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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 SUBFILE NO. C-125-B 3:73-cv-00127-ECR-LRL SUBFILE NO. C-125-C 3:73-cv-00128-ECR-LRL
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	**WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO REVISED PROPOSED ORDERS AND AMENDED ORDERS CONCERNING SERVICE ISSUES PERTAINING TO DEFENDANTS WHO HAVE BEEN SERVED**

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I. THE PROCEEDINGS BEFORE THE MAGISTRATE JUDGE.

As the result of an October 19, 2010 status conference in subproceedings C-125-B and C-125-C, the United States of America (the "United States"), the Walker River Paiute Tribe (the "Tribe") and Mineral County (collectively, the "Plaintiff Parties") submitted identical Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served (the "Proposed Orders"). Doc. 1614-1; Doc. 516-1. The Walker River Irrigation District (the "District") objected to the Proposed Orders. Doc. 1621; Doc. 523.[1] With their Reply to the District's Objections, the United States, the Tribe and Mineral County submitted identical Revised Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served (the "Revised Proposed Orders").

On August 24, 2011, the Magistrate Judge entered the Revised Proposed Orders. Doc. 1649; Doc. 540. On August 26, 2011, the Magistrate Judge entered an Amended Order in subproceeding C-125-B (Doc. 1650), and on September 6, 2011, entered an identical Amended Order in subproceeding C-125-C (Doc. 542). The only apparent difference between the Revised Proposed Orders (Doc. 1649; Doc. 540) and the Amended Orders (Doc. 1650), (Doc. 542) is that the latter orders include three attachments referenced in all of the orders, but which were not attached to the former orders.

As a result of the same status conference, the United States and the Tribe submitted a Proposed Order Concerning Service Cut-Off Date (the "Proposed Service Cut-Off Order"). Doc. 1613-1. The District also objected to the Proposed Service Cut-Off Order. Doc. 1621. The Magistrate Judge has not entered any order with respect to a service cut-off date.

Although there are some factual differences which are significant with respect to the two subproceedings, the law applicable to both is the same. Therefore, for the convenience of the Court and the parties, the District files the same Objections to the Magistrate's rulings, and the same points and authorities in support of those objections in both subproceedings.

II. SUMMARY OF THE DISTRICT'S OBJECTIONS TO THE MAGISTRATE'S RULINGS IN THE AMENDED ORDERS.

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[1] Unless otherwise indicated, the docket references herein are first to the document number in C-125-B and second to the document number in C-125-C.

A. Treatment of Successors-in-Interest as a Result of an Inter Vivos Transfer.

The Amended Orders provide that service of process must have a defined end point, and that even if successors-in-interest are never substituted into these proceedings, they will be bound by the ultimate judgment. In order to either substitute or join a successor-in-interest, the Amended Orders require a motion properly served on non-parties in accordance with Rule 4 and on parties in accordance with Rule 5. Although a form for a joint motion by the predecessor and successor is approved, the Amended Orders do not preclude a separate motion by either, or by any other party. Doc. 1650 and Doc. 542 at 5, lns. 5-12. The Amended Orders place the burden of moving for substitution on properly served defendants and their successors-in-interest. *Id.* at 4, lns. 5-12. It is not appropriate to place the burden on defendants to join or substitute successors-in-interest in litigation which the Plaintiff Parties have brought or seek to bring. The Court has made a similar ruling in a somewhat analogous situation. Recognizing that defendants may not file such motions, the Amended Orders purport to determine in advance of any final judgment that a successor-in-interest will be bound by it nonetheless. *Id.* at 3, ln. 16-4, lns. 4. That determination is contrary to law.

Although Rule 25(c) does say "if an interest is transferred, the action may be continued by or against the original party," it does not define the "interest" to which it refers, and more importantly, it does not state that a "transferee" who is not substituted prior to judgment is nonetheless bound by that judgment. Relevant case law makes it clear that attempting to obligate an unjoined transferee to a judgment is itself a separate process requiring appropriate notice, and in some cases, such transferees are not bound by the ultimate judgment.

The Amended Orders proceed from a number of incorrect assumptions. First, they suggest that the Plaintiff Parties must be relieved of a duty to track defendants "perpetually." Second, they provide that the "Court" has required service on "significant numbers of water right holders in the Walker River Basin." Doc. 1650 and Doc. 542 at 1, ln. 21 - 2, ln. 10. Neither the Court nor the defendants defined the scope of this litigation, the Plaintiff Parties did. Neither the Court nor the defendants required service of process, the Constitution of the United States and the Federal Rules of Civil Procedure did. Neither the law nor the Rules of

Procedure contemplate that litigation will be "perpetual." Both require that claims be prosecuted with diligence. *See* Fed. R. Civ. P. 41(b); *In Re Eisen*, 31 F.3d 1497 (9th Cir. 1994). That nearly two decades have passed since these proceedings were initiated results from the fact that while the Plaintiff Parties were willing to devote the resources necessary to file them, they have been unwilling to devote the resources necessary to prosecute them.

Contrary to the Plaintiff Parties' assertions, the District's approach to service would not "effectively prevent the Court from addressing the merits of these proceedings contrary to the pragmatic intent of the Rules." Doc. 1639 and Doc. 535 at 20. Rather, the law and sound judicial policy require that at identified stages of the proceedings, when the identity of a transferee is actually known, or is readily ascertainable, the Plaintiff Parties should provide those transferees with notice and an opportunity to be heard.

Neither the parties nor the Court can or should proceed from this point forward based upon the assumption, or worse yet, a ruling now, that successors-in-interest (or even successors to successors-in-interest), some of whom may not yet be born, will be or are bound by the ultimate result simply because someone in the chain of title was served decades earlier. That assumption is not made more reliable by attempting to characterize these matters as water right adjudications, *in rem* or *quasi in rem* proceedings, or by asserting that the Court controls the *res* involved here.

Importantly, no matter the merit of the arguments concerning *in rem* jurisdiction, they can carry no weight as regards groundwater users, whose rights have never been adjudicated. This Court has never taken any jurisdiction over the regulation of groundwater. The Court must acquire personal jurisdiction over groundwater users, and the Plaintiff Parties must provide notice to groundwater users in accordance with Fed. R. Civ. P. 4.

The present proceedings are not analogous to a typical water right adjudication, i.e., the action is not one to determine the relative rights of all claimants to use of the waters of the Walker River system, or to groundwater in the Walker River Basin. The litigation that determined the relative rights to the surface waters of the Walker River has been final for over 70 years.

The claims here are neither a continuation of the prior surface water adjudication, nor a new adjudication of all rights. Rather, they are claims for the recognition of alleged federal reserved rights and a public trust claim. The only relation these proceedings bear to the Walker River adjudication and Walker River Decree is that, if successful, the actions will impact decreed surface water rights, whether owned by party defendants or by absentee transferees. That potential impact and the continuing jurisdiction of the decree court to effectuate the terms of its judgment does not obviate the need to look to particular facts and circumstances to determine if due process is indeed satisfied by the Amended Orders. It is clearly erroneous and contrary to law to devote no attention throughout the course of the multi-decade proceedings to properly serving and joining successors-in-interest.

The Court has already determined that persons claiming an interest in one or more of the categories of water rights identified in its prior orders are "parties required to be joined" within the meaning of Fed. R. Civ. P. 19(a), and so must be joined. It did that in part to avoid multiple additional proceedings after these were concluded. The Amended Orders will greatly increase the probability of such post-judgment litigation. The proper, and conveniently, simplest and most economic course of action, is to join the absentees as required parties based upon the previous orders of the Court. That can be accomplished without the need for a motion with respect to each successor-in-interest, with no more, and likely substantially less, service than will be required to substitute or join successors-in-interest after judgment, and with far less risk to the finality of any judgment entered.

B. Treatment of Successors-In-Interest As a Result of Death.

The District agrees that Fed. R. Civ. P. 25(a) governs substitution of successors-in-interest as a result of death. Doc. 1650 and Doc. 542 at 5, ln. 14 - 6, ln. 20. However, like Rule 25(c), Rule 25(a) is silent on the question of whether a successor-in-interest as a result of death who is not substituted will be bound by the ultimate judgment. Doc. 1650 and Doc. 542 at 6, lns. 21-23. Again, the relevant case law suggests otherwise, and the District objects to the Magistrate's ruling today that they will be bound.

C. Treatment of Defendants in Subproceeding C-125-C Who Transferred Their Interests Prior to Service.

If the portion of the Amended Orders, dealing with defendants who transferred their lands and water rights before service, applies only to defendants in subproceeding C-125-C who have not yet been served and who will be served with a copy of the relevant portion of the Amended Orders and the attachments related to it, the District does not object to it. However, if it is intended to apply to persons who have been served, the District objects because there are hundreds of persons and entities who have been served and who have no notice of this requirement set forth in the Amended Orders. As to those persons and entities, the District's position as to successors-in-interest applies.

D. Notice to Parties.

The Amended Orders provide that the "Plaintiff Parties shall provide periodic notice of developments in these proceedings to other parties in these proceedings by mail and by publication as directed by further order of this Court." Doc. 1650 and Doc. 542 at 8, lns. 14-16. The District does not object to this concept as a general proposition. There is no question that the hundreds of persons who are "parties" to these proceedings and who have appeared without counsel need to be served with papers filed in these proceedings. They have not been served with any such papers, including the Amended Orders. Providing notice of "developments" to persons who are already parties must be an ongoing requirement. However, the Amended Orders should have been directed to providing notice of these proceedings, as required by the Constitution and the Federal Rules, sooner rather than later, to the numerous successors-in-interest of whom the Plaintiff Parties are aware and who clearly are not "parties."

E. Duty to Provide Updated Information.

The Amended Orders also require the District, the Nevada State Engineer and the California Water Resources Control Board to "regularly provide updated water right ownership information to the Court and the Plaintiff Parties." Doc. 1650 and Doc. 542 at 8, lns. 18-22. Every year since October of 2003, coincidental with its annual update of its own records, the District has provided counsel for the United States a hard copy and computer disk of the District's current assessment roll, a copy of new water right index cards which revised or replaced cards that have changed in the last year, a copy of the District's list of reserved water

rights, and copies of deeds which the District has received from the Lyon County Recorder. The District has not provided such information to the Court, but is willing to do so.[2] However, to the extent that the above-quoted portion of the Amended Order is intended to impose any burden on the District beyond what it has been doing since 2003, including to undertake independent research concerning ownership of water rights, the District objects to it as contrary to law.

In addition, to the extent that this requirement evidences an assumption by the Magistrate Judge that the information provided will be all the Plaintiff Parties need, he is mistaken. The District and the Nevada State Engineer have no information concerning surface or groundwater rights in California. The California State Board has limited information concerning pre-1914 surface water right owners in California, and little or no information on groundwater users in California.

III. PROCEDURAL BACKGROUND.

Some procedural background for both subproceedings explains how and why these issues arise, and provides an understanding of the central goal which has driven all previous court rulings on service and joinder --- ensuring that when each of these multi-year proceedings are concluded, the judgment in each will bind all persons who have an interest related to the subject of each, and the litigation will be over.

A. The Claims of the Tribe and the United States.[3]

In their initial claims filed in 1992, the United States and the Tribe sought to establish a right to store water in Weber Reservoir, and a right to water for lands added to the Reservation in 1936. Doc. nos. 1; 2; 17; 18. Based upon Fed. R. Civ. P. 19, the Court ordered that the Tribe and the United States join as parties and serve, in accordance with Rule 4, all existing claimants to water of the Walker River and its tributaries. Doc. 15. It did so because the existing rights of those parties might be impaired by recognition of additional water rights for

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[2] The hard copy of this information is usually a full banker's box of material. The logistics of filing that material need to be considered.

[3] Unless otherwise indicated, docket references in this section are references to those in subproceeding C-125-B.

the Tribe and to avoid the need for those parties to file post-judgment litigation to protect their water rights. *See* Doc. 15 at 5-6.

In 1997, the Tribe and the United States expanded their counterclaims to include claims related to groundwater. In addition, the United States made additional claims to surface water and groundwater throughout the Walker River Basin for other federal properties and interests. Docs. 58 and 59. The April 19, 2000 Case Management Order ("CMO") (Doc. 108) bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). The CMO requires the Tribe and United States to serve, in accordance with Rule 4, their amended pleadings and related service documents on and thereby join the individuals and entities who hold surface and underground water rights within the Walker River Basin. It groups these individuals and entities into several different categories. Doc. 108, pgs. 5-6.

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I consists of "threshold issues as identified and determined by the Magistrate Judge." Phase II involves "completion and determination on the merits of all matters relating to the said Tribal Claims." Doc. 108, pg. 11, lns. 11-18. Additional phases of the proceedings encompass all remaining issues in the case. *Id.*, pg. 11, lns. 25-26.

It is clear from the CMO, as well as from the briefing related to it, that the Court was particularly concerned with changes in ownership while service of process was taking place, and during the pendency of the multiple phases of litigation. It required the filing of proposed procedures for recording lis pendens, and authorized the Magistrate Judge to determine such procedures. Doc. 108 at 6. The Court also directed that the Magistrate Judge "consider and determine how, when and at whose cost information regarding changes or modification in the individuals or entities with such water right claims shall be provided as between the parties and the entities which receive information respecting any such changes until service of process is complete on the counterclaims." Doc. 108 at 7, ln. 21-8 at ln. 2. With respect to responses to process, the Court ordered that parties file a Notice of Appearance and Intent to Participate

within 60 days after service. No answers are required, and no default may be taken for failure to appear. Doc. 108 at 12.

Magistrate Judge McQuaid held numerous status conferences and arguments concerning service and the inevitable changes in ownership that would happen during the time it took for service of process, as well as after service of process, but before the action was concluded. The District provided him with a memorandum concerning procedure for recording notices of lis pendens. *See* Doc. 132. The United States and the Tribe opposed the recordation of lis pendens. Doc. 133. After extensive argument on that and other issues, for a number of reasons, he decided not to require the filing of notices of lis pendens. Doc. 136.

Instead, he entered the Order Regarding Changes in Ownership of Water Rights on July 16, 2003. Doc. 207. That Order, which is one of the documents required to be served on water right holders, requires that if a party sells or otherwise conveys ownership of all or a portion of any water right within the categories set forth in the CMO, the party is required to notify the Court and the United States of the change in ownership, including the name and address of the person or entity who acquired ownership and to attach a copy of the deed, court order or other document by which the change in ownership was accomplished. The Notice is to be sent to the Clerk of the Court and to counsel for the United States. The Order had attached to it the form and substance of the Notice to be provided. Since service began in this proceeding, numerous such Notices have been filed. *See, e.g.*, Doc. nos. 324-327; 351; 363; 415; 439; 440; 445-447; 617; 696; etc. Having required notice of changes in ownership of water rights, as well as having the District and Nevada provide annual updated information, the Magistrate Judge did not address what should be done with that information.

B. Mineral County's Motion to Intervene.[4]

Mineral County filed its Motion to Intervene on October 25, 1994. Doc. 2. After a January 3, 1995 status conference, the Court entered an order (the "Service Order") directing Mineral County to file a revised motion to intervene and points and authorities in support

[4] Unless otherwise indicated, docket references in this section are to the docket in subproceeding C-125-C.

thereof, a revised proposed complaint-in-intervention, "which identifies the persons or entities against whom" its claims would be asserted, and any motion for preliminary injunction with supporting points and authorities and other supporting documents (collectively the "Intervention Documents").[5] Doc. 19 at 2. The Court ordered Mineral County to serve the Intervention Documents pursuant to Rule 4 of the Federal Rules of Civil Procedure on all parties holding water rights under the Walker River Decree and all parties who had acquired rights to use the waters of the Walker River by subsequent appropriation. *Id.* at 2, 3.

If allowed to intervene and file its Amended Complaint, Mineral County will seek a reallocation of the waters of the Walker River in order to preserve minimum levels in Walker Lake and "the right to, at least, 127,000 acre feet of flows annually reserved from the Walker River that will reach Walker Lake." Doc. 20. In its proposed Motion for Preliminary Injunction, Mineral County seeks an injunction requiring 117,000 acre feet of Walker River flows to Walker Lake during the pendency of its action. *Id.*

For a number of reasons, which are detailed in the District's Response to Mineral County's Service Report (Doc. 488), Mineral County's efforts to comply with the Court's orders concerning service floundered, and that service is not yet complete. There are a number of matters related to that service which are important here.

Mineral County was ordered to file a caption which was to identify the persons or entities served and/or to be served. Docs. 152; 156. That caption was filed on or about November 26 and December 3, 1997. Docs. 160; 161. That caption, which included approximately 1,061 names, was last updated near the end of 2001. *See* Doc. 397. In those situations where the caption was updated based upon death and intervivos transfers of land and

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[5] Apparently through some clerical error, Mineral County's proposed Amended Complaint was "filed" by the Clerk on March 10, 1995, even though the Court has never heard or granted Mineral County's Motion to Intervene as required by Fed. R. Civ. P. 24. That point is important because Fed. R. Civ. P. 25(c) applies only to transfers of interests during the pendency of litigation, and not to those which occur before the litigation begins. *See, Hilbrands v. Far East Trading Co., Inc.*, 509 F.2d 1321, 1323 (9th Cir. 1975). It does not apply at all to subproceeding C-125-C because no Complaint has been properly filed. *See* Fed. R. Civ. P. 1.

water rights, Magistrate Judge McQuaid routinely ordered without any motion that the new owners be "added" and "served" pursuant to Rule 4. *See, e.g.*, Doc. 397 at 17-18, para. 21; 18-19, paras. 40; 41; 47; 55; 57; p. 20, paras. 61; 62. *See also*, Doc. 413.

On April 3, 2000, the Magistrate Judge determined that approximately 617 individuals and entities had been served, and that approximately 170 remained to be served. Doc. 327 at 2-5 and Exh. 1. Except as noted above, there has been no effort to determine the extent of deaths of or inter vivos transfers by those persons since that time. The Magistrate Judge also ordered that any party served from that point forward would be required to file and serve a Notice of Appearance which includes the name and the mailing address of that party. *Id.*, at 8. Finally, the Order stated that responses to the Motion to Intervene would be served pursuant to a schedule to be established by further order of the Court. *Id.*

Thus, most of the persons and entities served in connection with the Mineral County Motion to Intervene were served at least ten years ago based upon a caption which is over ten years old. Most of those persons and entities were not required to file any document with the Court, and except for those represented by counsel, have not been served with a single document since that time.

Relevant here is the Court's explanation of why proper service is so important:

> Finally, we risk wasting scarce judicial resources, as well as the time and effort of the parties, if we allow this case to proceed with even a small number of water rights holders lacking notice of the action. If we fail to properly acquire jurisdiction by service of process, a single party adversely affected by a judgment entered in this case and who was not properly served could conceivably later challenge the validity of that judgment, notwithstanding the extensive work that will no doubt be necessary to adjudicate Mineral County's claim. Doc. 210 at 5.

IV. STANDARD OF REVIEW.

A district judge may reconsider any pretrial matter referred to a magistrate judge where it is shown that the magistrate judge's ruling is clearly erroneous or contrary to law. L.R. IB3-1(a); *see also* 28 U.S.C. § 636(b)(1)(A). The clearly erroneous standard applies to factual findings. The contrary to law standard applies to legal conclusions. *See, Grimes v. City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

A factual finding is clearly erroneous if the district judge is left with the "definite and firm conviction that a mistake has been committed." *Burdick v. C.I.R.*, 979 F.2d 1369, 1370 (9th Cir. 1992). Under the contrary to law standard, the court conducts a de novo review of the magistrate judge's legal conclusions. *Grimes*, 951 F.2d at 241; *see also, Laxalt v. McClatchy*, 602 F.Supp. 214, 217 (D.Nev. 1985); *26 Beverly Glen, LLC v. Wykoff Newberg Corp.*, 2007 WL 1560330 (D.Nev. 2007). The District's objections to the Amended Orders relate to the Magistrate Judge's legal conclusions. Some of those erroneous legal conclusions appear to be based upon clearly erroneous factual assumptions.

V. ARGUMENT.

A. Introduction.

The substance of and the legal bases for the Amended Orders were proposed by the Plaintiff Parties. In their Reply to the District's Objections, the Plaintiff Parties set forth additional legal bases for the propositions that the burden of keeping track of transfers of intervivos transfers of interests and substituting successors-in-interest properly is borne by the defendants and their successors and that successors-in-interest will be bound by the results of this litigation regardless of substitution. *See* Doc. 1639 and Doc. 535 at 20-28. Although the Amended Orders do not reflect any consideration of or reliance on those additional authorities, they are also addressed here.

The Plaintiff Parties would justify the legal conclusions in the Amended Orders in part based upon the misplaced assumption that these matters constitute water right adjudications, are *in rem* or *quasi in rem* proceedings, and that the Court has exclusive control and jurisdiction over the *res*. *See, eg.*, Doc. 1639 and Doc. 535 at 13-17. To a large extent, they rely on procedures related to administrative stream system adjudications under Nevada and California law, and upon procedures established pursuant to an order of the court in the Gila River adjudication in Arizona.

The Plaintiff Parties recognize, as they must, that due process requirements apply regardless of whether a proceeding is *in personam* or *in rem*. *See* Doc. 1639 and Doc. 535 at 15. They acknowledge, somewhat inconsistently, that initially service and joinder were

properly required regardless of how the proceedings are characterized. However, they argue, and the rulings made by the Magistrate Judge in the Amended Orders reflect, that as to successors-in-interest, the alleged *in rem* or *quasi in rem* nature of the proceeding eliminates any need for notice to or joinder of successors. *See* Doc. 1639 and Doc. 535 at 15-17. The authorities on which they rely do not bear that out.

These proceedings do not involve an adjudication of a stream system, a groundwater system, or a combination thereof. The Court has not directed or even suggested that any defendant in either proceeding must assert and prove a claim for a water right, surface or underground. It has recognized that the United States and Tribe seek recognition of additional water rights. Doc. 15 at 5-6. The surface water rights of the defendants were adjudicated in the prior action concluded in 1940. The Court has not even required that all users of underground water in California or in all hydrographic basins in Nevada be identified and joined. The Court does not now have, nor has it given any indication that in the future it will assert control over the underground water (the *res*) within the Walker River Basin in Nevada or in California. It does not regulate the use of underground water in Nevada or in California based upon priority or on any other basis. Absent some dramatic change in the nature of these proceedings, the only way in which the Court may require users of underground water in Nevada or in California to recognize any rights of the Plaintiff Parties determined in these proceedings will require *in personam* jurisdiction over those users.

B. The Ruling Shifting the Burden of Joining Necessary Parties From the Plaintiffs to the Defendants Is Contrary to Law.

Although the Amended Orders conclude that "the burden of keeping track of inter vivos transfers of the defendants' water rights . . . and substituting the defendants' successors-in-interest is properly born by the defendant and its successor(s)-in-interest," no authority is provided for that conclusion. There is no such authority. The Plaintiff Parties did not cite to any in their initial filing, and the Amended Orders reflect that absence of authority. The Court's prior orders in these proceedings and the Federal Rules impose the burden of joining parties on the Plaintiff Parties. *See* pgs. 6-9 above; Fed. R. Civ. P. 4(m).

In reply, the Plaintiff Parties relied upon *Humboldt Land & Cattle Co. v. Allen*, 15 F.2d 650 (9th Cir. 1926), *Humboldt Land & Cattle Co. v. District Court*, 47 Nev. 396, 224 P.612 (1924), or *L.U. Ranching Co. v. United States*, 138 Ida. 606, 67 P.3d 85 (2003), and *In Re Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992) as support for this part of the Amended Orders. *See*, Doc. 1639 and Doc. 535 at 21-22. None of those cases involved any issue concerning notice obligations to a successor-in-interest to an original claimant. They all involved issues related to notice to persons or entities who were and from the inception had been claimants in the proceedings. However, relevant to the issue of notice obligations to successors-in-interest is Appendix C to the Pre-Trial Order in the *Gila River* case which required the Department of Water Resources to file a Notice of Lis Pendens in each county where the river system or source is located which described "the property encompassed, the nature of the proceedings, and the effect thereof as to any water rights the property may have or claimed to have." 830 P.2d at 462.

In addition, a similar issue has already been decided by the Court. Shortly after the court entered the CMO, the Tribe and the United States filed a motion in the main Walker River proceeding (C-125) to require all water right holders and their successors-in-interest to identify themselves to the Court and the United States Board of Water Commissioners. Recognizing that part of the motivation for the motion was to shift burdens regarding service from the Tribe and the United States to the water right holders, in denying the motion, the Court said that "the burden is properly on those who seek to alter water rights." *See* June 1, 2001 Order, Doc. 522 in C-125.

C. The Ruling that Where a Defendant Has Been Served in a Subproceeding and Subsequently Sells or Otherwise Conveys a Water Right or a portion of a Water Right, a Successor-in-Interest Need Not Be Re-Served, But Will Be Bound by the Results of This Litigation, Is Contrary to Law.

1. Introduction.

The Amended Orders purport to decide today that a successor-in-interest to a properly served defendant, and presumably a successor to a successor-in-interest, etc., will be bound by the results of this litigation even if they are never served, given notice of, or made a party to the

litigation. That ruling is contrary to law for two important reasons. First, it cannot be made now without giving such a successor-in-interest notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). Successors-in-interest who have not been given notice of these proceedings certainly have not been given notice that the Magistrate Judge would determine now that they nonetheless will be bound by the outcome. Second, as is discussed below, after successors-in-interest are properly noticed on the issue of whether they are bound by any final judgment here, it is by no means certain that they will be bound.

Neither the authorities cited in the Magistrate's ruling, nor the additional authorities cited by the Plaintiff Parties in Reply support the ruling. What those authorities do establish is that the issue of whether a successor is bound must be litigated after judgment, and with notice and opportunity to that successor to defend, and that a successor is not bound in every situation.

2. The Authorities Referenced in the Amended Orders Do Not Support a Conclusion That a Decision Can Be Made Now That Successors Will Be Bound When There Is a Judgment in These Matters.

The Amended Orders rely upon *In Re Bernal*, 207 F.3d 595 (9th Cir. 2000); *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69 (3rd Cir. 1993); *PP Inc. v. McGuire*, 509 F.Supp. 1079 (D. N.J. 1981); and *Froning's, Inc. v. Johnston Feed Service, Inc.*, 568 F.2d 108 (8th Cir. 1978) to conclude that "where a defendant has been served in a subproceeding and subsequently sells or otherwise conveys a water right or a portion of a water right subject to that subproceeding, a successor-in-interest need not be reserved, but will be bound by the results of this litigation." None of those cases so hold.

In re Bernal involved a situation where the Education Credit Management Corp. ("ECMC"), having taken an assignment of notes after a default judgment had been entered against its predecessor discharging those notes, filed a motion to intervene in the adversary proceeding and set aside the default. The bankruptcy court denied the motion because at the time the complaint was filed and at the time the default was entered ECMC was not a proper party in intervention. *In Re Bernal*, 207 F.3d at 596-97.

The Ninth Circuit determined that the bankruptcy court did not abuse its discretion. *In re Bernal*¸ 207 F.3d at 599. It held that the proper procedure in such a case would have been a motion brought by ECMC under Fed. R. Civ. P. 25(c) because, were ECMC allowed to substitute in the action, it would have to explain why its predecessor allowed its default to be taken. *Id.* Thus, *Bernal* did not directly involve Rule 25(c), and did not decide that had such a motion been filed, ECMC would have been bound, although in that case it likely would have been. However, *Bernal* does establish, as does Rule 25 itself, that the question of whether one is bound by a judgment as a successor or transferee can only be determined after the transferee is served and is given an opportunity to be heard. *See* Fed. R. Civ. P. 25(c) and 25(a)(3).

In *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69 (3d Cir. 1993), the court held that a district court may not determine factual issues arising in the context of a Fed. R. Civ. P. 25(c) motion, including issues of whether an absentee is a successor in interest within the meaning of the Rule, without providing the absentee whose substitution is sought with an opportunity to be heard. *Id.* at 70-73. An evidentiary hearing, following, of course, proper service of a post-judgment motion to substitute or join an absentee, will be required in contested cases to determine if an absentee is a judgment party's successor to liability within the meaning of Fed. R. Civ. P. 25(c). *Id.*

PP, Inc. v. McGuire, 509 F.Supp. 1079 (D. N.J. 1981) did not involve an issue of whether a successor to a defendant was obligated to a plaintiff. In that case, it was the plaintiff who had assigned the note on which the litigation was based, and it was the plaintiff who sought to add its assignee as a named plaintiff. 509 F.Supp. at 1083. *Fronings, Inc. v. Johnston Feed Service, Inc.*, 568 F.2d 108 (8th Cir. 1978) is similar. There, it was the plaintiff which had been dissolved during the pendency of the litigation. The court held that under Iowa law, a dissolved corporation could maintain a lawsuit, and there was no need for substitution under Rule 25(c).

Clearly, reliance on Rule 25(c) for purposes of substituting absentee water right holders after entry of judgment provides no assurance that they will be bound by it. Moreover, it will require filing of the same motion and service in the same manner as a similar motion filed

today before judgment. In addition, it will require a far more complicated individual hearing on each motion than would be required for a similar motion filed today before judgment. *See*, *Herrara v. Singh*, 118 F.Supp.2d 1120, 1122-24 (E.D. Wash. 2000). Most importantly, allowing these matters to proceed to judgment, based upon the unsupported conclusion that the "successor-in-interest need not be reserved, but will be bound by the results of this litigation," raises the very real possibility that any final judgment will be void, or if not void, not capable of being administered, perhaps after decades of litigation.

3. The Authorities on Which the Plaintiff Parties Relied in Reply Do Not Support a Conclusion That After Judgment in These Matters, a Successor Who Is Then Given an Opportunity to Be Heard on the Issue Will in Every Situation Be Bound By the Judgment.

Fed. R. Civ. P. 25 is merely a procedural provision that gives a court authority to continue with the original parties or to substitute or join successors-in-interest. 6 Moore, Jmes. Wm. et. al., *Moore's Federal Practice & Procedure*, § 25.31(2) (3d ed. 2010). Whether Rule 25 applies is a matter of substantive law. 6 *Moore's*, § 25.31(2) (3d ed. 2010) [*citing Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 566 F.2d 8, 24-25 (7th Cir. 1977) (substitution under procedural rule must follow substantive law)].

In the present litigation, the issue of whether Fed. R. Civ. P. 25 applies in the manner the Amended Orders provide, so as to relieve the Plaintiff Parties of all further efforts to identify and provide notice to successors-in-interest, must first and foremost, be determined by reference to the requirements of due process. This is because due process must be the first source of substantive law that determines the applicability of the procedures of Fed. R. Civ. P. 25 to the present litigation and to whether the Amended Orders are contrary to law. As explained below, the Amended Orders are inconsistent with other substantive law, but most importantly, the Amended Orders are contrary to law because they fail to meet the requirements of due process and so no other source of substantive law, whether state or federal can overcome that fatal flaw.

Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding that will affect the property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are readily

ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) [emphasis in original]. In *Mennonite*, the purchaser of a property sold for non-payment of taxes filed a suit in state court to quiet title to the property. *Mennonite*, 462 U.S. at 795. The mortgagee of the property opposed the purchaser's motion for summary judgment, contending that it had not received constitutionally adequate notice of the pending tax sale. *Id.* Indiana's courts upheld the Indiana tax sale against this constitutional challenge, and the United States Supreme Court reversed. *Id.*

In *Mennonite*, the court concluded that the issue of notice in the case was controlled by the analysis in *Mullane*. In *Mullane*, it was recognized that prior to an action that will affect an interest in property protected by the Due Process Clause of the Fourteenth Amendment notice reasonably calculated, under all the circumstances, to apprise the parties of the pendency of the action and afford them an opportunity to present their objections is required. *Mennonite*, 462 U.S. at 795. The court reasoned that because a mortgagee possesses a property interest that is significantly affected by a tax sale he is entitled to notice reasonably calculated to apprise him of it. *Mennonite*, 462 U.S. at 798.

The Plaintiff Parties argue that "[b]ecuase *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 is generally less than in an *in personam* action."[6] Doc. 1639 and Doc. 535 at 13 (*citing Tyler v. Judges of the Court of Registration*, 55 N.E. 812, 812-814 (Mass. 1900)]. This is simply not true because, as always, the "degree of notice and service of process required" is notice reasonably certain to inform those affected, or where conditions do not permit such notice, the form of notice chosen must not be substantially less likely to bring home notice than other feasible and customary substitutes. *Mullane*, 339 U.S. at 314-315, 70 S.Ct. 652, 657. The Amended Orders contemplate that <u>no</u> form of notice need be provided transferees of previously served holders of surface and underground water rights.

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[6] The logical extension of Plaintiff Parties' argument is that no service was required here, even in the first instance.

There is no condition here, other than effort that precludes the Plaintiff Parties from providing notice reasonably certain to actually inform those affected. Further, even were that not the case, the no notice to transferees contemplated in the Amended Orders, is notice substantially less likely to bring home notice than other feasible, customary alternatives.

Additionally, the Plaintiff Parties' reliance upon *Tyler v. Judges of the Court of Registration* is misplaced. The difference between the facts and circumstances of the present matters and *Tyler* are significant; importantly, too, in *Tyler* the court determined its holding on the basis of due process considerations, not upon characterization of the action as *in rem*.

Tyler upheld the constitutionality of a land registration statute which provided that, following the filing of an application for registration (a land claim), and the filing of a memorandum containing a copy of the description of the land so concerned in the registry of deeds and, following a determination by an examiner appointed by the judge of the court of registration that the registrant had a good title as alleged, or if the applicant elected to proceed further despite an unfavorable opinion from the court appointed examiner, that notice could be published by the recorder in the district where any portion of the land lies. *Tyler*, 55 N.E. at 812. This notice was to be addressed, by name, to all persons known to have an adverse interest, and to "all whom it may concern." *Id.* A copy was to be and mailed to every person named in the notice whose address was known and a duly attested copy posted in a conspicuous place on each parcel of land included in the application and the statute provided that a court might order further notice. *Tyler*, 55 N.E. at 812-813. As to binding transferees, subsequent owners of registered land, to the registry system, in "deciding whether substantial justice is done…it is contemplated that if there is a question to be discerned, it shall be referred to the court, and, of course, that the court will order notice to any party interested." *Tyler*, 55 N.E. at 816.

Obviously, none of the provisions of the land registration act at issue in *Tyler* that served to put transferees on notice regarding the ongoing land registration litigation exist in the present litigation to put transferees to surface or underground water rights in the Walker River Basin that litigation involving a claim adverse to their own is ongoing. None of the factors that

actually led the court in *Tyler* to conclude that the notice provisions of the land registration statute satisfied due process, the true basis for the decision there are present here no matter the characterization of the action as *in rem* or *quasi-in rem*.

The difference between a usufruct, such as the use rights that defendants here already possess and which the Plaintiff Parties seek and absolute ownership of a portion or whole of a *res* is significant. Consideration of the unique characteristics of a usufruct further demonstrates that none of the factors present in typical *in rem* or *quasi-in rem* actions that serve to put transferees and other non-parties on notice of the pendency of litigation involving claims adverse to theirs are present in this litigation.

A usufruct is merely the right to use a portion of the *res*. *See, Desert Irrigation Ltd. v. State of Nevada*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997). In a typical *in rem* action, the court takes jurisdiction over the *res* whether a sum of money or a ship. Any party with an absolute ownership right in the *res* is put on notice by the fact that the *res* is removed from their existing control during the pendency of the action, and new control is exercised by the court. Further, in a typical *in rem* action, a person owning merely a right to use a portion of the *res*, a usufruct in the *res*, would no longer able to make use of it during the pendency of an action, in their prior manner, because the *res* is under immediate or new regulatory control of the court.

Thus, parties with an absolute ownership right or a use right in the *res* have adequate notice of the pendency of the action from the court's new control over the *res*, because they can no longer make use of the *res* in the fashion they did before the commencement of the action. Even in an adjudication, the court assumes new regulatory control over the res, and thus claimants can no longer make use of the *res* in the manner they did prior to the commencement of the action.[7] Thus, in a typical *in rem* or *quasi in rem* action, the court's exercise of new control over the *res* helps to provide claimants to absolute ownership or use of the *res* constitutionally required notice and an opportunity to be heard, in that the court's control of the *res* serves to apprise claimants of pendency of the action.

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[7] Examples of this are the temporary restraining orders which were entered in the *Orr Ditch* and *Alpine* cases many years before the final judgments were entered in those cases.

During the pendency of this litigation, that is not the case. The Court has not exercised any new control over the *res*, and water right holders and their transferees will be and have been able to continue to use the *res* in the same manner they always have. Unlike in *Tyler*, there has been no conspicuous posting, nor the equivalent of a memorandum of notice describing the property at issue filed with the registrar of deeds, such that even a subsequent purchaser of land together with water rights might be put on notice.

Unlike the typical *in rem* action, here in any case, if the Plaintiff Parties achieve a favorable result, there is and will be no new control, regulatory or otherwise, exercised by the court over the *res*, until the action is complete. Thus, because none of the factors related to exercise of control over the *res* by the court, typical *in rem* or *quasi in rem* actions will occur during the pendency of the present litigation, the Plaintiff Parties' arguments related to what notice is adequate and calculated to reasonably apprise claimants of the pendency of an *in rem* or *quasi in rem* action are largely irrelevant. Rather, as always, water right holders and their transferees must be provided notice in a manner reasonably calculated to apprise them of the pendency of the action and an opportunity to be heard.

In Tyler, Justice Holmes made it clear that the sufficiency of notice in all cases is determined by whether the notice satisfies due process. He recognized that:

> "perhaps the classification of the proceeding [as *in rem*] is not so important as the course of the discussion [regarding the distinctions between *in personam* and *in rem* actions] thus far might imply…for the purposes of decision a majority of the court prefers to assume that in cases where it heretofore has been necessary to give . . . [interested persons] actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them it is not in the power of the legislature, by changing the form of the proceeding from an action in personam to a suit in rem, to avoid the necessity of giving such notice, and to assume that . . . personal rights in property are so involved and my be so affected, that effectual notice and an opportunity to be heard, should be given to all claimants who are known, or who[se identity] b[y] reasonable effort can be ascertained."

Tyler, 55 N.E. at 815. The act at issue in Tyler showed throughout the intent that no one's rights be finally determined without having a chance to be heard. *Tyler*, 55 N.E. at 816.

Moreover, even in true water right adjudication proceedings where claimants and transferees have notice of the proceedings based upon the court's control of the *res* during the

pendency of the proceedings, courts have proceeded to serve and join successors before entry of final judgment. *See, e.g.*, Ex. A, Excerpt from Motion for Substitution and, or Joinder of Parties, *United States v. Orr Water Ditch Co.*, In Equity No. A-3 (D. Nev. 6/17/1943); Ex. B, Excerpt from Order Substituting and/or Joining Parties as Defendants, *United States v. Orr Water Ditch Co.*, In Equity No. A-3 (D. Nev. 12/1/1943).

The requirement that a successor-in-interest have actual or constructive notice of the pendency of prior litigation in order to be bound by it is established in *Pitt v. Rodgers*, 104 F. 387, 389 (9th Cir. 1900). *Pitt* involved an appeal from an order of a Nevada federal court restraining certain plaintiffs from proceeding in a state court action for a water rights decree against a subsequent purchaser of the rights at issue because that purchaser had no actual or constructive notice of the pending state court action at the time he acquired the property. *Id.* The appellate court affirmed the order. *Id.*, at 391.

In *Pitt*, plaintiff landowners had sued defendant landowners, in state court praying for a decree that the plaintiffs had the prior right to the use of a flow of water for irrigation. Defendants filed an answer but no injunction was ever issued in the suit and the case was never tried. *Id.*, at 388. Nearly two years after the initial complaint was filed defendants sold the land, along with the appurtenant water rights, to Rodgers. *Id.* Three years after purchasing the land and water rights, Rodgers sued the original state court plaintiffs in federal court for a decree adjudging a priority water right to Rodgers. *Id.* The lands and water rights at issue in the federal action were identical to those at issue in the state court proceedings, while the parties to the respective suits were not. *Id.* The appellate court concluded that Rodgers, the subsequent purchaser could only be bound by a judgment in the state court action if he had actual or constructive knowledge of the pending litigation at the time he acquired the property. *Id.*, at 389.

Under Nevada's lis pendens statute, Rodgers, the subsequent purchaser, could not be charged with constructive notice of the state suit because there was no notice of the pendency of the state action on file with the recorder of the county where the property was located. *Id.* at 390. Since the subsequent purchaser, Rodgers, did not have actual or constructive notice of the

pending state action, the state court could not issue a binding judgment affecting Rodger's title to the water rights at issue. *Id.* at 389.

In Reply, Plaintiff Parties argued that *Pitt* was both superseded by Nevada's adjudication statute, and that the action was "an *in personam* action brought by three water rights claimants against three other water rights claimants, while C-125 and these subproceedings are *in rem* proceedings involving claims to water rights." Doc. 1639 and Doc. 535 at 27. Leaving aside that self-contradicting assertion, *Pitt* was not superseded by Nevada's adjudication statute because it was not, as the Plaintiff Parties acknowledge, an adjudication. Rather, the action in *Pitt* bears much more resemblance to the present litigation where, here, as in *Pitt*, the action is an action brought by water rights claimants against adverse water rights claimants, the holders of surface and groundwater rights. The number of adverse claimants is the only discernable difference, and it surely is a difference of no import in determining what will be required to bind successors to surface and groundwater rights to any final judgment here.

The cases and authorities cited by the Plaintiff Parties in Reply stand for nothing more than the proposition that in a subsequent proceeding involving a transferee, the transferee "<u>could</u> <u>be</u> bound by the judgment in the [prior] action without having been made a party." *See* Doc. 1639 and Doc. 535 at 22. [Emphasis added]. *See, e.g.*, *Golden State Bottling Co. v. National Labor Relations Board*, 414 U.S. 168 (1973) (purchaser of business with knowledge of unfair labor practice litigation is bound by reinstatement and back pay order); *Moyer v. Mathas*, 458 F.2d 431 (5th Cir. 1972) (purchaser of property subject to a tax lien cannot relitigate the validity of tax assessments made against his predecessor); *Beherens v. Skelly*, 173 F.2d 715 (3rd Cir. 1949) (purchaser with constructive notice of pendency of litigation is bound by the outcome); *Farwest Steel Corp. v. Barge Sea-Span 241*, 828 F.2d 522 (9th Cir. 1987) (purchaser of barge subject to court's *in rem* jurisdiction assumed risks of seller with regard to pending litigation).

The Plaintiff Parties also relied upon Restatement (Second) of Judgments § 44 (1982). However, they quoted only the general rule, and ignored the exceptions that the successor is not

bound where: "(1) a procedure exists for notifying potential successors-in-interest of pending actions concerning property, the procedure was not followed, and the successor did not otherwise have knowledge of the action; or (2) the opposing party in the action knew of the transfer to the successor and knew also that the successor was unaware of the pending action." *Id.* What is important about those exceptions is that they clearly require information not before the Magistrate Judge now, and they present the probability of numerous post-judgment fact specific proceedings once these matters are concluded. That result should be avoided to the greatest extent possible.

Also in Reply, the Plaintiff Parties placed considerable reliance on California's and Nevada's statutory procedures concerning administrative adjudications to support what is now the Magistrate's legal conclusion that successors-in-interest will be bound even if they are never joined. *See* N.R.S. §§ 533.090-533.185; Cal. Water Code §§ 2500-2866. There is a fundamental difference between an administrative adjudication and proceedings like these which are collateral attacks on already existing and adjudicated water rights. In those statutory administrative adjudications, the administrative agencies are charged with investigating the system under adjudication, and recognizing rights to water even when a person makes no claim. *See* N.R.S. § 533.100; § 533.125; Cal. Water Code §§ 2550-2555. Moreover, in those adjudication proceedings, multiple notices are provided at each step in the proceedings, both by mail and publication. *See, eg.*, N.R.S. § 533.110; 533.140; 533.150; 533.160; 533.165; Cal. Water Code §§ 2527; 2604; 2650; 2701; 2753. The administrative agency is not allowed to ignore giving notice to someone who the agency has ascertained is a water user simply because that user has not filed a claim. *See, e.g.*, N.R.S. § 533.110(2); Cal. Water Code §§ 2527; 2577; 2604; § 2701; 2753. In addition, both States allow intervention very late in the proceedings by persons who had no actual knowledge of their pendency. N.R.S. § 533.130; Cal. Water Code § 2780. Finally, California requires the State Board to record the functional equivalent of a lis pendens giving constructive notice to anyone researching title to a parcel of land involved in a stream system adjudication of the pendency of the proceeding, its purpose and its deadlines. *See* Cal. Water Code § 2529.

Those statutory provisions do not support a conclusion that the Plaintiff Parties have no obligation to provide notice to successors-in-interest of whom they are aware, or that successors-in-interest who have no actual or constructive notice of these proceedings will be bound by the outcome of the litigation.

D. The Ruling That a Successor-in-Interest as a Result of Death Will Be Bound By a Judgment Even If Not Substituted Is Contrary to Law.

In the Amended Orders, the Magistrate Judge concluded now that successors-in-interest as a result of death are bound by any final judgment in these proceedings even though those successors are never substituted as provided in Fed. R. Civ. P. 25(a). That is not the law for the same reasons it is not the law for inter vivos transferees. It is not a ruling which can be made now, before any final judgment and without giving notice and opportunity to be heard to the successors-in-interest. Even then, it is by no means certain that they will be bound. *See, Ransom v. Brennan*, 437 F.2d 513 (5th Cir.) *cert. den.* 403 U.S. 904 (1971) (executrix is not bound even though she had actual notice of the litigation where she was not properly served). Moreover, for all of the same reasons expressed above, with respect to inter vivos transferees, the incorrect assertions that these proceedings are *in rem* do not change that result. *See* pgs. 17-20 above.

E. The Ruling That the Plaintiff Parties Need Only Provide Periodic Notice of Developments in These Proceedings to Other Parties Is Contrary to Law.

The Magistrate Judge's Ruling that the Plaintiff Parties need only provide periodic notice of "developments" in these proceedings to "parties" is contrary to law for two reasons. First, persons and entities who have been properly served are entitled to be served with papers to the extent provided in Fed. R. Civ. P., Rule 5. There is no exception for "periodic notice of developments."

Second, the Magistrate's ruling concerning notice should have been directed to notice to successors of whom the Plaintiff Parties are aware and who are not parties. It is clear from the authorities relied upon by the Plaintiff Parties that establishing that a successor-in-interest had actual notice of the proceedings may be determinative in binding that successor-in-interest to the judgment. Therefore, the Amended Orders should have required, at a minimum, that the

Plaintiff Parties mail the Request of Waiver of Service packages previously approved in these matters to such persons. At least then, even if a successor does not waive service, the successor may not be able to assert it had no actual notice of the proceedings.

F. There Is No Authority Which Can Require the District or Any Other Defendant to Undertake Independent Investigation Into Water Right Ownership for the Benefit of the Plaintiff Parties.

As indicated at the outset, the District will continue to provide the annual information it has been providing to the United States. Based upon the Amended Orders, it will now begin to provide that information to Mineral County. It will also file that information with the Court once the logistics of doing that are established. However, to the extent that the Amended Orders require more than that, they are contrary to law.

Although the analogy is by no means perfect, the Supreme Court's reasoning in deciding when a defendant might be required to identify the members of a plaintiff class is helpful. In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the court drew an analogy to the practice under Rule 33(c) of allowing one to answer an interrogatory by specifying the records from which the answer may be obtained. Where the information needed can be derived with substantially the same effort by the party seeking the information or the party whose records must be examined, the party seeking the information must perform the task. Where the burden of deriving the information is not substantially the same, and the task can be performed more efficiently by the responding party, that party may be required to provide the answer. 437 U.S. at 357. However, even in that situation in *Oppenheimer* where the court required the defendant to direct a transfer agent to make certain records available for identifying members of the plaintiff class, it required the class representative to bear the expense of assimilating the information. *Id.* at 360.

Information concerning successors-in-interest is contained in public records in assessors' offices, recorders' offices and the office of the water agencies of the two states. The burden of examining those records cannot be shifted from the United States, the Tribe and Mineral County to the District, Nevada or California. *C.f., Securities and Exchange Comm. v.*

Samuel H. Sloan & Co., 369 F.Supp. 994, 995 (S.D. N.Y. 1973) (discovery need not be required of documents of public record which are equally accessible to all parties).

VI. CONCLUSION.

The Amended Orders are contrary to law. The Court cannot decide today that a successor-in-interest will be bound by a final judgment in these proceedings without first giving that successor-in-interest an opportunity to be heard on that issue. When that opportunity is given, the conclusion made by the Magistrate now, that the successors will be bound by the judgment, will of necessity have to be based upon exceptions to the rule that ordinarily persons not a party to an action are not bound by its outcome. That will require fact specific evidentiary hearings on the applicability of an exception with no certainty as to the outcome in every case. The number and scope of such proceedings cannot be determined at this time.

In addition, in order to implement the Amended Orders now, particularly the substitution burdens they attempt to impose on defendants, they and their attachments must be served, presumably by mail, on all of the persons who have entered Notices of Appearance in each of the subproceedings, and who are unrepresented by counsel. In addition, the Amended Orders and their attachments must be served in some fashion on all of the persons who have been served in the Mineral County proceeding, but who were not required to do anything at all except respond to the Motion to Intervene by a date which has been changed and is now vacated. *See*, pgs. 8-10, *supra.*

There are approximately 2,200 such persons and entities in subproceeding C-125-B and several hundred in subproceeding C-125-C. The reason that all of these persons and entities must be served, even those who have entered Notices of Appearance, is that the Amended Orders contemplate that at any time an interest in a water right is transferred, those defendants are to take some action related to substitution. Heretofore, none of the defendants in either subproceeding have been required to do what is provided by the Amended Orders. Moreover, in addition to the fact that any motion to substitute under Rule 25(c) will have to be served in accordance with Rule 4 on the non-party being substituted, it will also have to be served on

parties in accordance with Rule 5. *See*, Fed. R. Civ. P. 25(c); 25(a)(3). That means it will have to be mailed to all of the persons who have appeared but who are not represented by counsel.

There is a better approach which involves less time and expense and, importantly, more certainty of a final judgment which will be enforceable without the potential for significant post-judgment litigation. That approach as outlined below is to consider the need to join successors-in-interest at the commencement of a new phase of the proceedings in C-125-B. The initial approach with respect to C-125-C is slightly different, given the fact that there has been no consideration given to successors-in-interest there for about 10 years.

These proceedings should simultaneously move forward even as reviews for the need to join successors-in-interest take place. The most significant reason that the successor-in-interest issue has become so critical is the fact that the Plaintiff Parties have been allowed 19 and 17 years, respectively, to make service. The magnitude of that problem going forward will be substantially mitigated by requiring these matters to move forward.

A. The Claims of the Tribe and the United States in Subproceeding C-125-B.

As noted above, the CMO bifurcates this proceeding into the Tribal Claims and the Federal Claims. It further bifurcates the Tribal Claims into two phases. Based upon the Court's prior orders related to joinder, the Court can order presently known successors-in-interest joined as necessary parties under Fed. R. Civ. P. 19 without the need for any motion. Rule 25 is not the exclusive Rule for adding new parties after the commencement of an action. They may be joined through amendment under Rule 15, or as required parties under Rule 19. *See* Moore, James Wm. et al., *6 Moore's Federal Practice and Procedure*, § 25.02 (3d ed. 2010).

The Court should also order the United States and Tribe to presently mail all of the documents required to be served on defendants by prior order, including, but not limited to, a Notice of Lawsuit and Request for Waiver of Service of Notice in Lieu of Summons, to those presently known successors-in-interest. This will be a much smaller mailing than the mailing required if the Amended Orders are not vacated. Phase I of the Tribal Claims should proceed forward once that mailing is complete, without waiting for personal service, if waivers of

service are not forthcoming. Any required personal service can take place as Phase I is proceeding.

Once the threshold issues have been identified and decided, depending upon what proceedings remain with respect to the Tribal Claims, another assessment should be made to determine to what extent there are additional successors-in-interest to some of the water rights within any categories listed in the CMO which may be involved in the remaining proceedings involving the Tribal Claims. At that time, all such successors-in-interest who have not been joined should be joined under the provisions of Rule 19. The Court can order them joined under its provisions without any need for a motion to substitute and all of the attendant issues described above.

At the conclusion of any remaining proceedings concerning the Tribal Claims, the same process should be followed with any additional successors-in-interest, and they should be joined as defendants prior to entry of judgment. Depending upon any proceedings remaining with respect to the Federal Claims, prior to the time that those proceedings commence, the same process should be followed, and the same process should be followed prior to entry of any final judgment on the Federal Claims.

B. The Mineral County Motion to Intervene, Subproceeding C-125-C.

Given the fact that the caption on which most of the service is based in subproceeding C-125-C is now over ten years old, it should be compared with the similar category of defendants from subproceeding C-125-B. If there are significant differences, the Court should require that persons who are required to be joined, be served with the Mineral County Motion either through waiver of service or personal service as has been previously ordered.

The Court should then proceed with establishing and requiring notice of a schedule for determination of Mineral County's Motion to Intervene. If Mineral County is allowed to intervene and assert a claim, at that time there should be a review of the extent to which there are successors-in-interest who must be joined, and they should be joined at that time, as provided in previous Court orders. Finally, prior to entry of any judgment on Mineral County's claim, the Court should again require joinder of any additional successors-in--interest who will

need to be bound by any such judgment. This process is preferable to individual motions to substitute after entry of judgment which entails all of the work and pitfalls described above.

DATED this 12th day of September, 2011.

WOODBURN AND WEDGE

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 12th day of September, 2011, I electronically served the foregoing *Walker River Irrigation District's Points and Authorities in Support of Objections to Rulings of Magistrate Judge With Respect to Revised Proposed Orders and Amended Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served* in Case No. 3:73-cv-00127-ECR-LRL with the Clerk of the Court using the CM/ECF system, which will notify the following via their email addresses:

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I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00127-ECR-LRL to the following via U.S. Mail, postage prepaid, this 12th day of September, 2011:

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I certify that I am an employee of Woodburn and Wedge and that on the 12th day of September, 2011, I electronically served the foregoing *Walker River Irrigation District's Points and Authorities in Support of Objections to Rulings of Magistrate Judge With Respect to Revised Proposed Orders and Amended Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served* in Case No. 3:73-cv-00128-ECR-LRL with the Clerk of the Court using the CM/ECF system, which will notify the following via their email addresses:

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