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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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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.

LAW OFFICES OF
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By _____

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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

[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.

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]

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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.

/ / /

/ / /

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.

LAW OFFICES OF
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MINERAL COUNTY

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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JAMES SPOO, ESQ.
TREVA J. HEARNE, ATTORNEY AT LAW
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MINERAL COUNTY

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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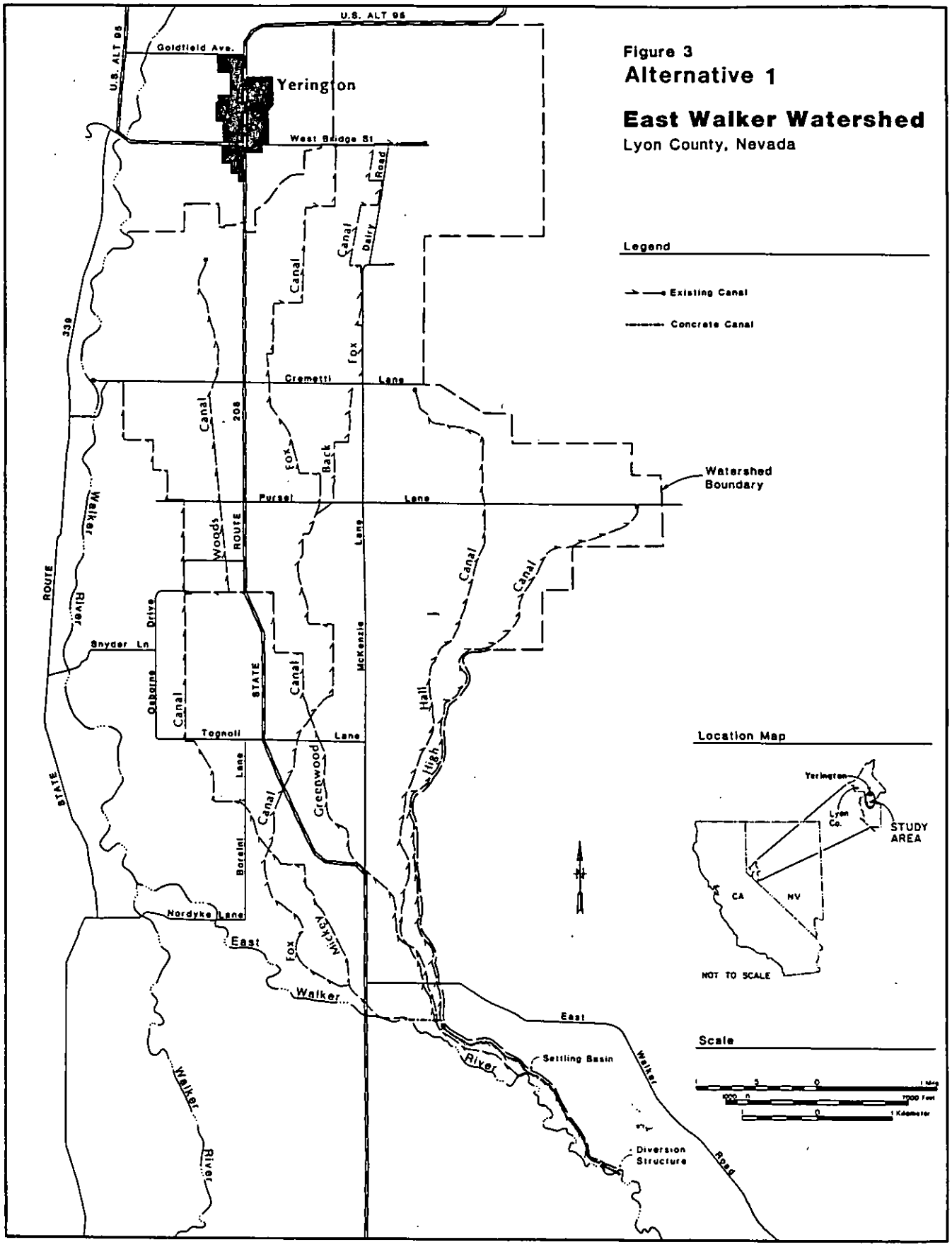
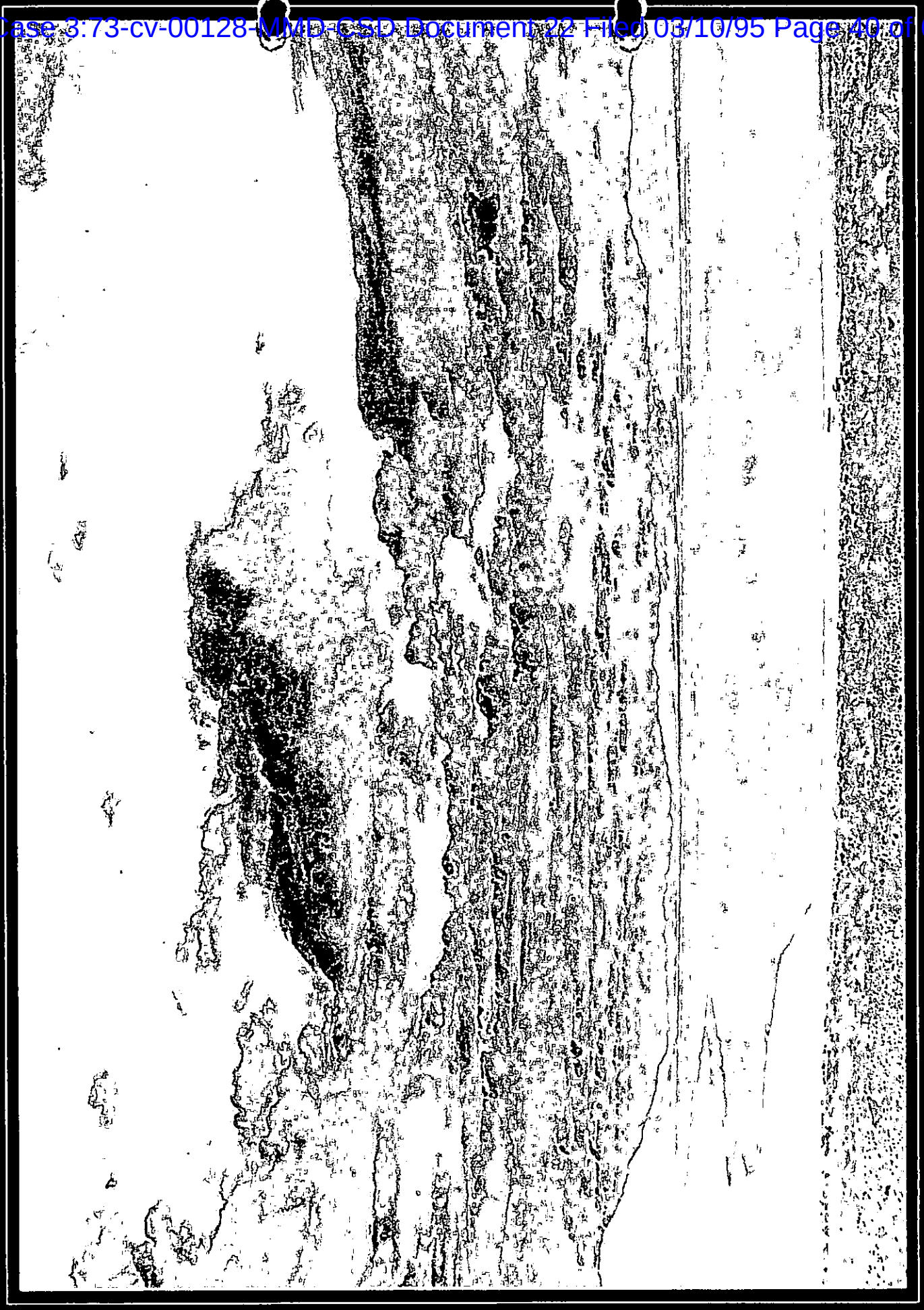


Figure 3
Alternative 1
East Walker Watershed
Lyon County, Nevada
Legend
Existing Canal
Concrete Canal
Watershed Boundary
Location Map
Yerington
Lyon Co.
STUDY AREA
CA
NV
NOT TO SCALE
Scale
U.S. ALT 95
Goldfield Ave.
Yerington
West Bridge St
Cremetti Lane
Pursel Lane
Snyder Ln
Tognoli Lane
Nordyke Lane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



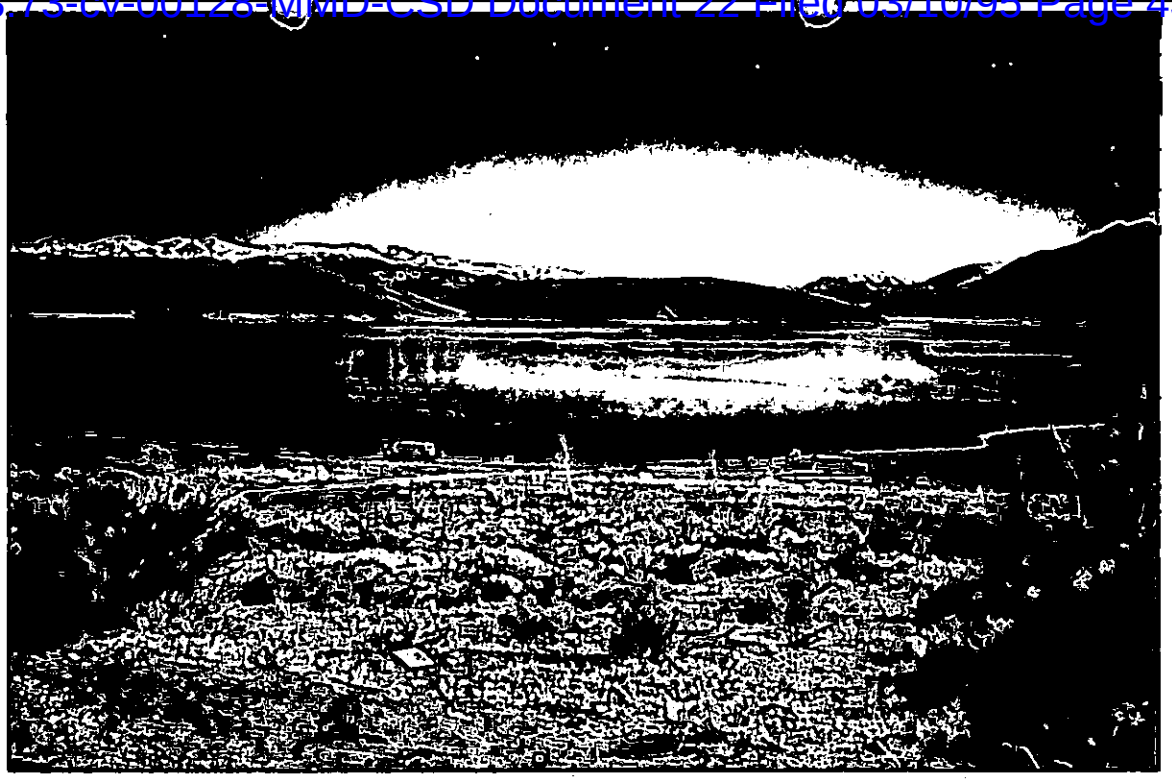
WALKER LAKE

Hall Ditch, looking south, East River Road

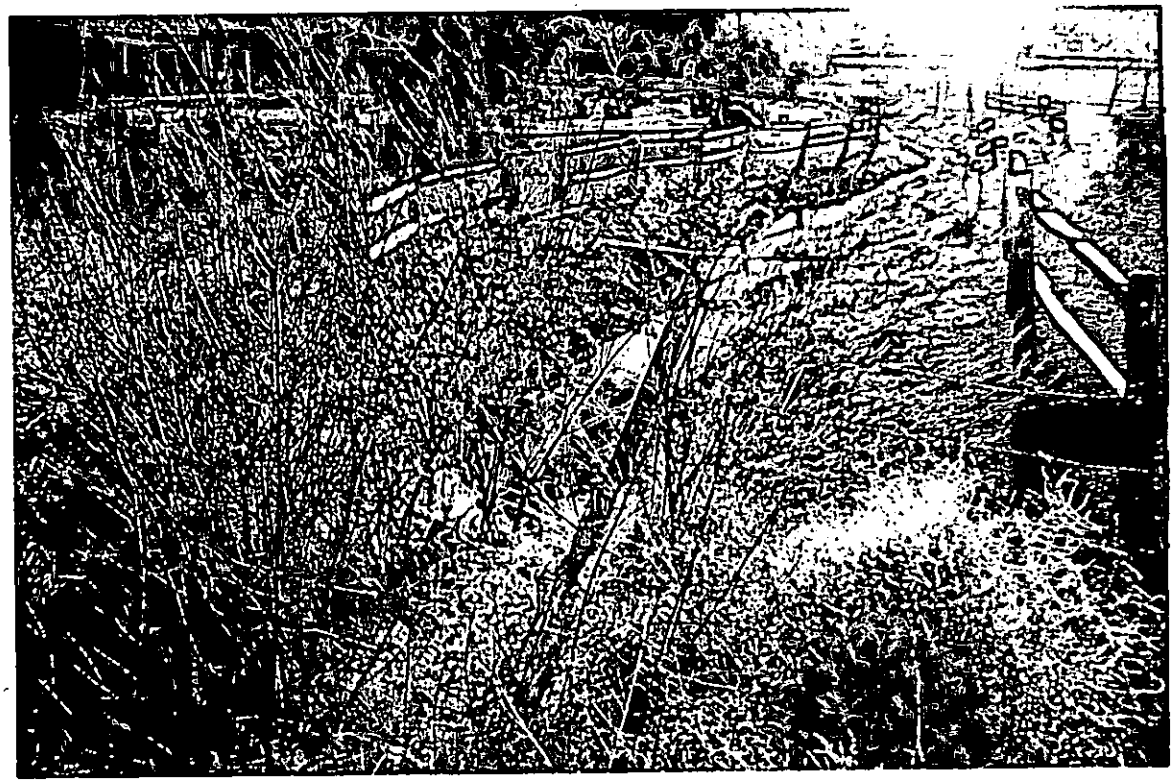
Mickey Ditch, looking east, Highway 208

Greenwood Ditch, looking south, East River Road

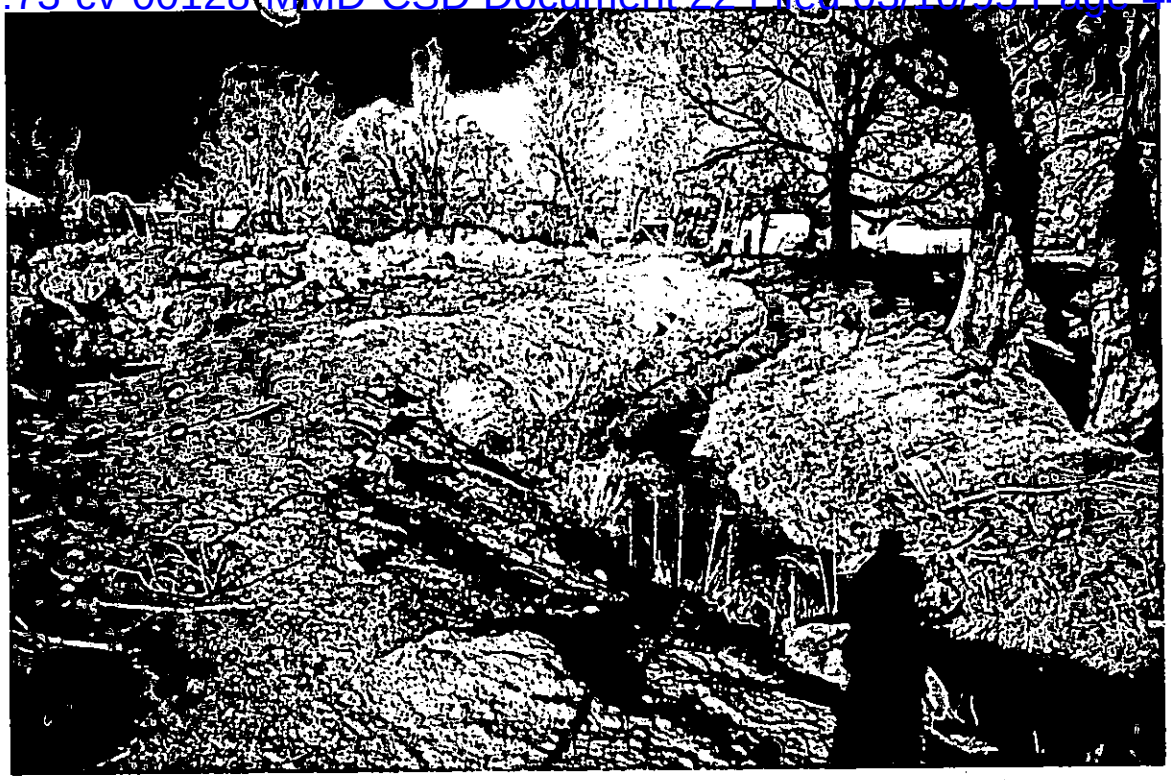
Tunnel Ditch, looking east, Highway 208



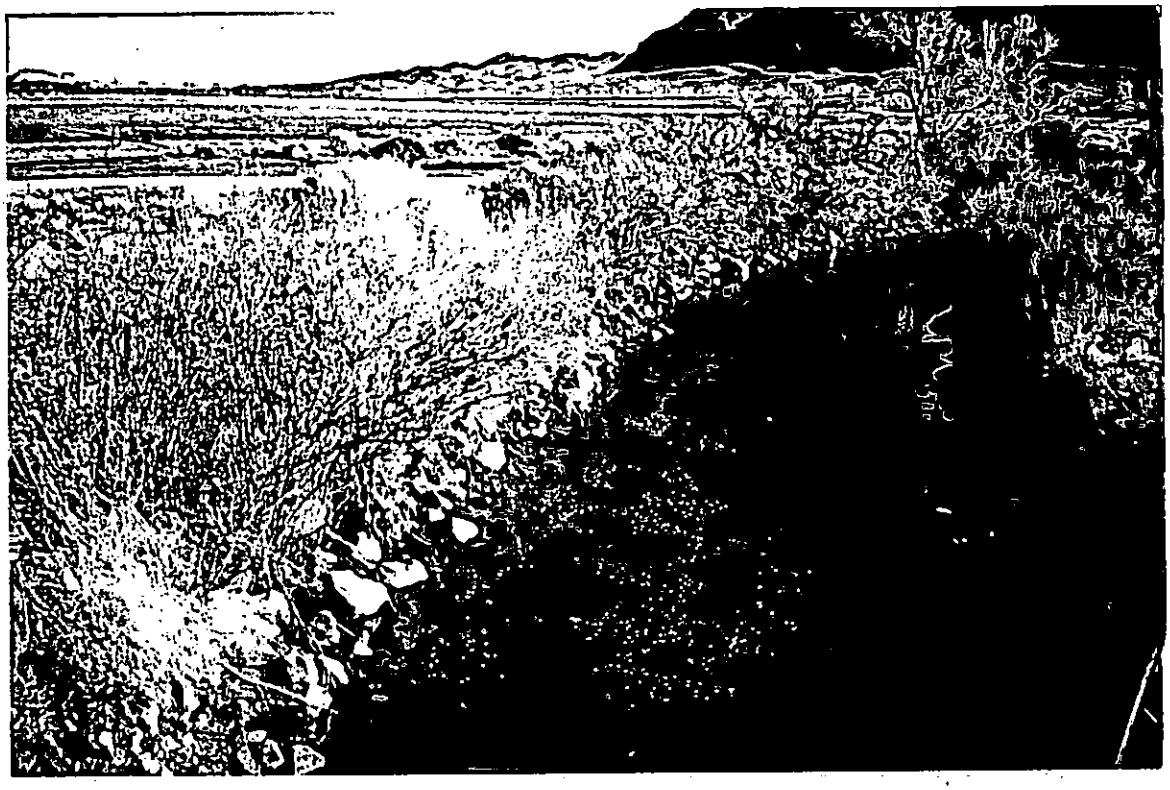
Topaz Lake, February 5, 1995. Volume is 14,000 acre feet.



Lee Sanders Ditch at Highway 208, looking west

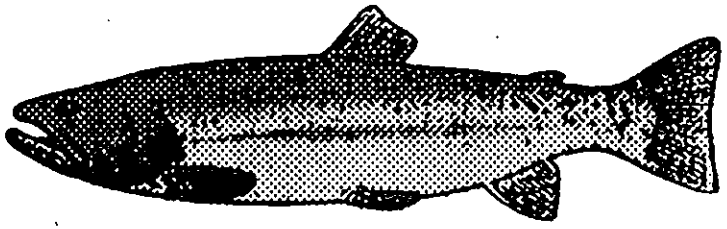


Lee Sanders Ditch looking north, near Highway 208

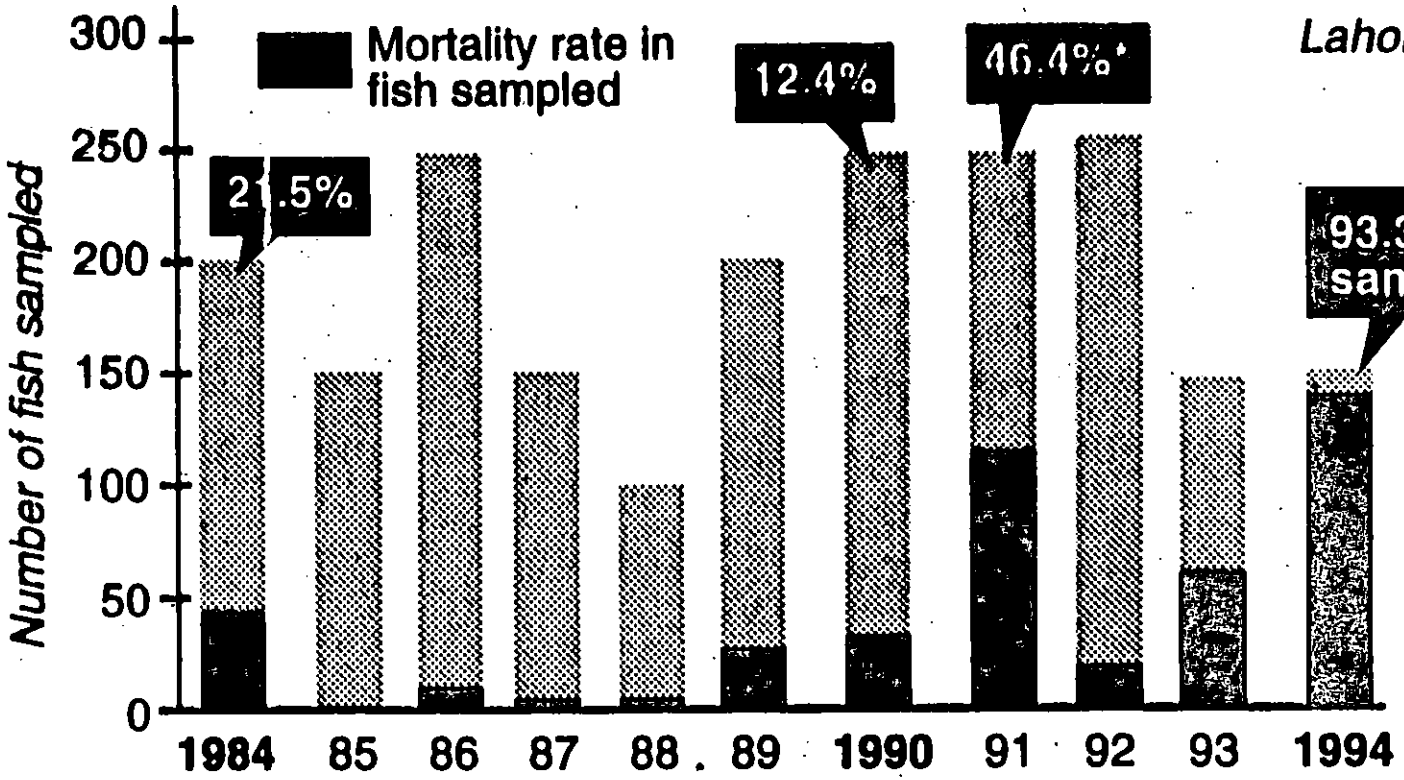


West Walker River near Lee Sanders Ditch

Cutthroat Trout bioassay summary



Lahontan cutthroat

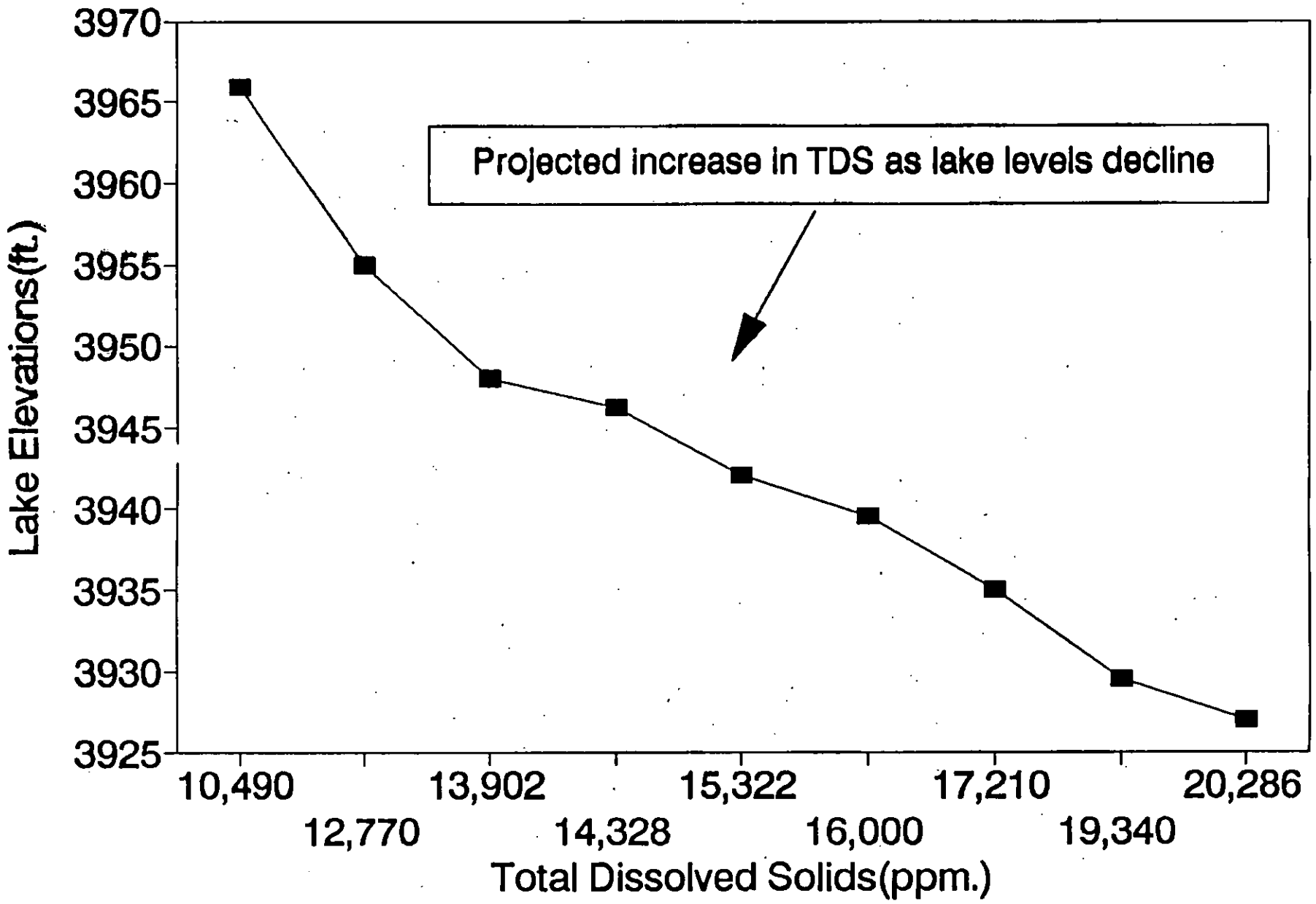


Source: Walker Lake Working Group, Nevada Department of Wildlife

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

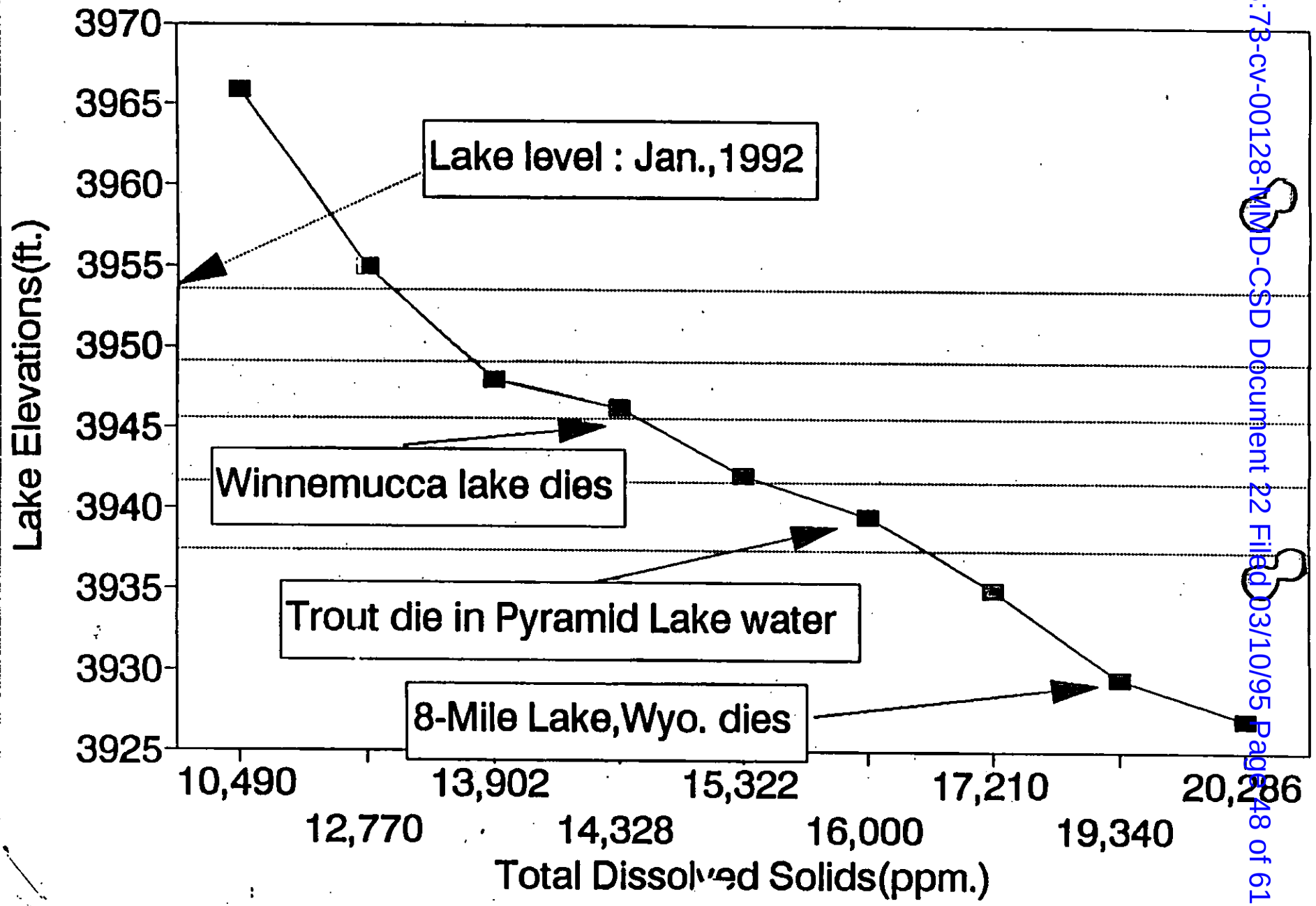
Mark Nowlin/Gazette-Journal

Walker Lake
Mortality Factors

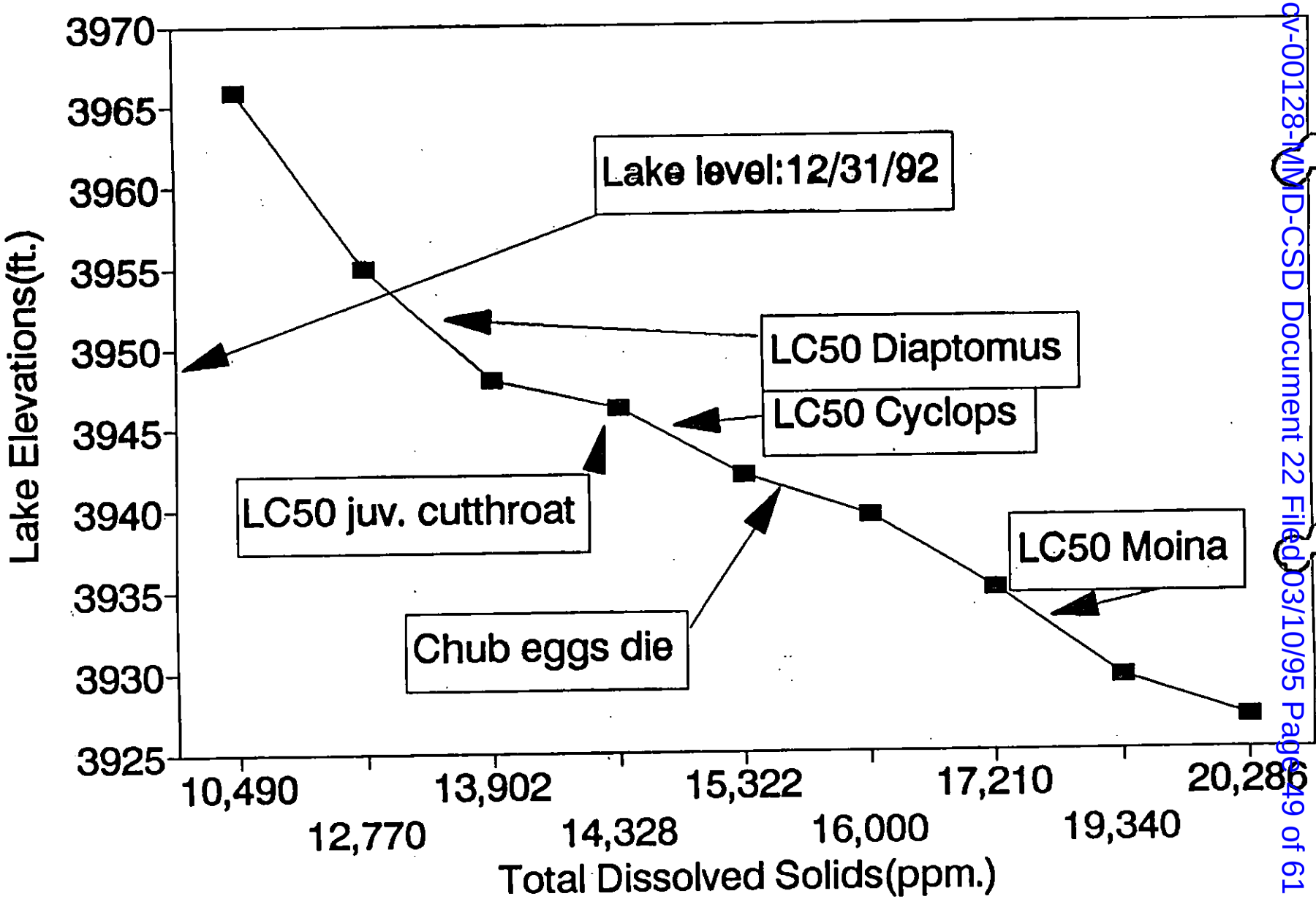


Walker Lake

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.

<u>PROPOSED RELEASE SCHEDULE, BRIDGEPORT AND TOPAZ RESERVOIRS</u>

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.

Henkle-Buchanan Group

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

Henkle-Buchanan Group

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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

Henkle-Buchanan Group

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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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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.

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