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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 JOINT MOTION OF THE UNITED STATES AND 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**

I. INTRODUCTION.

The United States and the Walker River Paiute Tribe ("the Tribe") have brought a F.R.C.P. Rule 59(e) motion for reconsideration of this Court's April 29, 2002 Order denying class certification of two proposed classes of defendants. Alternatively, they seek relief from that Order under F.R.C.P. Rule 60(b)(6). Their Rule 59(e) motion, however, is an impermissible attempt simply to relitigate matters already determined by this Court .

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Furthermore, the United States and the Tribe make no attempt whatsoever to identify the "extraordinary circumstances" which justify relief under 60(b)(6). In truth, the motion appears to have been brought primarily to create the opportunity for the United States and the Tribe to slip in an untimely and inappropriate request that the Court now revise its previous rulings as to joinder and service of process.

II. THE RULE 59(E) MOTION OF THE UNITED STATES AND THE TRIBE TO ALTER, AMEND OR VACATE THE ORDER DENYING THEIR MOTION FOR CERTIFICATION OF DEFENDANT CLASSES MUST BE DENIED.

A. Standard of Review.

Rule 59(e) motions may be granted for any of four reasons: 1) to correct a manifest error of law or fact upon which the judgment is based; 2) to present newly discovered or previously unavailable evidence; 3) to prevent manifest injustice; and 4) to account for an intervening change in controlling law. McDowell v. Calderon, 197 F.3d 1253, 1255 fn. 1 (9th Cir. 1999) ; see also 11 Charles Alan Wright, Arthur Miller, and Mary Kay Kane, Federal Practice and Procedure §2810.1 (2d Ed.1995). Rule 59(e) motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment." Wright, Miller and Kane, supra; A party cannot have relief under Rule 59(e) merely because it is unhappy with the judgment. Kahn v. Fasano, 194 F.Supp.2d 1134, 1136 (S.D.Cal.,2001); see also, Durkin v. Taylor, 444 F.Supp. 879, 889 (E.D.Va. 1977) ("Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.") Rule 59(e) is intended to afford relief only in extraordinary circumstances, and not to routinely give litigants a second bite at the apple. See 389 Orange Street Partners v. Arnold, 179 F.2d 656, 665 (9th Cir. 1999); School District No. 1J. Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994); Novato Fire Protection District v. United States, 181 F.3d 1135, 1142, n. 6 (9th Cir. 1999). Rule 59(e) "offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.' " Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

The United States and the Tribe have brought their Rule 59(e) motion on two of the above grounds. They contend that the Court's denial of their class certification motion was based on "manifest errors of law or fact" and perpetuates a "manifest injustice." 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 or for Relief From This Same Order ("Memorandum"), pp. 4-5. Their argument, however, begins by "reiterating" all of the arguments in all their prior pleadings and never goes any further. Memorandum, p. 4. The United States and the Tribe "disagree" with the Court's decision but never identify any "manifest" error of law or fact or demonstrate any "manifest injustice." It is well established that " '[a] party seeking reconsideration must show more than a disagreement with the Court's decision, and "recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." ' " Bermingham v. Sony Corporation of America, Inc., 820 F.Supp. 834, 856-857 (D.M.J. 1992), aff'd, 37 F.3d 1485 (3d Cir. 1994). To succeed on a Rule 59(e) motion, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. See, e.g., Kern-Tulare Water District v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987). The United States and the Tribe have failed to do either. Their motion must be denied.

B. This Court Should Not Alter or Amend its Determination That the State of Nevada is Not an Adequate Class Representative for the Proposed Class of Domestic Groundwater Users.

The United States and the Tribe "disagree" with the Court's conclusion that the State of Nevada would not be an adequate class representative for the proposed class of domestic groundwater users. Memorandum, p. 5, lns. 16-17. The United States and the Tribe fail to substantiate their "disagreement," however, by identifying anything in the record that they contend was misapprehended or overlooked by the Court in reaching its decision. Instead they simply cite to new evidence attached to the Memorandum purportedly demonstrating that the State of Nevada has groundwater interests in two of the same groundwater basins as the members of the proposed class. Id., p. 5, ln. 20 - p. 6, ln. 2 and Attachment A.

A Rule 59(e) motion may be made on grounds of newly discovered evidence. The United States and the Tribe, however, do not base their motion on that ground. They attempt to get their new evidence in on other grounds because the law is undisputed. A party who wishes to submit new evidence under Rule 59 must demonstrate that the new evidence was newly discovered and that it could not have been discovered earlier with reasonable diligence. See School District No. 1J. Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994); Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th Cir. 1992); Englehard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 252 (9th Cir. 1963); cert denied, 377 U.S. 923, 84 S.Ct. 1220, 12 L.Ed.2d 215 (1964). A party that fails to introduce facts in a motion or opposition cannot introduce them later in a Rule 59(e) motion by claiming that they constitute "newly discovered evidence" unless they were previously unavailable. Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

The United States and the Tribe admit that evidence of the State of Nevada's groundwater rights was available prior to the class certification motion. Accordingly, that evidence cannot properly be considered by the Court on this Rule 59(e) motion for reconsideration. Even if it could be considered, however, that new evidence would have little, if any, impact. The fact that the State of Nevada, through various agencies, may have wells in the designated sub-basins does not make it a member of the class of domestic groundwater users. The United States and the Tribe carefully argue only that the claims of all types of groundwater users are similar. They offer no proof that any of the wells belonging to the State are domestic wells. Similarly, they offer nothing to contest the Court's conclusion that "'[t]he state's focus will be on its decreed rights on the Walker River and its permit to flood waters in Walker Lake." Order, p. 11, lns. 3-5.

Recognizing that their argument is weak and they are unlikely to persuade the Court to reverse itself and accept the State of Nevada as an appropriate class representative for domestic groundwater users, the United States and the Tribe also make the novel proposal that they and the Court "explore" the appointment of an "alternative representative" for such a class.

Memorandum, p. 6, lns. 8-10. The United States and the Tribe cite no authority for the Court's participation in such an "exploration" process. Nor do they offer any specifics of such a process. It is not clear whether defendants will also be invited to "explore," whether the "exploration" will also include the choice of counsel for the designated representative, or whether the representative chosen by the United States, the Tribe and the Court will be required to bear the fees and expenses of defending the class.

Under the law, the Court must reject both the new evidence offered by the United States and the Tribe and their "exploration" proposal. The Court must affirm its original determination that the State of Nevada is not an adequate class representative for the proposed class of domestic groundwater users.

C. This Court Should Not Alter, Amend or Vacate its Determination That the United States and the Tribe Failed to Demonstrate That Either of Their Proposed Classes Meets the Requirements of at Least One of the Three Subsections of FRCP 23(b).

In addition to meeting the four requirements of FRCP Rule 23(a), a proposed class must satisfy the requirements of at least one of the three subsections of FRCP Rule 23(b) in order to be certified. In their motion for certification of defendant classes, the United States and the Tribe argued that their proposed classes met the requirements of all three subsections. In its April 29, 2002 Order denying class certification, the Court rejected those arguments, finding that the proposed classes failed to meet the requirements of any one of the 23(b) subsections. Without identifying any "manifest" error of law or fact made by the Court in its April 29, 2002 Order or any "manifest injustice" in the result, the United States and the Tribe use the instant Rule 59(e) motion to amend, alter or vacate that Order simply to restate their prior arguments and take another opportunity to persuade the Court to their position. As such, the Rule 59(e) motion is improper and should be denied. See, e.g., Demasse v. I.T.T. Corp., 915 F.Supp. 1040, 1048 (D.Ariz. 1995) (motion which attempted to relitigate matters previously considered and determined was properly denied) ; see also, 11 Wright, Miller and Kane, supra, §2810.1, pp. 127-128; 12 Moore's Federal Practice §59.30[6] (Matthew Bender 3d Ed.). Assuming, however, the Rule 59(e) motion was properly brought, the renewed and

restated arguments of the United States and the Tribe are no more persuasive than on the initial motion and must again be rejected by the Court.

1. Rule 23(b)(1).

Subsection 23(b)(1) is directed at the risk that separate adjudications by or against members of a proposed class may produce incompatible standards. This Court concurred with the Magistrate in concluding that Subsection 23(b)(1) does not apply here 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." Order, p. 14, lns. 2-5. The United States and the Tribe quote the Court's ruling but then, inexplicably, argue that the Court provides no explanation. Memorandum, p. 7, lns. 3-7. The Court's explanation may be short but it is complete. Subsection 23(b)(1) does not apply because there can be no other adjudications, there can be no other adjudications because all parties and all claims must be joined in this action, and there is no risk of incompatible standards if there can be no other adjudications.

The United States and the Tribe also argue that class certification under Subsection 23(b)(1) here is supported by the decision in United States v. Truckee-Carson Irrigation District, 71 F.R.D. 10 (D.Nev. 1975). Memorandum, p. 7, lns. 7-10. This argument has been made and rejected. The United States and the Tribe relied exclusively on the Truckee-Carson Irrigation District decision to support their initial argument for class certification under 23(b)(1). That decision remains both wrong and distinguishable.

In United States v. Truckee-Carson Irrigation District, before it even began to consider whether the requirements of Rule 23 were met, the Court determined that the case did not involve a general stream adjudication. The Court acknowledged the rule that such adjudications require each individual appropriator to be brought before the court, making class certification unsuitable. 71 F.R.D. at 14. Having determined that the case did not involve a general stream adjudication, the Court then looked at (1) whether all class members would be affected equally by the claims made by the Pyramid Tribe and the United States, and (2) whether members of the proposed class held water rights which could be applied against each

other based upon priority. *Id.* at 14-15. Only after the Court had determined that all class members would be affected equally and that no class members had conflicting claims was the class certified. Unlike the situation that existed in the Truckee-Carson Irrigation District case, the rights of members of the proposed classes here are neither identical with each other as against the Tribal Claims nor are they fixed as among themselves. Therefore, they are not appropriate to class adjudication. Each individual holder of affected water rights must be joined.

Furthermore, it was the Court in Truckee-Carson Irrigation District that failed to make an adequate explanation of its Rule 23(b)(1) determination. Contrary to well-established case law,[1] the Truckee-Carson Irrigation District Court did not require that there be a realistic possibility of separate litigation creating incompatible standards. Instead, the Court apparently based its certification of a 23(b)(1) class on the totally hypothetical possibility of inconsistent adjudications within the same case. 71 F.R.D. at 17.

The United States and the Tribe also try to bolster their position that this Court erred in determining that there can be no other adjudications here by suggesting that "there is no reason to believe that one or more parties may not obtain redress of some of these issues in other forums." Memorandum, p. 7, lns. 12-13. As examples, they cite Mineral County v. Nevada, (Case No. 34352, Nev. Sup. Ct.) (June 26, 2000)[2] and Mineral County and Walker Lake Working Group v. EPA, Case No. C-01-03894-MHP (N.D. Cal.). Memorandum, p. 7, lns. 13-19. This argument is not persuasive and must be rejected. First, it is highly unlikely that any members of the proposed classes will bring defensive declaratory actions

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[1] See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2nd Cir. 1968), rev'd on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); McDonnell Douglas Corp. v. United States District Court, 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied sub nom, Flanagan v. McDonnell Douglas Corp., 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976); 7A Wright, Miller, and Kane §1773, p. 427 (1986); 5 Moore's Federal Practice §23.41[1] (Matthew Bender, 3d Ed.).

[2] The United States and the Tribe provide the docket number and the filing date. They fail to note that the decision in Mineral County v. Nevada is reported at 20 P.3d 800 (Nev. 2001).

against the claims of the United States and Tribe in some other forum. Second, even if they did, they would not be successful. This Court has continuing and exclusive jurisdiction over the surface water of the Walker River. In Mineral County v. Nevada, 20 P.3d 800 (Nev. 2001), the Nevada Supreme Court concluded that the Federal Decree Court was the proper forum to resolve issues concerning surface and groundwater rights in the Walker River System and refused to grant extraordinary writs sought by the County and the Walker Lake Working Group. 20 P.3d at 807; see also, United States v. Alpine Land & Reservoir Co., 174 F.3d 1007 (9th Cir. 1999).

Finally, the action filed by Mineral County and the Walker Lake Working Group against the EPA in federal court in San Francisco is not an example of someone seeking to redress the issues involved here or in subfile C-125-C in another forum. As is apparent from a copy of the Amended Complaint For Declaratory and Injunctive Relief filed in that action on December 5, 2001, which is attached hereto as Exhibit A, that action involves the Clean Water Act, 33 U.S.C. §§1251 *et seq.* and EPA's duties under it. It involves broad allegations that substantially all of Nevada's water quality standards do not meet the requirements of the Clean Water Act and that therefore EPA has a mandatory duty to promulgate such standards. It contends that Nevada's list of water quality limited segments within the State as submitted in 1998 was not adequate and that EPA's approval of it violated the Clean Water Act. It alleges that EPA now has a duty to develop water quality standards for water bodies that allegedly do not currently have necessary standards, including Walker Lake. It asserts that EPA has a mandatory duty to establish total maximum daily loading requirements for Walker Lake. None of these issues are involved in the present case.

2. Rule 23(b)(2).

Class certification under subsection 23(b)(2) is only available "where the relief sought is exclusively or predominantly injunctive or declaratory." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), rev'd on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); Nelson v. King County, 895 F.2d 1248, 1254-55 (9th Cir. 1990). Recognizing that "the heart of [this] litigation is [the] desire [of the United States and the Tribe]

for additional water from the Walker River" rather than injunctive or declaratory relief, this Court held that the proposed classes were not eligible for certification under subsection 23(b)(2). Order, p. 15-16. The United States and the Tribe cannot and do not attempt to deny that the ultimate relief they seek is additional water. They do argue that the Court erred in analogizing this case to one "where the primary claim is damages." Memorandum, p. 8, lns. 13-14. The true analogy, however, is not to cases seeking monetary damages but to cases where the primary relief sought is not injunctive or declaratory relief.

In support of their argument that their claims are primarily for injunctive and declaratory relief, the United States and the Tribe cite Southern Ute Indian Tribe v. Amoco Production Company, 874 F.Supp. 1142 (D.Colo. 1995), rev'd on other grounds, 119 F.3d 816 (10th Cir. 1997), aff'd in part on reh'g en banc, 151 F.3d 1251 (10th Cir. 1998), rev'd on other grounds, 526 U.S. 865 (1999). Again, Southern Ute is the case primarily relied upon by the United States and the Tribe in their original motion for certification of defendant classes under subsection 23(b)(2). Its application here has been considered and rejected. A defendant class was certified in Southern Ute based on a joint motion brought by the plaintiff tribe and the great majority of defendants. See Southern Ute Indian Tribe v. Amoco Production Ciompany, 2 F.3d 1023, 1025-1026 (10th Cir. 1993)[3]. Certification of a defendant class essentially by consent provides no authority whatsoever for the certification of any class of defendants in the present case. Nothing in the Southern Ute decision has any bearing on the finding that the primary relief sought by the United States and the Tribe in this case is additional water rather than injunctive relief. There was no error of fact or law in this Court's determination that the proposed defendant classes could not be certified under subsection 23(b)(2).

3. Rule 23(b)(3).

Certification under subdivision 23(b)(3) requires findings of both "predominance" and "superiority." After the requisite "rigorous analysis," this Court

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[3] The Southern Ute decision cited by the United States and the Tribe contains no discussion of the class certification issue. It is a decision on the merits.

determined that the United States and the Tribe failed to satisfy their burden as to either requirement and accordingly denied 23(b)(3) certification. Order, pp. 16-22. The United States and the Tribe understandably disagree with the Court's findings but fail to identify any error of either fact or law in the Court's analysis. They simply offer 8+ pages of extended reargument of their prior positions.

a. Predominance.

The United States and the Tribe proposed certification of two defendant classes -- one of holders of surface water rights (successors-in-interest under the Decree) and a second of holders of groundwater right (domestic well users in designated sub-basins). The Court, however, identified three groups of defendants in terms of the water rights they hold: those with surface water rights, those with groundwater rights, and those with both surface and groundwater rights. Because the threshold issues involve the determination of what law to apply to the interaction of surface and groundwater rights, the Court surmised that the positions of the defendants as to those issues will depend on the individual combination of water rights they hold rather than on their membership in a particular class or classes. The Court then concluded that the proposed classes were not "sufficiently cohesive to warrant adjudication by representation" and found that the predominance requirement had not been satisfied. Amchem Products v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, 244 F.3d 1152, 1162-1163 (9th Cir. 2001).

The United States and the Tribe appear to miss the point of the Court's analysis. They accept the Court's division of the members of the proposed defendant classes into three groups but argue that "[t]his is a distinction without a difference." Memorandum, p. 11, lns. 7-8. According to the United States and the Tribe, irrespective of the differing circumstances of different groups of proposed class members, "this does not change the common nature of [the threshold] issues." Id., p. 10, ln. 4; see also, p. 11, lns. 8-9. The focus of the predominance inquiry, however, is not on the "common nature" of the issue but on whether a proposed class is "sufficiently cohesive" that it has a common position and can fairly

participate in the adjudication by representation. The United States and the Tribe have failed to refute the Court's conclusion that the predominance requirement has not been satisfied because, since the proposed class of holders of surface rights will include holders of groundwater rights as well and the proposed class of holders of groundwater rights will similarly include holders of surface rights, neither class is "sufficiently cohesive to warrant adjudication by representation." Amchem Products, supra at 623.

b. Superiority.

The superiority requirement of 23(b)(3) requires the determination that the class action is better than other methods "for the fair and efficient adjudication of the controversy." In disagreeing with the Court's determination that they have not demonstrated the superiority of a class action here, the United States and the Tribe again fail to identify any error of either fact or law in the Court's analysis. Their motion to alter, amend or vacate the Order denying class certification makes seven enumerated arguments under the heading of "superiority," all of which, however, concern only the issue of service of process. All these separate arguments ultimately come down to the proposition that certification of the two proposed defendant classes will allow the threshold issues and a declaration of the Tribe's rights to be determined more quickly.

However, in their Memorandum in Support of the Reconsideration Motion, the United States and Tribe admit that when it becomes necessary to know the nature and extent of the water rights of the members of the proposed classes, decertification of the classes and joinder will be required. Memorandum, p.3, lns 1-16. They argue that such information is not required in order to declare the nature and extent of the Tribe's rights. Id. That simply is not the case.

First, in United States v. New Mexico, 438 U.S. 696 (1978) the Court recognized that the existence and quantification of reserved rights must be carefully examined because "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water needy state and private appropriators." 438 U.S. at 701-705. Justice Powell, agreeing with that part of the majority's analysis, described

this process as requiring that "implied-reservation doctrine . . . be applied with sensitivity to its impact on upon those who have obtained water rights under state law and to Congress' general deference to state water law." Id. at 718. The requirements of United States v. New Mexico cannot be satisfied by declaring the existence, priority, nature and quantification of the Tribe's rights here in a factual vacuum which includes no information on the nature and extent of the competing rights of state and private appropriators or of the impact of the Tribe's claims on those rights. See also, Mergen and Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683 (1997).

Second, the claims to an implied reserved right to groundwater present unique issues with respect to the requirements of United States v. New Mexico. Arizona, the single jurisdiction which has allowed a claim to an implied reserved right to groundwater to proceed, has not held that a federal reservation has separate and independently quantifiable reserved rights in both a surface and groundwater source. In In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739 (Ariz. 1999) (Gila River III), the Arizona court in essence held that at best a federal reservation has a single reserved right which applies to groundwater "only . . . where other waters are inadequate to accomplish the purpose of reservation." Id. at 748. If the Gila River III decision is to be applied here, it is the District's position that United States v. New Mexico requires the single reserved right be apportioned between surface and groundwater in a way that minimizes its impact on the rights of state and private appropriators.

When considering the superiority requirement of Rule 23(b)(3), the admission of the Tribe and the United States that decertification and joinder will be required when it becomes necessary to know the nature and extent of the water rights of the members of the proposed classes is significant. In truth, that knowledge will be necessary in connection with the determination of the nature and extent of the Tribe's rights. Therefore, at best, this partial class certification could only apply with respect to the determination of the threshold issues; and, unless the United States and Tribe lose on all of those issues, the joinder and service sought to be avoided here would be immediately required.

Rather than actually attempting to demonstrate the "superiority" of the class action alternative in their motion to amend, alter or vacate the April 29, 2002, Order, the United States and the Tribe appear to be arguing that the Court "owes" them something more than a fair application of the law. For example, in an argument that is both meaningless and unrelated to the issues of class certification, they argue that "it is not fair for ... water rights holders under the Court's Decree to get all of the benefits of the Decree without any responsibilities." Memorandum, p. 12, lns. 13-15. According to the United States and the Tribe, the Court "has allowed these persons to reap all of the benefits of the Decree and, in essence, maintain a judicially-sanctioned anonymity." Id., p. 13, lns. 1-2. Of course, the water right holders under the Walker River Decree have all the responsibilities of the holders of any water right and their "anonymity" is quickly ended by a trip to the County Recorder's office. But, because the Court has made service of process more difficult by refusing their request to require the successors-in-interest under the Decree to identify themselves and by failing to authorize the use of the District and the U.S. Board of Water Commissioner assessment lists, the United States and the Tribe argue they are now somehow entitled to certification of the successors-in-interest as a class. Id., p. 13, lns. 7-12.

The United States and the Tribe also make much of the alleged efforts by defendant water rights holders to evade service of process. They attempt to turn this Court's acknowledgment of their argument that some water rights holders are likely to resist service of process into a factual finding. Memorandum, p. 13, lns. 16-17.[4] Accordingly, the United States and the Tribe argue that the Court should certify the proposed defendant classes so as not to "invite resistance to service" or encourage the "delaying tactics" of defendants. In fact, the only parties who have attempted to avoid service in this case have been the United States and the Tribe and the delays in reaching the merits of this case have been primarily the

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[4] The Court actually wrote that it "[did] not find persuasive the arguments that service will be difficult because certain water rights holders are actively resisting service of process." Order, p. 8, lns. 4-6.

result of the various motions by the United States and the Tribe to avoid having to effect service.

Finally, the United States and the Tribe argue that denying certification of the two proposed defendant classes deprives the Tribe of its due process right of access to the courts. In support of that argument, they cite Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) and Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Neither case, however, substantiates their claim. Three Affiliated Tribes involved a lower court decision which left a Tribe with no court in which it could pursue its claim. Boddie involved a situation where indigent persons could not bring an action for divorce, except upon payment of court fees and costs which they did not have the ability to pay. No analogous situation is found here. The United States and the Tribe are in court. Certification of the proposed defendant classes threatens the due process rights of the defendants not the Tribe.

III. THE MOTION OF THE UNITED STATES AND THE TRIBE FOR RELIEF UNDER F.R.C.P. 60(B)(6) MUST BE DENIED.

The United States and the Tribe also seek relief under FRCP Rule 60(b)(6) from the Court's Order denying their motion for certification of defendant classes. Section (6) is the catchall provision of Rule 60(b) and permits the Court to "relieve a party ... from a final judgment, order, or proceeding for . . . . any other reason justifying relief . . . ." Although Rule 60(b)(6) itself does not identify or limit the factors that may justify relief, it has been narrowly construed to promote the finality of judgments. Accordingly, the U.S. Supreme Court has held that Rule 60(b)(6) authorizes relief only in "extraordinary circumstances." Ackerman v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950); Liljeberg v. Health Services Acquisition Corporation, 486 U.S. 847, 863-864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988). The Ninth Circuit likewise has held that 60(b)(6) may only be used "sparingly as an equitable remedy to prevent manifest injustice." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993) cert. denied, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993) (reversing trial court's grant of relief under 60(b)(6) where party had failed to read and

understand adverse impact of judgment); see also, Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th Cir. 1971). To be afforded relief under Rule 60(b)(6), a moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." Lehman v. United States, 154 F.3d 1010, 1018 (9th Cir. 1998); see also, United States v. Alpine Land & Reservoir Co., supra, 984 F.2d at 1049.

The United States and the Tribe make just two references to Rule 60(b)(6) in their 17 page Memorandum. They make no attempt to describe any "extraordinary circumstances" that would justify relief. They cite no 60(b)(6) cases. In fact, they make no 60(b)(6) argument at all. Unless the United States and the Tribe are saving something for their reply, there is no apparent reason for their having included Rule 60(b)(6) as an alternative basis for the relief they seek.

In any event, the relief they seek, i.e., the reversal of the Court's April 29, 2002 Order denying certification of defendant classes, is not available under 60(b)(6). The provisions of Rule 60(b) are available only to set aside or vacate a prior order or judgment. Rule 60(b) does not authorize the court to grant affirmative relief. See, e.g., United States v. One Toshiba Color Television, 213 F.3d 147, 158 (3d Cir. 2000); Adduono v. World Hockey Association, 824 F.2d 617, 620 (8th Cir. 1987); McCall-Bey v. Franzen, 777 F.2d 1178, 1186 (7th Cir. 1985); United States v. One Douglas A-26B Aircraft, 662 F.2d 1372, 1378 (11th Cir. 1981); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1356 (5th Cir. 1972). Rule 60(b)(6) does not support or authorize a motion for reconsideration. The 60(b)(6) motion of the United States and the Tribe must be denied.

IV. THE REQUEST OF THE UNITED STATES AND TRIBE FOR A RULING THAT "SERVICE BASED ON THE CURRENT ASSESSMENT LIST OF WRID AND THE UNITED STATES BOARD OF WATER COMMISSIONERS, PLUS PUBLICATION, IS SUFFICIENT FOR MEETING ALL DUE PROCESS AND OTHER REQUIREMENTS OF SERVICE IN THIS MATTER" MUST BE DENIED.

On its face, the Rule 59(e)/Rule 60(b)(6) motion brought by the United States and the Tribe seeks to alter, amend or vacate only the April 29, 2002 Order denying the Class Certification Motion. However, by requesting a "ruling that service based on the current

assessment list of WRID and the United States Board of Water Commissioners, plus publication, is sufficient for purposes of meeting all due process and other requirements of service in this matter" (Memorandum, p. 13), the United States and Tribe are actually asking the Court to alter its October 30, 1992 Order concerning joinder (the "Joinder Order"), its April 19, 2000 Case Management Order and its June 11, 2001 Order denying the joint motion for an order requiring the identification of all decreed water right holders and their successors (the "Identification Order"). Before explaining why that request must be denied, it is useful to briefly provide some of the background leading up to the Joinder Order, the Case Management Order and the Identification Order.

A. The Joinder Order.

The Joinder Order resulted from the District's and Nevada's motion to dismiss the original counterclaims of the United States and Tribe or in the alternative to require joinder of all claimants to the waters of the Walker River as defendants and for service on those claimants in accordance with Fed. R. Civ. P. Rule 4. Joinder Order (Doc. 15 at 3). At that time the Tribe argued that the joinder was unnecessary and the United States and the Tribe contended that they should be allowed to give notice of their claims by posting and by publication. See Sept. 10, 1992 Response of Walker River Paiute Tribe to the Walker River Irrigation District and the State of Nevada's Preliminary Threshold Motions at 25-28; Sept. 10, 1992 Points and Authorities of the United States in Response to Opposition by the Walker River Irrigation District and State of Nevada to Counterclaims filed by the United States at 11-14.

The District and Nevada contended that the Tribe and United States were wrong for two fundamental and related reasons. First, joinder was required so that any judgment entered on the Tribe's claims would bind all claimants to the waters of the Walker River. Proper service of the persons to be joined was required under Rule 4 to satisfy their due process rights of notice and an opportunity to be heard. The Court agreed and ordered joinder of all existing claimants to the waters of the Walker River and its tributaries and service on those persons in accordance with Rule 4. Joinder Order (Doc. 15) at 6-7.

B. The Case Management Order.

After entry of the Joinder Order, there were 13 extensions of time to join additional parties and complete service of process. The Court granted the first extension by order dated February 23, 1993 (Doc. 19) and the last by order dated September 9, 1998 (Doc. 63). Near the end of July 1997, the United States and Tribe each filed First Amended Counterclaims. In addition to surface water claims as set forth in its original counterclaim, the Tribe's First Amended Counterclaim included groundwater claims for the Reservation. The United States also included groundwater claims for the Reservation and included claims to surface and groundwater for other federal reservations within the Walker River Basin.

On or about August 19, 1998, the Tribe and the United States filed their Joint Motion for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and Waiver and to Approve Procedure for Service of Pleadings Once Parties Were Joined. They also sought to extend the time to complete joinder of parties and service of process. Various parties responded to that joint motion and on May 11, 1999, the Court entered a minute order (Doc. 81) which provided for a scheduling conference to establish procedures for the expeditious and efficient management and resolution of the matter and to hear argument and proposals on several specific matters. After a telephonic hearing with the parties, the Court entered another minute order on May 21, 1999 granting the parties a period of time within which to submit a stipulation for case management, or if a stipulation could not be reached a statement of issues on which there was agreement and disagreement. (Doc. 83).

After four extensions of time to comply with the May 21, 1999 minute order, the parties reported to the Court that they were unable to reach agreement and stipulated to the submission of their respective proposals for case management by way of motion. The Case Management Order resulted from competing proposals, one submitted by the United States and Walker River Tribe and one submitted by the District and Nevada and concurred in by the State of California.

The issues related to the Case Management Order also involved the question of who should be joined and how they should be served. The District in its opposition to the motion of the Tribe and the United States again explained why joinder was required. The United States and the Tribe argued that it "will be unnecessarily time consuming for the United States and Tribe to be left to identify" the proposed defendants "on their own." See Feb. 21, 2000 Response of the United States and Walker River Paiute Tribe to Joint Motion By the State of Nevada and WRID Concerning Case Management, at 4. The District noted that in the past it had provided its assessment roll to the United States. It argued, however, that it should not be obliged to undertake research in the assessors' offices, recorders' offices and the offices of the water agencies of the two states. That burden, the District contended, should properly fall on the United States and the Tribe. See Walker River Irrigation District's Points and Authorities in Opposition to Motion of the United States and Walker River Paiute Tribe to adopt Case Management Order (filed Feb. 22, 2000) at pages 8-11. In addition, in their proposed Case Management Order, the United States and the Tribe suggested a standard outside of Fed. R. Civ. P. Rule 4 for determining when service by publication on identified defendants would be proper. The District objected to that suggestion. See Tribe and the United States Proposed Case Management Order at para. 4; District's Points and Authorities in Opposition to Motion of the United States and Walker River Paiute Tribe to adopt Case Management Order (filed Feb. 22, 2000) at 11.

In the Case Management Order, entered April 19, 2000 (Doc. 108), the Court ordered joinder of nine categories of water right holders in order to ensure that any judgment entered would bind all necessary parties. The Court authorized the Magistrate Judge to conduct all necessary proceedings and to decide how information would be obtained by the United States and the Tribe to enable them to identify the individuals and entities required to be joined. It is clear that the Case Management Order places the ultimate responsibility for identifying the parties to be joined on the United States and the Tribe. See Case Management Order (Doc. 108) at pages 7-8. The Court also ordered that the parties to be joined be served in accordance with Rule 4 and that any service by publication must be consistent with Rule 4 and the laws and

rules applicable for Nevada and California respectively to the extent they are to be used according to Rule 4. Id. at 5-7.

C. The Identification Order.

At the hearing on the Commissioners' Report and Petition for Approval of Budget and Approval of Rate Assessment for the year July 1, 2000 through June 30, 2001, the Tribe and the United States orally moved for an order requiring identification of Walker River Decree water right holders. After entertaining oral argument, the Court established a briefing schedule for the parties on this issue. On June 20, 2000, the Tribe and the United States filed their Joint Motion for an Order Requiring the Identification of all Decreed Water Right Holders and their Successors.

Ultimately, the Court entered the Identification Order which denied the relief requested for several reasons. First, the Court properly rejected the notion that the United States Board of Water Commissioners have the responsibility to declare ownership of water rights on the River. Second, it concluded that requiring a potential plaintiff to identify water right holders it intended to join as a defendant did not implicate the due process right of access to the courts. It recognized that the information needed for that task here was available to the United States and the Tribe, and although work was involved, the work could be accomplished. The Court reiterated its requirement that all parties be served to ensure that all water right holders are bound by the ultimate outcome here. *See* Identification Order (Doc. 522) at 6-10.

D. The Request of the United States and the Tribe for a Ruling That "Service Based on the Current Assessment List of WRID and the U. S. Board of Water Commissioners, Plus Publication, is Sufficient for Meeting All Due Process and Other Requirements of Service in This Matter"

The decisions of the Court regarding joinder, case management and identification have clearly and consistently required that all necessary parties be joined and properly served. The reasons for those decisions have also remained consistent, i.e., ensuring that the final outcome here binds all necessary parties and that those parties have adequate notice and opportunity to protect their interests. Those decisions have never limited the parties to be joined to persons and entities appearing on a particular list, at a particular time. They

have consistently held that it was ultimately the burden of the plaintiff to identify the defendants.[5] The Court's orders on method of service have consistently required service in accordance with Rule 4 of the Federal Rules.

Now, nearly ten years after entry of the Joinder Order, with respect to persons and entities who are successors-in-interest to water right holders under the Final Decree, the United States and the Tribe in effect ask that the Joinder Order and the Case Management Order be amended to require joinder only of persons and entities whose names appear on the District's or Commission's current assessment lists without regard to whether those lists actually include all of those successors-in-interest. They ask that those orders be further amended to allow service by publication on persons and entities not on those lists and who with reasonable effort can be identified and served without regard to the requirements of Rule 4.

The District has often explained the nature of its assessment list, how and when it is revised and why it may not include all successors-in-interest to water right holders under the Decree. For example, in an October 5, 2000 letter to counsel for the United States and the Tribe, the District's counsel said:

> The Walker River Decree adjudicated water rights appurtenant to lands located in both California and Nevada. All lands within the District's boundaries are located entirely within the State of Nevada. Therefore, it is important to note that the information discussed below pertains solely to lands located within the District's boundaries and, therefore, within the State of Nevada. The District does not maintain information concerning lands located in California with appurtenant Walker River Decree water rights.
>
> The Lyon County Recorders Office forwards deeds to the District, typically on a monthly basis. The Recorders Office, however, only forwards deeds to the District which it believes include or involve the conveyance of a water right within the District. Upon receiving the deeds, the District's staff reviews them and subsequently updates the District's records based upon that review. The District's staff is comprised of laypersons with no formal training in the interpretation of documents conveying title to real property. We also believe that the review of deeds at the Lyon County Recorders Office is conducted by lay persons.

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[5] The decisions of the Court on these same issues in the Mineral County intervention subfile C-215-C have been the same. See, e.g., March 22, 1996 Minutes of the Court in C-125-C (Doc. 74).

> The District's records contain two sources of information that are updated with information received from the Lyon County Recorders Office and that may be helpful in ultimately identifying the successors in interest to Walker River Decree water rights holders. First, the District maintains an assessment roll, in computer and hard copy format, which it uses in connection with the levying and collection of its assessments pursuant to Chapter 539 of the Nevada Revised Statutes. In most instances, the name appearing on the assessment roll should accurately identify the current record title holder of a Walker River Decree water right. In some instances, however, the name present on the assessment roll may not accurately identify the current record title holder of a particular Walker River Decree water right. This may occur, for example, when the District does not receive a copy of the document conveying title to the water right from one individual to another, where the information received is not correctly interpreted, or where the ownership of the water right is different than the ownership of the land to which is it appurtenant.
>
> * * *
>
> In some cases ownership of a water right is different than the ownership of the land to which it is appurtenant. Until 1999, the District could only assess the land regardless of who owned the water rights. Even under the 1999 amendments that is the situation unless there is an agreement which provides otherwise. To date there are only a few such agreements. However, the District has begun to maintain a list of persons and entities who appear to own a water right, but not the land to which the water right is appurtenant. That list is available in hard copy. However, it may not be complete for the same reasons that the District's other information may not be complete.

In a December 6, 2000 letter to counsel for the United States and the Tribe, counsel for the District also said:

> The nature of the District's assessment roll and the purposes for which it is compiled have been explained many times. It is a good beginning point for anyone seriously interested in identifying all owners of surface water rights within categories 3(a) and 3(b) of the Case Management Order who own land within the District. As we have explained many times and again in my November 22, 2000 letter, the best place to check the accuracy of the District assessment roll on that subject is the Lyon County Recorder's Office. It is not the responsibility of the District to identify the "defendants" for the United States and the Tribe. The failure of the United States and the Tribe to join a necessary party or their joinder of a party who is not necessary is not cured simply because the party in question is or is not on the assessment roll of the District.

This Court simply cannot sanction the approach requested by the United States and the Tribe. That approach ignores the rationale for joinder and service in the first instance,

i.e., a final binding judgment and satisfaction of the due process rights of the defendants. This Court cannot decide today that a judgment entered in the future will bind and satisfy the due process rights of a person or entity not on the assessment rolls of the District and Commissioners, who is a successor-in-interest to water right holders under the Decree and whose name and address are reasonably ascertainable. The law would suggest a contrary result. See, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Granting the relief requested by the United States and the Tribe is also not consistent with the Identification Order. First, if the United States and Tribe can simply rely on the assessment rolls of the District and Commissioners, the motion which resulted in the Identification Order was unnecessary. Second, granting that relief effectively makes the assessments lists of the District and the Commissioners declarations of ownership of water rights.

Again, the United States and the Tribe argue that requiring them to identify and serve the persons they wish to sue deprives the Tribe of its due process right of access to the courts. That argument finds no support in the law or the facts. The Tribe and the United States are in court. The issue is what they must do to bring into Court those persons whose water rights may be affected by their claims. The United States and the Tribe are not intellectually or financially incapable of doing what must be done. As this Court expressed so succinctly in the Identification Order, the United States and the Tribe have access to the necessary information and the task is not impossible. Even if the United States and Tribe could show that they lack the resources to do what must be done, that problem is not cured by disregarding the due process rights of the persons whose property interests they seek to affect. This Court cannot sacrifice the due process rights of defendants to notice and an opportunity to be heard so that the task of identifying and serving successors-in-interest to water right holders under the Decree will be made easier and less expensive for the Tribe and the United States. The request of the United States and Tribe that the Court rule that "service based on the current assessment lists of WRID and the United States Board of Water Commissioners, plus

publication, is sufficient for meeting all due process and other requirements of service in this matter" must be denied.

V. CONCLUSION.

The United States and the Tribe have not satisfied, and cannot satisfy, the requirements for relief under Rule 59(e) or Rule 60(b)(6). Their "request" for a ruling that they may make service on Category 3(a) of the CMO by using the current assessment lists of WRID and the U.S. Board of Water Commissioners violates the due process rights of defendants as well as the previous orders of this Court and must also be rejected. The April 29, 2002 Order denying certification of defendant classes must stand.

Dated this 17th day of June, 2002.

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MINERAL COUNTY, a Political Subdivision of the State of Nevada, and WALKER LAKE WORKING GROUP, a Nevada Nonprofit Corporation,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

Case No. C-01-3894-MHP

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs seek a declaration that Defendant Environmental Protection Agency (hereinafter, "EPA") violated the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and the Federal Water Pollution Control Act (commonly known as the Clean Water Act), 33 U.S.C. § 1251 *et seq.*, in approving the State of Nevada's 1986, 1991, 1994 and 1997 water quality standards, in approving Nevada's 1998 list of water quality limited waterbodies, and by failing to promulgate water quality standards in the absence of state standards that meet the requirements of the CWA. Plaintiffs also seek a

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Exhibit A

declaration that EPA violated the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, by failing to initiate and complete consultation with the United States Fish and Wildlife Service prior to approving Nevada's 1998 list of water quality limited waterbodies. Plaintiffs seek injunctive relief to redress the injuries caused by these violations of law.

2. Should plaintiffs prevail, plaintiffs will seek an award of costs and attorneys' fees pursuant to the Clean Water Act, 33 U.S.C. § 1365(d), the Endangered Species Act, 16 U.S.C. § 1540(g), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346, because this action involves the United States as a defendant, and it arises under the laws of the United States, including the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; the Clean Water Act ("CWA"), 33 U.S.C. 1251, *et seq.*; and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* Jurisdiction also is proper under 33 U.S.C. § 1365(a)(2), because this action alleges a failure of the Administrator to perform a duty under the CWA which is not discretionary with the Administrator. Jurisdiction is also proper under 16 U.S.C. 1540(g) because this action alleges that EPA has violated, and continues to violate, Section 7 of the ESA. An actual, justiciable controversy exists between plaintiffs and defendant.

4. In compliance with 33 U.S.C. § 1365, on May 11, 2001, plaintiffs gave notice of the CWA violations specified in this complaint and of their intent to file suit to EPA. Sixty days or more have elapsed since the CWA notice was properly served. The violations complained of in the CWA notice letter are continuing and have not been remedied. In compliance with 16 U.S.C. § 1540(g), on September 25, 2001, plaintiffs gave notice of the ESA violations specified in this complaint and of their intent to file suit to EPA and the Department of the Interior. Sixty days or more have elapsed since the ESA notice was properly served. The violations complained of in the ESA notice letter are continuing and have not been remedied.

5. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202, 33 U.S.C. §

1365(a), 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 705 & 706. The challenged agency action is final and subject to this Court's review under 33 U.S.C. § 1365(a), 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 702, 704, and 706.

VENUE AND INTRADISTRICT ASSIGNMENT

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Defendant's Region 9 office, whose jurisdiction includes the State of Nevada, is located in the City and County of San Francisco, California. Assignment is proper in this district and division. Civil L.R. 3-2(c-d), 3-5(b).

PARTIES

7. Plaintiff MINERAL COUNTY is a political subdivision of the State of Nevada. Mineral County, is responsible for the health, safety, and welfare of its citizens, and has an interest in insuring that other political entities, including EPA, properly carry out all substantive and procedural obligations such entities owe to the citizens of Mineral County. The citizens of Mineral County use the waterways within the State of Nevada for subsistence, navigation, fishing, recreation and the use and enjoyment of scenic beauty. The citizens' use and enjoyment of the waterways within the State of Nevada (including Walker Lake and Walker River, which are located within Mineral County, Nevada) are adversely affected and irreparably injured by Defendant's failure to comply with the procedural and substantive mandates of the CWA, as is more fully set forth below.

8. Plaintiff WALKER LAKE WORKING GROUP is a private, not for profit 501(c)(3) organization, with approximately 160 members within and outside Mineral County, Nevada. The Walker Lake Working Group was established to preserve and protect Walker Lake. The members of the Walker Lake Working Group use the waterways within the State of Nevada for subsistence, navigation, fishing, recreation and the use and enjoyment of scenic beauty. The members' use and enjoyment of the waterways within the State of Nevada (including Walker Lake and Walker River, which are located within Mineral County, Nevada) are adversely

affected and irreparably injured by Defendants' failure to comply with the procedural and administrative mandates of the CWA, as is more fully set forth below.

9. Plaintiffs' injuries in this case include informational injury. The 303(d) list is a public list that is required by the Clean Water Act to identify all impaired waterbodies in the State, and to identify the particular pollutants that are causing the impairment. Without an adequate 303(d) list that accurately identifies all water quality limited water bodies within the State of Nevada, plaintiffs cannot determine the full extent of water quality problems in the State, cannot determine all waterbodies that are currently impaired, and cannot determine the full extent of pollutants that are causing the impairment. A legally adequate 303(d) list would address plaintiffs' information and injury.

10. Defendant ENVIRONMENTAL PROTECTION AGENCY ("EPA") is the primary federal agency responsible for implementing the CWA, including the provisions referred to herein. Region 9 of EPA is headquartered in San Francisco, and covers the following states: Nevada, Arizona, California, and Hawaii.

STATUTORY FRAMEWORK OF THE CLEAN WATER ACT

11. In 1972, Congress passed the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve this objective, Congress declared the national goals of: (1) attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by July 1, 1983, and (2) eliminating the "discharge of [all] pollutants into the navigable waters" by 1985. 33 U.S.C. § 1251(a)(1)-(2).

12. The CWA utilizes a two-pronged approach to improve and maintain water quality. First, the CWA requires all "point source" discharges to obtain permits restricting the amount of pollution in their discharges. *See generally*, 33 U.S.C. §§ 1311, 1342. Second, the Act uses a water quality based approach (water quality standards) to regulate all discharges, from both point and nonpoint sources, according to their effect on the receiving water. *See* 33 U.S.C. § 1313.

13. Under the water quality based approach, each state must develop water quality standards, and regularly monitor water quality. 33 U.S.C. § 1313. Water quality standards developed by the state are to include three components: (1) designated uses for each waterbody, such as recreation, fish and wildlife, 40 C.F.R. § 131.10; (2) criteria (physical, chemical, and biological) necessary to protect the designated uses, 40 C.F.R. § 131.11; and (3) an antidegradation policy designed to protect existing uses and preserve the present condition of the waters, 40 C.F.R. § 131.12. In developing the required criteria, states are to establish numerical values based on EPA's guidance, and narrative criteria where numerical criteria cannot be established or to supplement numerical criteria. 40 C.F.R. § 131.11.

14. States must submit the water quality standards to EPA for approval. 33 U.S.C. § 1313. EPA must review state standards and determine whether such standards are consistent with the CWA. *Id.* If EPA determines such standards are not consistent with the CWA, EPA must set its own standards. *Id.*

A. 303(d) List Of Water Quality Limited Segments

15. As an essential step in the water quality based approach, Section 303(d) of the CWA requires each state to compile a list of all water quality limited segments ("WQLS"). WQLSs are water bodies within the state's boundaries that do not currently meet, or are not expected to meet, applicable water quality standards, despite the application of existing pollution controls. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.2(j). This list of WQLSs is commonly known as a "303(d) list."

16. The 303(d) list must establish a priority ranking for "water quality limited" waters, taking into account the severity of the pollution and the uses to be made of such waters. 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. §§ 130.7(b)(4), 130.7(d).

17. The 303(d) list must identify the pollutants causing or expected to cause violations of applicable water quality standards. 40 C.F.R. § 130.7(b)(4).

18. To comply with the obligations imposed under § 303(d), the CWA requires each

state to "establish appropriate monitoring methods (including biological monitoring) necessary to compile and analyze data on the quality of waters of the United States." 40 C.F.R. § 130.4(a); 40 C.F.R. § 130.4(b).

19. The CWA regulations impose an affirmative obligation on each state to "assemble and evaluate all existing and readily available water quality-related data and information" in developing the 303(d) list. 40 C.F.R. § 130.7(b)(5). The CWA regulations set forth sources of information and categories of waters that each state must consider. 40 C.F.R. § 130.7(b)(5)(i)-(iv). Many sources and types of information must be considered in developing a 303(d) list, including waters for which water quality problems have been identified by local, state, or federal agencies, members of the public, or academic institutions. 40 C.F.R. § 130.7(b)(5)(ii); *see also* 40 C.F.R. § 130.10(d)(6).

20. In developing the 303(d) list, one source of information that each state must consider is the state's " 305(b) Report." 40 C.F.R. § 130.7(b)(5)(i). Section 305(b) of the CWA requires each state to biennially prepare and submit to EPA a "305(b) Report" describing the water quality of all navigable waters in the state. 33 U.S.C. § 1315(b); 40 C.F.R. § 130.8. The state must consider waters identified in the most recent 305(b) Report as "partially meeting" or "not meeting" designated uses or as "threatened." 40 C.F.R. § 130.7 (b)(5)(i). "Threatened" waters are those waters that currently meet water quality standards, but are not expected to meet standards in the near future. 40 C.F.R. § 130.2 (j). To identify "threatened" waters, states should consider information indicating declining or adverse trends in water quality.

21. In addition to the 305(b) Report, states must consider evidence of numeric criterion exceedences, beneficial use impairment, and evidence of not meeting a narrative criterion when assembling their 303(d) lists. 40 C.F.R. § 130.7 (b)(3).

22. States must consider streamflow, and the link between water quantity and water quality, in developing their 303(d) lists.

B. Total Maximum Daily Loads

23. For each WQLS, the state must establish a total maximum daily load ("TMDL") for the pollutants of concern. 33 U.S.C. § 1313(d)(1)(C). The TMDL is the maximum amount of a given pollutant that may be discharged or "loaded" into a WQLS without violating water quality standards. 40 C.F.R. § 130.2(I). The TMDLs for each impaired water body must address all pollutants contributing to the water body's impairment. 33 U.S.C. § 1313(d)(1)(C).

24. Each TMDL must identify both a waste load allocation ("WLA"), the portion of the loading capacity attributable to existing or future point sources of pollution, and a load allocation ("LA"), the portion attributable to existing or future nonpoint sources of pollution and natural background pollution. 40 C.F.R. § 130.2(g)-(h). The TMDL is "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background." 40 C.F.R. § 130.2(I).

25. Once the maximum load, or "loading capacity," of a given pollutant into a WQLS is determined, the TMDL must allocate between point, non-point and natural background pollution sources as necessary to achieve and maintain the applicable water quality standards. 40 C.F.R. § 130.2(f), (I).

26. A TMDL must set the maximum pollutant load at a level necessary to attain and maintain applicable water quality standards while providing for seasonal variations and a margin of safety to account for uncertainty. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c).

27. TMDLs must be completed in accordance with the priority ranking. 33 U.S.C. § 1313(d)(1)(C). A 303(d) list's priority ranking must specifically include the identification of waters targeted for TMDL development within the next two years. 40 C.F.R. § 130.7(b)(4).

28. After a state initially promulgates a TMDL it must revise the TMDL as necessary to achieve the CWA's goals.

29. States and the EPA have frequently failed to establish the legally required 303(d) lists or TMDLs until required to do so through court orders. At least 40 legal actions have been

filed in 38 states seeking judicial review of EPA's failure to implement, and EPA is under court order or consent decrees in many states to ensure that TMDLs are timely established.

C. EPA's Duty in Approving 303(d) Lists And TMDLs

30. Each state must "from time to time" submit the 303(d) list and any TMDLSs to EPA for approval. *See* 33 U.S.C. § 1313(d)(2). Regulations implementing the CWA establish that "from time to time" means at least once every two years. 40 C.F.R. § 130.7(d). Each state must submit biennially to EPA the list of WQLS, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years. *Id.* The lists are required on April 1 of every even-numbered year. *Id.* All TMDLs shall continue to be submitted to EPA for review and approval. *Id.*

31. Once a state submits the 303(d) list and TMDLs, EPA has thirty days to approve or disapprove the submission. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2).

32. EPA may approve a state's submission only if the submission satisfies the explicit requirements set forth in the CWA and its implementing regulations. *See* 40 C.F.R. §§ 130.7, 130.7(d)(2). EPA must reject a 303(d) list that fails to identify all waters that do not or are not expected to meet applicable water quality standards. *See* 40 C.F.R. §§ 130.2(j), 130.7.

33. If EPA approves a submitted 303(d) list or TMDL, the state must incorporate the list or TMDL into its current water quality management plan. 40 C.F.R. § 130.7(d)(2).

34. If EPA disapproves a submitted 303(d) list, and/or TMDLs, EPA has a non-discretionary duty to identify, within thirty days after such disapproval, all WQLSs within the state and establish TMDLs for such waters as determined necessary to implement applicable water quality standards. 40 C.F.R. § 130.7(d)(2).

D. Section 303(e) Continuing Planning Process

35. Section 303(e) of the CWA mandates that each state establish and maintain a Continuing Planning Process ("CPP") that sets forth the procedures for implementing the Act's requirements. 33 U.S.C. § 1313(e); 40 C.F.R. § 130.5.

36. The CPP must set forth the process for developing TMDLs in accordance with § 303(d) and the implementing regulations. 40 C.F.R. § 130.5(b). The CPP must also include, among other things, the state's process for: (1) developing effluent limitations and schedules of compliance; (2) updating, maintaining and implementing water quality management plans; and (3) establishing and assuring adequate implementation of new or revised water quality standards. *Id.*

37. The CWA requires each state to submit a CPP for EPA approval by February 17, 1973, and EPA is required to approve or disapprove those submissions within thirty days. 33 U.S.C. § 1313(e)(2).

38. The EPA Regional Administrator holds responsibility for periodically reviewing the adequacy of a state's CPP "for the purpose of insuring that such planning process is at all times consistent" with the CWA and the implementing regulations. 33 U.S.C. 1313(e)(2); 40 C.F.R. § 130.5(c).

STATEMENT OF FACTS

A. The State Of Nevada's Failure to Implement The CWA

39. Thirty years after enactment of the CWA, most of Nevada's waters still lack the mandated "appropriate monitoring methods and procedures," such as surface water monitoring stations and site-specific numeric water quality standards. 40 C.F.R. § 130.4(a-b).

40. According to Nevada's 1998 305(b) Report, of the State's 143,578 total miles of rivers and streams, only 2,995 miles, or 2%, have beneficial use standards which are numeric, narrative, or both. The 1998 305(b) Report acknowledges that it addresses only 1,639 of the river miles in Nevada. The 305(b) Report determined that of these 1,639 river miles, 864 miles fully support beneficial uses, 657 miles partially support beneficial uses, and 118 miles do not support beneficial uses.

41. According to Nevada's 1998 305(b) Report, the State only assessed 320,906 acres of the State's 533,239 acres of lakes and reservoirs. This constitutes only 60% of the

State's lakes and reservoirs. Of the 320,906 acres assessed, the 305(b) Report determined that 265,999 acres fully support beneficial uses, 16,107 acres partially support beneficial uses, and 38,800 acres do not support beneficial uses.

42. According to Nevada's 1998 305(b) Report, the State only assessed 21,326 acres of the State's 136,650 acres of freshwater wetlands. This constitutes only about 15% of the State's freshwater wetlands.

43. The State of Nevada submitted a list of WQLS to EPA on May 8, 1998. This list identified only 38 WQLSs in need of TMDLs.

44. The State of Nevada decided in 1998 that narrative water quality standards "are of a subjective nature" and therefore the State's 1998 303(d) list "focused" only on exceedences of numeric water quality standards. Despite this "focus," the State of Nevada failed to establish even numeric standards for the majority of its navigable water bodies. The State's 305(b) Report and 303(d) list therefore rely on the State's own failure to develop numeric standards as a reason for not listing waters as WQLS.

45. The State of Nevada's 1998 303(d) list acknowledged that federal regulations require states to include on the 303(d) list waters identified on the most recent 305(b) Report as "partially meeting" or "not meeting" designated uses. The State of Nevada, however, did not include waterbodies that only "partially" met water quality standards on the 303(d) list. Instead, the State included only waterbodies "not meeting" designated uses on the State's 303(d) list.

46. The State of Nevada did not consider the most recent 305(b) Report in preparing the 1998 303(d) list. The State did not include waterbodies with impaired beneficial uses, "threatened" waters, or waters that are impaired due to insufficient stream flows in developing the 1998 303(d) list. The State also did not consider whether waterbodies satisfied the State's "antidegradation" standard, which applies to all waters of the State, in developing the 1998 303(d) list.

47. On August 13, 1998, EPA approved Nevada's 1998 Section 303(d) list. EPA

approved the State of Nevada's 303(d) list despite Nevada's failure to evaluate narrative criteria, failure to consider and include those waters "partially meeting" water quality standards, failure to consider and include waters with impaired beneficial uses, failure to consider Nevada's 1998 305(b) Report, failure to consider and include "threatened" waters, failure to consider waters with inadequate streamflows, failure to consider Nevada' antidegradation standard, and failure to include waterbodies, like Walker Lake, that were known to the State to be biologically, chemically and physically impaired.

48. Prior to approving Nevada's 1998 303(d) list, EPA did not consult with the United States Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act.

49. EPA last reviewed and approved a CPP for the State of Nevada in 1986. Nevada acknowledges that the existing CPP is outdated, but has failed to submit a CPP consistent with the goals of the CWA. The State's CPP does not include required plans for all of Nevada's navigable waters. Most of Nevada's water bodies lack adequate monitoring and site-specific water quality standards. TMDLs have never been established in accordance with § 303(d) for these waters. Despite that fact that Nevada has for fifteen years been managing water quality under an inadequate and outdated CPP, the EPA has failed to require submission of a new CPP.

B. Walker Lake

50. An egregious example of EPA and the State's failure to protect Nevada's waterbodies is Walker Lake--one of the most spectacular water resources in Nevada. The State of Nevada, federal agencies, academic institutions, and the general public have recognized for years that the lake, and the aquatic life that depends on the lake, are dying. Biologists give the lake only a few years before it is devoid of virtually all life. Once that occurs, the many species of birds that depend on the lake will be forced to relocate or perish.

51. Walker Lake is a rare type of terminal desert lake. It is a large desert lake that supports an abundant coldwater population of big trout. Walker Lake and a few others (Pyramid Lake, Nevada; Issyk Kul in Kirghiza; and Balkhash in Kazakhstan; and perhaps a few more in

the desert regions of Mongolia and China) are the only lakes in the world with these characteristics.

52. Lahontan cutthroat trout (LCT) reside in Walker Lake and qualify as an "existing use" under the CWA. The United States Fish and Wildlife Service has designated LCT as a threatened species under the Endangered Species Act. 40 Fed. Reg. 29,864 (1975). Walker Lake's water quality, however, is so poor that LCT cannot reproduce in the lake, and must be raised in hatcheries and slowly acclimated to the lake in order to survive.

53. The concentration of total dissolved solids (TDS) in Walker Lake has increased from about 2,000 mg/l in 1880 to more than 13,000 mg/l in 1995. According to a recent study entitled, "Effects of High Levels of TDS in Walker Lake, Nevada on Survival and Growth of Lahontan Cutthroat Trout," survival of LCT is inversely proportional to the amount of TDS in the lake. According to the study, a TDS level of 10,300 mg/l will significantly impair survival of LCT and is clearly too high.

54. In December, 1994, a report on Walker Lake funded by EPA's Clean Lakes Program entitled "Walker Lake Nevada: State of the Lake, 1992-1994," found that Walker Lake is now only 28% of its 1882 volume and half of its 1882 area. The report also found that large adult LCT have become rare "most probably due to poor water quality (high TDS, high temperature, low dissolved oxygen, hydrogen sulfide"). The report concludes that Walker Lake is in danger of extinction.

55. The impaired health of Walker Lake has been obvious for many years and is readily acknowledged by the State of Nevada. Nevada's 1998 305(b) Report classifies all 38,800 acres of Walker Lake as "non supporting" beneficial uses. The 305(b) Report defines "non supporting" as follows: "for any one pollutant, criteria exceed in greater than or equal to 25% of measurements and mean of measurements is less than criteria; or criteria exceeded in less than or equal to 11-25% of measurements and mean of measurements is greater than criteria. Pollutants are found as levels of concern." Nevada's Clean Water Action Plan "United Watershed

Assessment" list Walker Lake as a Category 1 waterbody, meaning it does not meet, or faces imminent threat of not meeting, clean water and other natural resource goals.

56. Despite acknowledging in its 305(b) Report and elsewhere that Walker Lake is in jeopardy, the State of Nevada has not developed water quality standards for Walker Lake and many other waterbodies in the State, and the State of Nevada's 1998 303(d) list of WQLS failed to identify Walker Lake and other waterbodies that do not meet water quality standards. As a result, no TMDL has been prepared or is proposed for Walker Lake, and no regulatory action is being taken to protect the Lake. The State lacks an adequate monitoring program for Walker Lake. The Nevada Division of Environmental Protection (NDEP) recently attempted, for the first time, to develop site-specific, numeric water quality standards for a single location on Walker Lake, but the proposed standards were rejected by a committee of the Nevada legislature.

57. During NDEP's unsuccessful attempt to develop site-specific, numeric water quality standards for Walker Lake, the Nevada Division of Wildlife recommended that the TDS standards for Walker Lake be 10,000 mg/l. Plaintiffs requested that the TDS standard for Walker Lake not exceed 8500 mg/l. After reviewing all submitted comments, NDEP recommended a TDS standard of 10,000 mg/l. The Nevada State Environmental Commission relaxed the proposed TDS standard to 12,000 mg/l prior to submitting the proposal to the Nevada legislature. A committee of the Nevada legislature, however, refused to approve even this lax proposed TDS standard, or any other proposed water quality standard for Walker Lake.

58. EPA has known for years that Walker Lake's water quality does not meet the minimum requirements of the CWA, and that the State of Nevada has repeatedly failed to develop adequate standards and monitoring for the lake. EPA's own website recognizes serious problems at Walker Lake.

59. In 1985, the State of Nevada submitted water quality standards to EPA for the Walker River Basin. The State acknowledged water quality problems at Walker Lake, but omitted standards for the lake, and numerous other waterbodies within the State, from its

submission of standards for the river. EPA approved the standards in 1986. The state *again* submitted standards for the river, again without standards for the lake, or numerous other waterbodies within the State, to EPA in the late 1980s. EPA approved these standards in 1991. Standards for the river were again submitted to EPA in 1993, and approved in 1994. Once again, no standards were proposed for Walker Lake and numerous other waterbodies. The State of Nevada last submitted a set of standards and revisions to EPA in 1996. In 1997, EPA again approved Nevada's water quality standards, despite the absence of standards for Walker Lake and other waterbodies.

60. Since 1997, Nevada has failed to submit any new or revised water quality standards to EPA for approval pursuant to 33 U.S.C. § 1313(c). EPA is aware that a committee of the Nevada legislature recently threw out the site-specific water quality standards that NDEP finally proposed for Walker Lake.

61. On February 21, 2001, plaintiffs submitted a public records request to the State of Nevada. Plaintiffs' letter included a request for all records relating to Nevada's decision not to identify Walker Lake as WQLS pursuant to the CWA. NDEP responded to plaintiffs' request on March 15, 2001. In its March 15, 2001 letter, NDEP asserted that Nevada requires monitoring data to show exceedences of numeric water quality standards before a waterbody may be placed on the State's 303(d) list, and since Walker Lake does not have numeric standards, it was not included on the 1998 303(d) list.

62. During NDEP's recent attempts to finally develop site-specific, numeric water quality standards for Walker Lake, one commenter asked why water quality standards had not yet been established for the Lake. NDEP's written response was that it does not know.

63. On May 11, 2001, plaintiffs sent notice to EPA of their intent to sue pursuant to the CWA. In addition to identifying EPA's improper determination that Nevada's water quality standards were consistent with the CWA, and improper approval of Nevada's 1998 303(d) list, the May 11, 2001, notice letter informed EPA that EPA is required to promulgate water quality

standards for Walker Lake and other Nevada waterbodies that lack the required standards.

64. Subsequent to the May 11, 2001, notice letter, plaintiffs were informed by both EPA and the State of Nevada that Nevada has a "tributary rule," which extends existing water quality standards to include upstream or downstream waterbodies where site-specific standards have not yet been developed. As a result of Nevada's tributary rule, as interpreted by EPA and the State, the water quality standards for the lowest reaches of the Walker River apply downstream to Walker Lake. According to this interpretation, many other waterbodies for which the State has asserted it does not have standards (and therefore cannot place on its 303(d) list) do in fact have standards under the tributary rule.

65. On July 16, 2001, plaintiffs wrote to NDEP to clarify the State's position regarding the tributary rule and its application to Walker Lake. Plaintiffs wrote that based on the State's explanation of the tributary rule, the standards that are applicable to the Walker River section that runs from the inlet of Walker Lake to the Walker Reservoir also apply to Walker Lake itself, and therefore, Walker Lake has a water quality standard for total dissolved solids which ranges from 390 to 570 mg/l. Plaintiffs asked the State to inform plaintiffs if plaintiffs' understanding was incorrect. The State of Nevada did not respond to plaintiffs' July 16, 2001, letter.

66. On September 13, 2001, plaintiffs again wrote to NDEP regarding Nevada's tributary rule. Plaintiffs stated that since NDEP had not responded to the July 16, 2001 letter, plaintiffs would move forward with the understanding that Walker Lake has a total dissolved solids standard, of from 390 to 570 mg/l, which has been greatly exceeded for a number of years.

67. On October 1, 2001, the Nevada Office of the Attorney General finally responded to plaintiffs' "tributary rule" letters. The Nevada Attorney General responded as follows:

> As you are aware, settlement discussions regarding water rights issues in the Walker River Basin are ongoing and, while complex, the participants are hopeful of achieving a global resolution. Due to these ongoing negotiations and our desire to facilitate, to the

extent possible, the dispute resolution process, we do not feel that NDEP's analysis of Nevada's tributary rule would be constructive at this point.

68. On August 13, 1998, EPA approved the State of Nevada's list of 1998 303(d) WQLSs and TMDLs despite the fact that the list failed to identify numerous waterbodies that did not meet water quality standards, including Walker Lake.

69. Most of Nevada's waters lack any surface water monitoring stations. Monitoring remains inadequate in the few regions where it does occur. Walker Lake, for example, has only a single monitoring station near Sportsman's Beach. As stated in Nevada's 1998 303(d) list, the State does not conduct any biological assessments or bioassays at this time, and instead limits its analysis to chemical quality.

CLAIM FOR RELIEF

COUNT 1

EPA's Approval of Nevada's Water Quality Standards Was Arbitrary, Capricious, an Abuse of Discretion, and Not in Accordance with the CWA.

70. Plaintiffs hereby incorporate by reference all preceding paragraphs.

71. Section 303(c) of the CWA requires the Administrator to determine if state water quality standards are consistent with the requirements of the CWA, and to notify states if such standards do not meet the requirements of the Act. 33 U.S.C. § 1313(c)(3). If a state does not correct inadequate standards within 90 days, the Administrator must promulgate such standards.

72. The Administrator has a nondiscretionary duty under the CWA, 33 U.S.C. § 1313 (c)(3), to approve only standards that are consistent with the requirements of the CWA. The Administrator violated this nondiscretionary duty in approving Nevada's water quality standards in 1986, 1991, 1994, and 1997. The Administrator also violated her nondiscretionary duty under 33 U.S.C. § 1313(c) by failing to promulgate standards in the absence of state standards that meet the requirements of the Act. EPA's approval of Nevada's water quality standards was arbitrary, capricious, an abuse of discretion, and not in accordance with the CWA. 5 U.S.C. § 406.

COUNT 2

EPA's Approval of Nevada's 1998 303(d) List was Arbitrary, Capricious, an Abuse of Discretion, and Not in Accordance with the CWA

73. Plaintiffs hereby incorporate by reference all preceding paragraphs.

74. Section 303(d) of the CWA requires each state to identify all WQLS within the state's borders, establish a priority ranking for such waters, and establish TMDLs for all identified waters. 33 U.S.C. § 1313(d)(1)(A); (C); 40 C.F.R. § 130.7.

75. The 303(d) list and TMDLs must be submitted to EPA for approval. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d). EPA has a nondiscretionary duty to approve only 303(d) lists that meet the requirements of the CWA. EPA must either approve or disapprove the 303(d) list and TMDLs within 30 days. *Id.* If EPA disapproves, EPA has a non-discretionary duty to identify the state's WQLSs and establish such TMDLs as determined to be necessary to meet applicable water quality standards. *Id.*

76. EPA approved Nevada's 1998 303(d) list despite the following: (1) the list failed to identify all WQLS within the State; (2) the list failed to include and establish TMDLs for all WQLSs within the state, including Walker Lake; (3) the list failed to properly consider narrative criteria in addition to numeric criteria in evaluating WQLSs; (4) the list failed to identify waters only "partially meeting" water quality standards within the state; (5) the list failed to identify waters that were determined to be impaired within Nevada's 1998 305(b) Report; (6) the list failed to identify waterbodies with impaired beneficial uses; (7) the list failed to identify "threatened" waters, and (8) the list failed to identify waterbodies that are impaired due to inadequate streamflows.

77. EPA's approval of Nevada's 1998 303(d) list violated EPA's nondiscretionary duty to approve only 303(d) lists that meet the requirements of the CWA. EPA's approval of Nevada's 1998 303(d) list was also arbitrary, capricious, an abuse of discretion and not in accordance with the CWA. 5 U.S.C. § 706.

COUNT 3

EPA Violated Section 7 of the Endangered Species by Failing to Initiate and Complete Consultation with the United States Fish and Wildlife Service Prior to Approving Nevada's 1998 303(d) List of Water Quality Limited Waterbodies

78. Plaintiffs hereby incorporate by reference all preceding paragraphs.

79. Section 7(a)(2) of the ESA requires each federal agency, in consultation with the United States Fish and Wildlife Service, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

80. For each proposed action, the federal agency must request information from the United States Fish and Wildlife Service whether any listed or proposed species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed or proposed species may be present, the federal agency must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. Id. If the agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in "formal consultation" with the United States Fish and Wildlife Service. 50 C.F.R. § 402.14.

81. After formal consultation is completed, the United States Fish and Wildlife Service must provide the action agency with a "biological opinion" explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the United States Fish and Wildlife Service concludes that the proposed action "will jeopardize the continued existence" of a listed species, the biological opinion must outline "reasonable and prudent alternatives." 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action will not result in jeopardy, the United States Fish and Wildlife Service must provide an "incidental take statement" specifying the impact of such incidental taking on the species, any "reasonable and prudent measures" that are considered necessary to minimize such impact, and setting forth the "terms and conditions" that must be complied with by the agency to implement

those measures. 16 U.S.C. § 1536(b)(4).

82. EPA approved the State of Nevada's list of 303(d) waterbodies in August, 1998. Prior to approving Nevada's 1998 list of waterbodies, EPA failed to comply with its mandatory duties under Section 7 of the ESA. EPA failed to request information from the United States Fish and Wildlife Service whether any listed or proposed species may be present, in violation of 16 U.S.C. § 1536(c)(1). Listed and proposed species are present, including the Lahontan cutthroat trout, and therefore EPA violated 16 U.S.C. § 1536(c)(1) by failing to prepare a biological assessment to determine whether the 1998 approval may affect the listed species. EPA also failed to consult with the United States Fish and Wildlife Service, as required by 16 U.S.C. § 1536(a)(2), to ensure that the 1998 approval will not jeopardize the continued existence of any of the listed species or result in the adverse modification of the critical habitat of such species.

83. EPA has continued its failure to comply with its ESA Section 7 mandatory duties regarding Nevada's 1998 303(d) list since the 1998 approval.

84. EPA's failure to meet its ESA Section 7 mandatory duties regarding Nevada's 1998 303(d) list, in addition to violating the ESA, is also arbitrary, capricious, an abuse of discretion, and not in accordance with the law, pursuant to the APA. 5 U.S.C. § 706.

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

A. Declare that EPA's approval of Nevada's water quality standards violated the CWA and the APA;

B. Declare that EPA's failure to develop water quality standards violated the CWA and the APA;

C. Declare that EPA's approval of Nevada's 1998 303(d) list violated the CWA, the ESA, and the APA;

D. Declare that EPA's failure to identify WQLSs for all applicable water bodies within the State of Nevada, and failure to establish TMDLs for such waters, violated the CWA;

E. Order EPA to perform its mandatory duties under the CWA by: (1) determining that Nevada's current water quality standards are not consistent with the CWA because they do no address all waterbodies with the State; (2) developing water quality standards for those waterbodies that do not currently have necessary standards; (3) disapproving Nevada's 1998 303(d) list; (4) promptly identifying Walker Lake as a WQLS and establishing TMDLs for Walker Lake; (5) promptly identifying WQLSs for all applicable waters within the state of Nevada; and (6) establishing an expeditious schedule for TMDL development for all identified WQLSs in accordance with the required priority ranking;

F. Order EPA to perform its mandatory duties under Section 7 of the ESA by initiating and completing consultation with the United States Fish and Wildlife Service regarding EPA's approval of Nevada's 303(d) list of water quality limited waterbodies;

G. Award Plaintiffs their reasonable fees, costs, and expenses associated with this litigation; and

H. Grant Plaintiffs such additional and further relief as the Court deems just and equitable.

DATED this 30th day of November, 2001.

Respectfully submitted,

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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 JOINT MOTION OF THE UNITED STATES AND 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*** in an envelope addressed to:

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Dated this 17th day of June, 2002.

Penelope H. Colter
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