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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. C-125-ECR (RAM) Subfile No. C-125-B **REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, vs. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

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Plaintiffs filed a Joint Motion For Certification of Defendant Classes (Doc. #142). Defendants have opposed the motion (Docs. #150, 151). For the reasons set forth below, Plaintiffs' motion should be denied.

BACKGROUND

Plaintiffs, the United States of America and the Walker River Paiute Tribe ("Tribe"), seek to certify two classes of defendants in connection with their pending counterclaims for additional surface and groundwater from the Walker River stream system.

The Tribe's original counterclaims were filed in 1992 and sought recognition of a right to store water in Weber Reservoir for use on lands of the Tribe's Reservation along with an implied federal reserved water right to use water on lands added to the Reservation in 1936. In 1997, the Tribe, joined by the United States, expanded the counterclaims to include claims related to groundwater. As a result of the amended counterclaims, Judge Reed entered a Case Management Order ("CMO") on April 19, 2000. The CMO identified nine categories of defendants that the United States and Tribe must join in these proceedings in connection with their counterclaims. (CMO ¶¶ 3(a)-(i)).

Among the nine identified categories of defendants are those comprising "successors in interest to all water rights holders under the [Walker River Decree C-125 of April 14, 1936, as modified]," (CMO ¶ 3(a)) (hereinafter "Category 3(a) defendants"), and "[a]ll 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)." (CMO ¶ 3(c)) (hereinafter "Category 3(c) defendants"). Plaintiffs seek to treat all members of Categories 3(a) and 3(c) as two respective defendant classes for purposes of proceeding with litigation. (Doc. # 142, at 1).

The CMO directs that pretrial proceedings in this case shall occur in multiple phases. First, in Phase I of the proceedings, the CMO directs that specific threshold issues be identified and determined. (CMO ¶ 12(a)). Second, in Phase II, the court is to determine the merits of all matters related to the Tribe's claims. (CMO ¶ 12(b)). Additional phases of the proceedings shall encompass all remaining issues in the case. (CMO ¶ 12(c)). "Prior to the resolution of the Threshold issues . .

. the U.S./Tribe shall effect service of their respective First Amended Counterclaims, notices in lieu of summons, requests for waiver of service, and [a copy of the CMO] on all members of the categories of water rights holders . . . ." (CMO ¶ 3). Plaintiffs seek certification of Categories 3(a) and 3(c) individuals and entities for purposes of addressing both Phase I threshold issues and Phase II substantive issues.

DISCUSSION

A. Standard of Review

The decision to grant or deny class certification under Federal Rule of Civil Procedure 23 is committed to the discretion of the district court and will not be reversed absent abuse of discretion. *Doninger v. Pac. Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). While the court has broad discretion to certify a class, its discretion must nevertheless be exercised within the framework of Rule 23. *Id.* Before certifying a class, the district court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996)). The decision to certify "involves intensely practical considerations, most of which are purely factual or fact intensive. Each case must be decided on its own facts, on the basis of practicalities and prudential considerations." *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) (citations omitted).

B. Phase I versus Phase II Adjudication

Initially, it is important to note the distinction to be drawn between Phase I and Phase II adjudication of this matter as described in the Case Management Order. *See* CMO ¶¶ 12(a), (b). Plaintiffs seek to certify the representative classes for purposes of an initial determination of threshold issues described in Phase I of the CMO. *See* Joint Motion for Class Certification, at 1. Additionally, Plaintiffs request the court to certify the classes "for purposes of addressing the declaratory relief that [Plaintiffs] seek in Phase II of the proceedings." *Id.*

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Phase I threshold questions are identified in the CMO as encompassing determinations of:

> (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 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 that 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 the 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 issues is to protect 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). Determination of Phase II issues would be based upon the merits of Plaintiffs' claims as identified in the Tribe's First Amended Counterclaim, in which 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 Reservation 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 and permanently enjoin the defendants and counterdefendants from asserting any adverse rights, title or other interest in or to such water rights.

Tribe's First Amended Counterclaim, at 17-18.

The threshold issues identified in Phase I are arguably appropriate for class certification. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, 874 F. Supp 1142, 1146 (D. Colo. 1995), *rev'd on other grounds*, 119 F.3d 816 (10th Cir. 1997), *aff'd in part on rehearing en banc*, 151 F.3d 1251 (10th Cir. 1998), *rev'd on other grounds*, 526 U.S. 865 (1999) (discussing certification of defendant class solely to determine issues of applicability of defenses and ownership of coalbed methane). Threshold questions regarding jurisdiction and equitable defenses are common to the members of the proposed classes and, as demonstrated in *Southern Ute Indian Tribe*, certification of the defendant classes may be deemed desirable[1]. *But cf. McDonnell-Douglas Corp. v. United States Dist. Ct. for Central Dist. of Cal.*, 523 F.2d 1083, 1087 (9th Cir. 1975) ("A denial of liability, even to multiple plaintiffs, cannot form the basis for a class action.").

Adjudication of the merits of Plaintiffs' claims under "Phase II," however, would require a determination of water rights among the separate parties. Class certification would be inappropriate to address such issues. In such a case, "each individual appropriator must be brought before the court." *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10, 14 (D. Nev. 1974). This requirement is based upon notions of due process. "No matter how desirable the economy and enforcement functions of defendant class actions may be . . . they cannot be purchased at the expense of fundamental unfairness to persons who are not before the court that binds them." Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 632 (1978). Plaintiffs concede as much, stating in their reply, "the

[1]The court is mindful of Defendants' assertions that, for purposes of Phase I litigation, a defendant class comprised of domestic users of groundwater may conflict with interests of those defendants holding a decree right. However, unanimity potentially exists for specific Phase I threshold issues (e.g., defenses which act as a complete bar to all of Plaintiffs' claims). Therefore, the better justification for denying certification *in toto* is failure to comply with Rule 23(b). *See* discussion *infra*.

determination subsequent to the declaration of the United States' and Tribes' rights regarding the rights of other users in the basin may have to occur outside of the class context." Joint Reply Regarding Certification, at 7.

While, 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), if other factors militate against trying the case as a class action, it is appropriate to refuse to certify the class. *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 757-59 (4th Cir. 1998). Such factors are analyzed below. Whether the defendant classes may be maintained in this instance is to be determined on the basis of whether certification of the two classes for purposes of Phase I adjudication comports with Federal Rule of Civil Procedure 23.

C. Class Certification

Rule 23 of the Federal Rules of Civil Procedure specifies a two-step procedure for determining whether an action may appropriately proceed as a class action. First, Rule 23(a) states four prerequisites which must be met before there is any possibility of a class action: (1) class members are so numerous that joinder of all members is impracticable; (2) questions of law or fact are common to the class; (3) claims or defenses of the representatives are typical of class members; and (4) the representatives will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a). In addition, once these prerequisites are met, a class action will still not be allowed unless the action fits into one of three subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). In the present action, plaintiffs seek certification of the two proposed classes under Rule 23(b)(1)(A), 23(b)(2), or 23(b)(3). Plaintiffs bear the burden of proving that all four elements of Rule 23(a) are satisfied and that one or more of the three alternatives of Rule 23(b) are satisfied. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

For the reasons discussed below, the court finds that certification of the defendant classes comprising Categories 3(a) and 3(c) would be inappropriate as certification would fail to meet the requirements of Rule 23(b). Given the requirements on the court to conduct a rigorous analysis of

whether plaintiffs have met the requirements under Rule 23, *see Zinser*, 253 F.3d at 1186, Plaintiffs' Rule 23(a) arguments will also be addressed in turn.

1. Numerosity

To satisfy the numerosity requirement of Rule 23(a)(1), the joinder of all class members need not be impossible, but rather joinder must be deemed "impracticable." *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993). Whether joinder of all class members would be impracticable depends on the circumstances surrounding the case and not merely on the number of class members. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds*, 459 U.S. 810 (1982). Given a substantial number of potential plaintiffs, as here, courts focus more on the impracticability element, considering such factors as geographical dispersion, degree of sophistication, and class members' reluctance to sue individually, to determine whether joinder would be impracticable. *See Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989). A class that might otherwise satisfy the numerosity requirement may fail the impracticability requirement if the proposed class members are readily identifiable and not widely scattered. *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980).

The Plaintiffs estimate the number of potential class members to be approximately 950 in the proposed Category 3(a) defendant class, and 725 in the proposed Category 3(c) defendant class. Potential defendants are all located throughout the Walker Lake Basin. Plaintiffs have obtained information from the Defendant and the Board of Water Commissioners concerning the identity of the potential Category 3(a) class members. Category 3(c) class members may be identified from well log, county recorder and county assessor information. However, the well log does not include all well owners since Nevada does not require the reporting or permitting of new domestic wells.

In light of the geographic concentration and the resources available to Plaintiffs to identify members of the proposed classes, Plaintiffs have not established that joinder of all parties is impracticable. As the court has previously recognized, "the United States and the Tribe . . . have access to the necessary information, even though it may be difficult to obtain. It is not as though finding the water rights holders is an impossible task." Doc. # 522, at 9.

Plaintiffs assert that the fluctuation of membership in the proposed classes provides additional support for a finding of impracticability. Joint Motion for Certification, at 7. Fluctuation may be dealt with adequately by serving upon prospective defendants the proposed "Notice of Change of Ownership of Water Rights," which will provide notice to the Court and parties of (a) a party's interest in any water rights within any of the nine categories identified in the CMO; and (b) any transfer of ownership of water rights by any interested party. *See* Proposed Order Regarding Transfer of Water Rights, Doc. #139, ex. 1.

2. Commonality

The second requirement for class certification is that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). With respect to Phase I threshold issues, it is clear that certain questions of law and fact are common to all class members. The issues common to members of the two proposed classes are identified among the eight threshold issues in the CMO. *See* CMO ¶¶ 11(a)-(h).

3. Typicality

In order to certify as a class, the claims of the representative plaintiffs must be typical of the class claims. If the class representative's claims or defenses arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members, the typicality requirement is satisfied. *See Hanon v. Dataprods., Inc.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality acts to insure that the interest of the named plaintiffs are sufficiently coextensive or inter-related with the interests of class members to ensure that the interests of those class members will be adequately protected in their absence. *Id.*

Plaintiffs have proposed that the Walker River Irrigation District ("District") be named as the class representative for Category 3(a) defendants. The State of Nevada is proposed as the class representative for Category 3(c) defendants. The District and Nevada both argue that they are not suited to act as representatives because their claims are not typical of the class. Nevada's Opposition to Certification, at 5-10; District's Opposition to Certification, at 2-5. With respect to Phase II litigation this assertion is correct. Each proprietary interest will differ and the position taken by a member of either proposed class will be based upon their unique and total water rights package. Phase

I litigation, however, would present a set of questions common to all defendants. The Phase I threshold questions identified in the CMO are typical to all defendants and certification would not be denied on this basis. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civ. No. 91-B-2273 (D. Colo. June 24, 1992) (unpublished opinion) ("[Defendant's] claims and defenses are typical of the absent class members' claims and defenses. If [defendant] defeats the [plaintiff's] ownership claim, then all class members benefit. Likewise, if [defendant] prevails on any of the common defenses, then all class members benefit.").

4. Adequate Protection of the Class Interests

The final requirement under Rule 23(a) is that the representatives fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4) does not require that the interests of the class representative and the class members be identical, but simply representative of the class. Additionally, a class representative should not have interests which conflict with the interests of members of the class. *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). The representative must also have a sufficient interest in the outcome to ensure vigorous advocacy. *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986).

Nothing suggests that the proposed representatives would have conflicts with interests of the classes for purposes of Phase I litigation. Conflicts of interest exist in situations where the class representative will assert claims separate from the class action claims. *See Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 678-79 (S.D. Ohio 1995). Adequacy of representation is not defeated simply because of potential economic competition with respect to any relief sought. *Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 342 (E.D.N.Y. 1987). Phase I adjudication will address the threshold issued identified *infra*. Neither party suggests that the District nor Nevada will assert arguments separate and apart from those of the proposed classes.

The proposed representatives must also have a sufficient interest in the outcome of the case. *Riordan*, 113 F.R.D. at 64. Both the District and Nevada have sufficient interest in the outcome of this case to justify certification.

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D. Rule 23(b) Requirements

While Plaintiffs fail to establish that certification of the proposed classes meets the prerequisites of Rule 23(a), in that it is not impracticable to join the proposed class members, denying certification is most clearly proper based on analysis of the requirements of Rule 23(b). Rule 23(b) provides that a class action may be maintained so long as the action falls within any one of the three categories. Plaintiffs have failed to establish any one of the three categories has been satisfied.

1. 23(b)(1)(A)

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. P. 23(b)(1)(A). Certification under Rule 23(b)(1) requires not only that there be a realistic risk of separate litigation, but also that such litigation will likely result in inconsistent or varying adjudications imposing incompatible standards of conduct on the defendants. *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 724-25 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

There is simply no basis for finding that risks of incompatible standards of conduct will be imposed on defendants in the absence of certification. The CMO requires that all necessary defendants be joined. *See* CMO ¶ 10. In the absence of certification, if all necessary defendants are not joined, the case cannot proceed. There is no risk that plaintiffs will be forced to litigate their claims party by party in separate litigation. *See id. Compare Southern Ute Indian Tribe*, Civ. No. 91-B-2273, at 7 ("If a class is not certified, the [plaintiff] will have to litigate its claims party by party and tract by tract."). In light of the requirements for service outlined in the CMO, it cannot be said that certification of the proposed classes under Rule 23(b)(1)(A) is appropriate.

2. 23(b)(2)

Rule 23(b)(2) permits class actions if the requirements of Rule 23(a) are satisfied, and "*the party opposing the class* has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2) (emphasis added). Class actions under Rule 23(b)(2) are proper if injunctive or declaratory relief would be appropriate for an entire class. The Rule may be utilized if a party's action or inaction affects an entire class seeking relief. *See* 5 Moore's Federal Practice § 23.43.

Here, "the party opposing the class" is the Plaintiffs. However, Plaintiff's have not "acted or refused to act on grounds generally applicable to the [defendant] class." It is Plaintiffs who have filed their counterclaim alleging that the named defendants and unnamed defendant class members have "acted" by asserted adverse rights, title, or other adverse interests in the contested water rights. The Rule does not appear to address situations where assertions of an ownership claim constitute the requisite action or inaction required by the Rule. In *Henson v. East Lincoln Township*, 814 F.2d 410, 414-17 (7th Cir. 1987), the court recognized that: "Always it is the alleged wrongdoer, the defendant--never the plaintiff (except perhaps in the reverse declaratory suit)--who will have 'acted or refused to act on grounds generally applicable to the class.'" *Id.* at 414.

This action does not constitute a reverse declaratory suit, although Plaintiffs have argued as much. Plaintiffs assert that "the defendants also will request declaratory relief against the Tribe and the United States in the determination of the threshold issues," (Doc. # 158, p. 16), thus making Plaintiffs an "alleged wrongdoer." Plaintiffs' argument confuses the issues. This counterclaim is Plaintiffs' action for recognition of additional water rights. The proposed classes of defendants would not otherwise be seeking declaratory relief against the Tribe or United States. But for the counterclaim, the water rights status quo would remain in tact. Certainly the defendants will seek a favorable ruling on the determination of the threshold issues, however a potential defense to Plaintiffs" claim cannot be said to equate to an action for declaratory relief. As such, Rule 23(b)(2) is inapplicable here.

In *Southern Ute Indian Tribe*, the district court was faced with a similar issue. *See id.*, Civ. No. 91-B-2273, at 8. The plaintiff sought certification of a defendant class comprised of all persons claiming an ownership interest in coalbed methane gas found in the coal strata reserved to the plaintiff by the United States. The district court certified the proposed class, finding the requirements of Rule 23(b)(2) to be satisfied. The court noted that, "although [it is the plaintiff] Tribe advocating class certification, it is the party 'opposing' the class in the overall case. By asserting its ownership claim, the Tribe has acted on grounds generally applicable to all putative class members" *Id.* at 8. The court continued: "Defendants here could have brought an identical declaratory judgment against the Tribe

in which they would have been named as plaintiffs. It would be highly incongruous if the class certification could be defeated in this action merely because the Tribe happened to file first." *Id.*

While not controlling authority, *Southern Ute Indian Tribe* is illustrative of the confusion surrounding application of Rule 23(b)(2). *Compare, e.g., Thompson v. Board of Educ.*, 709 F.2d 1200, 1203 (6th Cir. 1983) ("To proceed under 23(b)(2) against a class of defendants would constitute the plaintiffs as 'the party opposing the class,' and would create the anomalous situation in which the plaintiffs' own actions or inactions could make injunctive relief against the defendants appropriate.") *and Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980) ("As is clear from the language of the Rule, it is applicable to situations in which a class of plaintiffs seeks injunctive relief against a single defendant--the party opposing the class--who has acted on grounds generally applicable to the plaintiff class"), *with United States v. Rainbow Family*, 695 F. Supp. 314, 320 (E.D. Tex. 1988) (Rule 23(b)(2) "has been held an appropriate mechanism for such certification in circumstances . . . where the uniform conduct of multiple defendants is challenged and solely injunctive relief is requested."). The Ninth Circuit has yet to announce a position on the application of Rule 23(b)(2) to defendant classes, however the court finds that the reasoning contained in cases such as *Henson*, *Thompson*, and *Paxman* to be persuasive. As such, certification under Rule 23(b)(2) would be inappropriate.

3. <u>23(b)(3)</u>

Rule 23(b)(3), "[f]ramed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations," permits certification where class suit "'may nevertheless be convenient and desirable.'" *Amchem Prods.*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697). A class action may be maintained under Rule 23(b)(3) if the court finds both that a common question of law or fact predominates, and that a class action is superior to other available methods for resolving the controversy. *See* Fed. R. Civ. P. 23(b)(3). "In adding 'predominance' and 'superiority' to the qualification-for-certification list, 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.'" *Amchem Prods.*, 521 U.S. at 615 (quoting Adv.

Comm.Notes, 28 U.S.C.App., p. 697) (emphasis added); *see also In re Agent Orange Prod. Liab. Litig.*,, 100 F.R.D. at 723 (whether class action will result in "litigation economies" is relevant to question of whether to certify).

With respect to the second requirement in Rule 23(b)(3), "superiority," a class action must be better than, not merely as good as, other methods of adjudication. *See Beebe v. Pac. Realty Trust*, 99 F.R.D. 60, 73 (D. Or. 1983) (denying certification). Superiority is determined by comparing the efficiency and fairness of all available methods of adjudicating the matter.

In this case, the CMO sets forth a detailed plan for management of plaintiffs' counterclaims. The CMO contemplates formal service upon "each of the members of each said category . . . in this case," prior to the resolution of the threshold issues. CMO ¶ 3. In essence, the CMO's plan is the alternative method of adjudication upon which Plaintiffs' motion for class certification may be judged. In comparing the methods contemplated by the CMO and the proposed class action, it cannot be said that Plaintiffs' proposed class treatment of defendants is superior to the previously established framework of the CMO.

First, in the general class action suit under Rule 23(b)(3), notice is required. *See* Fed. R. Civ. P. 23(c)(2). Members of the class are entitled to "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Id.* Generally, the notice requirement significantly reduces the requirements on a plaintiff to individually serve potential defendants. Thus, certification of a class may often be deemed more efficient, and, therefore, a superior method of adjudication. *See Amchem Prods.*, 521 U.S. at 615 (quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697). The fact that potential class members may choose to opt out of the litigation under Rule 23(c)(2) generally does not alter the measure of efficiency. In this case, however, once a potential class member opts out of the class, Plaintiffs will be required to formally serve the opt-out defendant under the requirements of the CMO. *See* CMO ¶ 3. This fact alone significantly diminishes the superiority of certification based on a measure of efficiency.

Second, as identified above, formal service upon each defendant will be a prerequisite with proceeding to Phase II of this case, should the need arise. In light of future potential for effectuation

of service, it would not be a superior method of adjudicating this dispute to now certify the proposed classes, give notice to class members in accordance with Rule 23(d), and subsequently be presented with the need to effectuate formal service upon all defendants at a later date.

Plaintiffs assert that certifying the defendant classes will "drastically speed up the proceedings." This may be so as to Phase I adjudication, however, viewing the case as a whole, it cannot be said that Rule 23(d) notice to class members followed by subsequent formal service would be more efficient than simply serving defendants in the first instance.

CONCLUSION

IT IS THEREFORE RECOMMENDED that Plaintiffs' Joint Motion for Certification of Defendant Classes (Doc. #142) be **DENIED**.

DATED: September 13, 2001.

UNITED STATES MAGISTRATE JUDGE