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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. ——————————— UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants. ———————————	IN EQUITY NO. C-125 SUBFILE NO. C-125-B 3:73-cv-00127-ECR-LRL **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**

I. THE PROCEEDINGS BEFORE THE MAGISTRATE JUDGE.

As the result of an October 19, 2010 status conference in subproceedings C-125-B and C-125-C, the United States of America (the "United States"), the Walker River Paiute Tribe ("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.[1] The United States and the Tribe also submitted a Proposed Order Concerning Service Cut-Off Date (the "Proposed Service Cut-Off Order"). Doc. 1613-1. The Walker River Irrigation District (the "District") objected to the Proposed Orders and to the Proposed Service Cut-Off Order. Doc. 1621; Doc. 523. With their February 23, 2011 Reply to the District's Objections to the Proposed Service Cut-Off Order, the United States and the Tribe submitted a revised Proposed Order Concerning Service Cut-Off Date. See Doc. 1638 and Doc. 1638-1. On April 4, 2011, the District also requested oral argument with respect to all of its objections. Doc. 1640; Doc. 536.

With respect to "Service Issues Pertaining to Defendants Who Have Been Served, " the Magistrate Judge entered identical Revised Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served in subproceedings C-125-B and C-125-C on August 24, 2011. Doc. 1649; Doc. 540. On August 26, 2011, the Magistrate Judge amended the order in subproceeding C-125-B, and on September 6, 2011, the Magistrate Judge amended the order in subproceeding C-125-C. Doc. 1650; Doc. 542. The District has filed objections to all of those orders, along with supporting points and authorities. Doc. 1652-1653; Doc. 522-523. For purposes of these Points and Authorities, the District will refer to its points and authorities filed in support of those objections as the "District's Successor-In-Interest Points and Authorities."

On September 19, 2011, the Magistrate Judge entered the "Proposed Order Concerning Service Cut-Off Date" (herein the "Service Cut-Off Order"). Doc. 1656. On September 29, 2011, the Magistrate Judge denied the District's request for oral argument as "moot." Doc.

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

1660. The Service Cut-Off Order is the order submitted by the United States and Tribe with their Reply on February 23, 2011. Doc. 1638-1.

II. SUMMARY OF THE DISTRICT'S OBJECTIONS TO THE SERVICE CUT-OFF ORDER.

In relevant part, the Service Cut-Off Order provides:

> One issue the parties have raised with the Court is the designation of a cut-off date respecting the defendants to be included in this action pursuant to the CMO.
>
> IT IS HEREBY ORDERED 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.

Doc. 1656. Because the Magistrate Judge signed the order submitted by the United States and the Tribe and provided no separate explanation for the Service Cut-Off Order, the District must assume that it is based upon the rationale provided by those parties.

The United States and Tribe, in their previous filings, represented that the Service Cut-Off Order "does not address issues regarding successors-in-interest." See Doc. 1613 at 1-2; Doc. 1638 at n. 4. However, the Service Cut-off Order itself is less than clear on that issue. To the extent that the Service Cut-Off Order in any way 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, and/or that such unjoined persons will nonetheless be bound by the judgment here, the District objects to it on all of the grounds and for all of the reasons set forth in its Successor-In-Interest Points and Authorities (Doc. 1653), and it incorporates them here by this reference.[2] The District will not repeat those grounds and reasons here.

That issue aside, the Service Cut-Off Order seems to do two other things, although not very clearly. First, it appears to address the following portion of this Court's April 19, 2000 Case Management Order (the "CMO") (Doc. 108):

> As soon as convenient after the entry of this order, and upon appropriate notice to the parties presently appearing in the case, the Magistrate Judge shall consider

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[2] That determination, which clearly was made in connection with the orders objected to in the Successor-In-Interest Points and Authorities, is not one which a magistrate judge is empowered to make under the reasoning of *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067-1068 (9th Cir. 2004) because it is "dispositive." Based upon *Guerrero*, those determinations must be reviewed *de novo*.

> and make a preliminary determination of the threshold issues to be addressed at the outset of the litigation on the U.S./Tribe said counterclaims. Scheduling of such consideration shall go forward notwithstanding other proceedings provided for in this order. The list of threshold issues regarding said claims will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined.

CMO (Doc. 108) at 9.[3]

The District does not object to requiring that persons served as of December 31, 2009 be notified that the Court intends to finally resolve the list of threshold issues. However, successors-in-interest to such persons must be eventually joined or substituted, and allowed to participate in the proceedings leading to a resolution of those threshold issues. Moreover, given the fact that there has not yet been even a preliminary determination of the list of threshold issues, and December 31, 2011 is nearly upon us, there is no reason why persons who are now known to be successors-in-interest should not at least be similarly notified.

Second, the Service Cut-Off Order seems to provide that the only persons or entities who will ever need to be joined in this action are those persons or entities within one or more of the nine categories who hold a water right in existence as of December 31, 2009. The District objects to that ruling as beyond the scope of the Magistrate's authority, contrary to law, and clearly erroneous. First, the CMO did not refer to the Magistrate Judge the question of who might need to be joined in these proceedings after the list of threshold issues is final and after those issues are decided. Second, for the reasons explained below, the foundation for the assertion that only persons with water rights in existence as of December 31, 2009 need ever be joined in this action is contrary to law and fact. At 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.

III. PROCEDURAL BACKGROUND.

A. The Claims of the United States and Tribe.

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[3] The Court should be aware that questions related to a preliminary determination of a list of threshold issues have been fully briefed since November 3, 2008. *See* Doc. Nos. 1411-1416; 1441-1444; 1452-1455. The preliminary determination provided for in the CMO could have been, but was not, made before December 31, 2009.

In this litigation, the Tribe and the United States seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation. They do not differentiate between the use of water stored in Weber Reservoir to irrigate lands which were part of the Reservation when the Walker River Decree was entered, and lands added to the Reservation thereafter (the "Added Lands").[4] They also seek a federal reserved water right for the 167,460 acres of Added Lands. These claims are in addition to the direct flow rights awarded to the United States for the benefit of the Tribe in the Walker River Decree. These claims are made against both surface water from the Walker River and underground water.

The United States also makes additional claims to surface water and underground water in the Walker River Basin for the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine Corps, and the Bureau of Land Management. It also advances claims for surface and underground water for the Yerington Reservation, the Bridgeport Paiute Indian Colony, and several individual Indian allotments.

B. The Court's Management of the Claims of the United States and Tribe - the Case Management Order.

After extensive briefing, on April 19, 2000, the Court entered the CMO. Doc. 108. The CMO bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal Claims"). Except as expressly provided in the CMO, all discovery and other proceedings in the action are stayed. CMO, p.4, lns. 20-24. The CMO requires the Tribe and United States to serve their amended pleadings and related service documents on and thereby join numerous individuals and entities who hold surface and underground water rights within the Walker River Basin. It groups these individuals and entities into nine different categories of water right holders. CMO, pp. 5-6.

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[4] They also do not differentiate between use of Weber Reservoir to "regulate" the water right recognized in the Walker River Decree and to "conserve" water over and above that recognized water right.

In the CMO, the Court states that it expanded the categories of water right holders to be joined beyond the categories suggested by the United States and the Tribe, but did not include all of the categories suggested by the District, Nevada and California. CMO at p. 3, lns. 3-8. The CMO does not use the date a water right was established as a factor for determining which water right holders in a category should be joined. The CMO recognizes that, depending upon how certain issues might evolve as the action proceeded, the categories of water right holders to be joined might also need to be expanded. CMO at 3, ln. 9 - 4, ln. 3.

The CMO expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default shall be taken for failure to appear. CMO, p. 12, lns. 22-25. The CMO clearly does not provide for an adjudication of the water rights held by the defendants within the nine categories.

The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase I will consist of "threshold issues as identified and determined by the Magistrate Judge." Phase II will "involve completion and determination on the merits of all matters relating to [the] Tribal Claims." CMO, p. 11, lns. 11-18. Additional phases of the proceedings will "encompass all remaining issues in the case." Id., p. 11, lns. 25-26.

The identification of threshold issues is left to the Magistrate Judge, and those issues shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." CMO, p. 9. Included among the possible threshold issues to be considered for inclusion by the Magistrate Judge are issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims. See CMO, pp. 9-11.

The CMO also directs the procedures to be followed in connection with the disposition of the threshold issues. First, it allows for discovery on those issues. Second, it allows for written discovery concerning the bases for the Tribal Claims. It stays all other discovery. CMO, p. 13, lns. 4-15. It provides for disposition of the threshold issues by the District Judge on motion, evidentiary hearing, or both. Id., p. 13, ln. 16 - p. 14, ln. 2. Full briefing for at least a preliminary identification of threshold issues was complete on November 3, 2008. See Doc.

Nos. 1411-1416; 1441-1444; 1452-1455. There has been no motion to modify any portion of the CMO.

IV. STANDARD OF REVIEW.

A district judge may reconsider any pretrial matter referred to a magistrate judge where it is shown that the magistrate judge's ruling is clearly erroneous or contrary to law. L.R. IB3-1(a); see also 28 U.S.C. § 636(b)(1)(A). The clearly erroneous standard applies to factual findings. The contrary to law standard applies to legal conclusions. *See, Grimes v. City and County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). To the extent that the magistrate judge has made a ruling which is outside the scope of matters not 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). *De novo* review there means the court's obligation 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).

V. IF THE SERVICE CUT-OFF ORDER DETERMINES THAT PERSONS HOLDING RIGHTS ESTABLISHED AFTER DECEMBER 31, 2009 NEED NEVER BE JOINED, THE ORDER IS DISPOSITIVE OF THAT ISSUE AND A MAGISTRATE JUDGE LACKS THE POWER TO MAKE SUCH A DETERMINATION.

In determining whether an order is within the authority of a magistrate judge to make, the list of excepted pretrial matters that cannot be delegated to the final authority of a magistrate judge found in 28 U.S.C. § 636(b)(1)(A) is not an exhaustive list of all pretrial matters that are excepted from a magistrate judge's authority. *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067-1068 (9th Cir. 2004). Instead, courts look to the effect of the motion or order to determine whether it is properly characterized as dispositive of the claim or

defense of a party. *Rivera-Guerrero*, 377 F.3d at 1068. Even an order that does not dispose of an issue related to the merits of the action is dispositive if it conclusively determines a disputed question. *Rivera-Guerrero*, 377 F.3d at 1068. At a minimum, good cause for direct Article III control, rather than delegation to a magistrate judge, exists in a case where a substantial constitutional question is presented. *Rivera-Guerrero*, 377 F.3d at 1069. Any findings and recommendations on issues involving constitutional rights violates Article III, unless *the ultimate decision is made by the district court*. *Rivera-Guerrero*, 377 F.3d at 1070; *United States v. Raddatz*, 447 U.S. 667, 683 (1980). Allowing a magistrate judge to make the ultimate determination on matters of clear constitutional importance raises serious Article III concerns. *Id.* A magistrate judge may only submit proposed findings and recommendations on matters of clear constitutional import to the district court for *de novo* review. *Rivera-Guerrero*, 377 F.3d at 1071.

Here, on its face, the Service Cut-Off Order appears to conclusively determine the disputed question of whom is a proper party to this action by "designat[ing] a cut-off date respecting the defendants to be included in this action," and so exceeds the authority of the Magistrate Judge to make. Doc. 1656. In addition, the Order is dispositive in that it appears to finally determine that persons holding rights established after December 31, 2009, within categories of water right holders already determined by this Court to be necessary parties, and who have a constitutional right to due process, are nevertheless excluded from this litigation.

Subparagraph A of 28 U.S.C. § 636(b)(1) was clearly intended for less important matters than finally determining a "Service Cut-Off," based only upon an arbitrary date, beyond which no due process need be afforded persons holding water rights established after that arbitrary date. *See, Rivera-Guerrero*, 377 F.3d at 1069. Barring holders of rights established after the arbitrary date chosen in the Service Cut-Off Order from participation is contrary to law, and clearly erroneous because it lacks any articulated basis in law or fact, evincing consideration of either due process or the proper structuring of this litigation. Further, even if such consideration was made, such matters are simply too important to be delegated to

the final authority of the Magistrate Judge (*see Rivera-Guerrero*, 377 F.3d at 1069), and on *de novo* review, should be rejected.

VI. THE RULING THAT THE ONLY DEFENDANTS TO BE INCLUDED IN THIS ACTION ARE THOSE WITH WATER RIGHTS IN EXISTENCE AS OF DECEMBER 31, 2009 IS CONTRARY TO LAW AND CLEARLY ERRONEOUS.

A. The Magistrate Judge Was Not Authorized By the Case Management Order to Limit Persons to Be Joined in This Action Based Upon the Date of Establishment of a Water Right.

A magistrate judge may only finally determine a pretrial matter which a judge of this Court designates the magistrate to hear. See L.R.I.B. 1-3; L.R.I.B. 3-1(a); 28 U.S.C. § 636(b)(1)(A). While the District recognizes the CMO granted the magistrate judge considerable authority with respect to service of process, and to determine that appropriate parties have been joined for purposes of finally resolving the list of threshold issues, the CMO does not refer to the magistrate judge issues of limiting who within a category of water right holders required to be joined may nonetheless be excluded. More importantly, it does not refer to the magistrate judge the question of 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.

Therefore, the Magistrate Judge's apparent determination here that persons holding water rights not in existence on December 31, 2009 need never be included in this action regardless of the scope of the action after the threshold issues are decided, is contrary to law. It is a decision on a matter which the Magistrate Judge had no authority to decide. It is at best a recommendation which is subject to *de novo* review, and for the reasons set forth below, should be rejected.

B. Assuming for the Sake of Argument That the Magistrate Judge Had the Authority to Decide That the Only Persons Who Ever Need to Be Joined in This Action Are Those With Water Rights in Existence on December 31, 2009, That Decision Is Clearly Erroneous and Contrary to Law.

When the United States and Tribe submitted the Proposed Service Cut-Off Order, they stated that this proceeding would only address "water rights in existence as of December 31,

2009." Doc. 1613 at 1; see also Doc. 1638 at 4. The proposed order submitted at that time also stated "that the parties agree that only water rights that might be created after December, 2009 are domestic rights associated with groundwater use." Doc. 1613-1 at 1. In fact, the parties did not so agree.

Although the District recognizes that it is unlikely that there will be any new surface water rights established in Nevada, the Walker River has never been declared fully appropriated in Nevada. In addition, the California State Water Resources Control Board has never declared the forks of the Walker River in California as fully appropriated. See Cal. Water Code §§ 1205 et seq., and related California State Water Resources Control Board Orders. Moreover, it is simply not accurate to assume that the only new underground water rights which may be established after December 31, 2009 in the Groundwater Basins referenced in the CMO are domestic rights to underground water. Groundwater Basins 110A (Schurz Subarea), 108 (Walker Lake Subarea) and 109 (East Walker) are not presently subject to any Nevada State Engineer Orders concerning new appropriations. Current State Engineer Orders for Groundwater Basins 107 (Smith Valley), 108 (Mason Valley) and 106 (Antelope Valley) allow for new appropriations for commercial, industrial or stockwater purposes for up to 1,800 gallons per day. The State Engineer Order for Groundwater Basin 110C (Whiskey Flat) prohibits appropriations for irrigation, but authorizes as a preferred use appropriations for municipal purposes. California does not regulate the use of underground water at all.

Thus, to the extent that the Service Cut-Off Order is based upon a factual determination that only domestic water rights might be established after December 31, 2009, it is clearly erroneous. A "mistake has been committed."

In Reply, the United States and Tribe recognized that persons within the categories of water right holders required to be joined with water rights coming into existence after December 31, 2009 and who "were not brought into the litigation" would not be "bound by its result." Doc. 1638 at 5. They asserted that would be of no consequence because owners of water rights established after December 31, 2009 could nevertheless have their "junior" water

right priorities regulated by the Court. Doc. 1638 at 4-5. The former conclusion is correct, but the latter is not.

Depending on the decisions on merits of the threshold issues, the merits (Phase II) of the Tribal Claims may not proceed at all. Alternatively, some, but not all, or all, of those claims will proceed on the merits. The Court may need to decide whether to become involved in issues related to underground water and its uses within the Walker River Basin. The potential outcomes there range from not at all, to in a limited way, to a separate adjudication of rights to underground water, and, finally, to an adjudication of surface and underground water as a single source of supply. Again, depending on how those issues are determined, the scope of the merits (Phase II) of the Tribal Claims may be broad or narrow.

The Service Cut-Off Order apparently accepts the argument that it is appropriate to now eliminate any future consideration of whether owners of water rights established after December 31, 2009 need be made a party to this action. It apparently accepts the argument that although those unjoined parties will not be bound by the result here, their water rights will nevertheless be controlled by the outcome. Those conclusions are clearly erroneous and contrary to law, and should be rejected.

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

the only way in which the Court may require users of underground water in Nevada or in California to recognize the results of these proceedings is to acquire in personam jurisdiction over those users before there is a judgment here. On the other hand, if these proceedings do evolve into an adjudication of rights to underground water, including the relative rights of the defendants *inter se*, due process will require the joinder of all water right holders regardless of when their water right was established. Absent such joinder, they will not be bound. *Mennonite Bd. of Missions v.* Adams, 462 U.S. 791 , 800 (1983); *McShan v. Sherrill*, 283 F.2d 462, 463 (9th Cir. 1960).

Second, many underground water rights in California are classified as "overlying." An overlying right is analogous to a riparian right on a surface stream. An owner of an overlying right is entitled to take water from the ground underneath for use on his land within the basin or watershed. Use is restricted to reasonable beneficial use. *See, City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 5 P.3d 853, 862-63 (2000). Overlying rights are not regulated based upon priority. The overlying rights of owners in a groundwater basin are correlative, and superior to appropriative rights. Id. at 820. Thus, the assertion that somehow persons in California who exercise overlying rights 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.

Finally, 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. The Court should determine present and future issues related to joinder based upon the phased proceedings provided for in the CMO. This matter has been ongoing for over 19 years, and we have not yet identified, much less decided, the threshold issues. How much longer that will take is uncertain.

Once the threshold issues are decided by the Court, the scope of the remaining issues to be determined on the merits of the Tribal Claims will be clear. At that time, depending on the scope of the issues remaining, and on how many years have elapsed since December 31, 2009, the Court (and the parties) should review whether any additional water rights have been

established since December 31, 2009, and whether the nature of the proceedings remaining and the nature of the newly established water rights require joinder of their owners under applicable law. It is not only unwise for the Court to determine at this time that owners of water rights established after December 31, 2009 should not be joined in that subsequent phase of the Tribal Claims which may not even begin until many years after December 31, 2009, there is also absolutely no need or reason to make that decision now. The same is true with respect to proceedings involving the Federal Claims, which are the last phase under the CMO.

VII. CONCLUSION.

Except to the extent that the Service Cut-Off Order simply establishes who must be notified that the Magistrate Judge intends to finally determine the list of threshold issues, it is subject to *de* novo review, and must be rejected. In addition, to the extent that the Service Cut-Off Order provides that there is no obligation to join or substitute successors-in-interest to persons and entities served in this matter on or before December 31, 2009, it should be rejected, and is clearly erroneous and contrary to law. Also, to the extent that it provides that the only persons or entities to be included in this action are those with water rights in existence as of December 31, 2009, it should be rejected, and is also clearly erroneous and contrary to law.

DATED this 6th day of October, 2011.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on October 6, 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 Proposed Order Concerning Service Cut-Off Date* in Case No. 3:73-cv-00127-ECR-LRL with the Clerk of the Court using the CM/ECF system, which will notify the following via their email addresses:

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