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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	)))))))))))))))	IN EQUITY NO. C-125-ECR-WGC Subproceedings: C-125-B 3:73-CV-00127-ECR- WGC **RESPONSE IN OPPOSITION TO THE WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO PROPOSED ORDER CONCERNING SERVICE CUT-OFF DATE**

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe"), Plaintiff and Plaintiff-Intervenor in Subproceeding C-125-B ("Plaintiffs"), hereby respond to the *Walker River Irrigation District's Objections to Rulings of Magistrate Judge with Respect to Proposed Order Concerning Service Cut-Off Date* and *Walker River Irrigation District's Points and Authorities in Support of Objections to Rulings of Magistrate Judge with Respect to Proposed Order Concerning Service Cut-Off Date* (#1663 ["Obj."], #1664

["WRID"]).[1] WRID objects to the *Order Concerning Service Cut-Off Date* ("Cut-Off Order") issued by Magistrate Judge Leavitt,[2] which provides that: "The service cut-off date for Phase I of the Tribal Claims is December 31, 2009, and includes water rights in existence as of that date." (Sept. 19, 2011, #1656).

Plaintiffs are attempting to complete service on several thousand defendants in this subproceeding and address future case management. One issue discussed with Magistrate Judge McQuaid and, following his recusal, with Magistrate Judge Leavitt, was the need to identify a service cut-off date so litigation can proceed. The Case Management Order does not allow the list of Threshold Issues for Phase I of the litigation to be resolved and addressed until "all appropriate parties" are joined. *Case Management Order* at 8 (Apr. 18, 2000, #108)("CMO"). Plaintiffs proposed that C-125-B address water rights in existence as of December 31, 2009. *Submission of Proposed Order Concerning Service Cut-Off Date* (Nov. 30, 2010, #1613). WRID objected, but agreed to "us[e] December 31, 2009 as the date for considering established

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[1] Unless otherwise stated, all docket references are to Subproceeding C-125-B. Docket numbers prefaced "C-#" reference Subproceeding C-125-C.

[2] Only WRID objected to the Cut-Off Order. Circle Bar N Ranch LLC, and Mica Farms LLC joined WRID's Initial Objections and the instant Objections. (##1623, 1665). The U.S. Board of Water Commissioners ("Board") also joined WRID's Initial Objections. (#1622). The Court created the Board in 1937 to distribute the waters of Walker River pursuant to the C-125 Decree. The Board and its attorney are "bound by the Code of Judicial Conduct, and [are] obligated to conduct [themselves] in an impartial, unbiased manner." *Order* at 4 (C-125, Feb. 13, 1990, #162) (it is inappropriate for the same attorney to continue representing both WRID and the Board). The Board must avoid the appearance of impropriety or partiality. *Id.* at 5. While it is proper for the Board's attorney to review and comment on service lists, formally taking a side over the process to join successors-in-interest and establish a cut-off date for service violates the Board's duty to administer justice impartially. At a minimum, the Board's action creates an appearance of impropriety and/or partiality. Plaintiffs have appreciated the Board attorney's assistance to identify service issues to be clarified or corrected, but the Board's decision to join WRID's Objections is clearly inappropriate.

water rights whose owners should be served for purposes of Phase I of the Tribal Claims."[3] Plaintiffs revised their proposed Order to clarify that the service cut-off date of December 31, 2009 was for the litigation of Phase I to resolve the Threshold Issues regarding the Tribal Claims. *Reply of the United States of America and the Walker River Paiute Tribe: Proposed Order Concerning Service Cut-Off Date* (Feb. 23, 2011, #1639).

Magistrate Judge Leavitt issued the Cut-Off Order on September 19, 2011. (#1656). WRID speculates that the Magistrate Judge's rationale for the Cut-Off Order is based solely on Plaintiffs' submissions, yet WRID's written submission was also before the Magistrate Judge.[4] WRID's Initial Objections at 4, 25-30. By issuing the Cut-Off Order, Magistrate Judge Leavitt implicitly considered and rejected WRID's arguments.

WRID objects to the Cut-Off Order, saying now that it will accept a service cut-off date of December 31, 2009, only to identify the parties to be involved in the identification of Threshold Issues. WRID at 4. Otherwise, WRID would eliminate a service cut-off date altogether and require Plaintiffs at various points in the litigation, including litigation of the Threshold Issues, to investigate, identify and serve any new water rights, as well as the successors-in-interest to already served defendants.[5] *Id.*, at 3. WRID provides no legal authority

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[3] *Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date* at 26 (Jan. 7, 2011, #1621)("Initial WRID Objections").

[4] Plaintiffs' failure to address any point in WRID's objections does not indicate their agreement.

[5] WRID objects to the Service Cut-Off Order to the extent it "directly or indirectly" rules "there is no obligation to join or substitute successors-in-interest to persons and entities served with process in this matter on or before December 31, 2009." Obj. at 2. (#1663). The service cut-off date is unrelated to the treatment of successors-in-interest that result from *inter vivos* transfers or the death of a served defendant. Plaintiffs address WRID's objections regarding successors-in-interest by a separate filing. *Response in Opposition to the Walker River Irrigation District's 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*

for this proposal, which it asks the Court to substitute for the Cut-Off Order. There are now over 3,000 defendants in this subproceeding. In a case of this size, such requirements would periodically halt litigation for investigations, service, and related motions to join or substitute that are unnecessary as a matter of law and would significantly increase costs and delays.

WRID fails to show that the Cut-Off Order is clearly erroneous or contrary to law. According to WRID, service should simply continue, because "[a]t this point, one cannot know for sure who might need to be joined, and more importantly, there is no reason to make that decision now." *Id.* at 4. WRID's arguments focus primarily on unknown, hypothetical persons and entities that it does not represent, with theoretical water rights that may be relevant to this case but may never come into existence. WRID's arguments are unfounded and appear calculated to continue to delay this proceeding.

I. BACKGROUND:

Subproceeding C-125-B is part of litigation over water rights in the Walker River system that commenced in 1924 when upstream users prevented water from reaching the Walker River Paiute Reservation. In 1936, the Court entered a judicial Decree, which it amended in 1940 following the 9th Circuit's partial reversal of the trial court. Decree, (Apr. 15, 1936), modified, Order for Entry of Amended Final Decree to Conform to Writ of Mandate (Apr. 24, 1940)("Decree"). The Court retained jurisdiction "for the purpose of changing the duty of water

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(filed in C-125-B and C-125-C on Dec. 2, 2011)("Opposition to WRID Objections to Successors-in-Interest Order"). Successor-in-interest issues arise after a defendant, who has been served and brought under the Court's jurisdiction on the basis of a claim to a water right, transfers that interest. This issue is governed by Rule 25, Fed. R. Civ. P., which, in conjunction with applicable law, makes clear that successors-in-interest are generally bound to a judgment whether or not they have been substituted into the proceeding. There is no legal basis to tie the issue of successors-in-interest to the Cut-Off Order because the Cut-Off Order does not address that issue.

or for correcting or modifying this decree; also for regulatory purposes . . . ." Decree at 72-73, XIV.

Subproceeding C-125-B addresses claims for water rights for lands restored to the Reservation subsequent to the Decree, storage in Weber Reservoir, and groundwater under and adjacent to the Reservation ("Tribal Claims"). C-125-B also includes claims for surface and groundwater for other tribal and federal interests not addressed in the Decree ("Federal Claims"). The Court issued a Case Management Order on April 18, 2000, in which it acknowledged the potential complexity of trying the claims and bifurcated the Tribal Claims from the other Federal Claims. CMO at 2. The CMO divides litigation of the Tribal Claims into Phase I to identify and address threshold issues and Phase II to "involve completion and determination on the merits of all matters" relating to the Tribal Claims, and provides that the Phase I list of Threshold Issues "will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *Id.* at 9-11, ¶¶11, 12.

The CMO requires the United States and Tribe to effect personal service pursuant to Rule 4, Fed. R. Civ. P., on nine categories of persons and entities, including the successors-in-interest to all water rights holders in the 1936 Decree and holders of permits or certificates to pump groundwater in specific sub-basins in the Walker River Basin. *Id.* at 5-6, ¶3. The United States has been substantially finished with these efforts since 2009 and desires to bring service to completion so that case management issues may be addressed and Phase I may commence.

The issue of a service cut-off date was before the Court no later than July 2008, when the parties appeared before Magistrate Judge McQuaid to address a variety of pretrial issues. The United States reported that it was working to complete service by the end of December 2008, although activities such as personal service would continue into 2009, and publication was

anticipated to occur in 2009, as well.[6] The United States noted that Lyon County records used to identify new wells were about seven months out of date, which delayed identification of new wells and any related service. Tr. at 6-7, Status Conference (July 25, 2008).[7] In response, Magistrate Judge McQuaid noted his concern that service not continue indefinitely:

> At some point in time it seems to me we're going to have to say, we're going to proceed with the people that we have served and the stragglers we'll somehow have to deal with.
>
> But I mean this could well go on indefinitely if we don't set some sort of a cutoff at some point.

Id. at 8. The Court directed the United States to add the service cut-off date to the agenda for the next status conference. *Id.* at 9. The Court's minutes specifically "advise[d] the parties that, at some point in time, a cut-off will have to be set regarding service." *Minutes of the Court*, Joint Status Conference in C-125-B & C-125-C (July 25, 2008, #1381). In December 2008, several months before he disqualified himself from C-125 and its subproceedings, Magistrate Judge McQuaid recognized that service must be completed before the threshold issues can be decided:

> The Court advises the parties that, according to its interpretation of the case management order, the threshold issues cannot be decided until service is completed and all parties are joined. When a date has been determined when service will be completed, the Court will hear oral argument in addition to the briefing already done regarding the threshold issues.

Minutes of Court, at 2, Status Conference in C-125-B & C-125-C (Dec. 3, 2008, # 1468).

Magistrate Judge McQuaid disqualified himself in March 2009 and the case was reassigned to Magistrate Judge Leavitt. (Mar. 12, 2009, #1510; Mar. 13, 2009 #1511).[8] In

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[6] *See also, e.g., Minutes of Proceedings* (Aug. 20, 2007, #1221)(ordering that the target date for the completion of service in C-125-B is Dec. 31, 2008.).

[7] A copy of the relevant portions of this transcript is attached as Exhibit A.

[8] Magistrate Judge Leavitt's chambers indicated that he would meet with the parties following review of the extensive files in C-125 and its subproceedings. Tr. at 6-9, Annual Budget Hearing in C-125 (June 1, 2010). In the absence of scheduled proceedings, the United States began to submit certain requests, which the Magistrate addressed. *E.g.,Request for Approval of*

response to a motion by Plaintiffs and Mineral County, (July 30, 2010, #1591, #C-508), Magistrate Judge Leavitt conducted a Status Conference on October 19, 2010. Plaintiffs filed their initial proposed Cut-Off Order thereafter.

II. STANDARD OF REVIEW:

Although the parties disagree on the applicable standard of review of the Cut-Off Order, WRID has the burden to establish the basis for its objections. The standard of review of a magistrate judge's order depends on the nature of the order and the magistrate judge's authority:

> [N]ondispositive pretrial matters are governed by § 636(b)(1)(A) and are subject to the clearly erroneous or contrary to law standard of review, while dispositive matters are governed by § 636(b)(1)(B) and are subject to de novo review. *Gomez v. United States*, 490 U.S. 858 . . . (1989); *see also* Fed. R. Civ. P. 72(a).

Montgomery v. Etreppid Technologies, LLC, 2010 WL 1416771, at *12 (D. Nev., Apr. 5, 2010). *See Grimes v. City and County of San Francisco*, 951 F.2d 236, 240 (9th Cir. 1991).[9]

In reviewing nondispositive pretrial matters, "[t]he district court shall defer to the magistrate's orders unless they are clearly erroneous or contrary to law." *Id.*, 951 F.2d at 240, *citing* Fed. R. Civ. P. 72(a). *Grimes* states that "[p]retrial orders of a magistrate . . . are reviewable under the 'clearly erroneous and contrary to law' standard; they are *not* subject to de novo determination . . . ." *Id.* at 241 (emphasis added).[10] A finding of fact is "clearly erroneous" only if the reviewing court is left with "a definite and firm conviction that a mistake has been committed." *Id.*, quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "A

Fourteenth Report of the United States of America Concerning Status of Service on Certain persons and Entities (Feb. 24, 2010, #1571). Thereafter, the Plaintiffs and Mineral County moved for a Status Conference. (July 30, 2010, #1591, #C-508).

[9] The Local Rules for the District of Nevada make the same distinction. *Compare* LR IB 3-1(a) ("clearly erroneous or contrary to law" standard for pretrial matters) *with* LR IB 3-2(b)("*de novo*" standard for dispositive matters).

[10] *Gomez v. United States*, 490 U.S. 858 (1989); *Trustees of No. Nev. Oper. Eng. v. Mach 4 Construction, LLC*, 2009 WL 1940087 (D. Nev., July 7, 2009); *Montgomery v. Etreppid Technologies, LLC*, 2010 WL 1416771 (D. Nev., Apr. 5, 2010); Fed. R. Civ. P. 72(a).

decision is "contrary to law" if it applies an incorrect legal standard or fails to consider an element of the applicable standard." *E.g., Doubt v. NCR Corp.*, 2011 WL 3740853, at *2 (N.D. Cal., Aug. 25, 2011); *Na Pali Haweo Community Ass'n v. Grande*, 252 F.R.D. 672, 674 (D. HI. 2008).

> "[A party] may not simply address the same arguments the magistrate judge considered and expect the Court to treat the filing seriously. Instead, [he] ought to explain to the reviewing Court, citing proper authority, why the magistrate judge's application of law to facts is legally unsound."

Mach 4, 2009 WL 1940087, at *1 (D. Nev., July 7, 2009)(addressing objections filed as possible delaying tactic and quoting *Colon v. Wyeth Pharmaceutical*, 611 F. Supp. 2d 110, 116 (D.P.R. 2009).

If the district judge finds that the magistrate judge's ruling is clearly erroneous or contrary to law, the judge may affirm, reverse, or modify the ruling, in whole or in part, and may remand the same to the magistrate judge with instructions. LR IB 3-1(b). In particular, as to orders issued regarding nondispositive matters, the reviewing court "may not simply substitute its judgment for that of the deciding court." *Grimes*, 951 F.2d at 241.[11]

For dispositive matters, a magistrate judge usually issues proposed findings and recommendations and the Court conducts a *de novo* review. 28 U.S.C. § 636(b)(1)(B). However, if the district court disagrees with the magistrate judge's decision to issue an "order," it may treat it as a proposed findings and recommendations and conduct its review under the more stringent standard. *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004).

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[11] Two cases cited by WRID are inapposite. *See* WRID at 7. *Laxalt* did not involve the contrary to law standard and made no such assertion regarding *de novo* review. *See Laxalt v. McClatchy*, 602 F. Supp. 214 (D. Nev. 1985). *Beverly Glen* appears to have miscited *Grimes* for the proposition that *de novo* review is appropriate under the contrary to law standard. *See 26 Beverly Glen, LLC. v. Wykoff Newberg Corp.*, 2007 WL 1560330 (D. Nev. 2007). *Beverly* is plainly mistaken and contradicted by controlling precedent.

When the district judge reviews a dispositive matter, he "shall" make a *de novo* interpretation of the portions of the finding or recommendation to which objections have been made, and may accept, reject or modify the magistrate judge's findings or recommendations in whole or in part, and may receive further evidence or remand the same to the magistrate judge with instructions. LR IB 3-2(b).

III. ARGUMENT:

Service cut-off issues address whether additional categories of water rights claimants or new claims to water within one of the nine existing CMO categories should be included in the litigation. If so, these new interests would have to be identified and served, thereby bringing them under the Court's jurisdiction. The Service Cut-Off Order simply sets December 31, 2009, as the limit for claims in the categories set forth in the CMO for Phase I of the Tribal Claims.

It should be apparent from its objections that WRID's goal is to delay the litigation by continuing to raise hypothetical and speculative concerns and by placing additional, costly and ongoing procedural burdens on Plaintiffs that are neither legally supported nor practical. WRID fails to meet its burden; the Cut-Off Order is a non-dispositive Order fully within the authority of the Magistrate Judge and is neither clearly erroneous nor contrary to law.

A. WRID Lacks Standing or Authority to Make Arguments On Behalf of Unknown Persons and Entities That It Does Not Represent.

WRID's objections raise a series of speculative impacts on unknown, hypothetical persons and entities that may obtain relevant water rights at some future time. WRID does not represent any such persons or entities and lacks standing and authority to object on their behalf. Unlike *Rivera-Guerro*, which WRID cites repeatedly, WRID's objections do not address an actual case or controversy before the Court involving real persons or entities. WRID does not

represent such unknown and hypothetical persons or entities, which may not ever exist, and cannot argue on their behalf regarding potential disputes that are not ripe.[12]

To the extent these unknown hypothetical persons or entities ever obtain water rights at some future time that the Court determines are relevant to this subproceeding, the Federal Rules of Civil Procedure provide a way for them to make their voices heard. If they want to join, there are processes under the Federal Rules for them to follow. If they are not parties, they are not bound by the outcome of this subproceeding. Either way, these proceedings can move forward without joining or accounting for such persons and entities. If the Court were to follow WRID's view, there would always be a hypothetical person or entity that might acquire an interest that somehow must be accounted for in this subproceeding and service would go on *ad infinitum*. As a practical matter, the Magistrate Judge would not be able to determine the Threshold Issues, and the Court could not begin, let alone complete, litigation.

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[12] Among other things, there are no identifiable parties to be served, no injury in fact that is both concrete and particularized, as well as actual or imminent, which fails to meet at least one hallmark of Article III standing. In addition, WRID has asserted rights that belong to third parties, which fails to meet one judicially-created requirement of "prudential standing." Furthermore, WRID's assertion of theoretical claims on behalf of hypothetical persons and entities that are not its members and it cannot even identify, fails to meet at least two exceptions to the general rule against third party standing: 1. WRID addresses parties with which it does not have a close relationship; and 2. WRID's actions are not justified pursuant to "associational standing. " *E.g., League of United Latin American Citizens, New Mexico v.* Ferrera, 792 F. Supp. 2d 1222, 1240-41 (D.N.M., 2011); *Begay v. Public Service Co. of New* Mexico, 710 F. Supp. 2d 1161, 1185-88 (D.N.M. 2010); *Kessler Inst. For Rehabilitation, Inc. v. Mayor and Council of Borough of Essex Fells,* 876 F. Supp. 641, 656 (D.N.J. 1995).

Ironically, WRID's opposition in 2001 to certification of defendant classes illustrates its reluctance to represent such interests, even if they existed and could be identified. *Walker River Irrigation District's Points and Authorities in Opposition to Joint Motion of the United States of America and the Walker River Paiute Tribe for Certification of Defendant Classes* at 15-16, 18 (June 18, 2001, #151).

B. WRID Fails to Show That the Service Cut-Off Order is Clearly Erroneous or Contrary to Law.

1. The Service Cut-Off Order Addresses a Non-Dispositive Pre-Trial Matter Within the Magistrate Judge's Authority.

WRID misreads applicable law when it contends the Cut-Off Order addresses a dispositive issue that the Magistrate Judge is not authorized to determine. The Service Cut-Off Order is a non-dispositive pre-trial matter within the Magistrate Judge's authorities under 28 U.S.C. § 636(b)(1)(A) and 28 U.S.C. § 636(b)(3), as well as the CMO.

Magistrate Judges are authorized pursuant to 28 U.S.C. § 636(b)(1)(A) to determine any pre-trial matter, except for eight types of motions identified in this provision. *Rivera-Guerro*, 377 F.3d at 1067-68. Case law also holds that magistrate judges may not determine motions that are analogous to the eight motions specified in 28 U.S.C. § 636(b)(1)(A). *Id.* The issue of a service cut-off is not one of the eight specifically excepted motions nor is it analogous to any of them. In addition, whether a motion is within a magistrate judge's authority to determine depends on whether its effect is "dispositive or non-dispositive of a claim or defense of a party." *Id.*, at 1068, quoting *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747 (9th Cir. 1990).

WRID argues that the Cut-Off Order is dispositive because it "appears to conclusively determine the disputed question of whom [sic] is a proper party to this action." WRID at 8. The Cut-Off Order is not dispositive of a claim or defense of a party. First, no *party* to this case is affected by the Cut-Off Order for the obvious reason that each party in C-125-B (other than Plaintiffs) is a person or entity within the nine categories addressed by the CMO with water rights in existence of December 31, 2009, that has already been served. Thus, the only persons

or entities affected by the Cut-Off Order are those persons or entities that are not parties to C-125-B, whose water rights came, or will come, into existence after that date.

Rivera-Guerro, which WRID cites repeatedly, is inapposite. There, the 9th Circuit determined a trial court erred when it did not review *de novo* a magistrate judge's order authorizing involuntary medication of a criminal defendant to make him competent for trial; this determination impacted Rivera's defense that he was not competent to stand trial and was, therefore, dispositive of a claim or defense of a party. *Rivera-Guerro* at 1069. Here, WRID cannot identify even *existing* persons or entities, much less parties, with identifiable claims or defenses that are affected by the Cut-Off Order.[13] Instead, WRID speculates about hypothetical persons or entities that are not parties to the case with theoretical water rights that may be established in the future. It argues that these persons or entities *might* have claims or defenses that will be finally determined because they have not been identified and served.[14] The Cut-Off Order cannot possibly be dispositive of claims or defenses that are not yet before the Court.

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[13] To the extent that existing parties acquire additional rights that fall within the categories of water rights to be served under the CMO, Magistrate Judge Leavitt's *Order Approving Revised Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* (Aug. 24, 2011, #1649), states that "[i]f a defendant who has been served in a subproceeding subsequently acquires additional water rights that are subject to that subproceeding, the prior service on the defendant shall be effective as to all water rights held by that defendant, including any rights acquired subsequent to service." *Id.* at 5, ¶6. WRID has not objected to this provision. *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*, at 4-5 (Sept. 12, 2011, #1653).

[14] WRID argues that these unknown hypothetical persons or entities with theoretical water rights are Rule 19 parties. This Court's Order addressing Rule 19 parties required joinder only of "*existing* claimants to water of the Walker River and its tributaries," Order at 5-7 (Oct. 30, 1992, #15)(emphasis added). Furthermore, it would be both speculative and illogical for the Court to determine that hypothetical persons or entities with theoretical water rights are Rule 19 parties.

Second, assuming that unknown, hypothetical persons or entities establish rights after the cut-off date, the Cut-Off Order does not determine that persons or entities holding such rights need never be joined in this action. The CMO authorizes the Magistrate Judge to "consider and decide all issues which may arise pertaining to service of process," including completion of service and the modification of the categories of persons and entities to be served. CMO at 7-9, ¶¶6-7. Thus, if appropriate, the Magistrate Judge can amend the CMO to include new categories.[15] In appropriate circumstances and subject to applicable case law and requirements, additional new parties might be joined as Rule 19 necessary parties or be allowed to intervene under Rule 24. Nothing in the Cut-Off Order prevents this from occurring. Moreover, if any persons or entities with identifiable water rights that come into existence after December 31, 2009 (who are not already defendants or successors-in-interest to previously served defendants), are not brought into this case, they are not bound, which means there has been no dispositive determination regarding any valid claim or defense that they might have.

Magistrate Judges may also be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). The principle of "constitutional avoidance" requires that a magistrate's authority not extend to issues that raise "a substantial constitutional question" or "questions of clear constitutional importance." *E.g.*, *Rivera-Guerro* at 1069-70. *Rivera-Guerro*, for example, raised a well-established "substantial constitutional question" and question of "clear constitutional importance" because the Magistrate

[15] To date, no one has contended that additional categories of persons and entities should be served in connection with any aspect of the Tribal Claims. One issue that remains pending before the Court is whether certain persons and entities in California belong in the categories of persons and entities to be served. That issue was discussed with the Magistrate Judge and is the subject of the pending 16th Service Report. *Sixteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities and Request for Guidance* (Oct. 14, 2010, #1609). Once this issue is addressed, the United States would then be able to prepare and file a 17th Service Report that would include other similar potential defendants.

Judge made a final determination to require involuntary medical treatment of a criminal defendant who was before the court. *Id.*, at 1070.

WRID argues that the Cut-Off Order raises matters of constitutional importance that must be determined by the trial court because unknown hypothetical persons and entities with theoretical water rights (that it does not represent) have been or will be deprived of due process. WRID at 8. This argument elevates theory over logic. Concerns about the due process rights of unknown and theoretical persons or entities cannot possibly present a "substantial constitutional question" or question of "clear constitutional importance." Moreover, in appropriate circumstances, the Magistrate Judge can modify the categories of persons and entities to be included in this action to address **real** instances where persons and entities should be added to the case. *See* CMO at 3-4.

WRID also misreads the Cut-Off Order when it argues that the CMO did not specifically authorize the Magistrate Judge to determine two somewhat related questions: "who within a category of water right holders required to be joined may nonetheless be excluded;" and "who need not be joined with respect to proceedings to decide the threshold issues on the merits or which may follow the decision on the merits of the threshold issues." WRID at 9. Instead of looking to what the CMO says and what actions are logically within its parameters, WRID looks to what the CMO does not say. Under WRID's view, a case management order must anticipate every potential situation a magistrate judge might face in handling pretrial matters and itemize each potential step the magistrate judge could take in response. While it is true that the CMO does not itemize the specific issues that WRID describes, such specificity is not required. To do so would require encyclopedic case management orders. Instead, one can simply look to the language of the CMO to determine what actions are logically within its parameters.

The CMO supports the Magistrate Judge's authority to issue the Cut-Off Order. Among other things, the CMO authorizes the Magistrate Judge to "consider and decide all issues . . . pertaining to service of process," including scheduling completion of service of process, adjusting the categories of persons and entities to be served, addressing publication, and determining whether specific service efforts, and service efforts as a whole are adequate and complete. CMO at 3, 6-8, ¶¶5-9. Establishing a service cut-off date so that litigation may go forward is well within this broad authority. Certainly, views expressed by Magistrate Judges McQuaid and Leavitt on this issue clearly suggest that each believed he was authorized to address the issue and that it was also necessary to do so as a matter of common sense and practicality to complete service, organize the case for efficient management, and begin litigation.

In addition, the CMO states that the list of Threshold Issues for Phase I "will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *Id.* at 9, ¶11. Under WRID's approach, this could never occur because the end point could never be reached. Both Magistrate Judges recognized the need for an end point for service, if only to allow the Court to determine the Threshold Issues and begin Phase I. To the extent that service of persons and entities with water rights existing as of the cut-off date might continue past the cut-off date because rights were created near the cut-off date, Magistrate Judge McQuaid recognized there would have to be a way to deal with "stragglers," but that service could not go on "indefinitely." Tr. at 8, Status Conference (July 25, 2008). As a practical matter, service cannot continue endlessly and disputes about "stragglers" should not derail or sidetrack litigation.[16] Otherwise, a very small tail would wag a very large dog.

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[16] Over the years, the Magistrate Judges have determined whether service on specific persons and entities has been accomplished. *E.g., Thirteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities* (Mar. 26, 2008, #1316); *Minutes*

2. The Cut-Off Order is Neither Clearly Erroneous Nor Contrary to Law.

WRID argues that the Cut-Off Order is clearly erroneous because it is based on a factual determination that only domestic rights might be created after December 21, 2009, and that it is contrary to law because the unknown hypothetical persons and entities that might acquire a water right potentially subject to this case might not be bound by any judgment in this case. It then argues that the Cut-Off Order addressing Phase I should not be entered or is not needed, and instead suggests a broad proposal to require continued investigation and service throughout these proceedings. WRID fails to show that the Cut-Off Order is clearly erroneous or contrary to law.

WRID argues that the Cut-Off Order is based on a factual determination that only new domestic water rights might be created after December 31, 2009, and that this determination is clearly erroneous. WRID at 10. First, WRID cannot point to a specific finding of fact that it claims is clearly erroneous. It simply postulates that the Magistrate Judge had to have made such a finding. This is not an appropriate basis for a reviewing court to conclude with "a definite and firm conviction that a mistake has been committed." Second, WRID offers a variety of factual allegations to counter the factual determination it only *supposes* the Magistrate Judge made. *Id.* WRID recognizes the unlikelihood of new surface water rights in Nevada, but claims it is possible that new rights might be established in the Walker River, various groundwater basins, and in a variety of ways in California. *Id.* However, WRID identified most of these potential

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of the Court, (July 25, 2008, #1381)(reviewing and determining to enter order approving 13th Report); *Order Concerning Thirteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities* (July 28, 2008, #1382)(collectively outlining service efforts, identifying persons and entities served, and requesting and determining that service be deemed complete). This effort includes a review whether a person or entity is within any of CMO's nine categories. Clearly, identifying an end date to service is an aspect of this determination; otherwise, service can never be completed. Moreover, a service cut-off date is a relevant precursor to publication. If the United States must keep serving, it may never be able to do publication, even though the CMO can be read to address publication on unknown future users. CMO at 6, ¶5.

sources of new water rights in its submission to the Magistrate Judge, so these factual allegations were before the Magistrate Judge when he issued the Cut-Off Order. Initial WRID Objections at 26. In addition, some of the potential water rights that WRID points to, such as "overlying" rights in California, are not within the categories of persons and entities to be served pursuant to the CMO.[17]

WRID contends the Cut-Off Order is contrary to law because, in WRID's view, it decides that owners of water rights established after December 31, 2009, need never be a party to this action. WRID at 10-12. As a corollary, WRID disagrees with Plaintiffs that even though such unjoined "parties" will not be bound by the outcome of the litigation, their water rights will be. *Id*. While WRID agrees with Plaintiffs that unknown and hypothetical persons and entities who might acquire future water rights are not bound by these proceedings, it disagrees with Plaintiffs' observation that failure to join such persons or entities does not obviate such rules as the priority system. WRID makes two points in support of this flawed argument, neither of which establishes that the Cut-Off Order is contrary to law.

First, WRID argues that because this action is not currently intended to adjudicate all surface and groundwater uses in the Walker River Basin, the Court does not have jurisdiction over all such users and cannot bind them. *Id.* at 11-12. As set forth in more detail in the Response in Opposition to WRID's Objections to Successor-in-Interest Order, to the extent persons and entities were served in this case, they and their successors-in-interest are bound by the actions, decisions and judgment(s) in this case. The groundwater users that the Court directed to be served are under the Court's jurisdiction based on being served; the Court has not

[17] Neither California nor Mono County objected to the Cut-Off Order. Nor did Nevada or Lyon County. If WRID wishes to add this category to the CMO, it can file a motion to do so.

yet determined whether to exercise its jurisdiction over groundwater.[18] As stated above, in appropriate circumstances, the CMO allows the Magistrate Judge to add additional categories of persons and entities to be served, to join new parties as Rule 19 necessary parties or allow others to intervene. Nothing in the Cut-Off Order prevents this from occurring. While the CMO preserves the possibility that service on additional categories of persons and entities might be necessary, particularly in later phases that address the Federal Claims, no one, including WRID, has made a showing of such a need. If it is not appropriate to join additional parties, then the failure to bind them cannot be an issue.

Second, WRID argues that "overlying" underground water rights in California are regulated by reasonable beneficial use, not priority, so any assertion that:

> persons in California who exercise overlying right to groundwater after December 31, 2009 will be subject to some sort of regulation by priority vis-a-vis the joined parties to this action is both contrary to law and fact.

Id. at 12. WRID only speculates that unknown, hypothetical persons in California, whom it does not represent, might exercise "overlying" groundwater rights after December 31, 2009, and that somehow they are among the persons and entities to be served. The CMO requires that groundwater users in California be served only if they are using groundwater for irrigation or are municipal providers. CMO at 5, ¶3(e), (h). To date, no one has contended that service efforts have missed any of the persons and entities enumerated in the CMO.

WRID argues that not all potential future water rights holders might be obligated to follow the priority system because of the nature of their water right. While that may be so for some potential speculative rights, the basic point is that if hypothetical future water rights holders are not bound to these proceedings, they would nevertheless be bound by any other

[18] The bulk of the over $1.5 million the United States has spent to date on service has been used to address the large number of groundwater users in the basin.

applicable water law. That might not change if they were a party to this case. Moreover, if there are administration issues, the appropriate court of competent jurisdiction is available, as necessary. Once again, if and when any such rights come into existence, the Federal Rules of Civil Procedure provide a means, if appropriate, for their inclusion in C-125 and its sub-proceedings.[19]

Finally, WRID insists that there is "simply no sound reason or need for the Court to determine now that persons who own water rights which come into existence after December 31, 2009 need not be 'included in this action' as the Magistrate apparently concluded." WRID at 12.[20] There is no question that the Cut-Off Order is based on "sound reason," as well as logic, common sense, practicality and the recognition that service must end at some point so that the case can move forward. Other factors that demonstrate the "sound reason" for the Cut-Off Order are the need to consider delay and unnecessary additional costs for the United States, which has spent over $1.5 million on service; it is never appropriate to cause an opponent to spend money needlessly as a litigation tactic, and it is particularly so in today's financial climate.

On the other hand, what is not grounded in "sound reason" is WRID's endless speculation about unknown hypothetical persons and entities with unknown future water rights that may never come into existence. If the Court approaches service as framed by WRID, service will never be completed.

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[19] Two other points appear plain from this speculation. First, that WRID wants the Court to broaden the categories of persons and entities to be served so that the United States can be directed to reopen and continue investigating water rights and making personal service. To date, no one has contended that additional categories of persons and entities should be served in connection with any aspect of the Tribal Claims. Second, that WRID appears to base many of its arguments on the proposed Cut-Off Order that Plaintiffs filed in November 2010, and not the actual order that the Magistrate Judge issued in February 2011.

[20] WRID misreads the Cut-Off Order.

IV. CONCLUSION:

The record demonstrates that WRID has repeatedly sought to delay these proceedings by seeking additional procedural requirements of the Plaintiffs while presenting itself as simply being concerned about procedure and due process. This should be abundantly clear at this juncture as WRID's current objections are based in speculation and potential claims of hypothetical persons and entities that it does not represent. Based on WRID's reasoning, this case cannot move forward -- the Court cannot finalize the list of Threshold Issues until all appropriate parties are joined, Plaintiffs cannot proceed to publication, and litigation cannot commence, even though, according to WRID, it cannot possibly know who needs to be joined. Clearly, WRID's intention is to prevent this case from moving forward. WRID has failed to show that the Cut-Off Order is clearly erroneous or contrary to law.

Dated: December 2, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2011, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO THE WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO PROPOSED ORDER CONCERNING SERVICE CUT-OFF DATE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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