FRANKIE SUE DEL PAPA
Attorney General
MARTA A. ADAMS
Senior Deputy Attorney General
Nevada State Bar #1564
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) 684-1237
Facsimile: (775) 684-1103
Attorneys for Nevada Division of Wildlife

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

FILED
02 JUN 10 PM 2:16
BY
DEPUTY CLERK

STATE OF NEVADA'S OPPOSITION TO THE 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 OR FOR RELIEF FROM THIS SAME ORDER

The State of Nevada, through the Nevada Division of Wildlife (alternatively, Nevada or NDOW), hereby opposes the motion filed by the United States of America (United States) and the Walker River Paiute Tribe (Tribe) to alter, amend, or vacate this Court's Order of April 29, 2002, pursuant to FED. R. CIV. P. 59(e) or, alternatively, pursuant to FED. R. CIV. P. 60(b) (hereafter Rule 59(e) and Rule 60(b)). This Court's Order of April 29, 2002 (Order) denied the motion filed by the United States and the Tribe seeking certification of two defendant classes and to designate Nevada and the Walker River Irrigation District (WRID) as representatives for these defendant classes. Now, the United States and the Tribe are seeking to alter, amend, or vacate the Order.

////

185

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

For purposes of this opposition and as set forth below, Nevada reiterates its opposition to Nevada being designated the class representative for domestic groundwater users in specified sub-basins of the Walker River Basin. Pursuant to the Order, based on the requirements of Rule 23 of the Federal Rules of Civil Procedure, Nevada's claims and defenses are not typical of the claims or defenses of the proposed class of domestic groundwater users. Further, Nevada is not equipped to fairly and adequately protect the interests of other domestic groundwater users in Nevada. Although NDOW does in fact utilize a domestic well at the Mason Valley Wildlife Management Area, there is no genuine commonality of interests between NDOW and other domestic users of groundwater sufficient to support designation of Nevada as the class representative under Rule 23.[1] In addition, none of the wells held by State of Nevada entities identified by the Tribe and the United States are domestic in character and the existence of the State's wells does nothing to change the fact that Nevada is participating in this litigation as a water right owner of decreed and permitted water rights.

As the following arguments articulate, the United States and Tribe have failed to meet the requirements of either Rule 59(e) or Rule 60(b). The original joint motion seeking to require that Nevada should be the designated representative for the proposed defendant class of domestic groundwater users was properly denied and the Court's Order should stand.

POINTS AND AUTHORITIES

A. Introduction.

Despite the United States' and the Tribe's latest claims that the Court's Order "works to deny the Tribe its constitutional right of access to the courts," the simple fact remains that the United States and the Tribe are the entities legitimately responsible for service of process of their claims to additional Walker River water on those prospective parties who stand to be affected by the Court's adjudication of these claims. *See* United States' and Tribe's Memorandum at 16. Admittedly, service of process on the numerous Walker River water users presents a significant challenge for the United States and the Tribe. Still, regardless of the procedural challenges presented by service, the United States and the Tribe have

[1] No other Nevada agency, including the Division of Water Resources, regulates domestic well owners or has possession of comprehensive information as to the identity of these people. Although the State Engineer, through the Nevada Division of Water Resources, maintains well drillers' logs, there is no relationship between the well drillers' logs and a comprehensive list of domestic groundwater users in the Nevada portion of the Walker River Basin.

chosen to embark on this litigation which will, eventually, reach the substantive issue of whether the Tribe and the United States are entitled to more water on a system which is unable to meet the demands currently placed on it. As the Court succinctly stated, "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." Order at 22. To the extent proper service of process is effected on appropriate parties, future litigation concerning an ultimate decision by this Court is circumscribed and judicial economy is achieved.

B. The Court's Order Contains No Manifest Errors of Law or Fact Nor Does It Cause Manifest Injustice.

There are four bases upon which a Rule 59(e) motion may be granted: (1) to correct errors of law or fact upon which the judgment is based, (2) to present newly discovered evidence, (3) to apply an intervening change in the law, or (4) to prevent manifest injustice. *McDowell v. Calderon*, 197 F.3d 1253 n.1 (9th Cir. 1999). Of these criteria, the Tribe and the United States argue that the Order should be vacated due to manifest errors of law or fact and to prevent manifest injustice. *See* United States' and Tribe's Memorandum at 5. The United States and the Tribe also contend that Rule 60(b) provides an alternate remedy requiring that the Order should be changed or vacated to prevent manifest injustice as evidenced by an abuse of discretion by the Court. *Id.*

Here, because the denial of class certification contains no clear error of law or fact, the motion under Rule 59(e) should be denied. Although the United States and the Tribe claim to be at a gross disadvantage due to the numbers of potential defendants, the Court correctly determined that the government and the Tribe have adequate resources, including a full-time paralegal, to accomplish service of process.

Likewise, relief from the Order should not be granted under Rule 60(b)(6). Rule 60(b)(6) motions always require "extraordinary circumstances" justifying relief. *McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985) (affirming denial of plaintiff's motions under 60(b)(6) because his case met none of the exceptions); *see also Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (holding that trial court's denial of motion for reconsideration was valid absent applicability of Rule 60(b) exceptions). Here Rule 60(b)(6) does not apply because the United States and the Tribe

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

have failed to show the extraordinary circumstances required for relief. *See United States v. Alpine Land and Reservoir Co.*, 984 F. 2d 1047, 1049 (9th Cir. 1993) ("The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.").

The Tribe and the United States provide an attachment identifying certain wells owned by the State of Nevada. The Tribe and the government argue that because Nevada owns wells in the Walker River Basin, Nevada's "interests should also include claims and defenses that would be typical of other groundwater users in Category 3(c), such that it would, indeed, be an appropriate class representative."[2] *See* Memorandum In Support of Joint Motion at 6. Despite this attempt to inject "new" facts, the truth is that none of these wells are domestic.

As the Court determined, Nevada's interests and reasons for participating in this litigation are solely to protect its decreed and permitted water rights in the Walker River and Walker Lake. Nothing advanced by the Tribe and the United States changes the fact that Nevada is not in a position to capably defend the interests of Category 3(c) groundwater users. That the class would be decertified after the threshold issues are addressed does nothing to change the inappropriateness of designating Nevada to be the groundwater class representative if it is ultimately determined that a groundwater class should exist.

C. Nevada's Claims and Anticipated Defenses Are Not Typical of Those Claims and Defenses of Other Domestic Well Owners.

Unlike the proposed class of domestic groundwater users, NDOW is the single largest decreed water right holder on the Walker River. In addition, NDOW holds a permitted water right to flood waters in Walker Lake. As this Court determined, these are the interests which form the basis for Nevada's participation in this litigation rather than the incidental fact that NDOW also has a single domestic well. Similarly, the wells held by other agencies of the State of Nevada do not change Nevada's role in this litigation. Despite the United States' and the Tribe's proposal to create a

////

////

[2] In the final column of the Attachment under the designation Proposed Use are the uses of the wells. As described in the Code Definitions, attached hereto as Exhibit A, all of the Nevada wells are for either aquaculture or monitoring rather than domestic use.

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

defendant class of all those individuals and entities with a right to use groundwater for domestic purposes in sub-basins 107, 108, 110A, and 110B in the Walker River Basin in Nevada, there are few, if any, "typical" claims or defenses which Nevada shares with other domestic groundwater users.

As the largest decreed water right holder in the Walker River and the only party with water rights in Walker Lake, questions of law and fact relative to Nevada's interests are unique to itself and certainly cannot be considered "typical" for purposes of Rule 23. Even before reaching the merits of the United States' and the Tribe's claims, it is clear that to the extent the tribal claims to additional water may impact Nevada's water rights, the impact is vastly disproportionate to the impact experienced by any other domestic groundwater user. Unlike other domestic users of groundwater, Nevada, by virtue of its decreed water rights, is in a position to claim a priority on water as determined by the Walker River Decree. This fact alone places Nevada in a unique position dissimilar to other domestic groundwater users and prevents Nevada from participating in this litigation in a manner consistent with the best interests of domestic groundwater users.

In the instant case, priorities among decree holders along the Walker River are different from each other and are clearly distinguishable from any protectible interests that may or may not exist for domestic users of groundwater. To the extent that domestic groundwater users are potentially impacted by the Tribal claims to water, variables such as proximity to the reservation and hydrology will be a factor. These factors, among others which may be "typical" to domestic groundwater users, may not assume a prominent role in Nevada's much larger claims or defenses in this case.

As argued previously, the state statutory scheme for the administration of groundwater expressly does not define the rights of domestic groundwater users. The permitting provisions of Nevada's groundwater law expressly do *not* apply to domestic well users. Because domestic groundwater users are exempt from the groundwater law, Nevada has no particular relationship with these users. *See* NRS 534.180. Nevada, through its Division of Wildlife, is present in this litigation on behalf of its proprietary interest in water and its role in the protection of wildlife.

D. Conclusion.

Based on the foregoing, Nevada respectfully submits that the Court should reject the United States' and the Tribe's motion to amend its Order. The Tribe and the United States have failed to

demonstrate a clear error of law or fact or that manifest injustice results from the Court's denial of class certification.

DATED this 10th day of June, 2002.

FRANKIE SUE DEL PAPA
Attorney General

By: Marta A. Adams

MARTA A. ADAMS
Senior Deputy Attorney General
Nevada State Bar #1564
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1237

Attorneys for Nevada Division of Wildlife

c:\documents and settings\pcuser\files\adams\wrid\opp class2.doc

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717

Code Definitions

Site Type

E	Existing (deepen)
N	New
P	Proprietary-new
Y	Proprietary-existing

Drilling Method

A	Air rotary
B	Bored or augered
C	Cable tool
D	Dug
H	Hydraulic Rotary-Mud
J	Jetted
P	Air percussion
R	Reverse rotary
T	Trenching
U	Unknown
V	Driven
W	Drive and wash
Z	Other (explain in remarks)

Work Type

D	Deepen
G	Geothermal
N	New
O	Other (exp rmks)
P	Plug or abandonment
R	Recondition
S	Replacement Well
T	Test

Proposed Use

A	Air conditioning	AC
B	Bottling	BOT
C	Commercial	COM
D	Dewater	DWR
E	Power	PWR
F	Fire	FIR
G	Monitoring Well	MON
H	Domestic	DOM
I	Irrigation	IRR
J	Industrial-cooling	IND
K	Mining	MM
M	Medicinal	MED
N	Industrial	IND
P	Public sup-municipal	MUN
Q	Auquaculture	AQC
R	Recreation	REC
S	Stock	STK
T	Institution	INS
U	Unused	UNU
X	Test Well	TST
Y	Desalination	DES
Z	Other (explain in remarks)	OTH

Test Method

A	Air lift
B	Bucket
C	Centrifugal pump
J	Jet pump
P	Piston pump
R	Rotary
S	Submergible pump
T	Turbine
U	Unknown
Z	Other (explain in remarks)

EXHIBIT A

CERTIFICATE OF MAILING

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of June, 2002, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

Gordon H. dePaoli, Esq.
Dale E. Ferguson, Esq.
Woodburn and Wedge
Post Office Box 2311
Reno, NV 89505

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

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

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

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

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

James Spoo, Esq.
Treva J. Hearne, Esq.
Zeh, Saint-Aubin, Spoo & Hearne
575 Forest Street, Suite 200
Reno, NV 89509

Linda Bowman, Esq.
540 Hammill Lane
Reno, NV 89511

Hank Meshorer
United States Department of Justice
Natural Resources Division
Ben Franklin Station
P.O. Box 7611
Washington, D.C. 20044

Pamela Young
Pamela Young

Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701-4717