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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 **MEMORANDUM IN SUPPORT OF JOINT MOTION OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE FOR AMENDMENT OF THE COURT'S ORDER DENYING MOTION FOR CERTIFICATION OF DEFENDANT CLASSES, AND, IN THE ALTERNATIVE, FOR RELIEF FROM THIS SAME ORDER**

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") have moved this Court, pursuant to FED. R. CIV. P. 59(e), to alter, amend or vacate its Order of March 29, 2002, denying the *Joint Motion of the United States and the Walker River Paiute Tribe for Certification of Defendant Classes* (May 4, 2001) ("Joint Motion for Class Certification"). In the

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alternative, the United States and the Tribe move this Court for relief from this same Order pursuant to FED. R. CIV. P. 60(b), and ask the Court to vacate the March 29, 2002 Order pending issuance of an Order articulating the basis for its denial of the Joint Motion for Class Certification.

A. Background:

The *Case Management Order* (Apr. 18, 2000) ("CMO") directs the United States and the Tribe to join water users 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] As discussed below, the figure of 3,000 is low. 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." *Order* at 4, No. C-125 (June 8, 2001) ("June 8 Order").

In seeking to comply with the Court's mandate to join water users who may be affected by the Tribal Claims, the United States and the Tribe have requested certification of a defendant class for two

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

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). Joint Certification Motion, Mem. at 1. Under this proposal, certification of these two classes would be limited to the determination of threshold questions under the CMO and for the declaration of the 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 of U.S. Magistrate Judge*, 3-4 (Sept. 13, 2001) ("Report and Recommendation"). Indeed, certain threshold questions are potentially dispositive of the Tribal Claims. If the United States and the Tribe prevail on the threshold questions and additional tribal rights are 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.

The United States and the Tribe filed their Joint Motion for Class Certification on May 4, 2001. This motion was heard initially by the Magistrate Judge, who recommended in September 2001, that the motion be denied. Report and Recommendation. Thereafter, in October 2002, the United States

and the Tribe filed their objections to the Magistrate Judge's Report and Recommendation. *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* (Oct. 26, 2001) ("Objection"). In addition, in January 2002, the United States and the Tribe provided a supplemental filing to their Objection to clarify that their continued work indicated that the number of potential defendants involved in the two proposed classes for certification was much higher than originally estimated. *Notice of Filing of Supplemental Affidavit Regarding the 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* (Jan. 10, 2002) ("Supplemental Filing to Objection").

In its Order of March 29, 2002, the Court denies the Joint Motion for Class Certification, but provides no basis for its decision. The Court simply states that it "adopts the recommendation, but not all parts of the [Magistrate's Report and Recommendation]. The Court will file a further written order explaining the reasons for its decisions in the near future." *Minutes of the Court* (Mar. 29, 2002). Consequently, the Court has ruled on the Joint Motion for Class Certification but has provided no reasons for its decision.

B. This Court should grant relief from this Order to prevent manifest injustice.

The Court's Order places the United States and the Tribe in a quandary regarding the issue of whether or not they wish to appeal this denial of a class action certification. The Court should grant relief from this Order pending issuance of its further written order regarding the basis for its March 29, 2002 Order.

FED. R. CIV. P. 59(e) authorizes this Court to alter or amend a judgment after its entry. The rule has also been interpreted to allow a motion to vacate a judgment rather than merely to amend it. *E.g., Foman v. Davis,* 371 U.S. 178 (1962). *See also* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIV. 2D, § 2810.1. There are four basic grounds on which a Rule 59(e) motion will be granted, which include motions filed under Rule 59(e) to prevent manifest injustice and is the ground most applicable to the present circumstances of this case. *See Id. and n. 17.*

FED. R. CIV. P. 60(b) provides an alternate remedy to address situations where an order or judgment should be changed or vacated to present manifest injustice. Pursuant to FED. R. CIV. P. 60(b), "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation for the judgment."

The United States and the Tribe seek such relief from the Court's Order of March 29, 2002, until such time as the Court issues its "further written order explaining the reasons for its decision."

Minutes of the Court at 2. It would be manifestly unfair and unjust to force or expect the United States or the Tribe, or indeed any other party, to treat an Order such as this one, as an order granting or denying a class action certification for purposes of FED. R. CIV. P. 23(f).

Under Fed. R. Civ. P. 23(f), the "court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order." A determination to seek such an appeal must be made by the respective lawyers in this matter in conjunction with and following consultation with their respective clients -- the Bureau of Indian Affairs of the United States Department of the Interior and the Tribe. Moreover, the United States must brief and obtain the concurrence for any such appeal from the Office of the Solicitor General. Since the Court has deferred stating its reasons for the Order of March 29, 2002, the United States and the Tribe are unable to assess this opinion to determine what, if any, portions of this ruling they wish to appeal or to conduct any meaningful consultation with their clients and decision-makers.

Further, in contrast to a notice of appeal, which generally consists of a short paragraph and automatically invokes the court of appeals' jurisdiction, a petition for permission to appeal has to persuade the court of appeals to take jurisdiction and must include substantive argument, which of necessity needs to address the district court's reasoning. *See* FED. R. APP. P. 5(b) (requiring a petition

for permission to appeal to identify the question to be presented as well as "the reasons why the appeal should be allowed . . . .").

We doubt that the Court would have intended that the determination stated in its Minutes of the Court be treated in such a manner. This action clearly creates manifest injustice for the United States and the Tribe. Consequently, the United States and the Tribe seek relief from the Court's Order and ask that the Court alter or amend the Order of March 29, 2002, to clarify that it is not a final Order for purposes of any appeal until the Court has issued its promised written opinion. In the alternative, the Court should vacate the Order of March 29, 2002, until it issues the supporting written opinion.

C. This Court should alter, amend or vacate its Order because of manifest errors of law or fact.

The United States and the Tribe reiterate their arguments in all of their pleadings related to the Joint Motion for Certification. We assert that the Report and Recommendation, which is the only written judicial basis that sets forth any judicial basis for denial of the class certification sought here, is based upon manifest errors of law or fact. Such assertions constitute a basis for the filing of a motion pursuant to FED. R. CIV. P. 59(e) or FED. R. CIV. P. 60(b). *See* WRIGHT & MILLER at § 2810.1.

There should be little question here that the proposed certification of defendant classes satisfies the numerosity requirement of FED. R. CIV. P. 23(a). While the Magistrate has acknowledge that there are a "substantial number of potential plaintiffs . . . here," Report and Recommendation at 7, he determined that joinder of all parties was not impractical "[i]n light of the geographic concentration and

the resources available to Plaintiffs to identify members of the proposed classes." *Id.* This determination cannot be supported.

First, the geographic location of potential defendants is only one factor to consider for this determination and must be considered on a case by case basis. *Hernandez v. Alexander*, 152 F.R.D. 192, 194 (Nev. 1993) (proposed class of 52). Other relevant 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 glossed over these factors. Nor too should the Court.

Second, the Magistrate concluded incorrectly that "[p]otential defendants are all located throughout the Walker Lake [sic] Basin." Report and Recommendation at 7. Throughout the long and endless effort of Mineral County to identify and serve persons and entities that appear to fit within Category 3(a) of the CMO, it has been clear that many of these persons and entities do not live in the Walker River Basin. *See, e.g., Response to Request for Status Conference at 2, No. C-1250C*

(Oct. 5, 2001). This fact was also confirmed by the efforts of the United States and Tribe to identify the members of the various Category 3 defendants. *Affidavit of Dennis Becker* ¶ 4 (Oct. 23, 2001) ("Becker Oct. 2001 Aff.") (Objection, Exhibit 1). *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.

D. <u>This Court should alter, amend or vacate its Order because of newly discovered or previously unavailable evidence.</u>

The supplemental filings of the United States and the Tribe in this matter make clear that the potential numbers of defendants in this matter are higher than earlier estimates, which constitutes newly discovered or previously unavailable evidence. Such assertions constitute a basis for the filing of a motion pursuant to FED. R. CIV. P. 59(e) or FED. R. CIV. P. 60(b). *See* WRIGHT & MILLER at § 2810.1.

The Supplemental Filing to Objection and affidavit of paralegal Dennis Becker, ("Jan. 8, 2002 Aff."), provided the Court with additional information regarding the potential numbers of persons and entities within the Nevada sub-basin domestic groundwater user group identified in CMO category 3(c). The supplemental affidavit demonstrates that the number of persons and entities who would be potential defendants in this case, based in whole or in part on their status as domestic users of

groundwater, is higher than prior numbers and estimates reported to the Court. As stated previously, we anticipated that the numbers of potential defendants would increase because the work on identifying potential defendants was ongoing and several sources of information had been located but not reviewed in depth. *E.g.*, Objection at 7. Mr. Becker's supplemental affidavit confirms these prior statements. Further, as set forth in his affidavit, this work remains ongoing and even the current numbers will increase. Thus, the numerosity factor of the determination whether to certify defendant classes is even higher than previously indicated..

Indeed, as of January 2002, the United States has identified 1514 domestic well owners. Jan. 8, 2002 Aff. ¶ 4. For 1137 well owners of this total, no other water rights claims had been identified *Id.* This total also includes 598 domestic well owners identified from Mr. Becker's ongoing review of the February 2001 Lyon County Assessors Office list of property owners in Lyon County. *Id.*

Mr. Becker had been in the process of reviewing the February 2001 Lyon County Assessors Office list of property owners in Lyon County. *Id.* ¶¶ 5-7. This list identifies 6,120 parcels and identifies parcels with domestic wells. *Id.* ¶ 5. As of January 2002, Mr. Becker had reviewed approximately 37% of the Lyon County list and identified 598 persons and entities whose status as domestic users of groundwater was not previously known to him. *Id.* ¶ 6. Of this number, he had already identified 187 persons and entities because he had already identified them as holders of water

rights claims under other categories in the CMO. *Id.* However, 411 of these persons and entities were not previously known to him. *Id.*

Thus, as of January 2002, Mr. Becker had identified 1514 persons and persons and entities who would be included in this case as defendants under category 3(c) of the CMO as domestic users of groundwater. *Id.* ¶ ¶ 4, 8. Moreover, Mr. Becker estimated that at this rate, his review of the Lyon County list could add approximately an additional 1,100 additional domestic users of groundwater to the numbers of potential defendants within that portion of category 3(c) of the CMO for which we seek class certification. *Id.* ¶ 7. Therefore, at that point, he estimated that there could be at least 2,600 persons and entities who are domestic users of groundwater and would be among the defendants to be served in this action. *Id.* ¶ 8. Clearly, there are significant numbers of potential persons and entities that the Court has ordered to be served in this matter, which is significant new information in this case.

CONCLUSION

Wherefore, for the above reasons and such other reasons that may appear to the Court, the United States and Tribe request that this motion be granted.

Date: 4/5/02

Respectfully submitted,

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