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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-ECR Subproceeding C-125-B **JOINT REPLY OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO THE WALKER RIVER IRRIGATION DISTRICT AND THE STATE OF NEVADA REGARDING CERTIFICATION OF DEFENDANT CLASSES**

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

Kelly R. Chase
P.O. Box 2800
Minden, Nevada 89423
702-782-3099

Attorneys for the WALKER RIVER PAIUTE TRIBE

Kathryn E. Landreth
United States Attorney
Susan Schneider
Assistant United States Attorney
United States Department of Justice
Environment & Natural Resources Division
999 18th Street, Suite 945
Denver, Colorado 80202
303-312-7308

Attorneys for the UNITED STATES OF AMERICA

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I. INTRODUCTION.

Pursuant to the *Minutes of Court* (May 30, 2001), the United States of America and the Walker River Paiute Tribe ("Tribe") file this reply to the *Walker River Irrigation District's Points and Authorities in Opposition to Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (June 18, 2001) ("District Response"), and the *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* (June 13, 2001) ("Nevada Response"). Pursuant to the *Stipulation and Order for Extension of Time Concerning Briefing Schedule on the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes (Third Request)* (July 10, 2001), the Tribe and the United States timely file this reply by August 3, 2001.

The State of Nevada does not oppose class certification, but instead objects only to its designation as class representative for the defendant class of domestic groundwater users in sub-basins 107, 108, 110A and 110B. Nevada Response at 1. The District's Gordian knot response boils down to two complaints: 1) it is not qualified to act as class representative for the defendant class of all 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"); and 2) certification of the two defendant classes identified in the Joint Motion does not satisfy the requirements of Rule 23 for all phases of this litigation as identified in the Court's *Case Management Order* (Apr. 18, 2000) ("CMO"). District Response at 5-30. Other than Nevada and the District, no other party to this case opposes the *Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (May 3, 2001) ("Joint Motion").

The responses do not change the fact that certification of the two defendant classes identified in the Joint Motion would assist the Court and the parties in addressing at least Phase I and the plaintiffs' requests for declaratory relief with respect to the Tribal Claims in Phase II of these proceedings. Nor do they refute the fact that class certification in these proceedings would satisfy the requirements of FED. R. CIV. P. 23. They also fail to provide any convincing argument that Nevada and the District are not appropriate class representatives. Rather, the responses only serve to complicate a straightforward issue: whether Rule 23 applies to allow the Court to exercise its discretion to certify two defendant classes in order to address threshold issues related to the Tribe's and United States' additional claims and to declare the nature and extent of the Tribe's rights. As the Tribe and the United States demonstrated in their Joint Motion, the rule does apply. Further, because Nevada and the District have amply demonstrated their ability to serve as class representatives, and that they are fully able to present the common defenses contained in the threshold issues and to defend against the Tribal Claims as well, both objections must fail. Accordingly, the Court should certify the two defendant classes that the United States and the Tribe have identified.

II. THE FACTUAL HISTORY OF THIS CASE DEMONSTRATES THE UTILITY OF DEFENDANT CLASS CERTIFICATION.

As a preliminary matter, the history of the United States' and the Tribe's efforts to pursue their claims for additional water in the Walker River Basin illustrates the need for case management tools such as defendant class certification. As the District notes, it has been nearly nine years since the Tribe filed its counterclaim asserting additional water rights claims, and four years since the Tribe and the United States filed their first amended counterclaims. District Response at 2. As the Court is well aware, identification of potential counter-defendants and

serving them once identified are not small chores and the fact that several years have elapsed since the Tribe and the United States filed their first amended counterclaims indicates the enormity of the project. *Order* at 4, No. C-125 (June 8, 2001) ("For some time now, various parties have had considerable difficulty in determining the current water rights holders on the Walker River for purposes of service of process.").[1] Moreover, the Court and the parties have expressed concern over managing the defendants as water rights are bought and sold during the course of this litigation. *Transcript of Further Status Conference Regarding the Case Management Order Before the Honorable Robert A. McQuaid, Jr., United States Magistrate Judge* at 8 (Mar. 20, 2001) ("Mar. 20 Tr.") ("And, quite frankly, and -- and I'm not at all being facetious with it, the pace of this case -- this thing's gonna be going on five years from now. And -- and there's gonna be all kinds of transfers made. How -- what do we do with those people?").[2] In light of these concerns, it makes sense to investigate all available tools to determine if the problems of identification and management of fluctuating defendants can be addressed, and the case streamlined. As a result, the United States and the Tribe filed their Joint Motion.

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[1]*See Affidavit of Dennis Becker* (June 12, 2001), Exhibit 1 to *Identification of Methods Used by the United States of America and the Walker River Paiute Tribe to Identify Persons and Entities to be Served Pursuant to Paragraph 3 of the Case Management Order* (June 18, 2001).

[2]The District has echoed this concern, noting a need to "eliminate the moving target problem which exists before service is complete." *Memorandum of Walker River Irrigation District Concerning Procedure for Recording Notices of Lis Pendens and Concerning Identification of Counterdefendants by Case Management Order Categories* at 5 (Feb. 12, 2001). *Accord* Mar. 20 Tr. at 34 ("'Because the period of time that will be required to complete service and because ownership of land with appurtenant water rights frequently . . . changes, it is important to ensure that successors in interest to parties originally joined and served have notice of the pendency of this matter and can be substituted without additional service under Rule 4.'" (quoting earlier District memorandum)).

Despite the simplicity of the Joint Motion, the District and Nevada have confused the United States' and Tribe's request by unwarranted focus on the determination of the non-tribal rights as well as enforcement and administration of the Decree. Indeed, there is "nothing in the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *See also National Union Fire Ins. Co. of Pittsburg, P.A. v. Midland Bancor, Inc.*, 158 F.R.D. 681, 685 (D. Kan. 1994) (citing *Eisen*, 417 U.S. at 177); *Rodriguez v. Carlson*, 166 F.R.D. 465, 474 (E.D. Wash. 1996) (citing *Walsh v. Ford*, 130 F.R.D. 260, 264-65 (D.D.C. 1990)).

Buried in the District's response is the roadmap set forth in the first amended counterclaims that proves the validity of the Joint Motion. There are three categories of issues -- or three stages of case progress -- presented by the first amended counterclaims, as the District shows:

With respect to the Tribal Claims, the Tribe asks the Court:

1. To recognize and declare and quiet title to:

   A. The right of the Tribe to store water in Weber Reservoir for use on the Reservation including the lands restored to the Reservation in 1936;

   B. The right of the Tribe to use water on the lands restored to the Reservation in 1936;

   C. The right of the Tribe to use groundwater underlying and adjacent to the Reservation on the lands of the Reservation including the lands restored to the Reservation in 1936;

   D. The right of the Tribe to use groundwater underlying and adjacent to the lands restored to the Reservation in 1936 on the lands of the

> [R]eservation including the lands restored to the Reservation in 1936.
>
> 2. Declare that the defendants and counterdefendants have no right, title or other interest in or to the use of such water rights.
>
> 3. Preliminary [sic] and permanently enjoin the defendants and counterdefendants from asserting any adverse rights, title or other interest in or to such water rights.

District Response at 10-11 (citing *First Amended Counterclaim of the Walker River Paiute Tribe* at 17-18 (1997)). The United States makes parallel claims on behalf of the Tribe in its first amended counterclaim. *First Amended Counterclaim of the United States of America* at 31 (1997). Consistent with Rule 23(c)(4)(A), the Joint Motion seeks class certification only for addressing the threshold issues that are identified in paragraph 11 of the CMO and those that may be added to the list, and for declaring the Tribe's rights under part 1 as recited above.

Class certification for discrete issues is within the Court's discretion. In *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023 (10th Cir. 1993), the "trial court certified a defendant class pursuant to Rule 23(b)(2) solely to determine the two described issues." *Id.* at 1026. Those issues were: 1) a determination of whether the federal reservation of the coal estate included coalbed methane, and 2),

> a determination of whether there exist defenses generally applicable to the defendant class, consisting of statutes of limitation, and estoppel, promissory estoppel, waiver, contractual limitations, consent, acquiescence, ratification, laches and good faith to the extent that these defenses, other than statutes of limitation, are based on the acts or omissions of the Tribe or its agents, employees, or representatives.

Id. The certification of the defendant class did not extend beyond the determination of these two issues. Later stages of the case would have addressed the Southern Ute Indian Tribe's claim to

ownership of coalbed methane relative to the rights claimed by the members of the defendant class. The situation in *Southern Ute Indian Tribe* is persuasive here where the certification of defendant classes is for discrete portions of the case.

Nowhere do the United States and the Tribe seek class certification for parts 2 and 3 of the first amended counterclaims, yet the District spends an inordinate amount of its brief attempting to demonstrate how the Court cannot address those two parts as a class action.[3] Stripping the District's discussion of all references to parts 2 and 3, the District never shows that class treatment of the threshold issues and part 1 of first amended counterclaims is unwarranted. This is so because the class action tool is particularly appropriate to address the threshold issues -- which include affirmative defenses to the United States' and Tribe's claims -- and the declaration of the Tribe's rights. At this stage of the proceedings, there is no need to delve into the merits of the first amended counterclaims, and indeed that would be contrary to the Court's establishment of the roadmap for this case in the CMO.

The District illustrates the distinction between establishing the procedural posture of the case and examination of the merits of the Tribe's and the United States' claims in its response. It juxtaposes the declaration that the Tribe and the United States seek -- water for the restored lands, water for storage in Weber Reservoir, and groundwater underlying the Reservation -- with subsequent determinations that the counter-defendants "have no right, title or other interest in or to the use of such water rights," and enjoining the defendants "from asserting any adverse rights,

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[3]The District goes so far as to criticize the Court's decision in *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D. Nev. 1975), as being "wrong and distinguishable." District Response at 20. However, as with the majority of the District's response, its criticisms go to the merits of the defendants' individual water rights claims, and have no applicability with respect to the threshold issues and the declaration of the Tribe's rights.

title or other interest in or to such water rights." District Response at 11. Clearly, the determinations subsequent to the declaration of the United States' and Tribe's rights regarding the rights of other users in the basin may have to occur outside of the class context. The United States and the Tribe acknowledged this fact in their motion. Joint Motion at 11. Nowhere did the United States and the Tribe assert in the Joint Motion that the single source theory requires the Court "to determine the relative priority and relationship of all such rights, surface and groundwater, to each other," District Response at 11, in order to resolve the threshold issues or declare the Tribe's rights. Such complexities are not before the Court at this time. *Minutes of the Court* at 2 (May 11, 1999) (the Court must first ascertain the procedural posture of the case, and subsequently address the merits of the groundwater claims relative to other claims in the basin); CMO ¶ 12 (procedural issues must be decided before resolution of the merits of the claims).

Leaving aside the District's awesome depiction of the problems associated with class actions when it comes to the determination of the defendants' and counter-defendants' rights vis-a-vis those of the United States and the Tribe, the Joint Motion is quite clear. As we show below, certification of the two classes identified in the Joint Motion assists the Court, the plaintiffs, the defendants and counter-defendants.

III. THE CERTIFICATION OF THE TWO IDENTIFIED DEFENDANT CLASSES SATISFIES THE REQUIREMENTS OF RULE 23.

A. THE TRIBE AND THE UNITED STATES DO NOT SEEK TO AVOID PROVIDING CLASS MEMBERS WITH NOTICE.

The thread that runs throughout the District's response is that by seeking certification of defendant classes, the Tribe and the United States are somehow trying to avoid their obligation to

provide all defendants and counter-defendants with notice of these proceedings. District Response at 13-14. To use the District's jargon, "[t]his argument is mere hypothetical nonsense." *Id.* at 20. To the contrary, use of the class action device in these circumstances would provide substantial benefits to the Court and the defendants, as well as the Tribe and the United States.

Only Rule 23(b)(3) expressly requires that notice be given to all defendant class members. *Eisen*, 417 U.S. at 173. It is, as a result, the best rule for certification of the two defendant classes identified in the Joint Motion. But the Tribe and the United States have never requested that they be excused from any obligation the Court has imposed that they provide all defendants and counter-defendants with notice since "[t]he district court has authority under FED. R. CIV. P. 23(d)(2) to require notice it deems necessary." *Southern Ute Indian Tribe*, 2 F.3d at 1026 n.2. *Accord In re Agent Orange Products Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *cert. denied*, 484 U.S. 1004 (1998) ("When members of the class can be identified through reasonable effort, individual notice is required; the expense of giving the notice must be paid by plaintiffs." (citing *Eisen*, 417 U.S. at 156; *Abrams v. Interco, Inc.*, 719 F.2d 23, 30 (2d Cir. 1983))).

Nothing in a class action proceeding relieves a party from the obligation to identify all class members and provide them notice of the proceedings.[4] As demonstrated below, the

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[4]The District cites to the Court's recent order stating that the information, while perhaps not easily obtainable, is available for identification of all counter-defendants. District Response at 14 (citing *Order* at 9, No C-125 (June 8, 2001)). It is not at all clear, however, that the necessary information is available in the public record regarding water rights transfers. The District has argued that individuals who transfer water rights routinely do not comply with the Nevada statutory requirements for recording transfers with the county recorders. *See Transcript of Further Status Conference Regarding the Case Management Order Before the Honorable Robert A. McQuaid, Jr. United States Magistrate Judge* at 14-15 (Jan. 11, 2001).

arguments of the District and Nevada that somehow notice will be lacking under a partial class action are meritless. Certification under Rule 23(b)(3) expressly requires notice to class members, FED. R. CIV. P. 23(c)(2), and the Court has discretion to order notice under any other provision of the rule in the certification of defendant classes. FED. R. CIV. P. 23(d)(2).

The District and the United States Board of Water Commissioners send assessments each year to those to whom the District provides water and to whom the Board provides water, respectively. *See Comments & Recommendations of 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 Rights Holders and Their Successors* at 2, No. C-125 (Oct. 16, 2000); *Walker River Irrigation District's Opposition 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 Rights Holders and Their Successors* at 4-7, No. C-125 (Nov. 16, 2000). This information is adequate for assessing those who receive water from those two entities:

> It seems to the Court that the decree has been administered for sixty years, adequately. And without this information [that the individual decreed right holders identify themselves and their claimed water rights to the Court]. And if there was such a critical need for this information, other than giving the Tribe and the United States these names without them having to go dig them out somewhere, it . . . would have been pointed out. But nobody has pointed out that . . . the situation up to this point has been lacking in any . . . manner.

Mar. 20 Tr. at 138-39. *See also Report and Recommendation of U.S. Magistrate Judge* at 2-3, No. C-125 (Mar. 22, 2001), *aff'd*, *Order*, No. C-125 (June 8, 2001). Thus, if the Court certifies the defendant classes under Rule 23(b)(3) or any other provision of Rule 23(b), the Tribe and the United States may provide notice to all members of the classes in the same way that the District

and the Board provide assessments: via direct mailing; and via publication. Mar. 20 Tr. at 135-36 ("Ms. Bowman is right. In the past we've always continued with publication and that sort of process, which have worked. . . . If there was a way to provide notice, we would provide notice." (Mr. McElroy)).

As described below, the initial phase of these proceedings lends itself to Rule 23(b)(3) certification of the two defendant classes identified in the Joint Motion. Alternatively, Rule 23(b)(2) also works with proper class definition. The notice methodology already in place regarding assessments applies to either class certification.

B. RULE 23(b)(3) APPLIES TO CERTIFY THE TWO IDENTIFIED DEFENDANT CLASSES.

Rule 23(b)(3) is the best device by which to certify the defendant classes that the Joint Motion identifies because: 1) it expressly requires notice to all class members; and 2) it allows class members to opt out of the class and defend against the Tribe's and the United States' claims on their own. FED. R. CIV. P. 23(c)(2). Yet, the District believes that the class action is not a superior method of adjudication. District Response at 24. This argument belies the obvious facts. First, the advantage of class certification to the United States and the Tribe is that once they identify all counter-defendants, they must serve only the class representative and will provide notice to the class members. Reducing the number of parties who must be served with process, as opposed to noticed by mail, will drastically speed up these proceedings. Expediting the resolution of the case is to the advantage of all parties to these proceedings. *In re Agent Orange*, 100 F.R.D. at 722-23. Second, the advantage to the Court is that fewer parties will be present to address the initial stages of these proceedings. Rather, the class members will be

represented by the class representatives, thereby streamlining the conduct of court proceedings. *Id.*

Third, the advantage to the defendants is that they may choose whether to allow the class representative to address for them the threshold issues and the declaration of the Tribe's rights, or they may choose to participate individually in these issues. "[C]lass members' right to notice and an opportunity to opt out should be preserved whenever possible." *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)). If they choose to allow the class representative to take the laboring oar, they will save the time and expense of doing so individually. "[O]ne of the two issues certified for class determination is whether there are common class defenses that will defeat the Tribe's claim. That issue will benefit only defendants." *Southern Ute Indian Tribe*, 2 F.3d at 1030. As the District and others have stated on various prior occasions, many of the defendants will find it financially burdensome to defend against the United States and the Tribe. *See Comments & Recommendations of 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 Rights Holders and Their Successors* at 2, No. C-125 (Oct. 16, 2000) ("This requirement would be costly for water rights holders . . . ."). The class action tool offers them the advantage of fiscal savings while still having their interests represented. On the other hand, they are free to participate individually if they so choose. "The purpose of class actions is to conserve the resources of the courts and the parties by allowing the most economical resolution of issues potentially affecting the members of the class." *Rodriguez*, 166 F.R.D. at 470. *See also In re Agent Orange*, 100 F.R.D. at 723 (whether class action will result in "litigation economies" is relevant to question whether to certify).

The District also argues that the Tribe and the United States cannot satisfy Rule 23(b)(3) for certification of the defendant classes because in its view, common questions do not predominate. District Response at 24. While that may be true with respect to the determination of the defendants' individual rights relative to those of the Tribe and the United States, common questions do predominate with respect to the portions of these proceedings for which we seek class certification: all defendants are similarly aligned with respect to resolution of the threshold issues and declaration of the Tribe's rights. *See* Part IV, *infra* (discussing commonality of defendant interests throughout Phase I and the declaratory relief portion of Phase II). *Accord Rodriguez*, 166 F.R.D. at 477 ("'when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis.'" (quoting *In re Agent Orange*, 100 F.R.D. at 722)). Certification of defendant classes for a portion of the adjudication of the first amended counterclaims is permissible and appropriate. FED. R CIV. P. 23(c)(4)(A). Holistic case evaluation -- which clearly demonstrates that water rights will have to be adjudicated vis a vis each other down the road -- does not prohibit the use of the class action tool for the portion of the case leading to that determination which will ultimately be resolved based on the priority system.

The District's citation to *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), *cited in* District Response at 25, is out of context on this point. In *Castano*, the court refused to certify a plaintiff class of tobacco users where there was insufficient commonality of interests at the time of certification, but perhaps there would be later on: "Reading Rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3) . . . ."

Castano, 84 F.3d at 745 n.21. The situation here is the exact opposite, as the Tribe and the United States seek certification of defendant classes now while common issues predominate with respect to the threshold issues and the declaration of the Tribe's rights. If and when individual issues come to the fore, the classes likely will be decertified. *See* Joint Motion at 11.

Those counter-defendants who do not wish to participate as class members with respect to the threshold issues can opt out of the classes. *See In re Agent Orange*, 100 F.R.D. at 728 (certifying plaintiff class generally under Rule 23(b)(3) because opt out provision would allow plaintiffs to individually determine whether to participate in class, as well as under Rule 23(b)(1) only for determination of punitive damages against Agent Orange manufacturer since there was likely a limited fund). The opt out provision of Rule 23(b)(3) is a critical element that allows individual defendants to determine how they wish to defend their claims. The District, in its zeal to put every possible hurdle before the Tribe and the United States, ignores the fact that class certification is a no-lose situation for all of the counter-defendants, since they can benefit from the District acting as their class representative, or they can benefit from representing their own interests. The choice is theirs; there certainly is no disadvantage to any defendant with the opt out provision.[5]

The District disputes the characterization of domestic groundwater users as claimants with small interests in these proceedings. District Response at 28. However, the defendants

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[5]The District relies on *Miller v. Jennings*, 243 F.2d 157 (5th Cir.), *cert. denied*, 355 U.S. 827 (1957) and *California v. United States*, 235 F.2d 647 (9th Cir. 1956), to argue that at some point common defenses will become conflicting claims and, therefore, class certification is not appropriate. District Response at 25. These cases were decided prior to the massive 1966 amendment to Rule 23. Practitioners should avoid the pre-1966 cases since the rule was so dramatically amended. 7A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1752 (1986) ("great caution must be exercised in relying on pre-1966 precedents.").

themselves have argued that they are financially incapable of taking steps to assist us in the identification of defendants. *See Comments & Recommendations of 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 Rights Holders and Their Successors* at 2-3, No. C-125 (Oct. 16, 2000). If they cannot afford to identify themselves to the United States Board of Water Commissioners, they also must have a difficult time defending such a massive undertaking as this lawsuit. The Tribe and the United States do not mean to do any of the defendants "favors," but rather have taken them on their word that these proceedings are financially burdensome for them. Those who use smaller amounts of water, such as the domestic groundwater users in the Nevada sub-basins, are suited to class treatment. There is no need for offensive statements such as the one the District makes on page 28.

In sum, Rule 23(b)(3) is the best vehicle for certification of the defendant classes identified in the Joint Motion. It benefits the Tribe and the United States by streamlining the joinder process. It benefits the Court by reducing the number of parties appearing in the preliminary stages of the case. It benefits the defendants by requiring notice to all class members, and allowing them to make the decision whether to participate as a class member in the Phase I proceedings and declaratory proceedings to determine the Tribe's rights, or whether to participate individually on their own. The Court should, then, certify the Category 3(a) successor in interest class and the domestic groundwater users in sub-basins 107, 108, 110A and 110B class under Rule 23(b)(3).

C. ALTERNATIVELY, THE COURT MAY CERTIFY THE DEFENDANT CLASSES UNDER RULE 23(b)(2).

Alternatively, certification of the two defendant classes is also appropriate under Rule 23(b)(2) which applies where the non-class parties make claims "generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). Even though the rule does not expressly require notice to all class members, it is within the Court's discretion to require notice. FED. R. CIV. P. 23(d)(2). The Tribe and the United States suggest that the classes should be identified as follows if the Court certifies the classes under Rule 23(b)(2):

> 1. All those individuals and entities claiming an interest to surface water rights as successors in interest to those determined to have water rights under the Decree, as set forth in Category 3(a) of the CMO, who are not participating individually in these proceedings.
>
> 2. All those individuals and entities claiming a right to use groundwater for domestic purposes in sub-basins 107, 108, 110A and 110B, who are not participating individually in these proceedings.

By so defining the defendant classes, there will be no question that those individuals and entities who wish may proceed to protect their individual interests. *Contra* District Response at 23.

The District argues that certification under Rule 23(b)(2) will not work because the rule does not apply to defendant classes. The District reads the term "the party opposing the class" too narrowly. The term does not mean that the declaratory relief that the Tribe and the United States seek against the defendants is the only declaratory relief that is relevant to the Rule 23(b)(2) inquiry. District Response at 21-22. Rather, the term refers to the party on the opposite side of the litigation from the class. In the context of Phase I and declaration of the Tribe's rights, it refers to the fact that not only do the Tribe and the United States seek declaratory relief

against the defendants, but the defendants also will request declaratory relief against the Tribe and the United States in the determination of the threshold issues. Under the CMO, the defendants will seek a variety of declaratory relief against the Tribe and the United States as set forth in the threshold issues that have been identified by the Court:

> (a) Whether this court has jurisdiction to adjudicate the said Tribal Claims. If so, to what extent should the court exercise its jurisdiction in these matters. In this connection, what is the scope of this court's subject matter jurisdiction to adjudicate the Tribal Claims to groundwater, as well as to additional surface waters?
>
> (b) Does federal law govern the pumping of groundwater on the Walker Lake [sic] Paiute Indian Reservation by the Tribe or the U.S. on its behalf?
>
> (c) If the Tribe has the right to pump groundwater under federal law, are such rights, as a matter of federal law, subject to different protections than those provided by State law?
>
> (d) Whether the court has jurisdiction over groundwater used pursuant to State law outside the exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the Tribe's rights under federal law to use water from the Walker River system. If so, should the court exercise that jurisdiction?
>
> (e) Whether equitable defenses bar some or all of the said Tribal Claims. Within such time as shall be fixed by the Magistrate Judge the parties now or hereafter appearing in the case shall file for consideration by the Magistrate Judge a statement as to any defenses or issues they intend to assert.
>
> (f) Whether, regardless of the extent of hydrologic connection between surface and groundwater, this court is required to accept the distinction drawn between surface water rights and groundwater rights provided by California and Nevada law.
>
> (g) Are holders of surface water rights established under federal law entitled to protection from the use of groundwater beyond the protection provided to holders of surface water rights established under state law.

> (h) If the only jurisdiction of this court with respect to groundwater is to protect the surface water rights established under federal law from interference by junior groundwater users, must the issues of interference be decided as a part of the adjudication of federal surface water claims.

CMO ¶¶ 11(a)-(h). The answers to each of these questions will be a declaration either for or against the claims asserted by the Tribe and the United States. All of the defendants are on the opposite side of the fence from the United States and the Tribe regarding the threshold issues which are in the nature of affirmative defenses, and the declaration of the Tribe's claims. Thus, the District is correct that "the declaratory or injunctive relief would have to be requested against the plaintiff." District Response at 21. With respect to the threshold issues and declaration of the Tribe's rights, the defendants will seek declaratory relief against the plaintiffs. Clearly, the certification of the two defendant classes identified in the Joint Motion satisfies the requirements of Rule 23(b)(2).

Despite the District's interpretation of Rule 23(b)(2), the court in *Southern Ute Indian Tribe* certified a defendant class under the rule. 2 F.3d at 1026. According to the District, the only reason the court did so was because all parties to that action agreed to defendant class certification under Rule 23(b)(2). District Response at 23-24. However, "three defendant oil companies objected to the proposed class certification." *Id.* Those defendants were Meridian Oil, Richmond Petroleum and Conoco. "In its objection, Meridian Oil argued that a class of defendants should not be certified without first providing notice to the unnamed members of the class and offering them an opportunity to object." *Id.* The court nevertheless certified the defendant classes "solely to determine the two described issues." *Id.*

The District argues that *Henson v. East Lincoln Township*, 814 F.2d 410 (7th Cir.), *cert. granted*, 484 U.S. 923 (1987), *cert. dismissed*, 506 U.S. 1042 (1993), and *Marcera v. Chinlund*,

595 F.2d 1231 (2d Cir.), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915 (1979), are based on inadequate reasoning and should not apply here. District Response at 22 and n.6. The Second Circuit in *Marcera* provided substantial support for its finding that "it is now settled that 23(b)(2) is an appropriate vehicle for injunctive relief against a class of local public officials." 595 F.2d at 1238. In *Henson*, the court did not agree with defendant class certification under Rule 23(b)(2), despite its citation to substantial authority supporting Rule 23(b)(2) defendant classes, because of notice concerns. This is not an issue here where the Tribe and the United States acknowledge that notice to class members is appropriate. These cases evidence the fact that defendant classes are not prohibited under Rule 23(b)(2). The determination in *National Union Fire*, 158 F.R.D. at 688, that Rule 23(b)(2) should not apply to defendant classes did not take into consideration the Tenth Circuit's decision in *Southern Ute Indian Tribe* which did not disturb class certification under Rule 23(b)(2). 2 F.3d at 1026. The District's habit of disputing whether the cases were decided correctly is unpersuasive. The fact remains that courts certify defendant classes under Rule 23(b)(2), whether the District agrees with that action or not. Obviously, there is no blanket prohibition against certification of defendant classes under Rule 23(b)(2).

D. RULE 23(b)(1)(A) IS NOT NECESSARY IN ORDER TO CERTIFY THE TWO IDENTIFIED DEFENDANT CLASSES.

Because the two defendant classes identified in the Joint Motion are certifiable under Rule 23(b)(3), or alternatively with the appropriate class definition, under Rule 23(b)(2), there is no need to resort to Rule 23(b)(1)(A) to certify the defendant classes. The District, however, raises an argument in the context of its Rule 23(b)(1)(A) discussion that merits a reply.

The District argues that class certification will not assist with fluctuating ownership of water rights. District Response at 14-15. The District goes on to assert that the Court has adopted a "solution . . . for dealing with changes in ownership . . . ." *Id.* at 15. It is not clear to what "solution" the District refers. Our review of the record shows that the Court has determined only that lis pendens is not an appropriate tool in these proceedings, since the United States and the Tribe do not seek to encumber the transferability of title during the pendency of these proceedings, and that the United States volunteered to track changes in ownership to the best of its ability. Mar. 20 Tr. at 113 (Court's determination not to require lis pendens), 117-18 (United States to keep track of transfers). That is the only solution that the Court has fashioned thus far, and it is nonsensical to state that such a solution may not have been available in *Arthur v. Starrett City Assocs.*, 98 F.R.D. 500 (S.D.N.Y. 1983), or *Folsom v. Blum*, 87 F.R.D. 443 (S.D.N.Y. 1980). The District's point escapes us. In any event, certification of the two defendant classes identified in the Joint Motion under either Rule 23(b)(3) or 23(b)(2) will assist in managing fluctuating class membership since the classes will exist regardless of transfers of ownership.

IV. THE DISTRICT AND NEVADA CAN ACT AS CLASS REPRESENTATIVES.

A. TEST FOR CLASS REPRESENTATION.

The District and Nevada both argue that they are not suited to act as representatives of the two defendant classes for which the Tribe and the United States seek class certification. District Response at 5-10; Nevada Response at 2-5. They argue that their claims are not representative of the classes, and the District delineates in much detail how its "assortments or packages of water rights," District Response at 6, differ from those of the decreed rights claimants, both in California and in Nevada. *Id.* at 5-10. Nevada, while it does not oppose class certification,

argues that its groundwater claims are not typical of those claimed by domestic groundwater users in Nevada sub-basins 107, 108, 110A and 110B, and as a result, it cannot serve as class representative. Nevada Response at 2-4. Both the District and Nevada miscomprehend not only the nature of the United States' and Tribe's Joint Motion, but also the test for class representatives.

A claimant may serve as a class representative where his interests share some commonality with those of the class. The test under Rule 23(a)(4) is met, "by demonstrating that the named [defendants'] attorneys are 'qualified, experienced, and generally capable to conduct the litigation and that the named representative's interests [are] not . . . antagonistic to the interests of the class.'" *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal.), *aff'd*, 747 F.2d 528 (9th Cir. 1984) (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1323 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982)). "The rule does not require all questions of law and fact to be common." *Rodriguez*, 166 F.R.D. at 472 (citing *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)). The interests do not have to be identical; nor must the class representative be able to defend each and every class member claim. "Obviously, there must be some potential for differences among class members. This alone, however, should not defeat the motion [for class certification]." *In re Arthur Treacher's Franchisee Litigation*, 93 F.R.D. 590, 597 (E.D. Penn. 1982). *See also Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (class representatives need not have claims identical in all respects with those of other members of the class); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280-81 (11th Cir. 2000) (Rule 23(a)(4) can be satisfied unless conflict "is a fundamental one going to the specific issues in controversy."). Rather, the meaning of the requirement that the representative must "fairly and adequately protect the interests of the class," FED. R. CIV. P. 23(a)(4), is that the

representative shares a similar position with all class members, in this case, with respect to the threshold issues and the declaratory relief sought by the Tribe and the United States respecting the Tribal Claims. *Southern Ute Indian Tribe*, 2 F.3d at 1026.

The cases where the courts have found a purported class representative to fall short of the Rule 23(a)(4) requirements is where the class representative's interests conflict with those of the class on the merits of the issue before the court. For example, in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the Court found that the named class representative parties were not appropriate class representatives: "In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* at 626 (citing *General Tel. Co. of N.W. v. EEOC*, 446 U.S. 318, 331 (1980)). As a result, the class representative could not "'be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Id.* (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The situation in *Amchem* was a very different determination than the one made in *Southern Ute Indian Tribe* where Amoco, a large lessor of oil and gas interests, was an appropriate class representative for all of the defendants who ranged from similar oil and gas companies to individual royalty holders, where the class action issues were potentially dispositive and resulted in similar alignment of all defendants, and served to lay the foundation for determination of the Tribe's rights relative to those of the oil and gas companies and royalty owners outside of the class action context. 2 F.3d at 1026. As here, if the defendants in *Southern Ute Indian Tribe* did not prevail on the threshold questions, their interests would not be compatible and class treatment would not be appropriate. That did not preclude the court from certifying the class for the initial portions of the case.

Even though the District and Nevada do not have identical interests to those of all defendant class members, they have interests that fall into one of the two classes. Those interests are sufficient to permit the District and Nevada to serve as class representatives for discrete, foundational issues. The District has been a de facto class representative in these proceedings, and has taken the lead role among the present defendants in opposing the additional claims asserted by the Tribe, the United States and Mineral County in subproceeding C-125-C, amply demonstrating its ability to act as a representative of numerous parties. This arrangement has worked because the District's claims on its own behalf as well as on behalf of its members are "reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *cited in* Joint Motion at 13. The District's detailed statement of all of the "assortments or packages of rights," District Response at 6, it possesses as opposed to its members does not disqualify it for class representation. Nevada makes the same attempt, Nevada Response at 2-4, but this argument fails when focus returns to certification of defendant classes for the discrete Phase I and declaratory questions only. The metes and bounds of the rights possessed by the District and Nevada are not germane to the question whether these parties are qualified to serve as class representatives on the threshold questions and the determination of the Tribe's rights. As demonstrated in the Joint Motion, for the purposes stated therein, clearly they are so qualified. Joint Motion at 12-15.

The District offers the additional reason that because it cannot legally defend the rights of all successors in interest to the Decree, it cannot serve as class representative. District Response at 16. Again, Nevada makes the same argument. Nevada Response at 4-5.[6] It is unlikely that

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[6]Unlike the successors in interest defendant class, the domestic groundwater permits which would be the subject of a defendant class, exist as a matter of state law and Nevada is

any class representative would be able to represent in a legal sense all class members' interests, and there is no requirement in Rule 23(a) that a class representative be qualified to legally represent each class member. Again, this point distracts from the Joint Motion's request that defendant classes be certified for the threshold issues and for declaration of the Tribe's rights. The District and Nevada are identically situated to all other defendants and counter-defendants with respect to the threshold issues and the declaration of the Tribe's rights, and there is no conflict between it and the other members of the successors in interest defendant class with regard to these issues.

B. THERE IS NO CONFLICT AMONG CLASS MEMBERS AT THIS STAGE OF THESE PROCEEDINGS.

The District makes much of the fact that at some point in these proceedings, "every member of the proposed successor in interest class has a conflict with every other member. The same is true of the proposed domestic groundwater user class." District Response at 18-19.[7] *See also* Nevada Response at 4. The District mistakenly focuses on the effect of class certification upon the ultimate resolution of the merits of the United States' and the Tribe's additional claims. But there is no conflict during Phase I and with respect to the Tribal Claims in Phase II since all defendants will have the same interest in curtailing or eliminating the Tribal Claims.

> Most significantly, one of the two issues certified for class determination is whether there are common class defenses that will defeat the Tribe's claim. That issue will benefit only defendants. As the district court stated in its order approving the joint motion,

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well-suited to defend those rights in the legal sense.

[7]To the extent individuals are identified and served as members of CMO categories that are not certified as defendant classes, they should not be class members even if they have claims that fall within Category 3(a), or are domestic groundwater users in the specified sub-basins, since they will have been joined as individual defendants. *Contra* District Response at 7.

> "[i]f Amoco defeats the Tribe's ownership claims, then all class members benefit. Likewise, if Amoco prevails on any of the common defenses, then all class members benefit."

Southern Ute Indian Tribe, 2 F.3d at 1030. Indeed, in the limited fund recovery cases under Rule 23(b)(1), all class members have a conflict with all other class members to the extent that the recovery fund is inadequate to compensate every class member. *See Ortiz*, 527 U.S. at 815 (class certification under Rule 23(b)(1) was not appropriate where limitation of recovery fund could not be proved).

Contrary to the District's assertions, there is no conflict between members of the Category 3(a) class of successors in interest to the Decree and those with domestic groundwater rights in the specified sub-basins with respect to the Phase I threshold issues and the declaration of the Tribe's rights. Nor does tension over litigation strategy -- that is, whether the threshold issues and declaration of the Tribe's rights serve to narrow and/or resolve the first amended counterclaims -- rise to the level of conflict between a class representative and the class members, or even among all of the class members, that would disqualify either the District or Nevada from acting as such representatives. *See, e.g., Southern Ute Indian Tribe*, 2 F.3d at 1026 (case management order certified defendant class for purposes of resolving threshold and potentially dispositive issues, and Amoco could adequately represent a range of interests for that purpose). Thus, the conflict that may exist between the District, its members who claim rights under the Decree, and the remaining decreed rights claimants does not come into the picture at this early -- and procedural -- stage of these proceedings. Any conflict among successors to the Decree and domestic groundwater users in the specified sub-basins is, then, irrelevant to the question now before the Court.

The District argues that the classes cannot be certified for Phase I of these proceedings because the parties do not yet know what all of the threshold issues will be, and some of the defendants may not agree with each other on some future-identified threshold issues. District Response at 17. This proposition obscures the fact that the two classes are opposed to the additional water rights that the Tribe and the United States seek since those claims conflict with existing water uses, and will, therefore, offer any jurisdictional defense that exists to curtail or eliminate those claims. Thus, the members of both classes are similarly aligned with respect to threshold jurisdictional issues. *See Southern Ute Indian Tribe*, 2 F.3d at 1026. The error that permeates the two responses is that the Tribe and the United States have not requested certification for anything beyond Phase I and the declaratory relief sought with respect to the Tribal Claims in Phase II, which are related to strategy, and not to the merits of how each of the Tribe's and United States' claims may affect the water rights of the class members. Indeed, the Tribe and the United States acknowledged at the outset that the Court may very well determine to dissolve the classes in order to examine the effect of the claims on the individual defendants. Joint Motion at 11.

V. NOTICE OF CLASS ACTION.

The District argues that the proposed notice to class members is "confusing and inadequate as a matter of law." District Response at 29. However, the District does not offer any suggestions as to how the notice might be improved. The Tribe and the United States are willing to work with the current parties to develop an appropriate notice, pursuant to Rule 23(c)(2), for class members.

VI. CONCLUSION.

Nothing in the responses filed by the District or Nevada detracts from the benefits that class certification would offer in the initial phase of these proceedings. Moreover, no other party has opposed the Joint Motion. Certification of the two defendant classes identified in the Joint Motion satisfies Rule 23 and will assist the Court as well as the parties to move forward in this case, and the District and Nevada are competent to serve as class representatives. Accordingly, the Tribe and the United States respectfully request that the Court grant the Joint Motion.

Date: Aug. 2, 2001

Respectfully submitted,

Scott B. McElroy
Alice E. Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
303-442-2021

Kelly R. Chase
P.O. Box 2800
Minden, Nevada 89423
702-782-5110

Attorneys for the Walker River Paiute Tribe

Kathryn Landreth, United States Attorney
Susan L. Schneider
United States Department of Justice
Environment and Natural Resources Div.
999 - 18th Street, Suite 945
Denver, Colorado 80202
303-312-7308

Attorneys for the United States of America

By: Alice E. Walker
Alice E. Walker

CERTIFICATE OF MAILING

I hereby certify that I have placed a true and correct copy of the foregoing *Joint Reply of the United States of America and the Walker River Paiute Tribe to the Walker River Irrigation District and the State of Nevada Regarding Certification of Defendant Classes* in the U.S. Mail, first-class postage paid , on this 2nd day of August, 2001, addressed to:

Marta Adams
Deputy Nevada Attorney General
100 N. Carson St..
Carson City, NV 89701

George Benesch
P.O. Box 3498
Reno, NV 89505

Roger Bezayiff
Chief Deputy Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Linda A. Bowman
Law Office of Linda A. Bowman Ltd.
540 Hammill Lane
Reno, NV 89511

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423

Ross E. deLipkau
Marshall, Hill, Cassas & deLipkau
P.O. Box 2790
Reno, NV 89505

Gordon H. DePaoli
Dale E. Ferguson
Woodburn and Wedge
P.O. Box 2311
Reno, NV 89505-2790

William Quinn
Field Solicitor's Office
Department of the Interior
2 North Central Avenue, Suite 500
Phoenix, AZ 85004

Mary Hackenbracht
Deputy California Attorney General
1515 Clay St., 20th Floor
Oakland, CA 94612-1314

Treva J. Hearne
James S. Spoo
Zeh, Saint-Aubin, Spoo & Hearne
575 Forest Street
Reno, NV 89509

Robert L. Hunter, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

John Kramer
Department of Water Resources
1416 - 9th Street
Sacramento, CA 95814

Hank Meshorer, Special Litigation Counsel
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397

David E. Moser
Matthew R. Campbell
McCutchen, Doyle, Brown & Enerson
Three Embarcadero Center, Suite 1800
San Francisco, CA 94111

Michael W. Neville
Deputy California Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3664

Hugh Ricci, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Susan L. Schneider
Attorney for the United States of America
United States Department of Justice
Environment & Natural Resources Division
999 18th St., Suite 945
Denver, CO 80202

Shirley A. Smith, Asst. U.S. Attorney
100 W. Liberty, #600
Reno, NV 89501

Garry Stone
290 South Arlington Ave.
Reno, NV 89501

Kenneth Spooner
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447