

EXHIBIT “B”

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Plaintiff,

Plaintiff-Intervenor,

**VS.**

IN EQUITY NO. C-125  
Subproceeding C-125-B

**MEMORANDUM IN SUPPORT  
OF THE JOINT MOTION OF  
THE UNITED STATES OF  
AMERICA AND THE WALKER  
RIVER PAIUTE TRIBE FOR  
CERTIFICATION OF  
DEFENDANT CLASSES**

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## I. INTRODUCTION

Pursuant to FED. R. CIV. P. 23 and LR 7-2, the United States of America and the Walker River Paiute Tribe ("Tribe") respectfully file this motion seeking certification of two defendant classes in this matter. The United States and the Tribe demonstrate below the propriety of certification of: 1) a defendant class of successors in interest to water right holders under the Decree (Apr. 14, 1936), *modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate, Etc.* (Apr. 24, 1940) ("Decree"), with the Walker River Irrigation District ("District") acting as class representative; and 2) a defendant class of all those individuals and entities with a right to use groundwater for domestic purposes in sub-basins 107, 108, 110A and 110B in the Walker River Basin in Nevada, with the State of Nevada acting as class representative.

The United States and the Tribe seek certification of the two classes for the following purposes, consistent with the Court's *Case Management Order* (Apr. 18, 2000) ("CMO"). First, the Court should certify the classes described above to include those individuals and entities included in Category 3(a) and the domestic groundwater users in sub-basins 107, 108, 110A and 110B who are members of Category 3(c) of the CMO. CMO ¶¶ 3(a), (c). Second, the Court should certify the classes to address the "Threshold Issues Relative to Tribal Claims." *Id.* ¶ 11. The Court has identified treatment of the threshold issues as Phase I of the proceedings following completion of service. *Id.* ¶ 12(a). Third, the Court should certify the classes for purposes of addressing the declaratory relief that the United States and the Tribe seek in Phase II of the proceedings. *Id.* ¶ 12(b). The classes should be defined as including all members of Category 3(a), and all domestic users of groundwater in sub-basins 107, 108, 110A and 110B who are members of Category 3(c).

1 Class certification beyond Phases I and II of the litigation may also be appropriate, and  
2 the Court should make that determination as appropriate as the case proceeds. In addition, the  
3 United States' and Tribe's request for certification of the two named classes is not intended to  
4 preclude the certification of any other class of defendants, either pursuant to the CMO categories,  
5 or as otherwise determined to be appropriate by the Court. The reasons supporting the United  
6 States' and the Tribe's motion follow.  
7

## 8 **II. BACKGROUND**

9  
10 In April of 2000, the Court issued its CMO, in which it identified nine categories of  
11 defendants that the United States and the Tribe must join in these proceedings in connection with  
12 their claims for additional surface and groundwater from the Walker River stream system. In  
13 preparation for the status conference before Magistrate Judge McQuaid held on March 20, 2001,  
14 the United States and the Tribe suggested that all domestic users of groundwater in sub-basins  
15 107, 108, 110A and 110B who are members of Category 3(c) of the CMO might be better  
16 handled in these proceedings as a discrete defendant class: "domestic groundwater users may be  
17 certified as a class just as the Court treated certain limited groups of water users in *United States*  
18 *v. Truckee-Carson Irrig. Dist.*, 71 F.R.D. 10 (D. Nev. 1975)." *Memorandum of the United States*  
19 *of America and the Walker River Paiute Tribe Concerning the Identification of Counter-*  
20 *Defendants by Case Management Order Categories and Use of Notices of Lis Pendens* at 9  
21 (Mar. 12, 2001) ("U.S. & Tribe Memo"). Although it included all successors in interest to the  
22 original Decree, the Court "limited domestic users to be served with process to those whom, it  
23 appears, might be affected by pumping of underground water on the Walker River Paiute Indian  
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1 Reservation.” CMO at 3.<sup>1</sup> The Court also defined Category 3(a) as the “successors in interest to  
2 all water rights holders under the Decree . . . .” CMO at 5.

3  
4 The United States and the Tribe submit this memorandum in support of our motion to  
5 treat all members of Category 3(a), and the domestic groundwater users in the specified sub-  
6 basins who are members of Category 3(c) as two defendant classes. Rather than waiting until  
7 service is completed, consideration of tools for “the efficient management of the litigation given  
8 the number of parties to the case,” CMO ¶ 10, appears to be appropriate now. The class action  
9 tool is “likely to reduce the burdens on the parties and the court in a case of this magnitude.” *Id.*  
10 Certification of these two classes will, as a result, help the Court manage the “enormity and  
11 complexity” of these proceedings. CMO at 1. As we proceed with service on the individuals and  
12 entities comprising the other categories to be served under the CMO, it may be necessary either  
13 to certify a class for other categories or at least to establish a class for the residual unserved  
14 members of one or more categories.  
15  
16

17 **III. CERTIFICATION OF DEFENDANT**  
18 **CLASSES IS APPROPRIATE HERE**

19 Federal Rule of Civil Procedure 23 provides that class certification is warranted where:

20 (1) the class is so numerous that joinder of all members is  
21 impracticable, (2) there are questions of law or fact common to the  
22 class, (3) the claims or defenses of the representative parties are  
23 typical of the claims or defenses of the class, and (4) the  
representative parties will fairly and adequately protect the interests  
of the class.

24 FED. R. CIV. P. 23(a). In addition to satisfying all four requirements of Rule 23(a), “parties  
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26 <sup>1</sup>The Court provided, however, that the number may be expanded “[i]f it is shown that  
27 other domestic users could be affected by such pumping or that the underground and surface  
28 water constitute a single hydrological system where an earlier priority for the tribe for surface or  
underground waters could affect the rights of other domestic users.” CMO at 3.

1 seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or  
2 (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) covers the  
3 following situations:  
4

5 Rule 23(b)(1) covers cases in which separate actions by or against  
6 individual class members would risk establishing "incompatible  
7 standards of conduct for the party opposing the class," Fed. R. Civ.  
8 Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of  
9 the interests" of nonparty class members "or substantially impair or  
10 impede their ability to protect their interests," Rule 23(b)(1)(B).  
11 Rule 23(b)(1)(A) "takes in cases where the party is obliged by law  
to treat the members of the class alike (a utility acting toward  
customers; a government imposing a tax), or where the party must  
treat all alike as a matter of practical necessity (a riparian owner  
using water as against downriver owners)."

12 *Id.* at 614 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966*  
13 *Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967)). If  
14 all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are  
15 satisfied, class certification is appropriate. *Id.* Rule 23 applies equally to plaintiff and defendant  
16 classes. *Thillens, Inc. v. Community Currency Exch. Assoc. of Ill., Inc.*, 97 F.R.D. 668, 673  
17 (N.D. Ill. 1983); STEVEN BAICKER-MCKEE, ET AL. FEDERAL CIVIL RULES HANDBOOK 430  
18 (2001).  
19

20 The classes identified by the United States and the Tribe satisfy the requirements of Rule  
21 23(a), Rule 23(b)(1)(A), Rule 23(b)(2), and Rule 23(b)(3). Certification of defendant classes  
22 with respect to the members of Category 3(a) and the domestic groundwater users in the  
23 specified sub-basins who are members of Category 3(c) for Phase I and for the declaration of the  
24 Tribal Claims<sup>2</sup> in Phase II is, then, appropriate.  
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27 <sup>2</sup>The CMO defines the Tribal Claims as those made by the Tribe and the United States on  
28 the Tribe's behalf, as distinguished from the other claims made by the United States on behalf of

1 A. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a).

2 1. The Classes are So Numerous that Joinder of All Members is Impracticable.

3 First, a class must be "so numerous that joinder of all members is impracticable."  
4  
5 FED. R. CIV. P. 23(a)(1). "[T]here is no exact numerical formula which is used to determine  
6 whether a group of [defendants] is sufficiently numerous to be certified as a class and . . . this  
7 determination must be made on a case by case basis." *Hernandez v. Alexander*, 152 F.R.D. 192,  
8 194 (D. Nev. 1993) (citing *Kraszewski v. State Farm Ins. Co.*, 27 Fair Empl. Prac. Cas. (BNA)  
9 27, 29 (N.D. Cal. 1981)). See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9<sup>th</sup> Cir. 1998). In  
10 addition to the number of class members, factors that influence the numerosity requirement  
11 include "judicial economy arising from avoidance of a multiplicity of actions, geographic  
12 disbursement of class members, size of individual claims, financial resources of class members,  
13 the ability of claimants to institute individual suits, and requests for prospective injunctive relief  
14 which would involve future class members." *Hernandez*, 152 F.R.D. at 194 (quoting HERBERT  
15 B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.06 (1985)) (other citations omitted). And it is  
16 important to note that "[i]mpracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d  
17 931, 935 (2<sup>nd</sup> Cir. 1993) (citations omitted).

18  
19 The United States' contract paralegal estimates that the number of members of  
20 Category 3(a), the successors in interest class, is at least "950 persons and entities." U.S. & Tribe  
21 Memo, Exhibit 1, *Affidavit of Dennis Becker* ¶ 15.1 (Mar. 9, 2001) ("Becker Affidavit"). The  
22 defendants are geographically dispersed throughout the Walker River Basin in Nevada and  
23 California. The United States Board of Water Commissioners has argued that the Category 3(a)  
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27  
28 other federal interests in the Walker River Basin. CMO ¶ 1.

1 members have limited financial resources, and, therefore, cannot assist the United States and the  
2 Tribe in identifying all of the potential defendants in this case. *Comments & Recommendations*  
3 *of the United States Board of Water Commissioners to Joint Motion of the Walker River Paiute*  
4 *Tribe and the United States of America for an Order Requiring the Identification of all Decreed*  
5 *Water Right Holders and their Successors* at 2, 3, No. C-125 (Oct. 16, 2000) ("USBWC  
6 Comments"). As set forth in the Decree, the individual claims of these defendants range from  
7 very extensive water rights to very small ones.  
8

9  
10 In March 2001, Mr. Becker estimated that the number of individuals in Category  
11 3(c) is approximately 685. Becker Affidavit ¶ 17.f. Since giving his affidavit on March 9, 2001,  
12 and as his work continues in this matter, Mr. Becker has identified approximately 40 additional  
13 individuals and entities in Category 3(c), raising the total to approximately 725. In addition to  
14 the domestic groundwater users in the specified sub-basins, Category 3(c) includes individuals  
15 who use groundwater pursuant to "permits or certificates to pump groundwater issued by the  
16 State of Nevada . . . ." CMO ¶ 3(c), for other than domestic purposes. Thus, the number of  
17 domestic groundwater users in the specified Nevada basins from the sources Mr. Becker has  
18 examined thus far is probably fewer than 725. In addition to the entities currently identified,  
19 however, as of December 19, 2000, the Nevada Division of Water Resources Well Log Database  
20 lists approximately 680 domestic wells in the sub-basins listed in Category 3(c). Moreover, the  
21 domestic well log does not include all well owners since Nevada does not require the reporting or  
22 permitting of new domestic wells. Another source of information that could increase the number  
23 of domestic groundwater users included in Category 3(c) is the Lyon County tax records.  
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26 Clearly, the number of domestic groundwater users in sub-basins 107, 108, 110A  
27 and 110B is sufficiently large to be within the contemplated magnitude for class treatment.  
28

1 Many of the domestic groundwater users who are members of Category 3(c) may lack financial  
2 resources to participate fully or at all in this litigation. Indeed, joining each of the domestic  
3 groundwater users in Category 3(c) as defendants in the proceedings based solely on the use of a  
4 domestic well would likely be overly burdensome since their individual interests are small  
5 compared to other interests in these proceedings. Class certification will instead make it possible  
6 for these water users to participate.  
7

8           Significantly, membership in Categories 3(a) and 3(c) fluctuates -- making  
9 individual joinder impracticable and potentially interminable -- and courts have used class  
10 certification as a tool to handle such fluctuations. *See Arthur v. Starrett City Assocs.*, 98 F.R.D.  
11 500, 505-06 (E.D.N.Y. 1983); *Folsom v. Blum*, 87 F.R.D. 443, 445 (S.D.N.Y. 1980). As the  
12 Court is acutely aware, changes in water right ownership is a critical issue here, and has plagued  
13 Mineral County's efforts to serve the necessary defendants. Mineral County's efforts to join  
14 those defendants in subproceeding C-125-C demonstrate the difficulty of tracking such changes.  
15 The class action tool goes a long way to address that problem and make inclusion of both present  
16 and future claimants more manageable.<sup>3</sup>  
17

18           In *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D. Nev. 1975),  
19 the United States sought to certify a class of defendants consisting of all "individuals who are  
20 holders of water right certificates on the Newlands Reclamation Project and who are members of  
21 TCID [Truckee-Carson Irrigation District] . . . ." *Id.* at 13. The class consisted of approximately  
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25 <sup>3</sup>As compared to the District's lis pendens suggestion, e.g. *Memorandum of Walker River*  
26 *Irrigation District Concerning Procedures for Recording Notices of Lis Pendens and*  
27 *Concerning Identification of Counterdefendants by Case Management Categories* (Feb. 12,  
28 2001), which the Magistrate determined to be inappropriate for use in the present circumstances,  
the use of a class action can effectively address changes in ownership without adverse effects on  
the title to real property.

1 3,800 members, and the Court found the class to be “so numerous that joinder of all members is  
2 impracticable.” *Id.* at 16 (quoting FED. R. CIV. P. 23(a)(1)). Treatment of the certificate holders  
3 as a class not only reduced the time required to join them in the proceedings, but also reduced the  
4 expense of their individual joinder and rendered the individuals’ participation more convenient.  
5 Certification of two classes to include, respectively, the members of Category 3(a) and the  
6 domestic groundwater users in the specified sub-basins who are members of Category 3(c) would  
7 accomplish the same beneficial result.  
8

9  
10 **2. There Are Questions of Law and Fact Common to the Class.**

11 Second, in order to certify a class, the Court must determine that “there are  
12 questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). “A common nucleus of  
13 operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).”  
14 *Keele v. Wexler*, 149 F.3d 589, 594 (7<sup>th</sup> Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013,  
15 1018 (7<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993)). Courts interpret this requirement  
16 liberally: “The commonality test is met when there is at least one issue, the resolution of which  
17 will affect all or a significant number of the putative class members.” *Lighbourn v. County of El*  
18 *Paso, Texas*, 118 F.3d 421, 426 (5<sup>th</sup> Cir. 1997), *cert. denied sub nom. Lighbourn v. Garza*, 522  
19 U.S. 1052 (1998) (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5<sup>th</sup> Cir. 1993)).  
20 *Accord Truckee-Carson*, 71 F.R.D. at 16 (there were “both questions of law and fact common to  
21 the class.”) (citing FED. R. CIV. P. 23(a)(2)); *Hanlon*, 150 F.3d at 1019 (“Rule 23(a)(2) has been  
22 construed permissively. . . . [T]he proposed class shares sufficient factual commonality to satisfy  
23 the minimal requirements of Rule 23(a)(2).”).  
24  
25

26 This requirement is easily met here. The issue common to members of the two  
27 proposed classes is whether the claims of the United States and the Tribe are valid. Defenses  
28

1 common to the classes are, at least preliminarily, identified among the eight threshold issues in  
2 the CMO, which list of issues could expand at the Magistrate's discretion. Thus, "[a]s against  
3 the United States and the Tribe, the defenses of each member of the class would be identical and  
4 there would be no claims of any one member which would be adverse to any other member."  
5 *Truckee-Carson*, 71 F.R.D. at 16. The two classes consisting of the members of Category 3(a)  
6 and domestic groundwater users in the specified sub-basins who are members of Category 3(c)  
7 are uniquely situated with respect to these common issues vis a vis the other categories of  
8 defendants identified in paragraphs 3(b), 3(d)-(i) of the CMO. The members of Category 3(a) are  
9 the only defendants who look to the Decree to define their water rights claims, thus their defenses  
10 to the United States' and the Tribe's claims will revolve around the Decree. The domestic  
11 groundwater users in sub-basins 107, 108, 110A and 110B look to state law to define their rights,  
12 which law does not assign them any priority, and their defenses will spring from that state law.

13  
14  
15 The domestic groundwater users in sub-basins 107, 108, 110A and 110B who are  
16 members of Category 3(c) are like the contractual right holders who were certified as a defendant  
17 class in *Truckee-Carson*. The Court found determinative the fact that the defendants all held the  
18 same right with respect to one another -- a right to use water within the Newlands Reclamation  
19 Project -- and the United States' and the Pyramid Lake Paiute Tribe's claims would affect all of  
20 those contractual rights in the same way. In other words, if the United States and the Pyramid  
21 Lake Paiute Tribe were successful, their claims would result in a "proportionate quantitative  
22 reduction of [the] water rights [of the contractual claimants]." *Id.* at 15. Similarly, domestic  
23 groundwater users included in Category 3(c) stand in the same legal relationship to one another.  
24 Nevada does not regulate domestic wells. "Domestic wells are exempted from the requirement  
25 of obtaining a permit for appropriation of underground water." Opinion of the Nevada Attorney  
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1 General No. 97-19, 1997 WL 317065 at \*2 (June 2, 1997) (citing NEV. REV. STAT.  
2 §§ 534.180(1), 534.030(4)). This exemption is opposed to the requirement that those wishing to  
3 appropriate surface water, and groundwater for purposes other than domestic, must obtain a  
4 permit to do so. NEV. REV. STAT. § 533.325. The State Engineer “does regulate the drilling of  
5 such [domestic] wells.” *Id.* at \* 3 (citing NEV. REV. STAT. §§ 534.140, 534.160; NEV. ADMIN.  
6 CODE § 534.330-450 (State Engineer’s regulations for licensing well drillers)) (other citations  
7 omitted). Stated another way, the burden of reporting the existence of domestic wells is on the  
8 well driller, not the domestic well owner. Moreover, even though the State Engineer exercises  
9 regulatory authority over those who drill wells for domestic groundwater use, the prior  
10 appropriation system does not apply to domestic wells. The users of groundwater for domestic  
11 purposes, then, have parallel rights to each other and the success of the United States’ and  
12 Tribe’s claims could affect them equally, and their relationship to one another is like the  
13 certificate holders who were certified as a defendant class in *Truckee-Carson*.  
14  
15  
16

17 With respect to the Category 3(a) defendants, the instant case differs in a  
18 significant way from the *Truckee-Carson* case. There, the Court distinguished the “individuals  
19 who are holders of water right certificates on the Newlands Reclamation Project and who are  
20 members of TCID [Truckee-Carson Irrigation District] . . . .” 71 F.R.D. at 13, who were  
21 appropriate for class certification, from the decreed right holders for whom the United States did  
22 not seek class certification.<sup>4</sup> The Court explained:

23  
24 Each certificate holder’s right is fixed under the terms of his  
25 contract with TCID. Under the terms and conditions of the  
26 contracts, if the United States and the Tribe were successful, it

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27 <sup>4</sup>The United States already had joined approximately 13,000 individual defendants in the  
28 case. *Id.* at 16.



1 appears each certificate holder would be affected equally by a  
2 proportionate quantitative reduction of their water rights. This is  
3 not true of the other individual defendants already joined. Each  
4 individual defendant has a water right with a priority date which  
could be applied to defeat another's right which is junior.

5 *Id.* at 15 (footnote omitted). Even though the Court distinguished the certificate holders from the  
6 decreed right holders, it did not pass on whether the decreed right holders could also be certified  
7 as a class for some or all of the issues relative to the United States' and Pyramid Lake Tribe's  
8 claims.

9  
10 It is not clear from the *Truckee-Carson* decision whether the Court certified the  
11 class in order to address specific issues or whether the class was certified for the duration of the  
12 proceedings. Here, however, it is clear that the CMO establishes an order for proceeding to  
13 address the issues raised in the United States' and the Tribe's first amended counterclaims. Once  
14 service is complete, the Court will next consider threshold issues with respect to the first  
15 amended counterclaims. At least through the completion of that step of the litigation as  
16 established by the CMO, the defendants in all of the categories are similarly aligned -- sharing  
17 commonality -- including the defendants who are members of Category 3(a). The fact that they  
18 claim decreed water rights does not at this stage of the proceedings distinguish them from any  
19 other defendant. *Contra id.* at 16. Collective defense as a class will allow all of the successors in  
20 interest, as opposed to only a few who have the resources to do so, to participate in the response  
21 to the United States and the Tribe, thereby simplifying the "enormity and complexity of the  
22 issues . . . ." CMO at 1. At the appropriate time, the Court may consider vacating its  
23 certification order so that the effect of the United States' and the Tribe's claims on individual  
24 decreed rights can be ascertained. FED. R. CIV. P. 23(e). *See* Part II(B)(2), *infra*. But for now,  
25 the peculiarities of the impact of the additional claims on each decreed water right are not before  
26  
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28

1 the Court; rather, the questions now (service of process, threshold issues, and the plaintiffs'  
2 entitlement to the declaration they seek) logically fit within the class scheme.

3  
4 3. **The Claims and Defenses of the Class Representatives are Typical of the Class.**

5 The third requirement for class certification is that "the claims or defenses of the  
6 representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3).  
7 "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably  
8 co-extensive with those of the absent class members; they need not be substantially identical."  
9 *Hanlon*, 150 F.3d at 1019. Thus, "Rule 23(a)(3)'s typicality requirement is satisfied when each  
10 class member's claim [or defense] arises from the same course of events and each class member  
11 makes similar legal arguments to prove the defendant's liability [or plaintiff's lack of  
12 entitlement]." *Robidoux*, 987 F.2d at 936 (citations omitted). This is not a difficult standard to  
13 meet. "The test for typicality, like the test for commonality, is not demanding." *Lightbourn*, 118  
14 F.3d at 426 (citing *Forbush*, 994 F.2d at 1106). And, it is satisfied here.

15  
16 With respect to the threshold issues, "there would be no claims of any one  
17 member which would be adverse to any other member . . . [t]he claims or defenses of TCID [the  
18 class representative] would also be identical with the members of the class." *Truckee-Carson*, 71  
19 F.R.D. at 16. This also is true with respect to the threshold issues where all of the defenses to the  
20 United States' and the Tribe's claims for additional water will be the same, and for the  
21 determination of the United States' and the Tribe's entitlement to the declaratory relief they seek.  
22 Clearly, "the claims or defenses of the representative parties are typical of the claims or defenses  
23 of the class." *Id.* (quoting FED. R. CIV. P. 23(a)(3)).

24  
25 4. **The Class Representatives Will Fairly and Adequately Represent the Interests of the Class.**

1           The final requirement under Rule 23(a) is that the class representative must "fairly  
2 and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Adequacy of  
3 representation is a critical determination that "is a question of fact." *Truckee-Carson*, 71 F.R.D.  
4 at 16 (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9<sup>th</sup> Cir. 1964)).  
5 With respect to a defendant class, the representative does not have to be willing, but adequacy  
6 remains the key issue. *Hanlon*, 150 F.3d at 1021; *Thillens*, 97 F.R.D. at 679; *Marcera v.*  
7 *Chinlund*, 91 F.R.D. 579, 584 and n.10 (W.D.N.Y. 1982) (citations omitted).  
8

9           In *Truckee-Carson*, the Court determined that the Truckee Carson Irrigation  
10 District was an adequate and capable class representative:  
11

12           It would seem that there could be no better representative of the  
13 class than TCID which was formed for just such a purpose.  
14 Although it has opposed the use of the class action device, counsel  
15 for TCID have indicated that they will gladly represent the class.  
16 The seven individual members were not picked at random. They  
17 are the current directors of TCID duly elected by members of the  
18 class. As such they have more than a passing interest in this  
19 litigation. TCID has already taken a very active role in this case  
20 and will, no doubt, continue to do so. It would appear there would  
21 be a great deal of communication between TCID, the seven  
22 representatives and the members of the class, and that all will be  
23 most ably represented.

24 71 F.R.D. at 16. The Court concluded that the "representative parties will fairly and adequately  
25 protect the interests of the class." *Id.* (quoting FED. R. CIV. P. 23(a)(4)).  
26

27           For the same reasons, the Walker River Irrigation District should represent the  
28 successors in interest to the water right holders under the Decree, since most of the successors are  
members of the District. The District has taken a very active role in these proceedings, "and will,  
no doubt, continue to do so." *Id.* Also for the same reasons, the State of Nevada should  
represent the domestic groundwater users in sub-basins 107, 108, 110A and 110B in Nevada,

1 since they use groundwater pursuant to state law. Nevada is a similarly active party to these  
2 proceedings.  
3

4 To the extent that any member of either defendant class is not satisfied that the  
5 District or Nevada adequately represent their interests, such individual or individuals may seek  
6 the designation of additional class representatives.

7 **B. THE CLASSES SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(A), 23(b)(2)**  
8 **AND 23(b)(3).**

9 In addition to the requirements of FED. R. CIV. P. 23(a), the United States and the Tribe  
10 must also satisfy at least one of the criteria listed in FED. R. CIV. P. 23(b): "parties seeking class  
11 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."

12 *Amchem*, 521 U.S. at 614. FED. R. CIV. P. 23(b)(1)(A), 23(b)(2) and 23(b)(3) all apply here.<sup>5</sup>  
13

14 1. **Class Certification Will Protect Against Incompatible Duties.**

15 "Rule 23(b)(1)(A), establishing the 'incompatible duties' standard, has the  
16 primary purpose of protecting the opponent of the class from the possibility of inconsistent  
17 obligations." FEDERAL CIVIL RULES HANDBOOK at 434. This was the provision under which the  
18 Court certified the class of water certificate holders in *Truckee-Carson* since in the absence of a  
19 class there would be a "risk of inconsistent or varying adjudications of the rights of each  
20 individual certificate holder which, when considered together, could impair the uniform course of  
21 conduct which the Tribe and the United States seek to pursue." 71 F.R.D. at 17.  
22

23 Having determined that all elements of Rule 23(a) were satisfied, the *Truckee-*  
24 *Carson* Court found that a class was maintainable under FED. R. CIV. P. 23(b)(1)(A):  
25

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26 <sup>5</sup>"Although a class may be certified if it fits within only one of the Rule 23(b) categories,  
27 there are sometimes advantages to fitting within more than one of the categories." FEDERAL  
28 CIVIL RULES HANDBOOK at 433.

1 Obviously, if the United States could not join certificate  
2 holders as a class, it and the Tribe would be forced to join them  
3 individually and establish the rights which they seek as against  
4 each. As a matter of practical necessity, the United States and the  
5 Tribe would be forced to act and litigate in the same manner  
6 against individual certificate holders as it would toward the  
7 certificate holders as a class. This would then create a risk of  
8 inconsistent or varying adjudications of the rights of each  
9 individual certificate holder which, when considered together,  
10 could impair the uniform course of conduct which the Tribe and  
11 the United States seek to pursue; that is, to establish water rights,  
12 some of which they contend are prior to the rights of certificate  
13 holders. The standards of subsection (b)(1)(A) are met.

14 *Id.* at 17 (citing CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND  
15 PROCEDURE § 1773, at 11 (1972)). In the end, the Court held that in addition to satisfaction of  
16 the Rule 23 requirements, "sheer practicality" favored class certification: "Treating the  
17 certificate holders as a class provides 'a ready and fair means of achieving unitary adjudication'  
18 of the rights of the United States and the Tribe and the certificate holders." *Id.* (quoting FED. R.  
19 CIV. P. 23 advisory committee's note, 39 F.R.D. 69 (1966)).

20 Treating members of Category 3(a) and the domestic groundwater users in the  
21 specified sub-basins who are members of Category 3(c) as classes will accomplish the same  
22 result here as well. There is one body of water ultimately at issue here. Before reaching the  
23 merits of the United States' and the Tribe's claims to that water, the parties to the instant case  
24 must address the threshold issues set forth in the CMO. Even after disposing of the threshold  
25 issues, the Court must address the merits of the additional water rights claims and determine  
26 whether the United States and the Tribe are entitled to the declaratory relief they seek. If the  
27 Court must consider each threshold issue and defense separately as to each defendant, not only  
28 will there be a possibility that the United States and the Tribe will be subject to inconsistent  
standards of conduct with respect to individual defendants, the Court will have to spend an

1 inordinate amount of time addressing each defendant's arguments separately. Certification under  
2 Rule 23(b)(1)(A) will eliminate the danger of inconsistent results, and greatly reduce the Court's  
3 burdens by permitting collective and consistent consideration of the threshold issues, among  
4 other matters.  
5

6       2.     **The United States and the Tribe Request Declaratory and Injunctive Relief.**  
7

8               FED. R CIV. P. 23(b)(2) is applicable where "the party opposing the class has acted  
9 or refused to act on grounds generally applicable to the class, thereby making appropriate final  
10 injunctive relief or corresponding declaratory relief with respect to the class as a whole." The  
11 members of Category 3(a) and the domestic groundwater users in the specified sub-basins who  
12 are members of Category 3(c) share general defenses against the United States and Tribe, at least  
13 with respect to the threshold issues. Moreover, the United States and the Tribe seek only  
14 declaratory and injunctive relief. "[T]o maintain an action under Rule 23(b)(2), declaratory relief  
15 rather than monetary relief must be the 'predominant' form of relief the plaintiffs pursue."  
16 *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 269 (5<sup>th</sup> Cir.), *cert. denied* 530 U.S. 1261  
17 (2000) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5<sup>th</sup> Cir. 1998)). Stated  
18 another way, "Rule 23(b)(2) authorizes a no-notice and no-opt-out class for 'final injunctive  
19 relief or corresponding declaratory relief [that operates] with respect to the class as a whole.'"  
20 *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7<sup>th</sup> Cir. 1999). *See also* FEDERAL CIVIL  
21 RULES HANDBOOK at 434 (the two elements of a Rule 23(b)(2) class are: "the class must share a  
22 general claim [or defense] against the non-class party; and the class [or the non-class party] must  
23 seek either final injunctive or declaratory relief.").

24               The proceedings in *Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civil Action  
25 No. 91-B-2273, 874 F. Supp. 1142 (D. Colo. 1995), *rev'd on other grounds*, 119 F.3d 816 (10<sup>th</sup>  
26  
27  
28

1 Cir. 1997), *aff'd in part on reh'g en banc*, 151 F.3d 1251 (10<sup>th</sup> Cir. 1998), *rev'd on other*  
2 *grounds*, 526 U.S. 865 (1999), are instructive with respect to Rule 23(b)(2) classes. There, the  
3 Southern Ute Indian Tribe sought certification of a defendant class for the sole purposes of  
4 determining first whether the tribe retained an ownership interest in coalbed methane situated in  
5 the coal estate that belonged to the tribe, and second, assuming the tribe did retain such an  
6 ownership interest, whether a series of defenses, termed "Class Action Defenses," applied to bar  
7 the tribe's ownership claim. The court certified the following defendant class under Rule  
8 23(b)(2) only for resolution of those discrete issues:

11 All persons, except the Tribe and local state and federal  
12 governmental entities, who claim an ownership interest in coalbed  
13 methane or who claim the right to explore for or develop such  
14 coalbed methane from coal reserved by the United States in patents  
15 issued under the Act of March 3, 1909, or under the Coal Lands  
16 Act of 1910, for lands located within the exterior boundaries of the  
17 Southern Ute Indian Reservation.

18 *Case Management Order No. 1* at 1, *Southern Ute Indian Tribe v. Amoco Prod. Co.*, Civil Action  
19 No. 91-B-2273 (D. Colo. Apr. 24, 1992) (citations omitted) (Attachment 1 hereto). Once the  
20 issues were disposed of, and assuming the tribe's claim still survived, the court would vacate its  
21 class certification and proceed to examine the effect of the tribe's ownership claim on each of the  
22 defendants, be they landowners or royalty interest holders. In fact, the Supreme Court ultimately  
23 determined that the tribe did not retain an ownership interest in the coalbed methane, *Amoco*  
24 *Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), and, as a result, the lower court  
25 never reached the Class Action Defenses. Yet, even though the non-class defendants raised  
26 objections throughout the proceedings to the class, no court ever disturbed the class certification  
27 and it remained intact through final Supreme Court treatment of the case.

28 Rule 23(b)(2) was appropriate in the *Southern Ute* proceedings because during the

1 class phase of the case, the tribe sought only a declaration that it retained an ownership in the  
2 coalbed methane situate in its coal estate, and the Class Action Defenses were equitable in  
3 nature. *See Case Management Order No. 1* ¶ 3 (listing estoppel, waiver, contractual limitations,  
4 consent, promissory estoppel, acquiescence, ratification, laches and good faith as the Class  
5 Action Defenses). It is similarly appropriate here. The United States and the Tribe seek a  
6 declaration that they are entitled to water in addition to that adjudicated under the Decree in 1936  
7 for use on the Reservation, including both surface and groundwater. With respect to that  
8 declaratory relief, the defendants share general defenses, as initially set out in the threshold  
9 issues. Separate adjudication of the question of the United States' and the Tribe's entitlement to  
10 the declaration they seek would be a burdensome and repetitive exercise that need not be so with  
11 the availability and propriety of class treatment.

14 **3. The Common Questions of Law and Fact Predominate.**

15 FED. R. CIV. P. 23(b)(3) also applies here. "Rule 23(b)(3) permits certification  
16 where class suit 'may nevertheless be convenient and desirable.'" *Amchem*, 521 U.S. at 615  
17 (quoting FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69 (1966)). *Accord*  
18 *Washington*, 199 F.3d at 265. Rule 23(b)(3) requires analysis of two additional elements:  
19 "Common questions 'predominate over any questions affecting only individual members'; and  
20 class resolution must be 'superior to other available methods for the fair and efficient  
21 adjudication of the controversy.'" *Amchem*, 521 U.S. at 615. These elements of Rule 23(b)(3)  
22 are important because "the Advisory Committee sought to cover cases 'in which a class action  
23 would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as  
24 to persons similarly situated, without sacrificing procedural fairness or bringing about other  
25 undesirable results.'" *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 69  
26  
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1 (1966)). The rule breaks down the predominance and superiority requirements as follows.

2  
3 **a. Interest of Class Members in Controlling the Prosecution or Defense**  
4 **of Separate Actions.**

5 The present parties to the proceedings have repeatedly raised the issue of  
6 the financial ability of water rights claimants as justification for requiring the United States and  
7 the Tribe to proceed to identify the potential defendants in this case without any assistance from  
8 the parties themselves. *See* USBWC Comments at 2-3. If financial resources are indeed a  
9 problem, the defendants would find that defending against the United States' and the Tribe's  
10 claims would be much less of a financial strain as class members. This is especially true with  
11 respect to the domestic groundwater users who are members of Category 3(c), as their water  
12 rights claims in the basin are comparatively small, and their individual joinder would likely be  
13 burdensome. Their interests would be served, as a result, by participating in the Phase I portion  
14 of these proceedings as a class, and possibly in later phases as well.

15  
16 **b. Extent and Nature of Any Litigation Concerning the Controversy**  
17 **Already Commenced by or Against Class Members.**

18 Obviously, this litigation has involved the members of Category 3(a) for  
19 over sixty years. Even in the absence of the United States' and the Tribe's claims, they continue  
20 to be parties to this action for purposes of administration of the Decree, as well as for any  
21 petitions for changes in places or manners of use of water adjudicated under the Decree. The  
22 United States and the Tribe seek to add groundwater users in the Walker River Basin to the mix  
23 of individuals subject to the Court's continuing jurisdiction over the Decree's implementation,  
24 since we have asserted a hydrological connection between surface and groundwater in the basin.  
25 The Court agreed that consideration of whether groundwater users should be among the parties  
26 before the Court is appropriate. CMO ¶¶ 3(c)-3(i), 11(a)-11(d). The determination whether to  
27  
28

1 include the members of Category 3(c) is, then, also appropriate as a class matter.

2  
3 **c. Desirability of Concentrating the Litigation of the Claims in a**  
4 **Particular Forum.**

5 As with existing litigation, the claims already are concentrated in a  
6 particular forum, since the Court has retained jurisdiction over the administration and  
7 modification of the Decree. Decree ¶ XIV. *See also Mineral County v. Nevada Dep't of*  
8 *Conserv.*, No. 36352, 117 Nev. Adv. Op. No. 23 at 8-9 (Apr. 11, 2001) ("the Decree Court,  
9 which has had continuing involvement in the monitoring of the Walker River for more than  
10 eighty years, is the proper forum for the redress that Petitioners [Mineral County] seek.")  
11 (footnote omitted). For purposes of determining at the outset whether the Court's jurisdiction  
12 includes groundwater in the Walker River Basin due to a hydrological connection between the  
13 surface and underground waters, as the United States and the Tribe allege, this forum is the  
14 appropriate one.  
15

16 **d. Difficulties Likely to be Encountered in the Management of a Class**  
17 **Action.**

18 The Court has recognized in prior orders that consideration of the United  
19 States' and the Tribe's additional claims could pose significant case management problems due  
20 to a very large number of defendants that would be brought into the case, in addition to those  
21 already before the Court. *Minutes of the Court* at 3 (May 11, 1999). Rather than create  
22 difficulties, the certification of two classes would help streamline this Court's management of the  
23 parties whose interests may be affected by the additional water rights claims.  
24

25 **4. Notice to Rule 23(b)(3) Class Members.**

26 Unlike the Rule 23(b)(1)(A) and 23(b)(2) classes, the members of a Rule 23(b)(3)  
27 class are entitled to individual notice and an opportunity to opt-out of the class:  
28

1 The notice shall advise each member that (A) the court will  
2 exclude the member from the class if the member so requests by a  
3 specified date; (B) the judgment, whether favorable or not, will  
4 include all members who do not request exclusion; and (C) any  
5 member who does not request exclusion may, if the member  
6 desires, enter an appearance through counsel.

7 FED. R. CIV. P. 23(c)(2). See *Amchem*, 521 U.S. at 617. The notice is mandatory. *Eisen v.*  
8 *Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). The United States and the Tribe have  
9 attached hereto as Attachment 2 a proposed form of notice to Rule 23(b)(3) class members, if the  
10 Court determines that it is the appropriate part of the rule under which to certify either or both of  
11 the classes, and for any or all of the issues in these proceedings. The proposed order may also be  
12 modified to provide notice to members of classes certified under Rule 23(b)(1)(A) and 23(b)(2),  
13 if the Court so determines. FED. R. CIV. P. 23(d)(2).

#### 14 **IV. CONCLUSION**

15 “Reason and logic render [the] rights [of the members of Category 3(a) and the domestic  
16 groundwater users in the specified sub-basins who are members of Category 3(c)] appropriate to  
17 class adjudication if the prerequisites under Rule 23 are satisfied.” *Truckee-Carson*, 71 F.R.D. at  
18 15-16. Class treatment of the members of Category 3(a) and the domestic groundwater users in  
19 the specified sub-basins who are members of Category 3(c) satisfies Rule 23. Certification of  
20 additional classes may also be warranted in these proceedings, as the United States and the Tribe  
21 move through the process of serving the potential defendants to this case. As the present motion  
22 addresses only Category 3(a) and a portion of Category 3(c), however, the United States and the  
23 Tribe respectively request only certification of those two classes at this time.  
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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing *Memorandum in Support of the Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* in the U.S. Mail, first-class postage prepaid thereon, on this 3<sup>rd</sup> day of May, 2001, addressed to the following:

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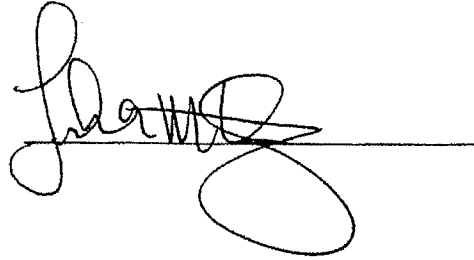
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Reno, NV 89501

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

A handwritten signature, likely of Garry Stone, is written over a horizontal line. The signature is stylized and cursive.