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STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

STATE OF CALIFORNIA

In re: The Matter of the City)
of Los Angeles Water Right)
License 10191 and 10192 for)
Diversion of Water from)
Streams Tributary to Mono Lake.)
_____)

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DEPOSITION OF

ELDON VESTAL

WEDNESDAY, NOVEMBER 3, 1993

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REPORTED BY:

KELSEY DAVENPORT ANGLIN, RPR
CM, CSR No. 8553

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APPEARANCES (CONTINUED)

THE VIDEOGRAPHER:

DON ANGLIN
Capitol Reporters
2340 Harvard Street
Sacramento, California 95815

ALSO PRESENT:

Ethel Vestal
Randal Orton

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I N D E X

	PAGE
Direct Examination by Mr. Roos-Collins	7
Cross-examination by Mr. Dodge	23
Cross-examination by Mr. Birmingham	27
Cross-examination by Ms. Cahill	63
Cross-examination by Mr. Thomas	73
Cross-examination by Mr. Frink	77
Recross Examination by Mr. Dodge	79
Redirect Examination by Mr. Roos-Collins	84

1 YOUNTVILLE, CALIFORNIA

2 WEDNESDAY, NOVEMBER 3, 1993, 2:51 P.M.

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4 THE VIDEOGRAPHER: This is the video testimony of
5 Eldon Vestal in the matter of the City of Los Angeles
6 Water Right License 10191 and 10192 for Diversion of
7 Water From Streams Tributary to Mono Lake.

8 My name is Don Anglin. I'm a Notary Public and
9 Certified Legal Video Specialist employed by Capitol
10 Reporters, 2340 Harvard Street, Sacramento,
11 California.

12 This deposition is being held at 7329 Silverado
13 Trail, Yountville, California. The date is November 3,
14 1993. The time is approximately 2:51.

15 Will counsel please identify themselves and
16 indicate the parties they represent, and then will the
17 Court Reporter swear the witness and we can begin,
18 please?

19 MR. VALENTINE: Michael Valentine, Staff Counsel,
20 State Lands Commission.

21 MR. DODGE: Bruce Dodge, National Audubon Society
22 and the Mono Lake Committee.

23 MR. ROOS-COLLINS: Richard Roos-Collins
24 representing California Trout.

25 THE WITNESS: Eldon Vestal, witness.

1 MR. THOMAS: Harold Thomas, Department of Fish and
2 Game, Staff Counsel.

3 MS. CAHILL: Virginia Cahill, McDonough, Holland
4 and Allen, representing the California Department of
5 Fish and Game.

6 MS. LOCKAREFF: Diane Lockareff representing L.A.
7 DWP.

8 MR. BIRMINGHAM: Thomas Birmingham, Kronick,
9 Moskovitz, Tiedemann and Girard, on behalf of the
10 Department of Water and Power of the City of Los
11 Angeles and the City of Los Angeles.

12 MR. FRINK: I'm Dan Frink, Staff Attorney with the
13 State Water Resources Control Board.

14 ---o0o---

15 BE IT REMEMBERED that on Wednesday, the 3rd day of
16 November, 1993, commencing at the hour of 2:51 p.m., at
17 7329 Silverado Trail, Yountville, California, before
18 me, KELSEY DAVENPORT ANGLIN, CSR NO. 8553, a Notary
19 Public in and for the County of Sacramento, State of
20 California, personally appeared

21 ELDON VESTAL,

22 having been called as a witness, who, having been sworn
23 by me to tell the truth, the whole truth, and nothing
24 but the truth, was thereupon examined and interrogated
25 as hereinafter set forth.

---oOo---

DIRECT EXAMINATION BY MR. ROOS-COLLINS

1
2
3 Q Mr. Vestal, good afternoon.

4 A Good afternoon.

5 Q We are here to take your deposition. You
6 understand that we will conduct this deposition as
7 though you were before the Board in this proceeding.

8 A Yes.

9 Q Who called you as a witness in this proceeding?

10 A You did, representing Cal-Trout.

11 Q And you also were called as a witness by the
12 Department of Fish and Game and the Mono Lake
13 Committee?

14 A Yes. This is my understanding.

15 Q Your written testimony is Cal-Trout Exhibit 5 in
16 this proceeding?

17 A Yes, it is.

18 Q Is that testimony true and accurate, to the best
19 of your knowledge?

20 A There are a few corrections that should be made,
21 some collation as far as pinpointing the numbers of the
22 exhibits and so on but, otherwise, it's true and
23 correct.

24 Q Mr. Vestal, you are referring to the references to
25 the exhibits as set forth in your written testimony?

1 There are some typographic errors in those references?

2 A That is correct.

3 Q And that is the responsibility of my firm. We
4 will submit a corrected declaration with the correct
5 references to exhibits in connection with the videotape
6 and the transcript of this deposition.

7 A This is my understanding, yes.

8 Q But other than those typographic errors, is your
9 written testimony true and correct?

10 A Yes, it is.

11 Q Are your qualifications set forth in Cal-Trout
12 Exhibit 5-A?

13 A Yes, they are.

14 Q Please summarize your qualifications as they
15 relate to Rush and Lee Vining Creeks.

16 A Well, I was employed by the Department of Fish and
17 Game and entered the -- as a junior fishery researcher
18 and entered the eastern California area and Mono County
19 in 1938 and served in several capacities in the period
20 from 1938 -- principally, 1939 through 1950, at which
21 time I left that area and transferred to another
22 region, Fresno.

23 Q And you continued with the Department of Fish and
24 Game until your retirement?

25 A Yes, I did. I was transferred on a promotion to a

1 coastal region to San Francisco and served there for 12
2 years with headquarters here at Yountville until my
3 retirement at the end of December 1978.

4 Q What is your professional degree in?

5 A In zoology.

6 Q You first visited the Mono Basin as an employee of
7 the Department of Fish and Game on April 30th, 1938; is
8 that correct?

9 A Yes, I did.

10 Q And you were employed as a fishery researcher on
11 behalf of the Department of Fish and Game from that
12 time until 1940?

13 A That's right.

14 Q And in 1940, you became the district biologist?

15 A That's right. Actually, I became a district
16 biologist about March of 1939 when I returned from the
17 survey work on the north coast in anadromous fishery,
18 salmon and steelhead, and survey of the Eligo Basin at
19 that time. And from that time on, it was my
20 understanding I would be a district fisheries biologist
21 for this area.

22 Q What were your responsibilities with respect to
23 Rush and Lee Vining Creeks?

24 A Well, they were part -- they were part of a --
25 initially, they were part of a region-wide inventory of

1 lakes and streams in the Mono -- in the Mono area
2 and -- by which we would develop a base for fisheries
3 management activities in subsequent years.

4 Q While you were employed as a fisheries researcher
5 and subsequently as the district biologist, did you
6 live in the vicinity of Rush and Lee Vining Creeks?

7 A Yes. I -- after initial -- you might say
8 residence at Mr. Whitney Hatchery during that first
9 winter, and then I took residence in the spring at --
10 on one end of Fern Creek Hatchery. I then, very
11 shortly -- it wasn't long before I married my wife, and
12 we settled down at Gull Lake a few miles away and made
13 that my headquarters for activities in the district.

14 Q You mentioned Fern Creek Hatchery. That's on the
15 Upper Rush Creek?

16 A On Fern Creek, which is a tributary to Upper Rush
17 Creek above Grant Lake.

18 Q Could you describe more specifically the
19 activities you undertook as a Department of Fish and
20 Game employee to manage or to study the fisheries of
21 Rush and Lee Vining Creeks?

22 A Well, it was -- it was a matter of making
23 observations. My initial assignment in 1939 and
24 beginning in 1939 was a cryocensus project at June Lake
25 testing the hatchery product, the catchable trout in

1 the planting program there at June Lake. And so as
2 time permitted, I would do -- I would make lake and
3 stream observations out in the Mono Basin and
4 tributaries to Mono Lake within that -- within that
5 area, and with particular interest to the development
6 of the City of Los Angeles and its diversions from Lee
7 Vining Creek on around the Basin to Grant Lake and via
8 the Mono Tunnel to the -- as part of the Owens Valley
9 aqueduct project.

10 And as time permitted, then, I would gather
11 information and add to the survey files, the inventory
12 files, so to speak. And then as the season progressed,
13 aside from the June Lake project, devote some time,
14 especially summer and early fall, to high lake
15 inventory work, surveys of lakes and streams in the
16 higher lakes.

17 But it was my responsibility to check on various
18 activities, results of fishing, and the catch in the
19 tributaries, the lakes, and the streams, and to look in
20 on any pollution or any changes in the -- in the
21 streams or lakes or tributaries, to conduct a liaison
22 with the Forest Service and the people with whom we
23 were working in these various activities, to contact
24 the wardens with whom it was my responsibility to
25 conduct a continuing liaison for information.

1 Also, the same with the hatchery people.
2 Mr. George McCloud, the superintendent of the
3 hatcheries for the area, and the various hatchery
4 people within the area including, of course, I lived
5 with Mr. Hussy. Ivil Hussy was the fleet hatcheryman
6 there at Fern Creek, and quite a bit of work was done
7 through Ivil because of his intimate contacts within
8 and without the Basin before my time.

9 Q You kept records of your activities as a fishery
10 researcher and later district biologist, didn't you?

11 A Yes. It was part of our regular -- part of our
12 regular program responsibility to keep daily logs and
13 summarize these in terms of weekly reports, and then at
14 the end of each month, to bring it all together in a
15 monthly report. This information was submitted to the
16 Chief of the Bureau of Fish Conservation in San
17 Francisco keeping a copy for myself and retaining a
18 copy for the district file.

19 Q Some of the daily, weekly, and monthly reports
20 which you prepared at that time are set forth as
21 Cal-Trout Exhibit 5-B. Is that correct?

22 A That is correct.

23 Q Now, you served in the military during World War
24 II?

25 A Yes.

1 Q So you left the Mono Basin in 1941?

2 A I left the Mono Basin at the 1st -- 2nd of
3 December 1942.

4 Q 1942. And you returned when?

5 A In March of 1946.

6 Q And you had what responsibilities in 1946 as a
7 Department of Fish and Game employee?

8 A Well, having completed the -- at the end of that
9 first period, pre-war period, as we're talking about
10 World War II now, we had laid some foundation for test
11 stream studies in Lower Rush Creek. And it was
12 initially my responsibility to reconnoiter, again,
13 Lower Rush Creek with that program in mind, and it was
14 again visited with the supervising fisheries biologist
15 and the chief of the bureau. And the decision was made
16 to forthwith, starting in 1947, to initiate that
17 program on stream tests, to evaluate the stocking of
18 catchable trout product from Hot Creek Hatchery.

19 Q Mr. Vestal, the Board is very familiar with that
20 1954 article. It was addressed at length last week by
21 Dr. Chapman and Dr. Platts.

22 In the interest of time, why don't we move on now
23 to the substance of your written testimony? You
24 describe Rush Creek before 1941 as a fisherman's
25 paradise. Is that your opinion?

1 A Well, it actually -- this was touted as a
2 fisherman's paradise as a result of information from
3 the Rush Creek Ranch, which was located at the Lower
4 Rush Creek, through various resorts and businesses in
5 the area, the Rainbow Angling Club. There was an
6 outdoor writer from the Pasadena Star News named Joe
7 Muirs, whom I knew very well, member of the Western
8 Writers or Western Outdoor Writers of America. And all
9 this came together in the phrase of paradise, and
10 Mr. Muirs said that he rated -- told me that he rated
11 among eastern California waters, Mono County waters in
12 particular, Rush Creek Number Four in the list, Hot
13 Creek being Number One, fourth in the popularity and
14 the quality of fishing in Lower Rush Creek. So that
15 dates back some years.

16 Q Let's focus on the fishery, itself, the biological
17 quality of the fishery as it existed in Rush Creek
18 before 1941. How would you characterize that fishery?

19 A Well, actually, it was basically a good -- a good
20 fishery. There was -- it had been stocked some, but it
21 was based below -- in addition to the stocking that
22 took place during the war, it was based on natural
23 propagation of brown trout where -- I'm referring now
24 specifically to Lower Rush Creek from The Narrows to
25 Grant Lake, and --

1 Q That's below Highway 395?

2 A That's below Highway 395, and below what has been
3 called a geologic feature, The Gorge or The Narrows,
4 and it was -- it was -- it certainly could be
5 classified as a good, good fishery. The reach from The
6 Narrows to Grant Lake was, in part, especially above
7 the lowest point of diversion, from there up to what we
8 called The Bend was also, according to -- I was of this
9 opinion, but also the opinion of the wardens and
10 anglers, local anglers who worked it and fished it,
11 they thought that they felt that it was -- had good
12 qualities also and certainly for them produced some
13 good -- good trout.

14 Q Did the Department of Fish and Game or any other
15 entity take a fish census before 1941, to your
16 knowledge, in Rush Creek?

17 A Not to my knowledge, no.

18 Q Now, your written testimony says that the Rush
19 Creek system had a highly productive fishery.

20 MR. BIRMINGHAM: Excuse me, Richard. Are you
21 going to conduct this examination as an examination, or
22 are you going to ask Mr. Vestal to summarize his
23 written testimony as we would do in the normal course
24 of the proceedings?

25 MR. ROOS-COLLINS: The former.

1 MR. BIRMINGHAM: Can we go off the record,
2 please?

3 THE VIDEOGRAPHER: This is the video camera
4 operator. We're now going off the record.

5 (Discussion held off the record.)

6 THE VIDEOGRAPHER: This is the video camera
7 operator. We're now back on the record. Please
8 continue.

9 Q BY MR. ROOS-COLLINS: Mr. Vestal, I have been
10 reminded that time is flying. Unfortunately, fish
11 stories take some time to tell, so let's proceed with
12 this deposition in a different format.

13 Let me ask you to summarize your written testimony
14 with respect to the fish habitat that existed in Rush
15 Creek before 1941.

16 A I believe in order to do that, it would take us
17 well back into the historical period. And by that, I
18 mean that in -- even in recent weeks, I have conducted
19 a particular study starting with the U.S.G.S. quad --
20 1901 and such records as we have to indicate that this
21 was a -- the Rush Creek system was a barren, pristine
22 system consisting of four lakes in total, including the
23 lakes, of 20 miles of stream, rich in food, with
24 excellent spawning areas and, judging from the rapid
25 development of the fishery after the introduction of

1 cut throat about 1880, the population -- the fish
2 population seized upon this habitat all the way from --
3 since there were no barriers, from Mono Lake clear to
4 June Lake, and filled out the habitat rapidly.

5 The native population of each of the lakes of
6 Grant Lake at that time, which was only 100 and --
7 about 152 acres and about 30 feet deep up through Silva
8 Lake and Gull Lake and June Lake were all cut throat.

9 The result of this was a -- an enormous initial
10 fishery. And this led to such reports as in 1890, when
11 there was documented a catch by two men from
12 Bridgeport, taking of some 700 pounds in one -- in one
13 day, in November of 1890, of cut throat from Grant
14 Lake. And from that, records gradually accumulated.
15 After 1900, there were more results of that kind to
16 indicate that this was a great -- a great fishery, a
17 very productive fishery.

18 Brown trout were introduced into the system in
19 1919, about July of 1919, and -- but the -- the cut
20 throat continued to dominate the fishery. They were
21 predominant in the fishery for some years and, starting
22 in 1923, the then Division of Fish and Game ran some
23 egg-taking tests after -- when they had developed --
24 began to develop an egg-taking station on Rush Creek
25 above Grant Lake. They took tests in 1923 and 1924 and

1 began large-scale egg taking with the development of
2 the Fern Creek Hatchery in 1925.

3 This situation for the next about 12 years, there
4 was an average of about two million eggs taken a year
5 from that station and, in summation, in their reports
6 to the Fish and Game Commission, biennial reports to
7 the Fish and Game Commission, it showed that even at
8 that time, after many years and some developments had
9 begun in the system, it was a very large fishery and a
10 very large egg-take.

11 Beginning early in the 1930s around -- starting
12 around 1932, at that time the brown trout had begun to
13 make themselves -- make a showing in the Rush Creek
14 system and gradually dominated the fishery. They
15 tended to gravitate their center of the population to
16 Grant Lake and Lower Rush Creek. And so it was a --
17 initially a very large fishery and led to, within the
18 habitat -- the habitat had to be very, very favorable
19 from the start, and then changes began to occur as a
20 result of developments in the system, and some changes
21 occurred as far as the habitat itself, pertaining to
22 the habitat.

23 Q Please summarize your written testimony regarding
24 the impact of grazing and also irrigation diversion on
25 the fishery of Rush Creek before 1941.

1 A Grazing as far as -- certainly, grazing ranged --
2 sheep were ranged, cattle and sheep were ranged within
3 the Basin. I -- I don't believe -- it's my opinion
4 that grazing did not take -- make serious inroads in
5 the -- in the habitat and, in turn, in the fishery,
6 fish population, because the herders would water their
7 stock and move them out into the range for forage.
8 They'd water their stock at intervals and not linger
9 for any length of -- any great length of time around
10 the waterways, the waters. So I don't think the impact
11 was all that great as far as grazing goes.

12 But in the -- as far as irrigation goes, there was
13 an increasing impact from large diversions, sections of
14 the stream, particularly below -- immediately above Old
15 Highway 395 down to The Gorge, were dried up at times.
16 Even though, for most years there was inflow, there was
17 return flow and inflow from springs in both the Lower
18 Parker and Walker Creeks.

19 As far as the reach below The Gorge, otherwise
20 called The Narrows, this was sustained as time went on
21 more and more by the springs, starting in 1947. This
22 was after the major diversions by the City of Los
23 Angeles out of the Basin via the Lee Vining Aqueduct
24 and Mono Tunnel. No water was put down Rush Creek, and
25 so the springs below The Gorge, which is below Highway

1 395, sustained the stream over the principal inflow for
2 the next several years during our testing project.

3 Q Again, summarizing your written testimony, how
4 would you compare the impact of L.A.'s diversions after
5 1941 to the impact of irrigation diversions and grazing
6 before 1941 on the fishery?

7 A I think after -- I think after 1941, the impact
8 was increasingly severe. It was my impression and also
9 the impression and consultation with others of our --
10 of the department, the fisheries people and the
11 wardens, that there was an increasing impact. Some
12 years were better water years than others, and the
13 stream benefited from those good water years, better
14 water years. But it amounted to a gradual
15 deterioration of the habitat between the -- especially
16 between the Grant Lake and The Narrows and certainly
17 below the lower-most diversion point just above Old
18 Highway 395.

19 As time went on, and with that, with the
20 diminution of outflow from -- releases, I should say,
21 for irrigation, the springs gradually dried up and
22 releases -- the springs in the aggregate fell from 24
23 second-feet in 1947 to only an average of about two
24 second-feet in 1951. As a matter of fact, Mr. Beck, in
25 his report in 1951, said that at one point -- reported

1 that, at one point, that -- in that year, the flow may
2 have gotten as low as one second-foot. So it was a
3 gradual constriction with diminution of flow and the
4 habitat was drying up.

5 Q Let's turn now to Lee Vining Creek. Please
6 summarize your testimony as to the fishery that existed
7 in Lee Vining Creek before 1941.

8 A Lee Vining Creek -- excuse me. Lee Vining Creek,
9 prior to 1941, was -- it was a good stream. It was --
10 while it was short and comparatively steep and rapid
11 below -- rapid and somewhat turbulent at some flows
12 below Highway 395, it was a good stream. And it was
13 considered by local people to be about the best fishing
14 section in the canyon, and this was repeated by several
15 people on several occasions, that opinion. I felt
16 pretty much the same because of -- partly because of
17 the sustained flow. While the flow got down
18 comparatively low, there was a sustained low that was
19 good habitat there for shade and shelter, comparatively
20 good spawning areas, some eastern brook -- as far as
21 variety goes, eastern brook in the upper section, some
22 rainbow, but still predominantly brown trout.

23 And this -- this was the general -- this opinion
24 and response was generally the same coming from the
25 wardens and fishermen who fished the area and some of

1 the older towns people who actually fished the area
2 themselves.

3 Q Before 1941, how did irrigation diversions and
4 grazing affect the fishery in Lee Vining Creek?

5 A As I recall, while there were -- there were
6 irrigation diversions, the stream never dried up. I
7 never -- it was never reported as such, and if it had
8 dried up as a result of irrigation diversions, either
9 above Highway 395 or the diversions for irrigation down
10 in the dairy section, what I call the lower section,
11 I'm sure it would have been reported right away through
12 either the district ranger or through the towns people
13 or Mr. McPherson who was supervisor at that time or
14 through Walter Dumbrowski, who has also been a
15 supervisor. So it sustained itself fairly well.

16 It was not as good a fishery in my opinion as Rush
17 Creek. The use was not as great, and -- but it was
18 not -- but still it was basically certainly a good -- a
19 good fishery.

20 Q After 1941, how did L.A. DWP diversions affect the
21 fishery in Lee Vining Creek?

22 A The -- I think actually there were fewer --
23 probably a reduction in the population, although we did
24 not make any census. I had to judge this from the
25 reports of anglers and wardens who were fishing on the

1 stream, but my impression was that there was
2 constriction there. There was a downtrend in the
3 fishery in Lee Vining Creek. We continued to stock.
4 We stocked fingerlings, particularly below the highway,
5 and catchables above and, to some extent, this helped
6 sustain the fishery. But there was a -- there was a
7 gradual downtrend.

8 MR. ROOS-COLLINS: Thank you. No further
9 questions.

10 Mr. Dodge?

11 MR. BIRMINGHAM: Let's take a break.

12 THE VIDEOGRAPHER: This is the video camera
13 operator. We're now going off the record.

14 (Whereupon a recess was taken.)

15 THE VIDEOGRAPHER: This is the video camera
16 operator. We're now back on the record. Please
17 continue.

18 CROSS-EXAMINATION BY MR. DODGE

19 Q Eldon, hi, I'm Bruce Dodge, as you know, and I'm
20 going to switch gears with you and not ask you anything
21 about fish but rather ask you about ducks and other
22 water fowl at Mono Lake.

23 Let me ask you first to affirm that the document I
24 have here in my hand which is labeled NAS and MLC-1-A,
25 B, testimony of Eldon H. Vestal, and its nine numbered

1 paragraphs with your signature at the end dated
2 September 17, 1993, let me just ask you to affirm that
3 that is your testimony on ducks and other water fowl in
4 the Mono Basin?

5 A Yes, it is.

6 Q Have you any corrections you wish to make to it
7 today?

8 A Let's see. There are none.

9 Q Okay. Now, I'm going to just ask you to summarize
10 your testimony in two areas, and one is basically
11 what's covered by Paragraph Three. I'd like you to
12 focus in on the time frame that you've already told us
13 about, 1938 to 1950, and focus in on your observations
14 in the fall and the winter of the year and just ask you
15 to summarize what you observed in terms of ducks and
16 other water fowl at Mono Lake.

17 A Yes. Well, I had rather frequent opportunities in
18 that time frame to -- in traveling to and from
19 Bridgeport and other areas within the Basin and also in
20 trips to Rush Creek, and I made two circuit trips
21 around Mono Lake with one in the spring in 1947 and one
22 in the fall with Claude James, the City of Los Angeles
23 hydrographer, in his circuit to measure the level of
24 wells in the city property around Mono Lake.

25 And I -- in later -- in the later years in 19 --

1 especially after Rush Creek's test stream was underway
2 and we had established a weir and trap in Lower Rush
3 Creek, I had a rather -- a number of occasions to hear
4 and see water fowl there in the delta region of Rush
5 Creek.

6 In the circuit trips with Mr. James, we saw water
7 fowl at what they call the Navy Beach -- well, in
8 addition to the delta, the Rush Creek delta, Navy
9 Beach, Salmon Springs or Salmon Springs, Warm Springs,
10 Dechambeau Ranch, the Monte Vista Springs or Fisher
11 Springs which later became the location of the Danberg
12 Ranch, and then on around to the mouth of the -- or
13 near the mouth of Lee Vining Creek.

14 We, in one -- on one occasion, I was invited by
15 Walt Dumbrowski to hunt with him, and this was on
16 the -- in October of 1940. And we saw -- at that time,
17 we saw, on these other occasions, which were late in
18 the -- very late in the season, numbers of water fowl
19 that were almost unbelievable. They -- when the ducks
20 were -- especially around the ponds there at the delta,
21 and the ducks would fly up from the ponds, there would
22 still be just thousands of ducks, water fowl, still --
23 principally ducks, left on or about the ponds.

24 It was my recollection that at times, as far out
25 across the lake as the eyes could see, there were water

1 fowl rafted out, and they were scared closer in to the
2 shores. They would raft out on the lake, and it was
3 just a dark mass of water fowl on the lake. The --
4 principal species, common species observed were mainly
5 shovelers or spoonies, the little ruddies. There were
6 mallards, of course, mallards were very common,
7 pintails, and then there were other species. There
8 were gaderal and widgeon, and it seemed to me that as
9 the winter season came on, there were more and more and
10 more water fowl into November and December.

11 It -- I had taken part in earlier years, traveling
12 up and down California and the coastal areas and around
13 the bay, I had taken part as a member of the staff here
14 within this region and Region Three out of Yountville,
15 I took part in an aerial census, flights with the water
16 fowl biologists on a couple of occasions, and we toured
17 centers. And their technique, as Walt did in making
18 his counts over at Rush Creek, the Rush Creek ponds and
19 about Mono Lake, was to checkerboard a small area and
20 then, by eye, estimate the number of birds that were
21 seen in those areas. And we were -- we flew over
22 Bolinas and Tomales Bay and the San Francisco Bay Area
23 and -- on those occasions, and then I had occasion
24 while I was here in this region to visit Grizzly Island
25 and the water fowl management over there.

1 And I had seen ducks in other parts within the
2 valley, Merced, Delhi, Manaberry, Los Banos, and I
3 remember that the -- I want to use the phrase "the vast
4 numbers of water fowl" that I saw, those species and
5 others, including swans, although the swans were not --
6 they were seen not directly in connection with Mono
7 Lake. They were seen within the Basin, but geese,
8 certainly, around Mono Lake, and Teal. There were at
9 least two species of Teal. Their numbers in Mono Lake
10 exceeded anything that I had seen in any of these other
11 localities that I had toured or you might say, quote,
12 surveyed, unquote, with the wildlife biologists here,
13 the water fowl biologists, they call them, out of this
14 region. And it -- it certainly was a sight to behold,
15 an extremely impressive experience over there within
16 the Basin and distinct and apart, of course, from my
17 principal forte which was in fisheries.

18 Q I think that's a good summary, Mr. Vestal. Thank
19 you very much.

20 MR. DODGE: I think we're ready for
21 cross-examination by Mr. Birmingham now.

22 CROSS-EXAMINATION BY MR. BIRMINGHAM

23 Q Mr. Vestal, my name is Tom Birmingham, and I'm
24 with Kronick, Moskovitz, Tiedeham and Girard. And, as
25 I stated earlier, I'm the attorney that is representing

1 the City of Los Angeles and the Department of Water and
2 Power and the City of Los Angeles in connection with
3 these proceedings.

4 I'm going to conduct a cross-examination of you.
5 If, during the course of the cross-examination, you
6 feel for any reason you want to take a break, please
7 let me know --

8 A Thank you.

9 Q -- and we will take a break.

10 I believe you stated that you began your tenure in
11 the eastern Sierras in 1938 or 1939; is that correct?

12 A 19 -- in the -- for a continued period in 1939;
13 however, I did make some early observations on my
14 travel through the Basin in -- on April 30th, 1938, at
15 which time, I took occasion to stop. It had been a
16 heavy snowstorm. That year was a heavy winter, and I
17 took occasion to stop at Lee Vining Creek and note the
18 high flow which exceeded 100, in my estimation, since I
19 had just come fresh from the water surveys over in the
20 Eel River Basin that exceeded 100 second-feet. And it
21 was quite frothy, a lot of white water, and quite
22 turbulent, and noted the condition of the stream and
23 the tremendous flow coming down there, both above and
24 below Highway 395. There was snow everywhere.

25 And they did the same thing again at -- at Rush

1 Creek. I stopped -- this was the Old 395 bridge and,
2 again, the snow-covered riparian, and I estimated it
3 was -- it looked to me like it was a beautiful stream
4 at that flow coming down which I estimated exceeded
5 between 75 and 100 second-feet. It was closer, to me
6 in my mind's eye, closer to 75 second-feet. I then
7 went on to my assignment at Convict Lake.

8 Q You were in -- prior to World War II, you were in
9 the Mono Basin until 1942; is that correct?

10 A That's correct.

11 Q And then after World War II -- well, during World
12 War II, you served in the military, and you returned in
13 April of 1946 to the eastern Sierra?

14 A Returned in March of 1946 to the eastern Sierra.

15 Q Excuse me. And then you worked in the eastern
16 Sierra until 1950 when you were transferred to --

17 A The Fresno region, yes, headquarters in Fresno.

18 Q From a review of the weekly reports that you
19 turned in, and I reviewed all of them, it appears that
20 during the period from 1939 to 1942, your work involved
21 primarily a creel census on June Lake; is that correct?

22 A Yes. That was the -- initially, that was the
23 primary assignment. It was a -- it was really a
24 carry-over from the break-in work under the California
25 trout investigation of Convict Lake. But that creel

1 census then continued on in 1939, 1940, '41, and '42.
2 It was terminated in 1942 just before I went into the
3 military.

4 Q And your observations of Lower Rush Creek were
5 more limited. I think you testified that you made
6 observations as time permitted. Is that correct?

7 A Well, the -- the observations actually -- I became
8 aware fairly early on of the reconstruction of Grant
9 Lake Dam, and I took -- I made rather frequent trips
10 down Rush Creek. These were -- and on those trips, as
11 time permitted, I'd go all the way to Lower Rush
12 Creek. But I'd stop at the L.A.-Ventura Weir to note
13 the flow of the condition in the stream and the flow
14 there, and then I took one or two occasions to
15 photograph the changes that were taking place during
16 the reconstruction of Grant Lake Dam in 1939.

17 And I followed that, the reconstruction period, on
18 through the changes that were taking place in 1940, at
19 which time the cover, the riparian cover at the inlet
20 of Grant Lake Dam, was destroyed by the city with great
21 battleship chains between two, let's see, D-8 Cats and
22 stacked and burned and the contributions of that to the
23 despoilation of, pollution of, Grant Lake.

24 So I -- and then I would stop to note the outflow
25 from Grant Lake, and on down, as time permitted, I

1 would look into the stream between Grant Lake and
2 Highway -- the Old Highway 395 crossing. And in 1939,
3 as a matter of fact, I took a photograph there looking
4 up the stream at Rush Creek at that crossing.

5 And then, I would take occasion, as time
6 permitted, to examine the -- since it was a kind of a
7 sub-assignment by the president of the Fish and Game
8 Commission, then Nate Milner, to do some work at his,
9 one of his favorite places at Little Walker Lake, to
10 examine the irrigation diversions and the conditions of
11 Parker Creek and Walker Creek above and below the
12 diversions at that point, the irrigation points. So I
13 became fairly familiar with those locations.

14 And then on the opening each season, about the
15 opening of the fishing season, and at the so-called
16 pressure points when fishermen would congregate there,
17 I took occasion to check with anglers and examine their
18 catches. And I'd also, in contacts with the wardens
19 and the anglers themselves, I would get information. I
20 mentioned earlier the liaison between these people.
21 And that, in that fashion, I would add to the survey
22 file and the inventory file that I was obligated to
23 assign to develop and maintain as part of my
24 responsibilities.

25 Q Now, your -- your notes and your weekly reports

1 were quite detailed. In fact I noticed that your
2 weekly reports contained references to having different
3 state vehicles maintained and repaired. Is that
4 correct?

5 A It's very important in that area, especially in
6 the fall and the wintertime. You --

7 Q So is it correct that your weekly reports would
8 have contained all of the visits you made to Lower Rush
9 Creek during the period from 1939 to 1940?

10 A No, they did not. The reports did not contain --
11 there was a time factor involved, and there was
12 certainly a guideline set forth by the -- by the
13 supervising fisheries biologist. So I didn't detail
14 everything that was done every day.

15 And in some of the -- on special assignments like
16 this one I mentioned to Mr. Milner and, at times, the
17 monthly reports, I would attempt to add to the material
18 that was -- that was in the weekly reports, perhaps
19 elaborate, augment that somewhat.

20 Q A few moments ago you made reference to an
21 L.A.-Ventura Weir, and there are references to the
22 L.A.-Ventura Weir in your testimony. That is a weir
23 that existed above the inflow into Grant Lake
24 Reservoir; is that correct?

25 A Yes.

1 Q Now, with respect to Lee Vining Creek, is it
2 correct that your personal observations of Lee Vining
3 Creek were limited during the period from 1939 to 1942?

4 A Comparatively so. I did have an opportunity to
5 walk out portions of them, portions of Lee Vining
6 Creek, and particularly between the diversion dam above
7 the ranger station on down to Highway 395 crossing and
8 then below the powerhouse. And I had an opportunity --
9 took an opportunity to observe the -- the stream just
10 above its entrance into Mono Lake, and I have -- as a
11 matter of fact, one of the photos that I borrowed, you
12 might say, from the files of the MVC in Berkeley was
13 quite representative of what I saw there with a
14 riparian -- arboreal cover and the riparian situation
15 at that time. That was taken in 1916 by Joseph Dixon
16 who was part of that survey, trans -- Sierra transect
17 survey out of Berkeley.

18 Q In your written testimony, it states that Lee
19 Vining Creek was considered an excellent fishery prior
20 to DWP's diversions; is that correct?

21 A It was a good fishery.

22 Q Now, that statement is based on what you were told
23 by others; isn't that right?

24 A Principally, by the old timers in the area and by
25 the wardens who certainly were more familiar because of

1 their patrol activities and I -- on whom I depended
2 rather -- rather heavily at times.

3 Q Was Mr. Dumbrowski one of the old timers that you
4 tended to rely on?

5 A Well, Walt wasn't as much of an old timer as some
6 of the other people. This was not -- it was not my
7 impression that Walt was that much of an old timer.
8 There were people like -- like Bill Banta and the
9 Hesses, and there were the McPhersons, Lois -- and, of
10 course, and his mother, Mrs. McPherson. There were
11 others.

12 One of the old timers who I saw more often than
13 not in June Lake was Ed Ferrington who was part of the
14 Ferrington family. It goes back many years, of course,
15 as you know, but there was a -- there was a -- there
16 were a number of these people.

17 Q Mr. Vestal, I don't want you to not give complete
18 answers to any of my -- any of the questions that I
19 asked or ask, but I am limited in the amount of time
20 that I have. In fact, I'm probably going to be cut off
21 by my colleagues with a great deal of glee.

22 A I understand.

23 Q But if you would just restrict your answers to my
24 questions, I would appreciate that very much.

25 Now, with respect to Mr. Dumbrowski, specifically,

1 did you ever know him to exaggerate reports to you?

2 A I thought that -- I thought that Walt was pretty
3 accurate. He -- we employed him -- that was one of the
4 bases for employment, as a matter of fact. I did
5 inquire into him before we employed him as a checker
6 down on the Rush Creek test stream project. And he --
7 the records that he kept for us and the accuracy that
8 he incorporated in -- for example, the water fowl maps
9 that he drew as part of the -- his contributions to the
10 Pacific flyway census in 1948, there were indications
11 there that he not only knew what he was talking about,
12 but he took pains in putting things together, putting
13 these reports together. He kept temperatures and kept
14 observations for us there at Rush Creek which, during
15 his tenure with us, which in a way were above and
16 beyond the call.

17 Q Now, isn't it correct, though, that in December of
18 1947 -- I'm sorry. I'm looking at the wrong date. It
19 was April of 1946, Mr. Dumbrowski reported to you that
20 hundreds of fish were being stranded in Rush and Lee
21 Vining Creeks, and also Gibbs Creek, and that, upon
22 your investigation, you were not able to substantiate
23 his report of hundreds of fish being stranded but, in
24 fact, you only found one fish that was stranded?

25 A It is true that I found one fish that was

1 stranded. The time that I got there, the report was
2 given to Walt by several people, and the time that I
3 got there, I'm very sure that natural consequences had
4 taken place. In other words, perhaps anglers, sheep
5 herders, who almost always got word of stranded trout
6 ahead of our approach, there were probably natural
7 predators that took their share of the fish. So
8 consequently, the numbers of stranded fish at the
9 time -- in that particular situation, that time, at the
10 time I got there were very much diminished.

11 Q Now, you indicated in your testimony that the fish
12 on Lee Vining Creek were somewhat smaller than the fish
13 caught on Rush Creek. Is that correct?

14 A They -- the average of fish caught on Lee Vining
15 Creek was between -- there were -- the average was
16 between about eight to ten inches, but some of the fish
17 were a little -- a few of the fish were ranges upward
18 around 14 inches or so.

19 Q Now, isn't it correct that that was about the same
20 length of fish that was caught in Rush Creek prior to
21 the city's diversions? As I recall, you testified on
22 this subject in Judge Finney's courtroom. Is that
23 correct?

24 A Yes, I testified in Judge Finney's court.

25 Q And at that time, did you testify that the average

1 length of fish in Rush Creek was about eight inches?

2 I'm talking about Lower Rush Creek.

3 A Yes. I'm referring to Lower Rush Creek. My
4 impression was that you were -- this was -- the
5 implication, Lower Rush Creek. The difference being
6 that you had a range, a much greater range. The
7 average in the bulk of Rush Creek may have been smaller
8 as a result of the -- reduced somewhat by the result of
9 the planting, but you had a range there of fish up to
10 several pounds which went into the delta section. And
11 the delta section was like a raceway. There were
12 deeper pools there, and the section received drift,
13 downstream drift of stream bottom foods. And the fish
14 in the delta also availed themselves of -- we infer
15 that this was the case, of shrimp and flies out of Mono
16 Lake.

17 Q During the -- your second tour in the eastern
18 Sierra after the war, you were responsible for an
19 experimental program on Lower Rush Creek; is that
20 right?

21 A Yes.

22 Q And the portion of Rush Creek designated as the
23 test stream for that experiment was the portion below
24 what's known as The Gorge or The Narrows; is that
25 correct?

1 A Yes.

2 Q And among the reasons that you selected that
3 portion of Rush Creek as the test stream for this
4 program was because it was typical of a heavily-fished
5 trout stream on the eastern Sierra. Isn't that right?

6 A As typical as we could find in that situation. If
7 you may recall from that publication, 1954, there were
8 several specifications in there, and it was a case of
9 trying to evaluate these specifications, arrive at a
10 situation where we had sustained flows, at least we
11 hoped were going to be sustained, plus the very
12 important element of control, both for access and for
13 stocking.

14 Q But it is correct that your 1954 report on this
15 test stream, and here I'm referring to Page 89 of
16 Cal-Trout Exhibit 5-S, states that --

17 MR. THOMAS: Hang on, Counsel. Let the witness
18 get the document.

19 MR. BIRMINGHAM: Absolutely.

20 THE WITNESS: The reference again?

21 Q BY MR. BIRMINGHAM: Page 89, which is the first page
22 of the report.

23 A I have it.

24 Q It states, "Under the description of the test
25 stream, the stream was fairly typical of a

1 heavily-fished trout stream -- " excuse me -- "of
2 heavily fished trout streams on the east slope of the
3 Sierra Nevada." Is that correct?

4 A Yes. We thought so. The average width and the
5 average depth, the distribution of -- it didn't have --
6 it didn't have, perhaps, the fluctuations at that time
7 when this project was going, it didn't have the annual
8 fluctuations, but we thought so for the purposes of
9 this program.

10 Q Now, your testimony states that it wasn't until
11 1947 that the Department of Water and Power began
12 diverting major amounts of water out of the Mono Basin;
13 is that correct?

14 MR. DODGE: Before Mr. Vestal answers that
15 question, the record should reflect that, according to
16 Mr. Valentine's electronic timer, we've just completed
17 the first 20 minutes of cross-examination.

18 MR. BIRMINGHAM: I appreciate that, Mr. Dodge, and
19 I will make an application to the absent Mr. del Piero
20 for an additional 20 minutes, which I'm sure will be
21 granted.

22 MR. DODGE: It will not be opposed.

23 THE WITNESS: May I have that question again?

24 Q BY MR. BIRMINGHAM: Sure. Absolutely. Maybe I can
25 refer specifically to your testimony.

1 On Page 18 of your written testimony -- do you
2 have a copy of that in front of you?

3 A Yes.

4 Q Down at the bottom, three lines from the bottom,
5 in fact, it states that, "It was in 1947 that L.A.
6 began diverting major amounts of water out of the Mono
7 Basin." Is that your memory?

8 A In 1947 we first became aware that the stream
9 above The Gorge was dried up, was being dried up, and
10 the inference was that it was all going out via the
11 tunnel. And hence, that inference.

12 I did not have it at the time. I did not have
13 specific records, but because of that observation at
14 the test stream and above The Narrows or The Gorge,
15 that was the inference.

16 Q Now, at the time your experiment started in 1947,
17 isn't it correct that the condition of Rush Creek below
18 The Gorge was representative of its condition prior to
19 diversions by DWP out of the Basin?

20 A In 1947?

21 Q When your program started in 1947.

22 A I don't think so.

23 Q Now, you have included with your testimony several
24 photographs that you have indicated were taken in 1947
25 in connection with your program.

1 A Yes.

2 Q And with respect to the photographs, you've
3 indicated in your testimony that the photographs
4 represent the conditions of the stream prior to the
5 city's diversions in 1941. Is that correct? For
6 instance --

7 MR. THOMAS: Objection. The witness is still
8 attempting to verify your first question.

9 MR. BIRMINGHAM: If he doesn't know the answer,
10 Mr. Thomas --

11 MR. THOMAS: I'm sure he'll answer it in due
12 course, Counsel.

13 MR. DODGE: Let's have a question and then an
14 answer and proceed in the traditional way here. I
15 think Mr. Birmingham was about to give Mr. Vestal a
16 specific question.

17 THE WITNESS: A specific reference, is what I'm --

18 Q BY MR. BIRMINGHAM: Absolutely.

19 A -- looking for.

20 Q On Page 12, there's a reference to a photograph of
21 Rush Creek that you took on February 21, 1947.

22 A Yes.

23 Q Showing what you referred to as, "Wonderful
24 gravels, riparian cover of dense willows and
25 cottonwoods, and a good fishing area." Now, was that

1 representative of what the stream looked like in 1941?

2 A That --

3 MR. DODGE: Referring specifically to the gravels
4 and the riparian?

5 MR. BIRMINGHAM: I'm referring specifically to the
6 photograph.

7 MR. DODGE: The question is -- excuse me. The
8 question is whether the photograph accurately
9 represents pre-1940 conditions?

10 Q BY MR. BIRMINGHAM: Let me state the question.

11 Mr. Vestal, the conditions that are depicted in
12 this photograph which you've attached to your testimony
13 as Cal-Trout Exhibit 5-K, is that photograph, the
14 conditions depicted in that photograph, typical of the
15 conditions that existed on the stream in 1941 below The
16 Gorge?

17 A I would say no. It -- I do not -- I do not
18 recall -- I couldn't typify from that photograph the
19 conditions at that time.

20 Q On Paragraph 32, which is on Page 13 of your --
21 your testimony, it -- looking at Paragraph 32, it
22 states that, "The quality of Rush Creek habitat in the
23 historical period was clearly the most important factor
24 in the superior quality of the fishery. The lower
25 section, given natural flow levels, was a very rich

1 area for trout food production and contained excellent
2 trout habitat in terms of riparian cover and gravels."

3 Now, that's a reference to the period prior to the
4 department's diversions. Is that correct?

5 A That's right.

6 Q Now, further down on the same --

7 A By "department," you're talking about Department
8 of Water and Power?

9 Q Yes, I am. Thank you for clarifying that.

10 Further down it states that, "The reach from The
11 Narrows to the lake, the delta area in particular,
12 provided this type of important habitat not only in
13 terms of food production, but also in channel refuge
14 and cover. The excellent quality of the delta area is
15 illustrated by Exhibit CT-5-M."

16 Now, that's another photograph that you took in
17 1947; isn't that correct?

18 A That's right.

19 Q Now, does that photograph represent the conditions
20 that existed on the stream in 1941?

21 A Well, I would say that at that level of flow in
22 1941, that certainly would represent the conditions
23 that existed at that time on Rush Creek.

24 Q All right. Finally, I'd like to look at Paragraph
25 36 of your testimony.

1 A 36?

2 Q 36, yes. You refer in Paragraph 36 to a
3 photograph CT-5-P, Cal-Trout 5-P, and you say that it's
4 a photograph that you took of an angler fishing on Rush
5 Creek as it existed in 1947. Are you able to find it?

6 A Yes. I have it right here.

7 Q Okay. Now, with respect to the photograph, you
8 say that within the photograph, "There is a dense
9 riparian cover, beautiful gravels, and a nice flow of
10 approximately 20 cfs." And then you go on to say,
11 "This photograph," Cal-Trout Exhibit 5-P, "is
12 representative of the conditions on Rush Creek before
13 L.A.'s diversions began to have a serious impact." Is
14 that correct?

15 A Referring -- referring there to the conditions
16 that took place gradually in time as the flows in the
17 spring, because already, the springs were on the
18 downtrend. And it was -- it represented -- it was at a
19 time when -- at the start of that downtrend the
20 constriction began to take place in the habitat.

21 Q Now, in 1947, isn't it correct that the flows in
22 the springs were 24 cfs?

23 A The record shows that the -- that -- we recorded
24 and I published in this paper, 24 second-feet for
25 1947.

1 MR. DODGE: Mr. Vestal, if Mr. Birmingham by
2 mistake interrupts you, let him know so that you can
3 complete your answer. I didn't think you'd completed
4 your answer to the last question, but I might be wrong
5 on that. But the important thing is, if you're not
6 finished with an answer and some lawyer starts to give
7 you another question, just tell that lawyer that you
8 hadn't quite finished yet.

9 Q BY MR. BIRMINGHAM: Please do that, Mr. Vestal.

10 Now, with respect to a chart that you prepared,
11 and I'm not sure that it was given a number. I believe
12 it's Cal-Trout Exhibit 5-E.

13 A 5-E? Yes.

14 Q In your testimony, you say that, "Cal-Trout
15 Exhibit 5-E is a true and correct copy of a chart that
16 you had prepared reflecting data you collected on Mono
17 Lake tributaries." Is that correct?

18 A This is true.

19 Q Now, does this chart, 5-E, represent the
20 historical conditions of those tributaries?

21 A This --

22 MR. DODGE: Objection. Only ambiguous as to what
23 you mean by "historical" and how it relates to the
24 onset of diversions.

25 MR. BIRMINGHAM: I believe that we had -- when

1 Mr. Vestal was talking in his testimony about
2 historical conditions, you meant to refer to the
3 conditions that existed prior to the department's
4 diversions. Is that correct Mr. Vestal?

5 THE WITNESS: That's right. Going back quite
6 aways. And I did -- in the researching, back in the
7 historical period, I did, for example, under volume of
8 flow, I've got dates there ranging 1911 to 1912, and a
9 range from 16 to 1280 cfs. So the data goes back -- it
10 was not just confined to the more contemporary period.

11 Q BY MR. BIRMINGHAM: Now, with respect to the springs
12 and the seepage below The Gorge on Rush Creek, you show
13 that during the historical period, the springs and --
14 were flowing at up to 18 cfs in meadow section below
15 gorge. Is that correct? Let me show you my copy.

16 A In Rush Creek?

17 Q Right.

18 A Let's see. Up to 18 second-feet in the meadow
19 section below The Gorge.

20 Q So that was -- go ahead. I'm sorry. Was that the
21 figure that you had for the historical period?

22 A That was the figure -- well, it was the figure
23 that I had on record, which was a metered flow by
24 Claude James taken at the -- that was -- taken on the
25 day that he recorded 152 second-feet coming from above

1 The Narrows. The day that he made the supplementary
2 record at the bridge, the ford, the upper bridge, to
3 indicate the total on that day of 170 second-feet.

4 Q Now, I'd like to ask you a question about these
5 photographs again that you've submitted from 1947. Is
6 it correct that these photographs depict the conditions
7 of the stream before, and I'll use your terms, "serious
8 impacts from the city's diversions"?

9 MS. CAHILL: Objection, ambiguous. I think you
10 need to take them one by one.

11 MR. BIRMINGHAM: I will.

12 Q BY MR. BIRMINGHAM: Your testimony clearly states,
13 Mr. Vestal, that -- let's refer to it again. I'm
14 looking at Paragraph 36 again.

15 A 36?

16 Q Yes.

17 A All right.

18 Q Cal-Trout Exhibit 5-P is representative of the
19 conditions on Rush Creek before L.A.'s diversions began
20 to have a serious impact. Is that your opinion?

21 A In the sense that I referred to earlier, that --
22 these photographs were taken in 1947, and the -- from
23 that time on, there was greater and greater -- and is
24 shown in the record, greater and greater constriction
25 and downtrend in the habitat.

1 Q But what I'm asking about is specifically what's
2 shown in that photograph, 5-P, Cal-Trout 5-P. Is that
3 representative of the condition of Rush Creek before
4 L.A.'s diversions began to have serious impacts on the
5 stream?

6 A I would say that that was -- that represented the
7 condition on that particular time and flow which was a
8 matter of release from Grant Lake.

9 Q Now, you say that the flow -- the photograph
10 depicts a -- a beautiful -- I'm sorry, a nice flow of
11 approximately 20 cfs. Is that correct?

12 A That was -- I believe that was -- that's
13 reasonably correct, yes.

14 Q Now, you would agree, wouldn't you, that that nice
15 flow of 20 cfs would have kept in good condition the
16 fish that existed in that portion of the stream?

17 A I would have to -- over a period of time, I would
18 have to evaluate the condition of the fishery and --
19 that would have to -- that would have to be a sustained
20 situation in order to arrive at that judgment.

21 Q But if there was a sustained flow as depicted in
22 that picture, Cal-Trout --

23 A Of 20 second-feet.

24 Q 5-P of 20 second-feet, that would keep the fish in
25 that portion of the stream in good condition?

1 MR. DODGE: Objection, asked and answered.

2 MR. BIRMINGHAM: I'm trying to clarify it.

3 THE WITNESS: It would be sufficient for that
4 purpose.

5 Q BY MR. BIRMINGHAM: Thank you.

6 I'd like to ask you a question about a proposal.
7 If there were flows in Rush Creek that -- a minimum
8 release out of Grant Lake of 35 cfs and no diversions
9 of Walker and Parker Creek, but a minimum flow, a
10 minimum release during the winter of 35 cfs out of
11 Grant Lake with flows ranging up to 106 cfs in July,
12 releases out of Grant Lake up to 106 cfs in July --

13 A 160 or 106?

14 Q 106.

15 A 106.

16 Q With no diversion of Walker or Parker, would those
17 flows keep in good condition the fishery that existed
18 in Rush Creek in 1941?

19 A This would be my inference as a result of the IFIM
20 studies that were carried out by the Department of Fish
21 and Game under contract. These were very carefully
22 evaluated, and these are part of -- I take it part of
23 their -- the results. And this would be my inference
24 based on that data and the conclusions that were
25 arrived at by those studies.

1 Q Now, I'm not referring specifically to the
2 studies. I'm referring to your --

3 A My opinion?

4 Q Your opinion particularly as it existed back in
5 1941. Is it correct that shortly after the Department
6 of Water and Power began its diversions in 1941, you
7 wrote to the City of Los Angeles Department of Water
8 and Power and requested a release of 5 cfs out of Grant
9 Lake Reservoir?

10 A Yes.

11 Q And isn't it correct that at that time you said
12 that that release of 5 cfs would maintain in good
13 condition the fish that existed below Grant Lake
14 Reservoir?

15 A Yes. And if you may recall the record, this was a
16 stopgap recommendation which exceeded authority. I had
17 to take a -- some criticism by our administration in
18 our department at that time as a result of that
19 communication with Mr. Jones.

20 Q Now, if in response --

21 MR. THOMAS: Objection, the witness is still
22 answering the question.

23 Q BY MR. BIRMINGHAM: Had you finished your answer,
24 Mr. Vestal?

25 A Well, what I wanted to --

1 Q Mr. Vestal, if you haven't finished any question
2 when I interrupt you, please let me know that. Okay?

3 MR. THOMAS: Counsel, you've been very clear.
4 Just slow down and he'll have a chance to answer.

5 THE WITNESS: I wanted to emphasize that this
6 was -- and I did so point out before the Court that
7 this was a stopgap measure. It did not evaluate water
8 rights. It did not -- it wasn't concerned -- it was
9 concerned with saving a situation in Grant Lake which
10 was threatened by a warm-weather period, and there were
11 a lot of factors involved in making that
12 recommendation.

13 So I made it low enough so that it would -- it
14 would sustain for a time until hopefully thunderstorms
15 and other flows, return flow or something, would
16 supplement conditions, supplement the flow and
17 supplement conditions, but it was under those --
18 subject to those restrictions, you might say, or
19 guidelines by the department. It was --

20 Q BY MR. BIRMINGHAM: I'm listening.

21 A It was just a stopgap recommendation.

22 Q Now, it's correct, isn't it, that what you said --
23 this was a letter that you sent on March 17, 1941. Is
24 that correct?

25 MR. THOMAS: Objection. He doesn't have the

1 letter in front of him.

2 MR. BIRMINGHAM: Let's take a moment so he can
3 find the letter.

4 THE WITNESS: Right, I have it.

5 Q BY MR. BIRMINGHAM: Now, you said that you would
6 greatly appreciate the department --

7 MR. DODGE: Let me just say that the record should
8 reflect that Mr. Valentine's timer has recorded the
9 expiration of the second 20-minute cross-examination.

10 MR. BIRMINGHAM: I appreciate your making that
11 clear on the record.

12 MR. FRINK: Mr. Birmingham, do you have an
13 estimate as to how much longer?

14 MR. BIRMINGHAM: I probably have an additional 15
15 minutes.

16 THE WITNESS: I have the reference,
17 Mr. Birmingham.

18 MR. VALENTINE: Excuse me. Since his summary of
19 direct only took 40 minutes, nobody's going to object
20 to you proceeding for another 15 minutes, but I think
21 the record should at least reflect why it is you need
22 the extra time.

23 MR. BIRMINGHAM: Well, the reason that I need the
24 extra time, Mr. Valentine, is that Mr. Vestal's
25 answers, and I don't want to cut him off, but

1 Mr. Vestal's answers have gone significantly beyond the
2 questions that I've asked him. And again, I don't want
3 to cut Mr. Vestal off because Mr. Vestal has very
4 important information for the Board. But I think we
5 can all agree that his answers have gone beyond the
6 specific questions that were asked.

7 MR. VALENTINE: Let's go.

8 Q BY MR. BIRMINGHAM: The reference that you have --
9 that I'm making to your March 17, 1941, letter says, "I
10 would greatly appreciate the department turning in and
11 maintaining a flow in that part of Rush Creek at all
12 times of not less than 5 cubic feet per second. This
13 amount would assure maintenance of the fish life there
14 in good condition, would permit a regular stocking
15 policy for the stream by the Department of Fish and
16 Game, and would provide for such irrigation as," and I
17 can't read the rest of it --

18 A "As Mono Basin in the vicinity seasonally
19 requires." Is that the end of your excerpt?

20 Q Yes. Yes, it is.

21 Now, did this letter on March 17, 1941, accurately
22 reflect your opinion about the effect that 5 cfs would
23 have in the maintaining in good condition the fish
24 that -- the fish life that existed in that portion of
25 the stream referred to in the letter?

1 A Subject to the guidelines that I previously
2 stated, Mr. Birmingham. Also the fact that this was in
3 response to a complaint by local people, I was -- this
4 was called to my attention by one of the local wardens
5 and not -- and not taking into consideration the
6 release guidelines that were given to me earlier by the
7 district ranger, Mr. Fisher. Above all, not following
8 the -- or not in full cognizance of the -- you might
9 say, the administrative guidelines by Mr. Taft, the
10 chief of the Bureau of Fish Conservation at that time
11 and which later I, in response to the department's
12 response and also Mr. Taft's response and you're
13 familiar with that letter, so I -- it was embarrassing.

14 Q But --

15 A But it did not -- it, on a permanent basis, it did
16 not -- the phrase "Rush Creek at all times of less than
17 5 cubic feet per second," I did not mean to imply that
18 this was to last more than the period, the emergency
19 period that was occurring at that time with respect to
20 Grant Lake.

21 Q Now, if in response to this letter, the Department
22 of Water and Power had come back and said, "Well, to
23 maintain in good condition the fish that exist in Rush
24 Creek below Grant Lake, we are going to have a release
25 of 35 cfs minimum out of Rush Creek -- Grant Lake. We

1 are not going to divert Parker and Walker Creek any
2 further," in your opinion, would those flows, the 35
3 cfs in the upper portion of Rush Creek plus the
4 contribution from Parker and Walker below The Gorge,
5 would those flows have maintained in good condition the
6 fish that existed in Rush Creek?

7 MR. ROOS-COLLINS: Objection.

8 MR. THOMAS: Objection.

9 THE WITNESS: That would have to be thoroughly
10 evaluated. There's some factors involved there,
11 Mr. Birmingham, that it would have to be evaluated. I
12 could not really, in all honesty, verbalize an opinion
13 on that.

14 MR. ROOS-COLLINS: Let me state my objection for
15 the record. My objection is that the question is
16 ambiguous, whether it refers to the conditions which
17 existed including the channel form as of March 17th,
18 1941, or to the conditions which exist today.

19 MR. THOMAS: The basis of my objection is the
20 ambiguity of the Parker and Walker diversion. Are we
21 saying the hypothetical involved only the cessation of
22 the diversion by Los Angeles Water and Power or the
23 cessation of the diversion by all of the existing
24 sub-lessees, Cane Ranch, and tributaries.

25 Q BY MR. BIRMINGHAM: The channel in Rush Creek as it

1 existed in -- below The Gorge in 1941, was that
2 significantly altered as a result of the city's
3 diversions before you published your paper in 1954?

4 A Yes. The channel was altered in that there was
5 increased constriction of flows, the flows got down, as
6 you -- as you know, down to at one point in 1951 to 1
7 second-foot. There was encroachment. There was
8 damaging encroachment by -- by riparian cover to the
9 point where, in 1951, we had to employ a small
10 bulldozer to create pools and drop structures in the
11 stream in order to maintain a habitat in the restricted
12 section. It was on a trial basis. But --

13 Q Prior to 1941, in periods other than the runoff
14 period, is it correct that Rush Creek consisted
15 primarily of a single channel below The Gorge?

16 A Prior to 1941?

17 Q Yes.

18 A As I recall, it consisted of a -- yes. A
19 single -- a main stem channel, but at higher flows, any
20 flood flows coming down there, I don't know whether
21 they were flush flows or spill flows or what they were,
22 there was certainly spill out over the meadows and went
23 through meanders.

24 Q And subsidiary channels?

25 A You might call it that, yes.

1 Q Now, is that the reason -- now, the Cal-Trout
2 Exhibit 5-S contains a map of the -- what's referred to
3 as the test portion of the stream which is Rush Creek
4 below The Gorge. Is that correct?

5 A On the right-hand side of the page, Page 91?

6 Q Yes.

7 A Yes, that's correct.

8 Q And is it correct that excluding periods of high
9 runoff, that this map depicts the main channel of Rush
10 Creek as it existed prior to 1941?

11 A Yes. And this was determined from a combination
12 of aerial photos and U.S.G.S. maps.

13 Q Does the 1954 report that you prepared in
14 connection with your study, Cal-Trout Exhibit 5-S,
15 reflect the opinions that you held in 1954 at the time
16 the report was published?

17 A I think essentially so. We -- certainly as a
18 result of the studies and the report, these opinions,
19 we were compelled to modify them. And as you notice
20 there in the report, this affected statewide -- well,
21 stocking policies throughout the Mono area and
22 statewide, subsequently.

23 Q Now, in your report it says that most anglers had
24 only poor to fair fishing. Is that correct? And here
25 I'm referring specifically to Page 101 of the report.

1 A Table 5? 101 --

2 Q No. This is actually in the text, Mr. Vestal, on
3 Page 101. It states that, under angling intensity and
4 angling success, "Thus most anglers still had only poor
5 to fair fishing with the bulk of the fish caught by a
6 minority." Was that your opinion in 1954?

7 A This was the fact of the matter judging from the
8 records.

9 Q With respect to the wild trout fishery, you stated
10 that -- let me ask you a couple of followup questions
11 on that, if I may. The -- even with substantial
12 planning, most anglers had only poor to fair fishing.
13 Is that correct?

14 A That's true.

15 Q And to ameliorate the problem of a minority of the
16 anglers catching the majority of the fish, you
17 suggested that a bag limit or that the bag limit be
18 reduced; is that correct?

19 A Let's see.

20 Q And again, I would refer you to Page 101 of the --
21 of the document.

22 A "The desirability to reduce bag limit on the
23 waters under this type of management." Yes. So the
24 fish would be more equitably distributed.

25 Q Now, on Page 97 of the document, you conclude

1 that, "Satisfactory fishing in the stream could only be
2 maintained by planting catchable trout in the stream
3 throughout the season." Is that correct?

4 A Throughout the season, yes. That's correct.

5 Q And wasn't it your ultimate conclusion that
6 without such stocking, the fishing would have
7 deteriorated early in the season?

8 A Without the stock -- without that kind of
9 stocking, the program would have fallen flat on its
10 face because of the type of angling pressure that the
11 test stream section was subjected to. That was almost
12 predetermined because -- due to observations on other
13 heavily fished waters.

14 Q Very quickly, Mr. Vestal, I'd like to ask you some
15 questions about specific testimony contained in your
16 written testimony. On Page 10, you make reference to a
17 decision made in 1925 to establish a hatchery on the
18 upper tributary of Rush Creek in order to take
19 advantage of the superior breeding and nursery
20 habitat. Now, that hatchery was placed above Grant
21 Lake Reservoir; isn't that correct?

22 A Yes, at that time, that's right.

23 Q Now, further down on the next paragraph it says
24 that your recollection concerning the abundance of fish
25 in Rush Creek are supplemented by contemporaneous

1 fishing data from the period, and then you make
2 reference to that statement in the 29th biennial
3 report. Now, that statement is about the fishery that
4 existed in Grant Lake Reservoir and above in Rush
5 Creek; isn't that correct?

6 A There's nothing said in this about the fishery in
7 Grant Lake. It's just the -- it's the result of
8 escapement from Grant Lake into the egg-collecting
9 station upstream, but nothing is said here about the
10 fishery of Grant Lake.

11 Q But this egg-collection station was above Grant
12 Lake Reservoir?

13 A That's true.

14 Q So when -- there are references in the 29th
15 biennial report to -- that the egg collections were
16 very gratifying because black spotted trout of the
17 region have an excellent lot of eggs that produce
18 vigorous embryos and develop into strong healthy fish.
19 That's a reference to eggs taken from fish above Grant
20 Lake Reservoir?

21 A That's correct.

22 Q Now, you, in your testimony and in your oral
23 summary of your testimony, you referred to cut throat
24 trout. Are cut throat trout also known as black
25 spotted trout?

1 A Yes. There's some -- there's some variation
2 there, but they're all salmopercae, they're all the
3 same species.

4 Q Now, with respect to that portion of Rush Creek
5 below Grant Lake during the period of the thirties and
6 in 1941 when the city began its diversions, isn't it
7 correct that there were no cut throat trout in the
8 lower portion of Rush Creek?

9 A At this time?

10 Q In the thirties and in 1941 when the city began
11 its diversions.

12 A This -- to my knowledge, this is true.

13 Q Your testimony --

14 A We have no evidence that they existed by Grant
15 Lake Dam.

16 Q Now, your testimony makes reference to Rush Creek
17 as being a fishing mecca; is that correct?

18 A It was at a time. In that period that I described
19 earlier in my testimony, yes.

20 Q Now, isn't it also correct that even when the
21 lower portion of Rush Creek was dry, and I'm referring
22 to the portion below Grant Lake Reservoir, that that
23 portion of Grant Lake -- portion of Rush Creek above
24 Grant Lake Reservoir continued to be a fishing mecca?

25 A It continued to be heavily fished, yes.

1 Q And didn't Grant Lake Reservoir and that portion
2 of Rush Creek above Grant Lake Reservoir continue to be
3 a good fishery?

4 A It continued to be -- for a time, but then as Hot
5 Creek Hatchery -- more as angling intensity increased
6 and as Hot Creek Hatchery developed, it was coming into
7 higher and greater and greater production as more and
8 more fishing pressure occurred and it received more
9 heavier stocking. I think this term is applicable,
10 yes.

11 Q Now, this map that you've attached to your
12 testimony as exhibit -- Cal-Trout Exhibit 5-C refers to
13 Mono County as a fisherman's paradise; is that correct?

14 A The records early on certainly showed that. For a
15 number of years -- let's see. We have a reference here
16 to one of the reports from the Fish and Game Commission
17 that Mono Lake -- I mean, Mono County was Number One in
18 fishing statewide.

19 Q Isn't it correct that Mono County continues to be
20 one of the highest-rated counties for trout fishing
21 statewide?

22 A I'm not aware of recent data. We know of no
23 records. I don't think the angler catch survey has
24 been -- that type of survey has been continued,
25 Mr. Birmingham. I'm not aware of this. It may have in

1 another form.

2 MR. BIRMINGHAM: I don't think I have any further
3 questions at this point.

4 MR. DODGE: Okay. Mr. Valentine's beeper has two
5 minutes and 40 seconds remaining on the third 20
6 minutes, so your last estimate was pretty good.

7 MR. BIRMINGHAM: Thank you.

8 MR. DODGE: Department of Fish and Game is next.

9 MS. CAHILL: Let's take a break before we start.

10 THE VIDEOGRAPHER: This is the video camera
11 operator. We're now going off the record.

12 (Whereupon a recess was taken.)

13 THE VIDEOGRAPHER: This is the video camera
14 operator. This is Tape Number Two of the testimony of
15 Eldon Vestal. We have now changed after an hour 45 on
16 Tape Number One.

17 Please begin.

18 CROSS-EXAMINATION BY MS. CAHILL

19 Q Good afternoon, Mr. Vestal.

20 A Good afternoon.

21 Q If you would turn just for a moment to your 1954
22 report on Page 94 --

23 A I have it. Thank you.

24 Q -- there is a statement -- now I can't find it.

25 A You said Page 94.

1 Q Yes. And you were talking about cut throat trout
2 being introduced, and then you say, "But apparently had
3 little effect on the brown trout population which was
4 by that time said to be producing excellent fishing in
5 Lower Rush Creek."

6 Was it your opinion at the time you wrote this
7 article that the brown trout population was producing
8 excellent fishery in the Lower Rush Creek by 1932?

9 A Yes. But by that time, the dominance of the brown
10 trout was making itself felt, and the brown trout
11 population was up, building to the point where it
12 contributed to a very marked degree to the fishing.

13 Q And in the letter that Mr. Birmingham was asking
14 you about that you wrote in 1941, "There is a reference
15 to excellent trout fishing that you had seen in the
16 stream on May 1st of the prior year, which would be
17 1940, and the fact that the lower section of Rush
18 Creek, when given a chance, is highly productive of
19 aquatic foods for trout."

20 Is it your opinion that those are accurate
21 statements regarding the fishery in approximately 1940?

22 A Yes. I believe that that would be -- I believe
23 that would be an accurate statement that implies
24 sufficient flows and so on to -- conducive to the
25 development of bottom foods and a productive stream.

1 Q Could you briefly describe the area below what you
2 call The Gorge and we tend now to call The Narrows,
3 with regard to the conditions that made that area good
4 habitat for fish?

5 A The section below The Gorge was -- first of all,
6 it was a much lower gradient. It was a considerably
7 lower gradient than the segment, the reach above.
8 There were meanders, good gravels. There was certainly
9 good food production. While we didn't carry on survey
10 of the bottom food, we did check enough sufficient
11 stomachs going through the station, the checking
12 station, to indicate there was a variety of at least 12
13 different kinds of bottom foods in the section.

14 You had the inflow from the springs through the
15 meadows, and certainly production there that was
16 contributed by the water cress, water cress beds. The
17 riparian cover was -- anglers likened it to a certain
18 jungle but, nevertheless, that jungle contributed a
19 shower of terrestrial organism and foods to the stream.
20 And I think that -- that stream was not subject to
21 violent flows or anything like that. I think that it
22 was -- the temperatures were certainly favorable for
23 brown trout which I indicated earlier dominated that
24 section of the stream.

25 And as you got down to -- including the meanders,

1 as you got down toward the lower part of the stream,
2 you had what I interpreted to be a sort of a raceway
3 contribution, a downstream drift of organisms, and this
4 situation where the larger trout were taking advantage
5 of that and also foraging out into the -- out from the
6 fresh water lens out into -- short distances out into
7 the lake to take advantage of the shrimp and flies.

8 Q And were there pools in what you call the delta
9 area which is the area immediately upstream of Mono
10 Lake?

11 A Yes. There were -- there were a number of pools
12 in there up to four to five feet at the one stage.

13 Q And did you have any indication that there were
14 large fish in those pools?

15 A Yes. We -- the inference was while we did not
16 actually see these trout in the -- Mr. Dumbrowski and
17 I, when we saw them, and I -- another time I saw them
18 with the chief of the Bureau of Fish Conservation,
19 Mr. Taft, fish would rise, they would dimple on the
20 surface and grab food on the surface, and as they rose
21 and swirled, you could tell that they were large fish.
22 These were fish 18 to 20 inches, pretty broad tailed
23 and pretty good-sized trout.

24 Q And was Mr. Dumbrowski's place in that portion of
25 Rush Creek?

1 A Mr. Dumbrowski's residence, and he lived in the JB
2 Clover place, was above the county road which was above
3 that delta portion. It was on the south side of the
4 road as you approach the bridge across Lower Rush
5 Creek.

6 Q And did he conduct fishing or did he allow angling
7 on his property and did those people go down into the
8 delta?

9 A The people that came through Rush Creek Ranch --

10 Q And Rush Creek Ranch is another way of referring
11 to Mr. Dumbrowski's property?

12 A That property, yes, which is synonymous with the
13 Clover property. I never actually knew of the fee
14 basis, but Rush Creek Ranch was operated on that basis.
15 And they would go down there and fish that section.

16 Q And were there accounts of large trout being
17 taken?

18 A Yes. They were certainly reported. Walt would --
19 had told me at one point of trout that had been taken
20 and were caught there and the -- we had a visitor at
21 Clover's Camp in 1939. His name was Fred Gill. He was
22 a director from Hollywood who was a superb fly
23 fisherman, and that was one of the areas where he fly
24 fished and took large trout out of Rush Creek.

25 Q And when you say "large trout," are --

1 A I'm talking about -- in his case the fish were up
2 to two pounds. I don't recall from my contact with him
3 any fish caught over two pounds, but -- but those were
4 pretty good-sized fish.

5 Q Okay. Let's talk just briefly about the sheep and
6 the grazing. Did the grazing typically have a
7 temporary impact or a relatively long-term impact on
8 your test section?

9 A In my opinion, the impact of the grazing was short
10 range. It was temporary. As I indicated earlier, the
11 sheep -- the sheep men would -- I may have indicated
12 earlier, the sheep men would move their stock in for
13 watering and keep them there for a few hours and then
14 move them on out into the basin for their forage.
15 There was no -- other than the highlining of where the
16 stock would yard for a short time, the willows, there
17 was no indication of bank destruction or stream bottom
18 destruction by the sheep. Since the herders knew that
19 we had a project there and they were -- I thought they
20 were considerate and cooperative and, of course, they
21 knew Mr. Dumbrowski and there was a rapport there which
22 went through to the Basque herders to control their
23 animals --

24 Q If you could turn to the picture, the photograph
25 that's marked as Cal Trout Exhibit 5-0.

1 A Yes, I have it.

2 Q Was that picture taken in your test stretch?

3 A No -- well, yes. It was taken just inside the
4 very lower end of the test stretch on the east side of
5 the road just below the bridge looking down toward the
6 delta. You can actually see Mono Lake in one of
7 Dumbrowski's duck blinds there in the picture.

8 Q And aside from the fact that the willows are
9 highlined, is there other evidence in this photograph
10 of overgrazing?

11 A I see none. I see evidence of higher water, but I
12 see no bank destruction there from overgrazing. As a
13 matter of fact, we're looking down in an area where I
14 am quite sure that the -- that herders did not graze.

15 Q So do you see anything in this photograph that
16 would be grazing-related that would have an impact on
17 the fishery in this stream?

18 A No, I do not.

19 Q Okay. Let's turn to the picture that's Cal-Trout
20 5-P.

21 A Yes, I have it.

22 Q Now, was this photograph within your test reach?

23 A Yes, it was.

24 Q And do you see impacts of overgrazing in this
25 photograph?

1 A Other than the willows -- even the willows on the
2 right in the right middle foreground. There's no
3 excessive highline by the sheep there. I do see some
4 highlining in the middle background there, center and
5 to the left, but I see no bank destruction from
6 grazing.

7 Q And does the bank appear to have been trampled or
8 is there any -- I'm sorry. Does the bank appear to be
9 trampled?

10 A No. It does not appear to be crushed or trampled
11 as a result --

12 Q And is there any apparent undercutting by water of
13 the bank?

14 A Yes. There -- on the right, on the right edge of
15 the photograph, about the middle, it shows undercutting
16 over -- and some of the overhang of grasses and so on
17 there, and it looks like over on the left here, just
18 about two inches out from the left cover, there's some
19 undercutting there. And nearing the center, there's
20 some under cutting there from high water.

21 Q Because of the videotaping, I think what we need
22 to say is when you were saying "there on the left," you
23 mean basically starting at the left edge of the picture
24 about two-thirds of the way from the bottom extending
25 out.

1 A That is correct.

2 Q And then "in the center" would be beyond that?

3 A That is correct.

4 Q All right. Let's turn to the photograph that --
5 there's one more. It's Cal-Trout Exhibit 5-M.

6 A Yes, I have it.

7 Q Where was this photograph taken?

8 A This picture was taken down below the test
9 section, below, as a matter of fact, below the weir,
10 the weir and trap, on the right -- looking toward Mono
11 Lake on the right bank of the stream, and into the
12 delta reach showing one of the meanders on the left
13 edge of the photograph up about midway and indication
14 of other meanders down into the delta, and then to the
15 right as the main channel swung over and entered Mono
16 Lake.

17 Q To your knowledge, was there any grazing in this
18 area?

19 A To my knowledge, there was no grazing. We would
20 have seen it, I'm sure that Mr. Conway was -- knew of
21 the project and was quite cooperative. But that I knew
22 of, nor was it reported by any of my men, that grazing
23 was permitted in this area.

24 Q In the area around Highway 395, did you see
25 riparian vegetation decline or die in the years

1 following Los Angeles' beginning diversions?

2 MR. THOMAS: Are you speaking of Rush Creek?

3 Q BY MS. CAHILL: In Rush Creek?

4 A In Rush Creek. Yes, the time that I -- by the
5 time I left to enter the military, this was beginning
6 to occur, but it was most marked in 1946 after I
7 returned. It was one of the -- it was -- it was quite
8 disturbing to notice what had happened there. The --
9 as a result of the dessication, dead -- black
10 cottonwoods and the -- down especially below 395, trees
11 that were left that were -- that were dead. They --
12 the foliage was rusty-colored, and it was very obvious
13 that it was a dying situation.

14 Q Prior to 1940, prior to diversions, was that
15 stretch of the channel intact in terms of channel
16 morphology and riparian vegetation?

17 A Principally, yes.

18 Q Just one last question. When Mr. Birmingham first
19 informed you of a proposal to release 35 cfs with no
20 diversions from Parker and Walker, did you understand
21 that that was the recommendation made by the Department
22 of Fish and Game as a result of its stream studies?

23 A Yes. This is my understanding --

24 Q And if I were to tell --

25 MR. BIRMINGHAM: Excuse me. Maybe I can --

1 MS. CAHILL: I'm sorry. Go ahead.

2 THE WITNESS: This was my understanding,
3 recommendations from the department's contract IFIM
4 studies.

5 Q BY MS. CAHILL: And have you, in fact, seen the
6 department's recommendations?

7 A I have seen them. I haven't -- yes. I have seen
8 the recommendations.

9 Q And if -- I think -- if I were to inform you that
10 those, in fact, were not the department's
11 recommendations but the recommendations of Los Angeles,
12 would that have affected your answer?

13 MR. BIRMINGHAM: In other words --

14 MS. CAHILL: I think there was a mistake -- were
15 you, in fact -- was there a mistake in understanding
16 when you answered that question?

17 THE WITNESS: I believe there was. I did not know
18 this.

19 MS. CAHILL: Thank you. I have no further
20 questions.

21 MR. DODGE: Ms. Cahill has come in at 17 minutes.

22 MR. THOMAS: I've got me three, I guess. I'll use
23 a few. A couple of duck questions.

24 CROSS-EXAMINATION BY MR. THOMAS

25 Q Sir, just a couple of quick duck questions.

1 Mr. Vestal, you indicated that you were hunting in
2 1940 on the edge of Mono Lake. Is that correct?

3 A That's correct. On -- it was the 6th of October,
4 1940, with Walt. I must say it was a new experience.

5 Q And is October the time that one would expect to
6 see ducks at Mono Lake?

7 A Well, ducks were beginning to -- the ducks were
8 beginning to come in. There was certainly a lot of
9 ducks there at that time, and Walt was a -- Walt was a
10 superb caller. He knew his water fowl, and we
11 exchanged views on the differences between water fowl
12 and falleros and the other birds, the shore birds, the
13 grebes, for example. And he could call in -- I was
14 amazed at how he could use his hands and his
15 vocalization to call ducks in toward our stance.

16 Q And did these ducks migrate away from Mono Lake
17 eventually? Did they stay there all year?

18 A Well, it was my -- it was my understanding even
19 before that time that this was an integral part. Mono
20 Lake was an integral part of the Pacific flyway, and I
21 became -- I was quite interested in Walt's
22 participation in keeping -- maintaining records and so
23 on, and his method of checkerboarding and making
24 counts. And the numbers that -- of water fowl that I
25 observed certainly coincided with his estimates of the

1 tens of thousands of water fowl that were present there
2 on the lake later in the season in wintertime, late
3 fall and winter.

4 Q Now, you later transferred across the Sierra to
5 the Fresno office; is that correct?

6 A Yes.

7 Q And you had -- you testified you had the
8 opportunity to see birds at Grizzly Island and Merced
9 and Los Banos; is that correct?

10 A Yes. I even shot at -- at Los Banos.

11 Q And are these important California water fowl
12 areas?

13 A Yes. They are. Yes. I had made several trips to
14 Los Banos in particular when -- when Wattenberger was
15 there and got fairly well acquainted with Los Banos.

16 Q And is the basis of your estimates of populations
17 at Mono Lake and your comparison formed as a result of
18 your viewing some of these other water fowl areas?

19 A I must say that I, at none of these other areas
20 did I see the numbers of water fowl that had gathered
21 at Mono Lake. The -- I'm not saying that the sky -- I
22 wouldn't say that the sky was blackened, but certainly
23 they were -- there were thousands of ducks in the air
24 at one time, and yet there were ducks on the -- like
25 the delta, for example, were on the water's surface and

1 even rafted out on the lake. There were just tens of
2 thousands of water fowl, ducks.

3 Q And you were familiar with the department's
4 methodology of counting and estimating ducks?

5 A Well, I became familiar with -- it was my
6 understanding that during the flights here in this
7 region, that they used this system of checkerboarding.
8 In other words --

9 Q You mean the Yountville area?

10 A The Yountville area, yes. Region -- out of
11 Yountville headquarters of Region Three. That they
12 would see a water area and they would -- Gill Thompson
13 was one of the men, you remember Gill, a wildlife water
14 fowl biologist, a good wildlife biologist, very learned
15 in terms of water fowl. He would observe a portion of
16 a body of water and then scan that in terms -- he had a
17 scan system for checkerboarding and then he would
18 estimate the rest of the area by multiplication and
19 come up with his estimate of the population.

20 Q And did Mr. Dumbrowski use a similar methodology?

21 A He used almost the same technique. That's when I
22 first became acquainted with it. I used the term
23 "checkerboarding" on that basis.

24 Q And you were later to understand from your work in
25 the other parts of the state that that was a proper

1 methodology for counting ducks?

2 A Well, this -- it was certainly used. I don't know
3 what the guidelines were within the department, but it
4 was certainly a method that was -- that was used, and
5 they came up with some pretty good results.

6 MR. THOMAS: Okay. Thanks. I have no further
7 questions.

8 MR. DODGE: We've added another five and a half
9 minutes to the Department of Fish and Game.

10 MR. FRINK: Bruce, are you planning to do redirect
11 now?

12 MR. DODGE: I have some questions.

13 MR. FRINK: I have a few questions on cross, too.

14 MR. DODGE: Sorry.

15 CROSS-EXAMINATION BY MR. FRINK

16 Q Hello, Mr. Vestal. I'm Dan Frink. We introduced
17 ourselves earlier. I'm with the State Water Resources
18 Control Board. I just have a few questions.

19 Before I ask them, I'd like to say on behalf of
20 the Board, we greatly appreciate your making yourself
21 available for this, for the deposition, in view of your
22 inability to attend the hearing in Sacramento. It's
23 greatly appreciated you've been willing to spend your
24 afternoon with us.

25 A Thank you.

1 Q I just have a couple of questions and some of this
2 you have touched on in various ways. The first one --
3 I wonder if you could briefly summarize how you believe
4 the condition of the Lower Rush Creek fishery in the
5 period from 1947 to 1950 compared with the condition of
6 the fishery in Lower Rush Creek prior to 1940?

7 A From 1947 to 1950, there was a -- this would be
8 the section between The Narrows and on down. In that
9 period, there was a condition of increasing
10 constriction. The -- and deterioration. In other
11 words, the conditions were changing as a result of the
12 diminution of flows from the springs, and we were
13 headed toward, ultimately, very, very close to, in
14 1951, to extinction.

15 Q And how does that compare with the condition
16 before 1940?

17 A It was a much -- before 1940, it was a much better
18 habitat. The springs were running as much as --
19 contributing as much as 24 second-feet, according to
20 our records. At least that. I know of no instance
21 where they were any greater than that, but it was a
22 much better habitat. It was a more complete habitat
23 from the standpoint of the fish population. There were
24 excellent gravels, excellent spawning areas, food
25 producing areas. There was a -- the springs had these

1 water cress beds and streams tributary to Rush Creek.

2 It was contributing to a much better, at that time, a
3 much better habitat.

4 Q All right. Thank you.

5 I know your primary area of work in the Mono Basin
6 was in fisheries, but your testimony mentioned your
7 background as a bird watcher and the fact that you
8 lived in the Basin a number of years.

9 Did you have much or any experience in water fowl
10 management after leaving the Mono Basin in 1950?

11 A No. I had no experience in water fowl
12 management. I kept up an interest through library and
13 publications produced by the department. I was
14 familiar with the work of some of the men in the -- in
15 the Sacramento office, and so I tried to keep up with
16 what was going on. But I had no experience in water
17 fowl management.

18 MR. FRINK: Okay. That's all the questions I
19 have. Thank you.

20 RECROSS EXAMINATION BY MR. DODGE

21 Q Mr. Vestal, I just have a few followup questions.

22 In response to questions by Mr. Roos-Collins, you
23 were talking about 1932, the brown trout were gradually
24 dominating, and that Rush Creek had favorable habitat
25 for them. And then you testified to changes occurred

1 from developments in the system, changes to the
2 habitat. To what did you refer?

3 A I was referring to the gradual downtrend in the
4 habitat. We're referring now to the section between
5 The Narrows and the lower end of that reach. I was
6 referring to the downtrend in the habitat as a result
7 of the diminution of flows from any source.

8 Q As a result of the diversions, then?

9 A That's correct.

10 Q Okay. Now bear with me. I'm just going to go
11 through my notes here. I just have a limited number of
12 questions.

13 In response to questions, I believe by
14 Mr. Birmingham relating to Rush Creek below The Narrows
15 pre-diversion, he asked you questions about whether
16 there was a single channel. Do you recall those
17 questions, Sir?

18 A Yes, I do. And --

19 Q Let me -- I just -- let me ask you a specific
20 question. Isn't it true pre-diversions below The Gorge
21 that in places Rush Creek had multiple channels?

22 A Yes, this is true. I was probably recalling at
23 that moment the -- the published map that we put in the
24 1954 report which showed essentially a single channel
25 and the one purpose for that was not to confuse the

1 fishermen since we had a paper that was issued to them
2 as far as their access and their use. But it's true
3 that there were meanders in places in the channel
4 between The Gorge and at least the upper bridge.

5 Q And were these meanders watered even at less than
6 flood flows?

7 A They -- the meanders were probably -- yes. They
8 were watered higher up in the -- up in the reach as a
9 result -- primarily as a result of the inflow from the
10 springs which permeated the meadow and, let's see.
11 Boulder Creek came down through there, and I think a
12 portion of them were watered but not all. This is what
13 I'm trying to remember, what proportion of them. There
14 would be some of these that were watered.

15 Q Now, you had questions from Ms. Cahill about the
16 conditions pre-diversion below The Gorge, and you
17 described those conditions. And I don't want you to
18 repeat that testimony, but on several occasions, you've
19 talked about the springs below The Narrows.

20 I want you to focus specifically on your opinion
21 on the effect of the springs on the trout habitat and
22 trout populations in that area.

23 A The effects were multiple. The springs
24 contributed almost -- right up to the lines. They
25 contributed in their rills and the gravels through

1 those rills. They contributed spawning areas for areas
2 that were sought out by eastern brook and to some
3 extent the brown trout. They contributed in abundance
4 through the dense water cress beds. They contributed
5 an abundance of foods. Paul Neidham missed a good bet
6 when he did not see fit to explore the spring areas and
7 water cress beds of Lower Rush Creek in comparison with
8 the glorified areas that he touted in Hot Creek. It
9 was a good bet, at least early on, as a possible
10 hatchery site.

11 They contributed temperatures, lower temperatures
12 as a result of the water coming out of the springs,
13 which helped maintain a lower temperature gradient in
14 that reach of Rush Creek. They -- the springs were
15 a -- they were a lifesaver. They were a mainstay, a
16 lifesaver for Rush Creek during that period.

17 Q Also in response to Ms. Cahill you spoke of pools
18 in the delta and you said four feet to five feet. Is
19 that a reference to depth, Sir?

20 A That was -- there were -- there were several pools
21 in there which -- that were as low as -- at least four
22 feet and may have gone to five feet, that were quite
23 deep. These were not -- I don't know of any -- I know
24 of no measurements, but the inference on that was
25 the -- was the type of currents and the rolling of

1 water and, of course, the appearance of these large
2 fish coming up out of a deeper area onto the surface.

3 Q Okay. My final question is just, perhaps my notes
4 are just inaccurate. But I'd like you to look at this
5 picture, CT 5-0, which I believe you told us was at the
6 low end of the test stretch. It's the one I believe
7 you testified shows a --

8 A I have it.

9 Q -- duck blind.

10 A I have it, yes.

11 Q Now, you do agree that there's highlining of the
12 willows, don't you, Sir?

13 A That's correct.

14 Q So that, at least on occasion, there was some
15 grazing in this area. Isn't that true?

16 A Well, there may have been sight unseen in order to
17 cause that because some highlining does show.

18 Q Well, your testimony was that it was not a common
19 area for grazing?

20 A It was not a common area for grazing, no.

21 Q That's all --

22 A We would have known that. We would have -- and we
23 would have observed it, I'm sure, the checking station
24 being as close as it was to that area, had the sheep
25 been ranged there in the daytime. And I'm sure they

1 weren't ranged overnight.

2 MR. DODGE: Thank you, Mr. Vestal. I have no
3 further questions.

4 REDIRECT EXAMINATION BY MR. ROOS-COLLINS

5 Q Mr. Vestal, I have several more questions for you.
6 Let me begin with a housekeeping detail.

7 Attached to your written testimony are Exhibits
8 Cal-Trout 5-A through 5-T; is that correct?

9 A Yes. That is correct.

10 Q To the best of your knowledge, are these
11 attachments true and correct copies of the originals?

12 A That is correct.

13 Q And you used these attachments in preparing your
14 written testimony?

15 A That's right.

16 Q Thank you.

17 Let me ask that you turn to Paragraph 22 on Page 9
18 of your written testimony. You previously discussed
19 this paragraph with Mr. Birmingham.

20 A Yes, I have it.

21 Q Before L.A. DWP began diversions from Rush Creek,
22 did the trout migrate from Upper Rush Creek through
23 Grant Dam into Lower Rush Creek?

24 A They could have. They could have during spill
25 times. It was possible, but we had no direct evidence

1 of this. But they could have. They may have.

2 Q Paragraphs 25 and 26 on Page 10 discuss the trout
3 hatchery located above Grant Dam on Rush Creek; is that
4 correct?

5 A Yes.

6 Q What is the relevance in your opinion of the egg
7 production in Upper Rush Creek as a measure of the
8 fishery below Grant Dam?

9 A I think that -- I would say that the situation
10 above Grant Dam in terms of this production was at that
11 time -- through the egg-taking station, number of eggs
12 and so on, was really astounding. It -- this was
13 certainly the result of annual recruitment out of Grant
14 Lake and up into Upper Rush Creek. There wasn't --
15 there just wasn't the opportunity for long range
16 migration of the cut throat from Lower Rush Creek up
17 into proper spawning.

18 I don't have any knowledge or evidence that the --
19 as alternatives paths that they ever used, that is, in
20 later years, certainly not after a diversion began into
21 Walker and Parker Creek. They may have historically.
22 There were no barriers in any of these tributaries and
23 that included -- earlier that included Rush Creek, but
24 they may have -- it is quite possible they migrated
25 well up into Walker and Parker Creek as well. But

1 after that time, their migrations, upstream migrations,
2 were cut off from Upper Rush Creek into the lower
3 reaches.

4 Q After which time?

5 A After 1925 when the dam -- the higher dam was
6 built, a larger structure.

7 Q Let me ask you finally about --

8 MR. BIRMINGHAM: Richard, can we take a break for
9 a second and step outside and confer?

10 THE VIDEOGRAPHER: This is the video camera
11 operator. We're now going off the record.

12 (Discussion held off the record.)

13 THE VIDEOGRAPHER: This is the video camera
14 operator. We're now back on the record.

15 Please continue.

16 MR. DODGE: We -- the attorneys took a short break
17 and we're, I think, persuaded that this has been a
18 tough day for Mr. Vestal and it's best to stop the
19 examination at this point. We've agreed that we can
20 use this testimony in the Water Board hearing. We've
21 also agreed that Mr. Vestal has testified under oath
22 before Judge Finney in the spring of 1990, and that
23 that testimony can be used to the extent relevant in
24 the Water Board hearing. And Mr. Birmingham has
25 indicated that he has a few additional questions for

1 Mr. Vestal and if he decides at some point to pursue
2 those questions with Mr. Vestal subject to his --
3 Mr. Vestal's availability, we would reconvene the
4 deposition as appropriate, but we're all hopeful that
5 that would be unnecessary.

6 So I think with that, we want to conclude today's
7 session.

8 MR. ROOS-COLLINS: Let me add two things. First,
9 Mr. Vestal, thank you for your clear and complete
10 testimony notwithstanding your medical condition. All
11 parties are very grateful for it.

12 MR. VESTAL: Thank you.

13 MR. ROOS-COLLINS: And let me also thank Dan Frink
14 for his presence. We're grateful that the Board
15 allowed us to conduct this examination by deposition,
16 and we're grateful for Mr. Frink's presence here.

17 THE VIDEOGRAPHER: This is the video camera
18 operator. This concludes the deposition of Eldon
19 Vestal. This is the end of Tape Number Two.

20 (Whereupon the deposition was concluded
21 at 5:45 p.m.)

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I hereby certify that I have read my deposition,
made those changes and corrections I deem necessary,
and approve the same as now written.

Dated the _____ day of _____, 1993.

ELDON VESTAL

