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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. ——————————— MINERAL COUNTY, Proposed-Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, et al., Proposed Defendants. ———————————	IN EQUITY NO. C-125 SUBFILE NO. C-125-C 3:73-cv-00128-ECR-LRL **WALKER RIVER IRRIGATION DISTRICT'S POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO SEPTEMBER 27, 2011 ORDER CONCERNING SERVICE ISSUES**

I. THE PROCEEDINGS BEFORE THE MAGISTRATE JUDGE.

A. Background.

The Order of September 27, 2011 (Doc. 547) (the "Magistrate's Order") to which the Walker River Irrigation District (the "District") objects is the third in a series of orders entered by the Magistrate Judge from August 24, 2011 through September 27, 2011 in connection with this matter. Those earlier orders (Docs. 540; 542), which are described briefly below and to which the District has also objected (Docs. 543-544), are the foundation for several of the rulings in the Magistrate's Order, including his apparent determination that Mineral County, the proposed plaintiff in this matter, has no ongoing obligation to ensure that any judgment rendered will bind the persons and entities previously ordered joined by the Court. That conclusion is based upon the Magistrate's determination in those prior orders that successors-in-interest, whether through inter vivos transfers or transfers as a result of death, will be bound by the ultimate judgment of the Court even if they are never joined.

The District will not repeat its objections to those prior orders here. However, it is important to briefly summarize the portion of the content of those prior orders relevant to the Magistrate's Order and the District's objections here.

As the result of an October 19, 2010 status conference in subproceedings C-125-B and C-125-C, the United States, the Walker River Paiute Tribe and Mineral County submitted identical Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served (the "Proposed Orders"). Doc. 1614-1; Doc. 516-1. 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

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

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. For purposes of these Points and Authorities, the District will refer to its points and authorities filed in support of its objections to those Orders as the "District's Successor-In-Interest Points and Authorities."

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. Doc. 542 at 3, ln. 16 - 4, ln. 4; at 6, lns. 21-23. 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." Doc. 542 at 4, lns. 5-12. With respect to inter vivos transfers, the Amended Orders require a motion properly served on non-parties in accordance with Rule 4 and on parties in accordance with Rule 5, and attach a form for a joint motion by the predecessor and successor. Doc. 542 at 5, lns. 5-12. In spite of seeming to relieve Mineral County of any obligation with respect to service on successors-in-interest, 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 [Mineral County]." Doc. 542 at 8, lns. 18-22. Finally, the Amended Orders include as Attachment C a form for "Disclaimer of Interest in Water Rights and Notice of Related Information and Documentation Supporting Disclaimer," presumably to be used by Mineral County in connection with future service in this matter. Doc. 542 at 7, ln. 1 - 8, ln. 4.

B. The Magistrate's Order.

On August 29, 2008, Mineral County filed a Report Concerning Status of Service on Proposed Defendants (Doc. 479) (the "Service Report") together with a Proposed Order Concerning the Service Report and Status of Service on Proposed Defendants (Doc. 480). The Service Report set forth Mineral County's position with respect to the status of service in the C-

125-C subproceeding and its position on certain issues involving service as previously ordered by the Court. The Service Report was based upon counsel's review of service which had taken place with respect to service by early 2002. Doc. 479. Little or no service has taken place since that time. *See* Docs. 415 - 548. The District filed its Response to the Service Report (Doc. 488) (the "District Response") on November 21, 2008. Mineral County filed its Reply to the District Response (Doc. 496) (the "Service Reply") on January 23, 2009.

The Magistrate's Order granted the relief prayed for in the Conclusion of the Service Reply virtually verbatim, with two exceptions. The Magistrate's Order did not address the detailed information necessary to clarify certain matters or provide any further guidance relating to Mineral County's service efforts as Mineral County had requested. *Compare* Doc. 547 with Service Reply (Doc. 496) at 20-21.

II. PROCEDURAL BACKGROUND.[2]

A. The Court's Orders Concerning Completion of Service and Responses to Mineral County's Motion to Intervene.

Mineral County filed its Motion to Intervene on October 25, 1994. Doc. 2. After a January 3, 1995 status conference, the Court entered a comprehensive Order Requiring Service of And Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County (the "Service Order"). Doc. 19. Among other things, the Service Order directed Mineral County to file a revised motion to intervene and points and authorities in support 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

[2] A more detailed procedural history concerning this matter is set forth in the District Response. *See* Doc. No. 488 at 2-14.

Documents").[3] 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. The Service Order also attached forms to be used by Mineral County, including: (i) Notice of Motion to Intervene, Proposed Complaint-In-Intervention, and Motion for Preliminary Injunction of Mineral County and Request for Waiver of Personal Service of Motions; (ii) Waiver of Personal Service of Motions; and (iii) Notice in Lieu of Summons. *Id.* at 3. Service was to be completed by May 10, 1995. *Id.* at 2.

Most importantly here, the Service Order required Mineral County to serve a copy of the Service Order itself on all persons and entities to be served. Doc. 19 at 5. In relevant part, the Service Order provides:

> (a) Responses to Mineral County's Motion to Intervene and Mineral County's Points and Authorities in support of its Motion to Intervene shall be served not later than July 11, 1995;
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> * * *
>
> 7. Persons, corporations, institutions, associations or other entities properly served with Mineral County's Intervention Documents who do not appear and respond to Mineral County's Motion to Intervene shall nevertheless be deemed to have notice of subsequent orders of the Court with respect to answers or other responses to the proposed complaint-in-intervention or responses to any motion for preliminary injunctive relief filed and served by Mineral County.

Id. at 4-5.

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

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[3] 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 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).

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 (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 facts related to that service which are important here.

First, subsequent to the Service Order, the Court entered an order suspending or vacating the July 11, 1995 date for responses to Mineral County's Motion to Intervene. It did so on July 7, 1995. Doc. 33. On August 16, 1995, the Court established September 29, 1995 as the date for completion of service, and October 27, 1995 as the date for responses to the Motion to Intervene. Doc. 44. On September 29, 1995, the Court entered another Order setting deadlines for service and clarifying what must be served. Doc. 48. In that Order, the Court required that Mineral County complete service by February 1, 1996, and that responses to the Motion to Intervene be served not later than April 1, 1996. Doc. 48 at 1; 3. The Court also ordered that a copy of its September 29, 1995 Order be served. *Id.* at 2. That Order also provided that persons who waive service, or who do not and appear and respond to the Motion to Intervene by the specified date, would be deemed to have notice of subsequent orders of the Court. *Id.* at 4. Also on that day, Mineral County filed a Motion to Dispense With All Further Service. Doc. 62. While that Motion was pending, the Court, on March 15, 1996, suspended the time for responding to the Motion to Intervene, and linked the new time for responses to a decision on the Motion to Dispense With All Further Service. Doc. 71.

The Court denied the Motion to Dispense With All Further Service on March 22, 1996 (Doc. 74), and on April 24, 1996, Mineral County appealed that denial to the Ninth Circuit Court of Appeals. Doc. 78. That Court dismissed the appeal for lack of jurisdiction on February 12, 1997. *See* Docs. 95-98.

As best the District can determine, the Court did not establish a new date for completion of service and responding to the Motion to Intervene until December 4, 1997. On that date, the Court directed that Mineral County complete service by March 30, 1998, and that documents served by Mineral County from that date forward would state that responses to the Motion to Intervene would be due on June 15, 1998. Doc. 162. On June 4, 1998, the Court extended the time for Mineral County to complete service by 60 days, or to about June 1, 1998. Doc. 210 at 14-15. On June 11, 1998, the Court ordered that the time for responding to Mineral County's Motion to Intervene would be extended to November 24, 1998. Doc. 221. On November 6, 1998, the Court extended the time to respond to Mineral County's Motion to Intervene to February 1, 1999. Doc. 240. Finally, on January 8, 1999, the Court vacated completely the time for responses to the Motion to Intervene. Doc. 247.

The following table summarizes the foregoing:

Docket No. of Order	**Date of Order**	**Date to Complete Service**	**Date to Respond to Motion to Intervene**
19	02/09/95	05/10/95	07/11/95
33	07/07/95	Expired	Vacated
44	08/16/95	09/29/95	10/27/95
48	09/29/95	02/01/96	04/01/96
71	03/15/96	Suspended	Suspended
78	04/24/96	Appeal to 9th Circuit - No schedule	
162	12/04/97	03/30/98	06/15/98
210	06/04/98	06/01/98	No change
221	06/11/98	No change	11/24/98
240	11/06/98	No change	02/01/99
247	01/08/99	Vacated	Vacated

It is readily apparent from the Court's orders concerning the time for completion of service and the time for responding to the Motion to Intervene (Doc. 19; Doc. 48; Doc. 162; Doc. 221) that the Court intended that parties served have an adequate time (30 or more days) after that service in which to respond to the Motion to Intervene. It is also clear that the Court intended that persons who filed a response to the Motion to Intervene by the date required for a response would thereafter receive notice of subsequent orders of the Court in this matter.

In late 1997, Mineral County was also 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 inter vivos transfers of land and 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, Magistrate Judge McQuaid 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. Magistrate Judge McQuaid 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, or of its counsel. *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.*

B. What Was Being Served and When.

In most situations, it is impossible to determine exactly what Mineral County was serving at any particular time, and more importantly, what any of those documents said about the time for responding to Mineral County's Motion to Intervene. However, the Court's files do include some relevant information.

The Returns of Service filed by Mineral County do not indicate, and in fact, since they only state that the "Intervention Documents" were served, imply that any order or other information concerning a response date for the Motion to Intervene was not actually served. A copy of the form of Return of Service used by Mineral County is attached hereto as Exhibit A. Moreover, in some situations, "Night Hawk Process Service" made service. Its proofs of service list the documents served and, for example, the Court's September 29, 1995 Order

(Doc. 48) is not listed with respect to service taking place in November of 1995. *See* Doc. 61 and attachments; *see also* Doc. 322-1 at 3-4, a copy of which is attached hereto as Exhibit B. Although the Court had never authorized the service of a summons, some were served on August 11 and 12, 1997, providing 20 days to answer the proposed complaint. *See* Docs. 128-138. Similar forms of Return of Service as described above were filed detailing service from February 1998 to November 1998. Again, one cannot determine what, if any, information was being provided with respect to the response date for the Motion to Intervene. *See* Docs. 166-174; 176; 180; 182; 185; 194; 195; 204; 205; 213; 214; 217; 218; 224; 231; 232; 234; 241 - 243; 245; 246.

Moreover, a good deal of the service took place after January 8, 1999 and before the Order of April 3, 2000 (Doc. 327) which required the filing of a Notice of Appearance thereafter. During that time frame, there was no date for responding to the Motion to Intervene. Doc. 247. Thus, when that service took place, if Mineral County was serving anything specifying a date for such a response, it would not have been correct.[4] For service during that time frame, the Court is directed to Docs. 250;[5] 251; 258; 260; 264; 265; 276; 278; 279; 281; 283 - 287; 291; 292; 295; 296; 299 - 301; 303 - 308; *see also* Doc. 322-1 through Doc. 322-7.

Thus, most of the persons and entities served in connection with the Mineral County Motion to Intervene were served at least 10 years ago and based upon a caption which is over 10 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, including, without limitation, the Magistrate's Order. Moreover, the date by which those persons were required to respond to the Motion to Intervene in order to

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[4] It appears that during this time frame, Mineral County was providing Waivers of Service which specified that August 23, 1999 was the date for such a response. *See, e.g.*, Docs. 261; 262.

[5] The Returns of Service under Docket 250, filed on February 12, 1999, indicate service in January and February of "1998." It appears that the year of service was actually 1999.

receive further notice in this matter has not happened and has not been established. As is discussed below, the Magistrate's Order in effect determines that those persons are not entitled to notice of that date when it is established.

III. 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). To the extent that the Magistrate Judge has made a ruling which is outside the scope of matters delegated to him, or which may not be delegated to him for final disposition, they are subject to *de novo* review. *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004). The court's obligation under *de novo* review is to arrive at its own independent conclusion the same as if no decision previously had been rendered. *Id.*

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).

IV. ARGUMENT.

A. Introduction.

As is set forth in greater detail below, the Magistrate's Order in isolation should be rejected under *de novo* review, and is both clearly erroneous and contrary to law. In some cases, it is inconsistent with rulings the Magistrate made in the Amended Orders, and in others entirely overlooks some of the rulings in the Amended Orders which should have been taken into account. Most importantly, the Magistrate's Order considers the issues presented by the Service Report as if there have been no changes in persons holding water rights under the

Decree over the last decade. In short, the Amended Orders and the Magistrate's Order further exacerbate the procedural nightmare which this matter has been for 17 years.

B. The Magistrate's Order That the Caption Is Accurate and Valid Should Be Rejected and Is Clearly Erroneous.

The Magistrate's Order provides:

> IT IS ORDERED that the caption submitted as Exhibit C to Mineral County's Service Report (#479) is hereby approved as accurate and valid.

Doc. 547 at 1. The precise purpose for that determination is not stated. In addition, the standard against which the caption is measured for accuracy is not revealed.

The Service Order required Mineral County to serve all persons holding water rights adjudicated by the Walker River Decree and all persons who appropriated water from the Walker River after entry of that Decree. Doc. 19 at 3. In 1995, Mineral County was ordered to identify those persons, and in 1997, Mineral County was ordered to prepare a caption which identified those persons, and then to serve them. That caption, which included approximately 1,061 names, was last updated based upon information assembled near the end of 2001. *See* Doc. 397; Doc. 414. Thus, what the Magistrate's Order determines is "accurate and valid," is nearly 10 years old.

To the extent that the Magistrate's Order concludes that that caption is an accurate and valid reflection as of September 27, 2011 of the persons and entities within the scope of the Service Order, it is clearly erroneous. No facts were presented which would allow that determination. To the extent that the Magistrate's Order determines that the only persons entitled to notice and opportunity to be heard in this matter, are those holding water rights as of near the end of 2001, it is beyond his authority to finally determine, and should be rejected. It is also contrary to law for all of the reasons set forth in the District's Successor-In-Interest Points and Authorities, Doc. 544. The District recognizes that the Court has broad discretion to extend the time for completing service. *See, e.g., In Re Sheehan*, 253 F.3d 507, 512-13 (9th Cir. 2001). However, it defies all notions of due process to effectively extend the time for completion of service to 2011 and beyond, and at the same time to conclude that the issue of

who must be served will be determined based upon facts as they existed near the end of 2001. Yet, that is exactly what the Magistrate's Order does.

C. The Magistrate's Order Should Be Rejected, and Is Clearly Erroneous and/or Contrary to Law to the Extent that It Purports to "Substitute" Parties Into this Action Without Proper Service as Required by Rule 4 of the Fed. R. Civ. P.

The Magistrate's Order provides:

> IT IS FURTHER ORDERED that Mineral County's requests to *substitute* parties as set forth in its Service Report (#479) and Exhibits 1 and 4 of its Reply (#496) are hereby granted.

Magistrate's Order at 2 (emphasis added). The Magistrate's Order grants Mineral County's request to *substitute* parties, however, it appears that Mineral County intends to *add* parties to the caption and then *serve* those added parties pursuant to Fed. R. Civ. P. 4 as has been previously ordered by Magistrate McQuaid. The District does not object to the addition of the parties listed in Exhibit 4 of the Service Reply to the caption and Mineral County's service upon those parties pursuant to Fed. R. Civ. P. 4 as previously ordered by the Court, and as is further discussed in E. below.

The Service Report requests the Court to "add" 81 parties to the caption as successors-in-interest to decreed water right holders. Doc. 479 at 5, 6. Mineral County also lists these parties as "additions to the caption" in Exhibit 4 to the Service Reply.[6] Doc. 496-5. These same parties are also listed as "persons and entities [that] remain to be served" in Exhibit 6 to the Service Reply. Doc. 496-7. Even though Mineral County listed these parties as persons and entities to be *added* to the caption and then *served*, it requested that the Court enter an order *substituting* them. Doc. 496 at 20, para. (4). As set forth above, the Magistrate's Order

[6] The number of parties listed in Exhibit 4 of the Service Reply has been reduced from 81, as listed in the Service Report, to 78 as a result of the District's comments made in the District's Response. These comments are reflected in Exhibit 1 to the Service Reply.

merely repeats the language from the relief requested in the Service Reply, including the *substitution* language at paragraph (4). Magistrate's Order at 2.

But for the fact that the Amended Orders indicate that the burden of joining successors-in-interest is not Mineral County's, the District would not object to this portion of the Magistrate's Order. However, to the extent that the Magistrate's Order, when read in conjunction with the Amended Orders concerning joinder of successors-in-interest, can in any way be interpreted as allowing the substitution of the parties listed in Exhibit 4 to the Service Reply without service under Rule 4, as provided in previous orders of the Court and as further described in E. below, the District objects to it. Any such interpretation should be rejected, and is contrary to law as set forth in the District's Successor-In-Interest Points and Authorities.

D. The Magistrate's Order That Mineral County Is Not Required to Make Further Service on Parties Who Have Already Been Validly Served and for Whom the Court Has Ratified Service, Including Without Limitation Notice of When Those Parties Must Respond to Mineral County's Motion to Intervene, Should be Rejected, Is Clearly Erroneous and Is Contrary to Law.

The Magistrate's Order provides:

> IT IS FURTHER ORDERED that Mineral County shall not be required to make further service on parties who have already been validly served, and for whom the court has already ratified service.

Magistrate's Order at 2. This portion of the Magistrate's Order apparently has its genesis in the District's position that Mineral County should be required to provide notice concerning any future briefing schedule imposed by the Court with respect to the Motion to Intervene to proposed defendants who were served before Judge McQuaid's implementation of the requirement to file and serve a Notice of Appearance beginning in April of 2000. Doc. 488 at 14-15. However, because of its breadth and lack of clarity, this portion of the Magistrate's Order has implications beyond even that.

Mineral County responded that it should not be required to notify proposed defendants who have already been served with "updated information concerning the as yet un-rescheduled briefing schedule" with respect to the Motion to Intervene. Doc. 496 at 7.[7] Mineral County attempted to support its position on this issue by citing to the following language from the Service Order:

> Persons, corporations, institutions, associations, or other entities properly served with Mineral County's Intervention Documents who do not appear and respond to Mineral County's Motion to intervene shall nevertheless be deemed to have notice of subsequent orders of the Court with respect to answers or other responses to the proposed complaint-in-intervention or responses to any motion for preliminary injunctive relief filed and served by Mineral County.

Doc. 19 at 4, 5. Mineral County's position ignores, however, that the various orders on service required Mineral County to complete service of its Motion to Intervene and related documents by specified dates, and established a briefing schedule requiring responses to the Motion to Intervene to be served, usually some 30 days or more after service was required to be completed. Therefore, those orders contemplated that proposed defendants would be served with the Motion to Intervene by no later than a date certain, and be required to respond by later date, and if they did not appear and respond by that date they would nevertheless be deemed to have notice of subsequent orders of the Court. Obviously, the Service Order and subsequent orders did not contemplate that service would still not be completed some 17 years later, or that responses to the Motion to Intervene would still not be required by that time. The Magistrate's Order is erroneous and/or contrary to law to the extent that it relies upon the language from the Service Order and subsequent orders, as urged by Mineral County, to relieve the County of any

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[7] Because the Magistrate's Order tracks the relief requested in the Service Reply without providing any separate explanation or analysis, the District has assumed that the order is based, at least in part, upon the arguments advanced by Mineral County in the Service Reply.

obligation to provide notice to previously served proposed defendants concerning a future briefing schedule on the Motion to Intervene.

Mineral County also attempts to support its position on this issue by arguing that proposed defendants were required to file notices of appearance and, therefore, they "will receive future filings and orders of the Court." Doc. 496 at 7. The requirement that served parties file notice of appearances, however, was not adopted until the Court's entry of an Order Concerning Status of Service on Defendants (Doc. 327) on April 3, 2000. That Order provides that any party served from that point forward would be required to file and serve a Notice of Appearance and, if they did not, they would be deemed to have notice of subsequent orders of the Court. Doc. 327 at 7, 8.

Therefore, from January 3, 1995 to April 3, 2000, some of the persons served by the County may have been notified that in order to receive future orders of the Court concerning this matter, they must respond to Mineral County's Motion to Intervene by a date certain. All of those dates were extended, and eventually vacated. Moreover, in many situations, when persons were actually served, there was no date in place at all for responding to the Motion to Intervene, which response under previous orders was crucial to a party receiving subsequent notices in this proceeding. The fact of the matter is that for persons served before April 3, 2000, that deadline has not yet come, and every one of them is entitled to notice of when it will be. When that date is established, they are at least entitled to notice by mail of it.

Finally, as written, this portion of the Magistrate's Order, if broadly interpreted, purports to relieve Mineral County of all future service on defendants, including that required under Rule 5 of the Federal Rules. While the District does not believe that was intended, it should be made express that it was not.

E. The Magistrate's Order Directing Mineral County to Serve Parties Identified in Exhibit 6 to Mineral County's Reply Without Unnecessary Delay Is Clearly Erroneous and Contrary to Law.

The Magistrate's Order provides:

> It is further ordered that the parties who remain to be served are those set forth in Exhibit 6 of Mineral County's Reply (No. 496); and that said parties shall be served without unnecessary delay.

In this portion of his Order, the Magistrate directs that certain parties be served "without unnecessary delay." However, even though Mineral County, both in its Report and in its Reply, requested "further guidance related to its service efforts as the Court deems necessary." (Doc. 479 at 9; Doc. 496 at 21), the Court apparently determined none was required, particularly as it relates to what documents must now be served, and as to what might be "necessary" delay.

By Order entered April 3, 2000 (Doc. 327), the Court ordered Mineral County on a going forward basis to serve its Intervention Documents, a Notice in Lieu of Summons attached to that Order as Exhibit 2, and a Notice of Appearance attached to that Order as Exhibit 3. The Notice in Lieu of Summons and the Notice of Appearance need to be updated and served with the Intervention Documents.

The Amended Orders purport to place the burden of keeping track of inter vivos transfers and substituting successors-in-interest on defendants. The Amended Orders include a proposed form for a joint motion to be used by the predecessor and successor-in-interest. In addition, the Amended Orders include as attachment C a form for Disclaimer of Interest in Water Rights and Notice of Related Information and Documentation Supporting Disclaimer. Finally, the Amended Orders and the Magistrate's Order here purport to place the burden of filing and serving a notice of death pursuant to Fed. R. Civ. P. 25(a) on the estate and successors-in-interest of a deceased party. If the Amended Orders are not vacated or modified as a result of the District's objections, all of those documents also need to be served on parties

who have not yet been served in this matter. In addition, some of those documents also need to be served on parties who have already been served so that they are aware of their content.

In summary, the direction that service take place without unnecessary delay is clearly erroneous and contrary to law. That service should necessarily be delayed until after the Court has made determinations with respect to the objections to the Amended Orders and this Order, and as to what documents Mineral County must, in fact, serve as a result of the determination on the objections. Moreover, given that Mineral County has already had nearly 17 years to complete service, and the Federal Rules generally require service to be completed within 120 days, a final deadline for completion of service should also be established.

In addition, to the extent that this portion of the Magistrate's Order may be construed as a ruling that Mineral County has no obligation to serve and join or substitute known successors-in-interest to parties who have been previously served as required by the Court, the District objects to it. The District's objections are based upon all of the grounds and for all of the reasons set forth in the District's Successor-In-Interest Points and Authorities. Doc. 544. The District will not repeat those grounds and reasons here. The District does note, however, that the requirement of the Amended Orders, that the District, the Nevada State Engineer and the California Water Resources Control Board regularly provide updated water right ownership information to the Court and Mineral County, is inconsistent with the Magistrate's determination that Mineral County has no obligation to make any use of that updated information for purposes of moving to substitute successors-in-interest by reason of inter vivos transfers or transfers by death.

F. The Magistrate's Order Is Clearly Erroneous and/or Contrary to Law Because It Shifts the Burden Solely to the Estate and Successors-In-Interest of Deceased Parties to File and Serve Notices of Death Pursuant to Fed. R. Civ. P. 25(a).

The Magistrate's Order provides:

> IT IS FURTHER ORDERED that for the purposes of this litigation the estate and successors-in-interest of a deceased party bear the burden of filing and serving a Notice of Death pursuant to Fed. R. Civ. P. 25(a) in the event of a party's death.

Magistrate's Order at 2. This portion of the Magistrate's Order is somewhat parallel to his ruling in the Amended Orders that "the burden of keeping track of inter vivos transfers of defendants' water rights . . . is properly born *(sic)* by the defendant and its successor(s)-in-interest." Doc. 542 at 4, lns. 6-12. It also has as its foundation that Mineral County need do nothing about transfers as a result of death, even those of which it is aware, because as the Magistrate ruled in the Amended Orders, successors-in-interest to a deceased defendant will be bound by the judgment even if they are never joined. *Id.* at 6, lns. 24-26. There was no authority which supported those rulings there, and there is none here.

In the Ninth Circuit, when a defendant dies during the pendency of an action and the action is not thereby extinguished, the court may order substitution of the proper parties when the two-step process specified in Fed. R. Civ. P. 25(a) is followed: (1) filing and service of statement noting death; and (2) filing and service of the motion for substitution. *See*, *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994); James Wm. Moore, 2 *Moore's Manual Federal Practice and Procedure*, § 13.32(3)(a) (2010). The first of the two-step process specified by Fed. R. Civ. P. 25(a) has two parts, requiring: (1) that a statement noting death must be filed; and then (2) that the statement must be served upon nonparties (decedent's representatives or successors) in the manner provided for in Fed. R. Civ. P. 4 and upon the parties in the manner provided for in Fed. R. Civ. P. 5. *Barlow v. Ground*, 39 F.3d at 233; *see also*, *Ransom v. Brennan*, 437 F.2d 513, 515 (5th Cir. 1971), *cert. denied*, 403 U.S. 904 (1971); *see also*, Fed. R. Civ. P. 25(a).

Significantly, the filing and service of the statement noting death starts the running of the 90 day limitations period to file a motion of substitution. 2 *Moore's Manual*, § 13.32(3)(a). Fed. R. Civ. P. 25 does not specify who may or must make a statement noting death, even though the Rule specifies that the motion for substitution must be made by a party or successors

or representatives of the decedent party, and so any party or decedent's representatives may file and serve the statement noting death. *See* Fed. R. Civ. P. 25(a).

Contrary to the Magistrate's Order, neither decedent's estate nor decedent's heirs are required by Fed. R. Civ. P. 25(a) 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. *Cheramie v. Orgeron*, 434 F.2d 721, 725 (5th Cir. 1970). If one of several defendants dies, the action does not abate with regard to the other defendants, even if it abates from lack of substitution of parties with regard to the defendant who has died. *Id.*, at 723.

There is no basis in law or federal procedure to place the service burdens of a statement noting death under Fed. R. Civ. P. 25(a) solely on a decedent's estate, and certainly not upon successors-in-interest to deceased parties. Rather, <u>any</u> party may file and serve a statement noting death. Moreover, given the fact that Mineral County's Motion to Intervene remains pending, there is no reason to depart from the procedure adopted by Magistrate McQuaid, which is to require Mineral County to add and serve successors-in-interest pursuant to Rule 4. The Court may order known successors-in-interest joined, and require service on them without any need for a motion under Rule 25.

Further, it is equitable that this burden is properly borne by Mineral County. It is Mineral County who seeks to bring this suit, and it is properly its burden to add and serve successor defendants. Given the fact that, in the Amended Orders, the Magistrate has directed the District, Nevada and California to regularly provide updated water right ownership information to Mineral County and to the Court, Mineral County should be required to act on that information when it is clear that there has been a death. Indeed, the Court has the power to order a plaintiff to substitute a successor to a deceased party if the plaintiff does not act. *See*, *First Idaho Corp. v. Davis*, 867 F.2d 1241, 1242 (9th Cir. 1989).

Such action by Mineral County is required because, contrary to the premise upon which the entire Magistrate's Order appears based, "any and all successors in interest" will not be bound merely by proceeding against existing parties. Rather, decedent's personal representatives and successors can only be bound by judgment upon their proper substitution.

See, *Ransom v. Brennan*, 437 F.2d at 518 (Service of the motion to substitute, together with notice of any hearing, in the manner provided for in Fed. R. Civ. P. 4 is required to obtain personal jurisdiction over nonparties sought to be substituted because of the death of a party). *See also* District's Successor-In-Interest Points and Authorities, Doc. 544 at 24; 17-20.

G. The Magistrate's Order Clearly Erroneous and/or Contrary to Law to the Extent That it Dismisses Any Party that May Own Water Rights.

The Magistrate's Order provides:

> IT IS FURTHER ORDERED that Mineral County's requests to dismiss parties as set forth in its Service Report (#479) and Exhibits 1 and 2 of Mineral County's Reply (#496) are hereby granted.

Magistrate's Order at 2. Mineral County requested and the Court granted the dismissal of the parties listed at page 4 of the Service Report and in Exhibit 2 of the Service Reply. The District does not object to the dismissal of these parties with the exception of Michael Sherlock. The District's records indicate that Michael Sherlock continues to hold water rights pursuant to a deed recorded as Document No. 128422 on October 27, 1989 with the Lyon County Recorder. The District's review in connection with the preparation and filing of the District Response inadvertently overlooked Michael Sherlock as a water rights holder.

The Magistrate's Order is clearly erroneous and/or contrary to law to the extent that it purports to dismiss Michael Sherlock.

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VI. CONCLUSION.

The District respectfully requests that the Court modify the Magistrate's Order consistent with these objections, and that the Court proceed with this matter as set forth in the District's Successor-In-Interest Points and Authorities. *See* Doc. 544 at 26-29.

DATED this 14th day of October, 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 October 14, 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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I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00128-ECR-LRL to the following by U.S. Mail, postage prepaid, this 14th day of October, 2011:

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