diversions and for meaningful and appropriately timed consideration of its perspective and interests are in alignment with the SWRCB's

2021 Resolution Condemning Racism.<sup>2</sup> In its resolution, the SWRCB acknowledged and recognized that its programs have been historically established over a structural framework that perpetuated racial inequalities. The omission of the Kutzadika'a Tribe in any formal or meaningful way from the hearings that resulted in D1631 certainly illustrates this history. The Board unanimously-approved this important resolution and made a number of commitments and directives, including the following:

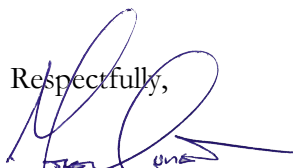
The SWRCB “[r]eaffirms our commitment to improving communication, working relationships, and co-management practices with all California Native American Tribes, including seeking input and consultation on the Water Board’s rules, regulations, policies, and programs to advance decisions and policies that better protect California’s water resources. The State Water Board recognizes our parallel relationship to the people we serve and values tribes’ traditional ecological knowledge and historic experience with managing California’s water resources since time immemorial.” SWRCB Resolution No. 2021-0050, p. 8.

...

The SWRCB “[d]irects staff to develop strategies for effectively reaching and meaningfully engaging with Black, Indigenous, and people of color communities; involving and partnering with tribes, stakeholders, and other interested parties in our decision-making processes; providing accessible, open and transparent opportunities for people to participate in our public meetings, hearings, and workshops; meeting people in their communities and spaces to seek out their perspectives; supporting communities with building capacity to advance racial equity and environmental justice; improving our communications by providing more plain-language materials; and addressing barriers to public participation, including language, digital, and time-of-day access.” SWRCB Resolution No. 2021-0050, p. 8.

If the Board’s unanimously-supported commitments to equity and reconciliation for California’s native peoples are sincere, it must act with urgency to halt the degradations to Mono Lake from water diversions, and meaningfully involve the Tribe in finding long term solutions to the Lake’s current crisis (i.e., once the TBU process is complete).

The Tribe joins the Mono Lake Committee to respectfully request that the SWRCB issue an emergency regulation halting LADWP’s export of water diverted from Mono Lake’s tributary streams until a minimal lake level is met. LADWP has flouted the Board’s 1994 order for decades; it is time for the Board to halt these degradations to the Tribe’s cultural resources and allow Mono Lake to reach an acceptable surface elevation in the short term, and chart a course for the Lake to reach a higher level in the long term.

Respectfully,  
  
 Michael Godbe  
 Directing Attorney

---

<sup>2</sup> State Water Resources Control Board Resolution No. 2021-0050 Condemning Racism, Xenophobia, Bigotry, And Racial Injustice And Strengthening Commitment To Racial Equity, Diversity, Inclusion, Access, And Anti-Racism, November 16, 2021  
 ([https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2021/rs2021\\_0050.pdf](https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021_0050.pdf))

CALIFORNIA INDIAN LEGAL SERVICES

Cc: Charlotte Lange, Chairwoman, Mono Lake Kutzadika'a Tribe (via email)  
Geoffrey McQuilkin, Executive Director, Mono Lake Committee (via email)  
Adriana Renteria, State Water Resources Tribal Liaison (via email)  
Daniel McClure, Lahontan Water Board Tribal Coordinator (via email)