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 WALKER RIVER IRRIGATION DISTRICT  
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10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE DISTRICT OF NEVADA  
 12

13 UNITED STATES OF AMERICA,	)	In Equity No. C-125-ECR
	)	Subfile No. C-125-B
14 Plaintiff,	)	
	)	
15 WALKER RIVER PAIUTE TRIBE,	)	<b>WALKER RIVER IRRIGATION</b>
	)	<b>DISTRICT'S POINTS AND</b>
16 Plaintiff-Intervenor,	)	<b>AUTHORITIES IN RESPONSE TO</b>
	)	<b>JOINT MOTION OF THE UNITED</b>
17 v.	)	<b>STATES AND WALKER RIVER</b>
	)	<b>PAIUTE TRIBE FOR AMENDMENT</b>
18 WALKER RIVER IRRIGATION DISTRICT,	)	<b>OF THE COURT'S ORDER DENYING</b>
19 a corporation, et al.,	)	<b>MOTION FOR CERTIFICATION OF</b>
	)	<b>DEFENDANT CLASSES OR FOR</b>
20 Defendants.	)	<b>RELIEF FROM THIS SAME ORDER</b>
21	)	

22  
 23 **I. INTRODUCTION.**

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

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

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

9 **A. Standard of Review.**

10 Rule 59(e) motions may be granted for any of four reasons: 1) to correct a  
11 manifest error of law or fact upon which the judgment is based; 2) to present newly discovered  
12 or previously unavailable evidence; 3) to prevent manifest injustice; and 4) to account for an  
13 intervening change in controlling law. McDowell v. Calderon, 197 F.3d 1253, 1255 fn. 1 (9th  
14 Cir. 1999) ; see also 11 Charles Alan Wright, Arthur Miller, and Mary Kay Kane, Federal  
15 Practice and Procedure §2810.1 (2d Ed.1995). Rule 59(e) motions "may not be used to  
16 relitigate old matters, or to raise arguments or present evidence that could have been raised  
17 prior to entry of judgment." Wright, Miller and Kane, supra; A party cannot have relief under  
18 Rule 59(e) merely because it is unhappy with the judgment. Kahn v. Fasano, 194 F.Supp.2d  
19 1134, 1136 (S.D.Cal.,2001); see also, Durkin v. Taylor, 444 F.Supp. 879, 889 (E.D.Va. 1977)  
20 ("Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to  
21 give an unhappy litigant one additional chance to sway the judge.") Rule 59(e) is intended to  
22 afford relief only in extraordinary circumstances, and not to routinely give litigants a second  
23 bite at the apple. See 389 Orange Street Partners v. Arnold, 179 F.2d 656, 665 (9th Cir. 1999);  
24 School District No. 1J. Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th  
25 Cir. 1993), cert. denied, 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994); Novato Fire  
26 Protection District v. United States, 181 F.3d 1135, 1142, n. 6 (9th Cir. 1999). Rule 59(e)  
27 "offers an 'extraordinary remedy, to be used sparingly in the interests of finality and  
28 conservation of judicial resources.' " Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877,  
890 (9th Cir. 2000).

1           The United States and the Tribe have brought their Rule 59(e) motion on two of  
2 the above grounds. They contend that the Court's denial of their class certification motion was  
3 based on "manifest errors of law or fact" and perpetuates a "manifest injustice." Memorandum  
4 in Support of Joint Motion of the United States of America and the Walker River Paiute Tribe  
5 for Amendment of the Court's Order Denying Motion for Certification of Defendant Classes or  
6 for Relief From This Same Order ("Memorandum"), pp. 4-5. Their argument, however, begins  
7 by "reiterating" all of the arguments in all their prior pleadings and never goes any further.  
8 Memorandum, p. 4. The United States and the Tribe "disagree" with the Court's decision but  
9 never identify any "manifest" error of law or fact or demonstrate any "manifest injustice." It is  
10 well established that "[a] party seeking reconsideration must show more than a disagreement  
11 with the Court's decision, and "recapitulation of the cases and arguments considered by the  
12 court before rendering its original decision fails to carry the moving party's burden." " "  
13 Birmingham v. Sony Corporation of America, Inc., 820 F.Supp. 834, 856-857 (D.M.J. 1992),  
14 aff'd, 37 F.3d 1485 (3d Cir. 1994). To succeed on a Rule 59(e) motion, a party must set forth  
15 facts or law of a strongly convincing nature to induce the court to reverse its prior decision.  
16 See, e.g., Kern-Tulare Water District v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal.  
17 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987). The  
18 United States and the Tribe have failed to do either. Their motion must be denied.

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

22           The United States and the Tribe "disagree" with the Court's conclusion that the  
23 State of Nevada would not be an adequate class representative for the proposed class of  
24 domestic groundwater users. Memorandum, p. 5, lns. 16-17. The United States and the Tribe  
25 fail to substantiate their "disagreement," however, by identifying anything in the record that  
26 they contend was misapprehended or overlooked by the Court in reaching its decision. Instead  
27 they simply cite to new evidence attached to the Memorandum purportedly demonstrating that  
28 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.

1 A Rule 59(e) motion may be made on grounds of newly discovered evidence.  
2 The United States and the Tribe, however, do not base their motion on that ground. They  
3 attempt to get their new evidence in on other grounds because the law is undisputed. A party  
4 who wishes to submit new evidence under Rule 59 must demonstrate that the new evidence  
5 was newly discovered and that it could not have been discovered earlier with reasonable  
6 diligence. See School District No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d  
7 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861  
8 (1994); Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th Cir. 1992); Englehard Industries, Inc.  
9 v. Research Instrumental Corp., 324 F.2d 347, 252 (9th Cir. 1963); cert denied, 377 U.S. 923,  
10 84 S.Ct. 1220, 12 L.Ed.2d 215 (1964). A party that fails to introduce facts in a motion or  
11 opposition cannot introduce them later in a Rule 59(e) motion by claiming that they constitute  
12 "newly discovered evidence" unless they were previously unavailable. Zimmerman v. City of  
13 Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

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

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

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

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

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

15 In addition to meeting the four requirements of FRCP Rule 23(a), a proposed  
16 class must satisfy the requirements of at least one of the three subsections of FRCP Rule 23(b)  
17 in order to be certified. In their motion for certification of defendant classes, the United States  
18 and the Tribe argued that their proposed classes met the requirements of all three subsections.  
19 In its April 29, 2002 Order denying class certification, the Court rejected those arguments,  
20 finding that the proposed classes failed to meet the requirements of any one of the 23(b)  
21 subsections. Without identifying any "manifest" error of law or fact made by the Court in its  
22 April 29, 2002 Order or any "manifest injustice" in the result, the United States and the Tribe  
23 use the instant Rule 59(e) motion to amend, alter or vacate that Order simply to restate their  
24 prior arguments and take another opportunity to persuade the Court to their position. As such,  
25 the Rule 59(e) motion is improper and should be denied. See, e.g., Demasse v. I.T.T. Corp.,  
26 915 F.Supp. 1040, 1048 (D.Ariz. 1995) (motion which attempted to relitigate matters  
27 previously considered and determined was properly denied) ; see also, 11 Wright, Miller and  
28 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

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

3 1. Rule 23(b)(1).

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

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

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



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

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

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

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23 <sup>1</sup> See, e.g., Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2nd Cir. 1968), rev'd on  
24 other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); McDonnell Douglas Corp.  
25 v. United States District Court, 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied sub nom,  
26 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.).

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

1 against the claims of the United States and Tribe in some other forum. Second, even if they  
2 did, they would not be successful. This Court has continuing and exclusive jurisdiction over  
3 the surface water of the Walker River. In Mineral County v. Nevada, 20 P.3d 800 (Nev.  
4 2001), the Nevada Supreme Court concluded that the Federal Decree Court was the proper  
5 forum to resolve issues concerning surface and groundwater rights in the Walker River System  
6 and refused to grant extraordinary writs sought by the County and the Walker Lake Working  
7 Group. 20 P.3d at 807; see also, United States v. Alpine Land & Reservoir Co., 174 F.3d 1007  
8 (9th Cir. 1999).

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

23 2. Rule 23(b)(2).

24 Class certification under subsection 23(b)(2) is only available "where the  
25 relief sought is exclusively or predominantly injunctive or declaratory." Eisen v. Carlisle &  
26 Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), rev'd on other grounds, 417 U.S. 156, 94 S.Ct.  
27 2140, 40 L.Ed.2d 732 (1974); Nelson v. King County, 895 F.2d 1248, 1254-55 (9th Cir. 1990).  
28 Recognizing that "the heart of [this] litigation is [the] desire [of the United States and the Tribe]



1 for additional water from the Walker River" rather than injunctive or declaratory relief, this  
2 Court held that the proposed classes were not eligible for certification under subsection  
3 23(b)(2). Order, p. 15-16. The United States and the Tribe cannot and do not attempt to deny  
4 that the ultimate relief they seek is additional water. They do argue that the Court erred in  
5 analogizing this case to one "where the primary claim is damages." Memorandum, p. 8, Ins.  
6 13-14. The true analogy, however, is not to cases seeking monetary damages but to cases  
7 where the primary relief sought is not injunctive or declaratory relief.

8 In support of their argument that their claims are primarily for injunctive  
9 and declaratory relief, the United States and the Tribe cite Southern Ute Indian Tribe v. Amoco  
10 Production Company, 874 F.Supp. 1142 (D.Colo. 1995), rev'd on other grounds, 119 F.3d 816  
11 (10th Cir. 1997), aff'd in part on reh'g en banc, 151 F.3d 1251 (10th Cir. 1998), rev'd on other  
12 grounds, 526 U.S. 865 (1999). Again, Southern Ute is the case primarily relied upon by the  
13 United States and the Tribe in their original motion for certification of defendant classes under  
14 subsection 23(b)(2). Its application here has been considered and rejected. A defendant class  
15 was certified in Southern Ute based on a joint motion brought by the plaintiff tribe and the  
16 great majority of defendants. See Southern Ute Indian Tribe v. Amoco Production Company,  
17 2 F.3d 1023, 1025-1026 (10th Cir. 1993)<sup>3</sup>. Certification of a defendant class essentially by  
18 consent provides no authority whatsoever for the certification of any class of defendants in the  
19 present case. Nothing in the Southern Ute decision has any bearing on the finding that the  
20 primary relief sought by the United States and the Tribe in this case is additional water rather  
21 than injunctive relief. There was no error of fact or law in this Court's determination that the  
22 proposed defendant classes could not be certified under subsection 23(b)(2).

23 3. Rule 23(b)(3).

24 Certification under subdivision 23(b)(3) requires findings of both  
25 "predominance" and "superiority." After the requisite "rigorous analysis," this Court  
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28 <sup>3</sup> 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.

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

6 a. Predominance.

7 The United States and the Tribe proposed certification of two  
8 defendant classes -- one of holders of surface water rights (successors-in-interest under the  
9 Decree) and a second of holders of groundwater right (domestic well users in designated sub-  
10 basins). The Court, however, identified three groups of defendants in terms of the water rights  
11 they hold: those with surface water rights, those with groundwater rights, and those with both  
12 surface and groundwater rights. Because the threshold issues involve the determination of  
13 what law to apply to the interaction of surface and groundwater rights, the Court surmised that  
14 the positions of the defendants as to those issues will depend on the individual combination of  
15 water rights they hold rather than on their membership in a particular class or classes. The  
16 Court then concluded that the proposed classes were not "sufficiently cohesive to warrant  
17 adjudication by representation" and found that the predominance requirement had not been  
18 satisfied. Amchem Products v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689  
19 (1997); Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands,  
20 244 F.3d 1152, 1162-1163 (9th Cir. 2001).

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

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

7 b. Superiority.

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

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

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

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

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

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

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

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

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27                     <sup>4</sup> The Court actually wrote that it "[did] not find persuasive the arguments that service  
28 Order, p. 8, lns. 4-6.

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

3 Finally, the United States and the Tribe argue that denying  
4 certification of the two proposed defendant classes deprives the Tribe of its due process right of  
5 access to the courts. In support of that argument, they cite Three Affiliated Tribes of the Fort  
6 Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881  
7 (1986) and Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).  
8 Neither case, however, substantiates their claim. Three Affiliated Tribes involved a lower court  
9 decision which left a Tribe with no court in which it could pursue its claim. Boddie involved a  
10 situation where indigent persons could not bring an action for divorce, except upon payment of  
11 court fees and costs which they did not have the ability to pay. No analogous situation is found  
12 here. The United States and the Tribe are in court. Certification of the proposed defendant  
13 classes threatens the due process rights of the defendants not the Tribe.

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

16 The United States and the Tribe also seek relief under FRCP Rule 60(b)(6) from the Court's  
17 Order denying their motion for certification of defendant classes. Section (6) is the catchall  
18 provision of Rule 60(b) and permits the Court to "relieve a party ... from a final judgment,  
19 order, or proceeding for . . . any other reason justifying relief . . ." Although Rule 60(b)(6)  
20 itself does not identify or limit the factors that may justify relief, it has been narrowly construed  
21 to promote the finality of judgments. Accordingly, the U.S. Supreme Court has held that Rule  
22 60(b)(6) authorizes relief only in "extraordinary circumstances." Ackerman v. United States,  
23 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950); Liljeberg v. Health Services Acquisition  
24 Corporation, 486 U.S. 847, 863-864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988). The  
25 Ninth Circuit likewise has held that 60(b)(6) may only be used "sparingly as an equitable  
26 remedy to prevent manifest injustice." United States v. Alpine Land & Reservoir Co., 984 F.2d  
27 1047, 1049 (9th Cir. 1993) cert. denied, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993)  
28 (reversing trial court's grant of relief under 60(b)(6) where party had failed to read and



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

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

12 In any event, the relief they seek, i.e., the reversal of the Court's April 29, 2002 Order  
13 denying certification of defendant classes, is not available under 60(b)(6). The provisions of  
14 Rule 60(b) are available only to set aside or vacate a prior order or judgment. Rule 60(b) does  
15 not authorize the court to grant affirmative relief. See, e.g., United States v. One Toshiba Color  
16 Television, 213 F.3d 147, 158 (3d Cir. 2000); Adduono v. World Hockey Association, 824  
17 F.2d 617, 620 (8th Cir. 1987); McCall-Bey v. Franzen, 777 F.2d 1178, 1186 (7th Cir. 1985);  
18 United States v. One Douglas A-26B Aircraft, 662 F.2d 1372, 1378 (11th Cir. 1981); United  
19 States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353, 1356 (5th Cir. 1972). Rule  
20 60(b)(6) does not support or authorize a motion for reconsideration. The 60(b)(6) motion of the  
21 United States and the Tribe must be denied.

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

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

1 assessment list of WRID and the United States Board of Water Commissioners, plus  
2 publication, is sufficient for purposes of meeting all due process and other requirements of  
3 service in this matter” (Memorandum, p. 13), the United States and Tribe are actually asking  
4 the Court to alter its October 30, 1992 Order concerning joinder (the “Joinder Order”), its April  
5 19, 2000 Case Management Order and its June 11, 2001 Order denying the joint motion for an  
6 order requiring the identification of all decreed water right holders and their successors (the  
7 “Identification Order”). Before explaining why that request must be denied, it is useful to  
8 briefly provide some of the background leading up to the Joinder Order, the Case Management  
9 Order and the Identification Order.

10 A. The Joinder Order.

11 The Joinder Order resulted from the District’s and Nevada’s motion to dismiss  
12 the original counterclaims of the United States and Tribe or in the alternative to require joinder  
13 of all claimants to the waters of the Walker River as defendants and for service on those  
14 claimants in accordance with Fed. R. Civ. P. Rule 4. Joinder Order (Doc. 15 at 3). At that time  
15 the Tribe argued that the joinder was unnecessary and the United States and the Tribe  
16 contended that they should be allowed to give notice of their claims by posting and by publi-  
17 cation. See Sept. 10, 1992 Response of Walker River Paiute Tribe to the Walker River  
18 Irrigation District and the State of Nevada’s Preliminary Threshold Motions at 25-28; Sept. 10,  
19 1992 Points and Authorities of the United States in Response to Opposition by the Walker  
20 River Irrigation District and State of Nevada to Counterclaims filed by the United States at 11-14.

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

28

1           B.     The Case Management Order.

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

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

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

28

1           The issues related to the Case Management Order also involved the question of  
2 who should be joined and how they should be served. The District in its opposition to the  
3 motion of the Tribe and the United States again explained why joinder was required. The  
4 United States and the Tribe argued that it “will be unnecessarily time consuming for the United  
5 States and Tribe to be left to identify” the proposed defendants “on their own.” See Feb. 21,  
6 2000 Response of the United States and Walker River Paiute Tribe to Joint Motion By the State  
7 of Nevada and WRID Concerning Case Management, at 4. The District noted that in the past it  
8 had provided its assessment roll to the United States. It argued, however, that it should not be  
9 obliged to undertake research in the assessors’ offices, recorders’ offices and the offices of the  
10 water agencies of the two states. That burden, the District contended, should properly fall on  
11 the United States and the Tribe. See Walker River Irrigation District’s Points and Authorities  
12 in Opposition to Motion of the United States and Walker River Paiute Tribe to adopt Case  
13 Management Order (filed Feb. 22, 2000) at pages 8-11. In addition, in their proposed Case  
14 Management Order, the United States and the Tribe suggested a standard outside of Fed. R.  
15 Civ. P. Rule 4 for determining when service by publication on identified defendants would be  
16 proper. The District objected to that suggestion. See Tribe and the United States Proposed  
17 Case Management Order at para. 4; District’s Points and Authorities in Opposition to Motion  
18 of the United States and Walker River Paiute Tribe to adopt Case Management Order (filed  
19 Feb. 22, 2000) at 11.

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

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

3 C. The Identification Order.

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

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

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

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

1 have consistently held that it was ultimately the burden of the plaintiff to identify the  
2 defendants.<sup>5</sup> The Court's orders on method of service have consistently required service in  
3 accordance with Rule 4 of the Federal Rules.

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

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

16 The Walker River Decree adjudicated water rights appurtenant to lands located  
17 in both California and Nevada. All lands within the District's boundaries are  
18 located entirely within the State of Nevada. Therefore, it is important to note  
19 that the information discussed below pertains solely to lands located within the  
20 District's boundaries and, therefore, within the State of Nevada. The District  
21 does not maintain information concerning lands located in California with  
22 appurtenant Walker River Decree water rights.

23 The Lyon County Recorders Office forwards deeds to the District, typically on a  
24 monthly basis. The Recorders Office, however, only forwards deeds to the  
25 District which it believes include or involve the conveyance of a water right  
26 within the District. Upon receiving the deeds, the District's staff reviews them  
27 and subsequently updates the District's records based upon that review. The  
28 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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<sup>5</sup> 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).



1 The District's records contain two sources of information that are updated with  
2 information received from the Lyon County Recorders Office and that may be  
3 helpful in ultimately identifying the successors in interest to Walker River  
4 Decree water rights holders. First, the District maintains an assessment roll, in  
5 computer and hard copy format, which it uses in connection with the levying  
6 and collection of its assessments pursuant to Chapter 539 of the Nevada Revised  
7 Statutes. In most instances, the name appearing on the assessment roll should  
8 accurately identify the current record title holder of a Walker River Decree  
9 water right. In some instances, however, the name present on the assessment  
10 roll may not accurately identify the current record title holder of a particular  
11 Walker River Decree water right. This may occur, for example, when the  
12 District does not receive a copy of the document conveying title to the water  
13 right from one individual to another, where the information received is not  
14 correctly interpreted, or where the ownership of the water right is different than  
15 the ownership of the land to which is it appurtenant.

16 \* \* \*

17 In some cases ownership of a water right is different than the ownership of the  
18 land to which it is appurtenant. Until 1999, the District could only assess the  
19 land regardless of who owned the water rights. Even under the 1999  
20 amendments that is the situation unless there is an agreement which provides  
21 otherwise. To date there are only a few such agreements. However, the District  
22 has begun to maintain a list of persons and entities who appear to own a water  
23 right, but not the land to which the water right is appurtenant. That list is  
24 available in hard copy. However, it may not be complete for the same reasons  
25 that the District's other information may not be complete.

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

28 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,

1 i.e., a final binding judgment and satisfaction of the due process rights of the defendants. This  
2 Court cannot decide today that a judgment entered in the future will bind and satisfy the due  
3 process rights of a person or entity not on the assessment rolls of the District and  
4 Commissioners, who is a successor-in-interest to water right holders under the Decree and  
5 whose name and address are reasonably ascertainable. The law would suggest a contrary  
6 result. See, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865  
7 (1950).

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

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

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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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10  
 11 **IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

12 MINERAL COUNTY, a Political Subdivision of the )  
 13 State of Nevada, and WALKER LAKE WORKING )  
 GROUP, a Nevada Nonprofit Corporation, )  
 14 Plaintiffs, )  
 15 v. )  
 16 U.S. ENVIRONMENTAL PROTECTION AGENCY, )  
 17 Defendant. )  
 18

Case No. C-01-3894-MHP  
 AMENDED COMPLAINT  
 FOR DECLARATORY  
 AND INJUNCTIVE RELIEF

19 **INTRODUCTION**

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

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

5 2. Should plaintiffs prevail, plaintiffs will seek an award of costs and attorneys' fees  
 6 pursuant to the Clean Water Act, 33 U.S.C. § 1365(d), the Endangered Species Act, 16 U.S.C. §  
 7 1540(g), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

8 **JURISDICTION**

9 3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1346,  
 10 because this action involves the United States as a defendant, and it arises under the laws of the  
 11 United States, including the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; the  
 12 Clean Water Act ("CWA"), 33 U.S.C. 1251, *et seq.*; and the Endangered Species Act ("ESA"),  
 13 16 U.S.C. § 1531, *et seq.* Jurisdiction also is proper under 33 U.S.C. § 1365(a)(2), because this  
 14 action alleges a failure of the Administrator to perform a duty under the CWA which is not  
 15 discretionary with the Administrator. Jurisdiction is also proper under 16 U.S.C. 1540(g)  
 16 because this action alleges that EPA has violated, and continues to violate, Section 7 of the ESA.  
 17 An actual, justiciable controversy exists between plaintiffs and defendant.

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

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



1 1365(a), 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 705 & 706. The challenged agency action is final  
2 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.  
3 §§ 702, 704, and 706.

4 VENUE AND INTRADISTRICT ASSIGNMENT

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

9 PARTIES

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

20 8. Plaintiff WALKER LAKE WORKING GROUP is a private, not for profit  
21 501(c)(3) organization, with approximately 160 members within and outside Mineral County,  
22 Nevada. The Walker Lake Working Group was established to preserve and protect Walker Lake.  
23 The members of the Walker Lake Working Group use the waterways within the State of Nevada  
24 for subsistence, navigation, fishing, recreation and the use and enjoyment of scenic beauty. The  
25 members' use and enjoyment of the waterways within the State of Nevada (including Walker  
26 Lake and Walker River, which are located within Mineral County, Nevada) are adversely

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

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

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

#### 15 STATUTORY FRAMEWORK OF THE CLEAN WATER ACT

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

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

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

10           14. States must submit the water quality standards to EPA for approval. 33 U.S.C.  
11 § 1313. EPA must review state standards and determine whether such standards are consistent  
12 with the CWA. *Id.* If EPA determines such standards are not consistent with the CWA, EPA  
13 must set its own standards. *Id.*

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

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

21           16. The 303(d) list must establish a priority ranking for "water quality limited"  
22 waters, taking into account the severity of the pollution and the uses to be made of such waters.  
23 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. §§ 130.7(b)(4), 130.7(d).

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

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

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1 state to "establish appropriate monitoring methods (including biological monitoring) necessary to  
2 compile and analyze data on the quality of waters of the United States." 40 C.F.R. § 130.4(a);  
3 40 C.F.R. § 130.4(b).

4 19. The CWA regulations impose an affirmative obligation on each state to "assemble  
5 and evaluate all existing and readily available water quality-related data and information" in  
6 developing the 303(d) list. 40 C.F.R. § 130.7(b)(5). The CWA regulations set forth sources of  
7 information and categories of waters that each state must consider. 40 C.F.R. § 130.7(b)(5)(i)-  
8 (iv). Many sources and types of information must be considered in developing a 303(d) list,  
9 including waters for which water quality problems have been identified by local, state, or federal  
10 agencies, members of the public, or academic institutions. 40 C.F.R. § 130.7(b)(5)(ii); *see also*  
11 40 C.F.R. § 130.10(d)(6).

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

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

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

1 B. Total Maximum Daily Loads

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

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

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

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

20 27. TMDLs must be completed in accordance with the priority ranking. 33 U.S.C. §  
21 1313(d)(1)(C). A 303(d) list's priority ranking must specifically include the identification of  
22 waters targeted for TMDL development within the next two years. 40 C.F.R. § 130.7(b)(4).

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

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

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

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

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

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

13 32. EPA may approve a state's submission only if the submission satisfies the  
14 explicit requirements set forth in the CWA and its implementing regulations. *See* 40 C.F.R. §§  
15 130.7, 130.7(d)(2). EPA must reject a 303(d) list that fails to identify all waters that do not or are  
16 not expected to meet applicable water quality standards. *See* 40 C.F.R. §§ 130.2(j), 130.7.

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

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

23 D. Section 303(e) Continuing Planning Process

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

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1 State's lakes and reservoirs. Of the 320,906 acres assessed, the 305(b) Report determined that  
2 265,999 acres fully support beneficial uses, 16,107 acres partially support beneficial uses, and  
3 38,800 acres do not support beneficial uses.

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

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

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

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

20 46. The State of Nevada did not consider the most recent 305(b) Report in preparing  
21 the 1998 303(d) list. The State did not include waterbodies with impaired beneficial uses,  
22 "threatened" waters, or waters that are impaired due to insufficient stream flows in developing  
23 the 1998 303(d) list. The State also did not consider whether waterbodies satisfied the State's  
24 "antidegradation" standard, which applies to all waters of the State, in developing the 1998  
25 303(d) list.

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

1 approved the State of Nevada's 303(d) list despite Nevada's failure to evaluate narrative criteria,  
2 failure to consider and include those waters "partially meeting" water quality standards, failure to  
3 consider and include waters with impaired beneficial uses, failure to consider Nevada's 1998  
4 305(b) Report, failure to consider and include "threatened" waters, failure to consider waters  
5 with inadequate streamflows, failure to consider Nevada's antidegradation standard, and failure to  
6 include waterbodies, like Walker Lake, that were known to the State to be biologically,  
7 chemically and physically impaired.

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

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

17 B. Walker Lake

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

11 CLAIM FOR RELIEF

12 COUNT I

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

15 70. Plaintiffs hereby incorporate by reference all preceding paragraphs.

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

20 72. The Administrator has a nondiscretionary duty under the CWA, 33 U.S.C. §  
21 1313 (c)(3), to approve only standards that are consistent with the requirements of the CWA.  
22 The Administrator violated this nondiscretionary duty in approving Nevada's water quality  
23 standards in 1986, 1991, 1994, and 1997. The Administrator also violated her nondiscretionary  
24 duty under 33 U.S.C. § 1313(c) by failing to promulgate standards in the absence of state  
25 standards that meet the requirements of the Act. EPA's approval of Nevada's water quality  
26 standards was arbitrary, capricious, an abuse of discretion, and not in accordance with the CWA.  
27 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

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

2 82. EPA approved the State of Nevada's list of 303(d) waterbodies in August, 1998.  
3 Prior to approving Nevada's 1998 list of waterbodies, EPA failed to comply with its mandatory  
4 duties under Section 7 of the ESA. EPA failed to request information from the United States  
5 Fish and Wildlife Service whether any listed or proposed species may be present, in violation of  
6 16 U.S.C. § 1536(c)(1). Listed and proposed species are present, including the Lahontan  
7 cutthroat trout, and therefore EPA violated 16 U.S.C. § 1536(c)(1) by failing to prepare a  
8 biological assessment to determine whether the 1998 approval may affect the listed species. EPA  
9 also failed to consult with the United States Fish and Wildlife Service, as required by 16 U.S.C. §  
10 1536(a)(2), to ensure that the 1998 approval will not jeopardize the continued existence of any of  
11 the listed species or result in the adverse modification of the critical habitat of such species.

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

14 84. EPA's failure to meet its ESA Section 7 mandatory duties regarding Nevada's  
15 1998 303(d) list, in addition to violating the ESA, is also arbitrary, capricious, an abuse of  
16 discretion, and not in accordance with the law, pursuant to the APA. 5 U.S.C. § 706.

17 **PRAYER FOR RELIEF**

18 Plaintiffs respectfully request that the Court:

- 19 A. Declare that EPA's approval of Nevada's water quality standards violated the
- 20 CWA and the APA;
- 21 B. Declare that EPA's failure to develop water quality standards violated the CWA
- 22 and the APA;
- 23 C. Declare that EPA's approval of Nevada's 1998 303(d) list violated the CWA, the
- 24 ESA, and the APA;
- 25 D. Declare that EPA's failure to identify WQLSs for all applicable water bodies
- 26 within the State of Nevada, and failure to establish TMDLs for such waters, violated the CWA;

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

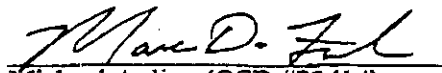
9 F. Order EPA to perform its mandatory duties under Section 7 of the ESA by  
 10 initiating and completing consultation with the United States Fish and Wildlife Service regarding  
 11 EPA's approval of Nevada's 303(d) list of water quality limited waterbodies;

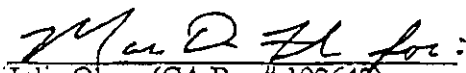
12 G. Award Plaintiffs their reasonable fees, costs, and expenses associated with this  
 13 litigation; and

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

16 DATED this 30<sup>th</sup> day of November, 2001.

17 Respectfully submitted,

18   
 19 Michael Axline (OSB #83414)  
 20 Marc D. Fink (OSB # 99261)  
 21 Western Environmental Law Center  
 22 Counsel for Plaintiffs

23   
 24 Julia Olson (CA Bar # 192642)  
 25 Wild Earth Advocates  
 26 Local Counsel for Plaintiffs



1 **CERTIFICATE OF MAILING**

2 I certify that I am an employee of Woodburn and Wedge and that on this date, I  
3 deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing

4 ***WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN***  
5 ***RESPONSE TO JOINT MOTION OF THE UNITED STATES AND WALKER RIVER***  
6 ***PAIUTE TRIBE FOR AMENDMENT OF THE COURT'S ORDER DENYING MOTION***  
7 ***FOR CERTIFICATION OF DEFENDANT CLASSES OR FOR RELIEF FROM THIS***

8 ***SAME ORDER*** in an envelope addressed to:

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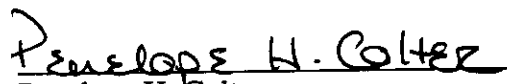
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18 Dated this 17<sup>th</sup> day of June, 2002.

  
Penelope H. Colter

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