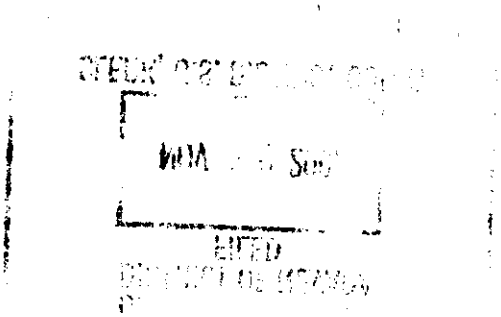
GORDON H. DEPAOLI
Nevada State Bar 00195
SUELLEN FULSTONE
Nevada State Bar 1615
DALE E. FERGUSON
Nevada State Bar 04986
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
Telephone: (775) 688-3000

Attorneys for Defendant/Counterdefendant,
WALKER RIVER IRRIGATION DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	) In Equity No. C-125-ECR) Subfile No. C-125-B))) **WALKER RIVER IRRIGATION**) **DISTRICT'S POINTS AND**) **AUTHORITIES IN RESPONSE TO**) **OBJECTIONS OF THE UNITED**) **STATES AND THE WALKER RIVER**) **PAIUTE TRIBE TO THE REPORT AND**) **RECOMMENDATION OF THE U.S.**) **MAGISTRATE JUDGE REGARDING**) **CERTIFICATION OF DEFENDANT**) **CLASSES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	)

169



I. INTRODUCTION.

The Case Management Order entered in this case in April of 2000 established nine categories of necessary party counterdefendants with respect to the amended counterclaims of the United States and the Walker River Paiute Tribe ("the Tribe"). That Order also bifurcated the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). By motion, the United States and the Tribe subsequently sought certification of 1 1/2 of those nine categories into two defendant classes for purposes of litigating the threshold issues related to the Tribal Claims and the declaratory relief sought by the United States and the Tribe as to those claims.

The Magistrate summarily rejected the class action motion with respect to the adjudication of any portion of the declaratory relief claims, holding that, as a matter of due process, each individual defendant must be before the court. *Report and Recommendation of U.S. Magistrate Judge (September 13, 2001) (hereafter "Report and Recommendation")*, p. 5, ln. 16 - p. 6, ln. 3. After determining that the "threshold issues" were "arguably appropriate" for class certification, the Magistrate proceeded to a detailed analysis of the requirements of Rule 23 before rejecting the class certification motion on those issues as well. *Id.*, pp. 6-14. Accordingly, the Magistrate recommended the denial of the motion in its entirety. *Id.*, p. 14.

The United States and the Tribe make no stated objection and make no argument with respect to the Magistrate's rejection of class certification on due process grounds as to the declaratory relief sought in their respective amended counterclaims. They object to the remainder of the Magistrate's Report and Recommendation, however, on two grounds. First, they object to the Magistrate's finding that they failed to establish that joinder of the individual members of the proposed classes is impracticable as required by Rule 23(a)(1). *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 ("Objection"), pp. 8-12. Secondly, they object to the Magistrate's finding that they failed to satisfy the requirements of Rule 23(b)(3) with respect to the proposed classes of defendants.[1] *Id.*, pp. 12-15.

Before a class can be certified, all four requirements of F.R.C.P. 23(a) must be satisfied and at least one of the three subdivisions of 23(b). In order to prevail on their motion, the United States and the Tribe must prove both the impracticability of joining individual defendants and the availability of 23(b)(3). They cannot do so. Their objections are not supported by the facts or the law. Their motion for class certification does not and cannot satisfy the requirements of either FRCP 23(a) or 23(b).

Furthermore, the partial class certification sought in this action fails to serve any of the purposes for which the class action device was developed. The United States and the Tribe simply propose to use the partial class action as a short-term strategy to delay having to serve necessary party counterdefendants until a later point in this case. This purpose is inconsistent with both Rule 23 and the due process rights of the defendants. The class certification motion must be denied.

II. STATEMENT OF FACTS.

A party seeking to certify a class is required to show that all the requirements of F.R.C.P. 23(a) and at least one of the three subdivisions of 23(b) are clearly met. *See, e.g., General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740 (1982) (Class actions "may only be certified if the trial court is satisfied, after a rigorous analysis,

[1] In their objections, plaintiffs make no reference to the Magistrate's determination that the proposed defendant classes could not be certified here under FRCP 23(b)(1) and, although they briefly advert to the Magistrate's rejection of certification under FRCP 23(b)(2), they specifically advise the Court that it need not address that issue. Objection, pp. 12-13. The plaintiffs' argument is directed exclusively at the denial of certification under FRCP 23(b)(3).

that the prerequisites of Rule 23(a) have been satisfied."); *Zinser v. Accufix*, 253 F.3d 1180, 1186 (9th Cir. 2001). The decision to grant or deny certification of a class lies within the discretion of the trial court. Whether a case should be allowed to proceed as a class action involves practical considerations, most of which are purely factual or fact-intensive. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03, 63 L. Ed. 2d 479 (1980). Each case must be decided on its own facts, on the basis of "practicalities and prudential considerations." *Id.* at 406, n.11.

Accordingly, the facts as to the claims of the Tribe and the United States in their respective amended counterclaims, the terms and provisions of the Case Management Order, the overlap among the categories of necessary party counterdefendants, and the variety of water rights and priority dates of the members of the proposed classes are critical to the determination of the class certification motion. Those facts are not conducive to easy summarization but are set forth at length in the *Walker River Irrigation District's Points and Authorities in Opposition to Joint Motion of the United States of American and the Walker River Paiute Tribe for Certification of Defendant Classes* at pages 2-10 and the Court's attention is directed thereto.

III. JOINDER OF INDIVIDUAL SUCCESSORS IN INTEREST UNDER THE DECREE AND DOMESTIC WELL OWNERS IS NOT "IMPRACTICABLE."

Before the Court may certify a class, the moving party must demonstrate that all the requirements of F.R.C.P. 23(a), including "impracticability," are clearly satisfied. *See, e.g., General Tel. Co. of the Southwest v. Falcon, supra*; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). The United States and the Tribe prefer to characterize this issue as "numerosity" because they want the Court to look only or primarily at the numbers of potential defendants.[2] Thus, the United States and the Tribe argue that "the numerosity requirement of

[2] When the United States and the Tribe do make reference to other factors, they cite such considerations as the avoidance of a multiplicity of actions, the size of individual claims, the financial resources of class members, the ability of claimants to institute individual suits, and

FED. R. CIV. P. 23(a) is amply met here because this case involves 'a substantial number of potential plaintiffs."[3] *Objection*, p. 2.

Both the language of Rule 23(a) and the case law that has developed under it, however, is to the contrary. The specific language of 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." The issue is not "numerosity" but the "impracticability" of joinder. *See, e.g., Donninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir. 1977). The actual number of class members is neither the only nor even the determinative factor.

A finding of "impracticability" depends on the particular facts of each case, including, in addition to the actual or estimated number of purported class members, such factors as the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claims. *See, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) , *cert. denied*, 449 U.S. 1113, 66 L. Ed. 2d 842 (1981); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172, 90 L.Ed.2d 983 (1986); *see also* 7A *Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d* § 1762 at 151-153 (1986); 5 *Moore's Federal Practice* §23.22. Each class certification decision regarding "impracticability" is necessarily unique. *Sherman v. Griepentrog*, 775 F.Supp. 1383, 1388 (D.Nev. 1991); *Hernandez v. Alexander*, 152 F.R.D. 192 (D.Nev. 1993).

---

the impact of injunctive relief on potential future class members. There are no facts which suggest that any of these has any bearing on the certification of the proposed defendant classes in this case.

[3] For some inexplicable reason, the United States and the Tribe cite at least three times to the Magistrate's reference to "a substantial number of plaintiffs." *See Objection*, pp. 2, 8, 11. Whether the Magistrate was speaking generically or simply inadvertently, it is undisputed that the motion of the United States and the Tribe seeks class certification as to two proposed classes of counterdefendants.

The United States and the Tribe have not established and cannot establish that joinder of members of either of the proposed classes here is impracticable. According to the declaration submitted with their *Objection*, the United States and the Tribe have now identified and located some 2,081 persons and entities who are within either or both of the proposed classes. *Objection, Exhibit 1*. The declaration says nothing with respect to whether these 2,081 persons and entities include all the members of either or both of the proposed classes. The declaration likewise says nothing about the difficulty of serving those 2,081 persons and entities.

The declaration is primarily directed at the finding by the Magistrate that all of the potential class members were located in the Walker River Basin. *Objection, Exhibit 1*, ¶ 4. Although that finding is disputed, the declaration carefully avoids advising the Court with any precision where any potential class members may be located outside the Walker River Basin. Dealing only in percentages, the declaration states that some 37.5% of potential class members are located outside the Walker River Basin, of whom 21.3% are located "in other areas of Nevada" and 16% are located "in other areas of California or other States." *Id.* Nothing in the declaration provides any information as to how many in which proposed class fall in the 37.5%. Nothing in the declaration provides any information as to whether those "other areas" of Nevada and California are adjacent to the Walker River Basin or at distant ends of either state. Nothing in the declaration provides any information as to how many of the potential class members live in states other than Nevada and California. Nothing in the declaration gives any reason why those persons and entities residing outside the Walker River Basin would be difficult to join in this action and serve with process.

The United States and the Tribe attempt to make much of the Magistrate's assumption, based on the information before him at the time, that because all of the water rights claims lie within the Walker River Basin, the owners of those claims must similarly be located there. A finding of "impracticability," however, does not and can not turn on whether all the potential

class members live within the Walker River Basin. Certainly, for the most part, the successors in interest under the Decree are farmers and ranchers living within four valleys in a single watershed. Likewise, for the most part, the domestic users of underground water are also within a compact geographic area within the same watershed. If other members of either class are located in adjacent areas, that does not constitute the "geographic dispersion" that supports class certification.[4] *See, e.g., Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984) *aff'd*, 747 F.2d 528 (9th Cir. 1984) (joinder impracticable in nationwide action by Medicaid beneficiaries).

It is clear that the United States and the Tribe have the resources to identify and locate the members of the proposed classes because they have done so.[5] Based on the declaration which is Exhibit 1 to their Objection, the "difficulty and inconvenience" of identifying and locating individual class members is no longer a significant consideration. That "difficulty and inconvenience" must, in any event, be assessed in light of the fact that it is defendant classes which the United States and the Tribe ask this Court to certify. As the Magistrate noted, "'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.'" *Report and Recommendation*, p. 5, lns. 20-22 (Citation omitted).[6] Some degree of "inconvenience" to the United States and the Tribe may be the

---

[4] In its argument on impracticability, the United States and the Tribe also make brief reference to what they describe as the "continuing fluctuation" in the ownership of rights under the Decree. *Objection*, p. 6. That issue has already been dealt with in this case by the Proposed Order Regarding Transfer of Water Rights, Doc. #139, ex. 1. *See also Report and Recommendation*, p. 8, lns. 1-7. There is simply no basis for any assertion that joinder is impracticable because of "fluctuation" in class members.

[5] In any event, the "burden is properly on" the Tribe and the United States, "as those who seek to alter water rights," to identify the necessary parties to be joined and served. *Order* (June 8, 1999) In Equity No. C-125, p. 9, lns. 15-24; p. 10, lns. 1-7.

[6] Any such economies are questionable in any event given the overlap in the various categories of holders of water rights. Many individuals and entities who are members of the proposed classes are also members of other categories identified in the Case Management Order and would have to be joined individually notwithstanding any grant of class certification.

unavoidable consequence here of affording due process to the individuals and entities whose water rights are threatened by the allegations of the amended counterclaims. *Cf., Order* (Feb. 25, 1999) No. C-125-C, p. 10, lns. 19-25. ("The requirement of serving individual defendants is not some arcane, administrative hoop that we are arbitrarily making Mineral County jump through. The requirement that every defendant be informed of actions that may deprive him or her of property is a fundamental right of due process and our procedural rules have developed as the best way to protect that right.")

In determining whether joinder of individual defendants is impracticable, the Court must also look at the "nature of the action." *See, e.g., Garcia v. Gloor, supra.* Because differences in the sources of water rights and in their priority dates mean individual water rights require individual proof, appropriative water rights are traditionally not amenable to class action treatment. *See, e.g., State of California v. Rank,* 293 F.2d 340 (9th Cir. 1961) *(aff'g in part, rev'g in part Rank v. (Krug) United States,* 142 F.Supp. 1 (S.D.Cal. 1956)*), modified,* 307 F.2d 96 (9th Cir. 1962) *(aff'd in part, rev'd in part, Dugan v. Rank,* 372 U.S. 627, 10 L.Ed.2d 28 (1963)*); Miller v. Jennings,* 243 F.2d 157 (5th Cir.), *cert. denied,* 355 U.S. 827, 2 L.Ed.2d 41 (1957)*; People of the State of California v. United States, 235 F.2d 647 (9th Cir. 1956).* The United States and the Tribe themselves have acknowledged that, if they are successful in the earlier stages of this action, the classes will have to be decertified and individual defendants joined for purposes of determining their respective rights. *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes ("Supporting Memorandum")*, p. 11, lns. 24-26 ("At the appropriate time, the Court may consider vacating its certification order so that the effect of the United States' and the Tribe's claims on individual decreed rights can be ascertained."). Joinder of individual defendants cannot fairly be "impracticable" for the threshold issues but "practicable" for subsequent determinations.

The United States and the Tribe have not met their burden of establishing clearly that joinder of the individual members of the proposed defendant classes is impracticable. No finding of "impracticability" can be made on the record before the Court.

IV. THE MOTION OF THE UNITED STATES AND THE TRIBE FOR CLASS CERTIFICATION MUST BE DENIED BECAUSE IT FAILS TO SATISFY THE REQUIREMENTS OF RULE 23(b).

Before it can be certified, in addition to meeting all four requirements of Rule 23(a), a proposed class action must also satisfy the requirements of at least one of the three subdivisions of FRCP Rule 23(b). Before the Magistrate, the United States and the Tribe argued that this action meets the requirements of all three subdivisions of Rule 23(b). *Supporting Memorandum*, p. 14, lns. 12-13. The Magistrate rejected that argument in its entirety, holding that, in fact, none of those requirements were met. *Report and Recommendation*, pp. 10-14. The United States and the Tribe have accepted the Magistrate's determination that class action certification is not available under either 23(b)(1) or 23(b)(2). They have, however, objected to the determination that class certification is not available under 23(b)(3).

An action may be maintained as a class under Rule 23(b)(3) if the requirements of 23(a) are satisfied and, in addition, if

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *F.R.C.P. 23(b)(3).*

Certification under subdivision 23(b)(3) thus requires findings of both "predominance" and "superiority." The United States and the Tribe have not satisfied and cannot satisfy either requirement. Their request for certification under F.R.C.P. 23(b)(3) must be denied.

A. Common Issues Do Not Predominate Over Individual Questions.

The first requirement of certifying a class action under Rule 23(b)(3) is that common questions of law or fact must predominate over the individual issues involved.

Although they have the burden of proof on "predominance," the United States and the Tribe merely argue that the threshold issues present common questions and that the "defendants may find it more expedient to address those common issues as class members." *Objection*, p. 13. Setting aside for the moment the natural skepticism which must necessarily greet the notion that the United States and the Tribe are pursuing a defendants' class action for the defendants' benefit, the argument addresses the "superiority" requirement of 23(b)(3) not "predominance."

Although there is no single test for "predominance," it is well established that the existence of common questions alone is not sufficient. See, e.g., 7A *Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d* §1778, p. 526-527. The Court must "evaluate the relationship between the common and individual issues." *Id.* Although certain threshold issues here may, in fact, be common, "predominance" is not determined by the most immediate issues but rather by a pragmatic evaluation of the whole case. See, e.g., Rodriguez v. Carlson, 166 F.R.D. 465, 477 (E.D.Wash. 1996).

Considering this case as a whole, the court cannot find that the common issues predominate over individual issues relating to individual water rights. Taking the plaintiffs' amended counterclaims to their ultimate possible conclusion, this Court would have to adjudicate the individual water rights of all groundwater users within the Walker River Basin. Those individual water rights arise under different facts and circumstances and require individual proof. At this point, if not before, defendants' "common defenses" become conflicting claims. It is well established that such cases are not appropriate for class certification. See, e.g., Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957), cert. denied, 355 U.S. 827, 2 L.Ed.2d 41 (1957); People of the State of California v. United States, 235 F.2d 647 (9th Cir. 1956). "'[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a rule 23(b)(3) action would be inappropriate.'" *Zinser v. Accufix, supra,* 253 F.3d at 1189, quoting 7A *Wright, Miller and Kane, Federal Practice and*

Procedure: Civil 2d §1778. Because of these individual issues and conflicting claims of individual defendants, those same defendants must be allowed to participate fully in their own defense on the threshold issues as well as the on the merits of the claims of the United States and the Tribe. Both sets of issues are critical to the protection of the defendants' individual claims and rights.

The United States and the Tribe make no effort to support their "predominance" argument by comparing the individual issues in this action with the common issues. They propose to isolate certain issues, have them determined against defendants as a class and then allow the individual defendants into the action to litigate over what's left. But "predominance" cannot be "manufactured" by separating out the common issues for class action purposes. See, e.g., Castano v. American Tobacco Company, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between sub-divisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.")

The "predominance" analysis must also be made in the larger context of the public policies which justify the class action device. For example, certain case law articulates one of the standards for determining "predominance" as whether "common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." See, e.g., In re Agent Orange Product Liability Litigation, 100 F.R.D. 718, 722 (E.D.N.Y. 1983), cert. denied, 484 U.S. 1004, 98 L.Ed.2d 648 (1988). This kind of standard obviously arises out of the policy concern of avoiding multiple adjudications which may not only be repetitive and inefficient but produce inconsistent results. That policy has no application here. No matter how "significant" the common issues may be here, there is but a single adjudication. In fact, the significance of the common issues in this case actually militates against the certification of a class action.

The "predominance" inquiry here must also take into account that the proposed classes consist of defendants who have not sought certification. Although the defendant class action must meet the same essential criteria under Rule 23 as the plaintiff class action, the analysis is necessarily different. A member of a plaintiff class stands to gain from the litigation. He or she risks only the right to bring a separate lawsuit. A member of a defendant class, however, stands to lose whatever rights are at issue without having had the opportunity to personally defend or protect those rights. See, e.g., Thillens, Inc. v. Community Currency Exchange Association, 97 F.R.D. 668, 674 (N.D. Ill. 1983). Due process requires that individual defendants have the opportunity to protect their individual rights and interests. The individual defendants here cannot do so unless they can participate in the resolution of common as well as individual issues. Due process is not satisfied by serving individual defendants after their rights may have already been substantially impacted by the determinations concerning threshold issues.

B. The Class Action Is Not Superior To Alternative Methods Of Proceeding.

The superiority requirement of 23(b)(3) requires the determination that the class action is better than other methods "for the fair and efficient adjudication of the controversy." *See, e.g., Zinser v. Accufix, supra,* 253 F.3d at 1190. Thus, even if the common issues can be found to "predominate," certification of the proposed defendant classes here remains inappropriate because the partial class action proposed by the United States and the Tribe here is clearly not superior to the joinder of individual water rights holders in this action as outlined in the April 2000 Case Management Order.

The United States and the Tribe effectively convert the 9 categories of defendants set out in the Case Management Order into 10 and propose that 2 of those 10 categories (mostly farmers and ranchers) be forced into "class" representation for purposes of litigating the threshold issues. The members of the remaining 8 categories including the

industrial and municipal users get to defend their interests individually and determine for themselves, from the outset of the litigation, how best to protect their rights.

Rule 23(b)(3) directs the Court to look specifically at "the interest of members of the [proposed] class in individually controlling the prosecution or defense of [their claims]." The Advisory Committee for the 1966 amendments further suggests that, in every case, courts must "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." 12A *Wright, Miller, Kane & Marcus, Appendices, Advisory Committee Notes, Rule 23*, p. 302. Plaintiffs here offer no basis whatsoever on which this Court could conclude that the members of their proposed classes -- the successors in interest under the Decree and domestic water users in the specified sub-basins -- are not as "interested" as the water rights holders in any of the other defendant categories in "individually controlling" the prosecution or defense of their rights.

Because of its emphasis on the interest of the individual litigant in controlling his own litigation, subsection (b)(3), unlike the other subsections of Rule 23(b), requires that each member of the class be given the right to "opt out" of the class if the member so chooses. FRCP 23(c)(2). With a proposed defendant class, the issue of "superiority," in fact, often turns on the likelihood that many members of the class will voluntarily exclude themselves from the action. See, e.g., In re Arthur Treacher's Franchise Litigation, 93 F.R.D. 590, 595 (E.D.Pa. 1982) (certification denied as pointless since defendants would likely opt out); see also Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974). In the present case, the Court can expect that many, if not all, the members of the proposed defendant classes will "opt out." They will want the same opportunity as the members of other categories of defendants identified by the April 2000 Case Management Order to participate fully in protecting their own interests. Furthermore, the extensive overlap among those categories means that many of the members of the proposed defendant classes will already be participating as individually

named defendants.

The Magistrate determined that the class action was not superior to the existing Case Management Order for achieving the fair and efficient adjudication of this matter on two grounds. First, because "once a potential member opts out of the class, Plaintiffs will be required to formally serve the opt-out defendant under the requirements of the CMO." *Report and Recommendation*, p. 13, lns. 23-24. According to the Magistrate, "[t]his fact alone significantly diminishes the superiority of certification based on a measure of efficiency." *Id.* Secondly, noting that "formal service upon each defendant will be a prerequisite with proceeding to Phase II of this case," the Magistrate necessarily concluded that

> [I]t 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. *Report and Recommendation*, p. 14, lns. 1-3.

It was obvious to the Magistrate that if individual defendants may have to be joined and served at some later point, it is neither fair nor efficient not to join and serve them at the outset. The short-term solution of the United States and the Tribe to get a number of issues determined before having to serve the individual defendants is unacceptable.

The United States and the Tribe never address the Magistrate's second reason for rejecting a partial class action as a "superior" method of adjudicating this case. Nor do they deny the likelihood that many of the class members here will, in fact, opt out if the proposed classes are certified. The United States and the Tribe, however, do attempt to argue, in a perverse reversal of logic, that the "opt-out" provision actually makes the class action "superior" here. *Objection*, pp. 14-15.

Again the United States and the Tribe present their case as though they are pursuing class certification here for the benefit of the defendants rather than themselves. Accordingly, they argue that certifying the two defendant classes will "allow

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." *Objection*, p. 14. They further argue that "giving the defendants the choice as to how they wish to participate is the factor by which to determine the superiority of class certification." *Id.*

No authority is offered and none exists to support the proposition that the class action alternative may be found to be superior because class members may choose not to use it. The idea is patently absurd. Rule 23(b)(3) itself requires a finding that the class action is a superior method for the "fair and efficient adjudication" of the controversy not for offering alternative methods of participation to potential class members. Whatever efficiencies may be achieved by the class action device are necessarily lost to the extent individual class members opt out and must be served and allowed to participate individually. Rule 23(b)(3) specifically requires the Court to look at "the interest of members of the class in individually controlling the prosecution or defense of separate actions" before making the certification decision because, if individual members of the proposed class want to control their own litigation and will opt out of any class, then the class action alternative is simply not superior.[7]

---

[7] The other factors the Court is required to look at under 23(b)(3) include the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the difficulties likely to be encountered in the management of a class action. *See also, Zinser v. Accufix*, 253 F.3d 1180, 1190-1192 (9th Cir. 2001). The first two considerations are inapplicable on the facts of this case. There is no other litigation and no other forum. With respect to "difficulties" in the management of a class action, the United States and the Tribe plaintiffs contend that a class action here would help "streamline" the Court's management of the case. *Objection*, p. 15. No explanation of how the case would be "streamlined" is offered. Presumably this has reference to a reduction in the number of directly participating defendants and their lawyers. Certainly there would be no streamlining of the issues. Clearly, any potential for reduction in the number of defendants and their lawyers is undermined by the mandatory "opt-out" provisions of Rule 23(b)(3).

V. CONCLUSION.

Class action certification requires the moving party to prove that both Rule 23(a) and 23(b) are satisfied. The motion of the United States and the Tribe fails to satisfy either provision. It is respectfully submitted that the motion must be denied.

Dated this 30th day of November, 2001.

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511

by _____
GORDON H. DEPAOLI
Nevada State Bar No. 00195
SUELLEN FULSTONE
Nevada State Bar No. 01615
DALE E. FERGUSON
Nevada State Bar No. 04986

Attorneys for Defendant/Counterdefendant
WALKER RIVER IRRIGATION DISTRICT

CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Walker River Irrigation District's Points And Authorities In Response To Objections Of The United States And The Walker River Paiute Tribe To The Report And Recommendation Of The U.S. Magistrate Judge Regarding Certification Of Defendant Classes in an envelope addressed to:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty Street, #600
Reno, NV 89501

Richard Greenfield
Department of the Interior
Two North Central Avenue, #500
Phoenix, AZ 85004

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

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

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

R. Michael Turnipseed, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Garry Stone
United States District Court Water Master
290 South Arlington Avenue
Third Floor
Reno, NV 89501

Alice E. Walker
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

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

Michael W. Neville
California Attorney General's Office
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-3664

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

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

Susan Schneider
Indian Resources Section
U.S. Department of Justice
999 18th Street
Suite 945, North Tower
Denver, CO 80202

Marta Adams
Deputy Attorney General
State of Nevada
100 North Carson street
Carson City, NV 89701

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay Street, 20th Floor
Oakland, CA 94612-1413

Treva J. Hearne
Zeh, Spoo, Quade & Hearne
575 Forest Service, Suite 200
Reno, NV 89509

James Shaw
Water Master
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Hank Meshorer
United States Department of Justice
Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044

Linda Bowman
540 Hammill Lane
Reno, NV 89511

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

Kathryn E. Landreth
U.S. Attorney
100 West Liberty Street, #600
Reno, NV 89501

Dated this 30th day of November, 2001.

Tommie Kay Atkinson

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000