Scott B. McElroy/Alice E. Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, CO 80302
303/442-2021

Kelly R. Chase
P.O. Box 2800
Minden, Nevada 89423
702/782-3099

Attorneys for the Walker River Paiute Tribe

Greg Addington, Assistant U.S. Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environmental and Natural Resources Div.
999 - 18th Street, Suite 945
Denver, Colorado 80202
303/312-7308

Attorneys for the United States of America

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-ECR Sub-proceeding C-125-B **JOINT REPLY OF THE UNITED STATES AND THE WALKER RIVER PAIUTE TRIBE FOR AMENDMENT OF THE COURT'S ORDER DENYING MOTION FOR CERTIFICATION OF DEFENDANT CLASSES OR FOR RELIEF FROM THIS SAME ORDER**

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I. INTRODUCTION

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe") file this reply to the *Walker River Irrigation District's Points and Authorities in Response to Joint Motion of the United States and the Walker River Paiute Tribe for Amendment of the Court's Order Denying Motion for Certification of Defendant Classes or for Relief from this Same Order* (June 17, 2002) ("District Response"), the *State of Nevada's Opposition to the Joint Motion* (June 10, 2002) ("Nevada Response"), and the *Response of United States Board of Water Commissioners to the Joint Motion* (June 17, 2002) ("U.S. Board Response").

II. DENIAL OF DEFENDANT CLASS CERTIFICATION MUST BE VIEWED IN THE BROADER CONTEXT OF THIS CASE.

Denial of class certification must be viewed in the larger context of this complex litigation, including the difficulties inherent in initiating and conducting service, the continuing effort of Mineral County to intervene, and the Defendants' clear interests in delay. FED. R. CIV. P. 59(e) authorizes the Court to alter or vacate a judgment after entry to correct manifest errors of law or fact upon which the judgment is based, as well as to prevent manifest injustice. FED. R. CIV. P. 60(b) authorizes the Court to act based on "any other reason justifying relief from the operation of the judgment," upon a finding of "extraordinary circumstances." This case demonstrates manifest injustice and extraordinary circumstances for application of this relief. The United States' and Tribe's efforts to pursue claims for additional water illustrate the need for case management tools such as defendant class certification. It is now almost ten years since the filing of the initial counterclaims and almost five years since the filing of the first amended counterclaims. This has been and continues to be a long journey. The only parties to have benefitted by passage of time are the Defendants.

The instant proceedings was initiated in 1924 on behalf of the Tribe, and culminated in a judicial

Decree (Apr. 24, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandamus, Etc.* (Apr. 24, 1940) ("Decree"), allocating the waters of Walker River in California and Nevada among the parties, including the Walker River Irrigation District ("District"). For the first fifty years, few issues appeared before the Court, and the United States Board of Water Commissioners ("U.S. Board"), a Court-appointed board of local citizens, administered the Decree.

In 1992, the United States and Tribe filed counterclaims for additional surface water rights.[1] The Court ordered the United States and the Tribe to join and serve all claimants to the water of Walker River and its tributaries pursuant to FED. R. CIV. P. 4. *Order* (Oct. 30, 1992) ("1992 Order"). The United States and the Tribe attempted to investigate and organize service,[2] and sought instruction whether the Court's 1992 Order included groundwater users, since the original case and Decree addressed only surface water. *Motion for Instructions and Order* (Apr. 4, 1994). *See Order* (July 8, 1994) (joinder of groundwater claimants not required).

The Amended Counterclaims: In 1997, the United States and the Tribe amended their

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[1]These were filed as counterclaims in sub-proceeding C-125-A, in which the District charged that State of California ("California") agency actions interfered with its Decreed rights; the Court allowed it to post publish notice of its Petition, rather than serving all Decreed water rights holders. *See Minutes of Court* (Jan. 3, 1992).

[2]The District's attempt to blame all delays on the United States and the Tribe is misleading. *E.g.*, District Response at 13. This has been an enormous project of ever-changing proportions; the work is time-consuming and information is always changing because water rights are continually being transferred. The record also indicates the parties delayed service at one point to pursue settlement discussions. *E.g., Stipulation and Order for Extension of Time Within Which to Join Additional Parties and Complete Service of Process (Eleventh Extension)* (Sept. 16, 1997). Moreover, most delays resulted from extensions of time requested by all parties, and many were sought to accommodate Defendants. *E.g., Stipulation and Order for Extension of Time to File Responses to the Joint Motion of the United States of America and the Walker River Paiute Tribe for Amendment of the Court's Order Denying Motion for Certification of Defendant Classes, or for Relief from this Same Order, and Memorandum in Support Thereof (Second Request)* (June 6, 2002).

counterclaims to include specific groundwater claims.[3] The United States and the Tribe filed a *Joint Motion for Leave to Serve First Amended Counterclaim, to Join Groundwater Users, to Approve Forms for Notice and Waiver and to Approve Procedure for Service of Pleadings Once Parties are Joined* (Aug. 20, 1998) ("1998 Joint Service Approval"), which included proposed service documents for the Court's approval, sought clarification of who needed to be served, given the Court's 1992 Order and the high costs of service, and voiced concern that:

> if all water claimants in this proceeding are not served at the present time, we may be faced with arguments in any future effort to adjudicate these rights that we should have brought the claims in the present proceeding, and that our failure to do so would preclude assertion of the rights as described in the first amended counterclaims.

1998 Joint Service Approval at 4-5. The District, California, and the State of Nevada ("Nevada") filed oppositions. This motion was never directly ruled on, but the Court later directed the parties to stipulate to these issues or to submit statements of agreed-upon issues and issues still in dispute. *Order* (May 11, 1999); *Minutes of Court* (May 21, 1999).

Agreement proved impossible. After considerable discussions and extensions of time, the parties agreed on very little. Two significant issues of disagreement were who was to be served, and how were they to be identified. As a basic function of their roles, the States, U.S. Board, and District had significant, relevant information in their possession. Most, in particular the District, insisted that providing this information would improperly place the burden of identifying persons and entities to be served on the Defendants. The District insisted that all it should have to do is provide its annual dues assessment list to the United States and the Tribe.[4]

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[3] *First Amended Counterclaim of the United States of America* (July 30, 1997); *First Amended Counterclaim of the Walker River Paiute Tribe* (July 30, 1997).

[4] *E.g., Walker River Irrigation District's Points and Authorities in Opposition to Motion of the United States and Walker River Paiute Tribe to Adopt Case Management Order* (Feb. 22, 2000).

The Case Management Order and aftermath: In April 2000, the Court entered its own *Case Management Order* (Apr. 19, 2000) ("CMO"). It listed nine categories of water rights holders to be served, expanding the categories suggested by the United States/Tribe, but not including all categories suggested by the District and States. *Id.* at ¶3. It severed the Tribe's claims from all other claims and directed that they be litigated first. *Id.* at ¶¶ 1-3. The parties were directed to file agreed-upon service documents for the Magistrate's review and approval. *Id.* at ¶ 4. The CMO provides for personal service and publication under FED. R. CIV. P. 4 and applicable State law. *Id.* at ¶ 5. The Magistrate Judge was directed to "consider and decide all issues which may arise pertaining to service of process," "establish a schedule for completion of service of process," and "conduct all necessary proceedings and shall decide how the information shall be obtained by the U.S./Tribe to enable them to identify . . . the appropriate counterdefendants . . . . [and] determine the responsibilities of the respective parties to provide such information and at whose cost." *Id.* at ¶¶ 6, 7.

Since early 2000, the United States and the Tribe have attempted to implement the CMO and address matters that the CMO did not anticipate. We have also looked for ways to expedite service, consistent with due process.

To begin with, the United States and Tribe asked the Court in the main C-125 proceeding to require the Decreed rights holders and their successors to identify themselves to the Court and to report the transfers of water rights in a manner consistent with Nevada law. *E.g.*, Joint Motion to Amend at 12-13 & n.3. We made this request to: 1. work toward better long-term Decree administration and improve the ability of any party to intervene or bring other claims before the Court in a timely manner; and 2. assist with service in the C-125-B proceeding. *Id.* at n.3. The Court denied our motion. *Order* (C-125) (June 8, 2001) ("June 8 Order").

We also met with the Magistrate Judge and parties to determine the language of specific service

documents and what information Defendants had and would share with us, and to agree on a *lis pendens* or other form of constructive notice. The parties stipulated to four service documents and most Defendants identified the range of relevant documents available in their offices.[5] The Magistrate directed the United States and Tribe to "actually obtain from each of the parties . . . exactly what they have so that a determination may be made as to what categories of peoples are missing who need to be identified and served." *Minutes of Court* (Oct 26, 2000). We did so and informed the Court in detail. *See, e.g., Status Report Submitted by the United States of America and the Walker River Paiute Tribe in Advance of this Court's Status Conference of December 21, 2000* (Dec. 19, 2000). This effort provided a wide range of valuable information. We determined that the District and U.S. Board assessment rolls were not, by themselves, sufficient to identify water rights holders, but that each office also maintained an index card system for each water right administered that contained the vital information. *Id.* For inexplicable reasons, the District initially claimed that the index cards provided "no information on identification of such persons and entities which is not already provided by the assessment roll." *Id.* at 10-12 quoting DePaoli *Letter*, Nov. 2000 (Exhibit I). There were similar problems obtaining other relevant information from the District. *Id.* at 8-10 and Exhibits C-I. The District and U.S. Board also maintained that information in their files was not reliable for service, and that accurate identification of water rights holders required title searches in the appropriate county recorders office; we asked the Court to determine the role of these records. *Id.* at 25-30.

In January 2001, the District sought a briefing on *lis pendens* and whether persons served had to be identified by CMO category. *Minutes of Court* (Jan. 11, 2001). The District was the sole Defendant to brief these issues. As to *lis pendens*, although the United States and the Tribe had agreed to review this

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[5] *Status Report Submitted by the United States of America and the Walker River Paiute Tribe in Advance of this Court's Status Conference of October 16, 2000* (Oct. 13, 2000).

issue, they had previously determined and discussed with the Defendants the inapplicability of such procedures. Nevertheless, the District pursued the issue and the United States and the Tribe briefed in detail how, contrary to the District's claims, these procedures would be ineffective, extremely costly, and mire the case and Court in significant, tangential and counter-productive litigation.[6] The Court agreed. *Minutes of Court* (Mar. 20, 2001). The District's service suggestion simply appeared to be an effort to redirect service and discard our work to date.

In conjunction with this briefing, the United States and Tribe asked the Court to: 1. determine that our methods of identifying potential defendants were reasonable and satisfied due process; 2. require persons and entities served to provide information about their water rights similar to that required by Nevada and California in their general stream adjudications; 3. require persons served, as well as the District, U.S. Board and States, to notify the Court of water rights transfers and comply with applicable state law regarding transfers (*e.g.*, NEV. REV. STAT. §§ 533.382-533.387); and 4. determine the role of the county recorders' records. *Id.* at 3, 11-12. We asserted that procedures similar to State procedures would easily apply to this case and that since we were required to identify and serve water rights holders, we should track them by water right. The Court disagreed, saying only that it was "satisfied with the way the U.S. and Tribe are attempting to identify parties," and approving a limited requirement that persons served notify the Court and United States of water rights transfers. *Minutes of the Court* (Mar. 20, 2001). In April, the United States and Tribe submitted revised and other proposed service documents (as did the District), and proposed that service be initiated in phases.[7] Thereafter, the Court directed the

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[6] *Memorandum of the United States of America and the Walker River Paiute Tribe Concerning the Identification of Counter-Defendants by Case Management Order Categories and Use of Notices of Lis Pendens* (Mar. 13, 2001) ("Memorandum - Identification by CMO Category and Use of *Lis Pendens*").

[7] *Status Report Submitted by the United States of America and the Walker River Paiute Tribe in*

(continued...)

United States to prepare amended service documents, *Minutes of the Court* (Apr. 20, 2001), and to "discuss with opposing counsel how the Tribe intends to go about service and what time frames are involved. Counsel shall also discuss whether the identification method is adequate." *Id.*

We also addressed the issue of title searches. Memorandum -- Identification by CMO Category and Use of Lis Pendens at 27-28. We had sent an investigator experienced in conducting title search investigations to each of the relevant county recorders offices. She reported that files and methods used to record information in each of these offices did not necessarily track or identify water rights transfers. Research in these offices would be extremely time-consuming (possibly taking up to one day for one search)[8] and would not necessarily identify the ownership of a water right, nor could the absence of information regarding the ownership of a water right necessarily allow the conclusion that the water right had not been transferred (as the District argued). We asked the Court to address the relevance and need for such research and our contention that water rights holders could be identified and served based on the information we had gathered.

In the Memorandum - Identification by CMO Category and Use of *Lis Pendens* at 9, the United States and the Tribe suggested class certification of CMO ¶3(c) domestic users, but the Court would not address the issue without full briefing. In May 2001, the United States and Tribe moved for certification of

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[7](...continued)
Advance of this Court's Status Conference of April 20, 2001 (Apr. 20, 2001).

[8]Our investigator was told that some searches might take up to a day. *Transcript of Status Conference* at 52-53 (Hon. Robert A. McQuaid, Jr.) (Aug. 27, 2001). We also told the Court that information in these offices is but one source for possible consultation. *Id. at* 51-56.

two limited defendant classes[9] and submitted revised service documents.[10] We also reported no agreement among the parties as to identification methods: "[w]e think this issue needs to be addressed by the Court so that the United States and the Tribe know at the outset how their service efforts will be measured for purposes of due process." *Id.* at 6. The Court ordered the United States to submit a list of its methods of identification for objections or suggestions from the parties, before it would determine "the reasonableness of the categories." *Minutes of the Court* (May 30, 2001). The United States and Tribe did so.[11] Only the District made a formal response, again asserting that title search investigations were warranted for each water right and that due process could not yet be determined.[12] Ultimately, the Court stated that these efforts were "reasonable," but would not determine if they met due process. *Minutes of the Court* (Aug. 27, 2001).

One other claim that the District has raised more than once is that FED. R. CIV. P. 10(a) requires a complete caption before service may commence.[13] Such a requirement would certainly tie any case of this size in a complete knot – service could never be accomplished as the names on the caption would always

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[9] *Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* (May 4, 2001).

[10] *Status Report Submitted By the United States of America and the Walker River Paiute Tribe in Advance of this Court's Status Conference of May 30, 2001* (May 25, 2001).

[11] *Identification of Methods Used by the United States of America and the Walker River Paiute Tribe to Identify Persons and Entities to be Served Pursuant to Paragraph 3 of the Case Management Order* (June 19, 2001).

[12] *Statement of the Walker River Irrigation District Regarding Methods Used by the United States of America and Walker River Paiute Tribe to Identify Persons and Entities to be Served Pursuant to Paragraph 3 of the Case Management Order* at 2-3(Aug. 3, 2001) ("WRID Statement – Identification Methods").

[13] *E.g., Position Paper of the Walker River Irrigation District Re: May 30, 2001 Status Conference* at 6 (May 30, 2001) ("[T]he captions on the amended counterclaims . . . should include the names of all of the counterdefendants when those documents are served on the various individuals and entities with water rights.").

be changing. This is particularly unwieldy -- indeed, hopeless -- particularly since we estimated a year ago that approximately 3,000 persons and entities would have to be served. *See* n.12.

Mineral County Intervention Efforts: In 1995, Mineral County moved to intervene to assert water claims for Walker Lake (now designated and addressed in the C-125-C sub-proceeding), and was directed to make personal service on all Decreed rights holders and their successors. After 7 years, it has not yet completed service on approximately 1300 persons and entities, has spent thousands of dollars and many hours on this effort, and has not had its motion to intervene considered on the merits. Initially, service by mail appeared to be working, as intended by the drafters of FED. R. CIV. P. 4, but these responses ceased; Mineral County has asserted that this happened after the District wrote its members and advised them not to return any waivers.[14] Thereafter, Mineral County used volunteers and paid process servers to make individual service. The County has just filed its fifth request for publication.[15]

It is not clear when, if ever, the County's claims will be heard, since many of the rights addressed by the County in its early service efforts have been transferred to other potentially unidentified persons and entities. The goal of identifying the Decreed rights holders appears to have become an end in itself for Mineral County, when its real objective is to have its case heard by the Court. Nevertheless, the United States and Tribe will have to redo this effort; the Magistrate Judge has directed that we cannot rely on Mineral County's work as adequately identifying the parties to be served.[16]

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[14] *See* Attachment I to *Response of the Walker River Paiute Tribe to the Motion to Vacate Schedule for Serving Responses to Mineral County Motion to Intervene; to Establish Date for Completion of Service; to Establish Schedule for Responses to Mineral County Motion to Intervene After Completion of Service* (C-125-C) (June 30, 1995).

[15] *Motion for Order of Publication (Fifth Request)* (C-125-C) (June 19, 2002). It also claims that publication of its entire intervention documents was estimated in 1999 to cost $96,000., and has sought permission to publish its Notice in Lieu of Summons only as a newspaper insert. *Id.*

[16] *Transcript of Further Status Conference* at 79-82 (Hon. Robert A. McQuaid, Jr.) (Mar. 20,

(continued...)

The response to Mineral County's service efforts is also instructive. After all these years of serving additional parties, the current service list for the C-125-C case is still less than two pages long. A review of the C-125-C litigation also shows that the District and U.S. Board have led this matter from the outset. Basically, the District and U.S. Board correct the County's service efforts, while insisting in the C-125-B sub-proceeding that they do not possess enough information to identify the decreed rights users correctly or sufficiently. Given the role of the District and U.S. Board, it is not surprising that so few of the users served in C-125-C have hired other counsel. Moreover, there is virtually no difference between the present certificates of service for the C-125-C and the C-125-B sub-proceedings.[17]

III. THIS COURT SHOULD APPOINT A CLASS REPRESENTATIVE UNDER FED. R. CIV. P. 23(a) FOR THE DOMESTIC WELL USERS IN CMO CATEGORY 3(c).

The Court agrees that the United States and the Tribe have met all prerequisites of FED. R. CIV. P. 23(a), with one limited, but important, exception – that the United States and Tribe have "failed to demonstrate that the State of Nevada would have claims and defenses typical of the class," such that Nevada "is not an appropriate class representative" for those persons and entities in Category 3(c) of the CMO who are domestic well users. Order at 11, 13. Throughout the briefing of this motion, only Nevada and the District have addressed this issue. In contrast to the District, Nevada has never opposed class certification; it simply wishes to avoid acting as a class representative. Nevada admits that its Division of Wildlife ("NDOW") has a domestic well at the Mason Valley Wildlife Management Area, *e.g.*, Nevada Response at 2, but argues that its participation in this case is based on a different interest -- NDOW's

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[16](...continued)
2001). *See also* WRID Statement – Identification Methods at 4 (the United States/Tribe should not rely on Mineral County's work).

[17]*Compare Motion for Order of Publication (Fifth Request)* (C-125-C) (June 19, 2002) with *Response of the Walker River Irrigation District to Joint Motion of the United States of America and the Walker River Paiute Tribe for Approval of Service Documents and Leave to Commence Service* (June 17, 2002) ("District Response to Joint Motion for Leave to Commence Service").

Decreed water rights on Walker River and its flood water right in Walker Lake. *Id.* at 4. It is also clear that Nevada has water rights interests, including groundwater wells, that go beyond NDOW's water rights.[18] Joint Motion for Amendment, Attachment A. The District, which does not represent Nevada, continues to argue on the State's behalf. *See* District Response at 3-5.[19]

The United States and the Tribe seek certification of two classes of defendants for discrete, but important stages of this case -- litigation of Phase I threshold issues and a declaration of the nature and extent of the Tribe's rights. These stages are discrete in that they do not address the specific water rights claims of any defendant. These stages are important in that they initiate this litigation and finally bring questions of substantive merit before the Court. The assessment of typicality under Rule 23(a)(3) was not based on these stages. Rather, Nevada's arguments, as well as the District's offerings, assume that class certification would continue beyond these initial stages.

As to whether Nevada is an appropriate class representative, the United States and the Tribe assert that they have demonstrated that Nevada has claims and defenses typical of the proposed class. First, in connection with Rule 23(a)(4)'s adequacy of representation factor, the Court recognized that:

> Nevada would not have any conflicts with the class as a whole that would prevent [it] from serving as the class representative[]. We agree. The defendants share a common goal; to ensure that the United States and the Tribe do not acquire any more water rights. While the individual interests may be different, . . . Nevada do[es] not have any conflicting interests with the rest of the class members.

Order at 12-13. Since Nevada and the rest of the members of the proposed class share a common goal and have no conflicting interests, this also supports a finding that they share claims and defenses.

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[18]When Nevada intervened in this case, *Order* (C-125-A) (June 11, 1992), it did so on behalf of the State of Nevada and not solely for one of its agencies.

[19]Nevada's apparent motivation is to avoid being named as a class representative. WRID's motivation in taking up Nevada's cause furthers an apparent broader interest in delaying this litigation at all costs.

Second, since Nevada has at least one domestic groundwater well[20] (and numerous other groundwater wells), it clearly has interests common to those of the proposed class. While it also has other interests, those interests do not prevent it from being a class representative nor should they allow Nevada to avoid being a class representative simply by declaring that its other interests (*i.e.*, its Decreed rights and flood rights) are its "real" interests. After all, Rule 23 looks at the gamut of interests that a party has and does not require that all questions of law and fact be common or all interests be identical. *E.g., Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976). Nevada has not renounced its claims to domestic or other groundwater wells nor has it concurred in the merits of the United States' and Tribe's groundwater claims. Consequently, those claims and defenses remain available to it. As things stand, Nevada shares a common interest and claims and defenses with the members of the proposed class, even if it has made the current strategic decision to claim that other interests are its primary focus. Nevada has shown no genuine conflict between its claims or defenses for any of its interests and those of potential class members for the certification period requested nor has it declared that it will not assert the claims or defenses available to the proposed class on its own behalf.

Third, many persons and entities claim Decreed rights or other rights as well as domestic rights, which demonstrates that Nevada's position is not unique. If the Court grants our motion, persons and entities with only Decreed rights, persons and entities with only domestic rights, and persons and entities with both Decreed rights and domestic rights would all fall within one or more of the two proposed classes and their interests would be represented. Nevada has simply not indicated what, if any, conflicts exist between its claims or defenses and the potential class members for the period requested.

Fourth, to the extent that Nevada attempts to distinguish itself from the other members of this

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[20]Most persons and entities in this category will likely have one domestic groundwater well also.

potential class, its focus on such issues as the varying size of claims, possible resort to the Decree for water rights, "proximity to the reservation and hydrology," fails to show a distinction for purposes of the certification requested. Nevada Response at 5. For potential members of this proposed class, including Nevada, whether they are big users, small users, users with Decreed or other rights, users without Decreed rights, users upstream, or users downstream, for purposes of the scope of this certification request, Nevada and the other members of the class clearly have common claims and defenses. The nature of their differences, if any, is immaterial.

Finally, naming Nevada as the class representative is consistent with applicable law. It has claims and defenses typical of the class. Claims and defenses need not be identical, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The typicality factor should be broadly construed, *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 463 (N.D. Cal. 1983), and defenses are typical if they "stem from a single event or are based on the same legal theory or remedial theory." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561 (8th Cir. 1982).

In addition, we have consistently advocated that because the superior method of addressing this very large group of water users is in a class, if the Court does not want to appoint Nevada as a class representative, an alternative representative should be identified. We have suggested that the Court work with the parties to identify an alternate representative. Nevada takes no position on this assertion nor has any other party ever offered an opinion. The District, however, which does not purport to represent any of these potential class members, derides this suggestion as "novel" and without authority. District Response at 4-5. We think our approach demonstrates common sense, is consistent with good case management, and is similar to other directions given the parties by the Court and Magistrate Judge.

IV. THIS COURT SHOULD ALTER, AMEND OR VACATE ITS DETERMINATION THAT THE UNITED STATES AND TRIBE FAILED TO DEMONSTRATE THAT THEIR PROPOSED CLASSES MEET THE REQUIREMENTS OF AT LEAST ONE OF

THE THREE SUBSECTIONS OF FED. R. CIV. P. 23(b).

The District remains the only party to contend that class certification fails under FED. R. CIV. P. 23(b). We reiterate our prior positions regarding FED. R. CIV. P. 23(b)(1) and (2), but focus our reply on the applicability of FED. R. CIV. P. 23(b)(3), which amply justifies the certifications requested.

1. Predominance:

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Given the nature of the Phase I Threshold issues and determination of the nature and extent of the Tribe's rights, there are clearly questions of law and fact that will apply to all parties. Indeed, as the Court found regarding the commonality requirement of Rule 23(a)(2), the "Phase I Threshold issues present questions of law that will apply to all parties." Order at 9. In this regard:

> the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context . . . "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles,* 476 U.S. 54, 76-77 . . . (1986) (O'Connor, J., concurring in part and concurring in judgment).

Amchem Products Inc. v. Windsor, 521 U.S. 591, 623 n.18 (1997).

The Court, without explanation, states that there are three possible groups of defendants in the possible classes – those who possess both groundwater and surface water rights, those who possess only groundwater rights, and those who possess only surface water rights – and that each group will have different issues and may take different positions based on their individual water rights and not the CMO service categories. Order at 17.[21] The Court points to *Amchem Products*, 521 U.S. at 623, which

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[21] WRID asserts that the United States and the Tribe "accept" this division. District Reply at 10. We do not necessarily agree with this "division." As with the Court's other determinations and directions in (continued...)

asserts that the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Order at 16. In *Anchem*, the Supreme Court held that a request for settlement-only class certification for negotiation of a global settlement of current and future asbestos-related claims did not meet this and other Rule 23 requirements. The Court found that certification could not be upheld for this "sprawling" class because "it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design." *Id.* at 624-25. Certification in *Anchem* would necessarily have required focus on the legal or factual circumstances of each member's case, which are inapplicable circumstances here, because we are not addressing the merits of any of the individual defendants in the phases for which we propose class certification. Rather, we seek adjudication of Phase I Threshold issues and the determination of the Tribe's rights, which may be determined without reference to the specific merits of any other individual's claim to a water right. Here, the cohesiveness is in their relation to the claims of the Tribe.

The Court also cites *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001), for its conclusion, but this case also makes clear that individual issues do not necessarily defeat class treatment:

> Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.

244 F.3d at 1162 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (internal quotation omitted.)). That is clearly the case here, particularly since the Phase I Threshold Issues and determination of the nature and extent of the Tribe's water right are significant aspects of the case that are to be determined in its initial stages prior to any focus on defendants' individual water rights.

21/(...continued)
this matter, we are trying to work with it and address it.

As we have stated previously, Joint Motion to Amend at 9-11, there is no reason to assume that the Court's three groups will have different positions on the issues for which we seek class certification. Presumably none of them wants the United States or the Tribe to have any success here. *See* Order at 9-10. We can think of no genuine basis on which any of these groups would want any portion of our case to proceed and none has been stated, even by the District. Consequently, we continue to maintain that this is a "distinction without a difference." Joint Motion for Amendment at 11.

2. Superior Method:

Rule 23(b)(3) also requires the Court to consider whether a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." The District offers no direct response to our argument. *See* Joint Motion for Amendment at 11-17.

The District does not even attempt to respond to most of the points raised in the Joint Motion to Amend. It ignores the clear utility of class certification for the Phase I Threshold issues and the reality that their resolution will take considerable time to resolve. *See id.* at 12. It does not address our concerns about potentially unending arguments about the quality of service on Decreed rights holders and all other potential defendants, or our concerns about the use of limited resources on such an exercise, when class certification is an available alternative. *See id.* at 14-15. We simply see no rational reason to spend significant resources conducting personal service when class certification is an available and acceptable option. This is especially so when it is clear that persons will attempt to evade service and the District, the U.S. Board and other current Defendants will be satisfied with nothing less than service based on individual title searches of each of their water rights beneficiaries. The District does not address the issue of constant shifts in memberships of the various proposed classes. *See id.* at 16. The District also does not address the burden faced by domestic groundwater users named as defendants. *See id.* at 15-16. Their numbers are large and their interests are relatively small, as compared to the District and other Defendants who are

already active in this case. It is in the District's advantage to force the United States and Tribe to conduct personal service on each domestic groundwater user in Category 3(c), which may be in excess of 2,600 users.[22] Clearly, this would serve their interest in maintaining the status quo by delaying this case as long as possible.

While the District purports to address our other concerns, its tactic is generally to derogate, rather than address them. First, it claims that the United States and the Tribe "appear to be arguing that the Court 'owes' them something more than a fair application of the law," District Response at 13. This is simply not true. All the United States and the Tribe seek herein is to avoid the fundamental unfairness of allowing the water rights holders under the Court's Decree to obtain all of the benefits of the Decree without having the responsibility of identifying themselves, which is the practical result of the instant Order and the Court's previous order refusing to require the Decreed rights holders to identify themselves. Joint Motion to Amend at 12-13 & n.3. While we believe that there are compelling reasons to require such identification, the Court denied our motion. June 8 Order. To be sure, we do not agree with the Court's decision, but it did not on its face bar us from looking for other ways to accomplish cost-effective and timely service, consistent with due process. Hence, we looked to the availability of class certification. Contrary to the District's intimations, nothing in the Court's June 8 Order is inconsistent with or would bar class certification.

Second, the District attempts to blame the United States and the Tribe as the primary sources of delay in this matter. It is an understatement to describe this as disingenuous. Any fair review of the filings and proceedings before the Court and its Magistrate show that we have tried and are continuing to try to satisfy the Court's demands and to address the unending concerns of the District and other long-standing

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[22] Joint Motion to Amend at 15, and Supplemental Becker Affidavit cited therein.

Defendants, and that we have done a tremendous amount of work in this regard. The District's slap-shot avoids addressing our very real concern about the efforts of some water rights holders to resist service of process.[23] Indeed, as we have already pointed out above, the District appears to have aided such efforts to some degree in the Mineral County case by advising its water users not waive service but to insist on actual personal service. The District also avoids addressing the constant delays it has injected into this process. Moreover, in a separate, but related, pleading filed the same day as the District's Response herein, the District recognized that the United States and the Tribe still do not have the Court's permission to commence service.[24]

Third, while the District does not address the utility of class certification for the Phase I Threshold issues, it injects for the first time ever an argument that class certification is not appropriate to determine the nature and extent of the Tribe's water right. Assuming that there is something to the so-called "sensitivity doctrine," there is nothing in the cases cited that requires an examination of each individual right in the basin to determine the nature and extent of the Tribe's rights. Such an assessment would in any event be unworkable as a practical matter.

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[23] Also, as we have told the Magistrate Judge and Defendants, we want to have our service documents approved by the Court in advance of commencing service, along with obtaining the Court's permission to commence service, so that we can try to avoid some of the problems that Mineral County has encountered. We have also said that we want to conduct service in phases, commencing with a small, but identifiable, group under the CMO, so that we can see if the process works and address any problems that arise. In addition, we intend to pursue costs where appropriate, pursuant to FED. R. CIV. P. 4(d) and CMO ¶ 6. Mineral County may be in a position where it cannot obtain the costs of personal service under FED. R. CIV. P. 4(d); certainly, it has not tried to recover these costs. We do not want to be in this same position.

[24] On May 30, 2002, the United States and the Tribe filed the *Joint Motion of the United States of America and the Walker River Paiute Tribe for Approval of Service Documents and Leave to Commence Service* (May 30, 2002), which included a request for a status conference to review any comments, questions or concerns from the Court or any of the parties. The only party to respond was the District, which wrote that "a status conference is especially important to again review with the Court and the parties when and how the United States may proceed with service." District Response to Joint Motion for Leave to Commence Service at 1-2 (emphasis added).

Finally, without providing any support for its claim, the District makes the argumentative assertion that "[c]ertification of the proposed defendant classes threatens the due process rights of the defendants not the Tribes." District Response at 14. It then asserts that the factual circumstances here are distinguishable from *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986) and *Boddie v. Connecticut*, 401 U.S. 371 (1971). While each case presents unique factual circumstances, the practical result in each is the same – the inability to have judicial access to have one's claims heard. Here, the inability to have judicial access is a function of the delay to the Tribe and other federal claimants in having their claims heard, which, so far, comes from the time that has been and will be spent conducting personal service on every one of the persons and entities that the Court has designated as defendants.

> "[D]ue process" requires, at minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given meaningful opportunity to be heard.

Boddie, 401 U.S. at 371 (emphasis added). Simply being in court does not necessarily provide a meaningful opportunity to be heard. There should be some means to provide sufficient notice to potentially affected persons and entities that also considers the right of the Tribe to have its issues heard in a timely fashion. Indeed, as we have pointed out previously, Memorandum - Identification by CMO Category and Use of *Lis Pendens* at 11-13, 15-16, 17-18, 28-30, the procedures imposed by this Court are more stringent than the procedures that would be used by Nevada or California if this matter was adjudicated at the state level. Here, for the two specific classes proposed, the proper balance can be struck by certifying the two proposed classes, and this balance will not affect the due process rights of the potential defendants.

V. OUR REQUEST FOR CLASS CERTIFICATION OR USE OF THE ASSESSMENT LISTS PRESENTS REASONABLE ALTERNATIVES

The District's and U.S. Board's Responses demonstrate that what really struck a nerve with them

was the following portion of our Motion:

> The Court has also not sanctioned the use of the WRID and United States Board of Water Commissioner assessment lists, combined with publication, as sufficient for service purposes. It seems to us that handling this group of water users as a class is a reasonable alternative under the circumstances. It also seems to us that the Court should not refuse to allow us to pursue either option – that is, use of the WRID and [U.S. Board] assessment lists and publication or certification of these water users as a class. By this motion, we ask the Court to reconsider these two approaches to service on this group of water users.

Joint Motion to Amend at 13. We seem to have come full circle to find that no matter what work we have done to identify the persons and entities the Court has ordered served, including the use of additional information as detailed to the Court, the District and U.S. Board[25] will be satisfied with nothing less than a complete title search on each water right. And the District appears to want such a level of investigation for all water rights, including those outside its jurisdiction. This is impractical, inordinately time-consuming, and too expensive. It is also clear to us that the District and U.S. Board will continue to insist on nothing short of a full title search and a defendant-by-defendant assessment of service. Consequently, we have looked to class certification as a means to expedite service, consistent with due process, in the hope that we may be closer to getting the initial substantive issues of this case before the Court.

CONCLUSION

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

Date: 7/8/02

Respectfully submitted,

Greg Addington, Assistant United States Attorney
Susan L. Schneider, Trial Attorney

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[25] We have serious questions as to the advocacy role of the U.S. Board in this matter. It is not a party and purports not to represent the decreed rights users. It is, in fact, an arm of the Court. Consequently, we are concerned when it acts as an advocate to oppose the Tribal and federal counterclaims.

U.S. Department of Justice
Environmental and Natural Resources Div.
999 - 18th Street, Suite 945
Denver, Colorado 80202
303/312-7308

By: S. L. Schneider
Susan L. Schneider
Attorneys for the United States of America

Scott B. McElroy / Alice E.Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
303/442-2021

Kelly R. Chase
P.O. Box 2800
Minden, Nevada 89423
702/782-3099

By: Scott B. McElroy / by SJS
Scott B. McElroy
Attorneys for the Walker River Paiute Tribe

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of July, 2002, I served a true and correct copy of the foregoing "**JOINT REPLY OF THE UNITED STATES AND THE WALKER RIVER PAIUTE TRIBE FOR AMENDMENT OF THE COURT'S ORDER DENYING MOTION FOR CERTIFICATION OF DEFENDANT CLASSES OR FOR RELIEF FROM THIS SAM ORDER**" by first-class mail, postage prepaid, addressed to the following persons:

Greg Addington
Assistant U.S. Attorney
100 West Liberty Street, Suite 600
Reno, NV 89509

George N. Benesch
P.O. Box 3498
Reno, NV 89505-3498

Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

Gary Stone
United States District Court Water Master
290 South Arlington Avenue, 3rd Floor
Reno, NV 89501

John Kramer
Department of Water Resources
1416 Ninth Street
Sacramento, CA 94814

Hugh Ricci, P.E.
Nevada State Engineer's Office
123 West Nye Lane
Carson City, NV 89710

William Quinn
U.S. Department of the Interior
Office of the Solicitor
401 W. Washington St., SPC 44
Phoenix, AZ 85003

Robert L. Hunter
Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

R. Michael Turnipseed, P.E.
Dept. of Conservation & Natural Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

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

Matthew R. Campbell
David Moser
McCutchen, Doyle, Brown & Enerson
Three Embarcadero Center
San Francisco, CA 94111

Ross E. de Lipkau
Marshall, Hill, Cassas & de Lipkau
P.O. Box 2790
Reno, NV 89505

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

Jim Shaw
Chief Dep. Water Commissioner
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423

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

Marta Adams
Deputy Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

James Spoo
Treva J. Hearne
Zeh, St. Aubin, Spoo, & Hearne
575 Forest Service, Suite 200
Reno, NV 89509

Hank Meshorer
United States Department of Justice
Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044-7397

Linda A. Bowman
Law Office of Linda A. Bowman, Ltd.
540 Hammill Lane
Reno, NV 89511

Daniel N. Frink
Water Resources Control Board
State of California
P.O. Box 100
Sacramento, CA 94814

Gordon H. DePaoli
Dale E. Ferguson
Woodburn and Wedge
6100 Neil Road, Suite 500
P.O. Box 2311
Reno, NV 89511

Craig Alexander
U.S. DOJ, ENRD, Indian Resources Section
P.O. Box 44378
L'Enfant Plaza Station
Washington, D.C. 20026-4378

Lou Leonard
U.S. Dept. of the Interior, Office of the
Secretary, Division of Indian Affairs
1849 C Street, N.W.,
Mail Stop 6456
Washington, D.C. 20240

Yvonne M. Marsh

Yvonne M. Marsh, Paralegal Specialist