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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF NEVADA

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 WALKER RIVER PAIUTE TRIBE,)

14 Plaintiff-Intervenor,)

15 v.)

16 WALKER RIVER IRRIGATION DISTRICT,)
17 a corporation, et al.,)

18 Defendants.)

19 _____)
20 UNITED STATES OF AMERICA,)
21 WALKER RIVER PAIUTE TRIBE,)

22 Counterclaimants,)

23 v.)

24 WALKER RIVER IRRIGATION DISTRICT,)
25 et al.,)

26 Counterdefendants.)
27 _____)

IN EQUITY NO. C-125

SUBFILE NO. C-125-B

3:73-cv-00127-ECR-LRL

SUBFILE NO. C-125-C

3:73-cv-00128-ECR-LRL

28)
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

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1 **I. INTRODUCTION.**

2 The United States of America (the “United States”), the Walker River Paiute Tribe (the
3 “Tribe”) and Mineral County have submitted identical Proposed Orders Concerning Service
4 Issues Pertaining to Defendants Who Have Been Served (the “Proposed Successor-In-Interest
5 Order”). Doc. #1614-1; Doc. #516-1. In addition, the United States and the Tribe have
6 submitted the Proposed Order Concerning Service Cut-Off Date (the “Proposed Service Cut-
7 Off Order”), Doc. #1613-1. Although there are some factual differences which are significant
8 with respect to the two subproceedings, the law applicable to both is the same. Therefore, for
9 the convenience of the Court and the parties, the Walker River Irrigation District (the
10 “District”) files the same objections in both subproceedings.

11 **II. SUMMARY OF THE DISTRICT’S POSITION ON THE PROPOSED ORDERS.**

12 **A. The Proposed Successor-In-Interest Order.**

13 **1. Re-Service of Properly Served Defendants.**

14 The District agrees that it is not necessary to re-serve a properly served defendant if and
15 when such a defendant acquires additional water rights in the same subproceeding. *See*, Doc.
16 #1614-1 and Doc. #516-1 at 2, ins. 15-16; at 5, ins. 1-4. Once a defendant is properly served,
17 there is no need to serve that defendant again, regardless of how his, her or its water right
18 portfolio might change.

19 **2. Treatment of Successors-In-Interest As a Result of an Inter Vivos**
20 **Transfer.**

21 The Proposed Successor-In-Interest Order assumes that service of process must have a
22 defined end point, and that even if successors-in-interest are never substituted into a
23 proceeding, they will nonetheless be bound, and the judgment may be enforced against them.
24 In order to either substitute or join a successor-in-interest, the Proposed Order would require a
25 motion properly served on non-parties in accordance with Rule 4 and on parties in accordance
26
27
28

1 with Rule 5. Although a form for a joint motion by the predecessor and successor is proposed,
2 the Proposed Order would not preclude a separate motion by either, or by any other party.¹ The
3 Proposed Order places the burden of moving for substitution on properly served defendants and
4 their successors-in-interest. Recognizing that defendants may not file such motions, the
5 Proposed Order would have the Court find now that a successor-in-interest will be bound by
6 the ultimate judgment nonetheless. Doc. #1614-1 and Doc. #516-1 at 4, lns. 1-4.

8 The District's objections to the Proposed Successor-In-Interest Order as it relates to
9 inter vivos transfers of water rights are straightforward. Unnecessary complication, work and
10 expense are in no one's interest; simplification, finality and economy are in the interest of all.
11 The Proposed Successor-In-Interest Order appears to offer a straightforward Fed. R. Civ. P.
12 25(c)-based solution to the issue of absentee water right transferees with an interest in one or
13 more of the categories of water rights identified in the Court's April 19, 2000 Case
14 Management Order (the "CMO"), Doc. #108 in C-125-B, or in the January, 1995 Order (the
15 "Service Order"), Doc. #19 in C-125-C. However, as explained below, it creates the potential
16 for additional and unnecessary complication, litigation, work and expense for all parties and the
17 Court.

19 It is not appropriate to place the burden on defendants to join or substitute successors-
20 in-interest in litigation which the Plaintiff Parties have brought or seek to bring. In an earlier
21 analogous situation, the Court has so ruled. The fall back position that successors-in-interest
22 will be bound by the outcome even if they are never joined or substituted is not sound.

24 The essential problem relates to what Rule 25(c) does not say as opposed to what it does
25 say. Although Rule 25(c) does say "if an interest is transferred, the action may be continued by
26 or against the original party," it does not define the "interest" to which it refers, and more
27

28 ¹ Although the District appreciates the effort which has gone into the drafting of the form of
motion, the District believes it may be too complex to be used by unrepresented parties.

1 importantly, it does not state that a “transferee” who is not substituted prior to judgment will be
2 bound by that judgment. Relevant case law makes it clear that attempting to obligate an
3 unjoined transferee to a judgment is itself a separate process, and in some cases, such
4 transferees are not bound by the ultimate judgment.

5
6 The Court has already determined that persons claiming an interest in one or more of
7 the categories of water rights identified in the CMO and Service Order are “parties required to
8 be joined” within the meaning of Fed. R. Civ. P. 19(a), and so must be joined. The proper, and
9 conveniently, simplest and most economic course of action, is to join the absentees as required
10 parties based upon the previous orders of the Court. That can be accomplished without the
11 need for a motion with respect to each successor-in-interest, with no more, and likely
12 substantially less, service than will be required to substitute or join successors-in-interest after
13 judgment, and with far less risk to the finality of any judgment entered. As is explained below,
14 attention must be given to such joinder throughout the course of these proceedings, both of
15 which have been ongoing for nearly two decades, and which will continue well into the future.

17 **3. Treatment of Successors-In-Interest As a Result of Death.**

18 The District agrees that Fed. R. Civ. P. 25(a) governs substitution of successors-in-
19 interest as a result of death. However, like Rule 25(c), Rule 25(a) is silent on the question of
20 whether a successor-in-interest as a result of death who is not substituted will be bound by the
21 ultimate judgment. Again, the relevant case law suggests otherwise.

23 **4. Treatment of Defendants in Subproceeding C-125-C Who
24 Transferred Their Interests Prior to Service.**

25 The District assumes that this portion of the Proposed Successor-In-Interest Order is
26 intended to apply to defendants in subproceeding C-125-C who have not yet been served and
27 who will be served with a copy of this portion of the order and the attachments related to it.
28 Assuming that is a correct assumption, the District does not object to it. However, there are

1 hundreds of persons and entities who have been served without notice of any such requirement
2 as is proposed in this portion of the Proposed Order. As to those persons and entities, the
3 District's position as to successors-in-interest applies.

4 **5. Specific Objections.**

5 The District objects to: (i) page 2, lines 10 through 23 of the Proposed Order, with the
6 exception of the statement that it is unnecessary to "re-serve [already properly served
7 defendants] if and when they acquire additional water rights"; (ii) all of Section I,
8 "Treatment of Successors-in-Interest As a Result of an Inter Vivos Transfer," at page 3 through
9 page 5, line 12, with the exception of paragraph 6 thereof at page 5, lines 1 through 4; and (iii)
10 the last sentence of paragraph 8, page 5, lines 20 through page 6, line 4, and to paragraph 11 on
11 page 6 of the Proposed Order.
12

13 **B. The Proposed Service Cut-Off Order.**

14 The District does not object to the establishment of a date by which service is
15 sufficiently complete for purposes of moving forward with Phase I of the Tribal Claims in
16 subproceeding C-125-B. *See*, Doc. #108, pg. 11, lns. 11-18. The District does object to
17 establishing a similar date now for Phase II of the Tribal Claims and for any additional phases
18 in subproceeding C-125-B involving the Federal Claims. The commencement of any phases of
19 subproceeding C-125-B beyond Phase I of the Tribal Claims is years away. One cannot even
20 know what those subsequent phases, if any, will involve. It is inappropriate to establish a date
21 today related to any additional service which might be required when and if those additional
22 phases commence.
23
24

25 **III. PROCEDURAL BACKGROUND.**

26 Some procedural background for both subproceedings helps explain how and why these
27 issues arise. It also provides an understanding of the central goal which has driven all previous
28 court rulings on service and joinder --- ensuring that when each of these multi-year proceedings

1 are concluded, the judgment in each will bind all persons who have an interest related to the
2 subject of each, and the litigation will be over.

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

4 **1. The Initial Filing by the Tribe and the United States.²**

5 In their initial claims filed in 1992, the United States and the Tribe sought to establish a
6 right to store water in Weber Reservoir, and a right to water for lands added to the Reservation
7 in 1936. Doc. #s 1; 2; 17; 18. Based upon the provisions of Fed. R. Civ. P. 19(a)(2)(i), the
8 Court ordered that the Tribe and the United States join as parties and serve, in accordance with
9 Rule 4, all existing claimants to water of the Walker River and its tributaries. Doc. #15. The
10 Court's rationale is relevant to the issues presented here:
11

12 In this case the Tribe and the United States want the Court to recognize
13 additional water rights for the Tribe and integrate these rights into the Decree.
14 Such a recognition might have the effect of reducing the water allocated to other
15 federal rights holders or altering the priority which their allocation is given.
16 Such a recognition may also give the Tribe's newly recognized rights priority
over claimants who acquired their rights through a state permit. Thus, the
claimants to the water of the Walker River clearly have an interest in the action.

17 If these water claimants are not joined in this action, their ability to
18 protect their interests in their water rights would be impaired. If they were not a
19 party to the suit and the Tribe's new water rights were recognized, the claimants
20 may have their water interests altered or suspended. They may be able to
21 protect their interests after this suit is concluded through another lawsuit;
22 however, during the pendency of a later action these claimants may suffer
without their water rights. Thus unless they are parties to this action, the
claimants' practical ability to protect their interests would be impaired. In
accordance with Rule 19, all claimants to the water of Walker River and its
tributaries must be joined as parties to the claim.

23 Doc. #15 at 5-6. Subsequent to that Order, the parties stipulated to and the Court granted the
24 Tribe and the United States from February 23, 1993 through September 21, 1998 to join the
25 additional parties and complete service of process. *See*, Doc. #s 20; 21; 25; 36; 37; 48; 49; 52;
26

27
28 ² Unless otherwise indicated, docket references in this section are references to those in
subproceeding C-125-B.

1 54; 55; 60; 61; 63.

2 **2. The Tribe and the United States Amend Their Counterclaims.**

3 In 1997, the Tribe and the United States expanded their counterclaims to include claims
4 related to groundwater. In addition, the United States made additional claims to surface water
5 and groundwater in the Walker River Basin for the Hawthorne Army Ammunition Plant, the
6 Toiyabe National Forest, the Mountain Warfare Training Center of the United States Marine
7 Corps, the Bureau of Land Management, the Yerington Reservation, the Bridgeport Paiute
8 Indian Colony, and several other Indian allotments. Doc. #s 58 and 59.

9
10 The April 19, 2000 CMO bifurcates the claims of the Tribe and United States for the
11 Walker River Indian Reservation (the “Tribal Claims”) from all of the other claims raised by
12 the United States (the “Federal Claims”). The CMO requires the Tribe and United States to
13 serve, in accordance with Rule 4, their amended pleadings and related service documents on
14 and thereby join the individuals and entities who hold surface and underground water rights
15 within the Walker River Basin. It groups these individuals and entities into several different
16 categories. Doc. #108, pgs. 5-6.

17
18 The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase
19 I consists of “threshold issues as identified and determined by the Magistrate Judge.” Phase II
20 involves “completion and determination on the merits of all matters relating the [the] Tribal
21 Claims.” Doc. #108, pg. 11, lns. 11-18. Additional phases of the proceedings encompass all
22 remaining issues in the case. *Id.*, pg. 11, lns. 25-26.

23
24 It is clear from the CMO, as well as from the briefing related to the CMO, that the Court
25 was particularly concerned with the issues which would arise from changes in ownership while
26 service of process was taking place, and thereafter during the potential multiple phases of
27 litigation. It required the filing of proposed procedures for recording lis pendens, and
28 authorized the Magistrate Judge to determine such procedures. Doc. #108 at 6. The Court also

1 directed that the Magistrate Judge “consider and determine how, when and at whose cost
2 information regarding changes or modification in the individuals or entities with such water
3 right claims shall be provided as between the parties and the entities which receive information
4 respecting any such changes until service of process is complete on the counterclaims.” Doc.
5 #108 at 7, ln. 21-8 at ln. 2. With respect to responses to process, the Court ordered that parties
6 file a Notice of Appearance and Intent to Participate within 60 days after service. No answers
7 are required, and no default may be taken for failure to appear. Doc. #108 at 12.
8

9 The Magistrate Judge held numerous status conferences and arguments concerning
10 service and the inevitable changes in ownership that would happen during the time it took for
11 service of process, as well as after service of process, but before the action was concluded. The
12 District provided the Court with a memorandum concerning procedure for recording notices of
13 lis pendens. *See*, Doc. #132. The United States and the Tribe opposed the recordation of lis
14 pendens. Doc. #133. After extensive argument on that and other issues, for a number of
15 reasons, the Court determined that it would not require the filing of notices of lis pendens.
16 Doc. #136.
17

18 Instead, the Magistrate Judge entered the Order Regarding Changes in Ownership of
19 Water Rights on July 16, 2003. Doc. #207. That Order, which is one of the documents
20 required to be served on water right holders, requires that if a party sells or otherwise conveys
21 ownership of all or a portion of any water right within the categories set forth in the CMO, the
22 party is required to notify the Court and the United States of the change in ownership, including
23 the name and address of the person or entity who acquired ownership and to attach a copy of
24 the deed, court order or other document by which the change in ownership was accomplished.
25 The Notice is to be sent to the Clerk of the Court and to counsel for the United States. The
26 Order had attached to it the form and substance of the Notice to be provided. Since service
27
28

1 began in this proceeding, numerous such Notices have been filed and served. *See, e.g.*, Doc.
2 #s. 324-327; 351; 363; 415; 439; 440; 445-447; 617; 696; etc.

3 Every year since October of 2003, the District has provided counsel for the United
4 States a hard copy and computer disk of the District's current assessment roll, a copy of new
5 water right index cards which revised or replaced cards that have changed in the last year, a
6 copy of the District's list of reserved water rights, and copies of deeds which the District has
7 received from the Lyon County Recorder. In addition, Nevada has provided counsel for the
8 United States with information concerning applications for and reports of conveyance related to
9 water rights filed in the Walker River Basin with the Nevada Division of Water Rights.
10

11 Having required notice of changes in ownership of water rights, as well as having the
12 District and Nevada provide annual updated information, the Court did not address what should
13 be done with that information. That is the essence of the issues presently before the Court.
14

15 **B. Mineral County's Motion to Intervene.**

16 Mineral County filed its Motion to Intervene on October 25, 1994. Doc. #2.³ Pursuant
17 to a Stipulation and Order, the District submitted a Report to the Court concerning the Motion
18 to Intervene. Doc. #9. In that Report, the District noted that under Rule 5 of the Federal Rules,
19 the motion must be served upon the "parties" and that the Court in its October 27, 1992 Order
20 (in subproceeding C-125-B) had ordered joinder of all parties with water rights under the
21 Walker River Decree. Doc. #9 at 4-5.
22

23 After a January 3, 1995 status conference, the Court entered the Service Order directing
24 Mineral County to file a revised motion to intervene and points and authorities in support
25 thereof, a revised proposed complaint-in-intervention, "which identifies the persons or entities
26 against whom" its claims would be asserted, and any motion for preliminary injunction with
27

28 ³ Unless otherwise indicated, docket references in this section are to the docket in subproceeding C-125-C.

1 supporting points and authorities and other supporting documents (collectively the
2 “Intervention Documents”). Doc. #19 at 2. The Court ordered Mineral County to serve the
3 Intervention Documents pursuant to Rule 4 of the Federal Rules of Civil Procedure on all
4 parties holding water rights under the Walker River Decree and all parties who had acquired
5 rights to use the waters of the Walker River by subsequent appropriation. *Id.* at 2, 3.
6

7 In its proposed Amended Complaint, Mineral County seeks a reallocation of the waters
8 of the Walker River in order to preserve minimum levels in Walker Lake and “the right to, at
9 least, 127,000 acre feet of flows annually reserved from the Walker River that will reach
10 Walker Lake.” Doc. #20. In its proposed Motion for Preliminary Injunction, Mineral County
11 seeks an injunction requiring 117,000 acre feet of Walker River flows to Walker Lake during
12 the pendency of its action. *Id.*
13

14 For a number of reasons, which are detailed in the District’s Response to Mineral
15 County’s Service Report (Doc. #488), Mineral County’s efforts to comply with the Court’s
16 orders concerning service floundered, and that service is not complete yet.⁴ There are a number
17 of matters related to that service which are important here.

18 Mineral County, working with the District, was ordered to file a caption which was to
19 identify the persons or entities served and/or to be served. Docs. # 152; 156. That caption was
20 filed on or about November 26 and December 3, 1997. Docs. #160; 161. That caption, which
21 included approximately 1,061 names, was last updated near the end of 2001. *See*, Doc. #397.
22 In those situations where the caption was updated based upon death and inter vivos transfers of
23 land and water rights, the Court has routinely ordered without any motion that the new owners
24 be “added” and “served” pursuant to Rule 4. *See, e.g.*, Doc. #397 at 17-18, para. 21; 18-19,
25
26

27
28 ⁴ The lessons learned from Mineral County’s service efforts were taken into account by the
Court in establishing the procedures for service related to the Tribe’s and United States’
Claims.

1 paras. 40; 41; 47; 55; 57; p. 20, paras. 61; 62. *See also*, Doc. #413.

2 On April 3, 2000, the Court determined that approximately 617 individuals and entities
3 had been served, and that approximately 170 remained to be served. Doc. #327 at 2-5 and Exh.

4 1. Except as noted above, there has been no effort to determine the extent of deaths of or inter
5 vivos transfers by those persons since that time. The Court also ordered that any party served
6 from that point forward would be required to file and serve a Notice of Appearance which
7 includes the name of the party and the mailing address of that party. The Order also stated that
8 any “party who is properly served but does not file and serve a Notice of Appearance shall be
9 deemed to have notice of subsequent orders of the Court and subsequent pleadings filed and
10 served in this matter.” *Id.*, at 8. Finally, the Order stated that responses to the Motion to
11 Intervene would be served pursuant to a schedule to be established by further order of the
12 Court. *Id.*

13
14
15 Thus, most of the persons and entities served in connection with the Mineral County
16 Motion to Intervene were served at least ten years ago based upon a caption which is over ten
17 years old. Most of those persons and entities were not required to file any document with the
18 Court, and except for those represented by counsel, have not been served with a single
19 document since that time.

20 Relevant here is the Court’s explanation of why proper service is so important:

21
22 Finally, we risk wasting scarce judicial resources, as well as the time and
23 effort of the parties, if we allow this case to proceed with even a small number
24 of water rights holders lacking notice of the action. If we fail to properly
25 acquire jurisdiction by service of process, a single party adversely affected by a
26 judgment entered in this case and who was not properly served could
conceivably later challenge the validity of that judgment, notwithstanding the
extensive work that will no doubt be necessary to adjudicate Mineral County’s
claim.

27 Doc. #210 at 5. Later, the Court said:

28 One final argument of Mineral County’s also needs to be addressed - that
is, the constant refrain that Mineral County has already spent a lot of money and

1 time trying to get to this point, and that it just is not fair that it should have to
2 spend any more money before being able to argue its case on the merits. We are
3 well aware of the laudable goals of environmental protection that motivated
4 Mineral County to undertake this action. But we find it difficult to believe that
5 the County ever could have thought that fighting this battle would be easy,
6 cheap, or quick. No matter how noble the County's goals are, we cannot simply
7 dispense with the Federal Rules of Civil Procedure just so those goals can be
8 accomplished more easily. The requirement of serving individual defendants is
9 not some arcane, administrative hoop that we are arbitrarily making Mineral
10 County jump through. The requirement that every defendant be informed of
11 actions that may deprive him or her of property is a fundamental right of due
12 process, and our procedural rules have developed as the best way to protect that
13 right. We will not disregard the rules because Mineral County is understaffed or
14 short on funds.

15 Doc. #252 at 10.

16 **IV. THERE IS NO AUTHORITY FOR SHIFTING THE BURDEN OF JOINING
17 NECESSARY PARTIES FROM THE PLAINTIFFS TO THE DEFENDANTS.**

18 Although the Proposed Order would have the Court conclude that “the burden of
19 keeping track of inter vivos transfers of the defendants’ water rights . . . and substituting the
20 defendants’ successors-in-interest is properly borne by the defendants and its successor(s)-in-
21 interest,” no authority is provided for that conclusion. There is no such authority.

22 Moreover, a similar issue has already been decided by the Court. Shortly after the court
23 entered the CMO, the Tribe and the United States filed a motion in the main Walker River
24 proceeding (C-125) to require all water right holders and their successors-in-interest to identify
25 themselves to the Court and the United States Board of Water Commissioners. Recognizing
26 that part of the motivation for the motion was to shift burdens regarding service from the Tribe
27 and the United States to the water right holders, in denying the motion, the Court said:

28 “In addition, we feel that requiring the water rights users to identify themselves
to the Commissioners would improperly shift the burdens in this case. The
United States and the Tribe are the parties who wish to alter existing rights and
as such should be the ones to bear the burden of establishing the necessary
parties to serve. We understand the desire of the United States and the Tribe to
obtain the most accurate list of water right holders, both to satisfy this Court’s
requirement that all parties be served, and also to ensure that all water right
holders are bound by whatever decision is reached in this case. However, these
concerns are not strong enough to justify shifting the burden onto those who

1 may be negatively impacted. The burden is properly on those who seek to alter
2 water rights.”

3 *See*, June 1, 2001 Order, Doc. #522 in C-125. That same rationale applies here. *C.f.*, *Cheremie*
4 *v. Orgeron*, 434 F.2d 721, 725 (5th Cir. 1970) (neither decedent’s estate nor decedent’s heirs are
5 required to act affirmatively to subject themselves to liability).

6 **V. RELIANCE ON RULE 25(c) AS SUGGESTED IN THE PROPOSED**
7 **SUCCESSOR-IN-INTEREST ORDER IS NOT THE SOLUTION WHICH THE**
8 **COURT SHOULD ADOPT FOR CHANGES IN OWNERSHIP DURING THE**
9 **PENDENCY OF THESE PROCEEDINGS.**

9 **A. Introduction.**

10 Recognizing that defendants might not file motions to substitute as set forth in the
11 Proposed Order, the Plaintiff Parties inappropriately rely on Rule 25(c) to solve that dilemma.
12 First, Fed. R. Civ. P. 25(c) applies only to transfers of interests during the pendency of
13 litigation, and not to those which occur before the litigation begins.⁵ *See, Hilbrands v. Far East*
14 *Trading Co., Inc.*, 509 F.2d 1321, 1323 (9th Cir. 1975); *Andrews v. Lakeshore Rehabilitation*
15 *Hosp.*, 140 F.3d 1405, 1407 (11th Cir. 1998); *Mikazumi v. Buras*, 419 F.2d 1319, 1320 (5th Cir.
16 1969). It does not apply at all to subproceeding C-125-C. An action is commenced by the
17 filing of a complaint. *See*, Fed. R. Civ. P. 1. Mineral County has filed no such complaint.
18

19 Second, Fed. R. Civ. P. 25 is merely a procedural provision that gives the court
20 authority to continue with the original parties or to substitute or join a successor in interest.
21 Whether a party is a successor to a transferred interest or is subject to liability as a successor, so
22 that Rule 25 applies, is a matter of substantive law. 6 Moore, Jmes. Wm. et al., *Moore’s*
23 *Federal Practice & Procedure*, § 25.31(2) (3d ed. 2010) [*citing, Hilbrands v. Far East Trading*
24 *Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975) (whether a right to continue a suit survives is a
25

26
27 ⁵ Rule 25 is not the exclusive Rule for adding new parties after the commencement of an action.
28 They may be joined through amendment under Rule 15, or as required parties under Rule 19.
 See, Moore, James Wm. et al., 6 *Moore’s Federal Practice and Procedure*, § 25.02 (3d ed.
 2010).

1 question of substantive law - Fed. R. Civ. P. 25 is procedural, and does not provide for survival
2 of any right of action); *also citing, Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 566 F.2d
3 8, 24-25 (7th Cir. 1977) (substitution under procedural rule must follow substantive law)].

4 Speaking generally, a person is not subject to liability based upon a transfer of interest
5 unless (1) the person agreed to assume the liability of the predecessor, (2) two companies
6 merged, (3) the purchaser was a simple continuation of the seller, or (4) fraud was involved. 6
7 *Moore's Federal Practice & Procedure*, § 25.36 (3rd ed. 2010) [*citing, LiButti v. United States*,
8 178 F.3d 114, 123-124 (2nd Cir. 1999) (in suit over ownership of racehorse, court had no
9 jurisdiction over company that acquired horse as part of syndicate agreement when company
10 was not liable as successor in interest under applicable New Jersey law)]. In cases governed by
11 federal law, successorship and successor liability are determined by federal statute or by the
12 federal common law "successorship doctrine." 6 *Moore's Federal Practice & Procedure*, §
13 25.31(2) (3d ed. 2010) [*citing, Herrera v. Singh*, 118 F.Supp.2d 1120, 1122-1123 (E.D. Wash.
14 2000)].

15
16
17 At this juncture, it is not even possible to determine factual issues arising here in the
18 context of a Fed. R. Civ. P. 25(c) motion, including whether an absentee is a successor to
19 liability of a party within the meaning of Fed. R. Civ. P. 25(c) such that the Rule applies and
20 the absentee will be bound by any judgment. For such a determination, due process requires
21 according such an absentee at least an opportunity to be heard. Thus, in the context of a case
22 such as this potentially involving multiple absentee water right transferees, proceeding to
23 judgment based upon the assumption that they will be bound by it is inadvisable because that
24 may not be the case.

25
26 The issues related to water rights of defendants which are raised by the Tribal Claims
27 and the Federal Claims, and which may be raised if Mineral County is allowed to intervene and
28 file its proposed Amended Complaint, are not a good fit in the context of Rule 25 or in the

1 context of the law applying it. In the usual Rule 25 context involving defendants, a plaintiff is
2 seeking to impose some sort of direct liability on one or more defendants. That is not what is
3 involved here.

4 The Tribal Claims and the Federal Claims seek recognition of additional water rights
5 not recognized in the Walker River Decree or in any permits issued by Nevada or California.
6 The Tribe and the United States do not seek to impose any direct obligation on the surface
7 water rights of the defendants here. Rather, because satisfaction of any new rights recognized
8 for the Tribe and United States will be taken from the same source, their claims may indirectly
9 impact the water rights of the defendants. Thus, if the Tribe and the United States are
10 successful, they have asked the Court to recognize, declare and quiet title to those additional
11 rights, to “declare that defendants and counterdefendants have no right, title, or other interest in
12 or to the use of such water rights,” and to “permanently enjoin the defendants and
13 counterdefendants from asserting any adverse rights, title or other interest in or to such water
14 rights.” Doc. #58 at 17-18; Doc. #59 at 31. The situation is not materially, different if the
15 Court ultimately undertakes an adjudication of underground water rights, separately or with
16 surface water as a single source of supply.

17 If allowed to file its complaint, Mineral County will seek “the right to, at least, 127,000
18 acre feet of flows annually reserved from the Walker River.” Exactly how Mineral County
19 would have the Court satisfy that request is not clear from the proposed Amended Complaint,
20 and in any event, how the Court might address such an issue should it arise, likely would not be
21 controlled by Mineral County’s pleading. Mineral County’s proposed complaint does not seek
22 any specific quantity of water from each particular defendant. Rather, it, too, seeks recognition
23 of a right or “principle” which may have an indirect effect on the water rights of defendants.

24 As noted above, Rule 25 is procedural. It does not provide for survival of a right of
25 action. Although the claims the Tribe and the United States assert, and the possible claim of
26

1 Mineral County, survive a defendant's transfer of water rights, they have no claim against a
2 defendant who has transferred all of its water rights. Such a defendant is entitled to be
3 dismissed from this action. *See, Irving Air Chute Co. v. Switlike Parachute & Equipment Co.*,
4 26 F.Supp. 329, 330 (D. N.J. 1939); *Procter & Gamble Company v. Kimberly-Clark Corp.*, 684
5 F.Supp. 1403, 1407 (N.D. Tex. 1987) (party which transfers all of its interest in patent should
6 not be compelled to litigate merely because it was an owner when the litigation was
7 commenced). Thus, where an owner has transferred all of its water rights, that owner is
8 entitled to be dismissed from the subproceeding as a matter of substantive law. On the other
9 hand, defendants who have transferred less than all of their water rights remain a proper
10 defendant. Their "transferee" would be joined, not substituted.

12 In each case, the critical issue is whether the claims asserted here can be recognized and
13 enforced against less than all of the water rights on the source. It is not in the interest of the
14 Court, the Plaintiff Parties, or of any of the properly served defendants with water rights to
15 learn the answer to that question. In both proceedings, the Court cannot grant effective
16 preliminary or permanent relief as to administration of the source if there are persons on the
17 source who are not bound. If and when there is a decision and a need for permanent relief on
18 the merits, it will be essential for the Court to have jurisdiction to render a valid judgment
19 which binds and can be enforced against all water right claimants on the source. On a river
20 system and in a groundwater basin, a judgment which did anything less would result in chaos.

23 For example, if Mineral County were completely successful, the water right or principle
24 it establishes will take precedence over an 1863 water right of a properly served defendant.
25 However, the judgment could not affect the 1876 water right of a defendant who was not bound
26 by it. The river system could not be effectively administered where the 1876 right is junior to
27 the 1863 right, but unaffected by the right or principle established by Mineral County, which is
28 senior to the 1863 right. The same would be true with respect to the Tribal and Federal Claims,

1 even as to underground water. This is what concerned the Court when it found that all
2 claimants were necessary parties required to be joined under Fed. R. Civ. P. 19.

3 If water right transferees are not substituted or joined before judgment, they will have to
4 be substituted or joined after judgment in order to properly administer the water source. As is
5 explained below, the process for that post-judgment substitution or joinder will be more
6 onerous than joinder now, and at appropriate times while this litigation proceeds. Moreover,
7 post-judgment substitution or joinder runs the risk that such transferees will not be bound by
8 the judgment, and the further risk that the entire judgment will be void.

9
10 **B. The Court Should Not Rely on Rule 25(c) Here Because the Absentee Water**
11 **Right Transferees May Not Be Successors-In-Interest to Liability Within**
12 **the Meaning of Fed. R. Civ. P. 25(c).**

13 Although this litigation does not fit neatly within the case law interpreting and applying
14 Rule 25(c), that law should be considered, particularly with respect to post-judgment
15 substitution issues. Given that the Proposed Orders will rely on mostly unrepresented
16 defendants to file motions to substitute, it is likely that some absentee water right transferees
17 will not be joined before final judgment.

18 In *Herrera*, 118 F.Supp.2d 1120, plaintiffs claimed that a defendant violated several
19 sections of the Migrant and Seasonal Agricultural Workers Protection Act (“AWPA”), 29
20 U.S.C. § 1801, *et seq.*, and had wrongfully discharged plaintiffs. When the action against
21 defendant was commenced, two orchards were owned by defendant and operated as Ram
22 Farms. During the pendency of the litigation, Ram Investments LLC was formed, and
23 defendant executed quitclaim deeds transferring the orchards to the LLC. Defendant was a one
24 percent owner of Ram Investments LLC, and defendant’s two sons equal owners of the
25 remainder. *Herrera*, 118 F.Supp.2d at 1121-22.

26
27 Following judgment and pursuant to Fed. R. Civ. P. 25(c), plaintiffs brought a motion
28 asking that the court formally find that plaintiffs might execute their monetary judgment

1 against Ram Investments LLC. *Herrera*, 118 F.Supp.2d at 1122. In granting plaintiffs' Fed. R.
2 Civ. P. 25(c) motion for substitution, the district court ruled that a transferee is a successor to
3 the transferor, and thus liable for a judgment that may be attached to the transferred assets
4 when (1) the transferee is a bona fide successor; (2) the transferee had notice of the potential
5 liability; and (3) the predecessor is unable to directly provide adequate relief. *Herrera*, 118
6 F.Supp.2d at 1123 [citing, *Steinbach v. Hubbard*, 51 F.3d 843, 845-846 (9th Cir. 1995)]. The
7 *Herrera* court also stated that a finding of successorship is a factual determination and
8 'emphasis on the facts of each case as it arises is especially appropriate.' *Id.*, at 1124. *See also*,
9 *In Re National Airlines, Inc.*, 700 F.2d 695, 699 (11th Cir. 1983) (successor liability balancing
10 is a highly fact-oriented task; successor airline not bound by injunction for title VII
11 transgressions charged against its predecessor).
12

13
14 If no effort is made here to join transferees until after judgment, the facts as to each
15 transferee will have to be considered in relation to the three part test employed by the *Herrera*
16 court. It is possible that in some situations, no element of the three part test can be satisfied. In
17 those situations where less than all of an original defendant's water rights is sold, it is not clear
18 that the transferee is a "bona fide successor," nor will it be clear that the "predecessor is unable
19 to directly provide adequate relief" out of water rights which were not transferred.

20 In every situation where there has been a transfer, whether of all or part of a defendant's
21 water rights, the issue of notice will be problematic. Notice by mail or other means as certain
22 to ensure actual notice is a minimum constitutional precondition to a proceeding that will affect
23 the property interests of *any* party, if its name and address are readily ascertainable. *Mennonite*
24 *Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) [emphasis in original]. Here, there is no
25 way to know the extent of notice the absentee water right transferees have had of the pendency
26 of the action, either at the time of transfer or thereafter. If they have had no such adequate
27 notice, under the federal "successorship doctrine," the transferees will not be "subject to
28 liability as successors in interest" so that Fed. R. Civ. P. 25(c) applies. These proceedings
cannot be continued to judgment without joinder of the transferees, in reliance on Fed. R. Civ.

1 P. 25(c), without substantial risk that the judgment will either be unworkable from a water right
2 administration standpoint, or void. That problem is compounded if the Court makes a
3 determination now, without notice or opportunity to be heard, that all such unjoined transferees
4 are bound by the outcome of these proceedings. Yet, that is what the Proposed Successor-In-
5 Interest Order would have the Court do.

6 **C. Judicial Economy Requires That Transferees Be Substituted or Joined at**
7 **Appropriate Times As These Proceedings Progress and Prior to Entry of**
8 **Judgment.**

9 In order to have a judgment in these proceedings that allows for administration of all of
10 the water rights on the source, it is necessary to have a judgment which binds the holders of all
11 water rights from the same source. Seeking to bind water right transferees after judgment is
12 rendered will not be easily accomplished. In *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*,
13 13 F.3d 69 (3d Cir. 1993), a case cited by the Plaintiff Parties, the court held that a district court
14 may not determine factual issues arising in the context of a Fed. R. Civ. P. 25(c) motion,
15 including issues of whether an absentee is a successor in interest within the meaning of the
16 Rule, without providing the absentee whose substitution is sought with an opportunity to be
17 heard. *Id.* An evidentiary hearing, following, of course, proper service of a post-judgment
18 motion to substitute or join an absentee, will be required in contested cases to determine if an
19 absentee is a judgment party's successor to liability within the meaning of Fed. R. Civ. P.
20 25(c). *Id.*

21 In *Luxliner*, one of the defendants was RDI/Luxliner ("RDI"), against whom a default
22 judgment was entered. *Luxliner*, at 71. Two months after the judgment, plaintiffs, moved
23 pursuant to Fed. R. Civ. P. 25(c) to join or substitute another company, Sturgis Lux-
24 liner ("Sturgis") on the judgment previously entered against RDI because Sturgis had purchased
25 RDI's assets during the pendency of the action prior to judgment, making RDI judgment proof.
26 *Id.* In support of their motion, plaintiffs filed an affidavit. *Id.* In support of its response,
27 Sturgis filed a competing affidavit, offering explanations of material facts proffered in
28 plaintiffs' affidavit to refute successor liability. *Luxliner*, at 71, 73-75. The district court,
without conducting an evidentiary hearing, granted the motion. *Id.* The appellate court

1 reversed and remanded for an evidentiary hearing. *Luxliner*, at 70. The appellate court held
2 that where competing affidavits focus on a material issue, “a district court may not decide
3 factual issues arising in the context of Rule 25(c) motions simply by weighing” sworn
4 affidavits. *Luxliner*, 13 F.3d at 72. In the context of imposing liability upon an absentee
5 purported to be a successor in interest to a party to a judgment within the meaning of Fed. R.
6 Civ. P. 25(c), after judgment is rendered, a court, at least, ‘must first determine whether the
7 affidavits show that there is no genuine issue as to any material fact and that the moving party
8 is entitled to [joinder or substitution] as a matter of law.’ *Luxliner*, 13 F.3d at 72 (emphasis
9 added). “If they do not, however, the court should conduct an evidentiary hearing to decide
10 whether the motion should be granted.” *Luxliner*, at 72-73.

11 If the court proceeds to judgment, proper service of a post-judgment motion to
12 substitute each absentee pursuant to Fed. R. Civ. P. 25(c) will be required, and due process will
13 require “at least” that any such substitution that is opposed by the absentee involve an
14 evidentiary hearing to determine disputed material factual issues, including the issue of
15 successor liability, arising in the context of the motion. Proceeding to judgment while relying
16 upon Fed. R. Civ. P. 25(c), and assuming that absentees will be bound is a panacea that will, in
17 the long run, result in far more time, expense and delay for the Court and the parties than will
18 requiring joinder of transferees at appropriate times as these proceedings progress and prior to
19 judgment.

20 The Plaintiff Parties would have the Court rely on *In Re Bernal*, 207 F.3d 595 (9th Cir.
21 2000); *Luxliner*, 13 F.3d 69 (3rd Cir. 1993); *PP Inc. v. McGuire*, 509 F.Supp. 1079 (D. N.J.
22 1981); and *Froning’s, Inc. v. Johnston Feed Service, Inc.*, 568 F.2d 108 (8th Cir. 1978) to
23 conclude that “where a defendant has been served in a subproceeding and subsequently sells or
24 otherwise conveys a water right or a portion of a water right subject to that subproceeding, a
25 successor-in-interest need not be reserved, but will be bound by the results of this litigation.”
26 None of those cases so hold.

27 In, *In re Bernal*, plaintiff Bernal brought an adversary proceeding to discharge certain
28 student loans, obtained from Citibank and guaranteed by the California Student Aid

1 Commission (“CSAC”) under the Guaranteed Student Loan Program on the ground of undue
2 hardship, against CSAC and others. *In re Bernal*, 207 F.3d at 596. A copy of the complaint
3 and an amended summons was served on CSAC. CSAC failed to respond to the complaint and
4 Bernal filed a request for entry of default which was duly entered. After the default judgment,
5 CSAC assigned and transferred its interest in the Bernal notes to Education Credit Management
6 Corp. (“ECMC”). ECMC then filed a motion to intervene in the adversary proceeding and set
7 aside CSAC’s default. The bankruptcy court denied the motion because at the time the
8 complaint was filed and at the time the default was entered ECMC was not a proper party in
9 intervention. *Id.*, at 596-97.

10 The Ninth Circuit determined that the bankruptcy court did not abuse its discretion,
11 concluding that CSAC “gutted its own case by allowing a default to be taken” after Bernal
12 brought an adversary proceeding to obtain her discharge. *In re Bernal*, 207 F.3d at 599.
13 ECMC had made no attempt to explain why CSAC allowed the default to be taken. It held that
14 the proper procedure in such a case would have been a motion brought by ECMC under Fed. R.
15 Civ. P. 25(c) because, were ECMC allowed to substitute in the action, it would have to explain
16 why CSAC, its predecessor, allowed its default to be taken. *Id.* Thus, *Bernal* did not directly
17 involve Rule 25(c), and did not decide that had such a motion been filed, ECMC would have
18 been bound, although in that case it likely would have been.

19 As noted above, the court in *Luxliner* held that district court should have conducted an
20 evidentiary hearing, and not merely relied upon affidavits to determine whether corporation
21 was the initial judgment debtors successor in interest under applicable substantive law prior to
22 joining the corporation pursuant to Fed. R. Civ. P. 25(c). There was nothing automatic about
23 the successor’s liability under the judgment there.

24 *PP, Inc. v. McGuire*, 509 F.Supp. 1079 (D. N.J. 1981) did not involve an issue of
25 whether a successor to a defendant was obligated to a plaintiff. In that case, it was the plaintiff
26 who had assigned the note on which the litigation was based, and it was the plaintiff who
27 sought to add its assignee as a named plaintiff. 509 F.Supp. at 1083. *Fronings, Inc. v.*
28 *Johnston Feed Service, Inc.*, 568 F.2d 108 (8th Cir. 1978) is similar. There, it was the plaintiff

1 which had been dissolved during the pendency of the litigation. The court held that under Iowa
2 law, a dissolved corporation could maintain a lawsuit, and there was no need for substitution
3 under Rule 25(c).

4 Clearly, reliance on Rule 25(c) for purposes of substituting absentee water right holders
5 after entry of judgment provides no assurance that they will be bound by it. Moreover, it will
6 require filing of the same motion and service in the same manner as a similar motion filed
7 today before judgment. In addition, it will require a far more complicated individual hearing
8 on each motion than would be required for a similar motion filed today before judgment. Most
9 importantly, allowing these matters to proceed to judgment, based upon the unsupported
10 conclusion that the “successor-in-interest need not be reserved, but will be bound by the results
11 of this litigation,” raises the very real possibility that any final judgment will be void, or if not
12 void, not capable of being administered, perhaps after decades of litigation.

13 As noted above, the original determinations made by Judge Reed in both of these
14 subproceedings is that persons or entities holding water rights identified in the CMO and
15 Service Order are necessary parties and must be joined. *See*, pgs. 5; 9-11 *supra*. He did so out
16 of concern that without their joinder, any judgment rendered would be subject to attack as void.
17 *See, e.g.*, Doc. #15 at 5-6 quoted above at page 5; *see also*, Doc. #210 at 5, quoted above at
18 page 10. Judge Reed’s concerns are well founded.

19 No decree can be entered affecting the title to property or cancelling any cloud thereon
20 unless all of the parties interested in the title or in the particular cloud and who will be directly
21 affected by any judgment that may be rendered are properly before the court. *McShan v.*
22 *Sherrill*, 283 F.2d 462, 163 (9th Cir. 1960); *United States v. Wood*, 466 F.2d 1385, 1388 (9th
23 Cir. 1972). The absence of indispensable parties can be raised at any time, even by the
24 appellate court on its own motion. Fed. R. Civ. P. 12(h) provides that the defense of failure to
25 waive an indispensable party is never waived. *Sherrill*, 283 F.2d at 464. ‘If there are
26 indispensable parties it is [the court’s] duty to protect their interests...even though the question
27 was not raised in the District Court; it [is] the duty of the District Court to protect them in any
28 further proceedings. The defect is not “jurisdictional” but is predicated ‘on the ground that no

1 court can adjudicate directly upon a person's right, without the party being either actually or
2 constructively before the court.' *Id.*

3 The issue of absence of indispensable parties can be raised by those who were parties,
4 participated in the action and lost, even on appeal. *Id.* Moreover, a non-party may obtain a
5 determination that a judgment is ineffective as to the non-party if the judgment jeopardizes a
6 protectable interest of his and the character of his interest warrants relief. *In Re Lovitt*, 757
7 F.2d 1035, 1039 (9th Cir. 1985). Thus, any judgment rendered here without joining absentee
8 water right transferees will be subject to challenge by both those defendants who participated
9 and lost, and by the non-parties themselves.

10 A court with jurisdiction over prior owners of water rights in an action to determine the
11 title to the water rights at the time a subsequent owner obtains the water rights does not have
12 jurisdiction to proceed in that action and render a judgment affecting the subsequent owner's
13 title to the purchased property. Such a judgment would not bind the subsequent owner unless
14 at the time of purchase the subsequent owner has actual or constructive notice of the pendency
15 of that action. *See, Pitt v. Rodgers*, 104 F. 387, 389 (9th Cir. 1900). In Nevada, under the
16 State's lis pendens statute, subsequent owners are not charged with constructive notice of the
17 pendency of an action unless at the time they acquire title there is a notice of the pendency of
18 such action on file with the recorder of the county where the property is situated. *Id.*, at 390.
19 There is no such notice here.

20 Because the absentee water right transferees are parties required to be joined within the
21 meaning of Fed. R. Civ. P. 19, and so must be joined, proceeding to judgment and failing to
22 join the absentees creates the potential for future complications. The problems and issues
23 associated with nonjoinder of the absentee transferees are magnitudenally greater than any
24 difficulties, expense, or simply additional work that the United States, Tribe and Mineral
25 County will incur as a result of properly joining the absentees and comporting with due
26 process. Since the absentees are required by Fed. R. Civ. P. 19 to be joined, there seems no
27 excuse to be found in arguments of additional work or expense that trump a required party
28 absentee's right to be accorded such due process, and Judge Reed has previously so ruled.

1 **VI. A SUCCESSOR-IN-INTEREST AS A RESULT OF DEATH IS NOT BOUND BY**
2 **A JUDGMENT IF THAT SUCCESSOR-IN-INTEREST IS NOT SUBSTITUTED**
3 **IN ACCORDANCE WITH THE PROVISION OF RULE 25(a).**

4 The District does not object to most of the Proposed Successor-In-Interest Order as it
5 relates to successors-in-interest as a result of death. However, in the Proposed Successor-In-
6 Interest Order, the Plaintiff Parties would have the Court conclude now that successors-in-
7 interest as a result of death are bound by any final judgment even though those successors are
8 never substituted as provided in Fed. R. Civ. P. 25(a). That is not the law.

9 *Ransom v. Brennan*, addressed the consequences of a plaintiff's failure to substitute
10 properly as a party defendant the executrix of a deceased defendant in the manner provided by
11 Fed. R. Civ. P. 25(a). *Ransom v. Brennan*, 437 F.2d 513, 515 (5th Cir.) cert. den. 403 U.S. 904
12 (1971). *Ransom* was a diversity action for breach of contract brought against defendant,
13 Brennan, in federal court. *Id.* During the pretrial stages Brennan's death was suggested upon
14 the record by deceased's counsel. *Id.* Within 90 days, plaintiff moved to substitute Brennan's
15 executrix, who had been appointed by the probate court. *Id.* Plaintiff failed to serve its motion
16 to substitute upon the executrix in the manner provided by Fed. R. Civ. P. 4, instead, plaintiff
17 mailed the motion to deceased's counsel. *Id.*

18 The district court granted the motion to substitute, and the executrix moved to dismiss
19 for lack of personal jurisdiction and for failure to state a claim upon which relief can be
20 granted. *Ransom*, 437 F.2d at 516. The district court denied that motion, and the case went to
21 trial, with an eventual judgment for plaintiff. *Id.* The executrix appealed, asserting, *inter alia*,
22 the jurisdictional issue. *Id.*

23 In reversing and remanding, the appellate court assumed that even had the executrix had
24 actual notice, such would not operate as a substitute for process. *Ransom*, 437 F.2d at 522. The
25 *Ransom* Court reasoned that whenever a defendant comes into court to challenge service of
26 process, the defendant has of necessity received notice of the suit, but mere notice clearly is not
27 a sufficient ground upon which a court can sustain the validity of service of process when
28

1 Congress has established other definitive standards. *Id.*, at 519. Accordingly, the court
2 concluded that the district court had no jurisdiction over the executrix of Brennan. *Id.*

3 If one of several defendants dies, the action does not abate with regard to the other
4 defendants, even if it abates from lack of substitution of parties with regard to the defendant
5 who has died. *Cheremie v. Orgeron*, 434 F.2d 721, 723 (5th Cir. 1970). Neither decedent's
6 estate nor decedent's heirs are required by Fed. R. Civ. P. 25(a) to act affirmatively to subject
7 themselves to possible liability or to call to plaintiff's attention the information they have of the
8 fact of a party's death. *Id.*, at 725.

9
10 In *Cheremie v. Orgeron*, a case alleging patent infringement, the district court entered
11 judgment against defendant Rodrigue, one of several codefendants, despite that he had died
12 during the pendency of the action, his death had been noted in open court, and none of the
13 plaintiffs or surviving defendants had ever acted to effect a substitution or adjourn the action
14 until substitution could be secured. *Cheremie*, 434 F.2d at 723. The several living defendants
15 appealed contending the judgment was void, that the judgment against Rodrigue was a nullity
16 and as a consequence, under Louisiana law, the judgments against them were void also. *Id.*
17 The appellate court reversed and remanded the judgment as to Rodrigue, with directions that on
18 remand the district court should allow plaintiffs to file an untimely motion to substitute and
19 allow both plaintiffs and those sought to be substituted to develop further the record on laches
20 because the court determined that where the suit involved federally created rights, equitable in
21 nature, the limitations period of Fed. R. Civ. P. 25(a) should not be rigidly applied. *Id.*, at 724-
22 25.

23
24
25 Fed. R. Civ. P. 25, as it currently exists, requires that a motion to substitute due to death
26 of a party be brought within 90 days of a suggestion of death on the record. The same equitable
27 considerations present in *Cheremie* might apply here, such that even a motion to substitute,
28 untimely under the current rule, might be allowed. However, such equitable considerations

1 might also mean that a long, needless delay in acting to substitute might leave such motion
2 open to a defense of laches or similar equitable defense. It is in the interest of all the parties to
3 ensure that substitution is not disallowed as a result of needless delay.

4 Contrary to the Proposed Order, “service of a statement noting death” does not
5 necessarily mean including identification of the successor who may be substituted. *See*, Doc.
6 #s 1614-1; #516-1 at 5, Ins. 25-27. There is a split of authority among the circuits as to the
7 necessity of naming a successor in a statement of death and the issue apparently has yet to be
8 addressed in the Ninth Circuit and, as noted above, Fed. R. Civ. P. 25(a) contains no express
9 requirement that a successor or representative of decedent be so named. *See, McSurely v.*
10 *McClellan*, 753 F.2d 88, 98 (D.C. Cir. 1985) (suggestion of death insufficient when it did not
11 identify decedent’s representatives); *but compare, Unicorn Tales Inc. v. Banerjee*, 138 F.3d
12 467, 470 (2d Cir. 1998) (holding that it is not necessary for statement noting death to name
13 decedent’s representatives or successors and opining that if there is a problem identifying the
14 legal representative of the estate, a motion may be brought under Fed. R. Civ. P. 6(b) to enlarge
15 the time to file the motion for substitution).

16 Contrary to plaintiffs’ suggestions, “any and all successors in interest” will not be
17 bound merely by proceeding against existing parties. Rather, decedent’s personal
18 representatives and successors can only be bound by judgment upon their proper substitution.
19 *Ransom v. Brennan*, 437 F.2d at 518. Moreover, it is not at all clear that a substitution will be
20 allowed after judgment. That may turn on applicable substantive state law. *See, First Idaho*
21 *Corp. v. Davis*, 867 F.2d 1241, 1242-43 (9th Cir. 1989) (affirming denial of post-trial motion to
22 substitute for deceased defendant). Therefore, it is also important to substitute successors to
23 deceased defendants at appropriate times as the litigation progresses and before judgment.
24

25
26
27 **VII. THE ISSUE OF A SERVICE CUT-OFF DATE SHOULD NOT BE ADDRESSED**
28 **IN THE CONTEXT OF WATER RIGHTS IN EXISTENCE AS OF A**
PARTICULAR DATE.

1
2 The United States and Tribe have submitted a proposed order which would provide that
3 the only water rights to be addressed in this proceeding are those in existence as of December
4 31, 2009. The proposed order also states “that the parties agree that only water rights that
5 might be created after December, 2009 are domestic rights associated with groundwater use.”
6 Doc. #1613-1 at 1. It is not at all clear what is meant by either proposal in the context of the
7 need to join successors-in-interest to water rights in existence as of December 31, 2009. As has
8 been established above, it is unwise to allow this matter to go to a final judgment without
9 substitution and/or joinder of such successors-in-interest.

10 The District agrees that it is unlikely that there will be any new surface water rights
11 established in Nevada. It is uncertain as to new surface water rights in California. Moreover, it
12 is simply not accurate to assume that the only new underground water rights which may be
13 established after December 31, 2009, in the Groundwater Basins referenced in the CMO are
14 domestic rights to underground water. Groundwater Basins 110A (Schurz Subarea), 108
15 (Walker Lake Subarea) and 109 (East Walker) are not presently subject to any Nevada State
16 Engineer Orders concerning new appropriations. Current State Engineer Orders for
17 Groundwater Basins 107 (Smith Valley), 108 (Mason Valley) and 106 (Antelope Valley) allow
18 for new appropriations for commercial, industrial or stockwater purposes for up to 1,800
19 gallons per day. The State Engineer Order for Groundwater Basin 110C (Whiskey Flat)
20 prohibits appropriations for irrigation, but authorizes as a preferred use appropriations for
21 municipal purposes. California does not regulate underground appropriations at all.

22 The Court should relate present and future service obligations to the phased proceedings
23 provided for in the CMO. The District has no objection to using December 31, 2009 as the date
24 for considering established water rights whose owners should be served for purposes of Phase I
25 of the Tribal Claims. This matter has been ongoing for over 18 years, and we have not yet
26 identified, much less determined, those issues. How much longer that will take is uncertain.

27 Once those issues are decided by the Court, it is unclear as to what issues will be left to
28 complete and determine on the merits of the Tribal Claims. At that time, depending on the
issues remaining, and on how many years have elapsed since December 31, 2009, the Court

1 and the parties should review whether any additional water rights have been established since
2 December 31, 2009, and whether the nature of the proceedings remaining and the nature of the
3 newly established water rights require joinder of their owners under applicable law. It would
4 be unwise for the Court to determine at this time that owners of water rights established after
5 December 31, 2009 should not be joined in that subsequent phase of the Tribal Claims which
6 may not even begin until many years after December 31, 2009. The same is true with respect
7 to proceedings involving the Federal Claims, which are the last phase under the CMO.

8 **VIII. THE DISTRICT'S PROPOSAL CONCERNING SUBSTITUTION AND**
9 **JOINDER OF SUCCESSORS-IN-INTEREST.**

10 **A. Introduction.**

11 The Proposed Successor-In-Interest Orders will require that each of those Orders and
12 their attachments be served, presumably by mail, on all of the persons who have entered
13 Notices of Appearance in each of the subproceedings, and who are unrepresented by counsel.
14 In addition, those Proposed Orders and their attachments will have to be served in some fashion
15 on all of the persons who have been served in the Mineral County intervention proceeding, but
16 who were not required to do anything at all except respond to the Motion to Intervene by a date
17 which has been changed and is now vacated. *See, pgs. 9-10 supra.*

18 There are approximately 2,200 such persons and entities in subproceeding C-125-B and
19 several hundred in subproceeding C-125-C. The reason that all of these persons and entities
20 must be served, even those who have entered Notices of Appearance, is that the Proposed
21 Orders contemplate that at any time an interest in a water right is transferred, those defendants
22 are to take some action related to substitution. Heretofore, none of the defendants in either
23 subproceeding have been required to do what is proposed by the Proposed Successor-In-
24 Interest Orders. Moreover, in addition to the fact that any motion to substitute under Rule 25(c)
25 will have to be served in accordance with Rule 4 on the non-party being substituted, it will have
26 to be served on parties in accordance with Rule 5. *See, Fed. R. Civ. P. 25(c); 25(a)(3).* That
27 means it will have to be mailed to all of the persons who have appeared but who are not
28 represented by counsel.

1 Based upon the concerns expressed above, particularly as to the efficacy of post-
2 judgment reliance on Fed. R. Civ. P. 25(c), there is a better approach which will involve less
3 time and expense and, importantly, more certainty of a final judgment which is enforceable
4 against all water rights on the source. The approach as outlined below is to review the status of
5 the need to join successors-in-interest at the commencement of a new phase of the proceedings
6 in C-125-B. The initial approach with respect to C-125-C is slightly different, given the fact
7 that there has been no consideration given to successors-in-interest there for about 10 years.

8 These proceedings should simultaneously move forward even as reviews for the need to
9 join successors-in-interest are taking place. One of the most significant reasons that the
10 successor-in-interest issue has become so critical is the fact that each of these proceedings have
11 been dealing with service for 18 and 16 years, respectively.

12 **B. The Claims of the Tribe and the United States in Subproceeding C-125-B.**

13 As noted above, the CMO bifurcates this proceeding into the Tribal Claims and the
14 Federal Claims. It further bifurcates the Tribal Claims into two phases. The District and
15 Nevada have provided the United States and Tribe with updated information on water right
16 transferees since 1993, and the United States and Tribe have reviewed that information. Based
17 upon the Court's prior orders related to joinder, the Court can order presently known
18 successors-in-interest joined as necessary parties under Fed. R. Civ. P. 19 without the need for
19 any motion.

20 The Court should also order the United States and Tribe to presently mail all of the
21 documents required to be served on defendants by prior order, including, but not limited to, a
22 Notice of Lawsuit and Request for Waiver of Service of Notice in Lieu of Summons, to those
23 presently known successors-in-interest. This will be a much smaller mailing than the mailing
24 required if the Proposed Orders are adopted. Phase I of the Tribal Claims should proceed
25 forward once that mailing is complete, without waiting for personal service, if waivers of
26 service are not forthcoming. Any required personal service can take place as Phase I is
27 proceeding.

28

1 Once the threshold issues have been identified and decided, depending upon what
2 proceedings remain with respect to the Tribal Claims, another assessment should be done to
3 determine to what extent there are additional successors-in-interest to some of the water rights
4 within any categories listed in the CMO which may be involved in the remaining proceedings
5 involving the Tribal Claims.⁶ At that time, all such successors-in-interest who have not been
6 joined should be joined under the provisions of Rule 19. The Court can order them joined
7 under its provisions without any need for a motion to substitute and all of the attendant issues
8 described above.

9 At the conclusion of any remaining proceedings concerning the Tribal Claims, the same
10 process should be followed with any additional successors-in-interest, and they should be
11 joined as defendants prior to entry of judgment.

12 Depending upon any proceedings remaining with respect to the Federal Claims, prior to
13 the time that those proceedings commence, the same process should be followed, and the same
14 process should be followed prior to entry of any final judgment on the Federal Claims.

15 This process is necessary so that any final judgment will bind all of the parties. It will
16 involve much less work for all concerned than will post judgment motions to substitute which
17 must be filed, served and heard one at a time as required by Rule 25(c) and applicable case law.

18 **C. The Mineral County Motion to Intervene, Subproceeding C-125-C.**

19 Given the fact that the caption on which most of the service is based in subproceeding
20 C-125-C is now over ten years old, it should be compared with the similar category of
21 defendants from subproceeding C-125-B. If there are significant differences, the Court should
22 require that persons who are required to be joined, be served with the Mineral County Motion
23 either through waiver of service or personal service as has been previously ordered.

24 The Court should then proceed with a schedule for determination of Mineral County's
25 Motion to Intervene. If Mineral County is allowed to intervene and assert a claim, at that time
26

27
28 ⁶ It is possible that any decision on the threshold issues will be certified for appeal under 28
U.S.C. § 1292(b), thus potentially further delaying when the next phase of this proceeding will
begin.

1 there should be a review of the extent to which there are successors-in-interest who must be
2 joined, and they should be joined at that time, as provided in previous Court orders. Finally,
3 prior to entry of any judgment on Mineral County's claim, the Court should again require
4 joinder of any additional successors-in--interest who will need to be bound by any such
5 judgment. This process is preferable to individual motions to substitute after entry of judgment
6 which entails all of the work and pitfalls described above.

7 DATED this 7th day of January, 2011.

8 WOODBURN AND WEDGE

9
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28

CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 7th day of January, 2011, I electronically served the foregoing *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* 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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13 I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00127-ECR-
14 LRL to the following via U.S. Mail, postage prepaid, this 7th day of January, 2011:

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11 I certify that I am an employee of Woodburn and Wedge and that on the 7th day of
12 January, 2011, I electronically served the foregoing *Walker River Irrigation District's*
13 *Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have*
14 *Been Served and to Proposed Order Concerning Service Cut-Off Date* in Case No. 3:73-cv-
15 00128-ECR-LRL with the Clerk of the Court using the CM/ECF system, which will notify the
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I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00128-ECR-
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