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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-RCJ SUBFILE NO. C-125-B 3:73-CV-00127-RCJ-WGC **SUBMISSION OF AND JOINT MEMORANDUM CONCERNING PROPOSED SUPERSEDING ORDER REGARDING SERVICE AND FILING IN SUB-PROCEEDING C-125-B AND BY ALL PARTIES**
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	

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I. INTRODUCTION.

On June 3, 2013, the Court entered the Order Regarding Service and Filing in Subproceeding C-125-B On and By Unrepresented Parties (the "Unrepresented Party Order"). Dkt. 1874. After the entry of the Unrepresented Party Order, the Court directed that it be modified. *See* July 25, 2013 Transcript of Status Conference at p. 74, ln. 13 - p. 91, ln. 15; November 4, 2013 Transcript of Status Conference at p. 33, ln. 2 - p. 51, ln. 15. The Court provided direction on how it should be modified at both the July 25, 2013 and November 4, 2013 Status Conferences. As a result of the direction provided by the Court, the parties, working with the Magistrate Judge, have developed a proposed order.

After consultation with other parties, the United States and the Walker River Irrigation District submit the Proposed Superseding Order Regarding Service and Filing in Subproceeding C-125-B On and By All Parties (the "Proposed Superseding Order") (Attachment A hereto) and this Joint Memorandum pursuant to the direction of the Magistrate Judge as set forth in the Minutes of the Court dated July 2, 2014. Dkt. 2032. In those Minutes, the Magistrate Judge directed the parties to submit a final version of the Proposed Superseding Order and to outline how the Proposed Superseding Order changes the provisions of the Unrepresented Party Order. For purposes of the memorandum, the original Order is referred to as the "Unrepresented Party Order," and the Proposed Order is referred to as the "Proposed Superseding Order." The differences between the two are outlined below, and in some instances, the reasons for the differences are explained. For the most part, this Memorandum addresses topics covered by the Orders in the sequence in which they are addressed in the Proposed Superseding Order.[1]

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[1] Citations to the Proposed Superseding Order are to "PSO" at a particular page or paragraph.

II. PARTIES AFFECTED BY THE ORDERS.

The Unrepresented Party Order is directed to and only affected parties who had previously filed a Notice of Appearance and Intent to Participate, but who were not represented by counsel. Dkt. 1874 at 1. It was not directed to, and was not served on, parties who had been served with process, but who made no appearance in the case at all because they had not filed a Notice of Appearance and Intent to Participate. In the Proposed Superseding Order, such parties are referred to as a "Non-Appearing Party." PSO at 4. At the November 4, 2013 status conference, the Court directed that Non-Appearing Parties be given another opportunity to appear and elect a method of service. November 4, 2013 Transcript at p. 38, ln. 10 - p. 39, ln. 2. The Proposed Superseding Order is directed to and will be served upon Represented Parties, Unrepresented Parties, and Non-Appearing Parties. PSO at paras. 3-5.

III. PURPOSE OF ORDERS.

The purpose of the Unrepresented Party Order is limited to identifying and implementing alternative methods to serve documents on Unrepresented Parties, and to allow Unrepresented Parties to file documents. Dkt. 1874 at 1. The Proposed Superseding Order continues to provide a manner for Unrepresented Parties to file documents, and it identifies and implements alternative methods of service for all parties to serve and be served with papers filed in this matter. PSO at p. 3.

IV. ESTABLISHMENT AND MAINTENANCE OF A PUBLIC WEBSITE.

The Unrepresented Party Order directs the Clerk to establish and maintain a public website on which the Clerk would post Orders and other filings in this matter, and provided for access to the website. Dkt. 1874 at 3-4. The Proposed Superseding Order does not change the provisions for establishment and maintenance of a public website and access to it. PSO at paras. 1-2.

V. SERVICE OF THE ORDERS.

The Unrepresented Party Order was served by the Clerk of the Court by mail on Unrepresented Parties.[2] Dkt. 1874 at 3.

The Proposed Superseding Order is to be served by mail by the United States on Unrepresented Parties and also on Non-Appearing Parties. Represented Parties will receive it through the CM/ECF System. PSO at paras. 4-5.

VI. ACTION BY NON-APPEARING PARTIES.

Because the Unrepresented Party Order does not apply to, and was not sent to, Non-Appearing Parties, there was no action to be taken by them. The Proposed Superseding Order gives Non-Appearing Parties a period of sixty (60) days to mail an attached Notice of Appearance and Intent to Participate and/or Notice of Selecting Method of Service to the Clerk of the Court. PSO at para. 6. Non-Appearing Parties who appear and are represented by counsel will become Represented Parties and will thereafter be served through the CM/ECF System. *Id.* at para. 7.

Non-Appearing Parties who appear, but who are not represented by counsel, become Unrepresented Parties, and are asked to select either service by e-mail notification, or service by postcard. Those who select e-mail notification will be sent an e-mail each time a document is filed by the Court, and will be directed to the public website where the document can be examined and printed at no additional cost to the party. PSO at para. 13. This is what happens under the Unrepresented Party Order for Unrepresented Parties who elected service by e-mail notification. Dkt. 1874 at 4.

Non-Appearing Parties who elect service by postcard will receive postcard notice as further described below. PSO at para. 14. Non-Appearing Parties who do not file a Notice of

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[2] Represented parties were served with the Unrepresented Party Order through the CM/ECF System.

Appearance and Intent to Participate, or who do not select a method of service, will remain Non-Appearing Parties. As a result, they will be deemed in "default" for purposes of Fed. R. Civ. P. Rule 5(a)(2), and no further service will be required on them unless and until they appear. PSO at para. 9.

VII. ACTIONS BY UNREPRESENTED PARTIES.

The Unrepresented Party Order allows Unrepresented Parties to consent to service by e-mail, or alternatively, and subject to approval by the Court, allows them to select service by mail. Dkt. 1874 at 4. The selection form attached to that Order required the Unrepresented Party to represent to the Court that such party had no access to a computer and the Internet at home or at work. The Unrepresented Party Order left for another day, and did not determine what actually would be mailed to parties who had elected service by mail and who had been approved by the Court for service by mail. Dkt. 1874 at p. 4, para. 4.

The Proposed Superseding Order gives Unrepresented Parties a period of sixty (60) days to select a method of service if they have not already done so pursuant to the Unrepresented Party Order. PSO at paras. 11-12. Unrepresented Parties may select service by e-mail, or service by postcard as described below. *Id.* at paras. 13-14. The Proposed Superseding Order does not contemplate that Court approval will be required for an Unrepresented Party to select service by postcard, and requires no representation regarding a party's access to a computer and the Internet.

If an Unrepresented Party fails either to consent to electronic service, or to request service by postcard, the party is deemed to have consented and agreed to receive service and subsequent notice of all filings in this matter by taking responsibility to check the public website periodically. All such parties are deemed to have received notice of all subsequent orders and other filings in this matter. PSO at para. 15.

VIII. POSTCARD NOTICE.

As noted above, the Unrepresented Party Order left for another day the nature and content of documents which would be required to be served by mail on parties electing service by mail. The Proposed Superseding Order provides for a postcard notice which includes language as to why the recipient is receiving a notice, the date a paper was filed, the name of the party or parties who filed the paper, the Court's docket number for the filed paper, the name of the paper filed, and the public website address where the party may view, print and/or save the paper. A single postcard notice may provide notice of the filing of multiple papers and notice on behalf of more than one party. PSO at para. 18.

The Court suggested this form of Notice by mail at the July 25, 2013 Status Conference. *See* July 25, 2013 Transcript of Status Conference at p. 86, lns. 9-16. However, at that time, the Court would have required postcard notice also be sent to Non-Appearing Parties. *Id.* The Court eliminated the requirement of postcard notice to Non-Appearing Parties at the November 4, 2013 Status Conference. *See* November 4, 2013 Transcript of Status Conference at p. 44, ln. 19 - p. 46, ln. 23.

The Proposed Superseding Order provides that the Clerk of the Court will maintain a list of Unrepresented Parties. PSO at para. 19.

IX. CONSEQUENCES OF FAILURE TO ELECT.

The Unrepresented Party Order provides:

> If any Unrepresented Party fails either to consent to electronic service or be approved for the "Mail-Only" List, that party shall be deemed to have consented to opt out of service, to have agreed to receive subsequent notice of all filings in this matter by taking the responsibility to check the public website by selecting "Walker River" on the Court's website (www.nvd.uscourts.gov) or by accessing the public website directly (ecf.nv.uscourts.gov/casedisplay). All such parties shall be deemed to have received notice of all subsequent Orders and other filings in Subproceeding C-125-B.

Dkt. 1874 at p. 4, para. 6.

The Proposed Superseding Order has a similar provision, but expands its application to include Non-Appearing Parties who take no action and remain a Non-Appearing Party. PSO at para. 15.

X. CONCLUSION REGARDING SERVICE.

The Unrepresented Party Order did not have a specific paragraph or paragraphs which expressly directed how parties would serve other parties after it was entered. That Order left it to the parties to infer what was required of them going forward.

The Proposed Superseding Order makes express what the Unrepresented Party Order implied. It includes express provisions directing how and when parties are to serve other parties after it is entered. PSO at para. 17.

XI. EXEMPTION FROM POSTCARD NOTICE.

The Proposed Superseding Order exempts from postcard notice a motion that may be heard ex parte. It also exempts any other filing not affecting the rights of others and not raising significant issues of law or fact. Parties filing papers and choosing not to provide postcard notice must so indicate on the papers filed. If the Court disagrees, the Court will then instruct the filing party to serve Unrepresented Parties who have elected service by postcard with an appropriate postcard. PSO at para. 20. The Unrepresented Party Order did not address this issue.

XII. AVAILABILITY TO PUBLIC.

Although the parties had discussed use of public libraries or other places for purposes of viewing filings in this matter, the Unrepresented Party Order did not address that topic. The Proposed Superseding Order provides that documents filed with the Court will be available to the public for free viewing at the Clerk's office. In addition, it provides the location near the Walker River Basin of libraries and other facilities where there is free public access to the Internet and the Court's website. PSO at para. 22.

XIII. CHANGES OF ADDRESS OR E-MAIL.

The Orders are substantially similar, if not identical, with respect to the consequences of failure to notify the Court of a change in mailing or e-mailing addresses. If, as a result of such failure, a party does not receive notice of a filed paper, the party will nevertheless be deemed to have notice of that paper and all subsequent orders and other filings in this matter. *Compare* Dkt. 1874 at p. 5, paras. 9-12 with PSO paras. 25-27.

XIV. SELECTION FORM.

Because the Unrepresented Party Order was mailed only to parties who had appeared, but who were not represented by counsel, the form to be returned was a "Notice Selecting Method of Service." Because the Proposed Superseding Order will be mailed to Non-Appearing Parties, as well as to Unrepresented Parties, the form to be returned is a "Notice of Appearance and Intent to Participate and/or Notice of Selecting Method of Service." PSO Attachment. Non-Appearing Parties must both enter an appearance and select a method of service. PSO Attachment at para. 1. Unrepresented Parties must select a method of service. *Id.*

Respectfully submitted this 6th day of August 2014.

WOODBURN AND WEDGE

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing **SUBMISSION OF AND JOINT MEMORANDUM CONCERNING PROPOSED SUPERSEDING ORDER REGARDING SERVICE AND FILING IN SUB-PROCEEDING C-125-B AND BY ALL PARTIES** was made through the court's electronic filing and notice system (CM/ECF) to all of the registered participants.

s/ Andrew "Guss"Guarino
Andrew "Guss" Guarino