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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

IN EQUITY NO. C-125-ECR
SUBFILE NO. C-125-B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA
Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.

Defendants.

STATE OF NEVADA'S OPPOSITION TO THE JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR CERTIFICATION OF DEFENDANT CLASSES

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The State of Nevada through the Nevada Division of Wildlife (alternatively, "Nevada" or "NDOW") hereby opposes the motion filed by the United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") to certify two defendant classes and to designate representatives for these defendant classes. For purposes of its opposition and as set forth below, Nevada specifically opposes its designation as the class representative for domestic groundwater users in specified sub-basins of the Walker River Basin. Based on the requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), Nevada's claims and defenses are not typical of the claims or defenses of the proposed class, nor is Nevada equipped to fairly and adequately protect the interests of other domestic groundwater users in Nevada. Although NDOW does in fact utilize a domestic well at the Mason Valley Wildlife

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Management Area, there is no other commonality of interests between NDOW and other domestic users of groundwater sufficient to support designation of Nevada as the class representative under Rule 23.[1]

As the following arguments articulate, the United States and Tribe have failed to meet the burden imposed by Rule 23. The joint motion seeking to require that Nevada be the designated representative for the proposed defendant class of domestic groundwater users should be denied

I. NEVADA CLAIMS AND ANTICIPATED DEFENSES ARE NOT TYPICAL OF THOSE CLAIMS AND DEFENSES OF OTHER DOMESTIC WELL OWNERS.

Rule 23 of the FRCP contains the requirements for class actions in federal court. Rule 23 does not distinguish between plaintiff and defendant class actions. Rule 23(a) requires that a proposed class:

(1) is so numerous the 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 represent the interests of the class.

Here, with respect to creating a class of domestic groundwater users to be represented by Nevada, the United States and the Tribe have failed to sustain the burden of proving that elements (3) and (4) of Rule 23(a) are satisfied. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985); *Burkhalter Travel Agency v. MacFarms International, Inc.*, 141 F.R.D. 144, 152 (N.D. Cal. 1991). (upon a motion for certification, the proponent of the class bears the burden of establishing that the requirements of Rule 23 are met.) Failure to satisfy any one of the requirements of Rule 23(a) precludes certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Unlike the proposed class of domestic groundwater users, NDOW is the single largest decreed water right holder on the Walker River. In addition, NDOW holds a permitted water right to flood waters in Walker Lake. These are the interests which form the basis for Nevada's participation in this case rather than the incidental fact that Nevada also has a single domestic well. Despite the United States' and the

[1] No other Nevada agency, including the Division of Water Resources, regulates domestic well owners or has possession of comprehensive information as to the identity of these people. The State Engineer, through the Nevada Division of Water Resources, maintains well drillers' logs for all wells drilled in the state, but there is no program for identification of domestic groundwater users in Nevada.

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Tribe's proposal to create 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, there are few, if any, "typical" claims or defenses which Nevada shares with other domestic groundwater users.

As the largest decreed water right holder in the Walker River and the only party with water rights in Walker Lake, questions of law and fact relative to Nevada's interests are unique to itself and certainly cannot be considered "typical" for purposes of Rule 23. Even before reaching the merits of the United States' and the Tribe's claims, it is clear that to the extent the tribal claims to additional water may impact Nevada's water rights, the impact is vastly disproportionate to the impact experienced by any other domestic groundwater user. Unlike other domestic users of groundwater, Nevada, by virtue of its decreed water rights, is in a position to claim a priority on water as determined by the Walker River Decree. This fact alone places Nevada in a unique position dissimilar to other domestic groundwater users and prevents Nevada from participating in this litigation in a manner consistent with the best interests of domestic groundwater users.

The United States and the Tribe rely on *United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10 (D. Nev. 1975) to support their argument that domestic groundwater users in the Walker River sub-basins are similar to the contractual right holders who were certified as a defendant class in that case. *See*. United States/Tribe Memorandum, p. 9. An examination of the court's reasoning in *Truckee-Carson* reveals that the analogy does not pertain to the circumstances presented to this Court. In *Truckee-Carson*, all the contract certificate holders comprising a class derived their rights from a single federal diversion for use on the Newlands Project. No one certificate holder was in a position to establish himself as superior to other certificate holders. *Id.* at 11, 12. Here, priorities among decree holders along the Walker River are different from each other and clearly distinguishable from any protectible interests that may or may not exist for domestic users of groundwater. To the extent that domestic groundwater users are potentially impacted by the Tribal claims to water, variables such as proximity to the reservation and hydrology will be a factor. These factors, among others which may be "typical" to domestic groundwater users, may not assume a prominent role in Nevada's much larger claims or defenses in this case.

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The United States and the Tribe argue that "[t]he 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." *See,* U.S./Tribe Memorandum, p. 9. Despite this contention, however, the state statutory scheme for the administration of groundwater expressly does not define the rights of domestic groundwater users. The permitting provisions of Nevada's groundwater law expressly do not apply to domestic well users and because domestic groundwater users are exempt from such provisions, the State has no particular relationship with these users. *See*, Nevada Revised Statute ("NRS") 534.180. Nevada, through its Division of Wildlife, is present in this litigation on behalf of its interest in protecting its water rights and its role in the protection of wildlife.

In order to gain certification, the United States and the Tribe must demonstrate that the claims and defenses of the domestic groundwater users are typical of those of the entire class and shared with the class representative. *Hagen v. City of Winnemucca*, 108 F.R.D. 61 (D.Nev. 1985). Based on the foregoing, the United States and the Tribe have failed to meet this requirement.

II. NEVADA CANNOT FAIRLY OR ADEQUATELY REPRESENT THE INTERESTS OF THE PROPOSED CLASS OF GROUNDWATER USERS.

In addition to the absence of typical claims and defenses, the United States and the Tribe cannot establish that Nevada will fairly and adequately protect the interests of the proposed class of domestic groundwater users, or that Nevada is actually part of the proposed class and possesses the same interests as the other class members. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997).

Parties are generally considered to be adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members and if the Court is persuaded that counsel for representatives will vigorously pursue the action. *Burkhalter Travel Agency v. MacFarms International, Inc., Id.* at 153. In the present situation, there may well be conflicts of interest between Nevada's interests and those of domestic well owners. Nevada has its own interests to defend in this case separate and apart from the needs of the proposed class. In considering the involvement and knowledge of a prospective class representative, the Court must be assured that the class representative will discharge his fiduciary obligations by fairly and adequately protecting the interests of the class. *Id.* at 154.

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Class representative must be part of the class and possess the same interests and suffer the same injuries as class members. *East Texas Motor Freight System, Inc., v. Rodriguez,* 431 U.S. 395, 403 (1977). Simply stated, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class member. That is not the case here. Nevada, by virtue of the extent of its water rights as well as its responsibilities for wildlife, does not share the same interests nor will it suffer the same injuries as the proposed domestic groundwater user class.

III. CONCLUSION

Based on the foregoing, Nevada respectfully submits that the Court should reject the United States' and the Tribe's motion to designate the state as the appropriate class representative for the proposed class and domestic groundwater users.

Respectfully submitted this 13th day of June, 2001.

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CERTIFICATE OF MAILING

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 13th day of June, 2001, I deposited for mailing, postage prepaid, true and correct copies of the foregoing document addressed as follows:

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