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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-C-ECR MINERAL COUNTY'S AMENDED COMPLAINT IN INTERVENTION

COMES NOW, Plaintiff-Intervenor, MINERAL COUNTY OF NEVADA, by and through its attorneys of record, on its own behalf and for benefit of the citizens, residents, and users of Walker Lake, and claims as follows:

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I.

INTRODUCTION

1. This claim is made for recognition of a right of minimum level of water for Walker Lake by means of certain right being reserved and allowed to flow down the Walker River both east and west forks, in sufficient quantity to reach, replenish, and maintain Walker Lake. Such minimum levels are requested based upon sufficient water to sustain naturally occurring fish population, including, but not limited to, the Chub, Lahouton Sucker, and Cutthroat Trout.

II.

JURISDICTION

2. Jurisdiction over this claim is pursuant to the continuing jurisdiction of this Court over the waters of the Walker River and its tributaries in California and Nevada; and the matter in controversy arises under the Constitution, laws, or treaties of the United States.

III.

PARTIES

3. Plaintiff-Intervenor, MINERAL COUNTY OF NEVADA, appears in this case on its own behalf and for the benefit of the citizens and residents of Mineral County and on behalf of the public, users of Walker Lake and for recreational, aesthetic preservation of wildlife and for economic purposes. Mineral County is duly

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established under the laws of the State of Nevada and retains all rights delegated pursuant to NRS 244.165 with the capacity to sue in its own name.

4. Respondents are all water users on the Walker River and its tributaries as set forth in the Final Decree or have statutory or regulatory authority over the allocation and protection of waters on the Walker River.

IV.

GENERAL ALLEGATIONS

5. Plaintiff-Intervenor, MINERAL COUNTY OF NEVADA, hereinafter referred to as, "County," currently benefits from the presence of sufficient levels of water in Walker Lake. The Nevada Department of Wildlife holds in trust for Mineral County, the right to 700 cfs. of surplus flows annually, Certificate No. 10860, granted by the State Engineer of Nevada on December 28, 1983.

6. Walker Lake and approximately 16 linear miles of Walker River are totally contained within the legal boundaries of Mineral County. The elevation of Walker Lake in 1908 was 4,077 feet. The elevation of Walker Lake in 1993 was 3,950 feet which is equivalent to a loss of one-half of the Lake. The levels required to maintain Walker Lake as a viable fishery are at an elevation of 3,972 feet. At the present rate of depletion Walker Lake will be dry by the year 2020.

7. Walker Lake supports recreational fishing, boating, and wildlife habitat. Activities and businesses attributable to the presence and use of Walker Lake represents approximately 50% of the economy of Mineral County.

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8. The current and consistent total loss of flows from Walker River into Walker Lake has degraded the quality of water in Walker Lake substantially.

9. The public interest and maintenance of the public trust requires that the flows be allowed to reach Walker Lake that will sustain minimum levels for the naturally occurring fish population and provide for the preservation of Walker Lake for the citizens and residents of the County for recreational values, preservation of wildlife, and maintenance of the economy of Mineral County.

10. Without reallocation of the waters to insure priority minimum flows to sustain the Lake, Walker Lake, its users and the citizens of Mineral County and the public will suffer substantial and irreparable damage.

11. Minimum flowage guaranteed to Walker Lake was not dealt with, resolved, or considered in the original decree (C-125) of 1936. Injury to Walker Lake and, therefore, to Mineral County has occurred since the Decree was entered.

12. Paragraph XIV of the Final Decree provides that this Court retain jurisdiction.

V.

FIRST CLAIM FOR RELIEF

13. An adjudication and reallocation of the waters of Walker River to preserve the minimum levels in Walker Lake, as a condition to the water rights licenses of all upstream users -- such requirements of minimum levels of Walker Lake to be a condition to each license and certificate presently held by upstream license

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holders in California and Nevada.

14. Imposition of responsibilities on the State of California and State of Nevada to maintain the public trust in Walker Lake by protecting minimum flows for naturally occurring fish populations.

15. The right to, at least, 127,000 acre feet of flows annually reserved from the Walker River that will reach Walker Lake.

WHEREFORE, Plaintiff-Intervenor, prays:

1. The Court, pursuant to its continuing jurisdiction under paragraphs XIV of the Final Decree, reopen and modify the final Decree to recognize the rights of Mineral County, its citizens and residents and other users of Walker Lake and the public to have minimum levels to maintain the viability of Walker Lake as a body of water to sustain its naturally occurring fish population and for recreational benefits, wildlife preservation, aesthetic and economic beneficial use.

2. That the Court order the State of Nevada to grant a certificate to Mineral County for the benefit of Walker Lake in the amount of 127,000 acre/feet per year.

3. That the Court recognize that a minimum of three feet above sea level in Walker Lake is necessary to maintain the viability of Walker Lake as a body of water to sustain its naturally occurring fish population and for recreational benefits, wildlife preservation, aesthetic and economic benefits and that a minimum of 127,000 acre/feet per year to Walker Lake is a beneficial use and in the public interest and required

under the doctrine of maintenance of the public trust.

4. That the Court grant such other and further relief as it deems just and proper.

DATED this 10th day of March, 1995.

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of the Law Office of ZEH, SPOO & HEARNE, and that on this date I caused to be mailed a copy of the attached **MINERAL COUNTY'S AMENDED COMPLAINT IN INTERVENTION**, with postage fully prepaid to:

See attached Service List

DATED this 10th day of March, 1995.

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UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-C-ECR AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MINERAL COUNTY'S AMENDED COMPLAINT IN INTERVENTION

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I.

INTRODUCTION

Since the dawn of the ice age, Walker Lake, an arm of the Pleistocene Lake Lahontan, has graced the desert landscape of Mineral County. Throughout pre-recorded human history and into the twentieth century, Walker Lake continued to support the naturally occurring Cutthroat Trout, Lahontan suckers, and tui chub, enough so that the Indian tribes living on the banks of this lake were actually named for their consumption of the bounty of the Lake. Walker Lake is a terminal lake fed by the waters of the Walker River. This river represents 84% of the lake's source of recharge with the balance made up from rainwater and groundwater. (See, Declaration of Kelvin J. Buchanan already filed 10/25/94, hereinafter referred to as, "Buchanan Declaration".)

In 1989, there were a series of events beginning with the release of sediment-laden irrigation water from Bridgeport Reservoir. This dewatering of the Reservoir resulted in litigation by upstream interests, initiated by the State Water Resources Control Board of California (SWRCB), which initiated the total loss of the fishery at Walker Lake, quickly and certainly, without further consideration. By the actions taken to retain minimum levels at Bridgeport Reservoir, a man-made trout fishery, the SWRCB essentially decreed a death sentence to Walker Lake, a naturally created trout fishery.

Simultaneously, in conjunction with this action by the SWRCB, the Walker River Irrigation District (WRID), manager of storage and irrigation allocations along

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the River, has failed in its stewardship. WRID has failed to mitigate waste of water resources along the River, failed to monitor and require returns of irrigation water to the river channel, and failed to require that the diversions be technically efficient, thereby, preserving the river to the extent possible with twentieth century technology. This failure has reduced the available waters to flow through the Walker River to Walker Lake. (See, Buchanan Declaration.) WRID has also allocated more water for irrigation then contemplated at the time the decree in C-125 was adopted. (Headley, Economic Study of Walker River Irrigation District.)

The State of Nevada has failed to enforce the water pollution laws and issued certificates for diversions that allowed allocations to greatly exceed the waters of the River actaully available which deprives any natural or excess flows from reaching Walker Lake. WRID, the State of Nevada, and the Walker River Paiute Tribe (the "Tribe") have not contracted with the United States to install and maintain accurate measuring devices along the Walker River so that lawful and proper allocations of water will be made (see, Declaration of Buchanan). As a result, Walker Lake has been denied flows that might have survived the treacherous path along the River to its inlet.

Without sufficient flows through the Walker River arriving at Walker Lake, the Lake has dropped so precipitously that, some scientists predict, within two years the Lake will not be able to support its naturally occurring fish population (see, Declaration of Buchanan). Mineral County depends on this resource for recreation, wildlife habitat, and other economic and aesthetic reasons for both the citizens of

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Mineral County and the users of the Lake.

Mineral County requests intervention into this case in order to represent interests for the preservation of this irreplaceable natural resource, Walker Lake, which is nearly totally dependent on adequate flows from the Walker River.

II.

ARGUMENT

A. MINERAL COUNTY MEETS THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT UNDER RULE 24(a)(2), F.R.C.P.

1. Mineral County Has Not Delayed in Moving to Intervene in the Pertinent Federal Case Affecting the Adjudication of the Waters of the Walker River, Case C-125.

Intervention as of right under Rule 24(a)(2) Federal Rules of Civil Procedure[1] requires that the applicant claim an interest, the protection of which may as a practical matter be impaired or impeded if the lawsuit proceeds without him. The Ninth Circuit has enunciated the test to be administered for applying these elements of Rule 24, F.R.C.P.:

> We (the 9th Circuit Court of Appeals) apply a four-part test under this rule: (1) the motion must be timely; (2) the applicant must claim a "significant protectable" interest

[1]Rule 24 Federal Rules of Civil Procedure: (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

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> relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. Sierra Club v. U.S. E.P.A., 995 F.2d 1478 (9th Cir. 1993) at page 1481.

Moreover, Rule 24, F.R.C.P., is to be liberally applied:

> The rule is construed "broadly in favor of the applicants for intervention." Sierra Club v. U.S. E.P.A., supra at page 1481.

Taking the elements of the Ninth Circuit's test, *seriatim*, and then tempering that by the liberal construction to be given Rule 24, F.R.C.P., it is evident that Mineral County satisfied the requirements of Rule 24, F.R.C.P., and should be allowed to intervene as of right in this case as developed, below.

A decision on the appropriation of the waters of the Walker River materially affects the preservation of Walker Lake. Mineral County cannot protect the interests of the Lake unless it can represent those interests in the present litigation.

The Court must, in its discretion, based upon the circumstances, determine if the motion to intervene is timely:

> Timeliness of intervention is a matter for the sound discretion of the trial court, NAACP v. New York, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648(1973), but a court should be more reluctant to refuse when intervention is sought of right, as here. United Sates v. American Telephone and Telegraph Co., 642 F.2d 1285, 1295 (D.C. Cir.1980). Williams and Humbert Limited v.

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> W.&H. Trade Marks (Jersey) Ltd., 840 F.2d 72 (D.C. Cir. 1988) at pp. 74-75.

The Ninth Circuit has also set forth the standard for assessing the timeliness of a motion to intervene:

> In determining whether a motion to intervene is timely, we evaluate three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. County of Orange v. Air California, 799 F2d 535 (9th Cir. 1986), cert. denied, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed2d 791 (1987) (citing United States v. Oregon, 745 F.2d 550 (9th Cir.1984).

Sierra Club v. U.S. E.P.A., supra at p. 1481.

Without a doubt, Mineral County's motion under Rule 24, F.R.C.P. is timely, first and foremost, because Mineral County began the process for intervention as soon as the Commissioners learned of the litigation. Mineral County had no knowledge of the litigation until September 1, 1994, and has never had written notice by any of the other parties of this litigation (see, Declaration of Herman F. Staat already filed 10/24/94). The County has clearly acted immediately upon the information, once supplied them. The County's immediate actions could not be construed as dilatory or less than vigilant in protecting their rights. Rule 24, F.R.C.P., demands no more of a potential intervenor in the timely pursuit of a claim.

Furthermore, Mineral County seeks to intervene in these proceedings at a time that notice is being given to other parties that may wish to intervene. By November 25, 1994, the Tribe, Plaintiff-Intervenor, will give notice to all surface water diversion license holders of the Walker River, pursuant to order of

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the Court (see, May 23, 1994, Stipulation and Order for Enlargement of Time). After this Notice any certified holder may wish to intervene to protect his interest or water diversion. Mineral County's intervention at this time will not be any different than the other potential interventions that may join after this Court ordered notice.

Moreover, these proceedings have not progressed to an agreement on the merits or substance of the case. Neither actual diversions, the request by the Tribe for additional quantities, the unlawful conditions imposed upon the Walker River Irrigation District ("WRID") by the SWRCB, nor the change of diversion requested by WRID has been heard, nor has discovery been commenced by any of the parties. The preliminary stage in the proceedings also argues in favor of intervention. See, Mille Lacs Band of Indians v. State of Minn., 989 F.2d 994 (8th Cir. 1993).

No prejudice to other parties could possibly arise because of the intervention of Mineral County. Its presence will not cause to unravel a complex settlement since none has been completed and entered into by the parties. The parties will remain essentially in the same position as if Mineral County had intervened earlier. See, U.S. ex rel. McGough v. Covington Technologies, 967 F.2d 1391 (9th Cir. 1992).

Each element of the three-pronged timeliness test set forth in the Sierra Club case is manifestly satisfied, here. There is no plausible basis for denying the motion of Mineral County to intervene because it is delinquent. Having engaged counsel, approved its intervention and voted to go forward to protect the interests of Walker Lake within less than 60 days from the date Mineral County learned of this

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litigation, Mineral County has been diligent. For these reasons, the intervention of Mineral County is timely and should be allowed by this Court.

B. MINERAL COUNTY HAS A SIGNIFICANT PROTECTABLE INTEREST IN THE PRESERVATION OF WALKER LAKE

1. Mineral County Has Water Rights in the Surplus Flows of the Walker River That Directly Feed the Waters of Walker Lake and, Moreover, Mineral County Asserts the Right to Minimum Sustainable Levels in Walker Lake on Behalf of the Public.

Mineral County is the only party representing the preservation of Walker Lake. Nevada State Law recognizes that recreational purpose is a beneficial use, NRS 533.030(c). This recreational, beneficial use can be a right to flows in situ without the requirement of diversion from the source. A similar fact situation arose in Humbolt County, Nevada:

> The Blue Lake application is for a water grant to waters of Blue Lake in situ, in place as a natural body of water. The BLM manages the land surrounding the lake and desires this water right to assure maintenance of Blue Lake for public recreation and fishery purposes.

State v. Morros, 766 P.2d 263, 265 (Nev. 1988).

The State of Nevada recognizes the recreational purpose and the in situ appropriation. Pursuant to this recognition, the State of Nevada issued a certificate for 795.2 Cfs to the Nevada Department of Fish and Game (now the Department of Wildlife) on December 28, 1983, for Walker Lake. The Department

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of Wildlife holds the certificate in trust for the benefit of Mineral County. (See, Exhibit "A" to Memorandum of Points and Authorites filed 10/24/94.) This trust relationship where a state agency holds rights for the benefit of the public has been recognized by other states. Permit No. 36-7200 In the Name of the Idaho Department of Parks & Recreation, 828 P.2d 848 (Id. 1992).

The Court has precedent to determine such matters of a "water duty for public recreation."

> The court need not allow the issue to lie unresolved; if the United States (in the instant case, the State of Nevada) is unwilling to represent the public, anyone with standing who can adequately represent the public's interest may be allowed to do so. [Parenthetical added.] United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 860 (9th Cir. 1983).

The State of Nevada has failed to come forward to enforce its public trust responsibilities to preserve minimum flows to the lake and failed to protect the water quality of Walker Lake. Mineral County will allege that it is the only party representing such responsibilities.

Mineral County will also allege that the Court should review the allocation in the C-125 decree of 1936 to determine if the waters of the Walker River are being put to beneficial use.

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The Court must determine beneficial use from the circumstances before it. United States v. Alpine Land and Reservoir Co., supra. Beneficial use is a dynamic concept and should not allow waste. Circumstances in 1994 are different than in 1936 when the Walker River Decree was last considered; different, in that society has determined that preservation of our natural waterways are critical to environmental balance and ecological survival. A summary of the conflict between in-stream flow preservation and appropriative rights is found in Johnson, "Reallocation" Volume 2, Chapter 16, Water and Water Rights.

A reallocation of the waters of Walker River is required to preserve the public's right to the natural body of water existing in Mineral County known as Walker Lake. The State holds land in its sovereign capacity in trust for the public purposes of navigation and fisheries. Any conveyance of trust property to a private individual, as in the case of a certificate of appropriation for waters, is subject to the public trust and the State remains trustee with the duty to supervise the trust. See, National Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (Cal. 1983). Mineral County requests intervention to insure that the State of Nevada performs its duties and obligations as trustee of the waters of Walker Lake for the benefit of the public.

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2. Mineral County Has a Great Financial Stake in the Property Values of Mineral County's Taxable Private Property, Which Are Inexorably Attached to the Presence of Walker Lake and Would, Likewise, Be Devalued by Loss of the Lake.

Mineral County has the right to tax the property of the private owners situated in and around Walker Lake since it is totally located within the political and legal boundaries of the County. N.R.S., Section 244.150. Any devaluation of the property values in Mineral County because of loss of Walker Lake will substantially reduce the budget of Mineral County which is dependent upon property tax revenues (see, Declaration of Marlene Bunch, hereinafter referred to as "Declaration of Bunch," already filed 10/25/94). "These taxing and regulatory interests are inherently ripe for protection by intervention as a practical means for a political subdivision to protect its financial and administrative affairs. Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. U.S., 921 F.2d 924, 928 (9th Cir.1990). Mineral County will allege the substantial loss of value of property within its borders if Walker Lake ceases to be a viable fishery.

3. Mineral County Has a Significant Protectable Interest in the Recreation, Wildlife Habitat, Aesthetic and Other Economic Concerns That Support Mineral County Because of the Presence of Walker Lake.

Mineral County has participated in many federal and state actions to preserve and enhance the Lake. (See, Exhibit "B" to Memorandum of Points and

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Authorities filed 10/25/94.) Mineral County has always been very interested and active in Lake matters (see, Declaration of Buchanan). Likewise, the federal courts have recognized these are significant protectable interests justifying the right to intervene by other public agencies that have actively participated in the issue that will be affected by the litigation. See, Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983).

Mineral County has a more critical concern than a public advocacy group as was the intervenor in Sagebrush Rebellion in protecting the interests of its citizens and the users of Walker Lake. A substantial percentage of Mineral County's businesses is related to Walker Lake and its available recreation (see, Declaration of Louis Thompson (hereinafter referred to as "Declaration of Thompson") already filed 10/25/94). Significant decreases in the revenues to these businesses have been realized already because of the damage to the Lake by the loss of flows into the Lake from the Walker River. (See, Declarations of Bunch and Thompson.)

The loss of flows of the Walker River into Walker Lake has so degraded the quality of the water of the Lake that fish no longer flourish and other wildlife have disdained to make Walker Lake their home or transient stop in migratory journeys. Besides the inability for the businesses to survive because of the loss of fishing in the Lake, other tourists are lost because the pathetic condition of reduced Lake levels does not entice those who came before to witness the pristine beauty of the Lake and the abundance of waterfowl and other wildlife present. Tourists do not

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come to witness the death of a Lake.

Only Mineral County is so affected by the loss of tourism and the presence of a naturally occurring desert lake with the exceptional beauty of the water itself and the incumbent wildlife populations. The loss of the familiar view of the Lake to a community that has little else in its vista cannot be measured in property terms alone, but must also be measured in aesthetic, environmental, and historical terms. Flows from Walker River are the only means by which Walker Lake can be rejuvenated and maintained. (See, Declaration of Buchanan.)

> "[T]he determination of whether an interest is sufficient for Rule 24(a)(2) purposes is colored to some extent by the third factor-whether disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest." Conservation Law Foundation v. Mosbacher, 966 F.2d 39 (1st Cir. 1992).

The U.S. Supreme Court allowed the intervention (certain Indian tribes who had claims in the Corado R. adjudication) on similar grounds as Mineral County alleges herein. "Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged." Arizona v. California, 460 U.S. 605, 615, 103 S.Ct. 1382, 1389 (1983). Mineral County is not a party to the original decree nor had it suffered any injury at that point in history regarding degradation of the Lake. Mineral County will contend the original decree omitted reference to Walker Lake. Mineral County will ask this Court to interpret and modify the Decree, if necessary, in light of Mineral County's substantial injury. Mineral County does not

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believe that the original decree gave the upstream users the right to de-water Walker Lake. (See, Nebraska v. Wyoming, 113 S.Ct. 1689 (1993).

One of the allegations of the Mineral County position is that the waters of Walker River are allocated beyond the capacity of the River, leaving no natural flows left to enter the Lake. The instant litigation is where the issues of allocation will be adjudicated. Mineral County must be allowed to intervene in order to preserve and protect Walker Lake in the forum where reallocations can and will be determined, the instant case.

C. MINERAL COUNTY IS NOT ADEQUATELY REPRESENTED BY ANY OF THE PRESENT PARTIES TO THE LITIGATION

Mineral County may very well have interests coincident with some of the parties to the present litigation to contest the right of the SWRCB to entrap flows to protect the man-made fishery of Bridgeport Reservoir at the cost of the natural fishery in Walker Lake. But no other party to this litigation has expressed even a casual reference to the protection of the levels of Walker Lake.

> Whether a party may intervene turns, in part, upon a comparison of the adequacy of representation primarily by comparing the interests of the proposed intervenor with the current parties to the action. Sierra Club v. Robertson, 960 F.2d 83, 86 (8th Cir. 1992). To satisfy the adequacy of representation test, an intervenor . . . need only show that representation may be inadequate, not that it is inadequate. Conservation Law Foundation v. Mosbacher, 966 F.2d 39 (1st Cir. 1992). (Emphasis added.)

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The State of Nevada is required by its very position to protect all of its citizens. The interests of its citizens are not necessarily identical and may become competing. Some residents may not favor the preservation of Walker Lake, if other, more immediate, pronounced, or self-serving interests are at stake. The burden of showing inadequate representation by a political sub-entity of a State when that State is a party also, may be more than minimal; however, Mineral County can more than show why its interests differ from all of the interests that the State of Nevada must represent upstream. See, Environmental Defense Fund v. Higginson, 631 F.2d 738 (D.C. Cir. 1979). The State must protect its own decisions regarding the appropriation of the waters of the Walker River which may in large part have deprived Walker Lake of its critical recharge. Further the State of Nevada only listed its concern for protection of the Mason Valley Wildlife Preserve as any specific reason for its intervention. (See, State of Nevada Motion for Intervention, Page 3, Lines 12-15.) Walker Lake, indeed, has no protector but Mineral County.

D. MINERAL COUNTY HAS NO OTHER MEANS TO PROTECT ITS INTEREST IN WALKER LAKE THAN TO ENTER THIS PROCEEDING AND PRAY THAT THIS COURT REALLOCATE THE WATERS OF THE WALKER RIVER

The Walker River is a stream the headwaters of which rise on the eastern slopes of the Sierra Nevada mountains in California. United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939). The River flows through lands that are arid, mostly rough or mountainous into the Walker River Paiute Reservation for a distance

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of approximately thirty miles where the stream empties into Walker Lake. See, United States v. Walker River Irr. Dist., supra at p. 335. The River has been the subject of litigation culminating in the Decree of C-125 entered on April 14, 1936, which is the basis for the continuing jurisdiction of this Court and the instant litigation. In order for Mineral County to claim minimum flows and in situ rights for the Lake, Mineral County must be a party to this action. An adjudication is a quiet title action in equity for the purpose of settling all claims to the waters of the watercourse that is the subject of the adjudication. (United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1308 (9th Cir. 1981), United States v. Alpine Land and Reservoirs Co., supra. When the matters brought before this Court are determined and the waters of the Walker River reallocated accordingly, the fate of Walker Lake will be in the balance.

E. IN THE EVENT THAT THIS COURT DOES NOT ALLOW MINERAL COUNTY INTERVENTION AS OF RIGHT, IN THE ALTERNATIVE MINERAL COUNTY ASKS FOR PERMISSIVE INTERVENTION PURSUANT TO F.R.C.P. 24(b)(2)

1. Mineral County Meets Each and Every Element of Permissive Intervention Pursuant to F.R.C.P. 24(b)(2).[2]

Permissive intervention is allowed a party that has a claim that involves a question of law or fact that is common to the main action. In both the

[2]Rule 24. Intervention (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . .(2) when an applicant's claim or defense and the main action have a question of law or fact in common.)

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claims presently filed, Mineral County's request for flows to Walker Lake will impact the outcome and the considerations. Because Walker Lake is located in Mineral County and comprises such an integral part of the economy and well-being of Mineral County, the County Commission considered it part of their public duty to protect and preserve the Lake as a healthy, viable recreational asset and fishery.

> It is a living tenet of our society and not mere rhetoric that a public office is a public trust. While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation. Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Dist. 1967).

2. The Intervention of Mineral County at this Stage of These Proceedings Will Not Unduly Delay the Litigation And, Moreover, Will Significantly Contribute to the Underlying Factual and Legal Issues.

No party to this litigation presently can offer the intimate knowledge of the Lake that Mineral County can. Mineral County has accumulated as much information as it can find regarding the scientific studies involving the biology, geology, hydrology and history of Walker Lake. Starting when the Bureau of Land Management indicated an interest in funding the recreational aspects of the Lake, and particularly through the last years when the loss of the Lake has been imminent, Mineral County has requested assistance in analysis from United States Senator Harry Reid, the Office of Technology Assistance, the University of Nevada at Reno, the State of Nevada Division of Wildlife, the Bureau of Land Management, the United

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States Geologic Survey and other engineers and other governmental and non-profit agencies. See, Natural Resources Defense Council v. Tennessee Valley Authority, 340 F.Supp. 400 (S.D.N.Y.1971); and Levin v. Ruby Trading Corporation, 333 F.2d 592 (2d Cir. 1964). In those cases the Court gave weight to the knowledge and expertise of those seeking intervention in its granting of their motion to intervene.

> Other factors to be considered in connection with permissive intervention are: the nature and extent of the intervenor's interest, whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, whether the applicant will benefit by the intervention, whether the intervenor's interests are adequately represented by the other parties, and whether the intervenors will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. State of Utah v. Kennecott Corp., 801 F.Supp. 553, 572 (D.Utah 1992).

As discussed heretofore, granting intervention to Mineral County will in no way delay these proceedings. Granting intervention to Mineral County will add an aspect to the adjudication of the waters of Walker River that has been neglected to this point in history and is a very necessary consideration to save Walker Lake.

III.

CONCLUSION

As stated hereinabove, Mineral County seeks intervention as of right or, in the alternative, as permissive intervention pursuant to Rule 24, F.R.C.P. For the

foregoing reasons, Mineral County respectfully requests that the Court grant its motion for intervention.

DATED this 10th day of March, 1995.

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CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of the Law Office of ZEH, SPOO & HEARNE, and that on this date I caused to be mailed a copy of the attached **AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MINERAL COUNTY'S AMENDED COMPLAINT IN INTERVENTION,** with postage fully prepaid to:

See attached Service List

DATED this 10th day of March, 1995.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-C-ECR MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES; AFFIDAVIT OF KELVIN J. BUCHANAN, P.E.; AND AFFIDAVIT OF GARY L. VINYARD, Ph.D

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Illinois Central Railroad v. Illinois
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People of the State of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency
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Grayson, *The Desert's Past*, Smithsonian Institutuion, 1993, p. 96 . . . . . 5, 7

Headley, *Economic Study of Walker River Irrigation District*, October 1933 [available at UNR library] 6

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Sax, Joseph L., *The Limits of Private Rights in Public Waters*, 19 Environmental Law 473 (1989) 14

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NOW COMES, Plaintiff, MINERAL COUNTY, by and through its attorneys, Zeh, Spoo and Hearne, and hereby moves the Court for a preliminary injunction, under the authority of FRCP 65(a), enjoining all Defendant users of the Walker River upstream of Walker Lake, and all those in active concert or participation with them, from retaining and using the entirety of the flows from the Walker River and to allow, specifically, approximately 260,000 acre feet of Walker River flows to reach the Walker Lake at its inlet to raise the Lake to 3,946 feet above mean sea level in calendar year 1995 and to allow, specifically, approximately 240,000 acre feet of Walker River flows to reach the Walker Lake at its inlet to raise the Lake to 3,950 feet above mean sea level, and, finally, to allow, specifically, approximately 117,000 acre feet for each year thereafter so that Walker Lake will remain at 3,950 feet above mean sea level until a final decree is entered by the Court in the present adjudication, C-125.

Unless Defendants are restrained and enjoined by order of this Court, Plaintiff will suffer immediate and irreparable injury, loss, and damage in that the fishery at Walker Lake will cease to exist without ability to rejuvenate, as more fully described and set forth in the Affidavits of Herman Statt, Marlene Bunch, and Louis Thompson previously filed with the Motion to Intervene dated October 25, 1994, and this Motion for Preliminary Injunction and accompanying Affidavits of Kelvin Buchanan and

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Dr. Gary Vinyard, attached hereto. This motion is made on the additional ground that Plaintiff has no adequate remedy at law.

DATED this 10th day of March, 1995.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

> In April or May, the Spring trout-run up the Agai Hoop (Trout River) began. People from throughout the region gathered at the mouth of the river to fish . . .. the fish runs were occasions for festivals . . . . [1]

Since the memory of man, the history of Walker Lake has always included the fishery. Walker Lake has been, until very recently, a destination for those in search of trophy Cutthroat Trout. Today the levels are so low in the Walker Lake that the fishery will be lost if immediate action is not taken.

The essence of this dispute over Walker Lake is whether a lake with its incumbent economic benefits and environmental resources can demand water based on the fact that it exists as a natural resource preserved for the public versus whether irrigation with its incumbent economic benefits and private property rights can continue to exist based upon a law that was adopted over a century ago when agricultural and mining development was the only goal. Can both interests coexist? Not as they are presently managed on the Walker River system. The basic fact is either upstream uses change or Walker Lake ceases to exist as a fishery.

While these timely issues presented in this case (*i.e.*, whether C-125 has been properly enforced, whether irrigation conducted by 1936 methods is still beneficial

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[1]Johnson, *Walker River Paiutes, A Tribal History,* Walker River Paiute Tribe, 1975, p 9.

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use, and whether the public trust allows the Court to allocate in-stream flows to Walker Lake) wait to be resolved, Walker Lake will become a moot issue. Walker Lake's existence as a viable fishery is at critical mass. Walker Lake cannot await the outcome of a decade-long adjudication.

The Nevada Department of Wildlife has already forecast Walker Lake's fate. Water to raise Walker Lake's levels is desperately needed or, according to nearly every expert's opinion, within one year fish will not be able to survive. Just because snowpack is above normal in 1995 provides no assurance that Walker Lake will receive one drop of water. Without intervention from this Court, the 1995 snowpack will be used to recharge groundwater reserves in Mason Valley, and replenish Bridgeport, Topaz, and Weber reservoirs, but none will reach Walker Lake just as has occurred since 1987.

Mineral County prays this Court to preserve Walker Lake, a natural resource and remnant from the Pleistocene era. It is part of our history, part of our environmental resources, and the mainstay of Mineral County's economy. Without immediate relief, it will no longer be a viable issue in this case.

STATEMENT OF FACTS

The level of Walker Lake is presently 3,941.2 feet above sea level. The Total Dissolved Solids are approximately 14,000 parts per million (ppm). This is approaching the level at which tui chub eggs die (approximately 15,500 ppm) and close to the level where trout will die (approximately 16,000 ppm). This dramatic

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scenario is being played out at Walker Lake as evidenced by the 93.3% of stocked fish sampled, which died in 1994. (See, Affidavit of Kelvin J. Buchanan attached.)

While some geologists debate whether or not Walker Lake did actually dry out nearly 14,000 years ago,[2] nonetheless if it did, fluvial circumstances existed immediately after that time to allow a rejuvenation of the Lake and it's fishery. Human intervention has since occurred that severs that inherent rejuvenation character of the River from the Lake. Topaz and Weber Reservoirs now exist to impede the ability of fish to reach Walker Lake to reestablish colonies. If Walker Lake ceases to be a viable fishery, no biologist can guarantee that it can ever be rejuvenated. (See, Affidavit of G. Vinyard attached.)

No meaningful flows from Walker River have reached to Walker Lake since 1987. (See, Affidavit of Kelvin J. Buchanan attached.) Upstream are three man-made reservoirs, one of which is required by the State of California to retain minimum levels, an allocation not contemplated by C-125. Good and efficient water management is hampered by present irrigation practices and facilities and Walker River Irrigation District (hereinafter "WRID") has not implemented recommended improvement projects. (U.S. Department of Agriculture, *Final Watershed Plan and*

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[2] There is some evidence that the Walker Lake basin held a deep lake between at least 32,000 and 25,000 years ago, and even better evidence that Walker Lake was not a lake at all between about 22,000 and 14,000 years ago, when the basin was occupied by a salt marsh. During this interval, it appears that the Walker river was flowing not into Walker Lake, but instead north into the Carson Basin, where a sizeable lake then existed....reconstruction has Lake Lahontan so high at 14,000 years ago that it incorporated the Walker Lake Basin. Grayson, *The Desert's Past*, Smithsonian Institution, 1993, p. 96.

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Environmental Impact Statement, East Walker Watershed, August 1989.) No one would contemplate that irrigation practices would not substantially improve since 1936. Many more acres are being irrigated with the granted storage rights than were contemplated at the time of the earlier decree in C-125. (Headley, *Economic Study of Walker River Irrigation District*, October 1933 [available at UNR library]). The Walker River Paiute Tribe (hereinafter "Tribe") has constructed a non-permitted reservoir not contemplated in C-125 that inhibits any remaining waters from flowing through the reservation to Walker Lake.[3]

LEGAL ARGUMENT

I. Mineral County Can Prove That Grave Irreparable Harm, the Loss of Walker Lake as a Viable Fishery, Will Occur Unless Preliminary Injunctive Relief Is Granted.

A. Without a Court Ordered Infusion of Water from the Walker River, Walker Lake Can Not Survive Because Walker River Is the Major Source of Water for Walker Lake.

The United States Court of Appeals, Ninth Circuit has adopted a standard employed in deciding whether to grant a preliminary injunction. These two tests for issuance of a preliminary injunction "are not separate, but rather represent the outer reaches of a single continuum." Los Angeles Memorial Coliseum v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980).

[3] Mineral County makes no allegation that the Tribe has retained more than its entitlement of reserved water rights.

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> At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).

The retention of flows upstream have deprived Walker Lake of substantially all of the rejuvenating waters from Walker River. Walker Lake has no other source of sufficient quantity to replenish it.[4] Walker Lake, presently at a critical level of 3,941.2 feet above sea level, will suffer irreparable harm unless this Court grants Mineral County a preliminary injunction on behalf of Walker Lake mandating that a duty of approximately 260,000 acre feet reach the Lake in 1995 to bring the Lake to 3,946 feet above mean sea level, and approximately 240,000 acre feet in 1996 to bring the Lake to 3,950 feet above mean sea level, the 1992 level, and finally a duty of 117,000 acre feet for each year thereafter so that Walker Lake will survive as a fishery until the reallocation of the waters of Walker River are completed. (See, Affidavit of Kelvin J. Buchanan attached.)

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of

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[4] As I have mentioned, Walker River provides 83% of the inflow to Walker Lake. Without that source, Walker Lake would be a puddle.
Grayson, *The Desert's Past, supra,* p. 96.

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harms will usually favor the issuance of an injunction to protect the environment. Amoco Prod. v. Village of Gambell, Alaska, 480 U.S. 531, 545, 107 S.Ct. 1396, 1404, 94 L.Ed.2d 542 (1987); see, also, Seattle Audobon Society v. Mosley, 798 F.Supp. 1484, 1491 (W.D. Wash. 1992) and Public Interest Research Group of New Jersey v. Star Enterprise, 71 F.Supp. 655 (D.N.J. 1991).

The critical nature of the levels of Walker Lake and its dependence on the Walker River provide overwhelming evidence of irreparable harm. The length of the adjudication itself, now in its fourth year, is a factor that must also be considered. Nothing would be more convenient to the upstream users than a delay until Walker Lake's fishery is gone and to thus eliminate Walker Lake as a potential party to any reallocation of the waters of Walker River.

Granting the preliminary injunction in this matter will keep the subject of the plaintiff's request "alive" until the Court has the opportunity to review important issues in Western water law that have and will continue to be reexamined based upon the necessary adjustment of an old legal system to changing public pressures.[5]

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[5] Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine,* 19 Environmental Law 573, Summer 1989.

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> Thus, this Court must choose the course of action that will minimize the costs of being mistaken. DiDamenico v. Employers Cooperative Industry Trust, 676 F.Supp. 903, 907 (N.D.Ind. 19877).

Allowing Walker Lake to survive is the only means to keep these important issues ripe and for the Court's decision to be meaningful.

> In the present matter, it is clear beyond peradventure of doubt that plaintiff has established that he will suffer irreparable harm absent preliminary relief. This is not a case where plaintiff can wait until after trial for a remedy. Simply put, absent some form of preliminary relief plaintiff runs the real risk of dying. DiDomenico v. Employers Cooperative Industry Trust, supra, p. 407.

Just as the patient in DiDomenico, supra, a judgment in favor of Mineral County at the close of the adjudication would be hollow if the Walker Lake fishery was already lost.

Not only would irreparable harm be suffered by the loss of such a historic and scenic remnant of the ice age gracing the Walker Lake Basin, but Mineral County, plaintiff herein, would lose fifty (50) percent of its economic base. (See, "Statement of Bunch", Mineral County's Motion to Intervene, filed 10/25/94.)

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Under some circumstances, loss of business threatening the very existence of an enterprise constitutes irreparable injury sufficient to justify the issuance of a preliminary injunction. In Doran v. Salem Inn, Inc., 422 U.S. 922,932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), the (U.S. Supreme) Court concluded that the district court had not abused its discretion in granting preliminary injunctive relief: "As required to support such relief, these respondents alleged... that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly, the latter type of injury meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless. Assoc. Prod. Company v. City of Independence, Missouri, 648 F.Supp. 1255, 1258 (W.D.Mo. 1986).

Mineral County has a small population, 15,000 residents, and an even smaller economic base. (See, Affidavits of Marlene Bunch and Louis Thompson, in Mineral County's Motion for Intervention, filed 10/25/94). With the considerable downsizing of the Hawthorne depot, Walker Lake has indeed become the mainstay of the economy of the citizens that Mineral County represents. With little

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else to develop, Mineral County must have a viable fishery at Walker Lake or suffer serious economic consequences to the County government.

B. Mineral County Raises Serious Legal Questions and the Balance of Hardships Tips Sharply in Favor of Granting a Preliminary Mandatory Injunction.

Mineral County has shown the requisite irreparable harm and:

> At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised so that the balance of hardships tips sharply in its favor . . . .
>
> Lopez v. Heckler, supra, p. 1435. (Emphasis added.)

Serious legal questions challenge the strict application of prior appropriation in the allocation of water rights adopted in most Western States. (Beck, *Waters and Water Rights,* Vol. 2, The Miche Co., 1991). The basis of prior appropriation is to divert the water and apply it to its most beneficial use. NRS 533.380 Because priorities in national policy in the latter half of the twentieth century have supported environmental protection and preservation of our natural resources, conflicts with traditional beneficial uses (i.e. agriculture, mining, municipal), of prior appropriation are widespread.

Those challenging the private rights of appropriation have first looked to the nature of the water right. Since a party cannot possess certain

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identifiable water, the term "usufructuary"[6] best describes the right incumbent to a water certificate. The right to use water means it is a usufructuary right rather than a possessory right. However, for example, no one has a right to use water and return it so polluted as to cause a degradation to the environment. (33 USC, Section 1251, et. seq. commonly referred to as the Clean Water Act, which has been adopted by Nevada as NRS, Section 445.131 et. seq.) Just as the deposition of foreign and toxic materials causes pollution to the water, so also the excessive withdrawal of natural flows significantly diminishes the quality of the water. Mineral County will vigorously argue that but for the excessive withdrawals upstream, Walker Lake would be a viable fishery into the future.

Recently, the United States Supreme Court found that minimum stream flows could be required in order to enforce a state water quality standard. PUD No. 1 of Jefferson County and City of Tacoma v. Washington Dept. of Ecology, 114 S.Ct. 1900 (1994). This case officially memorializes the significant link between water quality as it is affected by water quantity. This concept of protecting water quality by insuring sufficient quantity is elemental to present interpretations of the public trust doctrine as it has been judicially imposed in favor of minimum flows. Some Western States have codified public trust doctrine principles or, at least

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[6]Usufructuary - "It is laid down by our law writers, that the right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. (Eddy v. Simpson (1853) 3 Cal. 249, 252) Hence, the cases do not speak of the ownership of water, but only of the right to its use. (Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 554-555 [81 P2d. 553] [cites]. United States v. State Water Resources Control Board, 182 Cal.App.3d 82, 227 Cal.Rptr. 161, 168 (Cal.App. 1 Dist. 1986)

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expanded "beneficial use" definitions to include recreation, preservation of wildlife and minimum stream flows.[7]

One of the seminal cases upon which the public trust doctrine has developed stated that the beds of navigable water are:

> . . . held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

Likewise, Nevada has recognized the public's interest in water resources, "The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public." Bergman v. Kearney, 241 F.884, 893 (D.Nev.1917); NRS, 533.025.

This concept of the public right to preservation of water resources has been expanded in many Western States as population and demands on water grew. Both the judiciary and state legislative bodies have turned to the public trust doctrine as protection for non-navigable streams and lakes as well. National Audubon Soc. v. Superior Court, 33 Ca.3d 419, 658 P.2d 709, 189 Cal.Rptr. 346 (Cal.App. 3

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[7] Cal.Water Code, Section 1243 (1971, 1989); Wash. Rev. Code Ann., Sections 90.22 and 90.54; Or. Rev. Stat., Section 537.332(2)(1987); Idaho Code, Section 36-1601(1977); NRS, Section 501.100(2) and 501.181(3)(c), 533.367.

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Dist.1981), cert. denied, 464 U.S. 977 (1983). See, also, Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1085 (Mont.1984), CWC Fisheries v. Bunker, 755 P.2d 1115 (Alaska 1988), Kootenai Envtl. Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1088 (1983).

> The problem is really quite simple, it does not require mastery of abstruse legal doctrines to appreciate what is going on. The heart of the matter is that public values have changed, and the use of water has reached some critical limits. One result is that we need to retrieve some water from traditional water users to sustain streams and lakes as natural systems and to protect water quality. Sax, Joseph L., *The Limits of Private Rights in Public Waters*, 19 Environmental Law 473 (1989).

Both States involved in the present adjudication have begun to temper the harsh rules of prior appropriation in recognition of their public trust responsibilities.

California:

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of appropriated water. In exercising its sovereign power to allocate water resources in the public

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interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. National Audubon Society v. Superior Court, supra, p. 447.

Nevada:

Nevada law recognizes the recreational value of wildlife, NRS 501.100(2) and the need to provide wildlife with water. See, NRS 501.181(3)(c), 533.367. State v. Morros, 766 P.2d 263, 268 (Nev. 1988).

In State v. Morros the court recognized the very heart of the public trust controversy - what is beneficial use.[8] The court found that an appropriation "for public recreation and fishery purposes" was a beneficial use. State v. Morros, supra, p. 265, 266. Beneficial use is the basis of perfection of a water right. NRS 533.360 The definition of beneficial use has evolved since prior appropriation was adopted. In earlier cases and statutes, beneficial use was more or less the diversion and application of water to agriculture, mining, industrial or municipal use.

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[8]One of the primary challenges to agricultural use as "beneficial use" is whether the challenges can prove that agricultural irrigation is "waste." This is one of the critical factors in U.S. v. Alpine Land and Reservoir Co., supra at p. 855, "the issue we review is whether the district court reached a correct determination of beneficial use as of 1980." The Court went on to refer to the agricultural use as "relatively inefficient." Mineral County will vigorously argue that improved irrigation technology is "beneficial use," not outdated, inefficient, and wasteful irrigation methods.

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The Court of Appeals, Ninth Circuit, determined that although beneficial use is mainly determined by State law, that beneficial use "expresses a dynamic concept, which is a variable according to circumstances," and that " a district court in a quiet title action should determine beneficial use on the best current evidence available." U.S. v. Alpine Land and Reservoir Co., 697 F2d. 851, 855 (9th Cir.1983).

The best evidence available to the court in the instant case is that beneficial use should include public trust concepts that would allow dedication of water to in-stream flows through Walker River to Walker Lake. Mineral County will be irreparably harmed by the loss of the Walker Lake fishery and that the legal issues are so persuasive that a preliminary mandatory injunction should be granted allowing a water duty in the Walker River in favor of Walker Lake. Mineral County seeks this injunction to preserve the corpus while the parties argue the benefits of imposing a public trust in favor of the Lake.

> For the purposes of injunctive relief "serious questions" refers to questions which cannot be resolved one way or the other at the hearing on the injunction.....Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits. (citing National Wildlife Fed'n v. Coston, 773 F.2d 1513, 1517 (9th Cir.1985). Republic of

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the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988).

Mineral County has a fair chance of success on the merits of a very complicated issue. (An issue not without successful precedent.) Mineral County has met its burden and shown serious threat of irreparable harm so that the hardship tips very sharply in favor of the grant of the preliminary injunction.

II. Mineral County Has Satisfied the Criteria for Grant of a Preliminary Mandatory Injunction and the Grant Is Necessary to Prevent Injury.

Mandatory injunctive relief is "an extraordinary remedy that should be granted only under compelling circumstances and in a limited manner to restore the status quo." Golden State Transit Corp. v. City of Los Angeles, 660 F.Supp. 571, 575, (C.D.Cal. 1987). Mineral County has shown the irreparable harm of the loss of flows to Walker Lake and the threat that the fishery may not be capable of rejuvenation.

> A mandatory injunction may be issued if the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant. United States v. Malibu Beach, Inc., 711 F.Supp. 1301, 1310 (D.N.J. 1989).

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The court in U.S. v. Malibu Beach, supra, granted a preliminary mandatory injunction because of "irreparable harm to the environment." Much like the circumstances in the instant case the court found that "equitable relief is appropriate here because there is no adequate remedy at law to compensate the public for the harm caused . . . ." U.S. v. Malibu Beach, Inc., supra, p. 1312, 1313.

The Court of Appeals, Ninth Circuit, has applied the standards for issuance of a preliminary injunction when the sensitive environment at Lake Tahoe was threatened. "The district court has greater power to fashion equitable relief in defense of the public interest than it has when only private interests are involved." People of the State of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F2d 1319, 1324 (9th Cir. 1985).

The harm to Mineral County far outweighs the harm to defendants. Without the flows to Walker Lake, the Lake will cease to be the long standing fishery it is noted to be. The Defendants on the other hand will merely have to release waters that otherwise would replenish groundwater in Mason Valley and increase storage levels in Bridgeport, Topaz and Weber man-made reservoirs to insure that in the event next year is a low precipitation year that extra water is available. (See particularly, Ex. F. of the Affidavit of K. Buchanan) Loss of insurance for future years is much less critical a burden to bear than the total loss of a substantial economic and environmental resource such as Walker Lake that has existed for a millennium.

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The Court has the power to fashion this equitable remedy. The Watermaster can be directed to release flows, a very simple action to administer with little monitoring by the Court and the public interest will be served.

WHEREFORE the above stated reasons Mineral County, plaintiff herein, requests that this Court issue a preliminary injunction that will allow flows to reach Walker Lake to raise the Lake to 1992 levels as set out more fully hereinabove.

DATED this 10th day of March, 1995.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-C-ECR **SECOND AFFIDAVIT OF KELVIN J. BUCHANAN, P.E.**

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Kelvin J. Buchanan, being duly sworn, hereby state that:

1. I am a Professional Geological Engineer registered in the State of Nevada. I have practiced in Nevada for twenty (20) years, have worked in groundwater related issues in Nevada and other states and have taken continuing education in groundwater and related subjects from time to time.

2. I have researched and compiled documents and papers authored by the U.S. Geological Survey (USGS), the Nevada Department of Wildlife (NDOW), the U.S.

Bureau of Reclamation, the Nevada State Engineers' office, the California Division of Water Resources and the U.S. Department of Agriculture, Soil Conservation Division. I have studied Federal Decree C-125, and prior decree 731 as well as reviewing scientific papers which include, but are not limited to, those authored by Alex Horne, limnologist and Mike Sevon, NDOW biologist. I have traversed the East and West Walker River systems from Upper and Lower Twin Lakes to Walker Lake. I have personal knowledge of the facts contained herein and, if called as a witness, I could testify competently hereto.

3. I have personally visited USGS gauge station sites on the Walker River system and the WRID reservoirs at Bridgeport and Topaz Lake at various times in 1994 and 1995 to familiarize myself with the visual appearance of what the reported volume of river flows at the time were. During a six (6) day period in February, 1995, three visits were made. The terminal gauging station on the Walker River is located at Wabuska, at the boundary of the Walker River Paiute Reservation. I was told (Sam Stegeman, Engineer, Walker River Paiute Tribe, personal communication) that a new gauge was being installed by the USGS on tribal land at the head of Weber Reservoir, but I have not seen it. I was also told by Mr. Stegeman that he had personally supervised the release of 5,100 acre feet of water from Weber Reservoir during November, 1993 and that to his knowledge, no river water other than this release, had to date made it to Walker Lake since 1987. Mr. Stegeman also indicated that unless he could be assured of sufficient deliveries of river water in 1995, he would be unlikely to release any water from Weber Reservoir to the Walker Lake.

4. I have personally observed and photographed irrigation (stock ditches) canals in Mason Valley flowing with water diverted from both the East and West Walker Rivers (Attachment C, Ditch Map, USDA). At least two (2) of the canals, the Greenwood and Hall ditches diverted from the East Walker, do not return to the river but terminate east and south of Yerington. A third canal, the Mickey, returns to the main Walker River channel south west of Yerington (Attachment D, Photographs). On February 2, 1995, I observed the Greenwood, Hall and Mickey Ditches running vigorously at a point near the

junction of Highway 208 and the East Walker River Road. I proceeded to follow the flow of Greenwood Ditch for approximately two miles. I observed that in addition to flowing alongside fallow fields, it also went through one small stockyard between the house and the barn. On a visit to the USDA Soil Conservation Service office in Yerington later that day, I was told that these stock ditches diverted water from the river and returned to the river (Dick Franklin, USDA Soil Conservation Service, personal communication).

On February 5, I observed that while the flow in the Mickey Ditch was not diminished, the flow to the Greenwood Ditch was diminished and the Hall Ditch had pools of standing water. On the same day (see Attachment D), I observed that diversion from the West Walker River were also occurring. The Lee-Sanders Ditch and the Tunnel Ditch had significant flows (see photographs) close to their diversion point where the West Walker River exits from Wilson Canyon. The Lee-Sanders Ditch does not return to the river system; the Tunnel Ditch crosses the south end of Mason Valley and is intercepted by the West Strosnider Ditch just before it reaches the East Walker River.

On February 7, 1995 I observed that the flow in both the Greenwood and Hall Ditches had ceased. Indeed, both ditch beds were bone dry including the section through the stock yard noted above. The Mickey , Lee - Sanders and Tunnel Ditches appeared to be contain about the same amount of water and were flowing at the same rate as on February 2, 1995. I could not discern any change in the flow of these ditches during this six day period.

Diversions of river water which do not return to the river not only serve to deprive the river of stream flow, but will augment the underlying ground water table where these flows occur. Multitude diversions from a river channel, some of which do not return to the river, create a situation analogous to a "braided stream" where groundwater capture, evaporation and phreatophyte growth rob the river of its natural flow. Unless there is equilibrium in the system, surface water will be subject to groundwater capture. Because of significant groundwater pumping over the last eight (8) drought years, no such equilibrium exists. I have been unable to find any mention of specific diversion from the

river to individual ditches, other than the general term "stock ditches", that apply from C-125 or 731. There does not appear to be a minimum or maximum amount of water that flows in these ditches or what irrigation ditches are also considered stock ditches. I have no idea why the Hall and Greenwood Ditches should be flowing and then suddenly cease to flow in early February. The livestock I observed still needed water.

I conclude that, notwithstanding the purpose of irrigation ditches flowing during the winter months, that water from these ditches, and especially no-return ditches, rob the river of its' natural flow and augment the groundwater table to the ultimate detriment of Walker Lake.

5. I concur with the *Office of Assessment Technology Memorandum, August 1993,* that the diversions in the Walker River Irrigation District (WRID) source areas are not technically efficient and that irrigation ditches should be lined with impervious material to prevent leakage. Despite this assessment, WRID has this year allowed to lapse, a matching funds project authored by the USDA Soil Conservation Service, which would have significantly improved the delivery system of irrigation water (Mark Twyeffort, USDA Soil Conservation Service, personal communication).

6. I concur with the finding of the report, *Walker River Basin Water Rights Model, Nevada Department of Conservation and Resources, June 1993,* that the readings derived for the inflow into the Walker Lake from the Walker River represent 84% of the lake's recharge during the period 1961-1990 and that if the lake continues to receive less than 84% of this recharge from the Walker River, all fish life in the lake will be poisoned by the high levels of total dissolved solids. I also concur with data collected by NDOW that this level of toxicity is imminent and that the level of Total Dissolved Solids (TDS) has reached of 14,000 parts per million (ppm). (see Attachment E, graphics derived from NDOW and personal communication, John Elliot, NDOW). The level of the lake has dropped since this report was authored to a level of 3941.2 feet above sea level in February of 1995. The average amount of water the lake received during the period 1961-1990 was 103,000 acre feet, which slowed the overall fall of the lake level, but did not halt it. To

maintain the Walker Lake at its present level, the Lake requires an average of 117,000 acre feet of water per annum to counteract yearly evaporation. To reduce the level of TDS to approximately 13,000 ppm TDS, the lake would have to rise about 15 feet to a level of 3,955 feet (see Attachment E). The amount of additional acre feet of water the Lake would have to receive in 1995 to bring the Lake to this level from 3941.2 feet is 495,000 acre feet. The total amount of water required to bring the Lake to this level by December 1995 would 612,000 acre feet. Only in the flood year of 1983 did the amount of water entering the Walker Lake from the Walker River approach this amount.

7. The Walker River has lost a number of gauge stations over the past 20 years through deactivation caused by lack of funding and additionally, there has never been a gauge station within 10 miles of the delta of the Walker Lake (personal communication, Jim Thomas, USGS). It has and will continue to be, very difficult if not impossible, to ascertain the amount of water that reaches the Lake on a yearly basis without adequate gauges. Most scientists agree that rather on relying on a variable flow which is difficult to measure, a minimum guaranteed level such as has been worked out for Mono Lake in California would be more practical to preserve Walker Lakes' viability (personal communication, Gary L. Vinyard, University of Nevada). If the guaranteed level of the Lake were brought back to 1986 levels, it could result in not only a thriving fishery, but in a return of the power boat races which brought tourist revenue to Mineral County until they were canceled three years ago because of high alkalinity in the Lake (personal communication, Lou Thompson, Walker Lake Working Group).

8. Storage rights for water on the West Walker River were originally assigned under permit number 5528 on June 6, 1919. Total acreage allowed to be irrigated under this permit is 30,000 acres. Total acre feet allowed stored is 89,612 acre feet. The permit was not issued until April 27, 1971. Certificate number 8859 proving beneficial use was issued on October 15, 1976. Water is controlled and distributed by the Walker River Irrigation District (personal communication, Steve Walmsley, Office of the State Engineer).

Most irrigated land in northwestern Nevada is granted and needs at least 4 acre feet per acre of water rights to grow crops. It is possible to irrigate with 3.5 acre feet of water per acre as is being done in Fallon, Nevada using drip irrigation (personal communication, Mark Twyeffort) on an experimental basis. 89,612 acre feet of water could effectively irrigate 22,400 acres, but could not effectively irrigate 30,000 acres because this would be less than 3 acre feet of water per acre, an amount that is not sufficient to economically irrigate cropland.

EXECUTED this 8 day of March, 1995, at Reno, Nevada.

KELVIN J. BUCHANAN, P.E.

SUBSCRIBED and SWORN to before me this 8th day of March, 1995

MARILYN MITCHELL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES OCT. 1, 1998

Notary Public in and for said County and State

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	IN EQUITY NO. C-125-C-ECR **AFFIDAVIT OF GARY L. VINYARD, Ph.D**

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, Dr. Gary L. Vinyard, being duly sworn, hereby state that:

/ / /

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1. I have a doctorate in Systematics and Ecology. I have taught sixteen (16) years at the University of Nevada, Reno. My special interests and research have been Aquatic Ecology.

2. My knowledge of Walker Lake includes study and personal observation. From this information I have formulated the following opinions. I have personal knowledge of the facts stated herein and, if called as a witness, I could testify competently thereto.

3. Walker Lake is a naturally occurring section of the Lake Lahontan that existed in Pliestoscene age. The only other remnants of Lake Lahontan are Pyramid Lake and Honey Lake.

4. Desert lakes have a very tenuous existence because of the vagaries of climactic change and development. If lake levels drop, the total dissolved solids increase significantly causing high concentrations of alkalinity and salts in the water. Once high concentrations of dissolved materials reach certain levels, all vertebrate fish life ceases to exist. Although the Pyramid cui-cui, Tahoe sucker, tui chub and cuthroat trout are species that tolerate higher levels of alkalinity/salinity, even these species will perish. An indication that this is already occurring in Walker Lake is the reduction in average fish size and longevity.

5. Walker Lake will shift from a vertebrate dominated community to an invertebrate dominated community. This means that fish will not continue to inhabit the Lake and it will become dominated by certain invertebrates, such as fairy shrimp, tadpole shrimp and clam shrimp.

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6. Fish are a major food source for numerous bird species, including loons, pelicans, swans, geese, grebs, ducks, etc. These migratory water fowl will cease to visit the Lake and will be forced to find other sustenance. Because these birds utilize Walker Lake as an important rest stop during migration, loss of the fishery resource could adversely affect these bird populations.

7. Hawthorne has an annual loon festival to celebrate the arrival of the loons in late winter.

8. It is widely believed that Walker Lake may have totally dried up nearly 6,000 years ago because the Walker River changed course for a time and terminated in Carson sink rather than in Walker Lake. Recolonization of Walker Lake vertebrate population was possible after this time because the Walker River, continued to retain viable fish populations necessary for recolonization. These fish then regained access to Walker Lake when the river returned to its' present channel. Recolonization for fluvial populations is no longer possible because of changes which have occurred in the lower Walker River, including construction of Weber Reservoir, dewatering of the river between Weber Reservoir and Walker Lake and alterations of fish populations in the river.

9. If fish populations disappear from the Lake, it will take several years to reestablish populations of tui chub, Tahoe suckers and cuthroat trout in the Lake. Once the existing fish-dominated community in Walker Lake is lost, reestablishment of viable fish populations capable of sustaining a recreational fishery would be dependent on several factors. First, physical and chemical conditions in the Lake

would need to be restored. Subsequently, viable populations of fishes and their food resources would need to be reestablished. No entity that I am aware of supplies tui chub or Tahoe suckers for stocking purposes at this time.

10. There are no comparable natural resources equivalent to Walker and Pyramid Lakes. These are geologic remnants of a prehistoric lake that existed over this area. Once lost, no biologist could guarantee that this Lake can be returned to its present state.

EXECUTED this 6 day of March, 1995, at Reno, Nevada.

GARY L. VINYARD, Ph.D

SUBSCRIBED and SWORN to before before me this 6th day of March, 1995

Notary Public in and for said County and State

MARILYN MITCHELL
Notary Public - State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES OCT. 1, 1998

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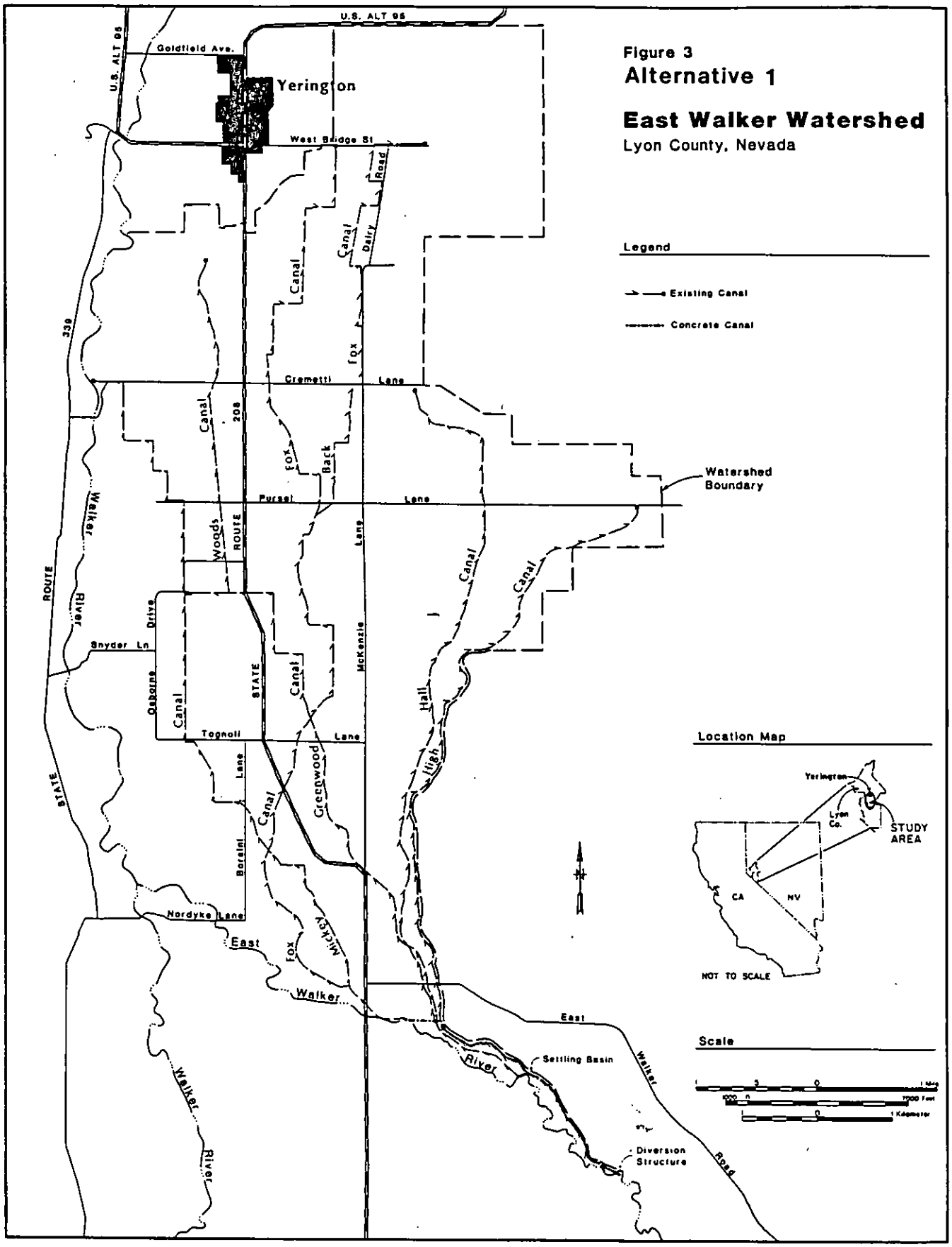


Figure 3
Alternative 1
East Walker Watershed
Lyon County, Nevada
Legend
Existing Canal
Concrete Canal
Watershed Boundary
Location Map
Yerington
Lyon Co.
STUDY AREA
CA
NV
NOT TO SCALE
Scale
Yerington
U.S. ALT 95
Goldfield Ave.
West Bridge St.
Dairy Road
Canal
Fox
Cremetti Lane
Back
Purcel Lane
Woods
ROUTE
Lane
McKenzie
Snyder Ln
Drive
Osborne
STATE
Tognoli Lane
Hall
High
Greenwood
Borsini
Nordyke Lane
East
Mickey
Walker
River
Settling Basin
Diversion Structure
Road
339
208

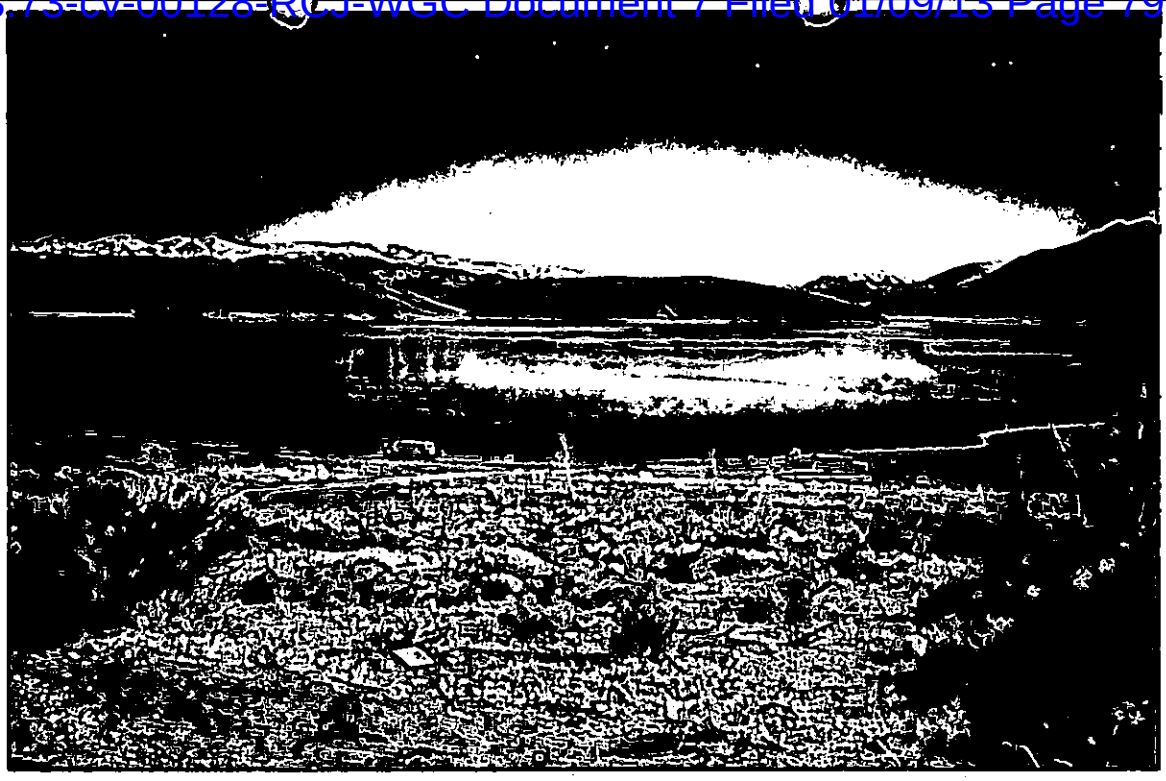
WALKER LAKE

Hall Ditch, looking south, East River Road

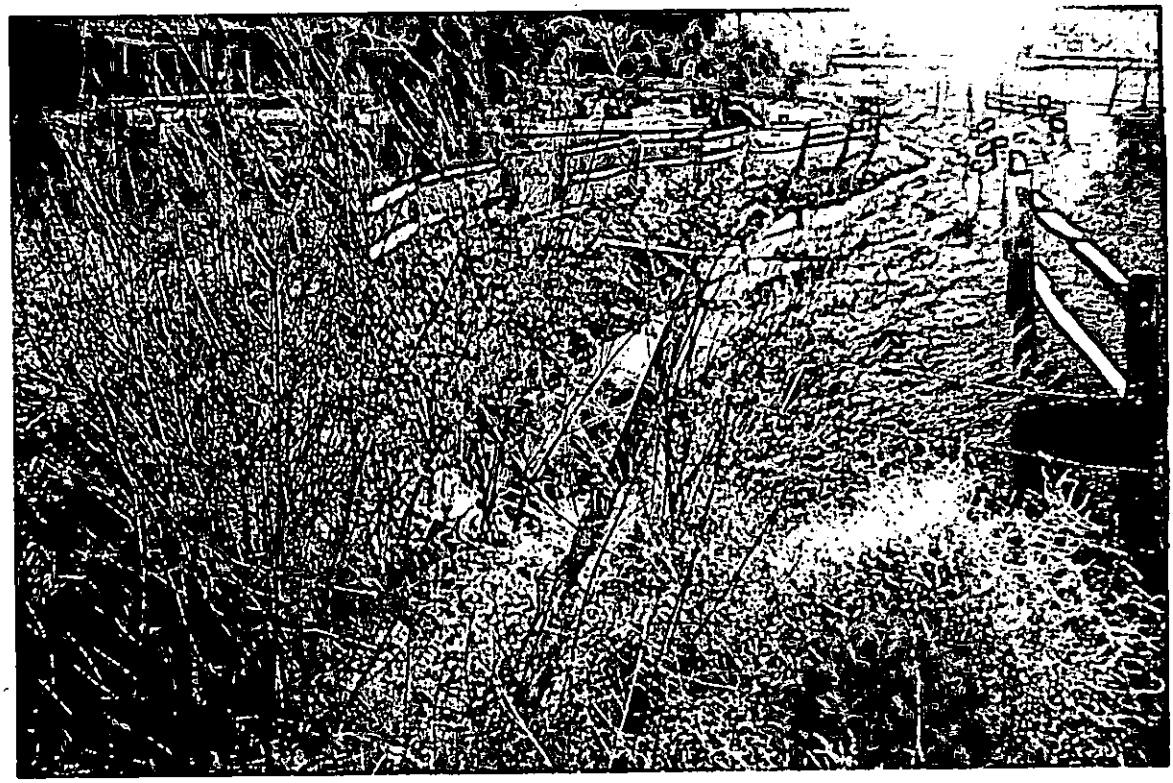
Mickey Ditch, looking east, Highway 208

Greenwood Ditch, looking south, East River Road

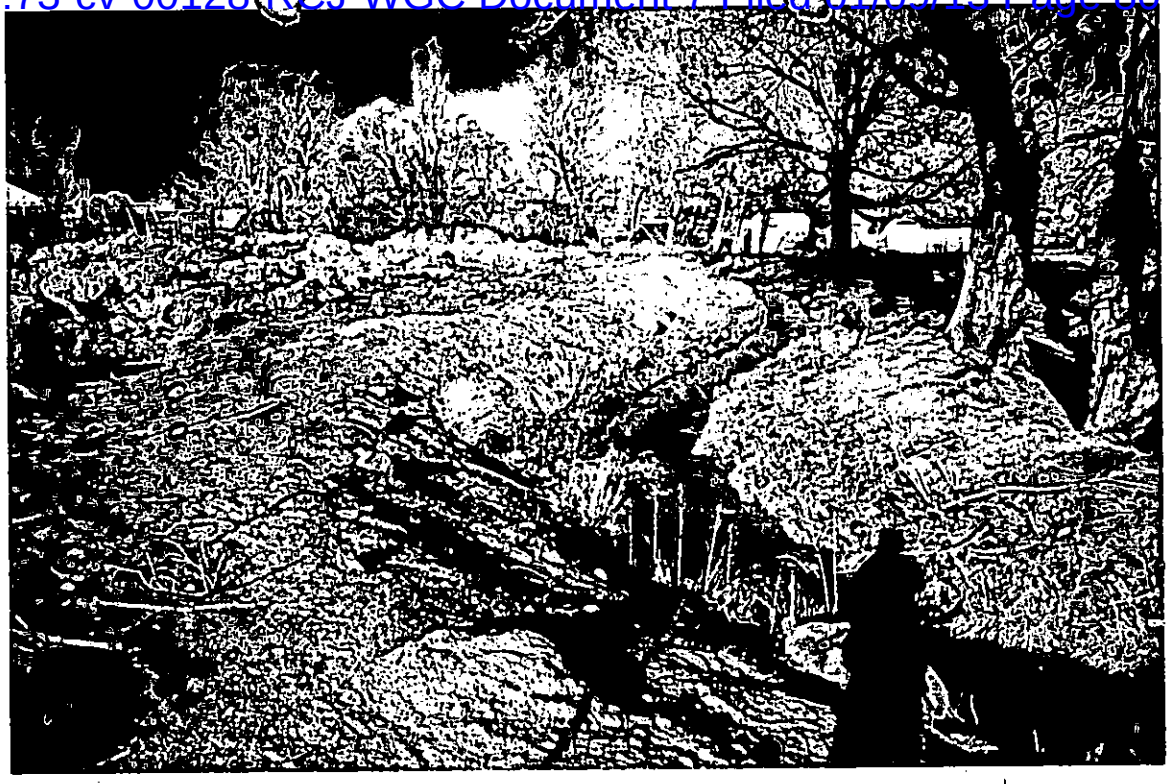
Tunnel Ditch, looking east, Highway 208



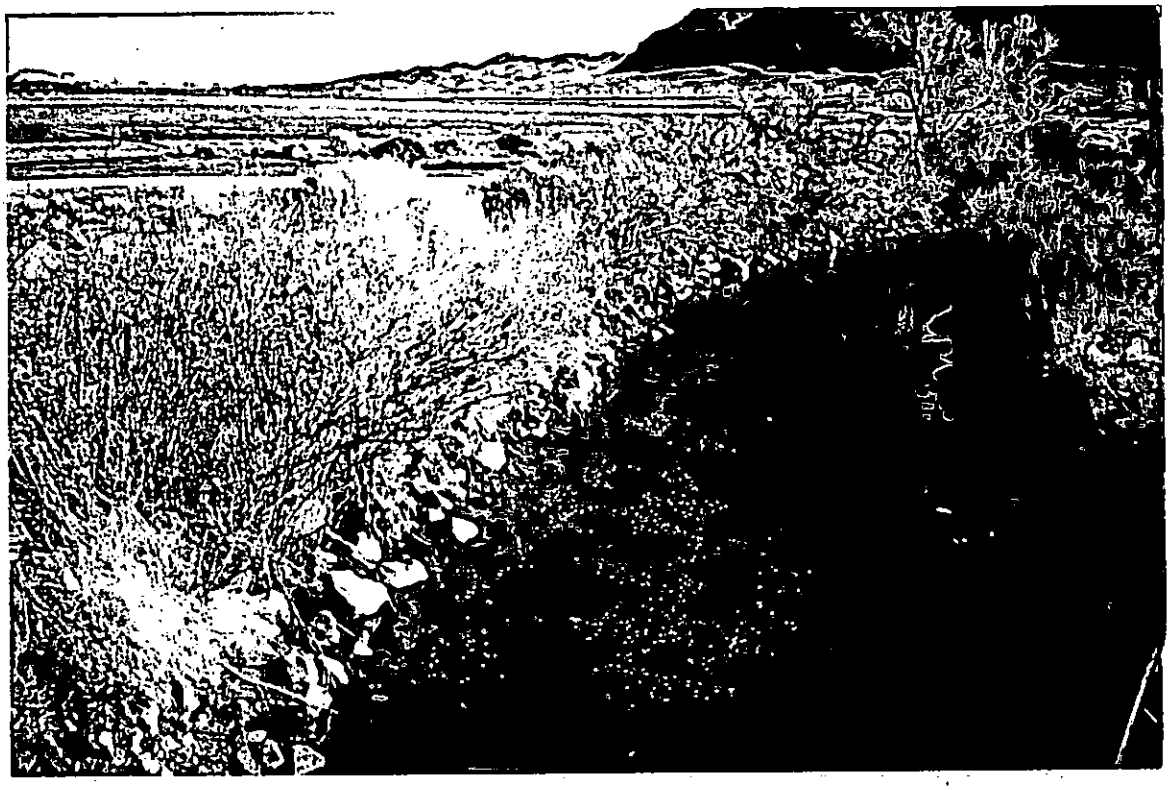
Topaz Lake, February 5, 1995. Volume is 14,000 acre feet.



Lee Sanders Ditch at Highway 208, looking west

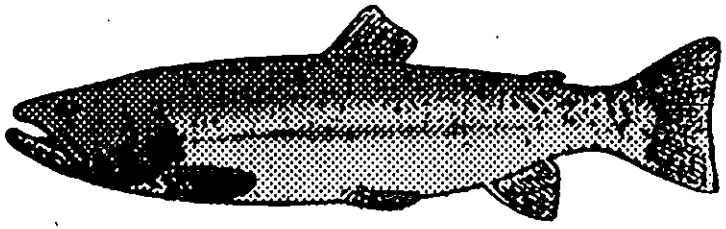


Lee Sanders Ditch looking north, near Highway 208

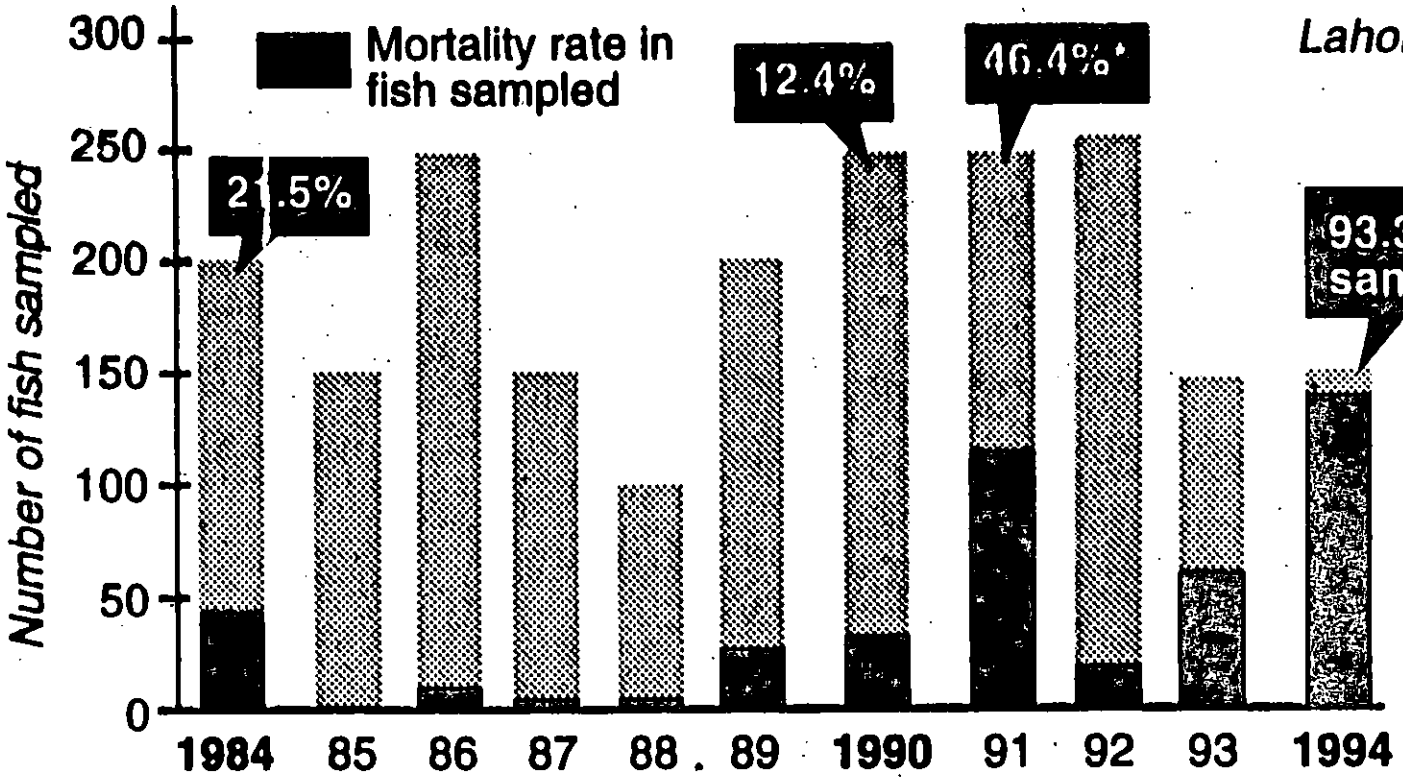


West Walker River near Lee Sanders Ditch

Cutthroat Trout bioassay summary



Lahontan cutthroat

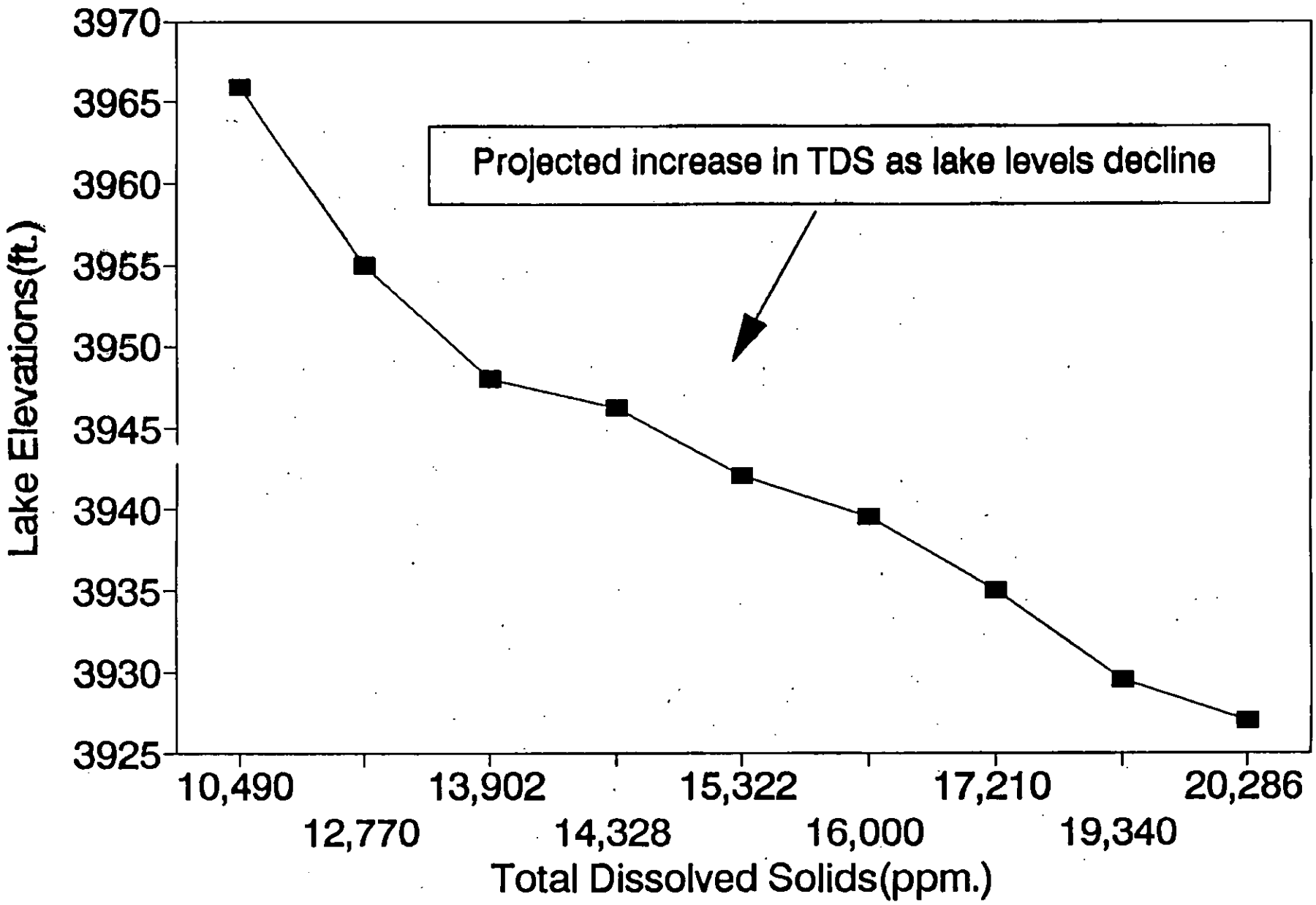


Source: Walker Lake Working Group, Nevada Department of Wildlife

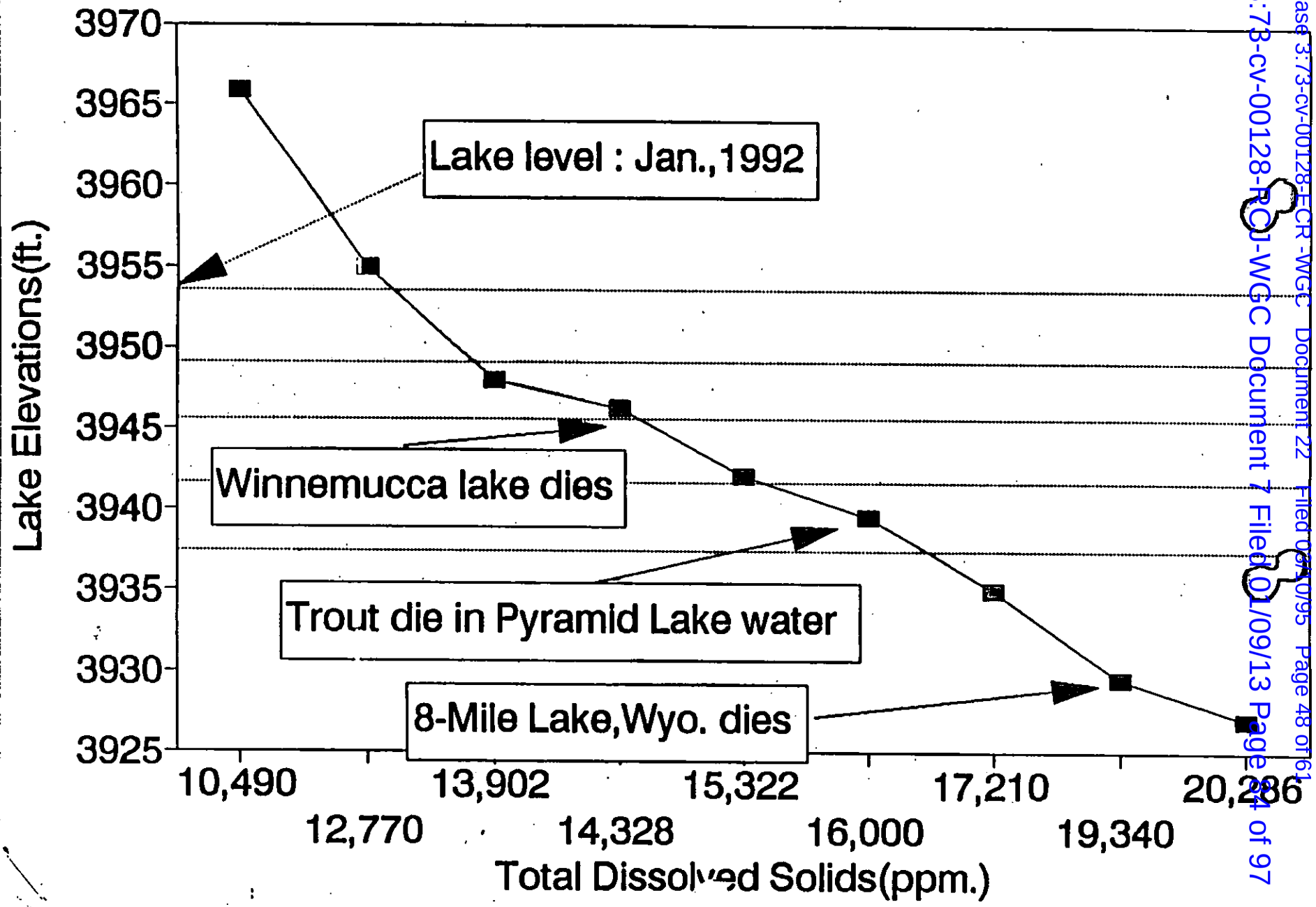
*The Heenan strain represented 82.7% of the total mortality. This less salt-tolerant strain is no longer stocked in Walker Lake.

Mark Nowlin/Gazette-Journal

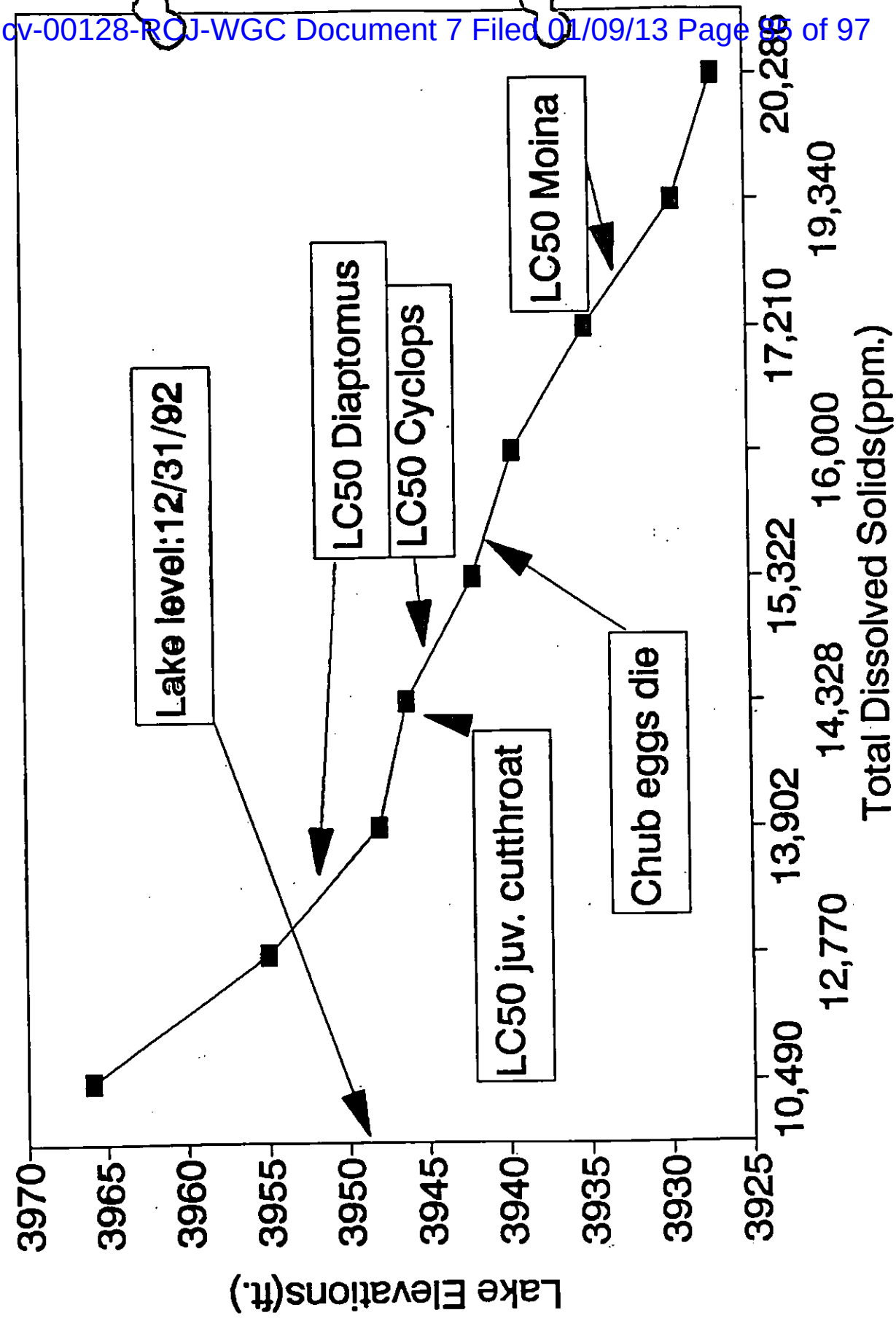
Walker Lake
Mortality Factors



Walker Lake
Mortality Factors



Walker Lake
Mortality Factors



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WALKER LAKE PROPOSAL

INTRODUCTION

The purpose of this proposal is to provide in excess of 100,000 acre feet to Walker Lake during 1995.

The Walker River watershed is reported to have 113% of the average yearly snowpack water content in data collected by the USDA on February 14, 1995. The average water content of the snowpack as calculated by the USGS in the Walker River Basin in readings taken from their Coleville Gauge (55 year record) on the West Walker River and the Bridgeport Gauge (71 year record) on the East Walker River totals 287,300 acre feet. Even if there was no further precipitation between February 14 and April 1, 1995, the end of the winter season, the run-off would total 324,000 acre feet. Since the possibility of no further significant precipitation is statistically improbable, a more realistic estimation of potential run-off would be to use a model which predicts that the balance of the season would be normal. This model suggests that the Walker River basin would receive an additional 86,000 acre feet by April 1, 1995 for a total snowpack water content of 410,000 acre feet.

Walker Lake has, except for a release of 5,100 acre feet from Webber Reservoir during the spring of 1993[1], received no water from the Walker River since 1988 and is dropping at the rate of 4 feet per year. The total dissolved solids in Walker Lake are approaching toxic levels for fish life (present level 14,000 TDS) and Walker Lake has declined in elevation to 3,941.2 feet ASL. Survival rates for new hatchery fish in 1993 were estimated at less than 7% by NDW. Fish survival rates for fish presently in the lake are estimated at between 2 and 3 years; growth of fish is negligible during this time and if the TDS content rises to a count of 15,000, then all fish life will cease to exist.[2]

1. Pers. Comm., Sam Stegeman, Engineer, Walker River Paiute Tribe, February 7, 1995
2. Pers. Comm., John Elliot, Nevada Division of Wildlife, February 2, 1995

That Walker Lake is close to dying is not the question. The question is, does any entity other than Mineral County, who has lost 20% of their tax base already due to lake diminution and has potential losses of 50% should the lake die, be the only party concerned with its demise?

The proposal submitted is meant as a rescue package for the year 1995 to stabilize the lake level while having little or no impact on upstream users. Recreational users on Topaz and Bridgeport Reservoirs must be able to enjoy the facilities with no degradation as to launching facilities and sport fishing. Irrigated acres in Smith and Mason valleys should receive their full allotment. The Walker River Paiute Tribe will receive their full allotment, which has not always been the case, and unlike past years, they will release most of this water through to the lake.

A possible benefit to the town of Yerington is the controlled scouring of the Walker River channel in the Mason Valley. The concern of high sudden run-off has prompted WRID and the Lyon County Commissioners to submit a request to the Corps of Engineers requesting that they clear the channel of debris. No response has been received to this date. The last time the channel was cleared, it was by natural causes when the Walker River flooded in 1983. A controlled release could help alleviate these concerns, especially for those living in areas flooded in 1983.

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PROPOSED RELEASE SCHEDULE, BRIDGEPORT AND TOPAZ RESERVOIRS

Walker Lake will receive more net water from the Walker River system if the proposed release schedule is followed for two reasons. There will be less water loss to groundwater recharge in Smith and Mason Valleys because some of the water released is prior to the effective date of the irrigation season. Additionally, there will be less water lost to evaporation over the system; the premise is that water evaporation at Walker Lake is more or less constant and there is no point waiting for water to evaporate from Bridgeport, Topaz, Artesia and Webber as well.

The following schedule assumes an average precipitation period from February 14 through April 1, 1995.

TOPAZ RESERVOIR

Storage: 13,500 acre feet as of February 1, 1995[3]

Month	Proposed Discharge	Reservoir Storage	Acre feet Release(month)
March	200 c.f.s.	13,500 a.f.	12,000
April	250 c.f.s.	14,500 a.f.	15,000
May	850 c.f.s.	20,500 a.f.	51,000
June	850 c.f.s.	48,500 a.f.	51,000
July	750 c.f.s.	46,000 a.f.	45,000
August	400 c.f.s.	30,000 a.f.	24,000
September	300 c.f.s.	16,000 a.f.	18,000
October	150 c.f.s	11,000 a.f.	9,000

Total acre feet released from reservoirs:	225,000 acre feet
Projected Runoff (March 1-October 31)	223,000 acre feet[4]
Reservoir depletion	2,500 acre feet
Total	225,500 acre feet

3. March 1 reservoir levels estimated at 18,000 acre feet

4. USDA projections adjusted for 1995 snowpack

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BRIDGEPORT RESERVOIR

Storage: 10110 acre feet as of January 25, 1995[5]

Month	Proposed Discharge	Reservoir Storage	Acre Feet Release(Month)
March	200 c.f.s.	5,000 a.f.	12,000
April	200 c.f.s.	6,000 a.f.	12,000
May	250 c.f.s.	18,000 a.f.	15,000
June	400 c.f.s.	30,000 a.f.	24,000
July	200 c.f.s.	28,000 a.f.	12,000
August	200 c.f.s.	22,000 a.f.	12,000
September	150 c.f.s.	17,000 a.f.	9,000
October	100 c.f.s.	13,000 a.f.	6,000

Total acre feet released from reservoir		102,000 acre feet
Projected Run-off (March 1, October 31)		110,000 acre feet[6]
Reservoir augmentation		-8,000 acre feet
	Total	102,000 acre feet

5. March 1 estimated reservoir level 15,000 acre feet

6. USDA projections adjusted for 1995 snowpack

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COMBINED RIVER FLOWS

Month	c.f.s.
March	400
April	450
May	1,100
June	1,250
July	950
August	600
September	450
October	250

THE WABUSKA GAUGE

Because of groundwater depletion in Smith and Mason Valleys in 1994, it is unlikely that, at least to begin with, that Walker Rivers flows at the Wabuska Gauge will be substantial, even though some non-return ditches (Hall and Greenwood) have been running during the winter months.

Provided that the ditch diversion is minimal in March, it is possible that 30% of the flow or 130 c.f.s. would reach the Wabuska gauge. This flow will decrease in April with the effective beginning of the irrigation season when water is delivered to the ditches, but should increase to 50% in May because the projected flow of 1,100 c.f.s. is more than double the senior water rights and the remaining flow will move at a speed which will

inhibit groundwater capture. Even if 50 c.f.s. were lost to irrigation and other causes below Wabuska, Walker Lake would still receive 30,000 acre feet in May alone.

THE WATER MASTER

It appears that the water master exercises a considerable amount of leeway in administering water allocation under C-125. Upstream storage in the reservoirs is supposed to begin November 1 and end on March 1, which coincides with the beginning of irrigation season. Water is then released to the senior water rights holders. However, in March, 1993 for example, water storage increased in Bridgeport Reservoir by 10,000 acre feet.

Since this proposal does not violate C-125 in any way, the water master could implement the proposal by using the flood control argument with possible dissenters.

TIME FRAME

Time is of the essence in implementing this proposal to halt the degradation of Walker Lake. The Walker River Paiute Tribe[7] has agreed to consider releasing water from Webber Reservoir to Walker Lake through the channel cleared in 1993 if they can be assured of this flow schedule.

Submitted by:

Kelvin J. Buchanan, P.E.

7. Pers. Comm., Sam Stegeman, Engineer, Walker River Paiute Tribe

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March 2, 1995

James Spoo
Zeh, Spoo and Hearne
450 Marsh Avenue
Reno, NV 89509

Re: Walker Lake Proposal

Dear Jim,

As we discussed this morning, the volume of contained water in the snow pack when the proposal was authored on February 14 has decreased by almost 20 % today to where we are at about 91% of the April 1 snowpack for moisture content. Not only did we have no precipitation for two weeks, we had a record warm February. The moisture in the snowpack did not totally disappear of course. Both Bridgeport and Topaz Reservoirs contain 5% more water than I estimated and some has ponded in upland meadows. It is impossible to project average precipitation over any time period and it is not unusual that this particular two week period should have no precipitation. Even in winter, the Sierra weather pattern is dominated by a high pressure dome, penetrated on average by 6-8 very active storm systems. It would be most unfortunate if we were to get discouraged by the previous two week lack of precipitation, not pursue the proposal and then find that March precipitation has increased the snowpack to the predicted level. I have no reason to change my proposal based on the February precipitation totals.

As to your question about groundwater, precipitation this year will have very little impact on groundwater levels in Mason and Smith Valleys. Both Station 6 in Smith Valley and the Yerington weather station had received their normal October 1-April 30 precipitation by January 31, but the warm weather in February minimized the impact of this above normal precipitation (although Yerington has had 0.5 inches of precipitation in first 2 days of March).

It appears likely that a wetter pattern is setting up that will continue through next week. All parties can access the Sno-tel data on a daily basis and the snowpack may, by early next week, show a significant increase. This would provide an opportunity to review current data and perhaps an informal discussion with the parties could commence next week.

Your questions regarding the March 1 storage deadline were sound and I was remiss in writing only one sentence in explanation on this matter. The storage season ends on March 1 if the senior water rights users demand their irrigation water on that date. If they don't, then water can be stored in the reservoirs until such time as they do. When I said the Watermaster had leeway in releasing this water, he needs the approval of various other parties. I think there is a mechanism for early release, but all parties would have to agree. The senior water rights users would have to request the release of this water, knowing full well that the purpose of the release is for Walker Lake. There is an intermediate step in the process and then, additionally, the State Engineer would have to permit a change in beneficial use at the point of diversion so that water could go to Walker Lake. This is not a walk in the park, but it certainly could be achievable through cooperation.

I believe the Watermaster has more leeway in release of storage water if he believes that downstream flooding is a possibility.

The release of water from the reservoirs to accommodate the mixing of the Weed Pit water will also require some agreement between parties. The proposed ratio of ten to one (10/1) pit water to river will require a constant flow which may not necessarily conform with C-125. These are all tough questions.

As to the actual condition of the present snowpack, it is more similar to that of a late April snowpack. Because of January rains and warm February temperatures, it is almost saturated, meaning that a few warm days could cause a significant melt. In some respects this has already happened.

Please call me if you have any further questions.

Sincerely,

Kelvin Buchanan, P.E.

cc: Treva Hearne

Henkle-Buchanan Group

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450 Marsh Avenue • Reno, NV 89509
Phone: (702) 323-4599 • Fax (702) 786-8183

CERTIFICATE OF MAILING

Pursuant to FRCP 5(b), I certify that I am an employee of the Law Office of ZEH, SPOO & HEARNE, and that on this date I caused to be mailed a copy of the attached **MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES; AFFIDAVIT OF KELVIN J. BUCHANAN, P.E.; AND AFFIDAVIT OF GARY L. VINYARD, Ph.D**, with postage fully prepaid to:

See attached Service List

DATED this 10th day of March, 1995.

MARILYN MITCHELL

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