

1 GORDON H. DePAOLI
 Nevada State Bar No. 195
 2 DALE E. FERGUSON
 Nevada State Bar No. 4986
 3 DOMENICO R. DePAOLI
 Nevada State Bar No. 11553
 4 Woodburn and Wedge
 5 6100 Neil Road, Suite 500
 Reno, Nevada 89511
 6 Telephone: 775/688-3000

7 Attorneys for Walker River Irrigation District

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF NEVADA

11	UNITED STATES OF AMERICA,	)	IN EQUITY NO. C-125
)	
12	Plaintiff,	)	SUBFILE NO. C-125-B
		)	3:73-cv-00127-ECR-LRL
13	WALKER RIVER PAIUTE TRIBE,)	
)	
14	Plaintiff-Intervenor,)	
)	
15	v.)	
)	
16	WALKER RIVER IRRIGATION DISTRICT,	)	WALKER RIVER IRRIGATION
17	a corporation, et al.,	)	DISTRICT'S POINTS AND
		)	AUTHORITIES IN SUPPORT OF
18	Defendants.	)	OBJECTIONS TO RULINGS OF
		)	MAGISTRATE JUDGE WITH
19	_____	)	RESPECT TO PROPOSED ORDER
		)	CONCERNING SERVICE CUT-OFF
20	UNITED STATES OF AMERICA,	)	DATE
	WALKER RIVER PAIUTE TRIBE,)	
21)	
	Counterclaimants,)	
22)	
	v.)	
23)	
	WALKER RIVER IRRIGATION DISTRICT,)	
24	et al.,)	
25)	
	Counterdefendants.)	
26	_____)	
27)	
28)	

1 **I. THE PROCEEDINGS BEFORE THE MAGISTRATE JUDGE.**

2 As the result of an October 19, 2010 status conference in subproceedings C-125-B and
3 C-125-C, the United States of America (the “United States”), the Walker River Paiute Tribe
4 (“Tribe”) and Mineral County submitted identical Proposed Orders Concerning Service Issues
5 Pertaining to Defendants Who Have Been Served (the “Proposed Orders”). Doc. 1614-1; Doc.
6 516-1.¹ The United States and the Tribe also submitted a Proposed Order Concerning Service
7 Cut-Off Date (the “Proposed Service Cut-Off Order”). Doc. 1613-1. The Walker River
8 Irrigation District (the “District”) objected to the Proposed Orders and to the Proposed Service
9 Cut-Off Order. Doc. 1621; Doc. 523. With their February 23, 2011 Reply to the District’s
10 Objections to the Proposed Service Cut-Off Order, the United States and the Tribe submitted a
11 revised Proposed Order Concerning Service Cut-Off Date. See Doc. 1638 and Doc. 1638-1.
12 On April 4, 2011, the District also requested oral argument with respect to all of its objections.
13 Doc. 1640; Doc. 536.

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

24 On September 19, 2011, the Magistrate Judge entered the “Proposed Order Concerning
25 Service Cut-Off Date” (herein the “Service Cut-Off Order”). Doc. 1656. On September 29,
26 2011, the Magistrate Judge denied the District’s request for oral argument as “moot.” Doc.
27

28 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.

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

3 **II. SUMMARY OF THE DISTRICT’S OBJECTIONS TO THE SERVICE**
4 **CUT-OFF ORDER.**

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

6 One issue the parties have raised with the Court is the designation of a cut-off
7 date respecting the defendants to be included in this action pursuant to the CMO.

8 IT IS HEREBY ORDERED that:

9 The service cut-off date for Phase I of the Tribal Claims is December 31,
10 2009, and includes water rights in existence as of that date.

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

14 The United States and Tribe, in their previous filings, represented that the Service Cut-
15 Off Order “does not address issues regarding successors-in-interest.” See Doc. 1613 at 1-2;
16 Doc. 1638 at n. 4. However, the Service Cut-off Order itself is less than clear on that issue. To
17 the extent that the Service Cut-Off Order in any way rules there is no obligation to join or
18 substitute successors-in-interest to persons and entities served with process in this matter on or
19 before December 31, 2009, and/or that such unjoined persons will nonetheless be bound by the
20 judgment here, the District objects to it on all of the grounds and for all of the reasons set forth
21 in its Successor-In-Interest Points and Authorities (Doc. 1653), and it incorporates them here
22 by this reference.² The District will not repeat those grounds and reasons here.

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

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

28 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*.

1 and make a preliminary determination of the threshold issues to be addressed at
2 the outset of the litigation on the U.S./Tribe said counterclaims. Scheduling of
3 such consideration shall go forward notwithstanding other proceedings provided
4 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.

5 CMO (Doc. 108) at 9.³

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

13 Second, the Service Cut-Off Order seems to provide that the only persons or entities
14 who will ever need to be joined in this action are those persons or entities within one or more of
15 the nine categories who hold a water right in existence as of December 31, 2009. The District
16 objects to that ruling as beyond the scope of the Magistrate's authority, contrary to law, and
17 clearly erroneous. First, the CMO did not refer to the Magistrate Judge the question of who
18 might need to be joined in these proceedings after the list of threshold issues is final and after
19 those issues are decided. Second, for the reasons explained below, the foundation for the
20 assertion that only persons with water rights in existence as of December 31, 2009 need ever be
21 joined in this action is contrary to law and fact. At this point, one cannot know for sure who
22 might need to be joined, and more importantly, there is no reason to make that decision now.

23 **III. PROCEDURAL BACKGROUND.**

24 **A. The Claims of the United States and Tribe.**

27 ³ The Court should be aware that questions related to a preliminary determination of a list of
28 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.

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

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

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

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

26
27
28 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.

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

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

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

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

22 The CMO also directs the procedures to be followed in connection with the disposition
23 of the threshold issues. First, it allows for discovery on those issues. Second, it allows for
24 written discovery concerning the bases for the Tribal Claims. It stays all other discovery.
25 CMO, p. 13, Ins. 4-15. It provides for disposition of the threshold issues by the District Judge
26 on motion, evidentiary hearing, or both. *Id.*, p. 13, In. 16 - p. 14, In. 2. Full briefing for at least
27 a preliminary identification of threshold issues was complete on November 3, 2008. See Doc.
28

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

3 **IV. STANDARD OF REVIEW.**

4 A district judge may reconsider any pretrial matter referred to a magistrate judge where
5 it is shown that the magistrate judge's ruling is clearly erroneous or contrary to law. L.R. IB3-
6 1(a); see also 28 U.S.C. § 636(b)(1)(A). The clearly erroneous standard applies to factual
7 findings. The contrary to law standard applies to legal conclusions. See, *Grimes v. City and*
8 *County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). To the extent that the magistrate
9 judge has made a ruling which is outside the scope of matters not delegated to him, or which
10 may not be delegated to him for final disposition, they are subject to *de novo* review. *United*
11 *States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004). *De novo* review there means
12 the court's obligation is to arrive at its own independent conclusion the same as if no decision
13 previously had been rendered. *Id.*

14 A factual finding is clearly erroneous if the district judge is left with the "definite and
15 firm conviction that a mistake has been committed." *Burdick v. C.I.R.*, 979 F.2d 1369, 1370
16 (9th Cir. 1992). Under the contrary to law standard, the court conducts a *de novo* review of the
17 magistrate judge's legal conclusions. *Grimes*, 951 F.2d at 241; see also, *Laxalt v. McClatchy*,
18 602 F.Supp. 214, 217 (D.Nev. 1985); *26 Beverly Glen, LLC v. Wykoff Newberg Corp.*, 2007
19 WL 1560330 (D.Nev. 2007).

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

25 In determining whether an order is within the authority of a magistrate judge to make,
26 the list of excepted pretrial matters that cannot be delegated to the final authority of a
27 magistrate judge found in 28 U.S.C. § 636(b)(1)(A) is not an exhaustive list of all pretrial
28 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

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

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

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

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

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

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

10 A magistrate judge may only finally determine a pretrial matter which a judge of this
11 Court designates the magistrate to hear. See L.R.I.B. 1-3; L.R.I.B. 3-1(a); 28 U.S.C. §
12 636(b)(1)(A). While the District recognizes the CMO granted the magistrate judge
13 considerable authority with respect to service of process, and to determine that appropriate
14 parties have been joined for purposes of finally resolving the list of threshold issues, the CMO
15 does not refer to the magistrate judge issues of limiting who within a category of water right
16 holders required to be joined may nonetheless be excluded. More importantly, it does not refer
17 to the magistrate judge the question of who need not be joined with respect to proceedings to
18 decide the threshold issues on the merits or which may follow the decision on the merits of the
19 threshold issues.

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

26 **B. Assuming for the Sake of Argument That the Magistrate Judge Had the**
27 **Authority to Decide That the Only Persons Who Ever Need to Be Joined in**
28 **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,

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

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

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

23 In Reply, the United States and Tribe recognized that persons within the categories of
24 water right holders required to be joined with water rights coming into existence after
25 December 31, 2009 and who “were not brought into the litigation” would not be “bound by its
26 result.” Doc. 1638 at 5. They asserted that would be of no consequence because owners of
27 water rights established after December 31, 2009 could nevertheless have their “junior” water
28

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

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

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

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

1 the only way in which the Court may require users of underground water in Nevada or in
2 California to recognize the results of these proceedings is to acquire in personam jurisdiction
3 over those users before there is a judgment here. On the other hand, if these proceedings do
4 evolve into an adjudication of rights to underground water, including the relative rights of the
5 defendants *inter se*, due process will require the joinder of all water right holders regardless of
6 when their water right was established. Absent such joinder, they will not be bound.
7 *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 , 800 (1983); *McShan v. Sherrill*, 283 F.2d
8 462, 463 (9th Cir. 1960).

9 Second, many underground water rights in California are classified as “overlying.” An
10 overlying right is analogous to a riparian right on a surface stream. An owner of an overlying
11 right is entitled to take water from the ground underneath for use on his land within the basin or
12 watershed. Use is restricted to reasonable beneficial use. *See, City of Barstow v. Mojave Water*
13 *Agency*, 23 Cal.4th 1224, 5 P.3d 853, 862-63 (2000). Overlying rights are not regulated based
14 upon priority. The overlying rights of owners in a groundwater basin are correlative, and
15 superior to appropriative rights. *Id.* at 820. Thus, the assertion that somehow persons in
16 California who exercise overlying rights to groundwater after December 31, 2009 will be
17 subject to some sort of regulation by priority vis-a-vis the joined parties to this action is both
18 contrary to law and fact.

19 Finally, there is simply no sound reason or need for the Court to determine now that
20 persons who own water rights which come into existence after December 31, 2009 need not be
21 “included in this action” as the Magistrate apparently concluded. The Court should determine
22 present and future issues related to joinder based upon the phased proceedings provided for in
23 the CMO. This matter has been ongoing for over 19 years, and we have not yet identified,
24 much less decided, the threshold issues. How much longer that will take is uncertain.

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

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

8 **VII. CONCLUSION.**

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

17 DATED this 6th day of October, 2011.

18 WOODBURN AND WEDGE

19
20 By: / s / Gordon H. DePaoli
21 Gordon H. DePaoli
22 Dale E. Ferguson
23 Domenico R. DePaoli
24 6100 Neil Road, Suite 500
25 Reno, Nevada 89511
26 Attorneys for WALKER RIVER
27 IRRIGATION DISTRICT
28

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:

Brian Chally	brian.chally@lvvwd.com
Bryan L. Stockton	bstockton@ag.nv.gov
Charles S. Zumpft	zumpft@brooke-shaw.com
Cherie K. Emm-Smith	emmsmithlaw@cccomm.net
Don Springmeyer	dspringmeyer@wrslawyers.com
Christopher Mixson	cmixson@wrslawyers.com
G. David Robertson	gdavid@nvlawyers.com
George Benesch	gbenesch@sbcglobal.net
Greg Addington	greg.addington@usdoj.gov
Harry W. Swainston	hwsainston@earthlink.net
J.D. Sullivan	jd@mindenlaw.com
James Spoo	spootoo@aol.com
John Paul Schlegelmilch	jpslaw@netscape.com
Julian C. Smith, Jr.	joylyn@smithandharmer.com
Karen Peterson	kpeterson@allisonmackenzie.com
Kirk C. Johnson	kirk@nvlawyers.com
Laura Schroeder	counsel@water-law.com
Louis S. Test	twallace@htag.reno.nv.us
Marta Adams	mAdams@ag.state.nv.us
Marvin W. Murphy	marvinmurphy@sbcglobal.net
Michael D. Hoy	mhoy@nevadalaw.com
Michael F. Mackedon	falowlaw@phonewave.net
Michael R. Montero	mrm@eloreno.com
Michael A. Pagni	mpagni@mcdonaldcarano.com
Richard W. Harris	rharris@gbis.com
Ross E. de Lipkau	ecf@parsonsbehle.com
Sylvia Harrison	sharrison@mcdonaldcarano.com
T. Scott Brooke	brooke@brooke-shaw.com
Michael W. Neville	michael.neville@doj.ca.gov
Stacey Simon	ssimon@mono.ca.gov
William E. Schaeffer	lander_lawyer@yahoo.com
Susan Schneider	susan.schneider@usdoj.gov
Paul J. Anderson	panderson@mclrenolaw.com
Debbie Leonard	dleonard@mcdonaldcarano.com
Wes Williams	wwilliams@standfordaluni.org
William J. Duffy	william.duffy@dgsllaw.com

1 Gene M. Kaufmann GKaufmann@mindenlaw.com
2 Erin K.L. Mahaney emahaney@waterboards.ca.gov
3 David L. Negri david.negri@usdoj.gov
4 Simeon Herskovits simeon@communityandenvironment.net
5 John W. Howard johnh@jwhowardattorneys.com
6 Malissa Hathaway McKeith mckeith@lbbslaw.com
7 Andrew D. Galvin drew.galvin@americantower.com
8 Lynn L. Steyaert lls@water-law.com
9 Noelle R. Gentilli ngentill@water.ca.gov
10 Donald B. Mooney dbmooney@dcn.org
11 Erick Soderlund esoderlu@water.ca.gov
12 Stuart David Hotchkiss david.hotchkiss@ladwp.com

13 I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00127-ECR-LRL to
14 the following via U.S. Mail, postage prepaid, this 6th day of October, 2011:

15 Robert L. Auer
16 Lyon County District Attorney
17 31 S. Main St.
18 Yerington, NV 89447

Todd Plimpton
Belanger & Plimpton
1135 Central Ave.
P.O. Box 59
Lovelock, NV 89419

19 Wesley G. Beverlin
20 Malissa Hathaway McKeith
21 Lewis, Brisbois, Bisgaard & Smith LCP
22 221 N. Figueroa St., Suite 1200
23 Los Angeles, CA 90012

William W. Quinn
Office of the Field Solicitor
Department of the Interior
401 W. Washington St., SPC 44
Phoenix, AZ 85003

24 Leo Drozdoff
25 Dir. of Conservation & Natural Resources
26 State of Nevada
27 901 S. Stewart St.
28 Carson City, NV 89701

Mary Rosaschi
P.O. Box 22
Wellington, NV 89444

Kelly R. Chase
P.O. Box 2800
Minden, NV 89423

Marshall S. Rudolph, Mono County Counsel
Stacy Simon, Deputy County Counsel
Mono County
P. O. Box 2415
Mammoth Lakes, CA 93546-2415

Arden O. Gerbig
106629 U.S. Highway 395
Coleville, CA 96407-9538

William E. Schaeffer
P. O. Box 936
Battle Mountain, NV 89820

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12
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19
20
21
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23
24
25
26
27
28

George M. Keele, APC
1692 County Rd., Suite A
Minden, NV 89423

Jason King
Division of Water Resources
State of Nevada
901 S. Stewart St.
Carson City, NV 89701

Timothy A. Lukas
P.O. Box 3237
Reno, NV 89505

James Shaw
Water Master
U.S. Board of Water Commissioners
410 N. Main Street
Yerington, NV 89447

Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

Garry Stone
U.S. District Court Water Master
290 S. Arlington Ave., 3rd Floor
Reno, NV 89501

Walker Lake Water Dist, G.I.D.
Walker Lake GID
175 Wassuk Way
Walker Lake, NV 89415

/ s / Holly Dewar
Holly Dewar