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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,	IN EQUITY NO. C-125 Subproceeding C-125-B **JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR CERTIFICATION OF DEFENDANT CLASSES**

Pursuant to FED. R. CIV. P. 23 and LR 7-2, the United States of America and the Walker River Paiute Tribe ("Tribe") respectfully move the Court for the certification of two defendant classes in this matter: 1) all those claiming water rights as successors in interest under the *Decree* (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940), who comprise Category 3(a) under the Court's *Case Management Order* (Apr. 18, 2000); and 2) all those claiming rights to use groundwater for domestic purposes in sub-basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley) and 110B (Walker Lake Subarea of the Walker Lake Valley), who

142

are included among those defendants in Category 3(c) under the Court's Case Management Order. The reasons supporting the United States' and the Tribe's motion are set forth in the accompanying *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (May 3, 2001).

Date: May 3, 2001

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,	IN EQUITY NO. C-125 Subproceeding C-125-B **MEMORANDUM IN SUPPORT OF THE JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR CERTIFICATION OF DEFENDANT CLASSES**

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. BACKGROUND 2

III. CERTIFICATION OF DEFENDANT CLASSES IS APPROPRIATE HERE 3

A. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a) 5

1. The Classes are So Numerous that Joinder of All Members is Impracticable 5

2. There Are Questions of Law and Fact Common to the Class 8

3. The Claims and Defenses of the Class Representatives are Typical of the Class 12

4. The Class Representatives Will Fairly and Adequately Represent the Interests of the Class 12

B. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(A), 23(b)(2) AND 23(b)(3) 14

1. Class Certification Will Protect Against Incompatible Duties 14

2. The United States and the Tribe Request Declaratory and Injunctive Relief 16

3. The Common Questions of Law and Fact Predominate 18

a. Interest of Class Members in Controlling the Prosecution or Defense of Separate Actions 19

b. Extent and Nature of Any Litigation Concerning the Controversy Already Commenced by or Against Class Members 19

c. Desirability of Concentrating the Litigation of the Claims in a Particular Forum 20

d. Difficulties Likely to be Encountered in the Management of a Class Action 20

4. Notice to Rule 23(b)(3) Class Members 20

IV. CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Page

Cases

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 16

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 4, 14, 18, 21

Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999) 17

Arthur v. Starrett City Assocs., 98 F.R.D. 500 (E.D.N.Y. 1983) 7

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 21

Folsom v. Blum, 87 F.R.D. 443 (S.D.N.Y. 1980) 7

Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993) 8, 12

Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) 5, 8, 12, 13

Hernandez v. Alexander, 152 F.R.D. 192 (D. Nev. 1993) 5

Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894 (7th Cir. 1999) 16

Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) 8

Kraszewski v. State Farm Ins. Co., 27 Fair Empl. Prac. Cas. (BNA) 27 (N.D. Cal. 1981) 5

Lightbourn v. County of El Paso, Texas, 118 F.3d 421 (5th Cir. 1997), *cert. denied sub nom. Lightbourn v. Garza*, 522 U.S. 1052 (1998) 8, 12

Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1982) 13

Mineral County v. Nevada Dep't of Conserv., No. 36352, 117 Nev. Adv. Op. No. 23 (Apr. 11, 2001) 20

Robidoux v. Celani, 987 F.2d 931 (2nd Cir. 1993) 5, 12

Rosario v. Livaditis, 963 F.2d 1013 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993) 8

Southern Ute Indian Tribe v. Amoco Prod. Co., Civil Action No. 91-B-2273, 874 F. Supp. 1142 (D. Colo. 1995), *rev'd on other grounds*, 119 F.3d 816 (10th Cir. 1997), *aff'd in part on reh'g en banc*,

151 F.3d 1251 (10th Cir. 1998), *rev'd on other grounds*, 526 U.S. 865 (1999) 16

Thillens, Inc. v. Community Currency Exch. Assoc. of Ill., Inc., 97 F.R.D. 668 (N.D. Ill. 1983) 4, 13

United States v. Truckee-Carson Irrig. Dist., 71 F.R.D. 10 (D. Nev. 1975) . . 2, 3, 7-9, 11-15, 21

Washington v. CSC Credit Servs., Inc., 199 F.3d 263 (5th Cir.), *cert. denied* 530 U.S. 1261 (2000) 16, 18

Statutes and Treaties

NEV. REV. STAT. § 533.325 10

NEV. REV. STAT. §§ 534.140, 534.160 10

NEV. REV. STAT. §§ 534.180(1), 534.030(4) 10

Miscellaneous

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) 4

CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1773 (1972) 15

FED. R. CIV. P. 23 1

HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.06 (1985) 5

LR 7-2 1

Nev. Admin. Code § 534.330-450 . . . . . 10, 11

Opinion of the Nevada Attorney General No. 97-19, 1997 WL 317065 (June 2, 1997) 9

STEVEN BAICKER-MCKEE, ET AL. FEDERAL CIVIL RULES HANDBOOK (2001) 4, 14, 16

I. INTRODUCTION

Pursuant to FED. R. CIV. P. 23 and LR 7-2, the United States of America and the Walker River Paiute Tribe ("Tribe") respectfully file this motion seeking certification of two defendant classes in this matter. The United States and the Tribe demonstrate below the propriety of certification of: 1) a defendant class of successors in interest to water right holders under the *Decree* (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("Decree"), with the Walker River Irrigation District ("District") acting as class representative; and 2) a defendant class of all those individuals and entities with a right to use groundwater for domestic purposes in sub-basins 107, 108, 110A and 110B in the Walker River Basin in Nevada, with the State of Nevada acting as class representative.

The United States and the Tribe seek certification of the two classes for the following purposes, consistent with the Court's *Case Management Order* (Apr. 18, 2000) ("CMO"). First, the Court should certify the classes described above to include those individuals and entities included in Category 3(a) and the domestic groundwater users in sub-basins 107, 108, 110A and 110B who are members of Category 3(c) of the CMO. CMO ¶¶ 3(a), (c). Second, the Court should certify the classes to address the "Threshold Issues Relative to Tribal Claims." *Id.* ¶ 11. The Court has identified treatment of the threshold issues as Phase I of the proceedings following completion of service. *Id.* ¶ 12(a). Third, the Court should certify the classes for purposes of addressing the declaratory relief that the United States and the Tribe seek in Phase II of the proceedings. *Id.* ¶ 12(b). The classes should be defined as including all members of Category 3(a), and all domestic users of groundwater in sub-basins 107, 108, 110A and 110B who are members of Category 3(c).

Class certification beyond Phases I and II of the litigation may also be appropriate, and the Court should make that determination as appropriate as the case proceeds. In addition, the United States' and Tribe's request for certification of the two named classes is not intended to preclude the certification of any other class of defendants, either pursuant to the CMO categories, or as otherwise determined to be appropriate by the Court. The reasons supporting the United States' and the Tribe's motion follow.

II. BACKGROUND

In April of 2000, the Court issued its CMO, in which it identified nine categories of defendants that the United States and the Tribe must join in these proceedings in connection with their claims for additional surface and groundwater from the Walker River stream system. In preparation for the status conference before Magistrate Judge McQuaid held on March 20, 2001, the United States and the Tribe suggested that all domestic users of groundwater in sub-basins 107, 108, 110A and 110B who are members of Category 3(c) of the CMO might be better handled in these proceedings as a discrete defendant class: "domestic groundwater users may be certified as a class just as the Court treated certain limited groups of water users in *United States v. Truckee-Carson Irrig. Dist.*, 71 F.R.D. 10 (D. Nev. 1975)." *Memorandum of the United States of America and the Walker River Paiute Tribe Concerning the Identification of Counter-Defendants by Case Management Order Categories and Use of Notices of Lis Pendens* at 9 (Mar. 12, 2001) ("U.S. & Tribe Memo"). Although it included all successors in interest to the original Decree, the Court "limited domestic users to be served with process to those whom, it appears, might be affected by pumping of underground water on the Walker River Paiute Indian

Reservation." CMO at 3.[1] The Court also defined Category 3(a) as the "successors in interest to all water rights holders under the Decree . . . ." CMO at 5.

The United States and the Tribe submit this memorandum in support of our motion to treat all members of Category 3(a), and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) as two defendant classes. Rather than waiting until service is completed, consideration of tools for "the efficient management of the litigation given the number of parties to the case," CMO ¶ 10, appears to be appropriate now. The class action tool is "likely to reduce the burdens on the parties and the court in a case of this magnitude." *Id.* Certification of these two classes will, as a result, help the Court manage the "enormity and complexity" of these proceedings. CMO at 1. As we proceed with service on the individuals and entities comprising the other categories to be served under the CMO, it may be necessary either to certify a class for other categories or at least to establish a class for the residual unserved members of one or more categories.

III. CERTIFICATION OF DEFENDANT CLASSES IS APPROPRIATE HERE

Federal Rule of Civil Procedure 23 provides that class certification is warranted where:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). In addition to satisfying all four requirements of Rule 23(a), "parties

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[1]The Court provided, however, that the number may be expanded "[i]f it is shown that other domestic users could be affected by such pumping or that the underground and surface water constitute a single hydrological system where an earlier priority for the tribe for surface or underground waters could affect the rights of other domestic users." CMO at 3.

seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) covers the following situations:

> Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. R. Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)."

Id. at 614 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967)). If all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are satisfied, class certification is appropriate. *Id.* Rule 23 applies equally to plaintiff and defendant classes. *Thillens, Inc. v. Community Currency Exch. Assoc. of Ill., Inc.*, 97 F.R.D. 668, 673 (N.D. Ill. 1983); STEVEN BAICKER-MCKEE, ET AL. FEDERAL CIVIL RULES HANDBOOK 430 (2001).

The classes identified by the United States and the Tribe satisfy the requirements of Rule 23(a), Rule 23(b)(1)(A), Rule 23(b)(2), and Rule 23(b)(3). Certification of defendant classes with respect to the members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) for Phase I and for the declaration of the Tribal Claims[2] in Phase II is, then, appropriate.

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[2]The CMO defines the Tribal Claims as those made by the Tribe and the United States on the Tribe's behalf, as distinguished from the other claims made by the United States on behalf of

A. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a).

1. The Classes are So Numerous that Joinder of All Members is Impracticable.

First, a class must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "[T]here is no exact numerical formula which is used to determine whether a group of [defendants] is sufficiently numerous to be certified as a class and . . . this determination must be made on a case by case basis." *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993) (citing *Kraszewski v. State Farm Ins. Co.*, 27 Fair Empl. Prac. Cas. (BNA) 27, 29 (N.D. Cal. 1981)). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In addition to the number of class members, factors that influence the numerosity requirement include "'judicial economy arising from avoidance of a multiplicity of actions, geographic disbursement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.'" *Hernandez*, 152 F.R.D. at 194 (quoting HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.06 (1985)) (other citations omitted). And it is important to note that "[i]mpracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir. 1993) (citations omitted).

The United States' contract paralegal estimates that the number of members of Category 3(a), the successors in interest class, is at least "950 persons and entities." U.S. & Tribe Memo, Exhibit 1, *Affidavit of Dennis Becker* ¶ 15.1 (Mar. 9, 2001) ("Becker Affidavit"). The defendants are geographically dispersed throughout the Walker River Basin in Nevada and California. The United States Board of Water Commissioners has argued that the Category 3(a)

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other federal interests in the Walker River Basin. CMO ¶ 1.

members have limited financial resources, and, therefore, cannot assist the United States and the Tribe in identifying all of the potential defendants in this case. *Comments & Recommendations of the United States Board of Water Commissioners to Joint Motion of the Walker River Paiute Tribe and the United States of America for an Order Requiring the Identification of all Decreed Water Right Holders and their Successors* at 2, 3, No. C-125 (Oct. 16, 2000) ("USBWC Comments"). As set forth in the Decree, the individual claims of these defendants range from very extensive water rights to very small ones.

In March 2001, Mr. Becker estimated that the number of individuals in Category 3(c) is approximately 685. Becker Affidavit ¶ 17.f. Since giving his affidavit on March 9, 2001, and as his work continues in this matter, Mr. Becker has identified approximately 40 additional individuals and entities in Category 3(c), raising the total to approximately 725. In addition to the domestic groundwater users in the specified sub-basins, Category 3(c) includes individuals who use groundwater pursuant to "permits or certificates to pump groundwater issued by the State of Nevada . . . ." CMO ¶ 3(c), for other than domestic purposes. Thus, the number of domestic groundwater users in the specified Nevada basins from the sources Mr. Becker has examined thus far is probably fewer than 725. In addition to the entities currently identified, however, as of December 19, 2000, the Nevada Division of Water Resources Well Log Database lists approximately 680 domestic wells in the sub-basins listed in Category 3(c). Moreover, the domestic well log does not include all well owners since Nevada does not require the reporting or permitting of new domestic wells. Another source of information that could increase the number of domestic groundwater users included in Category 3(c) is the Lyon County tax records.

Clearly, the number of domestic groundwater users in sub-basins 107, 108, 110A and 110B is sufficiently large to be within the contemplated magnitude for class treatment.

Many of the domestic groundwater users who are members of Category 3(c) may lack financial resources to participate fully or at all in this litigation. Indeed, joining each of the domestic groundwater users in Category 3(c) as defendants in the proceedings based solely on the use of a domestic well would likely be overly burdensome since their individual interests are small compared to other interests in these proceedings. Class certification will instead make it possible for these water users to participate.

Significantly, membership in Categories 3(a) and 3(c) fluctuates -- making individual joinder impracticable and potentially interminable -- and courts have used class certification as a tool to handle such fluctuations. *See Arthur v. Starrett City Assocs.*, 98 F.R.D. 500, 505-06 (E.D.N.Y. 1983); *Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980). As the Court is acutely aware, changes in water right ownership is a critical issue here, and has plagued Mineral County's efforts to serve the necessary defendants. Mineral County's efforts to join those defendants in subproceeding C-125-C demonstrate the difficulty of tracking such changes. The class action tool goes a long way to address that problem and make inclusion of both present and future claimants more manageable.[3]

In *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D. Nev. 1975), the United States sought to certify a class of defendants consisting of all "individuals who are holders of water right certificates on the Newlands Reclamation Project and who are members of TCID [Truckee-Carson Irrigation District] . . . ." *Id.* at 13. The class consisted of approximately

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[3]As compared to the District's lis pendens suggestion, *e.g. Memorandum of Walker River Irrigation District Concerning Procedures for Recording Notices of Lis Pendens and Concerning Identification of Counterdefendants by Case Management Categories* (Feb. 12, 2001), which the Magistrate determined to be inappropriate for use in the present circumstances, the use of a class action can effectively address changes in ownership without adverse effects on the title to real property.

3,800 members, and the Court found the class to be "'so numerous that joinder of all members is impracticable.'" *Id.* at 16 (quoting FED. R. CIV. P. 23(a)(1)). Treatment of the certificate holders as a class not only reduced the time required to join them in the proceedings, but also reduced the expense of their individual joinder and rendered the individuals' participation more convenient. Certification of two classes to include, respectively, the members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) would accomplish the same beneficial result.

2. **<u>There Are Questions of Law and Fact Common to the Class</u>.**

Second, in order to certify a class, the Court must determine that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "'A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).'" *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993)). Courts interpret this requirement liberally: "The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421, 426 (5th Cir. 1997), *cert. denied sub nom. Lightbourn v. Garza*, 522 U.S. 1052 (1998) (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993)). *Accord Truckee-Carson*, 71 F.R.D. at 16 (there were "both questions of law and fact common to the class.") (citing FED. R. CIV. P. 23(a)(2)); *Hanlon*, 150 F.3d at 1019 ("Rule 23(a)(2) has been construed permissively. . . . [T]he proposed class shares sufficient factual commonality to satisfy the minimal requirements of Rule 23(a)(2).").

This requirement is easily met here. The issue common to members of the two proposed classes is whether the claims of the United States and the Tribe are valid. Defenses

common to the classes are, at least preliminarily, identified among the eight threshold issues in the CMO, which list of issues could expand at the Magistrate's discretion. Thus, "[a]s against the United States and the Tribe, the defenses of each member of the class would be identical and there would be no claims of any one member which would be adverse to any other member." *Truckee-Carson*, 71 F.R.D. at 16. The two classes consisting of the members of Category 3(a) and domestic groundwater users in the specified sub-basins who are members of Category 3(c) are uniquely situated with respect to these common issues vis a vis the other categories of defendants identified in paragraphs 3(b), 3(d)-(i) of the CMO. The members of Category 3(a) are the only defendants who look to the Decree to define their water rights claims, thus their defenses to the United States' and the Tribe's claims will revolve around the Decree. The domestic groundwater users in sub-basins 107, 108, 110A and 110B look to state law to define their rights, which law does not assign them any priority, and their defenses will spring from that state law.

The domestic groundwater users in sub-basins 107, 108, 110A and 110B who are members of Category 3(c) are like the contractual right holders who were certified as a defendant class in *Truckee-Carson*. The Court found determinative the fact that the defendants all held the same right with respect to one another -- a right to use water within the Newlands Reclamation Project -- and the United States' and the Pyramid Lake Paiute Tribe's claims would affect all of those contractual rights in the same way. In other words, if the United States and the Pyramid Lake Paiute Tribe were successful, their claims would result in a "proportionate quantitative reduction of [the] water rights [of the contractual claimants]." *Id.* at 15. Similarly, domestic groundwater users included in Category 3(c) stand in the same legal relationship to one another. Nevada does not regulate domestic wells. "Domestic wells are exempted from the requirement of obtaining a permit for appropriation of underground water." Opinion of the Nevada Attorney

General No. 97-19, 1997 WL 317065 at *2 (June 2, 1997) (citing NEV. REV. STAT. §§ 534.180(1), 534.030(4)). This exemption is opposed to the requirement that those wishing to appropriate surface water, and groundwater for purposes other than domestic, must obtain a permit to do so. NEV. REV. STAT. § 533.325. The State Engineer "does regulate the drilling of such [domestic] wells." *Id.* at * 3 (citing NEV. REV. STAT. §§ 534.140, 534.160; NEV. ADMIN. CODE § 534.330-450 (State Engineer's regulations for licensing well drillers)) (other citations omitted). Stated another way, the burden of reporting the existence of domestic wells is on the well driller, not the domestic well owner. Moreover, even though the State Engineer exercises regulatory authority over those who drill wells for domestic groundwater use, the prior appropriation system does not apply to domestic wells. The users of groundwater for domestic purposes, then, have parallel rights to each other and the success of the United States' and Tribe's claims could affect them equally, and their relationship to one another is like the certificate holders who were certified as a defendant class in *Truckee-Carson*.

With respect to the Category 3(a) defendants, the instant case differs in a significant way from the *Truckee-Carson* case. There, the Court distinguished the "individuals who are holders of water right certificates on the Newlands Reclamation Project and who are members of TCID [Truckee-Carson Irrigation District] . . . ." 71 F.R.D. at 13, who were appropriate for class certification, from the decreed right holders for whom the United States did not seek class certification.[4] The Court explained:

> Each certificate holder's right is fixed under the terms of his contract with TCID. Under the terms and conditions of the contracts, if the United States and the Tribe were successful, it

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[4]The United States already had joined approximately 13,000 individual defendants in the case. *Id.* at 16.

> appears each certificate holder would be affected equally by a proportionate quantitative reduction of their water rights. This is not true of the other individual defendants already joined. Each individual defendant has a water right with a priority date which could be applied to defeat another's right which is junior.

Id. at 15 (footnote omitted). Even though the Court distinguished the certificate holders from the decreed right holders, it did not pass on whether the decreed right holders could also be certified as a class for some or all of the issues relative to the United States' and Pyramid Lake Tribe's claims.

It is not clear from the *Truckee-Carson* decision whether the Court certified the class in order to address specific issues or whether the class was certified for the duration of the proceedings. Here, however, it is clear that the CMO establishes an order for proceeding to address the issues raised in the United States' and the Tribe's first amended counterclaims. Once service is complete, the Court will next consider threshold issues with respect to the first amended counterclaims. At least through the completion of that step of the litigation as established by the CMO, the defendants in all of the categories are similarly aligned -- sharing commonality -- including the defendants who are members of Category 3(a). The fact that they claim decreed water rights does not at this stage of the proceedings distinguish them from any other defendant. *Contra id.* at 16. Collective defense as a class will allow all of the successors in interest, as opposed to only a few who have the resources to do so, to participate in the response to the United States and the Tribe, thereby simplifying the "enormity and complexity of the issues . . . ." CMO at 1. At the appropriate time, the Court may consider vacating its certification order so that the effect of the United States' and the Tribe's claims on individual decreed rights can be ascertained. FED. R. CIV. P. 23(e). *See* Part II(B)(2), *infra*. But for now, the peculiarities of the impact of the additional claims on each decreed water right are not before

the Court; rather, the questions now (service of process, threshold issues, and the plaintiffs' entitlement to the declaration they seek) logically fit within the class scheme.

3. **The Claims and Defenses of the Class Representatives are Typical of the Class.**

The third requirement for class certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019. Thus, "Rule 23(a)(3)'s typicality requirement is satisfied when each class member's claim [or defense] arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability [or plaintiff's lack of entitlement]." *Robidoux*, 987 F.2d at 936 (citations omitted). This is not a difficult standard to meet. "The test for typicality, like the test for commonality, is not demanding." *Lightbourn*, 118 F.3d at 426 (citing *Forbush*, 994 F.2d at 1106). And, it is satisfied here.

With respect to the threshold issues, "there would be no claims of any one member which would be adverse to any other member . . . [t]he claims or defenses of TCID [the class representative] would also be identical with the members of the class." *Truckee-Carson*, 71 F.R.D. at 16. This also is true with respect to the threshold issues where all of the defenses to the United States' and the Tribe's claims for additional water will be the same, and for the determination of the United States' and the Tribe's entitlement to the declaratory relief they seek. Clearly, "'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Id.* (quoting FED . R. CIV. P. 23(a)(3)).

4. **The Class Representatives Will Fairly and Adequately Represent the Interests of the Class.**

The final requirement under Rule 23(a) is that the class representative must "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Adequacy of representation is a critical determination that "is a question of fact." *Truckee-Carson*, 71 F.R.D. at 16 (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). With respect to a defendant class, the representative does not have to be willing, but adequacy remains the key issue. *Hanlon*, 150 F.3d at 1021; *Thillens*, 97 F.R.D. at 679; *Marcera v. Chinlund*, 91 F.R.D. 579, 584 and n.10 (W.D.N.Y. 1982) (citations omitted).

In *Truckee-Carson*, the Court determined that the Truckee Carson Irrigation District was an adequate and capable class representative:

> It would seem that there could be no better representative of the class than TCID which was formed for just such a purpose. Although it has opposed the use of the class action device, counsel for TCID have indicated that they will gladly represent the class. The seven individual members were not picked at random. They are the current directors of TCID duly elected by members of the class. As such they have more than a passing interest in this litigation. TCID has already taken a very active role in this case and will, no doubt, continue to do so. It would appear there would be a great deal of communication between TCID, the seven representatives and the members of the class, and that all will be most ably represented.

71 F.R.D. at 16. The Court concluded that the "'representative parties will fairly and adequately protect the interests of the class.'" *Id.* (quoting FED. R. CIV. P. 23(a)(4)).

For the same reasons, the Walker River Irrigation District should represent the successors in interest to the water right holders under the Decree, since most of the successors are members of the District. The District has taken a very active role in these proceedings, "and will, no doubt, continue to do so." *Id.* Also for the same reasons, the State of Nevada should represent the domestic groundwater users in sub-basins 107, 108, 110A and 110B in Nevada,

since they use groundwater pursuant to state law. Nevada is a similarly active party to these proceedings.

To the extent that any member of either defendant class is not satisfied that the District or Nevada adequately represent their interests, such individual or individuals may seek the designation of additional class representatives.

B. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(A), 23(b)(2) AND 23(b)(3).

In addition to the requirements of FED. R. CIV. P. 23(a), the United States and the Tribe must also satisfy at least one of the criteria listed in FED. R. CIV. P. 23(b): "parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. FED. R. CIV. P. 23(b)(1)(A), 23(b)(2) and 23(b)(3) all apply here.[5]

1. <u>Class Certification Will Protect Against Incompatible Duties</u>.

"Rule 23(b)(1)(A), establishing the 'incompatible duties' standard, has the primary purpose of protecting the opponent of the class from the possibility of inconsistent obligations." FEDERAL CIVIL RULES HANDBOOK at 434. This was the provision under which the Court certified the class of water certificate holders in *Truckee-Carson* since in the absence of a class there would be a "risk of inconsistent or varying adjudications of the rights of each individual certificate holder which, when considered together, could impair the uniform course of conduct which the Tribe and the United States seek to pursue." 71 F.R.D. at 17.

Having determined that all elements of Rule 23(a) were satisfied, the *Truckee-Carson* Court found that a class was maintainable under FED. R. CIV. P. 23(b)(1)(A):

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[5]"Although a class may be certified if it fits within only one of the Rule 23(b) categories, there are sometimes advantages to fitting within more than one of the categories." FEDERAL CIVIL RULES HANDBOOK at 433.

> Obviously, if the United States could not join certificate holders as a class, it and the Tribe would be forced to join them individually and establish the rights which they seek as against each. As a matter of practical necessity, the United States and the Tribe would be forced to act and litigate in the same manner against individual certificate holders as it would toward the certificate holders as a class. This would then create a risk of inconsistent or varying adjudications of the rights of each individual certificate holder which, when considered together, could impair the uniform course of conduct which the Tribe and the United States seek to pursue; that is, to establish water rights, some of which they contend are prior to the rights of certificate holders. The standards of subsection (b)(1)(A) are met.

Id. at 17 (citing CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1773, at 11 (1972)). In the end, the Court held that in addition to satisfaction of the Rule 23 requirements, "sheer practicality" favored class certification: "Treating the certificate holders as a class provides 'a ready and fair means of achieving unitary adjudication' of the rights of the United States and the Tribe and the certificate holders." *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69 (1966)).

Treating members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) as classes will accomplish the same result here as well. There is one body of water ultimately at issue here. Before reaching the merits of the United States' and the Tribe's claims to that water, the parties to the instant case must address the threshold issues set forth in the CMO. Even after disposing of the threshold issues, the Court must address the merits of the additional water rights claims and determine whether the United States and the Tribe are entitled to the declaratory relief they seek. If the Court must consider each threshold issue and defense separately as to each defendant, not only will there be a possibility that the United States and the Tribe will be subject to inconsistent standards of conduct with respect to individual defendants, the Court will have to spend an

inordinate amount of time addressing each defendant's arguments separately. Certification under Rule 23(b)(1)(A) will eliminate the danger of inconsistent results, and greatly reduce the Court's burdens by permitting collective and consistent consideration of the threshold issues, among other matters.

2. <u>The United States and the Tribe Request Declaratory and Injunctive Relief.</u>

FED. R CIV. P. 23(b)(2) is applicable where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) share general defenses against the United States and Tribe, at least with respect to the threshold issues. Moreover, the United States and the Tribe seek only declaratory and injunctive relief. "[T]o maintain an action under Rule 23(b)(2), declaratory relief rather than monetary relief must be the 'predominant' form of relief the plaintiffs pursue." *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 269 (5th Cir.), *cert. denied* 530 U.S. 1261 (2000) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998)). Stated another way, "Rule 23(b)(2) authorizes a no-notice and no-opt-out class for 'final injunctive relief or corresponding declaratory relief [that operates] with respect to the class as a whole.'" *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999). *See also* FEDERAL CIVIL RULES HANDBOOK at 434 (the two elements of a Rule 23(b)(2) class are: "the class must share a general claim [or defense] against the non-class party; and the class [or the non-class party] must seek either final injunctive or declaratory relief.").

The proceedings in *Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civil Action No. 91-B-2273, 874 F. Supp. 1142 (D. Colo. 1995), *rev'd on other grounds*, 119 F.3d 816 (10th

Cir. 1997), *aff'd in part on reh'g en banc*, 151 F.3d 1251 (10th Cir. 1998), *rev'd on other grounds*, 526 U.S. 865 (1999), are instructive with respect to Rule 23(b)(2) classes. There, the Southern Ute Indian Tribe sought certification of a defendant class for the sole purposes of determining first whether the tribe retained an ownership interest in coalbed methane situated in the coal estate that belonged to the tribe, and second, assuming the tribe did retain such an ownership interest, whether a series of defenses, termed "Class Action Defenses," applied to bar the tribe's ownership claim. The court certified the following defendant class under Rule 23(b)(2) only for resolution of those discrete issues:

> All persons, except the Tribe and local state and federal governmental entities, who claim an ownership interest in coalbed methane or who claim the right to explore for or develop such coalbed methane from coal reserved by the United States in patents issued under the Act of March 3, 1909, or under the Coal Lands Act of 1910, for lands located within the exterior boundaries of the Southern Ute Indian Reservation.

Case Management Order No. 1 at 1, *Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civil Action No. 91-B-2273 (D. Colo. Apr. 24, 1992) (citations omitted) (Attachment 1 hereto). Once the issues were disposed of, and assuming the tribe's claim still survived, the court would vacate its class certification and proceed to examine the effect of the tribe's ownership claim on each of the defendants, be they landowners or royalty interest holders. In fact, the Supreme Court ultimately determined that the tribe did not retain an ownership interest in the coalbed methane, *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), and, as a result, the lower court never reached the Class Action Defenses. Yet, even though the non-class defendants raised objections throughout the proceedings to the class, no court ever disturbed the class certification and it remained intact through final Supreme Court treatment of the case.

Rule 23(b)(2) was appropriate in the *Southern Ute* proceedings because during the

class phase of the case, the tribe sought only a declaration that it retained an ownership in the coalbed methane situate in its coal estate, and the Class Action Defenses were equitable in nature. *See Case Management Order No. 1* ¶ 3 (listing estoppel, waiver, contractual limitations, consent, promissory estoppel, acquiescence, ratification, laches and good faith as the Class Action Defenses). It is similarly appropriate here. The United States and the Tribe seek a declaration that they are entitled to water in addition to that adjudicated under the Decree in 1936 for use on the Reservation, including both surface and groundwater. With respect to that declaratory relief, the defendants share general defenses, as initially set out in the threshold issues. Separate adjudication of the question of the United States' and the Tribe's entitlement to the declaration they seek would be a burdensome and repetitive exercise that need not be so with the availability and propriety of class treatment.

3. **<u>The Common Questions of Law and Fact Predominate</u>.**

FED. R. CIV. P. 23(b)(3) also applies here. "Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'" *Amchem*, 521 U.S. at 615 (quoting FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69 (1966)). *Accord Washington*, 199 F.3d at 265. Rule 23(b)(3) requires analysis of two additional elements: "Common questions 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem*, 521 U.S. at 615. These elements of Rule 23(b)(3) are important because "the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69

(1966)). The rule breaks down the predominance and superiority requirements as follows.

a. Interest of Class Members in Controlling the Prosecution or Defense of Separate Actions.

The present parties to the proceedings have repeatedly raised the issue of the financial ability of water rights claimants as justification for requiring the United States and the Tribe to proceed to identify the potential defendants in this case without any assistance from the parties themselves. *See* USBWC Comments at 2-3. If financial resources are indeed a problem, the defendants would find that defending against the United States' and the Tribe's claims would be much less of a financial strain as class members. This is especially true with respect to the domestic groundwater users who are members of Category 3(c), as their water rights claims in the basin are comparatively small, and their individual joinder would likely be burdensome. Their interests would be served, as a result, by participating in the Phase I portion of these proceedings as a class, and possibly in later phases as well.

b. Extent and Nature of Any Litigation Concerning the Controversy Already Commenced by or Against Class Members.

Obviously, this litigation has involved the members of Category 3(a) for over sixty years. Even in the absence of the United States' and the Tribe's claims, they continue to be parties to this action for purposes of administration of the Decree, as well as for any petitions for changes in places or manners of use of water adjudicated under the Decree. The United States and the Tribe seek to add groundwater users in the Walker River Basin to the mix of individuals subject to the Court's continuing jurisdiction over the Decree's implementation, since we have asserted a hydrological connection between surface and groundwater in the basin. The Court agreed that consideration of whether groundwater users should be among the parties before the Court is appropriate. CMO ¶¶ 3(c)-3(i), 11(a)-11(d). The determination whether to

include the members of Category 3(c) is, then, also appropriate as a class matter.

c. Desirability of Concentrating the Litigation of the Claims in a Particular Forum.

As with existing litigation, the claims already are concentrated in a particular forum, since the Court has retained jurisdiction over the administration and modification of the Decree. Decree ¶ XIV. *See also Mineral County v. Nevada Dep't of Conserv.*, No. 36352, 117 Nev. Adv. Op. No. 23 at 8-9 (Apr. 11, 2001) ("the Decree Court, which has had continuing involvement in the monitoring of the Walker River for more than eighty years, is the proper forum for the redress that Petitioners [Mineral County] seek.") (footnote omitted). For purposes of determining at the outset whether the Court's jurisdiction includes groundwater in the Walker River Basin due to a hydrological connection between the surface and underground waters, as the United States and the Tribe allege, this forum is the appropriate one.

d. Difficulties Likely to be Encountered in the Management of a Class Action.

The Court has recognized in prior orders that consideration of the United States' and the Tribe's additional claims could pose significant case management problems due to a very large number of defendants that would be brought into the case, in addition to those already before the Court. *Minutes of the Court* at 3 (May 11, 1999). Rather than create difficulties, the certification of two classes would help streamline this Court's management of the parties whose interests may be affected by the additional water rights claims.

4. <u>Notice to Rule 23(b)(3) Class Members</u>.

Unlike the Rule 23(b)(1)(A) and 23(b)(2) classes, the members of a Rule 23(b)(3) class are entitled to individual notice and an opportunity to opt-out of the class:

> The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2). *See Amchem*, 521 U.S. at 617. The notice is mandatory. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). The United States and the Tribe have attached hereto as Attachment 2 a proposed form of notice to Rule 23(b)(3) class members, if the Court determines that it is the appropriate part of the rule under which to certify either or both of the classes, and for any or all of the issues in these proceedings. The proposed order may also be modified to provide notice to members of classes certified under Rule 23(b)(1)(A) and 23(b)(2), if the Court so determines. FED. R. CIV. P. 23(d)(2).

IV. CONCLUSION

"Reason and logic render [the] rights [of the members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c)] appropriate to class adjudication if the prerequisites under Rule 23 are satisfied." *Truckee-Carson*, 71 F.R.D. at 15-16. Class treatment of the members of Category 3(a) and the domestic groundwater users in the specified sub-basins who are members of Category 3(c) satisfies Rule 23. Certification of additional classes may also be warranted in these proceedings, as the United States and the Tribe move through the process of serving the potential defendants to this case. As the present motion addresses only Category 3(a) and a portion of Category 3(c), however, the United States and the Tribe respectively request only certification of those two classes at this time.

Date: May 3, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* in the U.S. Mail, first-class postage prepaid thereon, on this 3rd day of May, 2001, addressed to the following:

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ATTACHMENT 1

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

APR 24 1992

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 91-B-2273

SOUTHERN UTE INDIAN TRIBE,

Plaintiff,

v.

AMOCO PRODUCTION COMPANY, et al.,

Defendants.

CASE MANAGEMENT ORDER NO. 1

THIS COURT having considered the proposed Case Management Order No. 1 submitted by Plaintiff Southern Ute Indian Tribe (the "Tribe") and by Defendant Amoco Production Company ("Amoco"), having held a Scheduling Conference to consider such Order and having heard any objections thereto, it is

ORDERED:

CLASS ISSUES

1. For the sole purpose of discovery regarding and resolution of the Class Action Claim and the Class Action Defenses as defined in Paragraphs 3 and 4, the following class is certified (the "Certified Class") pursuant to Rule 23(b)(2) as a defendant class:

> All persons, except the Tribe and local, state and federal governmental entities, who claim an ownership interest in coalbed methane or who claim the right to explore for or develop such coalbed methane from coal reserved by the United States in patents issued under the Act of March 3, 1909, Ch. 270, 35 Stat. 844 (codified as 30 USC § 81) or under the Coal Lands Act of 1910, Ch. 318, 336 Stat. 583 (codified as 30 USC §§ 83-85) for lands located within the exterior boundaries of the Southern Ute Indian Reservation.

2. Until further order of the Court, Amoco and certain other persons to be determined by defendants are designated as the representatives of the Certified Class. This order shall not preclude any petition for intervention or motion by any party to have additional parties named as additional representatives of the certified class, or any action by the Court on its own motion.

3. This action shall be maintained as a class action on behalf of the Certified Class solely as to (a) the determination of ownership of coalbed methane located in or near coal reserved by the United States in patents issued under the Act of March 3, 1909, Ch. 270, 35 Stat. 844 (codified as 30 U.S.C. § 81) or under the Coal Lands Act of 1910, Ch. 318, 336 Stat. 583 (codified as 30 U.S.C. §§ 83-85) for lands located within the exterior boundaries of the Southern Ute Indian Reservation and the right to explore for or develop coalbed methane underlying such lands to the extent, if any, such right is relevant to the ownership of the coalbed methane ("Class Action Claim") and (b) the existence and applicability of the defenses of statutes of limitation, and estoppel, waiver, contractual limitations, consent, promissory estoppel, acquiescence, ratification, laches and good faith, to the extent that such defenses are or may be generally applicable to the class and to the extent that they are based on the acts or omissions of the Tribe or its agents, employees or representatives ("Class Action Defenses").

4. Resolution of the two issues described in Paragraph 3, above, will be limited to determining (i) the ownership of the coalbed methane and the right to explore for or develop coalbed methane underlying such lands to the extent, if any, such right is relevant to the ownership of the coalbed methane, (ii) the existence and applicability of the defenses described in Paragraph 3, above, and generally common or applicable to the defendant class, and (iii) the non-applicability of the Common Defenses to a named oil company defendant based on the acts or omissions of the company or its agents, employees or representatives.

5. Except as so ordered, all issues pertaining to class definition, class certification, class notice, the propriety of maintaining and continuing this action as a class action in whole or in part, and all other class matters, are reserved for future ruling upon appropriate motion.

6. The Class Action Claim and the Class Action Defenses are hereby bifurcated from all other claims, cross-claims, counterclaims, defenses and issues raised by the pleadings of the named parties. Except as to the Class Action Claim and the Class Action Defenses, all discovery and all other proceedings in this action (including the filing of cross-claims

and counterclaims, the determination of the Tribe's remedies, if any, the assertion of individual defenses available to the defendants, including the oil company defendants, based upon the facts of their particular situation and any challenge to the applicability of the Class Action Defenses to individual class members other than the oil company defendants) are stayed until further order of the Court. All counterclaims, whether deemed compulsory or otherwise, are preserved. Any defendant shall have the right to assert any counterclaims they may have when such stay is lifted, whether or not such counterclaims have heretofore been pleaded. The running of the statutes of limitation for any counterclaims, cross-claims or third-party claims is hereby tolled.

DISCOVERY AND FURTHER PROCEEDINGS

7. Full discovery shall be allowed to all parties upon the Class Action Claim and the Class Action Defenses. As part of this discovery, the Tribe may conduct full discovery from any named defendant as to (i) the existence or non-existence of the Class Action Defenses and (ii) the applicability of such defense to each named oil company defendant. The Tribe, Amoco, as class representative, and any other class representatives shall be entitled to present appropriate evidence and testimony in support of and in response to the Class Action Claim and the Class Action Defenses. The other named defendants reserve the right to present evidence at trial of the bifurcated issues.

2/3 4-24-92

8. The Tribe and the class representatives of the Certified Class and named defendants are encouraged to discuss and agree to the terms and conditions of (a) document depositories, (b) confidentiality orders, (c) discovery scheduling, (d) expert discovery, (e) scope of discovery, (f) the handling of privileged and work product documents, and (g) possible use of a special master to hear discovery disputes. The United States is permitted to participate in discovery.

9. Unless otherwise ordered by the Court, all defendants shall have access to all discovery, upon agreeing to appropriate confidentiality orders.

10. Discovery authorized by this Order shall be conducted in accordance with the Order Re: Joint Stipulated Plan and Schedule for Discovery, and shall be completed within twelve (12) months of entry of Case Management Order No. 1.

2/3 4/24/92

11. No defendant, other than the named oil company defendants ~~and the Federal Defendants~~ as defined in paragraphs 6-8 of the Complaint, shall move or plead in response or in further response to the Complaint until further order of the Court. Any defendant is granted leave to answer the complaint.

12. All motions for summary judgment, partial summary judgment and any other dispositive or partially dispositive of

the Class Action Claim and the Class Action Defenses shall be deferred until after completion of discovery and shall be filed within three (3) months of completion of discovery on such issues, claim or defenses. A party opposing any such motions shall respond within forty (40) days of service thereof, and the moving party may file a reply with twenty (20) days of service of such response. To the extent the Class Action Claim and the Class Action Defenses are not resolved by summary judgment, they shall be set for a consolidated trial, to be held on all remaining issues as to such claims and defenses. Motions going to the jurisdiction of the court are exempt.

2B 4-24-92

13. Any defendant, including Amoco and the other class representatives and the Federal Defendants as defined in Paragraph 8 of the Complaint, may present appropriate motions and arguments with respect to the Class Action Claim and the Class Action Defenses and act separately on its own behalf.

14. Any party may move for modification of this Order for good cause shown.

15. Nothing in this Order is intended to affect or limit the rights of the Federal Defendants, as defined in Paragraphs 6-8 of the Complaint, including, but not limited to, their right to raise and resolve at any time statutory or jurisdictional defenses they might have.

NEXT CONFERENCE

16. A second scheduling/case management conference is set for June 19, 1992, at 2:00 o'clock P.m. in this Court. Seven (7) days prior to this conference, the Tribe and Amoco shall submit a joint status report as to the status of the case.

Dated this ~~3rd day of March~~ 24th day of April, 1992.

BY THE COURT:

United States District Judge

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,	IN EQUITY NO. C-125 Subproceeding C-125-B **NOTICE OF PENDENCY OF CLASS ACTION AND OF RIGHTS OF CLASS MEMBERS**

TO ALL PERSONS WHOM IT MAY CONCERN:

Notice is hereby given to you that the Plaintiff, the United States of America, and the Plaintiff-Intervenor, the Walker River Paiute Tribe ("Tribe"), have filed claims seeking to amend the decree entered in the case, *United States v. Walker River Irrigation Dist.*, No. C-125 (D. Nev. Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (D. Nev. Apr. 24, 1940) ("Decree"), to provide the United States and the Tribe with the right to use additional water for use on the Walker River Indian Reservation ("Reservation"). The United States previously was adjudged to be entitled, for the benefit of the Tribe, to 26.25 cubic feet per second of water from the direct flow of the Walker River for use on 2,100 acres of Reservation land, for an irrigation season of 180 continuous days. The United States and the Tribe seek: 1) the right to use additional water from the Walker River for use on lands restored to the Reservation after entry of the Decree; 2) to store water in Weber Reservoir for use on lands in addition to the 2,100 acres entitled to receive water under the Decree; and 3) to use groundwater underlying the Reservation. The United States additionally claims water for

other federal interests in the Walker River Basin. The United States and the Tribe have filed these claims against certain named defendants and the members of the defendant classes herein addressed. The Court has designated consideration of these additional water rights claims as sub-proceeding C-125-B.

By case management order dated April 18, 2000, the Court bifurcated the claims asserted by the United States and the Tribe into two phases. In the first phase, the present parties to the case are to consider service of process and resolution of certain threshold issues that are potentially dispositive of only those claims related to the Tribe and its Reservation, which have been designated the "Tribal Claims." In the second phase, the parties are to consider whether the Tribal Claims are valid. In the third phase, the parties are to consider all other claims made by the United States.

By order dated _____, 2001, the Court determined that the Tribal Claims should proceed against two defendant classes, as well as individual defendants falling into a total of eight categories. The two defendant classes are defined as the members of Category 3(a) of the Court's April 18, 2000 case management order, who are all successors in interest to those whose rights were adjudicated under the Decree ("Category 3(a) Class"), and those members of Category 3(c) who use groundwater for domestic purposes in sub-basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley) ("Category 3(c) Domestic Class"). It is believed that you claim an interest in a water right that falls within the Category 3(a) Class and/or the Category 3(c) Domestic Class. Accordingly, this Notice is sent to advise you, as a member of one or both

of the defendant classes, of the pendency of the action and the rights which you have with respect to it.

You may also claim an interest in a water right that falls within any of the other categories set forth in the case management order. This Notice to you as a member of the Category 3(a) Class and/or Category 3(c) Domestic Class does not affect your joinder in these proceedings as a defendant belonging to any of the other categories.

NOTICE IS FURTHER GIVEN AS FOLLOWS:

1. *United States v. Walker River Irrigation Dist.*, No. C-125-B (D. Nev.), centers on whether the United States and the Tribe are entitled to use additional water from the Walker River and to use groundwater underlying the Reservation. Approximately 4,000 individuals and entities have water rights interests adverse to those claimed by the United States and the Tribe. The United States and the Tribe seek relief from both the named defendants and the class members.

2. By its *Case Management Order* (Apr. 18, 2000), the Court identified, among others, the following categories of defendants:

(a) The successors in interest to all water rights holders under the Decree (April 14, 1936), modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc. (April 24, 1940) ("1936 Decree").

(b) All holders of surface water rights under the laws of the States of Nevada and California in the Walker River Basi[n] who are not presently parties to this adjudication.

(c) All holders of permits or certificates to pump groundwater issued by the State of Nevada and domestic users of groundwater within Sub Basins 107 (Smith Valley), 108 (Mason Valley), 110A (Schurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley).

(d) All holders of permits or certificates to pump groundwater issued by the State of Nevada within Sub Basins 106 (Antelope Valley), 109 (East Walker), and 110C (Whiskey Flat-Hawthorne Subarea of Walker Lake Groundwater Basin).

(e) All users of groundwater for irrigation in the [Walker River Basin in] California.

(f) All holders of "vested rights" to the use of groundwater under the laws of the State of Nevada within the Walker River Basin.

(g) All municipal providers in Nevada within the Walker River Basin who currently use groundwater.

(h) All municipal providers in California within the Walker River Basin who currently use groundwater.

(i) All industrial users in Nevada within the Walker River Basin who currently use groundwater.

3. By Order dated _____, the Court determined that this action shall be maintained partially as a class action, with respect to the Category 3(a) Class and Category 3(c) Domestic Class, as defined above, FOR THE LIMITED PURPOSES OF DETERMINING:

(a) Whether certain threshold issues identified in the CMO, and such other issues identified by the Court thereafter, apply to bar the additional claims asserted by the United States and the Tribe.

(b) Whether the United States, for the benefit of the Tribe, and the Tribe are entitled to use water from the Walker River on lands restored to the Reservation by action of the Secretary of the Interior (Sept. 25, 1936), upon authority delegated by Congress under the Act of June 22, 1936, Pub. L. No. 74-748, for irrigation of said lands.

(c) Whether the United States, for the benefit of the Tribe, and the Tribe are entitled to store water from the Walker River in Weber Reservoir and subsequently use that water to irrigate lands in addition to the 2,100 acres of land previously awarded water rights under the Decree.

(d) Whether the United States, for the benefit of the Tribe, and the Tribe are entitled to use groundwater underlying the Reservation on the Reservation lands.

No other issues have been presently certified for class action determination. As a member of one or both of the defendant classes, you may be legally bound by any future orders or judgment of the Court relating to these issues.

4. In addition, this action has been bifurcated, that is, separated into two parts. The first part consists of the claims made by the Tribe, and the United States on the Tribe's behalf, which are described above. These claims are referred to as the "Tribal Claims." The second part consists of all other claims made by the United States on behalf of other tribes and federal interests in the Walker River Basin. These claims will be considered after resolution of the Tribal Claims. The Court has divided the Tribal Claims into two phases. Phase I consists of addressing certain threshold issues as identified and determined by the Magistrate Judge. Phase II involves completion and determination on the merits of all matters relating to the Tribal Claims. All other claims, counterclaims, crossclaims, defenses and issues raised by the pleadings will be considered after at least completion of Phase I of the Tribal Claims, and possibly after completion of Phase II.

5. The Court has designated the Walker River Irrigation District as lead counsel for the Category 3(a) Class, and the State of Nevada as lead counsel for the Category 3(c) Domestic Class. The Walker River Irrigation District is represented by:

Gordon H. DePaoli, Dale E. Ferguson
Woodburn and Wedge
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
(775) 688-3000

The State of Nevada is represented by:

Marta Adams, Deputy Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1100

6. With respect to the Tribal Claims, the United States is represented by:

Susan L. Schneider
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice
999 18th Street, Suite 945, North Tower
Denver, Colorado 80202
(303) 312-7308

The Tribe is represented by:

Scott B. McElroy
Alice E. Walker
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

7. ANY PERSON WHO IS A MEMBER OF EITHER OF THE DEFENDANT CLASSES AS ABOVE-DESCRIBED AND WHO WISHES TO OBJECT TO THE PARTIAL CERTIFICATION OF THIS ACTION AS A CLASS ACTION OR WHO WISHES TO OBJECT TO THE ADEQUACY OF THE REPRESENTATION OF THE CLASS OR TO APPEAR INDIVIDUALLY IN SAID ACTION FOR ANY PURPOSE AND HAS NOT ALREADY DONE SO, MUST, ON OR BEFORE _____, FILE A MOTION BEFORE THE COURT CONTAINING SUCH OBJECTION OR REQUEST TO APPEAR AND THE REASONS THEREFOR OR SUCH OBJECTION OR REQUEST SHALL BE DEEMED WAIVED. COPIES OF ANY SUCH MOTION OR REQUEST MUST ALSO BE SERVED

UPON COUNSEL FOR THE UNITED STATES AND THE TRIBE, WHOSE ADDRESSES ARE SET FORTH IN PARAGRAPH 6, AND COUNSEL FOR THE WALKER RIVER IRRIGATION DISTRICT AND THE STATE OF NEVADA, WHOSE ADDRESSES ARE SET FORTH IN PARAGRAPH 5.

8. Copies of the pleadings filed in this action are available at the United States District Court for the District of Nevada, in Reno, Nevada, the office of counsel for the Tribe in Boulder, Colorado, the office of counsel for the United States in Denver, Colorado, the office of Woodburn and Wedge in Reno, Nevada, and the office of the Nevada Attorney General in Carson City, Nevada.

Dated:_____

_____
UNITED STATES DISTRICT JUDGE