

THE STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

IN COOPERATION WITH  
CALIFORNIA DEPARTMENT OF FISH AND GAME  
CALIFORNIA DEPARTMENT OF WATER RESOURCES

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In the Matter of: Mammoth Community )  
Water District Licenses 5715 and 12593 and )  
Permit 17332 (Mammoth Creek, Mono )  
County) )

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**PETITION TO ESTABLISH APPROPRIATE LIMITATIONS ON DIVERSIONS BY  
MAMMOTH COMMUNITY WATER DISTRICT, DECLARE MAMMOTH CREEK  
FULLY APPROPRIATED, AND PROVIDE OTHER RELIEF TO PROTECT PUBLIC  
TRUST RESOURCES IN MAMMOTH CREEK, HOT CREEK, AND UPPER OWENS  
RIVER**

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**I.**  
**INTRODUCTION**

1. California Trout, Inc. (CalTrout) petitions the State Water Resources Control Board (State Water Board) to protect the public trust uses of Mammoth Creek, Hot Creek, and upper Owens River, including the trout fishery, recreation, and wildlife, in a manner which also assures adequate water supply for the Town of Mammoth Lakes. We specifically request that the State Water Board amend Mammoth Community Water District's (MCWD) Licenses 5715 and 12593 and Permit 17332 to re-establish a permanent instream flow schedule, determine whether Mammoth Creek is fully appropriated, correct MCWD's chronic water supply deficiency, and provide other appropriate relief. We seek such relief under the Water Code sections 100 *et seq.*, Fish and Game Code sections 5937 and 5946, and the public trust doctrine.

2. MCWD uses Mammoth Creek as a water supply source for the Town of Mammoth Lakes. See MCWD, Urban Water Management Plan (January 2004), p. 5. It stores water in Lake Mary and diverts pursuant to these licenses, granted in 1959 and 1990, and the permit, granted in 1978. The permit established a permanent flow schedule for protection of the public trust in Mammoth Creek. MCWD has operated under a different and interim flow schedule for at least 11 of the past 16 years: pursuant to temporary variances that the State Water Board granted from 1987-1989, and then pursuant to the Mono County Superior Court's Writ of Mandate (Civ. 11159) from 1996 to the present. The interim flow schedule is not based on an evidentiary record required by the California Environmental Quality Act (CEQA) or Water Code for any permanent flow schedule. It is an *interim*

schedule. After 11 years of MCWD's operation under this interim schedule, CalTrout respectfully asks the State Water Board to finish this unfinished public business. The second ordering paragraph in WR 97-01, the return on the Mono County Superior Court's Writ of Mandate, provides: "IT IS ... ORDERED that the Chief of the Division of Water Rights schedule a hearing at an appropriate time to receive evidence regarding establishment of a long-term instream flow requirements applicable to diversions of water from Mammoth Creek by Mammoth Community Water District" (emphasis in original). WR 97-01, *attached to* "Return of Peremptory Writ" (Jan. 13, 1997), (Ex. 1), p. 8.

3. CalTrout brings this Petition before the State Water Board to commence the proceeding required by WR 97-01, Water Code sections 100 *et seq.*, and other laws to amend these rights. In order to avoid unnecessary delay and cost, we do not seek relief directly from Superior Court. Only the State Water Board has the jurisdiction to amend these rights in this manner. We request that the Department of Fish and Game (DFG) and Department of Water Resources (DWR) participate as parties, given their jurisdiction over the administration of public trust resources and urban water management, respectively. Their coordinated action will be essential to timely action to protect and restore the beneficial uses of these public waters.

4. Since 1996, MCWD has diverted an average of 2,500 acre-feet/year (AFA) from the creek, while pumping an average of 1,700 AFA from the adjacent aquifer. *See* MCWD, Urban Water Management Plan (2004 Update) (2004 UWMP); MCWD, "Water Assessment for Draft Town of Mammoth Lakes General Plan" (Sept. 13, 2004) (Ex. 2) pp. 2-3. The State Water Board and California Department of Fish and Game (DFG) have found

that MCWD's diversions *may* degrade the trout fisheries and other public trust values of Mammoth Creek, Hot Creek, and the Upper Owens River, which are among the most productive wild trout streams in California. We attach those findings (made in compliance orders, comments, and other documents) as well as other recent evidence that shows a negative trend in these fisheries since issuance of the Writ of Mandate in 1996.

5. We recognize that municipal water supply is the highest beneficial use of water under the Water Code. *See* Water Code § 1254. As a matter of law and in recognition of the public interest, we do not seek any relief that will interfere with MCWD's continuing duty to provide an adequate water supply to the Town of Mammoth Lakes, today and in the future. It is our hope and expectation that MCWD, CalTrout, and other parties will collaborate in the proceeding requested by this Petition and reach a settlement as the basis for the State Water Board's final action.

6. Time is of the essence. We ask the State Water Board to *act expeditiously to prevent unnecessary harm* to the fisheries and other public trust uses. The harm will worsen, and the alternatives may narrow, if the State Water Board further delays its determination how to amend these rights to assure adequate water supply consistent with protection of the public trust. As the State Water Board found 13 years ago: "...the District is facing a serious water supply shortage that is not the direct result of an unusual or unexpected condition; i.e., 5 years of extreme drought, but is instead due to development within the District without the acquisition of additional water supplies to keep pace with escalating demand." *See* SWRCB, "Notice of Threatened Violation of Terms and Conditions of Permit 17332" (July 26, 1991) (Ex. 3), p. 4.

7. Finally, this Petition does not seek to prove that the interim flow schedule actually causes unnecessary harm to the public trust. Instead, relying in part on the State Water Board's own orders, we show that the flow schedule *may* cause such harm. While such impacts may be disputed in any future hearing, it is undisputed that the State Water Board is committed by WR 97-01 and applicable laws to undertake an evidentiary hearing, including a CEQA document, as the necessary basis to re-establish a permanent flow schedule. Respectfully, that time is now.

## **II.** **INTERESTS OF PETITIONER**

8. California Trout, Inc. is a non-profit membership corporation founded in 1971. Our headquarters are at 870 Market Street, Suite 528, San Francisco, California 94102. We have over 5,700 members. Our mission is "to protect and restore wild trout, native steelhead and the waters that nurture them and to create high quality angling for the public to enjoy." CalTrout was a lead plaintiff in the Mono Lake Cases. In subsequent years, we have continued our efforts to invigorate administration of the Water Code, Fish and Game Code, and other statutory laws, to comply with the public trust doctrine throughout the State. Many of our members use Mammoth Creek, Hot Creek, and the Upper Owens River for fishing and other forms of recreation, and some live adjacent to these waters.

## **III.** **JURISDICTION**

### **A. State Water Resources Control Board**

9. The people own the State's waters. *See* Water Code § 102. All water shall be managed for the greatest public benefit. *See id.*, § 105.

10. Since 1914, the State Water Board has had exclusive jurisdiction to issue, condition, amend, or rescind appropriative water rights. *See* Water Code § 1250 *et seq.* Its jurisdiction includes all surface waters and subterranean streams flowing through known and definite channels. *See id.*, § 1200. It regulates other rights, including pre-1914, riparian, and correlative, to prevent waste or unreasonable use. *See id.*, §§ 100, 250. These statutes implement Article X, section 2 of the California Constitution, which requires that all waters be put to reasonable and beneficial use.

11. The State Water Board is responsible to “provide for the orderly and efficient administration of the water resources of the state.” Water Code § 174. To perform that duty, it “shall exercise the adjudicatory and regulatory functions of the state in the field of water resources.” *Id.* It must take “all appropriate proceedings or actions before executive, legislative or judicial agencies to prevent waste unreasonable use, unreasonable method of use, or unreasonable method of diversion of water” in California. *Id.*, §§ 275, 100. The State Water Board may: “(A) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water; (B) Take testimony in regard to the rights to water or the use of water thereon or therein; and (C) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this state.” Water Code § 1051.

12. The State Water Board’s function “has steadily evolved from the narrow role of deciding priorities between competing appropriators to the charge of comprehensive planning and allocation of waters.” National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 444 (1983). In the Mono Lake Cases, the California Supreme Court addressed a

similar circumstance where diversion from non-navigable tributary creeks had lowered Mono Lake to the point where public trust values were unnecessarily degraded.

“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.... In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.”

*Id.* at 446-7.

13. Pursuant to Fish and Game Code section 5946, the State Water Board must condition any right issued after 1953 in this portion of Mono County to ensure compliance with Fish and Game Code section 5937. This statute provides: “the owner of any dam shall allow sufficient water at all times to pass through a fishway, or, in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.” *Id.*; *see also* California Trout Inc. v. State Water Resources Control Board, 207 Cal.App.3d 585, 610 (1989) (Cal Trout I). As the Court of Appeal held: “...the Legislature has already balanced the competing claims for water from the streams affected by section 5946 and determined to give priority to the preservation of their fisheries. There is no discretion in the Water Board to do other than enforce its requirements.” California Trout v. Superior Court, 218 Cal. App.3d 187, 201 (1990) (Cal Trout II).

14. Under Water Code section 1205, the State Water Board “may adopt a declaration that a stream system is fully appropriated.” Any such order shall contain a finding that the supply of water in the stream system is being fully applied to beneficial uses and that a

previous water right decision has determined that no water remains available for appropriation.” 23 C.C.R. § 872(a). After declaring that a stream system is fully appropriated, the State Water Board may not accept any further applications for permits to appropriate additional water from that stream system, and it may cancel any applications pending on that date. *See* Water Code § 1206.

15. The State Water Board is a public agency subject to the California Environmental Quality Act (CEQA). *See* Pub. Resources Code § 21063. It is the lead agency in a water rights proceeding, even though other public agencies may have concurrent jurisdictions.

**B. Department of Fish and Game**

16. DFG has statutory and common law jurisdiction over fish and wildlife resources and habitats in California. DFG regulates the taking of fish and wildlife and modifications of their respective habitats. *See* 14 CCR § 783.1.

“The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public importance. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people’s food supply and therefore their conservation is a proper responsibility of the state.”

Fish and Game Code § 1600. To fulfill this purpose, DFG regulates: (A) any diversion or obstruction of natural flow or other modification of a streambed (*id.*, § 1603); (B) any obstruction of fish passage in specified Districts (*id.*, § 5901); fishways (*id.*, § 5931); release of flow from, through, or around any dam or other artificial obstruction (*id.*, § 5937); and screening of any diversion (*id.*, § 6100). DFG may seek civil damages (*id.*, § 2014) or

criminal penalties (*id.*, § 12000 *et seq.*) for any unlawful taking or other form of destruction of fish and wildlife.

17. DFG is a public agency subject to CEQA. *See* Pub. Resources Code § 21063; *see also* CCR § 750 *et seq.* It is a responsible agency in a water rights proceeding. *See id.* § 21069; *see also* 14 CCR §§ 778, 779.5.

**C. DWR**

18. DWR is responsible for the California Water Plan, which provides for the “orderly and coordinated control, protection, conservation, development, and utilization of the water resources of the state ...” Water Code § 10004. DWR updates the California Water Plan every five years. *See id.* As part of any update, DWR must conduct a study to determine the amount of water needed to meet the state’s future needs, including environmental water needs, and to recommend programs, policies, and facilities to meet those needs. *See id.* at § 10004.6.

19. DWR may conduct an investigation of any surface or groundwater conditions and opportunities for wastewater reclamation. Such an investigation may proceed independently or in cooperation with the State Water Board or other public agency. Water Code §§ 226-230.

20. DWR oversees the implementation of the Urban Water Management Planning Act (Act), Water Code sections 10610 *et seq.* Pursuant to that statute, every urban water supplier must prepare and update a water management plan (UWMP), subject to periodic updates. Sections 10630 *et seq.* specify the content of such plans, as well as procedures for

adoption, implementation, and periodic updates. Each such plan must address sixteen different demand management measures. *Id.*, § 10631(f).

#### **IV. FACTS**

21. This section states the facts that are the basis of our claims for relief. It is organized as follows: (A) Hydrologic Setting; (B) Mammoth Community Water District; (C) Los Angeles Department of Water and Power's Water Rights; and (D) Current Condition of Trout Fisheries in Mammoth Creek, Hot Creek, and the Upper Owens River.

##### **A. Hydrologic Setting**

22. The Town of Mammoth Lakes is located in eastern California, just inside the State border. *See* Topographical Map 1 (Ex. 4). The basin has many lakes, streams, and meadows situated just below Mammoth Crest and Mammoth Mountain. Snowmelt recharges groundwater and contributes to surface flows in the basin. *See* Lahontan Regional Water Quality Control Board (RWQCB), Lahontan Regional Water Quality Control Board Watershed Management Initiative (2002) (Lahontan WMI), § 2.4.

23. Mammoth Creek drains the Mammoth Basin and flows through the Town of Mammoth Lakes to its confluence with Hot Creek. *See* MCWD and U.S. Forest Service, Administrative Draft Environmental Impact Statement/Environmental Impact Report For the Proposed Changes in Mammoth Creek Instream Flow Requirements, Point of Measurement, and Place of Use (May 2000) (hereafter, 2000 DEIS/R), p. S-7; *see also* Ex. 4. Hot Creek continues eastward to confluence with the Upper Owens River. *See* Topographical Map 2 (Ex. 5).

24. The Long Valley Caldera aquifer underlies the Mammoth Basin. *See* DEIS/R, p. 4-46. The aquifer extends from near Mammoth Mountain Ski Lodge in the west, through Old Mammoth and Mammoth Lakes, eastward past the Casa Diablo Hot Springs and the Hot Creek fish hatchery, then eastward across the Mammoth Basin boundary into the Owens Valley. *See id.* The aquifer receives the greatest recharge from snowmelt in the western and southern parts of the basin. *See* U.S. Geological Survey, “Review of Mammoth Community Water District Reports and Data” (1995) (hereafter, 1995 USGS Survey) (Ex. 6), p. 9.

**B. Mammoth Community Water District**

25. MCWD is the urban water supplier for the Town of Mammoth Lakes and the surrounding area. Its water supply is from two sources: Mammoth Creek and wells in the Mammoth Basin. *See* DEIS/R, Fig. 1-2.

26. We describe its water supply operations as follows: (i) Surface Water Rights, (ii) Groundwater Pumping, (iii) Temporary Permits from 1987-1990, (iv) Cease and Desist Order 9P, (v) Pending Petition to Amend Permit 17332, (vi) 1996 Writ of Mandate, (vii) MCWD’s Ongoing Preparation of an Environmental Document to Support Changes to Flow Schedule, and (viii) Water Supply Management.

**(i). Surface Water Rights**

27. MCWD holds water right licenses to approximately 2 cubic feet per second (cfs) of diversion from Mammoth Creek. License 5715 (1958) (Ex. 7), with a priority date of September 10, 1947, permits diversion of 0.039 cubic feet per second (cfs), during the period May through November. License 12593 (1989) (Ex. 8), with a priority date of August 13, 1957, permits diversion of 2 cfs from Mammoth Creek on a year-round basis. *See id.* Neither

of these licenses contains a minimum instream flow schedule for release into Mammoth Creek.  
*See id.*

28. In the 1970's, MCWD began its efforts to expand the water supply available under these rights.<sup>1</sup> *See* Ex. 3, p. 1. In 1977, it published a "Water Management Plan," which recommended a permit application for 3 cfs from Mammoth Creek as well as storage in Lake Mary of 660 AFA. *See* DEIS/R, p. 4-25. Because this plan proposed use of Lake Mary, which is located in the Inyo National Forest, the Forest Service published an Environmental Assessment (EA) for the plan. *See* U.S. Forest Service, "Environmental Analysis for MCWD's Water Management Plan" (Sept. 30, 1977). The EA recommended conditions on MCWD's use of waters within the National Forest. *See id.*, pp. 42-44.

"Subject to and to the extent of natural streamflow entering Lake Mary, the District shall maintain in Mammoth Creek between Old Mammoth Road and highway 395 a minimum of 4 cfs at all times and the following flows on a mean monthly basis (as recorded by the LADWP stream gage near Highway 395):

<u>Month</u>	<u>Mean Monthly Flow (cfs)</u>
January	5
February	5
March	5
April	10
May	25
June	40
July	25
August	10
September	6
October	6
November	6
December	6

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<sup>1</sup> In fact, the Town's Department of Real Estate declared a moratorium on new construction until additional water supplies could be assured. *See id.*  
*Mammoth Water Rights*  
*SWRCB L.5715, L.12593, P.17332*

*See id.*, p. 43. The Forest Service and MCWD incorporated these limitations into a Master Operating Agreement (MOA) (Ex. 9).

29. In 1978, the State Water Board issued Permit 17332 (Ex. 10). Paragraph 5 permits diversion of 3 cfs from Mammoth Creek during the period January 1 to December 31, and it further permits storage of 660 AFA in Lake Mary during the periods April 1 to June 30 and September 1 to 30. The total permitted diversion from Mammoth Creek under all of MCWD's rights is 2,760 AFA. *Id.*

30. Permit 17332 establishes minimum flow schedules for several locations between Lake Mary and Highway 395, all subject to natural inflow. Paragraph 18 requires: 1.5 cfs between Lake Mary and Lake Mamie for the period June 1 to November 1; 3 cfs over Twin Lakes Waterfall, from June 1 to August 10, and 2 cfs, from August 11 to October 31; and 3 cfs from Twin Lakes to Valentine Botanical Reserve. Paragraph 23 adopts the MOA's mean monthly flow schedule (as restated immediately above) and the instantaneous flow requirement of 4 cfs for the creek at Highway 395. Compliance with the latter schedules occurs at the Highway 395 gage. *Id.* Permit paragraphs 20, 24, and 25 require that MCWD will take and report daily flow measurements at: Lake Mary inflow and outlet, Twin Lakes outlet, Mammoth Creek at Old Mammoth Road and Highway 395, and Bodle Ditch.

31. MCWD also may divert from Mammoth Creek for non-municipal uses under two livestock stockpond registrations. These are: a maximum direct diversion of 4 cfs under Registration S0004326, and maximum direct diversion of 7 cfs under Registration S004327. *See* SWRCB, "WRIMS Query Report for S004326, S004327" (Ex. 11).

32. Lake Mary is MCWD's place of diversion. *See* SWRCB, "WRIMS Query Report for Applications 25368, 17770, and 12079" (Ex. 12). MCWD maintains valving and maintenance facilities on the shore and operates a submerged intake line that extends approximately 500 feet along the lake bottom. The intake line feeds the drinking water treatment facility located just off the lake. MCWD also maintains an outlet facility to control the rate at which water is passed from the lake back into the creek. It operates the diversion facilities subject to coordination with the Forest Service as required by the MOA.

33. MCWD collects and treats wastewater at a facility located at the eastern end of Mammoth Lakes. It discharges treated wastewater into Laurel Pond.

(ii). **Groundwater Pumping**

34. MCWD operates eight production wells and fifteen monitor wells in the Mammoth Basin. *See* Ex. 2, p. 3. MCWD has increased pumping over time: 48 AF in 1983; 1,412 AF in 1993; and 2,723 AF in 2002. *See id.*, p. 4. Pumped water is delivered into the drinking water treatment facility. MCWD projects that groundwater available from existing wells may be inadequate to meet the total demand in dry years as the town nears build-out in 2015. *See id.*, p. 5.

35. The physical nexus between creek flow and MCWD's groundwater pumping is unknown. In connection with the proposed expansion of Snowcreek Golf Course in 1996, Wildermuth Environmental Consulting concluded that such pumping does not appear to influence flows in Mammoth Creek at the Hot Creek springs, because the aquifer is "too deep" to have such an influence. *See* DEIS/R, p. 4-49. The U.S. Geological Survey (USGS), which analyzed the pumping and flow data at the request of DFG, found that a nexus is likely:

“Hydrologic testing to date has been inconclusive in proving or disproving the causative connection between MCWD ground-water pumping and decreases in the discharge rates of springs at Valentine Reserve and the Fish Hatchery and decreases in the flow of Mammoth Creek....

A conceptual model of Mammoth Basin, consistent with available hydrogeologic information, recognizes the aquifer from which MCWD pumps water is in hydraulic connection with Mammoth Creek and the springs at the Fish Hatchery....

Long term monitoring data show hydraulic pressures in the well field area have dropped by 100 feet or more since 1988. Part of the drop is probably due to reduced recharge caused by several years of below average precipitation since 1985. But part of the pressure drop is from ground-water withdrawals.

Spring flows at the Fish Hatchery have decreased substantially since 1988. The decrease in discharge correlates with both annual precipitation and annual ground-water pumpage. Other factors could also affect the discharge rate of the Hatchery Springs but *precipitation and ground-water pumpage together explain about 81 percent of the variability* recorded during 1988 to 1994.

More could be learned about the effect ground-water extraction has on the discharge rates of springs at Valentine Reserve and the Fish Hatchery and the flow rate in Mammoth Creek by conducting carefully controlled aquifer tests. [¶] Long-term monitoring is another fundamental technique that can provide data useful for assessing the connections between various components of the hydrologic system.”

1995 USGS Survey, Ex. 6, “Summary” (emphasis added). Similarly, the RWQCB has found:

“The District’s supply wells and proposed commercial development projects near the Town of Mammoth Lakes Airport may lower Mammoth Creek and groundwater levels which may affect springs and shallow groundwater within the area.” *See* 2002 Lahontan WMI, § 2.4.

36. MCWD has not sought permits for operation of these wells under Water Code section 1250, which extends permitting jurisdiction to groundwater only if flowing in a subterranean stream in a known and definite channel. However, Paragraph 19 in Permit 17332 requires: “Permittee will prepare and implement a groundwater mapping, surveillance and monitoring program to determine the extent of the groundwater basin from which water will be

extracted as part of this project. The plan will be prepared and submitted to the [State Water Board] for review and approval prior to its implementation.”

**(iii). Temporary Permits from 1987-1990**

37. In 1987 MCWD applied for, and the State Water Board approved, Temporary Permit 20124, to establish an interim flow schedule which “significantly reduce[d] fish flows in Mammoth Creek....” *See* WR 87-9 (Ex. 13); *see also* Ex. 3, p. 2. This permitted additional direct diversion for water supply, pending MCWD’s completion of a groundwater treatment facility. MCWD applied for and obtained similar Temporary Permits 20250 and 20336 for the same purpose in 1988 and 1989. *See* WR 88-16 (Ex. 14); *see also* WR 89-12 (Ex. 15).

38. All of these permits issued without preparation of a CEQA document, pursuant to Categorical Exemption 7 permitted by CEQA Guidelines 15307. However, Condition 10 of Temporary Permit 20124 required MCWD to prepare studies of instream flow needs in Mammoth Creek. *See* Ex. 13.

39. In response to Condition 10, MCWD published a study by Beak Consultants, Mammoth Creek Instream Flow Investigations (Mar. 1990) (1990 Beak Report). This report recommends that the flow schedule vary by wet, normal, and dry year-types.

40. In 1990 MCWD did not apply for a Temporary Permit. It imposed conservation measures to reduce demand, used groundwater to supplement surface diversion, and undertook “unauthorized diversions” that, while recommended in 1990 Beak Report, were inconsistent with Permit 17332’s flow schedule. *See* Ex. 3, *supra*, p. 3. The State Water Board notified MCWD that its change in operation that year violated that permit. *See id.*

(iv). C&D Order 9P

41. In 1991 MCWD applied for its fourth temporary permit since 1986. The State Water Board denied the application. Its denial is based on several findings, including Finding 16:

“[Water supply] demand within the District will continue to exceed present supplies over the entire period of study [until 2015].”

[U]nless additional supplies are obtained very soon, the gap between supply and demand will increase rapidly. Failure to close this gap will result in either serious water shortages or the need to reduce demand dramatically, which may produce significant adverse impacts on the local economy as well as potential health and safety problems.”

The District has at least three alternative sources of additional water supply available. However, all three of these alternatives have significant drawbacks which could either make them difficult to implement or which may limit their effectiveness as an adequate solution to the District’s problem....”

Cease and Desist Order No. 9P (Aug. 29, 1991) (Ex. 16) (hereafter, C&D Order 9P), pp. 6-7. In Findings 18-19, the State Water Board further found: “A potential for chronic shortages of water supply within the District presently exists and will become more severe each year unless the District obtains additional sources of supply or curtails demand. [¶] Issuance of a temporary permit for the fourth time in five years to deal with a chronic problem would not be in the public interest.” *Id.*, p. 7.

42. In the course of denying the 1991 temporary permit, the State Water Board issued C&D Order 9P to compel “...actions to correct the threat of violation of...Permit 17332 due to chronic water supply deficiencies which currently exist during years of ‘low runoff’....” *Id.*, Ordering ¶ 1, p. 7. Ordering Paragraph 3 directed MCWD to supplement the 1990 Beak Report, which was limited to the needs of the brown trout fishery. The Board had previously

instructed MCWD to include the rainbow trout fishery in that study, and this order reaffirmed that duty. *Id.*, p. 5. Further, “until such time as the State Board amends Permit 17332 to revise the long-term fishery flow requirements...,” Ordering Paragraph 2 directed MCWD not to divert water to storage or otherwise whenever the instantaneous flow at Highway 395 is less than the amounts stated immediately below, by year-type. This interim flow schedule is largely consistent with the 1990 Beak Report.<sup>2</sup> *See id.*, p. 8.

<u>Month</u>	<u>Dry Year (cfs)</u>	<u>Normal Year (cfs)</u>	<u>Wet Year (cfs)</u>
January	6.3	7	14.5
February	6.3	7	14.5
March	6.3	7	14.5
April	16.7	40.4	76.4
May	16.7	40.4	76.4
June	16.7	40.4	76.4
July	7.5	26.6	70.4
August	7.5	26.6	70.4
September	5.6	10.8	28.3
October	5.6	10.8	28.3
November	5.6	10	10
December	6.3	7	14.5

(v). **Pending Petition to Amend Permit 17332**

43. In September 1991, MCWD published Beak Consultants’ follow-up report, Mammoth Creek Instream Flow Investigations (September 1991) (1991 Beak Report),<sup>3</sup> which analyzed flow schedules varying by dry, normal, and wet water-years.

<sup>2</sup> One notable difference: the 1990 Beak Report specified measurement of flows at the District’s Old Mammoth Road gage, but Order 9P specified measurement of flows at Old Highway 395. *See Ex. 16, p. 1.*

<sup>3</sup> The 1991 Beak Report responded to SWRCB and DFG requests for additional information, including: (1) examination of rainbow trout, (2) extension of the hydrologic period of record used in the analyses, (3) evaluation of fish habitat assessments and water availability by month, modification of the hydrological condition parameters, and (4) discussion of recommended flow regimes on a monthly basis.

44. On December 24, 1991, MCWD filed a petition to amend the instream flow schedule in Permit 17332 in a manner consistent with the 1991 Beak Report (hereafter, 1991 Change Petition). *See* DEIS/R, p. 4-27. The petition also requests that the compliance point for that flow schedule be moved from LADWP's gage at Highway 395 to MCWD's gage upstream to Old Mammoth Road.<sup>4</sup> *See id.*

45. In January 1992, MCWD published Boyle Engineering, Feasibility Study Alternative Sources of Water Supply Methods of Reducing Demand. This report was prepared and submitted in response to C&D Order 9P, Ordering Paragraph 1(a), which directed MCWD to complete a study of "...alternatives which would increase supplies, reduce demands, or produce some combination of the two so that the existing chronic demand/supply deficiency which exists under present levels of development within the District can be eliminated." Ex. 16, pp. 7-8. This report recommended that MCWD proceed with certain measures to increase water supply including: changing the instream flow schedule as recommended by the 1991 Beak Report, increasing the amount of groundwater withdrawn from the Mammoth well field, and developing a well field in the Dry Creek area. *See id.*, p. 8-1. It also found that water conservation measures<sup>5</sup> and water reclamation and reuse projects<sup>6</sup> would probably yield 600 AFA each. *See id.*

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<sup>4</sup> Shortly thereafter, on January 2, 1992, MCWD filed a petition to amend permit 17332 to add several existing private and commercial entities, to which MCWD was already delivering water, to MCWD's authorized Place of Use (POU). *See* DEIS/R, p. 4-36.

<sup>5</sup> The report recommended that the District consider implementing additional Urban Water Agencies Conservation Best Management Practices. *See id.*, at p. 6-1.

<sup>6</sup> The report identified the following reclamation measures as potentially feasible: (1) irrigation of golf courses and similar large turfs, (2) providing reclaimed water for pasture irrigation in exchange for surface supplies and groundwater, (3) providing seasonal storage to increase supply, and (4) using reclaimed water  
*Mammoth Water Rights*  
*SWRCB L.5715, L.12593, P.17332*

46. On March 10-11, 1992, the State Water Board held a hearing to consider possible amendments to the interim flow schedule in C&D Order 9P. It affirmed that the “purpose of Order No. 9P was to *reduce damage* to the fishery to the extent feasible and thereby *partially mitigate* adverse impacts on the fishery during the period necessary for the District to come into Compliance with Permit 17332.” Cease and Desist Order 9P.2 (Jan. 20, 1994) (Ex. 17) (hereafter, C&D Order 9P.2) (emphasis added). The State Water Board stated that amendment to Permit 17332’s flow schedule will occur in a future proceeding on the 1991 Change Petition, and only after notice, hearing, and publication of an environmental document that MCWD was then preparing. *Id.*, p. 3.

47. In the hearing, through its expert witness Beak Consultants, MCWD recommended a mean daily flow schedule for all year-types.

<u>Month</u>	<u>Mean Daily Flow (cfs)</u>
January	6.4
February	6
March	7.8
April	9.8
May	18.7
June	20.8
July	9.9
August	7.2
September	5.5
October	5.5
November	5.9
December	5.9

This schedule for all year-types is based on the 1991 Beak Report’s dry-year schedule. In its testimony, Beak Consultants explained that, because MCWD’s diversion is limited to 5 cfs,

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supplies to augment Mammoth Creek flows by recharge operations for baseflow augmentation or through additional treatment and discharge. *See id.*, p. 5.2.

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“Mammoth Creek...is essentially a ‘run-of-river’ stream during all months under wet hydrologic conditions, those months corresponding to the snowmelt runoff period ... under normal hydrologic conditions, and several days during snowmelt runoff months under dry hydrologic conditions. Consequently, realized flows in Mammoth Creek would not be restricted to the recommended flow regime, but would be dynamic and increase in response to hydrologic conditions.”

Beak Consultants, “Expert Testimony on Mammoth Creek Instream Flow Issues by Beak Consultants Incorporated Representing Mammoth County Water District” (Feb. 24, 1992), p.

47. DFG, CalTrout, and other parties submitted evidence supporting flow schedules varying by year-type.

48. In C&D Order 9P.2, the State Water Board rejected MCWD’s recommendation for a single flow schedule as an amendment to Order 9P. It found:

“The evidence in the record does not support the District’s recommendation to amend the cease and desist order to establish minimum instream flow requirements based on the single flow regime developed for dry hydrologic conditions. In the absence of a large upstream storage reservoir in Mammoth Creek, the flows present in the Mammoth Creek vary primarily as a function of hydrologic conditions and water diversions. The IFIM methodology [used in the 1991 Beak report] is based upon determining appropriate flow levels for different annual hydrologic conditions. Establishing higher instream flow requirements for normal and wet years would allow the fishery to recover from the stress imposed upon it by the lower flow regime established for dry years. Where a study methodology has been employed to develop different recommended flow regimes based upon varying hydrologic conditions, it is not appropriate to allow water diversion at all times when the recommended minimum flow for a dry water year are present.”

*Id.*, ¶ 20, p. 5. See also “SWRCB Memorandum of Points and Authorities in Opposition to Petition For Writ of Mandate by Mammoth Community Water District” (May 13, 1996) (Ex. 18), p. 5; memo from Darrell Wong, DFG, to Steve Herrera, SWRCB (July 13, 1990) (Ex. 19).

49. The State Water Board also found that the 1991 Beak Report's flow schedules "would lead to illogical results," including prohibition of diversion in certain months of wet years while permitting such diversion in the same months of other year-types. *Id.*, ¶ 22, p. 6. It further found that the schedule in C&D Order 9P was based on the 1990 Beak Report, which is not the most recent work by Beak Consultants and was not supported by any expert testimony in the hearing. *Id.*, ¶ 23, p. 6. It found that the flow schedule in Permit 17332 was "...the result of reasoned analysis and agreement by the District and DFG at the time that the permit was issued." *Id.* For all of these reasons, the State Water Board found that the "instream flow requirements specified in Order No. 9P should be of no further legal effect and that the District shall make any diversions of water from Mammoth Creek in compliance with the requirements of Permit 17332." *Id.*; *see also* Ordering ¶ 2.

**(vi). 1996 Writ of Mandate**

50. After the State Water Board denied MCWD's request for reconsideration of C&D Order 9P.2, MCWD petitioned for a Writ of Mandate. It petitioned for a writ to instate the interim flow schedule recommended in the 1991 Beak Report. The writ issued. *See* Mono County Superior Court, "Peremptory Writ of Mandate" and "Statement of Decision" (Oct. 21, 1996) (Ex. 20), pp. 2-3. The Court found: "the weight of the evidence shows that, under the flow regime recommended by the District and its consultants, the fishery will be protected, as required by Fish and Game Code sections 5937 and 5946, during the period in which *interim* instream-flow requirements are in effect." *See* Ex. 20, p. 5 (emphasis added). The Court ordered:

"Until such time as the State Board amends Permit 17332 to revise the long-term fishery flow requirements for Mammoth Creek, the District shall not divert

water to storage or divert water directly from Mammoth Creek for municipal purposes whenever the mean daily instream flows, measured at the Old Mammoth Road Gage, are less than the following amounts:

<u>Month</u>	<u>Mean Daily Flow (cfs)</u>
January	6.4
February	6
March	7.8
April	9.8
May	18.7
June	20.8
July	9.9
August	7.2
September	5.5
October	5.5
November	5.9
December	5.9

*Id.*, pp. 1-2. The writ’s interim schedule is stated as a mean daily, not an instantaneous, flow.

*See id.*

51. Pursuant to the writ, the State Water Board established an interim flow schedule “until such time as the State Board amends Permits 17332 to revise the long-term fishery flow requirements for Mammoth Creek....” The schedule, as stated in the writ, is restated in paragraphs 47, 50 above. *See Ex. 1, p. 7.* The State Water Board amended License 5715 to include a standard term requiring compliance with Fish and Game Code section 5937. *See id.*, It ordered “the Chief of the Division of Water Rights to schedule a hearing at an appropriate time to receive evidence regarding establishment of long-term instream flow requirements applicable to diversions of water from Mammoth Creek by the Mammoth Community Water District.” *Id.*, p. 8.

52. In its return of the writ, the State Water Board stated the basis and purpose of the interim flow schedule as follows:

“The SWRCB does not believe that the holder of a water right permit or license should be allowed to agree to a particular term at the time of applying for a permit, and then challenge the validity of the term of the permit or license in a later proceeding brought to enforce compliance. In this instance, however, the SWRCB has elected not to appeal the Superior Court judgment regarding instream flow requirements. Rather, the SWRCB believes that the public interest in this case will best be served by focusing on establishing long-term instream flow requirements which will apply to the District’s diversions of water under all of its water rights on Mammoth Creek.”

Ex. 1, p. 4.

53. The interim flow schedule required by the writ differs from the flow schedule required by Permit 17332, as well as the prior interim schedule required by C&D Order 9P.

In the fourth column, “D” refers to dry years, “N,” normal, and “W,” wet.

<u>Month</u>	<u>P.17332 Flows (cfs)</u>	<u>Writ Interim Flows (cfs)</u>	<u>Order 9P Interim Flows (cfs) (D,N,Y)</u>
January	5	6.4	6.3 (D), 7(N), 14.5(W)
February	5	6	6.3 (D), 7(N), 14.5 (W)
March	5	7.8	6.3 (D), 7.0 (N), 14.5 (W)
April	10	9.8	16.7 (D), 40.4 (N), 76.4 (W)
May	25	18.7	16.7 (D), 40.4 (N), 76.4 (W)
June	40	20.8	16.7 (D), 40.4 (N), 76.4 (W)
July	25	9.9	7.5 (D) 26.6 (N), 70.4 (W)
August	10	7.2	7.5 (D) 26.6 (N), 70.4 (W)
September	6	5.5	5.6 (D), 10.8 (N), 28.3 (W)

October	6	5.5	5.6 (D), 10.8 (N), 28.3 (W)
November	6	5.9	5.6 (D), 10 (N), 10 (W)
December	6	5.9	6.3 (D), 7 (N), 14.5 (W)

Declaration of Thomas P. Keegan (Ex. 21), Table 1. Using MCWD’s hydrologic model included in DEIS/R as Appendix C, CalTrout estimates that the 1996 Writ’s flow schedule will result in material differences in actual flows in Mammoth Creek at Highway 395, inclusive of flow release and any other natural gain (such as springs) or loss (such as percolation to groundwater).

In every year-type, the interim flow schedule reduces the stated release requirement in amounts that vary by month from 1 to 20 cfs. Declaration of Peter Vorster (Ex. 22), ¶ 17(a).

The Writ, which adopted the 1991 Beak Report’s recommendation, omits the instantaneous flow schedule of 4 cfs required in Permit 17332. As a result, it permits fluctuations in actual instantaneous flows, provided the mean daily value is achieved at the compliance point. *Id.*, ¶ 18.

In April to August in all dry years, the interim flow schedule results in reductions of 20% to 50% in daily flows. *Id.*, ¶ 17(b)

In April to August in the drier of normal years (such as 1985 and 1989), the interim flow schedule results in reductions of 20% to 50% in daily flows. *Id.*, ¶ 17(c).

In 8 out of the 15 modeled years, the interim flow schedule reduced the mean annual of the daily flows by up to 17%. *Id.*, ¶ 17(d).

The interim flow schedule moves the compliance point upstream from Highway 395 gage to the Old Mammoth Road gage. That reach is a losing reach in dry years, as a result of percolation to groundwater. If the actual flow at the Old Mammoth Road gage is close to the minimum value of 5.5 to 5.9 cfs from September to December, actual flows at Highway 395 will often fall below 4 cfs. *Id.*, ¶ 18.

(vii). **Preparation of an Environmental Document to Support Changes to Instream Flows**

54. In September 1994, MCWD submitted to the State Water Board a schedule for preparation of an Environmental Impact Report (EIR), in accord with CEQA, as the basis for consideration of its 1991 Change Petition to amend Permit 17332. The schedule provided for completion of the EIR by May 1996. *See* Ex. 18, p. 16. The EIR was not completed before the mandate proceeding before the Mono County Superior Court. The State Water Board explained to the Court: “No action has been taken on that change petition because the District has not completed an environmental document in accord with [CEQA].” *Id.*

55. On March 14, 1997, MCWD and the Forest Service issued a Notice of Preparation (NOP) for a Draft Environmental Impact Statement/Report (DEIS/R). The notice requested public comment on the following actions:

“The District’s pending petition to the [Board] for modifications to Water Right Permit No. 17332, and associated modifications to Water Right Licenses 5715 and 12593, concerning Mammoth Creek streamflow requirements and the measuring point; and

The adoption by the USFS of an amendment to the existing [MOA] concerning Mammoth Creek minimum streamflow requirements and point of measurement.”

Letter from John Moynier, MCWD, to Interested Parties (Mar. 14, 1997) (Ex. 23).

56. In scoping comments, the State Water Board, DFG, and other stakeholders requested that the DEIS/R address a reasonable range of alternatives to the proposed action, including mitigation measures. *See* letter from Steve Herrera, SWRCB, to John Moynier, MCWD (April 28, 1997) (Ex. 24), p. 3; letter from Bruce Kinney, DFG, to John Moynier, MCWD (April 29, 1997) (Ex. 25), p. 4.

57. The State Water Board specifically requested that the DEIS/R analyze certain potential impacts of the proposed action on the hydrology and fisheries of Mammoth Creek, as well as mitigation measures for any such impacts found to be significant. *See* Ex. 24, p. 2.

MCWD's diversions may impact channel flushing and maintenance flows in Mammoth Creek. *See id.*, p. 3.

Moving the compliance point from Highway 395 to Old Mammoth Road may affect the accuracy of measuring and recording stream flow. *See id.*, at p. 3.

The DEIS/R should include a full disclosure of all of the known and foreseeable diversions and uses of water in the Mammoth Creek watershed, and an analysis of the cumulative effects of such diversions on MCWD's ability to meet instream flow release requirements. *See id.*, p. 4.

The modification of the flow schedule may adversely affect senior water rights downstream, including the instream uses by fish and wildlife. *See id.*, pp. 4-5.

The DEIS/R should evaluate the possibility that Mammoth Creek is fully appropriated. *See id.*, p. 4; *see also* letter from Jim Edmondson, CalTrout, to John Moynier, MCWD (April 21, 1997) (Ex. 26), p. 1.

58. Similarly, DFG requested that the DEIS/R analyze certain potential impacts of the proposed action. *See* Ex. 25.

"The proposed streamflow modifications could impact Mammoth Creek in the Chance Meadow area .... This reach of the creek ... is within the direct area of influence of District activities. Additionally, Mammoth Creek is the major tributary to Hot Creek ... Hot Creek is also a major tributary to the Upper Owens River ... Potential impacts to the aquatic and riparian resources of these waters which should be addressed include chemical, biological, and physical (including thermal) changes which could occur as result of the proposed project." *Id.*, pp. 1-2.

The monthly or seasonal rate of diversion may increase even though MCWD does not propose to increase its annual water withdrawal from Mammoth Creek. *See id.*, p. 2.

Changing the location of the compliance gage may reduce the quantity of flow released from Lake Mary, given the flow accretion that naturally occurs between the gages. *See id.*, p. 2.

“As District activities to provide water for the Town of Mammoth Lakes have potential impacts to the entire watershed, justification for the proposed change in point of measurement in the EIR/EIS should be dependent upon impacts of District activities on the entire and actual instream flow conditions, including downstream impacts to Mammoth, Hot Creek and potentially the Owens River.” *Id.*, at p. 3.

The DEIS/R should analyze the merits of an instantaneous flow schedule of 4 cfs, as distinct from a mean monthly average. *See id.*, p. 2.

The DEIS/R should evaluate “...minimum instream flow requirements for dry, normal and wet hydrologic year types and include channel maintenance, sediment transport, riparian vegetation and flushing flows.” *Id.*, pp. 3-4.

The DEIS/R should address: “...groundwater pumping and potential effects to the Mammoth Basin, including Mammoth Creek and the areas associated surface and spring flows, the cumulative impacts to Mammoth and Hot Creeks from the irrigation of Chance Meadow, and the identification of other water withdrawals from Mammoth Creek which may exacerbate the cumulative impacts of the proposed action.” *Id.*, p. 6.

59. MCWD published the DEIS/R in May 2000. Public comment closed on March 5, 2001. MCWD has not subsequently published an FEIS/R or other response to comments. In minutes since 2001, MCWD’s Board has reported progress in response to comments. However, MCWD has not submitted to the State Water Board or otherwise published a current schedule for CEQA compliance.

60. In its comments on the 2000 DEIS/R, the State Water Board found the DEIS/R did not meet the minimum requirements of CEQA. *See* letter from Melinda Dorin, SWRCB, to John Moynier, MCWD (Mar. 5, 2001) (Ex. 27), p. 5. The State Water Board addressed specific deficiencies.

The DEIS/R does not present a clear comparison of the hydrologic impacts of action alternatives. The tables, which directly compare alternatives, are “flawed...because they present a set of values at the LADWP Gage for the No

Action alternative and values at the MCWD Gage for the other three alternatives.” *Id.*, at p. 5.

The proposed instream flow schedule may result in “a 50 percent reduction in the minimum flow requirement could indeed represent a significant negative impact on hydrology.” *Id.*, p. 2.

“The appendix does describe the criteria used for operating MCWD’s water system but says nothing of the model itself...There is no indication that the model has been validated by independent peer review and for that reason the results must be considered questionable.” *Id.*, p. 3.

The data collection methods and analysis for the rainbow trout densities, spawning success, water temperature, and health of aquatic invertebrates studies does not appear to be scientifically sound. *See id.*

The analysis whether Mammoth is fully appropriated is inadequate. *See id.*, p. 4. The DEIS/R, which listed other rights in the Mammoth Creek Basin including LADWP’s, “...presents no information on the actual use of water made under these rights or the amount of use that might occur if these rights were fully exercised.” *Id.*

61. DFG filed similar comments. “The Department believes that deficiencies ... render the [DEIS/R] insufficient as written to satisfy the requirements of CEQA guidelines § 15124 and § 15126.6.” *See* Letter from Darrell Wong, DFG, to John Moynier, MCWD (Jan. 31, 2001) (Ex. 28), p. 2. DFG found specific deficiencies.

“The concerns raised in the [Department’s] 1997 [scoping] letter remain, and are incorporated by reference herein.” *Id.* These scoping comments requested that the CEQA document address: alternatives to meet MCWD’s water needs as recommended in the Boyle Report, alternatives to correct the pattern of non-compliance with Permit 17332’s flow schedule, feasibility of varying flow schedule by year-type, and impacts to riparian and aquatic resources in Valentine Reserve and downstream.

“The Department finds the document lacks a proper statement of objectives, mandated by CEQA guidelines § 15124, which has lead to a flawed selection of alternatives. The supporting information is inadequate, incomplete, or scattered throughout the document in a manner which obscures and prevents “meaningful evaluation, analysis and comparison with the proposed project” as required by CEQA guidelines § 15126.6 ...” *Id.*, p. 2.

“The information presented is insufficient to determine the actual effects of the proposed (and other) alternatives on stream flow in Mammoth Creek. Partial data in the document suggests that stream flow during some winter months could be decreased by up to 40%.” *Id.*, p. 2.

The DEIS/R lacks “supporting information to compare the impact of changing measurement location from one site to another....The alternatives should analyze the benefits of providing instream flow compliance at multiple points of measurement ...” *Id.*, p. 4.

“Inadequate information is presented to describe surface hydrology ... The document does not provide the most basic description, such as the unimpaired mean monthly flows; and daily flow duration tables by month for the unimpaired condition and each alternative.”

“The Department believes it is incumbent upon MCWD to reevaluate the water year alternative and propose a modified version which meets the District’s permitted annual and instantaneous diversion limits, while safeguarding vital inter-annual variation for aquatic and riparian resources.” *Id.*, p. 5.

“The statement, ‘the instantaneous flow requirement is not necessary’ is not supported and should be withdrawn. Instantaneous flow requirements serve to protect against flow interruptions for periods of less than one day. *Id.* p. 5

The EIR should discuss and disclose the linkage between increasing surface water use and population growth. *See id.*, p. 6.

**(viii). Water Supply Management**

62. In C&D Order 9P, the State Water Board found that MCWD faces a “chronic” water supply deficiency that threatens to worsen “rapidly” in response to population growth. Ex. 16, pp. 5-6. In Ordering Paragraph 1, it directed MCWD to fully implement the recommended measures in the Feasibility Study “...to provide additional sources of supply, reduce demand, or provide some combination thereof, by November 1, 1994;” and to submit quarterly progress reports on such implementation. *Id.*, p. 8.

63. In C&D Order 9P.2, the State Water Board directed MCWD to “continue to take the actions” required by Order 9P’s Ordering Paragraph 1 to implement the Feasibility Study which addresses the chronic water supply deficiency. Essentially, that paragraph requires MCWD to implement the 1992 Boyle Report. In addition, in Ordering Paragraph 3, the State Water Board directed MCWD to establish a “vigorous water conservation program which may include the following elements: “reduction or elimination of outside watering (e.g., implementation of the District’s existing level 5 restrictions); implementation of a leak detection/prevention program; retrofit water saving devices such as low flow toilets and showerheads in existing structures which currently have high flow devices; implementation of wastewater reclamation projects; and/or limitation of new hookups.” Ex. 17, p. 7. Further, MCWD shall submit a Demand Reduction Report by May 1 of each year to describe the status of implementation of these conservation measures as well as the plan for further implementation in the coming year. *Id.*, pp. 7-8. Based on Cal Trout’s review of the Demand Reduction Reports submitted for 1996 – 1999, 2000, and 2004, it does not appear MCWD has fully implemented any of the measures specified in C&D Order 9P.2. *See, e.g.*, MCWD, Demand Reduction Report (April 28, 2004) (Ex. 29); *see* Declaration of Peter Gleick (Ex. 30), ¶ 19.

64. Since C&D Order 9P.2, MCWD has adopted UWMP Updates, most recently in 2004.<sup>7</sup>

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<sup>7</sup> In determining whether the urban water supplier is eligible for funds, DWR must take into consideration whether the supplier’s UWMP substantially conforms to statutory requirements. *See* Water Code § 10657. According to MCWD’s recent “Proposal For DWR Local Groundwater Assistance Program 2004 (Jan. 28, 2004),” DWR staff have indicated MCWD’s UWMP is complete.

65. Total metered water delivery (exclusive of unaccounted-for water) by MCWD was 870 million gallons, or 2,670 AFA, in 2003. *See* Gleick Declaration, Ex. 30, ¶ 8.<sup>8</sup> Average daily per-capita water use in all sectors (residential, industrial, and commercial) was 373 gallons per capita per day (gpcd) in Mammoth that year. *See id.* Further, residential use, which is approximately 64% of MCWD’s current total water demand, is 205 gpcd.<sup>9</sup> *See id.* MCWD’s per capita uses are largely unchanged since 1983 and specifically since 1994, when the State Water Board adopted C&D Order 9P.2. *See id.*

66. The 2004 UWMP projects that the Town’s total water demand will increase from 2,700 AFA in 2003 in response to population growth. The projected increase is 50% (resulting in total demand of 4,174 AFA total) by 2010 and 75% (resulting in total demand of 4,778 AFA) by 2020. *See* Gleick Declaration, Ex. 30, ¶ 24.

67. MCWD has implemented certain conservation measures since C&D Order 9P.2. These include: an increasing block rate structure for residential customers, a repair and replacement program for distribution pipes, landscape irrigation efficiency, public education, and other Best Management Practices (BMPs) recommended by the California Urban Water Conservation Council, e.g., rebate program, interior and exterior audits. *See* Gleick Declaration, Ex. 30, ¶¶ 11, 20; 2004 UWMP, pp. 35-38.

68. Order 9P requires MCWD to prepare a Feasibility Study of conservation measures, select “one or more” alternatives, and “fully implement” such alternatives. *Id.*,

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<sup>8</sup> Based on our review it appears the UWMP is inconsistent with data MCWD has submitted to DWR. *See* Gleick Declaration, Ex. 30, ¶ 7.

<sup>9</sup> MCWD has a strong seasonal variation in its water supply demand, as a result of significant transient populations, especially in the peak winter and summer months. *See* Gleick Declaration, Ex. 30, ¶ 9. Because of this, the simple average estimate of annual per-capita water use is an overestimate. *See id.* Nevertheless, using other methods to evaluate water use in MCWD’s service area also supports the conclusion that sectoral and per-capita water use is inefficient. *See id.*

Ordering ¶ 1. MCWD prepared the 1992 Boyle Report to comply with this duty to evaluate the comparative feasibility of such measures. CalTrout has not located any documentation in the State Water Board's file that MCWD formally selected alternatives from that report, as required by Ordering Paragraph 1. MCWD has not fully implemented other measures recommended by the 1992 Boyle Report, as used by similarly situated municipalities, including a water audit program,<sup>10</sup> an increasing blocking rate structure for commercial customers,<sup>11</sup> a toilet rebate program,<sup>12</sup> or a rebate program for efficient washing machines.<sup>13</sup> *See* Gleick Declaration, Ex. 30, ¶¶ 11, 20.

69. As adopted in 1994, C&D Order 9P.2 requires MCWD to adopt and implement a “vigorous” conservation program to correct its chronic supply deficiency. Its implementation has not corrected that deficiency: it projects that its demand will double in the next 20 years, and it has not secured new supplies (other than that resulting from the substitution of the interim flow schedule for Permit 17332's). Further, its program does not appear as effective as other similarly situated municipalities. *See* Gleick Declaration, Ex. 30,

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<sup>10</sup> The purposes of a water audit program are to: identify the largest water users, evaluate their use and the potential to meet current needs with less water, and implement conservation actions to improve efficiency. While MCWD has proposed a program of interior and exterior water audits, the program was not in place at the end of 2003. *See* Ex. 30, ¶ 20. The 2004 UWMP included a proposal to offer water audits of large landscape efforts, but the proposal does not move beyond identifying potential improvements and writing reports and recommendations. *See id.* It does not appear MCWD has any comprehensive efforts underway to actually capture water identified in the proposed audits as wasted. *See id.*

<sup>11</sup> Increasing block rates charge higher rates for higher volumes of water, thereby providing an incentive to large water users to reduce use. *See* Gleick Declaration, Ex. 30, ¶ 20. According to the 2004 UWMP, commercial water users pay only a monthly service charge based on the size of the meter, with a flat rate for every 1,000 gallons of water used. *See id.*

<sup>12</sup> MCWD previously has a toilet rebate program, which it described as successful, but this program has been discontinued. *See* 2004 UWMP, p. 37.

<sup>13</sup> While MCWD is considering such a program, it has not adopted such a program as of the 2004 UWMP. *See* 2004 UWMP, p. 37

¶¶ 8, 10, 20. Its per capita use across all sectors is nearly 100% greater than the state average for municipalities, while its per capita use in the residential sector is 105% greater than the state average. *See id.*, ¶¶ 8 - 10. Its per capita uses are largely unchanged since 1983 and specifically since 1994, when the State Water Board adopted C&D Order 9P.2, whereas average per capita uses in other California municipalities have substantially declined. *Id.*

70. C&D Order 9P.2 requires that MCWD consider five specified elements for inclusion in its vigorous conservation program.

71. Element Two is a “leak detection/prevention program.” Historically, MCWD has had a high rate of leakage from its distribution system. This loss is “unaccounted for,” meaning that the water is diverted but not delivered through meters. The loss is estimated as 15 to 20% of supply, or 505 AFA in 2001. While MCWD is implementing a program of leak repair, its performance may not be effective enough to correct the supply deficiency. Leakage is projected to be 15.9% of supply, or 760 AFA, by 2020. *See* Gleick Declaration, Ex. 30, ¶ 21; 2004 UWMP, p. 12. According to the American Water Works Association, “a general rule of thumb is that, with today’s technologies, a well-managed system should have 10 to 15 percent” unaccounted for water. *See* Ex. 30, ¶ 21 (*citations omitted*). MCWD has acknowledged: “[r]eductions in demand through water restrictions or through decreasing the percentage of unaccounted for water in the system would have beneficial impacts on supply deficiencies.”<sup>14</sup> 2004 UWMP, p. 14.

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<sup>14</sup> MCWD has projected that its foreseeable demand can be met, even during an extended drought, by reducing unaccounted water use and implementing Level 1 water restrictions. *See* 2004 UWMP, pp. 15-16.

72. Retrofitting toilets and showers in existing homes and other facilities is Element Three of the conservation program required by C&D Order 9P.2. As stated above in paragraph 68, MCWD does not have such a program.

73. Implementation of wastewater reclamation projects is Element Four of Order 9P.2's conservation program. MCWD conducted feasibility studies in 1987 and 1992. *See* MCWD, Water Reclamation Feasibility Study (July 8, 1987); MCWD, Feasibility Study of Alternative Sources of Water Supply and Methods of Reducing Demand (Jan. 1992). These studies concluded that landscape irrigation is a potentially feasible use of recycled water. *See* Ex. Gleick Declaration, Ex. 30, ¶ 22. An estimated total of 1,100 AFA of water demand may be met with recycled water: 500 AFA for irrigation and 600 AFA for powerplant cooling. *See id.* The U.S. Forest Service supports the use of recycled water and has signed a Decision Notice and Finding of No Significant Impact for the District's use of recycled water on golf courses and other landscaping. *See id.*, ¶ 23. However, ten years after Order 9P.2, MCWD still does not deliver recycled water for golf course or other landscaping.

**B. Los Angeles Department of Water and Power's Water Rights**

74. The City of Los Angeles Department of Water and Power (LADWP) has appropriative and riparian water rights to the Mammoth Basin, including Mammoth Creek.

**(i). Owens Basin Waters**

75. Beginning in 1905, LADWP acquired riparian and appropriative rights to the waters of the Owens Basin. Since 1913, LADWP has imported water from the Owens Basin via the Los Angeles Aqueduct. *See* LADWP, Urban Water Management Plan (2000) (LA UWMP), p. 32.

76. LADWP holds riparian rights used for ranchland irrigation. For example, LADWP holds such rights in Mammoth Creek as a result of its ownership of lands now leased to Chance Ranch. Chance Ranch is located along several miles of lower Mammoth Creek to its confluence with Hot Creek. *See* letter from William J. Thomas, Dave Wood Ranches, to John Moynier, MCWD (Jan. 30, 2001) (Ex. 31). These rights are estimated at 11 cfs. *See* SWRCB, D-904 (1958) (Ex. 32).

77. LADWP's pre-1914 appropriative rights are for municipal water supply. Delivery under these rights began in 1913 when the Los Angeles Aqueduct was completed. From 1913 to 1970, an average of 262,000 AFA of Owens Basin waters were exported, leaving only 11,000 AFA of flow released to Owens Lake or lost to groundwater percolation. *See* SWRCB, "Memorandum Report Of The Water Supply Of The Mono And Owens Basins With Relationship To The Proposed Second Barrel Of The Los Angeles Aqueduct" (Dec. 1963) (Ex. 33) (hereafter, Second Barrel Report), p. 5. The State Water Board found: "surface runoff tributary to the Owens Basin portion of the aqueduct has historically nearly all been diverted ...." *Id.*

78. LADWP holds License 10190, with a priority date of December 12, 1916, for diversion of flow from Big Springs (headwaters of the Owens River) and tributaries to Lake Crowley for hydropower generation in the Owens Gorge. *See* SWRCB, License 10190 (1974) (Ex. 34). The license covers certain tributaries to the Upper Owens, including Mammoth Creek and Hot Creek. The license permits direct diversion of 500 cfs, 59,900 AFA of storage in Lake Crowley, and 43,000 AFA as the maximum to be released from storage annually. *See id.*

79. The second Los Angeles Aqueduct was completed in 1970. From 1970 into the 1990's, the additional capacity permitted LADWP to divert approximately 360,000 AFA of Owens Basin waters into the Los Angeles Aqueduct for municipal supply and other uses. SWRCB, D-1631 (1994) (Mono Lake Cases), p. 160.

80. Diversion of Owens Basin waters, including groundwater and surface flows, have been restricted by two agreements to protect the public trust. These are: "Agreement between the County of Inyo and the City of Los Angeles on a long Term Groundwater Management Plan for Owens Valley and Inyo County" (Oct. 1991) and the "Memorandum Of Understanding Between The City Of Los Angeles Department Of Water & Power, County Of Inyo, California Department Of Fish And Game, California State Lands Commission, Sierra Club, Owens Valley Committee, and Carla Scheidlinger" (June 1997), *available at* <http://www.inyowater.org/LORP/Default.htm>. Collectively, they provide for a permanent base flow of 40 cfs in the lower Owens River. LADWP is also implementing the Owens Lake Dust Mitigation Project to mitigate air quality problems in Owens Valley, as a result of which aqueduct delivery may be reduced by 45,000 AFA. *See* 2003 LA UWMP, p. 7.

(ii). **Mono Basin Waters**

81. In 1923, LADWP applied for permits to divert water from Parker, Walker, Lee Vining and Rush Creeks, tributary to Mono Lake. These permits, issued in 1941, provided for maximum diversion of 147,000 AFA. The creek flows average 124,745 AFA. *See* SWRCB, Draft Environmental Impact Report (1994), Table 3A-1; Ex. 33, p. 5. In 1940, LADWP completed the Mono Craters Tunnel to deliver Mono Basin waters into the Upper Owens, for capture and delivery in the Los Angeles Aqueduct. From 1940 to 1970, 76,000 AFA was

exported from the Mono Basin in this manner. Ex. 32, p. 5. Licenses 10191 and 10192 issued in 1974. From 1974-1989, using the original and second Los Angeles Aqueducts, LADWP diverted an average of 83,000 AFA of Mono Basin waters into the upper Owens. SWRCB, D-1631, p. 6.

82. The Mono Lake Cases, as decided in 1994, substantially reduce LADWP's export of Mono Basin waters, in order to protect public trust values. D-1631 establishes minimum flow schedules for protection of the tributary creeks. It indexes diversions against lake levels. Diversion is prohibited when the lake is below 6,377 feet MSL; 4,500 AFA of diversion is permitted when the lake is between 6,377 and 6,380 feet MSL; and 16,000 AFA, between 6,380 and 6,391 feet MSL. *See* D-1631, pp. 196-203.

83. Using 1989 water-year as a baseline, the State Water Board projected that the average exports through 2044 would have been approximately 74,500 AFA absent D-1631. Permissible diversions under D-1631 will average 21,000 AFA over that same period. *See* D-1631, p. 163. LADWP projects that diversions from 2000 to 2015 will average 16,000 AFA. *See* 2000 LA UWMP, p. 33.

**(iii). Consideration of LADWP's Water Rights in MCWD Proceedings**

84. MCWD's licenses and permit are junior to LADWP's appropriative water rights for diversion of Owens Basin waters for municipal use and hydropower generation.

85. In issuing these junior rights, the State Water Board did not make specific findings whether water was available for appropriation from Mammoth Creek, or how these new applications affect LADWP's senior appropriative rights for municipal water supply and other uses. LADWP did not protest these applications.

86. The State Water Board did consider a protest that Application 17770 (which became License 12593) would impair riparian rights of Chance Ranch, which was then privately owned. *See* Ex. 32, p. 13. In response to Chance's protest, the State Water Board conditioned the permit on the condition that MCWD would not divert during August and September when flow of Hot Creek at the Highway 395 Crossing did not exceed 11 cfs. *See id.*

87. The State Water Board has not reexamined whether MCWD's junior rights may impair LADWP's senior appropriative rights for municipal use and hydropower generation via the Los Angeles Aqueduct, since D-1631 required LADWP to significantly reduce diversion from Mono Basin. For example, LADWP's License 10190 covers 500 cfs of combined flow of Mono and Owens Basin waters for hydropower generation in the aqueduct system. The average flow of the Owens River at Long Valley Dam, the upstream storage dam in that system, is roughly 200 cfs. The reduction in Mono Basin exports from 74,000 AFA (or 101 cfs) before D-1631, to 21,000 AFA (or 29 cfs) afterwards, plainly increases the shortage under LADWP's senior right.

**C. Current Condition of Fisheries in Mammoth and Hot Creeks**

88. Mammoth Creek, Hot Creek, and the Upper Owens River have exceptional brown and rainbow trout fisheries. The State Water Board has not acted on the 1991 Change Petition or otherwise made a final decision how to amend Licenses 5715 and 12593 and Permit 17332 to establish a flow schedule to maintain these fisheries in good condition as required by Fish and Game Code section 5937 and the public trust doctrine.

**(i). Wild Trout Waters**

89. Mammoth Creek is a candidate stream for inclusion in the Wild Trout Program. *See* Ex. 25, p.1.

90. In 1971 the Fish and Game Commission established this program to recognize and protect the few remaining streams that sustain wild trout fisheries in the State. The Fish and Game Commission policy states, “All necessary actions, consistent with State law, shall be taken to prevent adverse impact by land or water development projects affecting designated wild trout waters.” *See*

[http://www.dfg.ca.gov/fishing/html/WildAndHeritageTrout/WHTTrout\\_0.htm](http://www.dfg.ca.gov/fishing/html/WildAndHeritageTrout/WHTTrout_0.htm). Today, there are 33 such stream reaches in the State, totaling 844.2 miles. *See id.*

91. Hot Creek is a Wild Trout Water. It is one of the most heavily fished wild trout streams in California and the western U.S., averaging 3,500 angling hours per surface acre. *See* DFG, Wild and Heritage Trout Waters (2003), *available at* <http://www.dfg.ca.gov/fishing/html/WildAndHeritageTrout/waters/HotCreek.htm>. DFG operates the Hot Creek Hatchery at the headwater springs, to stock the creek and other waters in the vicinity.

92. The Upper Owens is a Wild Trout Water famous for its trophy trout fishery. *See* DFG, Wild and Heritage Trout Waters (2003), *available at* <http://www.dfg.ca.gov/fishing/html/WildAndHeritageTrout/waters/UpperOwensRiver.htm>.<sup>15</sup>

93. Pursuant to the Porter-Cologne Act, Water Code sections 13170-13170.1, 13240-13241, the RWQCB has designated beneficial uses for these waters. *See* Water Quality

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<sup>15</sup> In recognition of their outstanding values, the Owens River headwaters and its tributary streams – Glass Creek, Deadman Creek, Big Springs, and the upper Owens River – are proposed for designation as Wilderness and Wild & Scenic Rivers in S.1555, California Wild Heritage Act.

Control Plan for the Lahontan Region, North and South Basins (1995) (Lahontan Basin Plan), Table 2-1. These designated uses include Agricultural Supply; Cold Freshwater Habitat; Commercial and Sportfishing; Freshwater Replenishment (Mammoth Creek and Owens River only); Ground Water Recharge; Migration of Aquatic Organisms; Municipal and Domestic Supply; Rare, Threatened, or Endangered Species (Hot and Mammoth Creeks only); Water Contact Recreation; Non-contact Water Recreation; Spawning, Reproduction, and Development; and Wildlife Habitat. *See id.* The Basin Plan also includes a mandatory policy prohibiting degradation of such beneficial uses or other water quality standards. *See* Resolution No. 68.16 (Oct. 28, 1968) (Ex. 4); *see also* Lahontan Basin Plan, p. 3-2.

94. In addition, Mammoth and Hot Creeks support native non-game fishes, such as the Owens Sucker.

**(ii). Probable Impacts of Interim Flow Schedule on Fisheries**

95. In issuing the 1996 Writ of Mandate, the Mono County Superior Court found that the hearing record, including the 1991 Beak Report, demonstrated that the interim flow schedule will be adequate to protect these fisheries in good condition *until* the State Water Board amends Permit 17332 in response to the 1991 Change Petition. *See* paragraphs 50-52, *supra*.

96. The State Water Board has consistently stated that the flow schedule recommended in the 1991 Beak Report, now in effect pursuant to the 1996 Writ, may be inadequate to maintain these fisheries in good condition on a long-term basis. For example, the interim flow schedule in C&D Order 9P was driven by the finding that MCWD would not have adequate water supply in all water-years if it complied with the more protective flow

schedule established by Condition 23 in Permit 17332. That interim schedule was intended to “...reduce damage to the fishery...and partially mitigate adverse effects on the fishery during the period necessary for the District to come into compliance...” with Permit 17332. C&D Order 9P.2, Ex. 17, p. 3. Thus, the Board did not find that that interim flow schedule will protect the fisheries in good condition; instead, it merely found that it was preferable to granting seriatim Temporary Permits suspending Condition 23 in Permit 17332.

97. The 1991 Beak Report recommends, and the return on the 1996 Writ adopts, another interim flow schedule that requires substantially less flow than Order 9P in normal and wet years. See Vorster Declaration, Ex. 22, ¶ 19. In Order 9P.2, as well as comments before and since, the State Water Board has stated that such a flow schedule, which is based on dry year conditions, may have several significant adverse impacts on the fisheries, including stressful or unsuitable water temperature below the Hot Springs. See letter from Mike Falkenstein, SWRCB, to Gary Sisson, MCWD (Dec. 13, 1990) (Ex. 35), p. 2; see also Ex. 27, p. 4.

98. DFG has made similar comments. The interim flow regime, which corresponds to hydrologic conditions for dry years, results in “unnatural” drought conditions. Testimony of Darrell M. Wong, “Mammoth Creek Instream Flow Requirement Hearing” (Mar. 10, 1992) (Ex. 36), p. 2. “In order to maintain the quality and diversity of the aquatic environment, including the streamside riparian zone, regulated flow regimes should mimic the unimpaired hydrograph as closely as possible.” See *id.*, p. 3.

99. Instead of maintaining this inter-annual variability, the interim flow schedule has the effect of “imposing dry year flow criteria every year....” Such flows “will not keep

fish in good condition.” *See* Ex. 25, p. 3; *see also* letter from Pete Bontadelli, DFG, to Gary Sisson, MCWD (Dec. 6, 1990) (Ex. 37). DFG has stated that continuous dry-year conditions may decrease the width and quality of riparian corridor, decrease stream bank stability, and increase sediment input. *See id.*

100. DFG has commented that the interim flow schedule, by increasing the frequency of low flows, may increase sedimentation of the creek channel in Mammoth Creek and Hot Creek. *See* Ex. 36, pp. 3-4; *see also* CalTrout, “Mammoth Creek Peak Flows” (2004) (Ex. 38).

101. DFG has commented about the risk that a flow schedule may raise temperature in Hot Creek, below the Hot Springs, to an extent harmful to that fishery.

“... fluctuations in the trout population in lower Mammoth Creek, their apparent correlation with flow, and the demonstrated potential of this reach as a quality trout fishery makes it imperative that the potential effects of water temperature in this reach be evaluated not only for acute short-term stress, but for chronic stress as well. In addition, the modification of the Mammoth Creek thermal influence on Hot Creek could result in a change in the thermal regime of Hot Creek and thus affect its flora and fauna....”

Ex. 36, p. 8.<sup>16</sup>

**(iii). Downward Trend in Fishery Populations**

102. There has been a downward trend in the populations of trout and other fisheries in Mammoth and Hot Creeks since 1996. In 2002 and 2003, the brown trout population in Hot Creek was approximately 57 percent and 64 percent, respectively, of the mean between 1982 and 1994. *See* Keegan Declaration, Ex. 21, ¶ 9. The population in those years was 39 percent

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<sup>16</sup> The reduction of instream flows in Mammoth Creek also can increase significantly the thermal influence of Hot Creek on the Upper Owens River. *See* letter to John Moynier, MCWD, from Gene L. Coufal, DWP (Jan. 30, 2001) (Ex. 39). The resulting increase of water temperatures in the Upper Owens has caused fish kills. *See id.*

and 44 percent, respectively, of the 1991 mean. *See id.* While variability in these populations occurs naturally and the statistical significance of this recent decline is unknown, it suggests that the fisheries may be at risk of further decline due to controllable factors. *See id.*, ¶ 10.

103. Several limiting factors may contribute to this apparent trend. These include: the interim flow schedule, other water diversions (including irrigation), manipulation of peak flows, groundwater extraction, or a reduction in yearly spring runoff relative to the long term average in 1999-2004. *See id.*

104. The recent drought does not appear to be a predominant cause for the recent decline in the trout fisheries. An earlier drought occurred in the Owens Valley between 1987 and 1992. *See Keegan Declaration, Ex. 21, ¶ 11.* However, brown trout population was relatively high in that earlier drought, most including a maximum population of 705.5 pounds/acre in 1991. *See id.* During any such drought, trout seek coldwater refuges, including pools. Natural variability in surface flow in the Owens Valley may not directly control brown trout population in Hot Creek. *See id.* The interim flow schedule is more likely to be a predominant cause of recent decline in these fisheries. *See id.*

105. The Owens Sucker fishery, which is designated as a species of special concern under the California Endangered Species Act, also appears to be declining. *See Keegan Declaration, Ex. 21, ¶ 13.* According to the 2002 MCWD Community Fish Survey, the number of all Owens Suckers in Mammoth Creek collection sites has declined from 84 to 2 since 1996. *See 2002 MCWD Community Fish Survey, p. 12, available at [www.http://firewall.office.mcwd.dst.ca.us/mcwd\\_internet/2002%20Fishsurvey%20Final%20Report.pdf](http://firewall.office.mcwd.dst.ca.us/mcwd_internet/2002%20Fishsurvey%20Final%20Report.pdf).* Similarly, in a DFG survey of Hot Creek in 2002, the Owens Sucker population

was 19.66 pounds/acre or 139 fish/mile, while it was 7.5 pounds/acre, or 39 fish/mile in 2003. MCWD's and DFG's surveys are consistent with recent DFG surveys. *See* Ex. 21, ¶ 13. The population of Tui Chub, another non-game native fish, has also shown a downward trend in recent years. *See* 2002 MCWD Community Fish Survey, p. 12.

## V. CLAIMS FOR RELIEF

106. MCWD's water supply operations, including its storage and diversion of the flow of Mammoth Creek, do not comply with applicable laws in the following four respects.

### **Claim One. Licenses 5715 and 12593 and Permit 17332 Do Not Comply with Fish and Game Code Section 5937.**

107. Fish and Game Code section 5937 requires that "the owner of any dam shall allow sufficient water at all times to pass through a fishway, or, in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

108. The State Water Board issued the licenses in 1958 and 1989, and the permit in 1978, all after the effective date of Section 5937.

109. Pursuant to Fish and Game section 5946, Section 5937 applies to all rights issued in District 4½, which includes Mono County.

110. The licenses do not include a schedule for MCWD's release of minimum flow for protection of the fisheries downstream of Lake Mary.

111. Condition 23 of Permit 17332 established a minimum flow schedule for protection of these downstream fisheries. The State Water Board adopted this flow schedule after public notice and hearing.

112. From 1987 to 1990, MCWD obtained variances from Permit 17332's flow schedule, in order to increase the amount of water divertible for its water supply. In 1991, the State Water Board issued C&D Order 9P, which established an interim flow schedule to "...*reduce damage* to the fishery to the extent feasible and thereby *partially mitigate* adverse impacts on the fishery during the period necessary for the District to come into compliance with Permit 17332" (emphasis added).

113. In December 1991, MCWD applied for a Change Petition to amend Condition 23 in Permit 17332. It committed to prepare an environmental document under the California Environmental Quality Act (CEQA) as the basis for action on that Change Petition.

114. In 1996, MCWD obtained from Mono County Superior Court a Writ of Mandate, which authorizes its diversion under an interim flow schedule until the State Water Board undertakes a further proceeding to re-establish a permanent schedule as an amendment to Permit 17332. The Writ suspended Condition 23 of that permit, pending such further proceeding.

115. MCWD diverted water under various interim flow schedules from 1987-1990 and 1996-present. These schedules, including the 1996 Writ's interim schedule, are not based on a CEQA document or other evidentiary record compiled in public hearing. Such a record is the necessary basis for any amendment to MCWD's rights to establish a permanent flow schedule that complies with Fish and Game Code section 5937. Thus, the State Water Board has not found that the interim schedule now in effect complies with Section 5937.

116. MCWD has not completed the environmental document required by CEQA as a necessary element for such amendment. MCWD has not published a schedule for further

action on the draft environmental document published in 2000. As a direct result, the State Water Board has not acted on the MCWD's 1991 Change Petition or otherwise amended MCWD's rights to establish a flow schedule which complies with Fish and Game Code section 5937 on a permanent basis.

117. In violation of Section 5937, MCWD has acted and failed to act in a manner that, for an indefinite period, prevents the State Water Board's undertaking a proceeding to establish a permanent flow schedule in MCWD's rights.

**Claim Two. Licenses 5715 and 12593 and Permit 17332 Do Not Comply with the Public Trust Doctrine.**

118. We incorporate Claim One.

119. Under the public trust doctrine, post-1914 appropriative water rights must protect the trust uses of navigable waters and their tributaries – fishing, navigation, commerce (such as boat and tackle rentals), and environmental quality – to the extent feasible. *See National Audubon*, 33 Cal. 3d at 437, 441; *CalTrout II*, 218 Cal. App. 3d 194, 195.

120. Under the State Constitution, fish in navigable waters (including planted fish) are the property of the State. *See California Constitution*, Art. 1, § 25; *People v. Glenn Colusa Irrigation District*, 127 Cal.App. 30 (1930).

121. In the course of issuing MCWD's licenses and permit, the State Water Board did not find that MCWD's operations will comply with the public trust doctrine.

122. In any proceeding on the 1991 Change Petition, the State Water Board must also consider whether these rights comply with the public trust doctrine. *See National Audubon, supra*, at 446-47.

123. MCWD has not completed the environmental document required by CEQA as a necessary element of the record for any amendment to these rights to comply with the public trust doctrine. MCWD has not established a schedule for completion of the environmental document. As a direct result, the State Water Board has not acted on the MCWD's 1991 Change Petition or otherwise amended these rights to comply with the public trust doctrine.

124. Since 1991, MCWD has acted and failed to act in a manner that, for an indefinite period, prevents the State Water Board's undertaking a proceeding to establish a permanent flow schedule that complies with the public trust doctrine.

**Claim Three. Licenses 5715 and 12593 and Permit 17332 May Prevent Attainment of Applicable Water Quality Standards in Mammoth and Hot Creeks.**

125. We incorporate Claims One and Two.

126. Under Water Code sections 1258 and 13146, appropriative rights may not interfere with the attainment of water quality standards established by the applicable Basin Plan.

127. The Lahontan Basin Plan designates Cold Freshwater Habitat; Commercial and Sportfishing; Freshwater Replenishment; Ground Water Recharge; Migration of Aquatic Organisms; Municipal and Domestic Supply; Rare, Threatened, or Endangered Species; Water Contact Recreation; Non-contact Water Recreation; Spawning, Reproduction, and Development; and Wildlife Habitat, as beneficial uses of Mammoth and Hot Creeks.

128. Under Resolution 68-16, the Lahontan Basin Plan prohibits any degradation of the beneficial uses of these waters as they existed in 1968.

129. MCWD's diversions under interim flow schedules have apparently contributed to the degradation of Cold Freshwater Habitat and other designated beneficial uses of Mammoth and Hot Creeks.

**Claim Four. MCWD's Management of its Water Supply Results in Waste and Unreasonable Use of Water in Violation of California Constitution Article X, Section 2, Water Code Section 100, and Cease and Desist Orders 9P and 9P.2.**

130. We incorporate Claims One to Three.

131. All waters belong to the state, subject to lawful right to use. *See* Water Code § 102.

132. The waste, unreasonable use, or unreasonable method of use, or unreasonable method of diversion of water is strictly prohibited. California Constitution Article X, Section 2; Water Code § 100. "...[T]he people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection." *Id.*, § 104.

133. In C&D Order 9P (1991), the State Water Board found that MCWD has a "chronic" water supply deficiency. In Ordering Paragraph 1, it directed MCWD to publish a Feasibility Study which evaluates alternative measures to increase supply, reduce demand, or some combination; and to fully implement recommended measures by 1994.

134. MCWD published the Feasibility Study required by C&D Order 9P in 1992. It has not yet implemented certain measures recommended by the Feasibility Study, including wastewater reclamation for landscape irrigation.

135. In Ordering Paragraph 3 of C&D Order 9P.2 (1994), the State Water Board directed MCWD to adopt and implement a "vigorous" program, including five specified

measures, to correct its chronic water supply deficiency. These are: “reduction or elimination of outside watering (e.g., implementation of the District’s existing level 5 restrictions); implementation of a leak detection/prevention program; retrofit water saving devices such as low flow toilets and showerheads in existing structures which currently have high flow devices; implementation of wastewater reclamation projects; and/or limitation of new hookups.”

136. MCWD does not currently undertake any measure to replace toilet and showerheads in existing homes with low-flow alternatives. This is waste and unreasonable use under Water Code sections 100 and 275 and C&D Orders 9P and 9P.2.

137. MCWD does not provide recycled water for landscape irrigation. Today, more than 500 AFA are diverted from Mammoth Creek for this purpose. This is waste and unreasonable use under Water Code sections 100 and 275, C&D Orders 9P and 9P.2, and Water Code sections 13550 *et seq.*:

“The Legislature hereby finds and declares that the use of potable domestic water for nonpotable uses, including, but not limited to, cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, is a waste or an unreasonable use of the water within the meaning of Section 2 of Article X of the California Constitution if recycled water is available ...”

138. MCWD implements a measure to detect and repair leaks in its distribution system. However, the measure is not effective, since such leakage currently exceeds 500 AFA of the roughly 2,500 AFA of water it diverts from Mammoth Creek. This is waste and unreasonable use under Water Code sections 100 and 275 and C&D Orders 9P and 9P.2.

139. MCWD has not decreased per capita usage since 1991 or otherwise implemented a vigorous conservation program to correct its chronic water supply deficiency.

Its acts and omissions collectively constitute waste and unreasonable use, method of use, and method of diversion of water under Water Code sections 100 and 275 and C&D Orders 9P and 9P.2.

**VI.**  
**REQUESTS FOR RELIEF**

140. CalTrout respectfully requests that the State Water Board schedule and undertake the proceeding required by its Order WR 97-01, as well as the 1996 Writ, to act on the 1991 Change Petition, re-establish a permanent instream flow schedule which complies with Fish and Game Code section 5937 and the public trust doctrine, and provide other relief.

**A. Scope of Hearing**

141. We request that the hearing address the following issues which the State Water Board itself has raised in C&D Orders 9P, 9P.2, and comments on MCWD's 2000 DEIS/R.

142. What flow schedule should be included in MCWD's licenses and permit to maintain the downstream fisheries in good condition as required by Fish and Game Code section 5937 and the public trust doctrine? Should the flow schedule vary by season and year-type? What performance standards and monitoring should be required to assure adequate protection of public trust resources? Among other things, the record should include a limiting factor analysis, as recommended in the Keegan Declaration, to analyze the comparative impacts of MCWD's operations and other limiting factors.

143. What measures should MCWD undertake, and on what schedule, to correct the chronic water supply deficiency described in C&D 9P and 9P.2? Among other things, as recommended in the Gleick Declaration, the State Water Board should consider measures used by other municipalities for this purpose.

144. In the course of issuing MCWD's licenses and permit, did the State Water Board make any finding under Water Code section 1202 whether water is available for appropriation from Mammoth Creek? If not, should these rights be conditioned to avoid any interference with LADWP's senior appropriative rights in the Owens Basin?

145. Should Mammoth Creek be declared fully appropriated under Water Code section 1205? If so, the Board should consider how best to exercise its authority to

“...order that a stream system be added to the declaration, and the order may specify conditions upon which applications will nevertheless be accepted for filing. Any such order shall contain a finding that the supply of water in the stream system is being fully applied to beneficial uses and that a previous water right decision has determined that no water remains available for appropriation.”

23 CCR § 872(a). Among other things, the State Water Board should address the impact of MCWD's groundwater pumping on the flow of Mammoth and Hot Creeks. In consultation with MCWD and other parties, and as recommended in the Vorster Declaration, it should use a water balance model that evaluates the impacts of storage and flow release from Lake Mary to the confluence of Hot Creek with the Owens River.

**B. CEQA Compliance**

146. The State Water Board should assume responsibility as lead agency in preparation of the CEQA document required for action on the 1991 Change Petition, including any license and permit amendments.

147. MCWD requested lead agency status in connection with its 1991 Change Petition, and the State Water Board agreed. C&D Order 9P.2 (1994) describes this arrangement, whereby MCWD will be lead agency for the purpose of preparing the environmental document required for action on the 1991 Change Petition.

148. MCWD has not completed that document in the 13 years thereafter. It has not published a schedule for completion. The State Water Board, with the concurrence of DFG, found that the DEIS/R published in 2001 does not meet the minimum requirements for CEQA compliance. Due to such delay and inadequate performance, the SWRCB should reassume responsibility to function as lead agency.

149. Further, MCWD has a potential conflict of interest serving as lead agency for an environmental document whose fundamental purpose is to limit diversion for water supply. Under 14 CCR section 15051, “the Lead Agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.” The State Water Board is the state agency with exclusive authority to amend MCWD’s rights.

150. Under 14 CCR section 15084, the State Water Board may enter into various arrangements whereby the applicant assists in preparing the environmental document, subject to the lead agency’s responsibility to assure CEQA compliance. It has a standard Memorandum of Understanding (MOU) whereby the applicant in a water rights proceeding funds a consultant to prepare the document under the Board’s supervision and control. *See* EIR-MOU (4/03), available at <http://www.waterrights.ca.gov/forms/MOU%2011-19-03.pdf>. The State Water Board used this arrangement in the Mono Lake Cases (1993-4) and more recently in the proceeding for the Cachuma Project Water Right Permits. *See* SWRCB, “Supplemental Statement of Responsibilities for Preparation of Environmental Impact Report for Possible Modifications of the Cachuma Project Water Right Permits (Permits 11308 and

11310) To Protect Prior Rights and Public Trust Resources in the Santa Ynez River (Oct. 21, 2004) (Ex. 40).

151. CalTrout does not object to MCWD's serving as a responsible agency in the initial drafting or review of certain EIR sections where it does not have a conflict of interest, including those describing its current water supply operations.

**C. Schedule**

152. The State Water Board should adopt an expeditious schedule for this proceeding to amend MCWD's water rights to comply with Fish and Game Code section 5937, public trust doctrine, and other applicable law. It has suspended Permit 17332's flow schedule on an interim basis, at various times beginning 17 years ago. It has instructed MCWD to act to correct its chronic water supply deficiency beginning in 1991, 13 years ago. In 1997, it directed the Division of Water Rights to schedule a proceeding to establish a permanent flow schedule. We respectfully submit: "an administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands." Cal Trout II, *supra*, at 203.

153. We request that the State Water Board convene a pre-hearing workshop not later than March 1, 2005, and that the Hearing Officer thereafter schedule further steps for hearing and environmental review, so that the Board makes a final decision not later than December 31, 2006.

**D. Settlement**

154. CalTrout offers to MCWD and other parties to expeditiously undertake settlement negotiations to resolve the issues raised by this Petition. We are confident that

settlement is achievable, given our joint interest in resolving environmental compliance consistent with adequate water supply.

**VII.**  
**CONCLUSION**

155. California Trout respectfully requests that the State Water Board amend MCWD's Licenses 5715 and 12593 and Permit 17332 to: re-establish a permanent instream flow schedule, determine whether Mammoth Creek is fully appropriated, correct MCWD's chronic water supply deficiency, and provide other appropriate relief.

Dated: December 9, 2004

Respectfully submitted,

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Richard Roos-Collins  
Julie Gantenbein  
NATURAL HERITAGE INSTITUTE

Attorneys for CALIFORNIA TROUT, INC.

## EXHIBIT LIST

1. SWRCB, Return to Peremptory Writ of Mandate (Jan. 13, 1997), *inc. attached* SWRCB, WR 97-01, “In the Matter of Water Right Permit 17332 and Water Right Licenses 5715 and 12593 (Applications 25368, 12079, and 17770)” (Jan. 8, 1997)
2. Mammoth Community Water District, “Assessment for Draft Town of Mammoth Lakes General Plan” (Sept. 13, 2004)
3. SWRCB, “Notice of Threatened Violation of Terms and Conditions of Permit 17332” (July 26, 1991)
4. Topographical Map 1
5. Topographical Map 2
6. U.S. Geological Survey, “Review of Mammoth Community Water District Reports and Data” (1995)
7. SWRCB, License 5715 (May 1, 1959)
8. SWRCB, License 12593 (April 13, 1990)
9. U.S. Forest Service, Master Operating Agreement
10. SWRCB, Permit 17332 (June 1, 1978)
11. SWRCB, “Water Resources Information Management System Query Report for S004326, S004327”
12. SWRCB, “Water Resources Information Management System Query Report for A025368, A017770, A 12079”
13. SWRCB, WR 87-9, “In the Matter of Temporary Permit 20124 (Application 29080)” (Sept. 3, 1987)
14. SWRCB, WR 88-16, “In the Matter of Temporary Permit (Application 29307)” (Aug. 18, 1988)
15. SWRCB, WR 89-12, “In the Matter of Temporary Permit 20336 (Application 29489)” (June 22, 1989)
16. SWRCB, “Issuance of Preliminary Cease and Desist Order 9P” (Aug. 29, 1991)

17. SWRCB, “Revisions to Preliminary Cease and Desist Order 9P,” Order 9P.2 (Jan. 20, 1994)
18. SWRCB, “Memorandum of Points and Authorities In Opposition to Petition for Writ of Mandate by Mammoth Community Water District” (May 13, 1996).
19. Memo from Darrell Wong, DFG, to Steven Herrera, SWRCB (July 13, 1990)
20. Mono County Superior Court, “Peremptory Writ of Mandate and Statement of Decision” (Oct. 21, 1996)
21. Declaration of Thomas P. Keegan
22. Declaration of Peter Vorster
23. Letter from John Moynier, MCWD, to Interested Parties, “Notice of Preparation (NOP\_/Notice of Intent (NOI) for a Draft Environmental Impact Report/Environmental Impact Statement for Changes in Mammoth Creek Minimum Streamflow Requirements and Point of Measurement, and for Changes in Place of Use” (Mar. 14, 1997)
24. Letter from Steven Herrera, SWRCB, to John Moynier, MCWD (April 28, 1997)
25. Letter from Bruce Kinney, DFG, to John Moynier, MCWD (April 29, 1997)
26. Letter from Jim Edmondson, Cal Trout, to John Moynier, MCWD (April 21, 1997)
27. Letter from Melinda Dorin, SWRCB, to John Moynier, MCWD (Mar. 5, 2001)
28. Letter from Darrell Wong, DFG, to John Moynier, MCWD (Jan. 31, 2001)
29. Letter from Gary Sisson, MCWD to Victoria Whitney, SWRCB (April 28, 2004)
30. Declaration of Dr. Peter H. Gleick
31. Letter from William J. Thomas, Dave Wood Ranches, to John Moynier, MCWD (Jan. 30, 2001)
32. SWRCB, Decision No. D 904, “In the Matter of Application 17770 by MCWD” (May 14, 1958)

33. SWRCB, “Memorandum Report of the Water Supply of the Mono and Owens Basins with Relationship to the Proposed Second Barrel of the Los Angeles Aqueduct” (Dec. 1963)
34. SWRCB, License 10190 (Jan. 25, 1974)
35. Letter from Mike Falkenstein, SWRCB, to Gary Sisson, MCWD (Dec. 13, 1990)
36. Testimony of Darrell M. Wong, DFG, Mammoth Creek Instream Flow Requirement Hearing (Mar. 10-11, 1992)
37. Letter from Pete Bontadelli, DFG, to Gary Sisson, MCWD (Dec. 6, 1990)
38. Cal Trout, “Hot Creek Fish Data” (2004)
39. Letter from Gene L. Coufal, LADWP, to John Moynier, MCWD (Jan. 30, 2001)
40. SWRCB, “Supplemental Statement of Responsibilities for Preparation of Environmental Impact Report for Possible Modifications of the Cachuma Project Water Right Permits (Permits 11308 and 11310) To Protect Prior Rights and Public Trust Resources In the Santa Ynez River” (Oct. 21, 2004)

## DECLARATION OF SERVICE

I, Shane Conway, declare that I today served the attached “***PETITION TO ESTABLISH APPROPRIATE LIMITATIONS ON DIVERSIONS BY MAMMOTH COMMUNITY WATER DISTRICT, DECLARE MAMMOTH CREEK FULLY APPROPRIATED, AND PROVIDE OTHER RELIEF TO PROTECT PUBLIC TRUST RESOURCES IN MAMMOTH CREEK, HOT CREEK, AND UPPER OWENS RIVER,***” to each person below by first-class mail as follows:

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