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**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.)
 _____)
 MINERAL COUNTY,)
)
 Proposed-Plaintiff-Intervenor,)
 vs.)
)
 WALKER RIVER IRRIGATION DISTRICT)
 a corporation, et al.,)
)
 _____)
 Proposed Defendants.)

IN EQUITY NO. C-125-ECR
 Subproceedings: C-125-B & C-125-C
 3:73-CV-00127-ECR- LRL &
 3:73-CV-00128-ECR- LRL

**REPLY TO WALKER RIVER
 IRRIGATION DISTRICT’S
 OBJECTIONS TO PROPOSED
 ORDER CONCERNING
 SERVICE ISSUES PERTAINING
 TO DEFENDANTS WHO HAVE
 BEEN SERVED**

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I. Introduction

The United States of America (“United States”) and the Walker River Paiute Tribe (“Tribe”) (Plaintiff and Plaintiff-Intervenor in Subproceeding C-125-B) and Mineral County (Proposed Plaintiff-Intervenor in Subproceeding C-125-C) (collectively “Plaintiff Parties”) respectfully submit this Joint Reply to the *Walker River Irrigation District’s* (“WRID’s”) *Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date*. (C-125-B, Jan. 7, 2011) (#1621) (C-125-C, Jan. 7, 2011) (#523) (“WRID’s Objections”).¹

Plaintiff Parties are attempting to complete service on defendants in their respective subproceedings. In connection with this effort and future case management, they have submitted proposals to address treatment of successors-in-interest to water rights claims following *inter vivos transfers* and the death of a defendant. *Submission of Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* (C-125-B, Nov. 30, 2010) (##1614); (C-125-C, Nov. 30, 2010) (#516).² By their proposed Order and this Reply, Plaintiff Parties request the Court to identify and approve procedures for this case that are consistent with the Federal Rules of Civil Procedure, do not create unreasonable additional burdens and obstacles for Plaintiff Parties, avoid overly-formalistic procedural traps, and allow the Court to reach the merits of the claims at issue.

¹ WRID’s Objections also address a proposed service cut-off date in C-125-B. The United States and Tribe address the issue of a service cut-off date in C-125-B by separate filing.

² The parties conferred on February 2, 2011, to attempt to reach common ground, but were unsuccessful.

WRID objects to these proposals. The United States Board of Water Commissioners (“Board”),³ Circle Bar N Ranch, LLC, and Mica Farms, LLC join WRID’s Objections.⁴ Neither the State of Nevada nor the State of California filed comments or objections.

The Parties agree that when water right claims are transferred before service is made on the transferor, the transferee must be served. The Parties disagree on what, if any, additional notice or process should be required for defendant water right claimants who have been served and for their successors-in-interest. WRID’s assertion that successors-in-interest must be actively tracked and served with personal service under Rule 4, Fed. R. Civ. P. is incorrect as a matter of law and would have the practical effect of perpetually postponing any resolution of the merits in these subproceedings.

WRID mistakenly argues that Rule 19, Fed. R. Civ. P. applies and requires joinder of every successor-in-interest to the water right claim of a defendant who already has been served. Once a defendant has been served, Rule 25, Fed. R. Civ. P. applies and governs whether and how

³ The U.S. Board of Water Commissioners joined WRID’s Objections despite the fact that it is treated in these matters as a quasi-judicial entity “and is obligated to conduct itself in an impartial, unbiased manner.” *Order* at 4 (C-125, Feb. 13, 1990) (#162) (ordering that it is inappropriate for the same attorney to continue representing both WRID and the Board). The Board is required to avoid the simple appearance of impropriety or partiality. *Id.* at 5. Despite the Court’s clear mandate, the Board filed a pleading joining one party in this dispute against other parties in these subproceedings. While the Board’s attorney has been involved in service related issues in the past, such as reviewing and commenting on service lists, taking a side in a dispute over the process to join successors-in-interest and the need to establish a cut-off date for service violates the Board’s duty to administer justice impartially. The Board and its attorney are “obligated to function in an impartial manner in administering [their] duties under the Decree.” *Id.* at 9. The Board was created in 1937 by court order to distribute the waters of Walker River in accordance with the Decree in C-125. The Board and its attorney are “bound by the Code of Judicial Conduct, and [are] obligated to conduct [themselves] in an impartial, unbiased manner.” *Id.* at 4. At a minimum, the Board’s action provides an appearance of impropriety and/or partiality. Plaintiff Parties have appreciated the feedback on Service Reports in C-125-B from the Board’s attorney, which has assisted in identifying service issues to be clarified or corrected, but question the Board’s decision to join the WRID Objections.

⁴ These joinders were filed on January 7, 2011. (C-125-B at ##1622, 1623) (C-125-C at ## 524, 525).

substitution should occur. WRID's passing assertion that Rule 25 does not apply to the C-125-C subproceeding because that proceeding has not commenced is obviously incorrect because Mineral County filed its motion to intervene and complaint in intervention over fifteen years ago in the ongoing litigation in C-125 and C-125-B, and has since been engaged in voluminous, burdensome and nearly complete service efforts, interrupted for several years by a multiyear mediation effort in both subproceedings.

Rule 25 and long settled law clearly show that successors-in-interest to claimed water rights of defendants who have been served do not need to be substituted in order for these proceedings to move forward to judgment. The subproceedings may proceed to judgment in the name of the original served defendant and the successor-in-interest will be bound by the judgment. This is particularly clear in an *in rem* proceeding, such as here. There is no requirement under Rule 25 that Plaintiff Parties track defendants' transfers of interest and move to substitute successors-in-interest. While Rule 25(c) provides for any party or a non-party successor-in-interest to move for substitution, it does not require that anyone file such a motion.

With regard to transfers of water rights claims from served defendants as the result of death, Rule 25(a) does not require Plaintiff Parties to bear the burden of tracking the continued existence of their defendants and effectuating substitution of successors-in-interest as a result of death. Just as with *inter vivos* transfers of interest, the successor-in-interest will be bound regardless of substitution. If anyone does file a statement of death to initiate the substitution process under Rule 25(a), case law and sound policy reasoning demonstrate the propriety and common sense of requiring that such filing identify the successor-in-interest of a deceased defendant.

Finally, since due process requires notice that is reasonable under the circumstances of the case, once the initial phase of service is completed on water rights claimants to the Walker River system, the most reasonable and fitting process to provide for notice of these proceedings at any critical junctures would be a process that tracks the procedures for periodic notice by mail and publication utilized in Nevada and California State water rights adjudications and in other analogous federal water rights adjudications.

For all of these reasons, WRID's objections are misplaced. Nonetheless, Plaintiff Parties have modified the proposed Order and attached forms to improve their clarity and ensure that they reflect the positions expressed herein and the requirements of due process. Accordingly, the Plaintiff Parties respectfully urge the Court to reject WRID's objections and approve the proposed Order and attached forms.

II. History of Subproceedings C-125-B and C-125-C and Their Respective Service Efforts

Subproceedings C-125-B and C-125-C are part of litigation over water rights in the Walker River system that commenced in 1924, when upstream users prevented water from reaching the Walker River Paiute Reservation. This conduct prompted the United States to sue to determine a water right for the Reservation and the relative rights to water of parties in Nevada and California. On April 14, 1936, the Court entered a judicial Decree in *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158 (D. Nev. 1935) ("Decree").⁵ The 9th Circuit reversed, in part, because the Court would not decree the right awarded the Reservation as a federally reserved water right. *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939).⁶

⁵ Decree, (Apr. 24, 1936), modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate (Apr. 24, 1940).

⁶ The Decree, as modified, provides 26.25 cfs for irrigation of 2,100 acres on the Reservation, plus sufficient water for domestic, stockwatering and power purposes.

On April 24, 1940, the Court amended the Decree to address the 9th Circuit's ruling and incorporate the parties' stipulation that:

This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries as of the 14th day of April, 1936

Decree at ¶XII, p. 72. The Court retained jurisdiction “for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . .” *Id.* at XIV, pp. 72-73. Over the years, it has exercised ongoing authority over and supervision of these proceedings, including approving rules to implement the Decree, addressing requests to amend the Decree, and appointing Water Masters and the U.S. Board of Water Commissioners. In addition, it has designated three subproceedings, including the two before this Court.

A. Subproceeding C-125-B:

The Court designated subproceeding C-125-B in 1992, after the Tribe filed a counterclaim in subproceeding C-125-A,⁷ seeking water rights for lands restored to the Reservation subsequent to the Decree and for storage in Weber Reservoir. *Order* (C-125-A, May 18, 1992) (#34). The United States sought leave to file a similar counterclaim in its trust capacity. *Motion for Leave to File Counterclaim* (C-125-B, July 23, 1992) (#3). The counterclaims were served on a limited group of parties. WRID then moved to dismiss the counterclaims or to require joinder and service of process on all claimants to water in the Walker River basin. *Motion to Dismiss* (C-125-B, Aug. 3, 1992) (#5). At that point, the Court

⁷ Subproceeding C-125-A addressed WRID's petition, filed in January 1991, for relief after the State of California issued administrative orders regarding instream and minimum pool objectives at WRID's Topaz and Bridgewater reservoirs. *Petition for Declaratory and Injunctive Relief and Request for Order to Show Cause; or in the Alternative to Change the Point of Diversion to Storage of Water From California to Nevada* (C-125-A, Jan. 9, 1991) (#3). WRID argued that California was acting inconsistently with the Decree and interfering with the federal court's retained jurisdiction. These claims were ultimately settled.

determined that “[i]n accordance with Rule 19, all claimants to the water of the Walker River and its tributaries must be joined as parties to the claim” and served under Rule 4, Fed. R. Civ. P. *Order* (C-125-B, Oct. 27, 1992) (“1992 Order”) (#15) at 6.⁸ WRID claims the 1992 Order requires that all successors-in-interest must also be served as Rule 19 parties throughout the litigation of subproceedings C-125-B and C-125-C..

Thereafter, the Court granted a series of stipulated extensions of time for the United States to investigate, identify, and serve the necessary additional parties. In April 1994, the United States sought instructions and an order addressing whether it was required to serve groundwater users. *Motion for Instructions and Order* (C-125-B, Apr. 7, 1994) (#23). In July 1994, the Court determined that the information before it did not require joinder of groundwater claimants under Rule 19. *Order* (C-125-B, July 8, 1994) (#30).

In 1997, the United States and Tribe filed amended counterclaims to include groundwater under and adjacent to the Reservation, asserting that the surface and groundwater systems of the Walker River Basin are so interconnected that taking water from one affects the amount available to the other.⁹ The United States also included claims for surface and groundwater for the following federal interests not addressed in the underlying C-125 litigation: Hawthorne Army Ammunition Plant, Toiyabe National Forest, U.S. Marine Corps Mountain Warfare Training Center, Bureau of Land Management, Yerington Paiute Indian Reservation, Bridgeport Paiute Indian Colony, and a series of Indian allotments.

⁸ The Court also determined as a matter of procedure that the Tribal and federal counterclaims were cross-claims because they arose out of the same transaction or occurrence relating to property that is the subject of the original action. *Id.* at 4-5.

⁹ *First Amended Counterclaim of the Walker River Paiute Tribe* (C-125-B, July 31, 1997) (#58); *First Amended Counterclaim of the United States of America* (C-125-B, July 31, 1997) (#59).

In August 1998, the United States and Tribe moved for leave to serve their first amended counterclaims, join groundwater users and for approval of a procedure for service.¹⁰ In response, Nevada moved for a more definite statement and WRID moved for a scheduling and planning conference.¹¹ In May 1999, the Court determined to hold a scheduling conference to “place the case on some sort of proper procedural track.” *Minutes of the Court*, at 3 (C-125-B, May 11, 1999) (#81). Part of its concern was whether groundwater users should be joined and if joined whether they should be identified and served. The Court encouraged the parties to meet and agree upon case management procedures. These efforts were unsuccessful. After extensive briefings, the Court issued its Case Management Order on April 18, 2000. *Case Management Order* (C-125-B, Apr. 18, 2000) (“CMO”) (#108).

In its CMO, the Court acknowledged the potential complexity of trying the claims and bifurcated the Tribal Claims from the other Federal Claims, because “[w]hile many of the defenses to the [Tribal Claims] may be the same or similar to the defenses that may be offered [regarding the remaining federal claims], each of the remaining claims appears to require development of a distinctly different factual scenario, as well as specific legal basis.” *Id.* at 2. The CMO requires the United States and Tribe to effect personal service pursuant to Fed. R. Civ. P. 4, on nine categories of persons and entities, including the successors-in-interest to all water rights holders under the Decree and holders of permits or certificates to pump groundwater in specific sub-basins in the Walker River Basin. *Id.* at 5-6, ¶3. Among other things, the CMO authorizes the Magistrate Judge to “consider and decide all issues which may arise pertaining to service of process,” including establishing a schedule for completion of service, and determining

¹⁰ *United States’ and Walker River Paiute Tribe’s Joint Motion for Leave to Serve First Amended Counterclaims* (C-125-B, Aug. 20, 1998) (#62).

¹¹ (C-125-B, Nov. 6, 1998) (#64); and (C-125-B, Nov. 9, 1998) (#67).

whether the categories to be served should be adjusted, modified or expanded, whether and when publication is appropriate, and whether specific service efforts and service efforts as a whole are adequate and complete. *Id.* at 6-8.

The CMO divides litigation of the Tribal Claims into Phase I to identify and address threshold issues and Phase II to “involve completion and determination on the merits of all matters” relating to the Tribal Claims. *Id.* at 11, ¶12. As Magistrate Judge McQuaid recognized, “the threshold issues [Phase I of the Tribal Claims] cannot be decided until service is completed and all parties are joined.” *Minutes of Court*, at 2 (Dec. 3, 2008) (#1468).

The Court’s position on the mechanics of service has evolved over the years. For example, the initial CMO required filing *lis pendens* for each person or entity served. The Magistrate Judge subsequently removed this requirement after the United States ascertained that such filings were not done by either the State of Nevada or California in conjunction with their water rights adjudications and could require “mini-trials” at the State level for each defendant served. Instead, the Court approved a form to require defendants to identify to the Court when they transfer interests subject to the proceeding. *Minutes of Court* (C-125-B, Mar. 20, 2001) (#136); *Order Regarding Changes in Ownership of Water Rights* (C-125-B, July 16, 2003) (#207).

Before the United States was authorized to commence service, the Court and other parties reviewed and approved a set of documents to be included in a service package. Following the Court’s approval of the last portion of the service package in July 2003, the United States initiated service efforts. Shortly before then, the parties began an extensive effort to mediate both subproceedings, which ended in 2006.

B. Subproceeding C-125-C:

In October 1994, Mineral County filed its Motion and Petition to Intervene in the C-125-B case, (C-125-B, Oct. 25, 1994) (##31-32) for which the Court created subfile C-125-C. *Minutes of the Court*, at 1 (C-125-C, Jan. 3, 1995) (#1). Mineral County seeks a water right for Walker Lake pursuant to the Public Trust Doctrine to restore and maintain the Lake in a reasonable state of ecological health and sustain its historical and immeasurable values as a wildlife habitat resource, a recreational resource, an economic resource, an environmental resource, and a scenic resource. On February 9, 1995, the Court ordered Mineral County to file and serve revised filings on all claimants to the waters of the Walker River and its tributaries pursuant to Rule 4, as further defined in its Order. *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶¶ 2, 3 (C-125-C, Feb. 9, 1995) (#19). Mineral County filed its *Amended Complaint in Intervention* on March 10, 1995. *Mineral County's Amended Complaint in Intervention* (C-125-C, Mar. 10, 1995) (#20). In September 1995, the Court identified the documents that Mineral County was required to include in its service effort, and reiterated that persons or entities that are served or waive personal service, but do not appear and respond will be deemed to have notice of all subsequent filings with the Court. *Order*, at 2, 4 (C-125-C, Sept. 29, 1995) (#48).

Mineral County compiled the list of claimants to waters of the Walker River and its tributaries by reviewing records at the county and State level, such as the County Recorders' offices and State Engineer's files. The sheer number of claimants, combined with the fact that few records and databases consulted or lists received were initially accurate, made the task time-consuming, expensive, and difficult. In this effort, which preceded the United States' service efforts, the Court directed Mineral County to identify the persons and entities to be served and

then reach consensus with the other parties on the proper list of persons and entities to be served. *Minute Order* (C-125-C, Oct. 24, 1997) (#156). This effort took several years. On January 12, 1998, the Court issued the caption that has been the basis of Mineral County's service efforts, and on May 13, 1998, issued an Order indicating that the Court and parties had agreed upon the list of defendants to be served. *Order at 2* (C-125-C, May 13, 1998) (#196).¹²

Thereafter, Mineral County dedicated significant time and resources to conduct service as directed by the Court, particularly given its size and budget constraints. The difficulties and costs associated with this effort were substantially increased by interference and evasion by upstream claimants, which led to complications and delays that otherwise could have been avoided. *See Points and Authorities in Opposition to WRID's Motion to Vacate Schedule and in Support of Counter Motion for Sanctions* (C-125-C, July 6, 1995) (#31); *Mineral County's Points and Authorities in Reply to WRID's Response and Request for Hearing* (C-125-C, Aug. 4, 1995) (#42).

C. Status of Service in Subproceedings C-125-B and C-125-C:

In compliance with earlier orders of this Court, Plaintiff Parties have spent significant time and resources serving the categories of persons and entities they were directed to identify and serve under Rule 4, Fed. R. Civ. P. in each respective subproceeding. The difficulties inherent in conducting the necessary investigations to identify and serve significant numbers of the residents of the Walker River Basin were compounded by a history of interference and evasion, including WRID advising its members not to return Mineral County's waivers of

¹² In contrast and as reported in its periodic service reports, the United States updated its caption on the materials it served, but has not yet filed an updated caption.

personal service, a similar newsletter from the Walker River Water Users Association¹³ to its members, also warning them of the impending service of the Tribal Claims, numerous hostile newspaper articles, including one in which a defendant advised that no one return waivers for the Federal Claims; and one individual, who, when served, jumped in his truck and chased after the federal process server, repeatedly trying to run the process server's vehicle off the road. Clearly, service as required by the Court has been neither economical nor easy.

There are now over 3,460 defendants in C-125-B. The United States mailed over 3,850 service packages, personally served over 1,500 persons and entities, and obtained the review and approval of its efforts by the Court and Defendants in sixteen Service Reports and three proofs of service by process servers. In response to the Defendants' concerns, the United States worked to complete service by the end of 2008¹⁴ and then continued those efforts in 2009 after Magistrate Judge McQuaid recused himself from the case. For almost eight years, the Court, including the Clerk's Office, and the United States have invested significant resources and attention to these ongoing service efforts and related mailings. But for questions regarding the treatment of successors-in-interest, a service cut-off date and the parties addressed in Service Report 16, no one has claimed that service on the categories of persons and entities that the Court directed to be served has not been accomplished.

To date, Mineral County has served well over a thousand claimants and the list of unserved claimants is relatively short. Although the process has taken significant time and resources and met with numerous obstacles, the Court commended the County's efforts on more than one occasion and ratified service on most of the claimants listed in the approved caption or

¹³ Its board members were appointed by WRID and the Bridgeport Valley Land Owners Association.

¹⁴ This does not include such issues as challenges to service, possible publication, and any determination whether service is complete.

their substituted successors-in-interest.¹⁵ At no time during this process did WRID or Nevada provide Mineral County with the updates in ownership they provided the United States. Mineral County's 2008 service report requesting that the Court (1) amend certain names in the caption; (2) strike certain names from the caption and substitute other names in their stead; (3) ratify service efforts for several proposed defendants; and (4) clarify the status of service on several proposed defendants is pending before the Court. *Mineral County Report Concerning Status of Service on Proposed Defendants* (C-125-C, Aug. 29, 2008) (#479).

WRID places great significance on the periodic ownership updates it and the State of Nevada have provided the United States. WRID Objections at 8. The United States used these updates during its investigation and service efforts to identify recent transfers of water rights. While helpful, they are of limited use because they do not identify all ownership changes in Nevada and do not address California defendants, other than possibly WRID members. WRID's updates apparently only provide information that its members elect to bring to WRID and do not represent a concerted effort by WRID to gather this information. WRID and Nevada have consistently maintained that they have no obligation to provide any information to the United States, that most people will not comply with the State's statutory reporting requirement, and that the information provided them is unreliable and they will not confirm its accuracy in any manner. Indeed, WRID stamps the information it provides as "Provisional" or "Unofficial."

At this juncture, the Plaintiff Parties would use the information from WRID and Nevada to provide written notice to sellers and buyers of the impact of Rule 25(c), Fed. R. Civ. P. in this case, a copy of the Court's Order on substitution, and a form motion by which they can move

¹⁵ *Order*, at 2 (C-125-C, June 4, 1998) (#210); *Order Concerning Status of Service on Defendants* (C-125-C, April 3, 2000) (#327); *Order* (C-125-C, Dec. 19, 2001) (#397); *Order* (C-125-C, June 18, 2002) (#414).

jointly to substitute the buyer.¹⁶ Instead of conducting yet more service, this notice would allow sellers and buyers to determine for themselves if substitution is appropriate. To the extent appropriate, the caption can be updated, but because the case may proceed under Rule 25(c) against original parties, the approved caption would remain correct.

III. ARGUMENT

The issue before the Court is how to treat successors-in-interest to interests in water rights transferred from defendants who have already been served under Rule 4, Fed. R. Civ. P. There are two basic types of successors-in-interest: successors in interest as the result of an *inter vivos* transfer of interest; and successors-in-interest as the result of a water right claimant's death.

A. The Nature of the Case

The *in rem* nature of C-125 and its sub-proceedings is relevant in determining the appropriate procedures to address successors-in-interest, particularly when the original named defendants were personally served. Because *in rem* jurisdiction "is secured by the power of the court over the res," the degree of notice and service of process required to subject claimants of an interest in the res to the court's jurisdiction and judgment is generally less than in an *in personam* action. See *Tyler v. Judges of the Court of Registration*, 55 N.E. 812, 812-14 (Mass. 1900) (Holmes, C.J.) (upholding sufficiency of notice by publication and mail to persons known to have an adverse interest in quiet title proceedings). In *Tyler*, Chief Justice (later United States Supreme Court Justice) Holmes explained the basic nature of *in personam* and *in rem* proceedings:

¹⁶ Plaintiff Parties proposed a form motion for sellers and buyers to file jointly for substitution. WRID objects to this proposed motion as too complicated, but offers no simplified version or amendment. Although Plaintiff Parties have revised their proposed motion, they point out that persons and entities who own water rights must have some experience with contracts, water rights applications and filing taxes so they should be able to review a several page form.

If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory, at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is in personam, although it may concern the right to, or possession of, a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts, which, if true, show an inconsistent interest, the proceeding is in rem.

Id. at 814 (citations omitted).

The Supreme Court has recognized that water rights adjudications are *in rem* or *quasi in rem* proceedings. *E.g.*, *Nevada v. United States*, 463 U.S. 110, 143-44 (1983). *See also State Engineer v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 339 F.3d 804, 810-811 (9th Cir. 2003); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-13 (9th Cir. 1999).¹⁷ In Nevada and California, as under the law of sister Western States, water rights adjudication proceedings are considered actions *in rem*. *State Engineer v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 66 F. Supp. 2d 1163, 1168 (D. Nev. 1999), *vacated on other grounds*, 114 F. Supp. 2d 1051 (D. Nev. 2000); *Pleasant Valley Canal Co. v. Borrer*, 61 Cal. App. 4th 742, 754 (Cal. App. 1998).¹⁸

Based on the substantive law and history of these proceedings, there is no dispute that C-125 and its sub-proceedings are *in rem*.

¹⁷ Suits to adjudicate [water rights] are to quiet title to realty. *Rickey Land & Cattle Co. v. Miller & Lux* (C.C.A.) 152 F. 11, 15, affirmed 218 U.S. 258. . . . Such suits are not *in personam* but *in rem* or *quasi in rem*, for that, though directed against defendants personally, the real object is to deal with and settle and protect title to and enjoyment of particular property, and to invalidate unfounded claims asserted thereto. And that converts actions otherwise *in personam* into actions *in rem* or *quasi in rem*. *See* 1 C.J. 929 and cases; 51 C.J. 141, 281 and cases; *Pennoyer v. Neff*, 95 U.S. 714.

Sain v. Montana, 20 F. Supp. 843, 846 (Mont. 1937).

¹⁸ *See* NRS §§ 533.160, 533.165, 533.170, 533.210; Cal. Water Code §§ 102, 104, 1001 (title to water), 1007 (eminent domain), 1052 (unauthorized diversion is a trespass); 1252.5 (rights and privileges),

This case is essentially an action in rem to quiet title to property – that property being the water (or rather, the right to take the water) of the Walker River and its tributaries.

Order at 4 (C-125-C, Mar. 2, 1999) (#257) (citing *Minute Order* at 2 (C-125-C, April 1, 1997) (#99) (“The instant action is in the nature of a suit to quiet title to water rights; as such it is an action the subject of which is real property.)). WRID does not dispute that this case is an *in rem* proceeding. *Position Paper of the Walker River Irrigation District Re: May 30, 2001, Status Conference* at 6 (C-125-B, May 25, 2001) (#145); *Status Report of the WRID and U.S. Board of Water Commissioners* (C-125-C, Apr. 26, 2002) (#411) (Attachment: Letter dated Apr. 23, 2002 at 2 from Dale Ferguson, Counsel for WRID to Treva Hearne, Counsel for Mineral County). *See also Mineral County v. State, Dept. of Conservation and Natural Resources*, 117 Nev. 235, 244, 20 P.3d 800, 806 (2001) (acknowledging water rights adjudications are properly classified as *in rem* in the context of a proceeding regarding Walker River Basin).

While the distinctions between *in personam* and *in rem* proceedings have blurred over time and due process requirements apply regardless of this distinction, the nature of the proceedings remains a critical factor to determine whether due process is met. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-314 (1950); *see also Dusenberry v. United States*, 534 U.S. 161, 167 (2002) (reaffirming *Mullane*’s “straightforward” reasonableness under the circumstances test). This Court directed that successors to the 1936 Decree and other water rights claimants be served pursuant to Rule 4. As set forth below, this effort exceeds the level of due process afforded water rights claimants in water rights adjudications in either Nevada or California. *See Order, United States v. Orr Ditch Water Ditch Co.*, at 3 (Case No. 3:73-cv-00003-LDG, Sept. 17, 2009) (#1027). Due process is met by the original service and joinder of defendants, which also meets the Court’s direction in the 1992 Order to serve certain categories of parties under Rule 19.

One attribute of an *in rem* proceeding is that if a court asserts jurisdiction over the property involved, it is vested with the exclusive right to control and administer it. *E.g., United States v. Alpine Land & Reservoir Company*, 174 F.3d 1007, 1012-13 (9th Cir. 1999). There is no real dispute that this Court has continuing and exclusive jurisdiction over the waters of the Walker River.¹⁹ *See* Decree at 72-73. Indeed, in 2001, the Nevada Supreme Court acknowledged that this Federal Decree Court has continuing involvement in monitoring the Walker River for more than 80 years and rejected Mineral County's application for a writ of prohibition against the State of Nevada to challenge State actions regarding the Walker River Basin, stating that it would not address issues related to C-125-C, because "to construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity." *Mineral County*, 117 Nev. at 245, 20 P.3d at 806 quoting *Alpine Land & Reservoir*, 174 F.3d at 1013. Although WRID argues that it is concerned about the prospect of multiple and possibly conflicting judgments, this concern is addressed by the recognition that once a court assumes jurisdiction over a res, such as water, its exclusive jurisdiction will help address this concern.

Moreover, the very nature of a water rights adjudication is different from an *in personam* action. C-125-B and C-125-C do not address any individual's liability nor do they even change the elements of anyone's water rights. Both C-125-B and C-125-C involve claims seeking recognition of rights in the waters of the Walker River System, which is the *res* in this case. This does not change the attributes of anyone else's water rights -- their rights still have the same quantity, priority, point of diversion, etc., and while a junior water rights user currently cannot

¹⁹ Nevada maintains it has jurisdiction over groundwater, basing its position on the now-discredited position that there is no interaction between surface and groundwater in the Walker River Basin.

take water that belongs in priority to a senior user, the resolution of these claims will not change this limitation. Because water adjudications are *in rem* or *quasi in rem* proceedings, once claimants are identified and served with process, any *in personam* aspects of the case are done and the proceeding shifts to an *in rem* focus.

WRID's approach would straightjacket the proceedings in perpetuity as an *in personam* proceeding with rigid, impractical requirements for repeated personal service. This approach would be contrary to the nature of a water right adjudication. Because the overarching Walker River Decree proceeding and these subproceedings are *in rem* proceedings in equity, the Court should implement flexible, pragmatic and economical provisions for ongoing notice to water rights claimants who have been served and their successors-in-interest, which will constitute notice that is reasonable under the circumstances.

B. Successors-in-Interest Are Properly Addressed Under Federal Rule of Civil Procedure 25 and Not Rule 19.

WRID argues that the Plaintiff Parties have a continuing duty to monitor transfers of water rights and move to join *inter vivos* transferees of such rights under Rule 19, Fed. R. Civ. P. and substitute transferees by virtue of death under Rule 25(a), Fed. R. Civ. P. In effect, WRID would require Plaintiff Parties to track and re-serve every water right every time it is transferred as if it were an entirely new right that had not already been served and brought under the Court's jurisdiction and, indeed, to monitor the continued existence of each defendant. This would also place Plaintiff Parties in the untenable position of having to repeat service on water rights that the Court had already determined were properly served and under its jurisdiction. WRID cites no analogous proceeding in which such a continuing and potentially unending burden has been placed on any party.

WRID's approach ignores the proper roles of and relationship between Rules 19 and 25.

The two rules must be read in *pari materia*, construed with reference to their interrelationship and the general plan of the Rules, so as to harmonize with each other. *See Weiss v. Regal Collections*, 385 F.3d 337, 342 (3rd Cir. 2004); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 658 (D.C. Cir. 1960); *Canister Co. v. Leahy*, 182 F.2d 510, 514 (3rd Cir. 1950); *In re Vioxx Products Liability Litigation*, 235 F.R.D. 334, 342 (E.D. La. 2006); *Trombino v. Transit Casualty Co.*, 110 F.R.D. 139, 147 (D. R.I. 1986).

Rule 19 was designed to provide the mechanism for bringing into a case individuals or entities possessing rights or interests in the subject matter of the case that are not already represented in the case. Rule 19 operates when those rights and interests, and their possessors, are initially identified but have not yet been brought into the case, allowing the court to take hold of the entire subject matter necessary for a final adjudication of the issues in dispute. Once a party is joined under Rule 19, that party's interest has been brought under the Court's jurisdiction. Any subsequent transfer of that interest is addressed under Rule 25. *Hilbrands v. Far East Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975); *Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629, 634 (1st Cir. 1989); *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144, 146 (D. Minn. 1987) (citing *Froning's, Inc. v. Johnston Feed Serv.*, 568 F.2d 108, 110 (8th Cir. 1978)); *P P Inc. v. McGuire*, 509 F. Supp. 1079, 1083 (D.C.N.J. 1981) (citing 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1958 (1972)).

Rule 25 was designed to deal with changes in ownership or possession of interests in the subject matter of the case at a later point in the proceeding. Once the owner or possessor of an interest or right that needs to be joined is served and the interest or right is thereby brought under the court's jurisdiction, Rule 25 governs any transfer of that interest or right to another person or

entity and ensures that the Court's jurisdiction over the case and its subject matter is not defeated. To adopt WRID's approach and apply Rule 19 to all *inter vivos* transfers would render Rule 25(c) a nullity,²⁰ and would trap the case in an endless return to Rule 4 service on rights that are already before the Court. As Moore's explains, Rule 25 applies to substitution due to a transfer of assets during litigation:

Rule 25(c) does not apply to transfers of interest that occur prior to the filing of the action that is in issue, because substitution expressly applies only to transfers of interest that take place during litigation. If a transfer occurs before the commencement of suit, the status of the parties is controlled by Rule 17 and Rule 19. Thus, for Rule 25(c) to apply to particular parties, not only must there be an actual transfer of interest between the parties but the transfer must occur during pending litigation.

Moore's at 13.34 [1] (citations omitted). *See Dingwell*, 884 F.2d at 634 (possession of a "direct and substantial interest" in the "action at the moment the complaint was filed" is determinative of Rules 19's applicability, as opposed to a "later transfer of interest to trigger Rule 25(c)").

WRID's approach would deprive federal courts of the ability to exercise their jurisdiction in cases where federal court jurisdiction is both proper and contemplated. As the Supreme Court has observed:

"[p]urchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain (sic) if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite* . . . Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.

Mellen v. Moline Malleable Iron Works, 131 U.S. 352, 370–371 (1889) (citations omitted). Such an outcome would be inconsistent with the pragmatic policy underpinnings of the Federal Rules

²⁰ WRID's suggestion that Rule 19 governs successors-in-interest even though Rule 25 is designed to address successors-in-interest during the pendency of litigation would render Rule 25 superfluous, violating a cardinal rule of statutory construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

of Civil Procedure. *See* Fed. R. Civ. P. 1 (The Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”); *Trombino*, 110 F.R.D. at 149 (Seyla, J.) (“Rules of practice and procedure are devised to promote the ends of justice, not to defeat them Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.”) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (Black, J.)). If followed, WRID’s approach also would effectively prevent the Court from addressing and resolving the merits of these subproceedings, contrary to the pragmatic intent of the Rules.

C. Successors-in-Interest Will Be Bound By the Result of This Litigation Regardless of Substitution Under Fed. R. Civ. P. 25, Provided Proper Notice Is Given.

1. Fed. R. Civ. P. 25(c) Applies to Subproceeding C-125-C.

WRID claims that Rule 25(c) is inapplicable to subproceeding C-125-C because that subproceeding has not commenced.²¹ WRID Objections, at 12. This claim is contradicted by the law and history of this case, including previous Court Orders.

An action is considered to have commenced upon the filing and service of a pleading. *See* 1A C.J.S. *Actions* § 315 (2010). Mineral County filed its Motion for Intervention and Proposed Petition to Intervene in the ongoing Walker River Decree proceedings,²² and subsequently filed an Amended Complaint in Intervention at the Court’s direction.²³ Over the following years, at the Court’s direction and subject to review by WRID and other defendants, the County served many hundreds of claimants to water rights. Even if the Court were to accept

²¹ WRID erroneously cites Fed. R. Civ. P. 1, instead of Fed. R. Civ. P. 3, for this proposition.

²² The Court retained continuing jurisdiction in the Decree to change the duty of water or to correct or modify the Decree. Decree at ¶XIV.

²³ *Notice of Motion and Motion of Mineral County of Nevada for Intervention* (C-125-B, Oct. 25, 1994) (#31) (C-125-C #2); *Mineral County’s Proposed Petition to Intervene* (C-125-B, Oct. 25, 1994) (#32) (C-125-C #3); *Mineral County’s Amended Complaint in Intervention* (C-125-C, Mar. 10, 1995) (#20).

WRID's argument that the filing of a complaint is necessary, Mineral County clearly commenced an action when it filed a complaint in 1995 and effected service.

Moreover, when the Court established subproceeding C-125-C for "the purposes of receiving the filing of all documents" pertaining to the motion to intervene and associated claim, it expressly indicated that C-125-C was part of an existing proceeding:

The entire case, including all of the sub files, C-125, C-125-A, C-125-B, and C-125-C constitute one action. All of these issues and claims also constitute a single law suit. The issues may overlap between the various claims and files which have been established.

No claims are to be prejudiced in any way because of their separation into a separate sub-file. The separation of the files is for record keeping purposes only.

Minutes of Court (C-125-B, Jan. 3, 1995) (#46).²⁴ That the C-125-C subproceeding is a continuation of that jurisdiction also is reflected by the Nevada Supreme Court's opinion in *Mineral County v. State*, 117 Nev. 235, 20 P.3d 800 (2001) (refusing to assert jurisdiction over Mineral County's public trust claim because the issue was the subject of pending litigation in this Court). Accordingly, there is no legitimate question that the C-125-C subproceeding constitutes an action that has commenced under the Federal Rules of Civil Procedure.

2. Successors-In-Interest Need Not Be Substituted In This Action To Be Bound.

Because this water rights adjudication is an *in rem* proceeding, once a water right claimant has been served, the burden of keeping track of *inter vivos* transfers of that claimant's water rights and substituting the claimant's successors-in-interest properly is born by the claimant and its successor(s)-in-interest. *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650, 653 (D. Nev. 1926); *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 224 P. 612, 613-14

²⁴ See also *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶1 (C-125-C, Feb. 9, 1995) (#19) ("For the administrative convenience of the Court, the Clerk shall establish a new subfile in this action to be designated C-125-C in which all documents pertaining to the Motion to Intervene and proposed complaint-in-intervention of Mineral County, Nevada shall be placed and filed.").

(1924); *LU Ranching Co. v. United States*, 67 P.3d 85 (Idaho 2003); *In re Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992); cf. Cal. Water Code §§ 5101, 5103 – 5107 (duty of appropriator to file statement of diversion and periodic supplemental statements on which State Water Resource Control Board may rely for notice purposes). In proceedings such as these, the action will continue in the name of the served defendant until such time as the served defendant, a successor-in-interest, or another party files a motion for substitution and the Court approves that substitution. *Mellen*, 131 U.S. at 370–371.

Under Rule 25(c) where during the pendency of an action one who is not a party thereto acquires an interest in the subject matter of the action, such person may be made a party in the discretion of the court. However, if the court, in the exercise of its discretion does not add such party, the final judgment rendered therein is binding upon such party and may be enforced to such extent as if he were one of the original parties thereto.

United States v. Griffith Amusement Co., 94 F. Supp. 747, 752 (W.D. Okla. 1950) (citing *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9 (1945), and a long line of decisions, in holding that non-party who acquired interest in subject matter of action could be bound by judgment in the action without having been made a party). Even a successor-in-interest as a result of death who resists the court's jurisdiction and venue may be brought under the court's jurisdiction in pending litigation and bound by the court's judgment. *See Dolgow v. Anderson*, 45 F.R.D. 470, 473 (E.D.N.Y. 1968) (Weinstein, J.) (noting “the strong policy embodied in the federal rules of deciding entire disputes on the merits as speedily and cheaply as possible”).

Contrary to WRIDs' assertion, successors-in-interest need not be substituted to be bound by orders of this Court. It is true, as WRID suggests, that whether successors-in-interest will be bound by the judgment of the Court depends on the substantive law giving rise to the claims at

issue in the case.²⁵ However, “[a] person who is liable as a successor in interest under the applicable substantive law may be bound by the judgment even if no motion under Rule 25(c) is filed and the person is not joined or substituted.” 6-25 Moore’s Federal Practice – Civil § 25.32. Substitution under Fed. R. Civ. P. 25(c) is merely a discretionary procedural determination that substitution would facilitate the litigation. *In re Bernal*, 207 F.3d 595, 598 (9th Cir. 2000) (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1958 (2d ed.1986)).

The Supreme Court of the United States has held that “[p]ersons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge.” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973); *see also Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972) (successors-in-interest to property are in privity with predecessors for purposes of res judicata); *Behrens v. Skelly*, 173 F.2d 715,718-19 (3^d Cir.1949), *cert. denied*, 338 U.S. 821 (1949); *Farwest Steel Corp.v. Barge Sea-Span 241*, 828 F.2d 522, 524 (9th Cir. 1987), *cert. denied* 485 U.S. 1034 (1988); Wright and Miller § 4462 (“Ordinarily a judgment is binding on a nonparty who took by transfer from a party after judgment or while suit was pending . . .”). The long standing common law rule that a successor-in-interest to property that is the subject of pending litigation to which his transferor is a party is bound by the results of the litigation is reflected, with narrow exceptions, in the Restatement of Judgments, which takes the view that generally:

²⁵ *See* 7C Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Fed. Prac. & Proc. Civ.* §§ 1952, 1958 (3d ed. 2007) (The rule relating to substitution of parties on the transfer of the claim is procedural only and does not affect the substantive rights of the parties which are determined by state law); *In the Matter of Covington Grain Co.*, 638 F.2d 1357 (5th Cir. 1981); *Froning's, Inc. v. Johnston Feed Serv., Inc.*, 568 F.2d 108, 110 (8th Cir. 1978) (citing Wright & Miller)).

the burden properly is placed on the successor. . . . [t]he successor usually has an express or implied right of indemnity against the transferor for loss resulting from the judgment; the successor changed the status quo regarding ownership and may justly be burdened with losses which might be expected possibly to result; and, *if the rule were otherwise, the stabilizing effect of a judgment concerning the property could indefinitely be postponed by successive transfers.*

Restatement (Second) of Judgments § 44 (1982) (emphasis added).²⁶

In this interstate water rights adjudication, the Court should look to Nevada and California State law to determine whether a successor-in-interest will be bound if not joined under Fed. R. Civ. P. 25(c). Notification procedures in both Nevada and California water rights adjudications provide the most closely analogous procedure related to providing notice of the pending action to successors-in-interest in this case. Under both Nevada and California water law, notice of water rights adjudications generally is provided by mail and publication, and it is the burden of a water right claimant and the claimant's heirs to keep the State Engineer or State Water Resource Control Board apprised of the claimant's address to facilitate such service. While the States' adjudication statutes do not expressly address successors-in-interest, the structure of the proceedings, the provision for periodic notice by mail and publication alone, and the imposition of an affirmative burden on the claimant to keep the adjudicating authority informed of the claimant's current mailing address, all clearly reflect the fact that both States consider water rights adjudications to be *in rem* proceedings in which notice by mail and/or publication will bind water right claimants and their successors-in-interest to the judgment or decree. *See* NRS §§ 533.095, 533.110, 533.150, 533.160, 533.165, & 533.170(5); Cal. Water Code §§ 2526, 2527, 2529, 2551, 2553, 2555, 2577, 2604, 2650, 2701, 2753, 2754, 2756, &

²⁶ Similarly, although WRID argues that water rights owners have a right to be dismissed from this case, it is their duty to move for substitution if they no longer wish to be part of the case.

2759.²⁷ Additionally, both of these State statutory regimes, as well as federal adjudications around the West, place the burden on claimants to a stream system to participate in the adjudication on the rationale that when one claims a water right, it is a regulated right that is being claimed – a right to use a common public resource that is heavily regulated by the State, and therefore the claimant subjects himself to the jurisdiction and oversight of the State and/or court.²⁸

As one leading commentator notes: “[f]inal decrees are conclusive against parties to the adjudication and those in privity with them, *including parties with a duty to participate in the adjudication.*” A. Dan Tarlock, *Law of Water Rights and Resources* § 7:22 (2009) (emphasis added). Consistent with the principle that “[p]reclusion may extend to a nonparty who did not participate in an action on the ground that the nonparty should have participated,”²⁹ in California when a decree has been entered, any claimant who has failed to appear and submit proof of his claim shall be barred and estopped from subsequently asserting rights and shall have forfeited all rights not provided for in the decree. Cal. Water Code § 2774 (2009); *cf.* NRS § 533.125(2); *LU Ranching Co.*, 67 P.3d at 87-88. Thus, in neither State is there any obligation to constantly substitute or join new successors-in-interest. The notice provisions in Nevada’s and California’s

²⁷ Neither Nevada nor California applies their *lis pendens* statute in water rights adjudications, and the Court already has determined that *lis pendens* filings are inappropriate here.

²⁸ Cal. Water Code § 2774 (2009); NRS § 533.095 (claimants are required to make proof of claims); NRS § 533.125 (if no proof of claim is filed, the State Engineer shall determine the right of such person from such evidence as the State Engineer may obtain or may have on file in the Office of the State Engineer); NRS § 533.130 (petition to intervene may be filed by interested person not served); *Interim Procedural Order Requiring All Water Rights Claimants to Update Their Water Rights Files With the State Engineer, United States v. A & R Productions*, 01 cv 00072 BB/WWD-ACE, at 2 (D. N.M. June 24, 2003) (Zuni River Basin Adjudication); *Procedural And Scheduling Order For Federal And Indian Water Rights Claims, United States v. A & R Productions*, 01 cv 00072 BB/WWD-ACE (April 5, 2004); *In re Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992).

²⁹ Charles Alan Wright, et al., 18A Fed. Prac. & Proc. Juris. § 4452 (2d ed. 2010).

adjudication statutes are instructive, and, assuming reasonable provisions for notice by mail and publication are followed, the burden properly is placed on defendants to notify their successors-in-interest that a lawsuit is pending and on successors to inform themselves.³⁰

WRID states that all successors will have to be joined formally to administer the decree properly. Yet that has not been the practice in administering the Decree to date³¹ by the Court or the United States Board of Water Commissioners, and does not appear to be the practice in State adjudications. Of course, if a successor to a water right claim wishes to intervene or be substituted in, the successor can do so, but absent such substitution or joinder, the successor will still be bound if the notice provided by the Plaintiff Parties is equivalent to or exceeds that required under California and Nevada State law, as is reflected in the proposed Order. Plaintiff Parties have amended their proposed Order to provide for periodic notice for the duration of each subproceeding.

Further, the Walker River Decree applies to and binds all users and their successors-in-interest. Decree at XI, XII.³² Purchasers from one whose title rests on a judicial decree take with constructive notice of the title under the decree, *Edwards v. Puckett*, 268 S.W.2d 582,570 (Tenn. 1954); 92A CJS § 560, and of defects apparent on the face of the record in the proceedings in which the decree was entered, *Bradbury v. Green*, 251 P.2d 807, 809 (Okla. 1952). It follows, then, that claimants to such water rights properly are charged with the burden of taking affirmative action to participate in this adjudication.

³⁰ It is noteworthy that neither the State of Nevada nor the State of California has joined WRID's objections.

³¹ Where successors have been joined, it has been for convenience only.

³² Section XI of the Decree binds "[e]ach and every party to this suit and each of their servants, agents and attorneys and all persons claiming by, through or under them, and their successors and assigns in and to the water rights and lands herein described." Section XII states that the Decree determines "all of the rights of the parties to this suit and their successors in interest."

WRID concedes that these proceedings are an adjudication of water rights, and argues that *Pitt v. Rodgers*, 104 F. 387, 389 (9th Cir. 1900), governs the question of the notice necessary to bind successors-in-interest to water rights. WRID Objections at 14, 22. WRID points out that the Court in *Pitt* required *lis pendens* filings, although it acknowledges that this Court considered and then rejected this requirement. WRID's reliance on *Pitt*, however, is misplaced because the holding in that case was superseded, in part, by the Nevada adjudication statute, which was enacted thirteen years after *Pitt* was decided.³³ Nevada's adjudication statute now controls the issue of constructive notice in the water rights context in Nevada, just as California's adjudication statute is controlling in California. Neither State requires filing *lis pendens* to bind successors. Nevertheless, so long as notice in this case rises to the level of that required under Nevada and California water law, successors-in-interest will be bound under the general rule announced in *Pitt* that successors are bound if constructive or actual notice is given. *Pitt*, 104 F. at 389.³⁴

WRID mistakenly argues that the question of whether a successor will be bound by a judgment is determined by the federal successorship doctrine. WRID Objections at 13. That doctrine, however, determines whether a purchaser of property is a successor for purposes of a particular lawsuit and subject to personal liability. *Herrera v. Singh*, 118 F. Supp. 2d 1120, 1123 (E.D. Wash. 2000). The doctrine originated in and is most often applied to employment and corporate merger and acquisition cases where a successor may be bound by a judgment when it purchases assets to which a liability judgment may attach. The *Herrera* case, which WRID cites,

³³ Act of Mar. 22, 1913, ch. 140, 1913 Nev. Stat. 192 (codified as amended at Nev. Rev. Stat. ch. 533 (2000)).

³⁴ In addition, *Pitt* was an *in personam* action brought by three water rights claimants against three other water rights claimants, while C-125 and its subproceedings are *in rem* proceedings regarding claims to water rights. See *Pitt*, 104 F. at 389.

pertains only to issues involving personal liability for debts or torts. WRID cites no cases that apply the federal successorship doctrine to the adjudication of water rights, title to property, or involve the binding effect of a judgment on a successor-in-interest to a property interest that is itself the subject of the litigation, such as a water right in a water rights adjudication.

Neither subproceeding subjects any defendant to personal liability. Instead, the issue before the Court concerns the transfer of the specific property interest that is itself before the Court. By definition, a purchaser of a water right is the successor to the property interest at issue. Indeed, different concerns are present when property that is the subject of litigation is transferred during the pendency of litigation, resulting in a rule just the opposite of that employed in the successor liability cases relied on by WRID.

3. Successors-In-Interest as the Result of a Served Claimant's Death Will Be Bound By the Judgment and May Be Substituted In an Efficient Manner Consistent with Federal Rule of Civil Procedure 25(a).

WRID raises two objections to Plaintiff Parties' proposed Order as it relates to successors-in-interest to a water right claim as a result of the death of a defendant who has been served. On a substantive level, WRID objects to Plaintiff Parties' assertion that in the absence of a statement or suggestion of death on the record, the case may proceed to judgment with the original named parties and will bind any successor-in-interest. On a procedural level, WRID objects to the proposed Order's requirement that a Rule 25(a) statement noting a death must identify the decedent's successors. WRID continues its refrain that responsibility for addressing successors-in-interest rests exclusively with the Plaintiff Parties. WRID Objections at 2, 25. We address these objections below and in our revised proposed Order.

a. Successors-In-Interest Resulting From the Death of a Water Right Claimant Who Has Been Served Will Be Bound By the Court's Judgment Regardless Of Substitution.

With regard to successors-in-interest as the result of death, the issue is whether the successors of water right claimants who already have been served will be bound in this *in rem* proceeding. It is important to remember that when water right claimants died before being served, the Plaintiff Parties identified and served the decedents' successors-in-interest.

WRID argues incorrectly that successors-in-interest to the property interest of claimants who have been served will not be bound unless the Plaintiff Parties track them down and personally serve and substitute them either continuously or periodically throughout the life of these subproceedings. *See, e.g.*, WRID Objections at 1-3. Furthermore, requiring Plaintiff Parties to substitute and serve heirs of defendants whose death is unknown to Plaintiff Parties would place an unmanageable and impossible burden on them to track the continued existence of each defendant.³⁵ As noted above, this would be inconsistent with the long settled, fundamental rule of law that successors-in-interest to a claimed interest in the property that is at issue in an *in rem* proceeding are bound by the judgment in that proceeding.³⁶

Rule 25(a) requires nothing other than to file a timely motion to substitute if a statement noting death has been properly filed and served. If no one files a statement noting death or

³⁵ As the Supreme Court has noted, the “principal function of the procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.” *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986); Order Adopting Revised Rules of the Supreme Court of the United States (Apr. 12, 1954).

³⁶ *See* Restatement (Second) of Judgments § 44 (1982); Restatement (First) of Judgments § 89 Comment c. (1942) (“The rule applies to any form of transfer whether by purchase, gift or operation of law. Thus, it applies to *heirs, devisees and others taking by succession*, to purchasers, donees, mortgagees and others taking by conveyance and to receivers, trustee in bankruptcy, purchasers at judicial sale and others taking by action of law or judicial process.”); *id.* at Comment f (“The rule stated in this Section applies to all persons who acquire interests in the property after the beginning of the action, whether or not before judgment, irrespective of their knowledge that proceedings have been begun or that a judgment has been rendered. This includes, as stated in Comment c, all persons who acquire interests in the property by way of voluntary or involuntary conveyance of title or other interest in the property.”); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973).

moves for substitution following a defendant's death, the Court properly may proceed to judgment with the original parties:

there is no requirement that substitution be made. If no one moves for substitution, it is proper for the court to proceed to judgment with the original named parties.

6 Moore's Federal Practice, § 25.12 [5] & n.20 (citing *Ciccone v. Sec'y of Dep't of Health and Human Servs.*, 861 F.2d 14, 15 n.1 (2d Cir. 1988)); *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 835 (10th Cir. 1998) (When plaintiff died and no motion to substitute was made in trial court, case continued in name of original plaintiff until court of appeals *sua sponte* ordered substitution on appeal.); *Fariss v. Lynchburg Foundary*, 769 F.2d 958, 962 (4th Cir. 1985) (Rule 25(a) imposes no time limit for substitution other than that from filing and serving a statement of death.).

WRID maintains that Rule 25(a) does not require a decedent's heirs or its estate to "act affirmatively to subject themselves to possible *liability* or to call to plaintiff's attention the information they have of the fact of a party's death." WRID Objections at 24 (emphasis added). WRID also maintains that the status of all defendants must be current to bind them to any order of this Court. *Id.* at 3. WRID's approach would impose requirements on the Plaintiff Parties that are both impossible to attain and not supported by the Federal Rules of Civil Procedure. As discussed above, absent any response to a properly filed statement noting death, Rule 25(a) requires no action by Plaintiff Parties or anyone else. More fundamentally, as noted above, WRID's entire discussion of successorship to personal liability is inapposite to this *in rem* action, because it is founded on a line of cases addressing a doctrine limited to *in personam* actions that seek to impose personal liability on a defendant for a debt or wrong. Service in these *in rem* proceedings is to provide notice and an opportunity to participate in the determination of Plaintiff Parties' claims for water rights -- not to address any defendant's "liability." As previously

discussed, Nevada and California State water adjudication procedures do not treat the death of a claimant any differently than an *inter vivos* transfer, and both States' water law requires all water rights owners, including heirs, to keep ownership records current with the State Engineer or Water Resources Control Board, irrigation district or other applicable agency. Periodic notice is provided to all owners of record, which includes heirs who properly update their water rights records. Thus, WRID's objections concerning the imposition of personal "liability" on successors-in-interest of defendants who have been served are simply misplaced.

Rule 25(a) does not impose the burden of identifying or moving for substitution of successors-in-interest as a result of death on any particular party. Rather, consistent with the Rules' overarching policy objective of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1. Rule 25(a) allows any party, as well as the representatives and successors of the deceased, to file a statement of death and/or a motion to substitute.³⁷ Given the evenhanded, permissive language of the Rule, there is no basis for assigning the burdens of compliance with Rule 25(a) to the Plaintiff Parties. Indeed, the Rule's permissive language is entirely consistent with the long standing common law rule, discussed above, which holds that successors-in-interest such as those to the water rights claimants in this case are bound by the judgment regardless of substitution or knowledge, so long as there is no fraud or other impropriety on the part of the opposing party.³⁸

³⁷ Fed. R. Civ. P. 25(a) (A "motion for substitution may be made by any party or by the decedent's successor or representative."); Advisory Committee's Notes to Rule 25(a) (1963 amendment) ("If a party or the representative of the deceased party desires to limit the time within which another make the motion, he *may* do so by suggesting the death upon the record.") (emphasis added).

³⁸ Plaintiff Parties attach a modified proposed Order to this Reply that clarifies that any party or the successor or representative of the decedent may file a motion to substitute, even if no statement of death was made on the record.

b. This Court Has Authority to Order That a Statement Noting Death Identify the Successor Who May Be Substituted.

WRID contends that Rule 25(a) does not expressly require a statement noting death to identify the successor who may be substituted and that the Ninth Circuit Court of Appeals has not addressed the issue, while other Circuit Courts of Appeal are split on the issue. WRID Objections at 25. WRID cites no cases holding that a court is without authority to require this information. In contrast, Plaintiff Parties' proposed requirement is supported by persuasive decisional precedent from this and other jurisdictions and makes practical sense in these subproceedings, given the large number of defendants. Plaintiff Parties made this point when they conferred with WRID and other defendants, but neither WRID nor any of the other defendants were amenable to our proposal, nor did they offer any alternative proposal to streamline this process or avoid repeated filings for each such substitution.

The approach proposed by WRID predictably would place upon the Plaintiff Parties the burden of locating a decedent's unnamed successor or representative while the 90-day clock ticks away. The District of Columbia Circuit Court criticized this "tactical maneuver" where a decedent's attorney filed a suggestion of death while giving "no indication of what person was available to be named in substitution as a representative of the deceased." *Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969). This tactic is subject to criticism even in cases with a limited number of defendants. Where there are hundreds or thousands of defendants, suggestions of death that do not identify the successors or legal representatives would unnecessarily consume yet further time and resources of the Plaintiff Parties to research the death and seek continuances before making a motion to substitute.

WRID contends the Ninth Circuit has not addressed the necessity of identifying successors in a suggestion of death. WRID Objections at 25. In *Barlow*, however, the Ninth

Circuit held that “the 90 day period provided by Rule 25(a)(1) will not be triggered against Barlow’s estate until the appropriate representative of the estate is *served* a suggestion of death in the manner provided by Federal Rule of Civil Procedure 4.” *Barlow v. Ground*, 39 F.3d 231, 233-34 (9th Cir. 1994) (emphasis added). The issue not addressed was whether the absence of an identifiable successor should hold up filing a statement of death. The Court did not reach the issue because decedent’s attorney had provided a copy of the decedent’s will that included the name and address of the executor. *Barlow*, 39 F.3d at 234. Thus, it appears that non-party successors and/or representatives, if ascertainable, must be served with the statement noting death, which necessarily requires that they be identified by the party filing and serving the statement noting death. In *Barlow*, the Ninth Circuit did not tacitly sanction the failure or refusal of a party filing a statement of death to locate and provide existing information that identifies the decedent’s successor(s) or legal representative.

Three trial court cases within this Circuit and the Nevada Supreme Court have considered whether a successor must be identified in a suggestion of death. Two federal courts have held that when successors or representatives of an estate file a suggestion of death, the name and contact information for the party to be substituted should be included when the representatives or successors file the motion. See *United States v. Seventy-One Firearms*, 2006 WL 1983240, *2 (D. Nev. July 13, 2006) (citations omitted), citing *Cardoza v. First Sec. Mortgage*, 111 B.R. 906, 909 (Bankr. S.D. Cal. 1990). However, as other courts have recognized, these rulings would not prevent “gamesmanship” by other parties. More recently, a federal court in this District cited *Rende* with approval and held that:

To be valid and trigger the 90-day limitation period for filing a motion for substitution, a suggestion of death must identify the successor or representative who may be substituted for the decedent.

Dummar v. Lummis, 2007 WL 4623623, *3 (D. Nev. Dec. 26, 2007).³⁹ Further, in *Barto v. Weishaar*, 101 Nev. 27, 29, 692 P.2d 498, 499 (1985), the Nevada Supreme Court embraced the reasoning in *Rende* and held that the 90-day limitation in NRCP 25(a)(1), which is virtually identical to Fed. R. Civ. P. 25(a)(1), is not triggered when the suggestion of death was “neither filed by nor identified a successor or representative of the deceased.”

It thus appears clear that, while it is not required to do so, this Court may require persons and entities who file suggestions of death to identify and serve the successor or representative of the decedent. As the court in *Rende* explained, this requirement works no harm on the successor(s) or legal representative of a deceased defendant:

No injustice results from the requirement that a suggestion of death identify the representative or successor of an estate who may be substituted as a party for the deceased before rule 25(a)(1) may be invoked by those who represent or inherit from the deceased. If the heirs or counsel fear that delay may prejudice the litigation they may move promptly for appointment of a representative, perhaps a temporary representative, either under the law of the domicile or by special order in the court wherein the litigation is pending.

Rende, 415 F.2d at 986.⁴⁰ WRID’s suggested alternative to this requirement is that parties file Rule 6(b) motions for more time to file and serve a motion to substitute, which is time-consuming and does not eliminate the time and resources needed to investigate cursory statements of death and keep the Court apprised of efforts to identify successors. At a minimum, requiring that statements of death identify the successors or legal representative who may be

³⁹ Citing *Smith v. Planas*, 151 F.R.D. 547, 549 (S.D.N.Y. 1993); *Kessler v. Se. Permanente Med. Group of N.C., P.A.*, 165 F.R.D. 54, 56 (E.D.N.C. 1995); *Rende*, 415 F.2d at 985.

⁴⁰ See also *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) (holding that “it is generally appropriate to require the serving party to shoulder th[e] burden [of determining and identifying who to serve]”).

substituted for the decedent will help the Court and parties address this issue in a consistent manner that conserves resources.⁴¹

4. Due Process and Successors-in-Interest.

Plaintiff Parties recognize that due process requires an opportunity to be heard, and have not suggested that they will not give notice. Instead, they have pointed out the common sense of determining that after a certain point in time and stage of service, periodic publication of notice, coupled with mailings to known successors at key junctures in the case – procedures which mirror those routinely relied on in analogous State water rights adjudications – will satisfy due process. Further, Plaintiff Parties respectfully suggest that broader use of the Court's e-file system, such as has been done recently in the Orr Ditch case⁴² in this District, and the development and maintenance of a website, as has been done in other water rights adjudications, will enhance the opportunity to participate, and reinforce the adequacy of notice to be provided to all water rights claimants in the Walker River system. Plaintiff Parties intend to make separate submissions in the near future regarding the specific procedures that they suggest the Court to implement regarding these broader case management issues.

The United States Supreme Court has repeatedly defined the standard for constitutionally adequate notice as that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Reasonableness is a function of the existence and feasibility of alternative forms of notice.

⁴¹ Moreover, nothing prevents parties from providing each other with informal notices of death. This might allow them to ascertain and substitute successors without the 90-day clock ticking.

⁴² *Order, United States v. Orr Water Ditch Co.*, (Case No. 3:73-cv-00003-LDG, July 2, 2010) (#1105) (allowing *pro se* parties to register for electronic delivery of documents from the Court's CM/ECF system for the Orr Water Ditch Litigation).

Greene v. Lindsey, 456 U.S. 444 (1982). Indeed, the court in *LU Ranching Co.*, 138 Idaho 606, 67 P.3d 85 (Idaho 2003), upheld the constitutionality of first class letter notice because personal service was impractical in a basin-wide adjudication. Further, the Court in *Humboldt Land and Cattle* recognized that to require a party to serve every other party interested in a stream system with objections to the order of determination would “impose an intolerable burden on the court as well as the litigants. In many instances the cost of objecting would be prohibitive.” *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650, 653 (D. Nev. 1926). Indeed, “[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.” *Mullane*, 339 U.S. at 313-14.

Plaintiff Parties’ proposed Order is consistent with the procedure used in adjudications in Nevada and California as well as in other western water rights adjudications. Because Plaintiff Parties propose to provide notice equivalent to or greater than that required by California and Nevada law, it is unnecessary to substitute successors-in-interest to bind them. Indeed, an approach consistent with WRID’s suggested approach would effectively bar the Plaintiff Parties from getting to the merits by imposing on them impossibly burdensome service and substitution duties. As noted above, such an approach would be inconsistent with the Court’s previous acknowledgements that service will have a defined end point.

A much more equitable, reasonable, and efficient approach would be to follow the practice used in other adjudications around the West and provide periodic notice by mail and publication, while placing the burden of keeping abreast of developments in litigation on properly served defendants and their successors-in-interest. It appears that this approach would be consistent with that contemplated by the Court, as evidenced in the Court’s many references to the “completion” of service. It is clear that ongoing personal service efforts have not been

contemplated by this Court in recognition that service must have an end point and the Plaintiff Parties should be permitted to pursue adjudication of the merits of the case.

In both California and Nevada, successors-in-interest are required by law to keep ownership records current with the State, and these records are the basis for notice given during the adjudication process. NRS § 533.384; Cal. Water Code §§ 5101, 5103 - 5107; Cal. Admin. Code § 831. Thus, the Court should order that the records of WRID, the Nevada State Engineer, and the California Water Resources Control Board be regularly updated by those entities and filed with the Court and provided to the Plaintiff Parties. Consistent with the underlying substantive law of Nevada and California, these updated records should be sufficient for periodic mailings of notice during the pendency of these proceedings. Plaintiffs ought to be able to rely on these ownership records, just as the State Engineer and Water Resource Control Board are entitled to rely on them for purposes of service in State water rights adjudications. Any outdated records would be the result of a failure to comply with Nevada or California law and should not prejudice Plaintiff Parties in this case. If successors fail to perform their duties as water rights owners required by law, they must bear the potential loss of failing to receive notice of any adjudication or water rights proceeding. Further, the Court should issue an order requiring that the States and WRID periodically provide the Plaintiff Parties current lists of accurate water rights owners, as was done in the Orr Ditch case. *Order, U.S. V. Orr Water Ditch Co.*, Case No. 3:73-cv-00003-LDG, Order, Doc. No. 1027, at 5 (Sept. 17. 2009).

IV. Plaintiff Parties' Proposal

As stated previously, the Plaintiff Parties have amended their proposed Order and related forms previously filed. The proposed Order confirms that successors-in-interest need not be substituted to be bound, with the exception of situations in which a statement of death is filed.

The Order has been amended to reflect the fact that the Plaintiff Parties would provide periodic notice of developments in these proceedings by mail and by publication, as directed by the Court, while requiring properly served defendants to keep the Court informed of any deaths or transfers for the purpose of periodic notice. The proposed Order will allow the parties to focus their time, effort and funds on addressing the merits of the pending claims, instead of requiring the Plaintiff Parties to engage in a continuing effort to finalize service throughout the duration of these cases, as proposed by WRID.

The Plaintiff Parties seek to streamline the processes for substituting any successors-in-interest who wishes to enter the case, and propose standardized forms for defendants' use in such situations. The proposed Order and forms will establish court-sanctioned procedures that comply with the Federal Rules of Civil Procedure and bind all claimants. The Plaintiff Parties also propose that the Court's Order require WRID, the Nevada State Engineer, and the California Water Resources Control Board to provide updated water right ownership information to the Court and the Plaintiff Parties on a regular basis. This information can then be used to provide notice of the pending proceedings to any new water rights owners.

V. Conclusion

For the reasons set forth above, Plaintiff Parties respectfully request the Court to reject WRID's misplaced objections and approve Plaintiff Parties' proposed Order and forms, thereby establishing both an efficient, reasonable procedure for providing notice to defendants who have been served and for successors-in-interest to those defendants' water right claims, and an equitable, workable procedure for the substitution of such successors-in-interest, as appropriate.

Dated: February 23, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2011, I electronically filed the foregoing **REPLY TO WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO PROPOSED ORDER CONCERNING SERVICE ISSUES PERTAINING TO DEFENDANTS WHO HAVE BEEN SERVED** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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and I further certify that I served or caused to have served a true and correct copy of the foregoing **REPLY TO WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO PROPOSED ORDER CONCERNING SERVICE ISSUES PERTAINING TO DEFENDANTS WHO HAVE BEEN SERVED** on the following non-CM/ECF participants by U.S Mail, postage prepaid, this 23rd day of February, 2011:

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