UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, 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-B

O R D E R

I. PROCEDURAL HISTORY

The United States of America (hereinafter "United States") and the Walker River Paiute Tribe (hereinafter "the Tribe") filed a motion for class certification on May 4, 2001 (#142). The State of Nevada opposed (#150) on June 14, 2001, as did the Walker River

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Irrigation District (#151) on June 18, 2001. The United States and the Tribe replied (#158) on August 3, 2001.

The magistrate judge issued his report and recommendation (#164) on September 13, 2001. The magistrate judge recommended that the motion for certification be denied.

The United States and the Tribe filed objections (#167) on October 26, 2001, and the Walker River Irrigation District filed points and authorities in reply (#169) on November 30, 2001. We issued our order (#172) denying the motion. This memorandum sets forth our explanation of our decision in that order.

II. BACKGROUND

In this order we consider the motion on behalf of the United States and the Tribe to certify two defendant classes. The classes come from categories we established in our case management order (#108). The first proposed class consists of members of category 3(a): successors in interest to all water rights holders under the decree of 1936. The second proposed class consists of members of category 3(c) who hold permits or certificates to pump groundwater in sub-basins 107, 108, 110A and 110B in the Walker River basin.

In our case management order we also established various phases for the case. We required that at the outset of the litigation concerning the United State and the Tribe's

counterclaims, the magistrate judge would determine a list of threshold issues. These issues would include, among others, jurisdiction, claim preclusion, applicable law, and any defenses which may apply. We designated these threshold issues as "Phase I." The remainder of the case would involve the determination of the merits of all matters relating to the claims of the United States and the Tribe. These we refer to as the "Phase II" issues. Part of the Phase II issues involve declaratory and injunctive relief; the United States and the Tribe seek a declaration of their rights to water in the Walker River and an injunction preventing the other water right holders from claiming and using the water.

The United States and the Tribe seek to certify classes consisting of category 3(a) and the specified members of category 3(c) for the purposes of determining the Phase I threshold issues and the Phase II injunctive and declaratory issues.

A. Review of Report and Recommendation

Certification of a class action falls within the category of cases that a magistrate judge does not have the authority to determine. 28 U.S.C. § 636 (b)(1)(A); Langley v. Coughlin, 715 F. Supp 522, 529 (S.D.N.Y. 1989). In these cases, the magistrate judge may issue proposed findings of fact and recommendations for disposition. 28 U.S.C. § 636 (b)(1)(B); Fed. R. Civ. P. 72(a);

Langley, 715 F. Supp. at 529. When objections are filed " [A] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations as to which objection is made." 28 U.S.C. § 636(b)(1).

In our case, the United States and the Tribe made three objections to the report and recommendation: (1) the determination that the United States and the Tribe had not met the numerosity requirement of Fed. R. Civ. P. 23(a); (2) the determination that the United States and the Tribe could not satisfy any of the subsections of Fed. R. Civ. P. 23(b); and (3) the final recommendation of the magistrate judge denying class certification. We review de novo the determination of numerosity, the determination under Fed. R. Civ. P. 23(b), and the final conclusion of the magistrate judge. Although we do not have to review the remainder of the report and recommendation, Thomas v. Arn, 474 U.S. 140, 149-152 (1985), we do so because the rights at stake in this case are extremely important.

III. ANALYSIS

Class certification under Fed. R. Civ. P. 23 requires the United States and the Tribe to demonstrate that their proposed classes meet the four requirements of Fed. R. Civ. P. 23(a) and then satisfy the requirements of one of the three parts of 23(b).

Mantolete v. Bloger, 767 F.2d 1416, 1424 (9th Cir. 1985). The district court has the discretion to grant or deny class certification. Local Joint Exec. Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir. 2001); SP/4 A.R. Montgomery, IV v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978) (stating that grant or denial of class certification is a "matter within the discretion of the trial court"); cf. Califano v. Yamasaki, 442 U.S. 682, 701 (1978) (holding that if the district court had jurisdiction to hear a case under section 205(g) of the Social Security Act, it also had the discretion to certify a class). The determination of class certification "does not permit or require a preliminary inquiry into the merits." Hernandez v. Alexander, 152 F.R.D. 192, 194 (D. Nev. 1993). However, it is our job to conduct a "rigorous analysis" to determine whether the requirements of Fed. R. Civ. P. 23 have been met. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982).

A. Fed. R. Civ. P. 23(a)

There are four requirements of Fed. R. Civ. P. 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will fairly and

adequately protect the interest of the class. We address each in turn.

1. Numerosity

A class may be certified only if it is "so numerous that joinder of all members is impracticable." Impracticable does not mean impossible. Hum v. Dericks, 162 F.R.D. 628, 633-34 (D. Haw. 1995); In re Activision Sec. Litg., 621 F.Supp 415, 433 (N.D. Cal. 1985). The standard is satisfied if there is great difficulty and inconvenience in joining all of the members of the proposed class. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14 (9th Cir. 1964). Determination of numerosity is fact specific and there are no absolute limitations. General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 330 (1980). The court may consider a number of factors in its numerosity analysis, such as "class size, ease of identification of members of the proposed class, geographic distribution of the class members, and the ability of the class members to pursue individual actions." Olden v. LaFarge Corp., 203 F.R.D. 254, 268 (E.D. Mich. 2001) (quoting Kriger v. Gast, 197 F.R.D. 310, 314 (W.D. Mich. 2000)). Further factors for consideration include "the nature of the relief sought, the ability of the individuals to pursue their own claims, the practicality of forcing relitigation of a common core of issues, and administrative difficulties involved in interpretation

and joinder." Rosario v. Cook County, 101 F.R.D. 659, 661 (N.D. Ill. 1983).

The United States and the Tribe present four main arguments as to why joinder is impracticable: (1) there are a large number of parties in class 3(a) and the class 3(c) sub-basins; (2) the parties are geographically dispersed; (3) the parties are actively resisting service of process; and (4) the United States and the Tribe are having difficulty identifying the water rights holders.

In addition to the factors presented by the United States and the Tribe we also consider the administrative difficulties in joinder. Our decision on the factors to consider is guided by an analysis of the factors that are most applicable to defendant class actions, as opposed to those that appear to be applicable to plaintiff class actions.

The United States and the Tribe have identified over 1,000 people who would fit into the 3(a) category, and over 1,000 people who would fit into category 3(c). Based upon numbers alone this case fits the numerosity requirement. However, numbers alone are not dispositive of the numerosity factor. Hum, 162 F.R.D. at 634.

The United States and the Tribe have noted that although the water rights exist only in a few valleys, the water rights holders, those who must be served, are geographically dispersed. It is not exactly clear what percentage of the water rights

holders reside outside of the valleys, but it is clear that the water rights holders are geographically dispersed. This factor makes it more "impracticable" to join all of the parties.

The court does not find persuasive the arguments that service will be difficult, because certain water rights holders are actively resisting service of process. Defendants never want to be served, especially in a case like this where the outcome of the litigation may very well be a reduction or elimination of their water rights. We recognized this difficulty when we noted in the case management order that after the United States and the Tribe attempted service of process they could apply for service by publication pursuant to Fed. R. Civ. P. 4. This would take care of the problems with those defendants who actively resist service.

We have recognized that there are difficulties with the identification of water rights holders on the Walker River. In our order denying the motion to require a list of current water rights holders in C-125 we stated our understanding of the frustrations of identifying all of the parties and accomplishing service, instead of focusing on the merits. However, we believe that the United States and the Tribe would have a less difficult time with identification, joinder, and service than has faced Mineral County.

As demonstrated by all of the motions, the United States and

the Tribe have a paralegal, Mr. Becker, devoted to the review and identification of the water rights holders who must be joined in this action. Currently Mr. Becker has identified over 2,000 water rights holders for this case. His methods appear to be effective in identifying those parties who must be joined. In addition, the United States and the Tribe also have the resources of the United States government to aid in the actual service of process. Therefore, we are not persuaded by a comparison of the situation in the Mineral County case.

We find that the United States and the Tribe have satisfied the numerosity requirement. Even though it is possible to identify, join, and serve all of the water rights holders, the large number of parties, and their geographic disbursement make joinder of all members impracticable.

2. Commonality

The United States and the Tribe must demonstrate at least one question of law or fact common among the class. Blackie v. Barrack, 524 F.2d 891, 904 (9th Cir. 1975) (stating that the standard for commonality is minimal because only one common issue of law or fact is required). The magistrate judge found that issues of law or fact were common, as set forth in the case management order. We agree. The Phase I threshold issues present questions of law that will apply to all parties. The United States

and the Tribe have demonstrated the commonality factor.

3. Typicality

The claims and defenses of the class representative must be typical of the class. However, they do not need to be identical. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

The typicality factor should be construed broadly, and exists to ensure that interests of the named representatives are aligned with the rest of the class members. International Molders and Allied Workers Local Union No. 164 v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983). Defenses are typical if they "stem from a single event or are based on the same legal or remedial theory." Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982). The court considers the nature of the defense, not the specific facts from which the defense arose. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

The Walker River Irrigation District and the State of Nevada both argue that their defenses are not typical of the class. The magistrate judge found that with respect to the Phase I, the defenses of the Walker River Irrigation District and the State of Nevada would be typical of the class. We disagree as to the State of Nevada, but agree as to the Walker River Irrigation District.

The United States and the Tribe proposed the State of Nevada as the class representative for the domestic well users. Although

there are common questions of law and fact between the State of Nevada and the domestic well users, the State of Nevada will not have typical claims and defenses. The state's focus will be on its decreed rights on the Walker River and its permit to flood waters in Walker Lake. The claims and defenses for these surface water rights differ significantly from the claims and defenses of domestic well owners who rely on groundwater.

The United States and the Tribe proposed the Walker River Irrigation District as the class representative for those parties who are successors in interest to the decreed rights on the Walker River. Although the Walker River Irrigation District is not an irrigator, it appears that its claims and defenses would be typical of the class. The District does hold water rights on the Walker River for various purposes, even though it is not a direct irrigator. It appears that the claims and defenses that the District would put forth would be typical of those of other water rights holders on the Walker River; the claims and defenses would flow from the fact that the party possessed a water right, and the specific end use of the water would not affect the claims and defenses.

We find that the State of Nevada would not have typical claims and defenses, and, therefore, is not an appropriate class representative. We find that the Walker River Irrigation District

would have typical claims and defenses. If the United States and the Tribe can satisfy the remainder of the Fed. R. Civ. P. 23 requirements for their proposed class, the Walker River Irrigation District could be the class representative.

4. Adequacy of Representation

There are two main qualifications for the class member to adequately represent the class: the class representative must have a sufficient interest in the outcome of the case to ensure that they vigorously defend the actions, and the class representative may not have interests in conflict with those of the other members of the class. Mego Financial Corp. Sec. Litg v. Nadler, 213 F.3d 454, 462 (9th Cir. 2000); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). A court will consider a conflict to defeat a class only when that conflict is at the heart of the case. Blackie, 524 F.2d at 909; Winkler, 205 F.R.D. at 242. The class representative does not have to have identical interests with those of the class.

The magistrate judge found that the proposed representatives, the Walker River Irrigation District and the State of Nevada, would not have any conflicts with the class as a whole that would prevent them from serving as the class representatives. We agree. The defendants share a common goal; to ensure that the United States and the Tribe do not acquire any more water rights. While

the individual interests may be different, the Walker River Irrigation District and the State of Nevada do not have conflicting interests with the rest of the class members.

In sum, we find that the United States and the Tribe have satisfied their burden of demonstrating that the proposed class of the successors in interest under the decree meet the tests of Fed. R. Civ. P. 23(a). However, we find that the United States and the Tribe have not met their burden with respect to the proposed class of the domestic well owners, because they have failed to demonstrate that the State of Nevada would have claims and defenses typical of the class.

B. Fed. R. Civ. P. 23(b)

The United States and the Tribe must also demonstrate that their proposed class fits under one of the three subsections of Fed. R. Civ. P. 23(b). Mantolete v. Bloger, 767 F.2d 1416, 1424 (9th Cir. 1985).

1. 23 (b)(1)

Fed. R. Civ. P. 23(b)(1)(A) allows a class action when separate actions may result in adjudications that would result in "incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(B) allows a class action when separate actions could prevent non-party class members from adequately protecting their interests.

The magistrate judge found that subpart(b)(1) did not apply to this case because there can be no other adjudications: all parties and claims to the Walker River that could be impacted by the claims of the United States and the Tribe must be joined in this action. This is the correct conclusion. Therefore, a class action cannot be certified under (b)(1).

2. 23(b)(2)

There is great dispute over whether Fed. R. Civ. P. 23(b)(2) can be used for defendant class actions. See e.g. David H. Taylor, Defendant Class Actions Under Rule 23 (b)(2): Resolving the Language Dilemma, 40 U. Kan. L. Rev. 77 (1991); Angelo N. Ancheta, Defendant Class Actions and Federal Civil Rights Litigation, 33 UCLA L. Rev. 283 (1985); Scott Douglas Miller, Certification of Defendant Class Actions Under Rule 23(b)(2), 84 Colum. L. Rev. 1371 (1984).

The literal reading of the rule seems to indicate that the rule is only applicable to plaintiff class actions. This interpretation has been followed by some circuits. Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir. 1987); Thompson v. Board of Educ., 709 F.2d 1200 (6th Cir. 1983); Paxman v Campbell, 612 F.2d 848 (4th Cir. 1980). Other circuits have determined that the rule may be applied to certify either a plaintiff or a defendant class, notwithstanding the rule's specific language. Brown v.

Vance, 637 F.3d 272 (5th Cir. 1981); Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979) vacated on other grounds sub nom Lombard v. Marcera, 442 U.S. 915 (1979).

The magistrate judge denied certification on the basis that the rule only provides for plaintiff class actions under (b)(2). However, the Ninth Circuit has recognized a defendant class action under Fed. R. Civ. P. 23(b)(2) in a case involving a lawsuit brought by Indians seeking hunting and fishing rights on property owned by Simpson Timber Co. Blake v. Arnett, 663 F.2d 906, 912 (9th Cir. 1981). The timber company sought class certification to determine whether the tribal members had the right to hunt and fish on its land. Id. The district court certified a class of cross-defendants for this purpose. Id. The Ninth Circuit affirmed the creation of the class under Fed. R. Civ. P. 23(b)(2) stating "Simpson's position is the same as to all of them so that final injunctive or declaratory relief is appropriate with respect to the class as a whole." Id. at 912-13.

Even though the Ninth Circuit has affirmed the use of Fed. R. Civ. P. 23 (b)(2) for defendant class actions, the within case does not qualify. The threshold issues involve questions of applicable law, jurisdiction and defenses to the claims of the United States and the Tribe, not issues of injunctive and declaratory relief. The United States and the Tribe are not

asking for primarily injunctive or declaratory relief, even though that is part of their claims in Phase II. The heart of the litigation is their desire for additional water from the Walker River. See e.g. Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 564 (2d Cir. 1968) (stating that "subsection b(2) was never intended to cover cases. . . where the primary claim is for damages") Therefore, the class cannot be certified under subsection (b)(2).

3. 23(b)(3)

Under Fed. R. Civ. P. 23(b)(3) a class may be certified if common questions of law or fact predominate, and the class action is the superior method of adjudicating the case.

a. Predominance

In order to maintain a class action the common issues must predominate over individual issues. Amchem Prods v. Windsor, 521 U.S. 591, 623 (1997). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. The inquiry under the predominance test focuses on the relationship between the common and individual issues. Local Joint Exec. Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001).

It does not appear that common issues predominate over individual issues. The threshold issues involve determinations of what law to apply to the interaction of groundwater and surface

water. There are three possible groups of defendants: those who possess both groundwater and surface water rights, those who possess only groundwater rights, and those who possess only surface water rights. Each group will have different issues that will be important. The positions of the defendants are likely to come from the individual water rights they hold, not from the categories of service that the court required.

b. Superior Method

Superiority requires that the class action be superior to other methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); Lienhart v. Dryvit Sys. Inc., 255 F.3d 138, 147 (4th Cir. 2001). In the consideration of superiority the court should take into account factors such as conserving time, effort and expense. Nicodemus v. Union Pac. Corp., 204 F.R.D. 479, 493 (D. Wy. 2001); see also Talbott v. GC Serv. Ltd. Partnership, 191 F.R.D. 99, 106 (W.D. Va. 2000) ("Efficiency is the primary focus to determine if a class action is the superior method . . . the court looks to judicial integrity, convenience, and economy.") We agree with the conclusion of the magistrate judge that the potential class action must be measured against the process set out in the case management order for adjudication of the claims. We consider the four factors of Fed. R. Civ. P. 23(b)(3) in our determination as to whether the class action is superior. We are not limited to

these factors, and we also take into account the unique nature of this case in our determination. In our consideration of the factors our focus is on the efficiency and economy elements. Winkler v. DTE Inc., 205 F.R.D. 235, 244 (D. Az. 2001).

Some of the 23(b)(3) factors are not applicable in this case. For example, 23(b)(3)(B) deals with other litigation that has already commenced, and 23(b)(3)(C) deals with the desirability of concentrating the claims in a single forum. Our case management order requires that parties and claims to the Walker River that could be impacted by the claims of the United States and the Tribe be joined in this action.

The United States and the Tribe argue that a class action would be beneficial for the preliminary claims and the declaratory relief for the following reasons: (1)the process would move faster with fewer attorneys; (2) the United States and the Tribe would simply have to provide all of the parties with notice, they would not have to serve all of the individuals at this time; and (3) the individual defendants would have the ability to decide for themselves how to proceed with the litigation.

(1) Fewer Attorneys

The United States and the Tribe argue that with fewer attorneys the time to determine the threshold issues would be less, and the case would quickly move on to the determination of the substantive

claims of Phase II.

Although there are benefits to creating two classes of defendants for this portion of the case, the class action is not a superior method. It may speed up the preliminary claims. However, in terms of the overall case, we do not see that certifying these classes would be a more efficient or economical way to proceed with the litigation. First, there would still be the additional individuals remaining in category 3(c), as well as the numerous individuals in 3(d) who own wells. The same problems with identification, joinder, and service would apply to them. Second, we are also persuaded by the argument, albeit not fully briefed, that there is overlap among these classes, and many of the parties would have to be served anyway. Third, we anticipate great difficulty in the management of the class action. Fed. R. Civ. P. 23(b)(3)(D). Judging by the way this litigation has proceeded we foresee an additional extensive phase of litigation relating to the class action. For example, we predict the parties would litigate about type of notice provided, the selection of the class representative, the opt-out provision, and future litigation about the adequacy of the representation. See Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996) (stating that the manageability factor includes "the whole range of practical problems that may render the class action format inappropriate for a

particular suit").

(2) Elimination of Service of Process

We find it very persuasive that our case management order requires all of the parties to be served before determinations are made as to their water rights. Strangely, it seems that the way the class action device would be superior is if the United States and the Tribe were to receive no benefit from the preliminary issues and the declaratory relief. If the United States and the Tribe do receive some relief at the preliminary stage, as we suspect they may, they will be required to join and serve all of the individuals claiming water rights as identified in our case management order. Delaying service of process until after the threshold issues were determined would in the end not alter the time spent in litigation.

(3) Defendants may Opt-Out and determine how they wish to proceed

The United States and the Tribe also argue that the class action is superior because it gives the defendants in the proposed classes the ability to determine the way that they wish to proceed in the case: they can either remain in the class, if they feel that their interest is too small to justify the expense of retaining a private attorney, or they may opt out if they feel that their interests require more attention that would be given by the class representative.

The United states and the Tribe argue that this benefit ties in with the opt-out provision. A class that is certified under Fed. R. Civ. P. 23(b)(3) requires notice to all class members and an opportunity for them to opt out of the class. Those who opt out must be served personally.

The magistrate judge found that the opt out provision would not be a reason that the class action would be superior. We agree. The main argument of the United States and the Tribe is that it would be easier to identify and serve those who opt out. The opt out provision was not designed to be a way to identify parties in order to effect service. We do not believe having many people opt out would make the class action a superior method of proceeding with this case. In addition, we feel that if the defendant members thought their interests would be best protected by a class, they would have moved to certify a class action.

We are also persuaded that the class action is not the superior method by the fact that the determination of the preliminary issues would not be the end of our inquiry, but rather the start of a long process. See Doe I v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 478 (N.D. Ill. 1992) (holding that the common questions do not have to dispose of the entire action, but they should "provide a definite signal of the beginning of the end"). These preliminary issues are just that, preliminary. We anticipate that the majority of this

litigation will be spent determining the water rights, if any, of the United States and the Tribe. See Wright v. Fred Hutchinson Cancer Research Center, 2001 WL 1782714, *4 (W.D. Wash. 2001) (stating that because there would be a point where the class litigation would give way to individual litigation "under these circumstances, there are just too many individual issues for the court to manage for class adjudication to be deemed superior").

Overall, requiring the United States and the Tribe to identify, join, and serve all of the parties in the case before proceeding to the threshold issues would prevent future litigation, and will promote judicial economy. Therefore, a class action will not be a superior method.

We conclude that the United States and the Tribe have not met their burden of demonstrating that their proposed classes fit under any of the subsections of Fed. R. Civ. P. 23(b).

IV. CONCLUSION

The parties have spent considerable time and resources on purely procedural issues. The determination of these questions is important, and we have undertaken the required "rigorous analysis" in our consideration of whether a class action would be appropriate in this case. The United States and the Tribe have carried their burden of satisfying the requirements of Fed. R. Civ. P. 23(a) as to the Walker River Irrigation District, but not as to the State of

Nevada. However, the United States and the Tribe have not been able to demonstrate that the proposed classes fit under any of the Fed. R. Civ. P. 23(b) categories.

IT IS THEREFORE HEREBY ORDERED THAT, our previous order (#172) is confirmed and re-entered.

IT IS THEREFORE HEREBY FURTHER ORDERED THAT, the report and recommendation of the magistrate judge (#164) is adopted and approved to the extent set forth above.

IT IS THEREFORE HEREBY FURTHER ORDERED THAT, the motion by the United States and the Tribe for certification of two defendant classes (#142) is **DENIED**.

DATED: April 26, 2002.

Edward C. Reed.

UNITED STATES DISTRICT JUDGE