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

Attorneys for Walker River Irrigation District

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125 SUBFILE NO. C-125-B 3:73-cv-00127-ECR-LRL SUBFILE NO. C-125-C 3:73-cv-00128-ECR-LRL
UNITED STATES OF AMERICA, WALKER RIVER PAIUTE TRIBE, Counterclaimants, v. WALKER RIVER IRRIGATION DISTRICT, et al., Counterdefendants.	**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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I. INTRODUCTION.

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

II. SUMMARY OF THE DISTRICT'S POSITION ON THE PROPOSED ORDERS.

A. The Proposed Successor-In-Interest Order.

1. Re-Service of Properly Served Defendants.

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

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

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

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

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

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

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

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[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.

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

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

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

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

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

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

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

5. Specific Objections.

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

B. The Proposed Service Cut-Off Order.

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

III. PROCEDURAL BACKGROUND.

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

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

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

1. The Initial Filing by the Tribe and the United States.[2]

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

> In this case the Tribe and the United States want the Court to recognize additional water rights for the Tribe and integrate these rights into the Decree. Such a recognition might have the effect of reducing the water allocated to other federal rights holders or altering the priority which their allocation is given. 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.
>
> If these water claimants are not joined in this action, their ability to protect their interests in their water rights would be impaired. If they were not a party to the suit and the Tribe's new water rights were recognized, the claimants may have their water interests altered or suspended. They may be able to protect their interests after this suit is concluded through another lawsuit; 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.

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

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

54; 55; 60; 61; 63.

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

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

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

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

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

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

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

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

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

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

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

B. Mineral County's Motion to Intervene.

Mineral County filed its Motion to Intervene on October 25, 1994. Doc. #2.[3] Pursuant to a Stipulation and Order, the District submitted a Report to the Court concerning the Motion to Intervene. Doc. #9. In that Report, the District noted that under Rule 5 of the Federal Rules, the motion must be served upon the "parties" and that the Court in its October 27, 1992 Order (in subproceeding C-125-B) had ordered joinder of all parties with water rights under the Walker River Decree. Doc. #9 at 4-5.

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

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

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

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

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

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

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[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.

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

On April 3, 2000, the Court determined that approximately 617 individuals and entities had been served, and that approximately 170 remained to be served. Doc. #327 at 2-5 and Exh. 1. Except as noted above, there has been no effort to determine the extent of deaths of or inter vivos transfers by those persons since that time. The Court also ordered that any party served from that point forward would be required to file and serve a Notice of Appearance which includes the name of the party and the mailing address of that party. The Order also stated that any "party who is properly served but does not file and serve a Notice of Appearance shall be deemed to have notice of subsequent orders of the Court and subsequent pleadings filed and served in this matter." *Id.*, at 8. Finally, the Order stated that responses to the Motion to Intervene would be served pursuant to a schedule to be established by further order of the Court. *Id.*

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

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

> Finally, we risk wasting scarce judicial resources, as well as the time and effort of the parties, if we allow this case to proceed with even a small number of water rights holders lacking notice of the action. If we fail to properly acquire jurisdiction by service of process, a single party adversely affected by a 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.

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

> 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

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

Doc. #252 at 10.

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

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

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

> "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

> may be negatively impacted. The burden is properly on those who seek to alter water rights."

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

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

A. Introduction.

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

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

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[5] Rule 25 is not the exclusive Rule for adding new parties after the commencement of an action. 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In every situation where there has been a transfer, whether of all or part of a defendant's water rights, the issue of notice will be problematic. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding that will affect the property interests of *any* party, if its name and address are readily ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) [emphasis in original]. Here, there is no way to know the extent of notice the absentee water right transferees have had of the pendency of the action, either at the time of transfer or thereafter. If they have had no such adequate notice, under the federal "successorship doctrine," the transferees will <u>not</u> be "subject to 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.

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

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

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

In *Luxliner*, one of the defendants was RDI/Luxliner ("RDI"), against whom a default judgment was entered. *Luxliner*, at 71. Two months after the judgment, plaintiffs, moved pursuant to Fed. R. Civ. P. 25(c) to join or substitute another company, Sturgis Lux-liner ("Sturgis") on the judgment previously entered against RDI because Sturgis had purchased RDI's assets during the pendency of the action prior to judgment, making RDI judgment proof. *Id.* In support of their motion, plaintiffs filed an affidavit. *Id.* In support of its response, Sturgis filed a competing affidavit, offering explanations of material facts proffered in 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Once those issues are decided by the Court, it is unclear as to what issues will be left to 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

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

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

A. Introduction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[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.

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

DATED this 7th day of January, 2011.

WOODBURN AND WEDGE

By: / s / Gordon H. DePaoli

Gordon H. DePaoli
Dale E. Ferguson
Domenico R. DePaoli
6100 Neil Road, Suite 500
Reno, Nevada 89511
Attorneys for WALKER RIVER IRRIGATION DISTRICT

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:

Brian Chally	brian.chally@lvvwd.com
Bryan L. Stockton	bstockton@ag.nv.gov
Charles S. Zumpft	zumpft@brooke-shaw.com
Cherie K. Emm-Smith	districtattorney@mineralcountynv.org
Don Springmeyer	dspringmeyer@wrslawyers.com
Chrristopher Mixson	cmixson@wrslawyers.com
G. David Robertson	gdavid@nvlawyers.com
George Benesch	gbenesch@sbcglobal.net
Greg Addington	greg.addington@usdoj.gov
Harry W. Swainston	hwswainston@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	maadams@ag.state.nv.us
Marvin W. Murphy	marvinmurphy@sbcglobal.net
Michael D. Hoy	Michael D Hoy mhoy@nevadalaw.com
Michael F. Mackedon	falonlaw@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
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@dgslaw.com

Gene M. Kaufmann GKaufmann@mindenlaw.com
Erin K.L. Mahaney emahaney@waterboards.ca.gov
David L. Negri david.negri@usdoj.gov
Simeon Herskovits herskovitx@westernlaw.org
John W. Howard johnh@jwhowardattorneys.com
Malissa Hathaway McKeith mckeith@lbbslaw.com
Andrew D. Galvin drew.galvin@americantower.com
Lynn L. Steyaert lls@water-law.com
Noelle R. Gentilli ngentill@water.ca.gov
Donald B. Mooney dbmooney@dcn.org
Erick Soderlund esoderlu@water.ca.gov
Stuart David Hotchkiss david.hotchkiss@ladwp.com

I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00127-ECR-LRL to the following via U.S. Mail, postage prepaid, this 7th day of January, 2011:

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

Jeff Parker
Deputy Atty. General
Office of the Attorney General
100 N. Carson St.
Carson City, NV 89701-4717

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

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

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

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

Nathan Goedde, Staff Counsel
California Dept. of Fish and Game
1416 Ninth St., #1335
Sacramento, CA 95814

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

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay St., 20th Floor
Oakland, CA 94612-1413

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

Robert L. Hunter, Superintendent
Western Nevada Agency
Bureau of Indian Affairs

James Shaw
Water Master
U.S. Board of Water Commissioners

311 E. Washington St.
Carson City, NV 89701-4065
Jason King
Division of Water Resources
State of Nevada
901 S. Stewart St.
Carson City, NV 89701

P.O. Box 853
Yerington, NV 89447
Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

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

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

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-00128-ECR-LRL with the Clerk of the Court using the CM/ECF system, which will notify the following via their email addresses:

Cheri K. Emm-Smith districtattorney@mineralcountynv.org
David L. Negri david.negri@usdoj.gov
Don Springmeyer dspringmeyer@wrslawyers.com
Chris Mixson cmixson@wrslawyers.com
Garry Stone jaliep@aol.com, jtboyer@troa.net
George N. Benesch gbenesch@sbcglobal.net
Gregory W. Addington greg.addington@usdoj.gov
James Spoo spootoo@aol.com
Karen A. Peterson kpeterson@allisonmackenzie.com
Marta A. Adams MAdams@ag.nv.gov
Michael Neville michael.neville@doj.ca.gov
Ross E. de Lipkau ecf@parsonsbehle.com
Simeon M. Herskovits simeon@communityandenvironment.net
Stacey Simon ssimon@mono.ca.gov
Stephen M. Macfarlane Stephen.Macfarlane@usdoj.gov
Susan L. Schneider susan.schneider@usdoj.gov
Wes Williams wwilliams@stanfordalumni.org

I further certify that I served a copy of the foregoing in Case No. 3:73-cv-00128-ECR-LRL to the following by U.S. Mail, postage prepaid, this 7th day of January, 2011:

Allen Anspach
U.S. Bureau of Indian Affairs
Western Region
400 North 5th St., 12th Floor
Phoenix, AZ 85004

Robert Auer
District Attorney for Lyon County
31 South Main St.
Yerington, NV 89447

Wesley G. Beverlin
Malissa Hathaway McKeith
Lewis, Brisbois, Bisgaard & Smith LCP
221 N. Figueroa St., Ste. 1200
Los Angeles, CA 90012

Kelly R. Chase
1700 County Road, Ste. A
P.O. Box 2800
Minden, NV 89423

Nathan Goedde
Staff Counsel
California Dept. of Fish & Game
1416 Ninth St., Ste. 1335
Sacramento, CA 95814

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay St., 20th Floor
Oakland, CA 94612-1413

Michael D. Hoy
Hoy & Hoy
1495 Ridgeview Dr., Suite 90
Reno, NV 89519

Robert L. Hunter
Western Nevada Agency
311 E. Washington St.
Carson City, NV 89701

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

Los Angeles City Attorney's Office
P.O. Box 51-111
111 North Hope St., Ste. 340
Los Angeles, CA 90051

Michael F. Mackedon
P.O. Box 1203
179 South LaVerne St.
Fallon, NV 89407

David Moser
McCutchen, Doyle, Brown, et al.
Three Embarcadero Center, Ste. 1800
San Francisco, CA 94111

Scott H. Shackelton
Law Offices of Scott Shackelton
4160 Long Knife Rd.
Reno, NV 89509

James Shaw
Water Master
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

William J. Shaw
Brooke & Shaw, Ltd.
1590 Fourth St.
P.O. Box 2860
Minden, NV 89423

Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820

Tracy Taylor
Department of Conservation and Natural Resources
Division of Water Resources

Yerington, NV 89447

901 S. Stewart St., Ste. 202
Carson City, NV 89701

Adah Blinn and John Hargus Trust,
Robert Lewis Cooper, Trustee
984 Hwy. 208
Yerington, NV 89447

Casino West
Lawrence B. Masini, RA
11 N. Main St.
Yerington, NV 89447

Domenici 1991 Family Trust
Lona Marie Domenici-Reese
P.O. Box 333
Yerington, NV 89447

L & M Family Limited Partnership
Rife Sciarani & Co, RA
22 Hwy. 208
Yerington, NV 89447

Wallace J. & Linda P. Lee
904 W. Goldfield Ave.
Yerington, NV 89447

Joseph J. Bessie J. Lommori Trust
Joseph & Bessie J. Lommori, Trustees
710 Pearl St.
Yerington, NV 89447

Cynthia Menesini
111 N. Hwy. 95A
Yerington, NV 89447

Cynthia Nuti
P.O. Box 49
Smith, NV 89430

Nancy J. Nuti
P.O. Box 49
Smith, NV 89430

Richard B. Nuti
P.O. Box 49
Smith, NV 89430

Charles Price
24 Panavista Cir.
Yerington, NV 89447

John Gustave Ritter III
34 Aiazzi Ln.
Yerington, NV 89447

Sceirine Fredericks Ranch
c/o Todd Sceirine
3100 Hwy. 338
Wellington, NV 89444

Silverado, Inc.
Gordon R. Muir, RA
One E. Liberty St., Suite 416
Reno, NV 89501

Daniel G. & Shawna S. Smith
P.O. Box 119
Wellington, NV 89444

Christy De Long & Kirk Andrew Stanton
27 Borsini Ln.
Yerington, NV 89447

Susan Steneri
7710 Pickering Cir., Reno
Reno, NV 89511

Jerry E. Tilley, Trust
Jerry E. Tilley, Trustee
11418 S. 105th E. Ave.
Bixby, OK 74008

/ s / Holly Dewar
Holly Dewar