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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., Defendants.	IN EQUITY NO. C-125 and Sub-file No. C-125-B **OBJECTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE REGARDING CERTIFICATION OF DEFENDANT CLASSES**

I. INTRODUCTION

Pursuant to FED. R. CIV. P. 72(b), LR IB 3-2, and 28 U.S.C. § 636(b)(1), the United States of America and the Walker River Paiute Tribe ("Tribe") object to the Magistrate Judge's recommendation to deny the *Joint Motion of the United States and the Walker River Paiute Tribe for Certification of Defendant Classes* (May 4, 2001) ("Joint Motion") and urge this Court to grant the Joint Motion and certify the two proposed defendant classes. *Report and Recommendation of U.S. Magistrate*

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Judge (Sept. 13, 2001) ("Report and Recommendation"). As specified below, the United States and the Tribe object to certain portions of the Report and Recommendation, as well as the Magistrate Judge's recommendation. Pursuant to FED. R. CIV. P. 72(b) and LR IB 3-2, the Court must make a *de novo* determination of the portions of the Report and Recommendation to which objections have been made herein. *See United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000) ("By utilizing the words 'shall' and 'may' in consecutive sentences, Congress clearly indicated that district courts are *required* to made a *de novo* determination of the portions of the magistrate judge's report to which a party objects . . . ."), *cert. denied*, 2001 WL 410338 (Oct. 1, 2001).

The Magistrate Judge recommends denial of the Joint Motion for two basic reasons. First, he asserts that the numerosity requirement of FED. R. CIV. P. 23(a) has not been met because it is "not impracticable to join the proposed class members." Report and Recommendation at 7. Second, he asserts that none of the categories under FED. R. CIV. P. 23(b) has been met (only one of these need be demonstrated). We believe that the numerosity requirement of FED. R. CIV. P. 23(a) is amply met here because this case involves "a substantial number of potential plaintiffs," *Id.* at 7, who are geographically located for purposes of service, not just inside the Walker River Basin, but also outside the area in other parts of Nevada and California, as well as in other parts of the United States. Moreover, the Court has acknowledged that finding the water rights claimants to be served here will be difficult, and we believe that these difficulties meet the numerosity requirement, for which the measure is impracticability and not impossibility. Further, we believe that at least one of the FED. R. CIV. P. 23(b) factors applies here. More importantly, this case is clearly one for which use of a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R.

CIV. P. 23(b)(3). For the reasons set forth below, the United States and the Tribe respectfully request the Court to: 1) reject the Magistrate Judge's recommendation; 2) modify the Report and Recommendation's determination as to the application of FED. R. CIV. P. 23(a)(1) and 23(b); and 3) grant the Joint Motion.

II. BACKGROUND

A. THE UNITED STATES AND THE TRIBE REQUEST CERTIFICATION OF TWO CLASSES FOR LIMITED PURPOSES.

This subproceeding involves the United States' and the Tribe's efforts to amend the *Decree* (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("Decree") to include: 1) additional water rights for use on the Walker River Indian Reservation ("Reservation") for the benefit of the Tribe and its members ("Tribal Claims"); and 2) claims by the United States for the benefit of other federal and Indian interests in the Walker River Basin. As the Court has noted, "[t]his court retains exclusive jurisdiction over the Walker River decree." *Order* at 6, No. C-125 (June 8, 2001) ("June 8 Order").

The *Case Management Order* (Apr. 18, 2000) ("CMO") bifurcates the case so that the first portion addresses only the Tribal Claims. CMO ¶ 1. The CMO further directs the United States and the Tribe to join those water users falling within nine categories of water right holders on the Walker River, estimated in June 2001 to number over 3,000, before the Court addresses the outstanding threshold issues relative to the Tribal Claims. *Id.* ¶ 3; *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, Exhibit 1: Affidavit of Dennis*

Becker ¶ 25.d (June 12, 2001) ("Becker June 2001 Aff.").[1] The Court has recognized that "[f]or some time now, various parties have had considerable difficulty in determining the current water right holders on the Walker River for purposes of service of process." June 8 Order at 4.

In seeking to comply with the Court's mandate to join those water users who may be affected by the Tribal Claims, the United States and the Tribe have requested the certification of a defendant class for two of the CMO's categories: 1) successors in interest to those individuals and entities whose rights are recognized in the Decree (Category 3(a) of the CMO); and 2) domestic well users in the sub-basins where the Court has deemed joinder of such users to be necessary (a portion of Category 3(c) of the CMO). *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* at 1 (May 3, 2001) ("Memo in Support"). The United States and the Tribe propose that the Walker River Irrigation District ("District") serve as representative for the defendants who are successors in interest to claimants under the Decree, and that the State of Nevada serve as representative of the defendants who claim domestic groundwater rights in Nevada sub-basins 107, 108, 110A, and 110B. The Magistrate did not disagree with this proposal. Report and Recommendation at 9.

Under the Joint Motion, the certification of the two classes would be limited to the determination of the threshold questions contemplated under the CMO and for the declaration of the

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[1]The Becker June 2001 Affidavit was filed subsequent to the Joint Motion, but was before the Court prior to argument of the Joint Motion. The Joint Motion referenced an earlier affidavit by Mr. Becker dated March 9, 2001. *E.g.*, Joint Motion at 5. As a general matter, Mr. Becker's affidavits demonstrate his continuing work related to the identification of persons and entities to be served and demonstrate that the total number of potential defendants identified continues to increase.

Tribe's rights. *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 the Certification of Defendant Classes* at 2 (Aug. 2, 2001) ("Joint Reply"). *See generally* Report and Recommendation at 3-4. Certain of the threshold questions are potentially dispositive of the Tribal Claims. If the United States and the Tribe were to prevail on the threshold questions and additional tribal rights were recognized, decertification of the class and joinder of the individual class members would be necessary before the Court can address the issues associated with the administration of the tribal rights relative to other rights in the basin and questions concerning the validity and the extent of the individual water rights of the class members. Under the CMO, however, these issues would be addressed in subsequent phases of this litigation.

B. THE SUCCESSORS IN INTEREST.

As of June 2001, approximately 1,037 individuals had been identified preliminarily as belonging to Category 3(a), which consists of those individuals and entities using water pursuant to the rights recognized under the original Decree. Becker June 2001 Aff. ¶ 15.m. While the United States Board of Water Commissioners ("U.S. Board") is responsible for administering the water rights governed by the Decree and for assessing its costs against those users, the U.S. Board does not purport to maintain an accurate, current compilation of the names and addresses of the decreed water rights holders. Instead, for water users outside the District, the U.S. Board maintains an informal list and accompanying index cards describing the water rights holders. *Id.* ¶ 15.c. Included within the U.S. Board's information is a partial history of the ownership of some of the water rights, as well as the names and addresses of the parties assessed by the U.S. Board. *Id.* ¶¶ 15.c, 15.e. The U.S. Board

insists that the information upon which it relies is adequate for purposes of its assessments but that it is not appropriate to depend on its system to determine with any accuracy who actually owns the water rights that are part of the Decree. *See generally Report and Recommendation of U.S. Magistrate Judge* at 3, No. C-125 (Mar. 22, 2001).

For those decreed water rights that are within the District, the U.S. Board relies upon data maintained by the District, which keeps its information in a fashion similar to that of the U.S. Board. The District also provides for the collection of the U.S. Board's assessments for the lands within the District as part of its assessment process through the offices of the County Treasurer. *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 7, No. C-125 (Nov. 16, 2000). The District and the U.S. Board also disavow the reliability of the District's information for determining in a reliable fashion precisely who owns the rights in question. *Id.* at 6-7.

Earlier this year, the Court addressed the question whether the U.S. Board should be required to take additional steps to identify the persons and entities who use water pursuant to the rights recognized under the Decree. *See generally* June 8 Order. In denying the United States' and Tribe's request for a directive to the U.S. Board to assist in identifying those who currently own the water rights governed by the Decree, the Court recognized among other things, the hardship on the United States and Tribe from "spending their time and money on the procedure of service of process without having their claims heard on the merits." *Id.* at 6. The continuing fluctuation in the ownership of the water rights governed by the Decree has also been the subject of considerable discussion before the

Magistrate and the Court. *See, e.g., Minutes of Court* (Mar. 20, 2001); *Transcript of Status Conference; Arguments Regarding the Class Certification Motion; and Arguments Regarding the Identification Methods before the Hon. Robert A. McQuaid, Jr.* at 13 (Aug. 27, 2001) ("Tr. of Aug. 2001 Proceedings"). It is also clear that once service is completed, the effort needed to update and maintain an accurate list of the water rights claimants throughout the litigation of this case will prove a further and difficult task.

C. DOMESTIC WELL OWNERS.

When the Joint Motion was filed in April 2001, the preliminary estimate was that there are approximately 725 individuals and entities within Category 3(c) of the CMO, Joint Motion at 6, which includes "[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 (Shurz Subarea of the Walker Lake Valley), and 110B (Walker Lake Subarea of the Walker Lake Valley)." CMO ¶ 3(c). This number is not final and will increase. *See* Becker June 2001 Aff. ¶¶ 17, 17.c, 17.f. Some portion of the 725 individuals and entities identified thus far would constitute the defendant class of domestic groundwater users in the specified sub-basins. The permitting provisions of Nevada state law do not apply to domestic well users, who are generally exempt from the various requirements of state law. *See 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* at 4 (June 13, 2001). There is a certain amount of overlap between the domestic well users and those who use water for other purposes in the Walker River Basin and would, therefore, be joined as members of

other categories. Becker June 2001 Aff. ¶ 17.b. However, there is no reason to believe that all of the domestic well users will be joined in the case as members of other categories.

III. CERTIFICATION OF TWO IDENTIFIED DEFENDANT CLASSES SATISFIES RULE 23(a)(1) – NUMEROSITY

The United States and the Tribe object to the Magistrate's finding that the proposed certification of defendant classes fails to satisfy the numerosity requirement of FED. R. CIV. P. 23(a). Report and Recommendation at 7-8. Although we agree with the Magistrate's acknowledgment that there are a "substantial number of potential plaintiffs . . . here," *id.* at 7, we disagree with the determination that joinder of all parties is not impractical "[i]n light of the geographic concentration and the resources available to Plaintiffs to identify members of the proposed classes." *Id.*

First, the Magistrate focused disproportionately on the geographic location of potential defendants to determine whether the proposed classes are sufficiently numerous to justify certification. *Id.* at 7. According to Rule 23(a)(1), a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." The geographic location of potential defendants is only one factor to consider in making this determination. Although "there is no numerical formula which is used to determine whether a group of [defendants] is sufficiently numerous to be certified as a class and . . . this determination must be made on a case by case basis," *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (D. Nev. 1993) (proposed class of 52), a variety of factors may influence this determination. These factors include "judicial economy arising from avoidance of a multiplicity of actions, geographic disbursement of class members, size of individual claims, financial resources of class members, the

ability of claimants to institute individual suits, and request for prospective injunctive relief which would involve future class members." *Id.* (quoting HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.06 (1985)) (other citations omitted). Moreover, "[p]racticability of joinder [also] depends on size of the class, ease of identifying its members and determining their addresses, [and the] facility of making service on them if joined." *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (proposed class of 31). The Magistrate addressed these other factors in too summary a fashion. Report and Recommendation at 7.

Second, the Magistrate concluded that "[p]otential defendants are all located throughout the Walker Lake [sic] Basin." Report and Recommendation at 7. This is incorrect. While the locations of the water claims that provide a basis for including potential defendants herein are dispersed throughout the Walker River Basin in Nevada and California, the persons and entities who purport to own these claims are not necessarily found within the basin or even within Nevada or California. Throughout the over five years of tortured efforts of Mineral County to identify and serve the persons and entities that appear to constitute some members of Category 3(a) of the CMO,[2] it has been clear that many persons and entities to be joined are not located in the Walker River Basin. *See, e.g., Response to Request for Status Conference* at 2, No. C-125-C (Oct. 5, 2001) ("Mineral County Response");[3] *Amended*

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[2]The problem with Mineral County's failure to identify the decreed water right holders is highlighted by the Magistrate Judge's directive to the United States and the Tribe that they cannot rely on the list of decreed rights holders compiled by Mineral County as being a complete and final listing, so that we must reinvent this wheel. *Transcript of Further Status Conference Regarding the Case Management Order Before the Hon. Robert A. McQuaid, Jr.* at 79-82 (Mar. 20, 2001).

[3]We do not, however, agree with any descriptions by Mineral County regarding the status of service by the United States and Tribe, which effort has always been separate from Mineral

Motion to Add and Dismiss Certain Parties (Apr. 30, 2001) (including supplemental filings dated May 1, 2001, and related box of documents provided to Magistrate Judge in chambers). This fact is confirmed by earlier status reports filed by the United States and the Tribe regarding their effort to identify the members of the various Category 3 defendants and by a recent review of the locations of relevant persons and entities identified thus far. *Affidavit of Dennis Becker* ¶ 4 (Oct. 23, 2001) ("Becker Oct. 2001 Aff.") (Exhibit 1 hereto). *See generally* Becker June 2001 Aff. (including specific references and other sources described therein). Indeed, almost 38% of the individuals and entities identified thus far within CMO Categories 3(a) and 3(c) are not located within the Walker River Basin. Becker Oct. 2001 Aff. ¶ 4. Thus, the Magistrate incorrectly found that all persons and entities to be served are located within the Walker River Basin.

Third, apart from the location of the persons and entities to be served, a variety of other difficulties in finding and serving all such persons and entities underscore the impracticability of joining all members of the proposed classes. Memo in Support at 5-8; *see also* Becker June 2001 Aff. ¶¶ 15.d, 15.f, 15.k, 25; Mineral County Response at 3 (describing encounters with guard dogs set upon one process server, another process server having to call for police assistance, a several block chase in Los Angeles to make personal service on one party, and allegations of hostility precipitated by newsletters of the Walker River Irrigation District). Fourth, the number of potential defendants in this matter is sufficiently large to satisfy numerosity for certification of the proposed classes. Memo in Support at 5-7. This motion proposes one class of at least 950 persons and entities for the successors in interest

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County's service work and, as set forth in the CMO, involves a broader set of persons and entities than that for Mineral County's service. *See also* n. 2, *supra.*

category and another class of some portion of 725 or more persons and entities in the domestic groundwater users category. The Magistrate acknowledged that this case presents a "substantial number of potential plaintiffs," but failed to afford significant weight to this factor. Report and Recommendation at 7.

Finally, the measure of numerosity is impracticability and not impossibility: "Impracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (court "applied the wrong standard" when it concluded numerosity was lacking because plaintiffs had not shown joinder was "impossible." (citing *Harris v. Palm Springs Alpine Estates*, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964); 7A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1762, at 159 (1986); 3B MOORE'S FEDERAL PRACTICE § 23.05[3], at 23-156 (2d ed. 1992) (superceded and now found at 5 MOORE'S FEDERAL PRACTICE § 23.60 (3d ed. 2001))). *See also* 5 MOORE'S FEDERAL PRACTICE § 23.22 (3d ed. 2001) (impracticable does not mean impossible). As one treatise recently defined the term:

> Within the context of a state class action rule based on the federal rule, the word "impracticable" means impractical, unwise, or imprudent rather than impossible or incapable of being performed. It has also been held that "impracticability," as used in the provision, does not mean impossibility, but means extreme difficulty or inconvenience of joinder.

59 AM. JUR. 2d *Parties* § 56 (1987). The Magistrate, however, apparently equated "impracticable" with "impossible," by stating that the Court has previously declared that "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." June 8 Order at 9.

The Court's observations in the June 8 Order do not address the issue of whether any of the categories of persons or entities that the United States and the Tribe are required to serve are appropriate for class treatment. Rather, the order addressed the request of the United States and the Tribe that the decreed water rights holders and successors be required to identify themselves to the Court and to the U.S. Board for purposes of assisting in the administration of the Decree and for purposes of assisting any party with claims to be addressed by the Court in any service of these water rights claimants. The order did not address class certification issues. Moreover, in the June 8 Order, the Court plainly acknowledged that the effort to identify and serve the affected individuals and entities will be difficult and inconvenient, which we assert amply meets the requirements of Rule 23(a)(1), particularly when considered in light of the large number of persons and entities potentially involved.

IV. RULE 23(b)(3) APPLIES TO CERTIFY THE DEFENDANT CLASSES

The Magistrate refused to certify the two identified defendant classes by holding that FED. R. CIV. P. 23(b)(2) does not apply to defendant classes generally, and does not apply in this case because "[t]he Rule does not appear to address situations where assertions of an ownership claim constitute the requisite action or inaction required by the Rule." Report and Recommendation at 11. Noting that the Ninth Circuit has not addressed the issue, the Magistrate relied upon decisions from other circuits in which the courts refused to certify defendant classes under the rule. Report and Recommendation at 11-12 (citing *Henson v. East Lincoln Township*, 814 F.2d 410, 414-17 (7th Cir. 1987); *Thompson v. Board of Educ.*, 709 F.2d 1200, 1203 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir. 1980)). Obviously, the circuits are split on the issue whether Rule 23(b)(2) applies to

defendant classes. *Compare Southern Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023 (10th Cir. 1993), *with Henson*, 814 F.2d at 413, *and Paxman*, 612 F.2d at 854.

It is our position that the Court need not resolve this significant issue here in order to achieve the substantial benefit to these proceedings of certifying under Rule 23(b)(3) the two defendant classes we have identified: the successors in interest to the water rights claimants under the Decree; and the domestic groundwater users in Nevada sub-basins 107, 108, 110A, and 110B. The classes would consist of all those successors in interest and domestic groundwater users in the specified basins who are not individually joined.

The Court has identified a series of threshold issues that affect all defendants in these proceedings in a similar, if not identical, manner. CMO ¶ 11. The Magistrate recognized this fact: "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." Report and Recommendation at 8-9. Because of the similar situation of all defendants with respect to the threshold issues and the declaration of the Tribe's rights, defendants may find it more expedient to address those common issues as class members. With respect to the class of domestic groundwater users in sub-basins 107, 108, 110A, and 110B, to the extent that those claims are all they have at stake in the litigation, it may not make sense to participate as individuals in the case. It is unlikely that those users would lose or see diminishment of their rights as a result of the United States' and Tribe's claims. With respect to the successors in interest to the water rights claimants under the Decree, the class tool provides the substantial benefit of tracking transfers of those claims. *See* Memo in Support at 7, 19.

Certification of the two identified defendant classes under Rule 23(b)(3) is appropriate for addressing the Phase I and declaratory relief portions of the litigation respecting the Tribal Claims because the rule allows defendants to determine for themselves how they wish to address the initial portion of the case, and offers them the substantial benefit of resolving the threshold issues as class members. *See* Report and Recommendation at 8-9; Joint Reply at 10-11 (listing benefits to Court, plaintiffs and defendants of certification of the identified defendant classes under Rule 23(b)(3)).[4] Even so, the Magistrate interpreted the opt out provision of Rule 23(b)(3) to countenance against the superiority of a class action because he assumed that many defendants would opt out and the United States and the Tribe would have to serve the opt out defendants with process, which is no different than the present requirements of the CMO. The Magistrate also considered the fact that individual service would be required in Phase II of the litigation as the other reason why class certification would not be superior. Report and Recommendation at 13. It is, however, precisely the opt out requirement of Rule 23(b)(3) that makes the rule especially attractive here. Even if the opt out provision results in a large number defendants opting out of either class, that does not mean that a class action is not a superior method of proceeding with the case. Rather, giving the defendants the choice as to how they wish to participate is the factor by which to determine the superiority of class certification. Moreover, once a defendant opts out, she will have identified herself and service of process will become easier. *See* Tr. of Aug. 2001 Proceedings at 34 (Aug. 27, 2001) ("The Court: But [opting out] takes care of the identification issue because they're identifying themselves, at that point.").

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[4]Indeed, another benefit of class certification is that notice to classes would work in a manner more analogous to the notice requirements used by most States in conducting general stream adjudications.

Certification of the two defendant classes we have identified satisfies Rule 23(b)(3).

- Common questions predominate over individual interests. "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." Report and Recommendation at 8.
- The class action is a superior method to address the threshold issues and declaration of the Tribe's rights because it allows individual defendants to choose how they wish to participate in the initial phases of the litigation, and will allow the Court and the parties to address the threshold and declaratory issues in a more streamlined fashion.

In sum, the United States and the Tribe reiterate the position set forth in their Joint Motion and Joint Reply that certification of the two identified defendant classes is beneficial to the case and satisfies the requirements of Rule 23(b)(3). Memo in Support at 18-21; Joint Reply at 10-14. The Magistrate erred in focusing on the opt out provision of the rule as a detriment, rather than an advantage in this case. The United States and the Tribe, therefore, respectfully request that the Court reject the Magistrate's recommendation that class certification should not proceed under Rule 23(b)(3), and grant the Joint Motion.

V. CONCLUSION

For the reasons set forth herein, the United States and the Tribe object to the Magistrate's recommendation that the Court deny the Joint Motion seeking certification of two defendant classes. Certification is warranted under Rule 23(b)(3), and will assist the Court, the plaintiffs and the defendants in proceeding to address the preliminary phases of this case. We, therefore, respectfully request that the Court reject the Magistrate's recommendation, and certify the two classes identified in the Joint Motion.

Dated this 25th day of October, 2001.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 25th day of October, 2001, I served a true and correct copy of the foregoing OBJECTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE REGARDING CERTIFICATION OF DEFENDANT CLASSES by first-class mail, postage prepaid, addressed to the following persons:

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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 SUBFILE NO. C-125-B **OBJECTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE REGARDING CERTIFICATION OF DEFENDANT CLASSES** **Exhibit 1:** **Affidavit of Dennis Becker**

I, Dennis Becker, hereby make the following declaration pursuant to 28 U.S.C. § 1746. The following statements incorporate and supplement statements made in my previous affidavits of March 9, 2001, March 19, 2001, and June 12, 2001.

1. The facts stated in this affidavit are based on my personal knowledge and I am competent to testify to the matters set forth herein.

2. I hold a B.A. from Tabor College, Hillsboro, Kansas, 1964; a Bachelor of Divinity from Mennonite Brethren Biblical Seminary, Fresno, California, 1967; a M.A. in Christian Education from Mennonite Brethren Biblical Seminary, Fresno, California, 1980; and a Paralegal Certificate from Denver Paralegal Institute, Denver, Colorado, 1990.

3. My primary assignment in this case is to work on the identification of the persons and entities described in the categories in paragraph 3 of the *Case Management Order* (Apr. 18, 2000) ("CMO") for purposes of conducting court-ordered service on them as counter-defendants. To this end, among other things, I have located, gathered, and reviewed a variety of information from a variety of sources, as set forth in my prior affidavits in this matter, to try to identify and locate potential counter-defendants by name, address, CMO category, and an identification of their respective water claim(s).

4. At this point, I have identified 2,081 persons and entities with claims to water in the Walker River Basin who are within CMO categories 3(a) and/or 3(c), which constitute the basis for a class certification proposal by the United States and the Tribe. The potential counter-defendants are not all located throughout the Walker River Basin. Approximately 62.5% (1,301) are located within the Walker River Basin in Nevada or California, while 37.5% (780) are <u>not</u> within this area. Of the 37.5% of potential counter-defendants who are located outside the Walker River Basin, 21.5% (447) are located in other areas of Nevada and 16% (333) are located in other areas of California or other States within the United States.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the foregoing is true and correct. Further, affiant sayeth not.

Executed this 24rd day of October, 2001.

Dennis Becker