

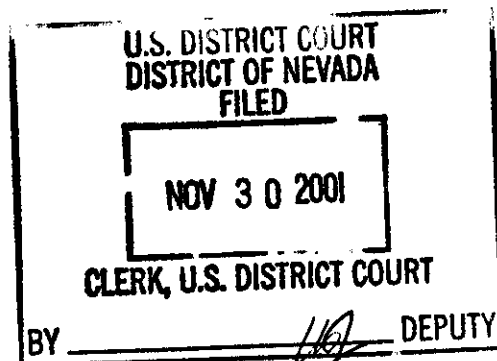
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CLERK, U.S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor

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.

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U.S. DISTRICT COURT
DISTRICT OF MICHIGAN
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MICHIGAN

1 I. INTRODUCTION.

2 The Case Management Order entered in this case in April of 2000 established nine
3 categories of necessary party counterdefendants with respect to the amended counterclaims of
4 the United States and the Walker River Paiute Tribe ("the Tribe"). That Order also bifurcated
5 the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal
6 Claims") from all of the other claims raised by the United States (the "Federal Claims"). By
7 motion, the United States and the Tribe subsequently sought certification of 1 1/2 of those nine
8 categories into two defendant classes for purposes of litigating the threshold issues related to
9 the Tribal Claims and the declaratory relief sought by the United States and the Tribe as to
10 those claims.
11

12 The Magistrate summarily rejected the class action motion with respect to the
13 adjudication of any portion of the declaratory relief claims, holding that, as a matter of due
14 process, each individual defendant must be before the court. *Report and Recommendation of*
15 *U.S. Magistrate Judge (September 13, 2001) (hereafter "Report and Recommendation")*, p. 5,
16 ln. 16 - p. 6, ln. 3. After determining that the "threshold issues" were "arguably appropriate"
17 for class certification, the Magistrate proceeded to a detailed analysis of the requirements of
18 Rule 23 before rejecting the class certification motion on those issues as well. *Id.*, pp. 6-14.
19 Accordingly, the Magistrate recommended the denial of the motion in its entirety. *Id.*, p. 14.
20

21 The United States and the Tribe make no stated objection and make no argument with
22 respect to the Magistrate's rejection of class certification on due process grounds as to the
23 declaratory relief sought in their respective amended counterclaims. They object to the
24 remainder of the Magistrate's Report and Recommendation, however, on two grounds. First,
25 they object to the Magistrate's finding that they failed to establish that joinder of the individual
26 members of the proposed classes is impracticable as required by Rule 23(a)(1). *Objection of*
27 *the United States of America and the Walker River Paiute Tribe to the Report and*
28

1 *Recommendation of U.S. Magistrate Judge Regarding Certification of Defendant Classes*

2 ("Objection"), pp. 8-12. Secondly, they object to the Magistrate's finding that they failed to
3 satisfy the requirements of Rule 23(b)(3) with respect to the proposed classes of defendants.¹

4 *Id.*, pp. 12-15.

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

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

17 II. STATEMENT OF FACTS.

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

22
23
24
25
26 ¹ In their objections, plaintiffs make no reference to the Magistrate's determination that the
27 proposed defendant classes could not be certified here under FRCP 23(b)(1) and, although they
28 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).

1 that the prerequisites of Rule 23(a) have been satisfied."); *Zinser v. Accufix*, 253 F.3d 1180,
 2 1186 (9th Cir. 2001). The decision to grant or deny certification of a class lies within the
 3 discretion of the trial court. Whether a case should be allowed to proceed as a class action
 4 involves practical considerations, most of which are purely factual or fact-intensive. *See*,
 5 *e.g.*, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03, 63 L. Ed. 2d 479
 6 (1980). Each case must be decided on its own facts, on the basis of "practicalities and
 7 prudential considerations." *Id.* at 406, n.11.

8
 9 Accordingly, the facts as to the claims of the Tribe and the United States in their
 10 respective amended counterclaims, the terms and provisions of the Case Management Order,
 11 the overlap among the categories of necessary party counterdefendants, and the variety of water
 12 rights and priority dates of the members of the proposed classes are critical to the determination
 13 of the class certification motion. Those facts are not conducive to easy summarization but are
 14 set forth at length in the *Walker River Irrigation District's Points and Authorities in Opposition*
 15 *to Joint Motion of the United States of American and the Walker River Paiute Tribe for*
 16 *Certification of Defendant Classes* at pages 2-10 and the Court's attention is directed thereto.

17
 18 **III. JOINDER OF INDIVIDUAL SUCCESSORS IN INTEREST UNDER THE**
 19 **DECREE AND DOMESTIC WELL OWNERS IS NOT "IMPRACTICABLE."**

20 Before the Court may certify a class, the moving party must demonstrate that all the
 21 requirements of F.R.C.P. 23(a), including "impracticability," are clearly satisfied. *See, e.g.*,
 22 *General Tel. Co. of the Southwest v. Falcon*, *supra*; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d
 23 1227, 1234 (9th Cir. 1996). The United States and the Tribe prefer to characterize this issue as
 24 "numerosity" because they want the Court to look only or primarily at the numbers of potential
 25 defendants.² Thus, the United States and the Tribe argue that "the numerosity requirement of
 26

27
 28 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

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

3 Both the language of Rule 23(a) and the case law that has developed under it, however,
4 is to the contrary. The specific language of 23(a)(1) requires that "the class [be] so numerous
5 that joinder of all members is impracticable." The issue is not "numerosity" but the
6 "impracticability" of joinder. *See, e.g., Donninger v. Pacific Northwest Bell, Inc.*, 564 F.2d
7 1304 (9th Cir. 1977). The actual number of class members is neither the only nor even the
8 determinative factor.

10 A finding of "impracticability" depends on the particular facts of each case, including,
11 in addition to the actual or estimated number of purported class members, such factors as the
12 geographical dispersion of the class, the ease with which class members may be identified, the
13 nature of the action, and the size of each plaintiff's claims. *See, e.g., Garcia v. Gloor*, 618 F.2d
14 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 66 L. Ed. 2d 842 (1981); *Andrews v.*
15 *Bechtel Power Corp.*, 780 F.2d 124, 131 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172, 90
16 L.Ed.2d 983 (1986); *see also* 7A *Wright, Miller and Kane, Federal Practice and Procedure:*
17 *Civil 2d* § 1762 at 151-153 (1986); 5 *Moore's Federal Practice* §23.22. Each class
18 certification decision regarding "impracticability" is necessarily unique. *Sherman v.*
19 *Griepentrog*, 775 F.Supp. 1383, 1388 (D.Nev. 1991); *Hernandez v. Alexander*, 152 F.R.D. 192
20 (D.Nev. 1993).

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

25 ³ For some inexplicable reason, the United States and the Tribe cite at least three times to the
26 Magistrate's reference to "a substantial number of plaintiffs." *See Objection*, pp. 2, 8, 11.
27 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
28 classes of counterdefendants.

1 The United States and the Tribe have not established and cannot establish that joinder of
2 members of either of the proposed classes here is impracticable. According to the declaration
3 submitted with their *Objection*, the United States and the Tribe have now identified and located
4 some 2,081 persons and entities who are within either or both of the proposed classes.

5 *Objection, Exhibit 1.* The declaration says nothing with respect to whether these 2,081 persons
6 and entities include all the members of either or both of the proposed classes. The declaration
7 likewise says nothing about the difficulty of serving those 2,081 persons and entities.
8

9 The declaration is primarily directed at the finding by the Magistrate that all of the
10 potential class members were located in the Walker River Basin. *Objection, Exhibit 1, ¶ 4.*
11 Although that finding is disputed, the declaration carefully avoids advising the Court with any
12 precision where any potential class members may be located outside the Walker River Basin.
13 Dealing only in percentages, the declaration states that some 37.5% of potential class members
14 are located outside the Walker River Basin, of whom 21.3% are located "in other areas of
15 Nevada" and 16% are located "in other areas of California or other States." *Id.* Nothing in the
16 declaration provides any information as to how many in which proposed class fall in the 37.5%.
17 Nothing in the declaration provides any information as to whether those "other areas" of
18 Nevada and California are adjacent to the Walker River Basin or at distant ends of either state.
19 Nothing in the declaration provides any information as to how many of the potential class
20 members live in states other than Nevada and California. Nothing in the declaration gives any
21 reason why those persons and entities residing outside the Walker River Basin would be
22 difficult to join in this action and serve with process.
23
24

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

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

8
 9 It is clear that the United States and the Tribe have the resources to identify and locate
 10 the members of the proposed classes because they have done so.⁵ Based on the declaration
 11 which is Exhibit 1 to their Objection, the "difficulty and inconvenience" of identifying and
 12 locating individual class members is no longer a significant consideration. That "difficulty and
 13 inconvenience" must, in any event, be assessed in light of the fact that it is defendant classes
 14 which the United States and the Tribe ask this Court to certify. As the Magistrate noted, "No
 15 matter how desirable the economy and enforcement functions of defendant class actions may
 16 be . . . they cannot be purchased at the expense of fundamental unfairness to persons who are
 17 not before the court that binds them." *Report and Recommendation*, p. 5, Ins. 20-22 (Citation
 18 omitted).⁶ Some degree of "inconvenience" to the United States and the Tribe may be the

19
 20
 21 ⁴ In its argument on impracticability, the United States and the Tribe also make brief reference
 22 to what they describe as the "continuing fluctuation" in the ownership of rights under the
 23 Decree. *Objection*, p. 6. That issue has already been dealt with in this case by the Proposed
 24 Order Regarding Transfer of Water Rights, Doc. #139, ex. 1. See also *Report and*
Recommendation, p. 8, Ins. 1-7. There is simply no basis for any assertion that joinder is
 impracticable because of "fluctuation" in class members.

25 ⁵ In any event, the "burden is properly on" the Tribe and the United States, "as those who seek
 26 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, Ins. 15-24; p. 10, Ins. 1-7.

27 ⁶ Any such economies are questionable in any event given the overlap in the various categories
 28 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.

1 unavoidable consequence here of affording due process to the individuals and entities whose
2 water rights are threatened by the allegations of the amended counterclaims. *Cf., Order* (Feb.
3 25, 1999) No. C-125-C, p. 10, lns. 19-25. ("The requirement of serving individual defendants
4 is not some arcane, administrative hoop that we are arbitrarily making Mineral County jump
5 through. The requirement that every defendant be informed of actions that may deprive him or
6 her of property is a fundamental right of due process and our procedural rules have developed
7 as the best way to protect that right.")

8
9 In determining whether joinder of individual defendants is impracticable, the Court
10 must also look at the "nature of the action." *See, e.g., Garcia v. Gloor, supra.* Because
11 differences in the sources of water rights and in their priority dates mean individual water rights
12 require individual proof, appropriative water rights are traditionally not amenable to class
13 action treatment. *See, e.g., State of California v. Rank*, 293 F.2d 340 (9th Cir. 1961) (*aff'd in*
14 *part, rev'd in part Rank v. (Krug) United States*, 142 F.Supp. 1 (S.D.Cal. 1956)), *modified*, 307
15 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
16 28 (1963)); *Miller v. Jennings*, 243 F.2d 157 (5th Cir.), *cert. denied*, 355 U.S. 827, 2 L.Ed.2d
17 41 (1957); *People of the State of California v. United States*, 235 F.2d 647 (9th Cir. 1956).
18 The United States and the Tribe themselves have acknowledged that, if they are successful in
19 the earlier stages of this action, the classes will have to be decertified and individual defendants
20 joined for purposes of determining their respective rights. *Memorandum in Support of the Joint*
21 *Motion of the United States of America and the Walker River Paiute Tribe for Certification of*
22 *Defendant Classes ("Supporting Memorandum")*, p. 11, lns. 24-26 ("At the appropriate time,
23 the Court may consider vacating its certification order so that the effect of the United States'
24 and the Tribe's claims on individual decreed rights can be ascertained."). Joinder of individual
25 defendants cannot fairly be "impracticable" for the threshold issues but "practicable" for
26 subsequent determinations.
27
28

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

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

7 Before it can be certified, in addition to meeting all four requirements of Rule 23(a), a
 8 proposed class action must also satisfy the requirements of at least one of the three subdivisions
 9 of FRCP Rule 23(b). Before the Magistrate, the United States and the Tribe argued that this
 10 action meets the requirements of all three subdivisions of Rule 23(b). *Supporting*
 11 *Memorandum*, p. 14, lns. 12-13. The Magistrate rejected that argument in its entirety, holding
 12 that, in fact, none of those requirements were met. *Report and Recommendation*, pp. 10-14.
 13 The United States and the Tribe have accepted the Magistrate's determination that class action
 14 certification is not available under either 23(b)(1) or 23(b)(2). They have, however, objected to
 15 the determination that class certification is not available under 23(b)(3).
 16

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

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

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

26 A. Common Issues Do Not Predominate Over Individual Questions.

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

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

7
8 Although there is no single test for "predominance," it is well established that
9 the existence of common questions alone is not sufficient. See, e.g., 7A Wright, Miller and
10 Kane, Federal Practice and Procedure: Civil 2d §1778, p. 526-527. The Court must "evaluate
11 the relationship between the common and individual issues." *Id.* Although certain threshold
12 issues here may, in fact, be common, "predominance" is not determined by the most immediate
13 issues but rather by a pragmatic evaluation of the whole case. See, e.g., Rodriguez v. Carlson,
14 166 F.R.D. 465, 477 (E.D.Wash. 1996).

15
16 Considering this case as a whole, the court cannot find that the common issues
17 predominate over individual issues relating to individual water rights. Taking the plaintiffs'
18 amended counterclaims to their ultimate possible conclusion, this Court would have to
19 adjudicate the individual water rights of all groundwater users within the Walker River Basin.
20 Those individual water rights arise under different facts and circumstances and require
21 individual proof. At this point, if not before, defendants' "common defenses" become
22 conflicting claims. It is well established that such cases are not appropriate for class
23 certification. See, e.g., Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957), cert. denied, 355 U.S.
24 827, 2 L.Ed.2d 41 (1957); People of the State of California v. United States, 235 F.2d 647 (9th
25 Cir. 1956). "[I]f the main issues in a case require the separate adjudication of each class
26 member's individual claim or defense, a rule 23(b)(3) action would be inappropriate." *Zinser v.*
27 *Accufix, supra*, 253 F.3d at 1189, quoting 7A Wright, Miller and Kane, *Federal Practice and*
28

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

6
7 The United States and the Tribe make no effort to support their "predominance"
8 argument by comparing the individual issues in this action with the common issues. They
9 propose to isolate certain issues, have them determined against defendants as a class and then
10 allow the individual defendants into the action to litigate over what's left. But "predominance"
11 cannot be "manufactured" by separating out the common issues for class action purposes. See,
12 e.g., Castano v. American Tobacco Company, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The
13 proper interpretation of the interaction between sub-divisions (b)(3) and (c)(4) is that a cause of
14 action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a
15 housekeeping rule that allows courts to sever the common issues for a class trial.")

16
17 The "predominance" analysis must also be made in the larger context of the
18 public policies which justify the class action device. For example, certain case law articulates
19 one of the standards for determining "predominance" as whether "common questions represent
20 a significant aspect of the case and they can be resolved for all members of the class in a single
21 adjudication." See, e.g., In re Agent Orange Product Liability Litigation, 100 F.R.D. 718, 722
22 (E.D.N.Y. 1983), cert. denied, 484 U.S. 1004, 98 L.Ed.2d 648 (1988). This kind of standard
23 obviously arises out of the policy concern of avoiding multiple adjudications which may not
24 only be repetitive and inefficient but produce inconsistent results. That policy has no
25 application here. No matter how "significant" the common issues may be here, there is but a
26 single adjudication. In fact, the significance of the common issues in this case actually
27 militates against the certification of a class action.
28

1 The "predominance" inquiry here must also take into account that the proposed
2 classes consist of defendants who have not sought certification. Although the defendant class
3 action must meet the same essential criteria under Rule 23 as the plaintiff class action, the
4 analysis is necessarily different. A member of a plaintiff class stands to gain from the
5 litigation. He or she risks only the right to bring a separate lawsuit. A member of a defendant
6 class, however, stands to lose whatever rights are at issue without having had the opportunity to
7 personally defend or protect those rights. See, e.g., Thillens, Inc. v. Community Currency
8 Exchange Association, 97 F.R.D. 668, 674 (N.D. Ill. 1983). Due process requires that
9 individual defendants have the opportunity to protect their individual rights and interests. The
10 individual defendants here cannot do so unless they can participate in the resolution of common
11 as well as individual issues. Due process is not satisfied by serving individual defendants after
12 their rights may have already been substantially impacted by the determinations concerning
13 threshold issues.
14

15
16 B. The Class Action Is Not Superior To Alternative Methods Of Proceeding.

17 The superiority requirement of 23(b)(3) requires the determination that the class
18 action is better than other methods "for the fair and efficient adjudication of the controversy."
19 See, e.g., Zinser v. Accufix, supra, 253 F.3d at 1190. Thus, even if the common issues can be
20 found to "predominate," certification of the proposed defendant classes here remains
21 inappropriate because the partial class action proposed by the United States and the Tribe here
22 is clearly not superior to the joinder of individual water rights holders in this action as outlined
23 in the April 2000 Case Management Order.
24

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

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

3 Rule 23(b)(3) directs the Court to look specifically at "the interest of members
4 of the [proposed] class in individually controlling the prosecution or defense of [their claims]."
5 The Advisory Committee for the 1966 amendments further suggests that, in every case, courts
6 must "consider the interests of individual members of the class in controlling their own
7 litigations and carrying them on as they see fit." 12A *Wright, Miller, Kane & Marcus,*
8 *Appendices, Advisory Committee Notes, Rule 23*, p. 302. Plaintiffs here offer no basis
9 whatsoever on which this Court could conclude that the members of their proposed classes --
10 the successors in interest under the Decree and domestic water users in the specified sub-basins
11 -- are not as "interested" as the water rights holders in any of the other defendant categories in
12 "individually controlling" the prosecution or defense of their rights.
13

14 Because of its emphasis on the interest of the individual litigant in controlling
15 his own litigation, subsection (b)(3), unlike the other subsections of Rule 23(b), requires that
16 each member of the class be given the right to "opt out" of the class if the member so chooses.
17 FRCP 23(c)(2). With a proposed defendant class, the issue of "superiority," in fact, often turns
18 on the likelihood that many members of the class will voluntarily exclude themselves from the
19 action. See, e.g., In re Arthur Treacher's Franchise Litigation, 93 F.R.D. 590, 595 (E.D.Pa.
20 1982) (certification denied as pointless since defendants would likely opt out); see also Kline v.
21 Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974). In the present case, the Court can
22 expect that many, if not all, the members of the proposed defendant classes will "opt out."
23 They will want the same opportunity as the members of other categories of defendants
24 identified by the April 2000 Case Management Order to participate fully in protecting their
25 own interests. Furthermore, the extensive overlap among those categories means that many of
26 the members of the proposed defendant classes will already be participating as individually
27
28

1 named defendants.

2 The Magistrate determined that the class action was not superior to the existing
3 Case Management Order for achieving the fair and efficient adjudication of this matter on two
4 grounds. First, because "once a potential member opts out of the class, Plaintiffs will be
5 required to formally serve the opt-out defendant under the requirements of the CMO." *Report*
6 *and Recommendation*, p. 13, lns. 23-24. According to the Magistrate, "[t]his fact alone
7 significantly diminishes the superiority of certification based on a measure of efficiency." *Id.*
8 Secondly, noting that "formal service upon each defendant will be a prerequisite with
9 proceeding to Phase II of this case," the Magistrate necessarily concluded that
10

11 [It would not be a superior method of adjudicating this dispute
12 to now certify the proposed classes, give notice to class members
13 in accordance with Rule 23(d), and subsequently be presented
14 with the need to effectuate formal service upon all defendants
at a later date. *Report and Recommendation*, p. 14, lns. 1-3.

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

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

25 Again the United States and the Tribe present their case as though
26 they are pursuing class certification here for the benefit of the defendants rather than
27 themselves. Accordingly, they argue that certifying the two defendant classes will "allow
28

1 defendants to determine for themselves how they wish to address the initial portion of the case,
2 and offers them the substantial benefit of resolving the threshold issues as class members."
3 *Objection*, p. 14. They further argue that "giving the defendants the choice as to how they wish
4 to participate is the factor by which to determine the superiority of class certification." *Id.*

5 No authority is offered and none exists to support the proposition that the class
6 action alternative may be found to be superior because class members may choose not to use it.
7 The idea is patently absurd. Rule 23(b)(3) itself requires a finding that the class action is a
8 superior method for the "fair and efficient adjudication" of the controversy not for offering
9 alternative methods of participation to potential class members. Whatever efficiencies may be
10 achieved by the class action device are necessarily lost to the extent individual class members
11 opt out and must be served and allowed to participate individually. Rule 23(b)(3) specifically
12 requires the Court to look at "the interest of members of the class in individually controlling the
13 prosecution or defense of separate actions" before making the certification decision because, if
14 individual members of the proposed class want to control their own litigation and will opt out
15 of any class, then the class action alternative is simply not superior.⁷
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20 ⁷ The other factors the Court is required to look at under 23(b)(3) include the extent and nature
21 of any litigation concerning the controversy already commenced by or against members of the
22 class, the desirability or undesirability of concentrating the litigation of the claims in the
23 particular forum, and the difficulties likely to be encountered in the management of a class
24 action. *See also, Zinser v. Accufix*, 253 F.3d 1180, 1190-1192 (9th Cir. 2001). The first two
25 considerations are inapplicable on the facts of this case. There is no other litigation and no
26 other forum. With respect to "difficulties" in the management of a class action, the United
27 States and the Tribe plaintiffs contend that a class action here would help "streamline" the
28 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).

1 V. CONCLUSION.

2 Class action certification requires the moving party to prove that both Rule 23(a) and
3 23(b) are satisfied. The motion of the United States and the Tribe fails to satisfy either
4 provision. It is respectfully submitted that the motion must be denied.

5 Dated this 30th day of November, 2001.

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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:

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