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6 **UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF NEVADA**

8 * * *

9 UNITED STATES OF AMERICA,)

10 Plaintiff,)

11 WALKER RIVER PAIUTE TRIBE,)

12 Plaintiff-Intervenor,)

13 vs.)

14 WALKER RIVER IRRIGATION DISTRICT,)
15 a corporation, et al.,)

16 Defendants.)

17

MINERAL COUNTY,)

18 Proposed-Plaintiff-Intervenor)

19 vs.)

20 WALKER RIVER IRRIGATION DISTRICT,)
21 a corporation, et al.)

22

Proposed Defendants.)

IN EQUITY NO. C-125-ECR-WGC
Subproceeding C-125-C
3:73-CV-00128-ECR-WGC

**MINERAL COUNTY RESPONSE
TO WALKER RIVER
IRRIGATION DISTRICT'S
OBJECTIONS TO RULINGS OF
MAGISTRATE JUDGE WITH
RESPECT TO SEPTEMBER 27,
2011 ORDER CONCERNING
SERVICE ISSUES**

23 COMES NOW, Mineral County, Nevada, by and through its counsel, Simeon Herskovits
24 of Advocates for Community and Environment, and responds to the Walker River Irrigation
25 District's ("WRID's") Objections to Rulings of Magistrate Judge with Respect to September 27,
26 2011 Order Concerning Service Issues as follows:
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1 **I. MAGISTRATE JUDGE PROCEEDINGS REGARDING MINERAL COUNTY'S**
2 **2008 SERVICE REPORT**

3 WRID objects to an order issued by the Magistrate Judge on September 27, 2011, which
4 ruled on Mineral County's August 29, 2008 Service Report and Status of Service on Proposed
5 Defendants, and Proposed Order Concerning the Service Report and Status of Service on
6 Proposed Defendants. (Docs. 479, 480)¹ ("Mineral County's Service Report" or "Service
7 Report"). Mineral County's 2008 Service Report was designed to present the Court with the
8 status of service in C-125-C and included an amended proposed caption reflecting all orders of
9 the Court, a table of defendants for whom service has been ratified by the Court, and current
10 ownership information relating to defendants or their successors-in-interest who have yet to be
11 served. Service Report, at 2, Exhibits C, D, &E (Aug. 29, 2008) (Doc. 479). The Service Report
12 requested the Court to issue an order (1) confirming the caption submitted by Mineral County as
13 Exhibit C to the Service Report; (2) approving the amendments to the caption requested in the
14 Service Report; (3) substituting and dismissing parties as requested in the Service Report; (4)
15 ratifying service on other parties as requested in the Service Report; (5) clarifying certain matters
16 as requested in the Service Report; (6) ordering service on proposed defendants for whom
17 service has not yet been ratified; and (7) providing any further guidance relating to service
18 efforts the Court deems necessary. *Id.* at 9. WRID filed a Response to Mineral County's Service
19 Report on November 21, 2008. Walker River Irrigation District's Response to Mineral County's
20 Service Report (Nov. 21, 2008) (Doc. 488). Mineral County filed its Reply to WRID's Service
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26 ¹ Unless otherwise indicated, all document numbers refer to subproceeding C-125-C documents.
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1 Report Response on January 23, 2009. Mineral County Reply to Walker River Irrigation
2 District's Response to Mineral County's Service Report (Jan. 23, 2009) (Doc. 496).

3 In mid-2009, Magistrate Judge McQuaid recused himself and Magistrate Judge Leavitt
4 was assigned to this case. After reviewing the file and at the request of Plaintiff Parties,
5 Magistrate Judge Leavitt held a telephonic status conference on October 19, 2010 for the purpose
6 of addressing Mineral County's pending service report and related service issues. (Order, C-
7 125-B Doc. 1598; C-125-C Doc. 512). At that status conference it was determined that Mineral
8 County's Service Report and the C-125-B service cutoff date issue would not be ruled on until
9 fundamental issues concerning the treatment of successors-in-interest had been addressed.
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11 Thus, pursuant to the status conference and by Stipulation and Order dated December 9,
12 2010, and December 15, 2010, the Court established a schedule for filing a proposed service
13 cutoff order in C-125-B and successor-in-interest orders in C-125-B and C-125-C as well as
14 memoranda related to objections, if any, to the proposed orders. (C-125-B Doc. 1616; C-125-C
15 Doc. 518).
16

17 Pursuant to the Court's direction, on November 30, 2010, the United States and Walker
18 River Paiute Tribe filed a Proposed Service Cut-Off Order in subproceeding C-125-B (C-125-B
19 Doc. 1613) and the United States, Walker River Paiute Tribe, and Mineral County ("Plaintiff
20 Parties") filed joint proposed Successor-in-Interest Orders in subproceedings C-125-B and C-
21 125-C. (C-125-B Doc. 1614; C-125-C Doc. 516).
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23 WRID filed an opposition to the proposed Successor-in-Interest Orders on January 7,
24 2011. Walker River Irrigation District's Objections to Proposed Order Concerning Service
25 Issues Pertaining to Defendants Who Have Been Served and to Proposed Order Concerning
26 Service Cut-Off Date (Jan. 7, 2011) (C-125-B Doc. 1621; C-125-C Doc. 523). The Plaintiff
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1 Parties filed a joint Reply to WRID's opposition on February 23, 2011 along with a revised
2 proposed order. Reply to Walker River Irrigation District's Objections to Proposed Order
3 Concerning Service Issues Pertaining to Defendants Who Have Been Served (Feb. 23, 2011) (C-
4 125-B Doc. 1639; C-125-C Doc. 535); Revised Proposed Order Concerning Service Issues
5 Pertaining to Defendants Who Have Been Served (Feb. 23, 2011) (C-125-B Doc. 1639-1; C-125-
6 C Doc. 535-1).

7
8 On August 24, 2011, after reviewing all the pertinent filings, Magistrate Judge Leavitt
9 issued identical Revised Proposed Orders Concerning Service Issues Pertaining to Defendants
10 Who Have Been Served in both subproceedings C-125-B and C-125-C. (C-125-B Doc. 1649; C-
11 125-C Doc. 540). On September 6, 2011, Magistrate Judge Leavitt issued an Amended Order
12 Concerning Service Issues Pertaining to Defendants Who Have Been Served in subproceeding
13 C-125-C. (Doc. 542) ("Successor-in-Interest Order").² The amended order contained
14 attachments not included in the August 24, 2011, orders, but is otherwise identical to the August
15 24 orders.
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17 On September 12, 2011, WRID filed Objections to Rulings of Magistrate Judge With
18 Respect to Revised Proposed Orders and Amended Orders Concerning Service Issues Pertaining
19 to Defendants Who Have Been Served, challenging the Magistrate Judge's August 24, August
20 26, and September 6 orders. (C-125-B Docs. 1652 & 1653; C-125-C Docs. 543 & 544). Circle
21 Bar N Ranch, LLC, and Mica Farms, LLC joined in WRID's objections to the Successor-in-
22 Interest Order. (C-125-B Doc. 1654; C-125-C Doc. 545).

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25 ² On August 26, 2011, Magistrate Judge Leavitt issued an Amended Order Concerning Service
26 Issues Pertaining to Defendants Who Have Been Served in subproceeding C-125-B. (C-125-B
27 Doc. 1650).

1 On September 27, 2011, after ruling on the related successor-in-interest issues, Magistrate
2 Judge Leavitt issued an Order Concerning Service Issues in C-125-C, which ruled on Mineral
3 County's 2008 Service Report and approved the requests contained therein (Doc. 547) ("Service
4 Report Order"). In particular, the Service Report Order approved as accurate and valid the
5 caption submitted by Mineral County, granted Mineral County's request to dismiss certain
6 unserved parties and substitute their successors-in-interest, approved Mineral County's
7 corrections to the caption, ratified service on certain parties, confirmed the list of parties who
8 remain to be served, and ordered that service on them be commenced without unnecessary delay.
9 The Service Order also confirmed, consistent with the Successor-in-Interest Order, that Mineral
10 County shall not be required to make further service on parties who have already been validly
11 served, and for whom the Court already has ratified service, and further ordered that for the
12 purposes of this litigation the estate and successors-in-interest of a deceased party bear the
13 burden of filing and serving a Notice of Death pursuant to Fed. R. Civ. P. 25(a) in the event of a
14 party's death. *Id.* at 1-2. WRID filed objections to the Service Report Order on October 14,
15 2011. Walker River Irrigation District's Objections to Rulings of Magistrate Judge With Respect
16 to September 27, 2011 Order Concerning Service Issues (Doc. 552); Walker River Irrigation
17 District's Points and Authorities in Support of Objections to Rulings of Magistrate Judge with
18 Respect to September 27, 2011 Order Concerning Service Issues (Oct. 14, 2011) (Doc. 553)
19 ("WRID Objections"). On that same day, Circle Bar N Ranch, LLC, and Mica Farms, LLC
20 joined in WRID's objections. Joinder by Circle Bar N. Ranch, LLC, et al. to Walker River
21 Irrigation District's Objections to Rulings of Magistrate Judge with Respect to September 27,
22 2011 Order Concerning Service Issues, and Points and Authorities in Support (Oct. 14, 2011)
23 (Doc. 554).

1 **II. HISTORY OF C-125-C SERVICE**

2 On October 25, 1994, Mineral County filed a Motion and Petition to Intervene in the C-
3 125-B case. (C-125-B Doc. Nos. 31-32). Mineral County claims that the Public Trust Doctrine
4 creates an obligation, which takes priority over any appropriative water rights in the Walker
5 River system, to maintain inflows to Walker Lake at a level that is sufficient to restore and
6 maintain the Lake to a reasonable state of ecological health and sustain its historical and
7 immeasurable values as a wildlife habitat, recreational, economic, environmental and scenic
8 resource.

9 On January 3, 1995 the Court created subfile C-125-C, or 3:73-CV-128-ECR-RAM.
10 Minutes of the Court, at 1 (Doc. 1). On February 9, 1995 the Court ordered Mineral County to
11 file revised Intervention Documents and to serve these Intervention Documents on all claimants
12 to the waters of the Walker River and its tributaries pursuant to Federal Rule of Civil Procedure
13 4. Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to
14 Intervene of Mineral County, at ¶¶ 2, 3 (Doc. 19) (Feb. 9, 1995) (“February 9, 1995, Service
15 Order”). Mineral County filed its Amended Complaint in Intervention on March 10, 1995.
16 Mineral County’s Amended Complaint in Intervention (Mar. 10, 1995) (Doc. 20).³ On
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20 ³ Previously, WRID claimed Rule 25(c) is inapplicable to C-125-C because litigation has not
21 “commenced.” WRID Objections to Proposed Order Concerning Service Issues for Defendants
22 Who Have Been Served and to Proposed Order Concerning Service Cut-off Date, at 12 (Jan. 7,
23 2011) (Doc. 523). An action commences upon filing and serving a pleading. *See* 1A C.J.S.
24 *Actions* § 315 (2010). Mineral County filed a Motion for Intervention and a Proposed Petition to
25 Intervene in the ongoing Walker River Decree proceedings, and filed an Amended Complaint in
26 Intervention at the Court’s direction. (C-125-B Docs. 31, 32; C-125-C Docs. 2, 3, 20) WRID
27 now claims, citing no relevant authority, that the Clerk erroneously “filed” the Amended
28 Complaint before the Court granted intervention, so litigation has not begun. WRID Objections,
at 5 n.3. WRID’s parsing of “filed” contradicts the local rules, *see generally* LR 5-1, and Rule
24’s requirement that intervention is commenced with a “timely motion,” and would require
Mineral County to spend years serving process, filing returns, and litigating service issues and

1 September 29, 1995 the Court issued a second service order which reiterated the requirements of
2 the February 9, 1995, Service Order and confirmed the documents that Mineral County was
3 required to serve on claimants to the waters of the Walker River and its tributaries. Order, at ¶ 1
4 (Sept. 29, 1995) (Doc. 48). Both Orders provide that persons or entities who are served or who
5 waive personal service, but do not appear and respond will be deemed to have notice of all
6 subsequent filings with the Court. (Doc. 19, at 4-5, ¶ 7; Doc. 48, at 4, ¶ 5).

8 Identifying all claimants to the waters of the Walker River and its tributaries has been a
9 daunting task, which has been largely completed in the teeth of determined opposition,
10 recalcitrance, and outright evasion on the part of many upstream water claimants who were
11 egged on by WRID, among others. Mineral County compiled the list of claimants to the waters
12 of the Walker River and its tributaries from county recorders' offices, records of the Federal
13 Water Master, State Engineer databases, and the records of WRID. The sheer number of
14 claimants, combined with the fact that few of the records and databases consulted or lists
15 received were initially accurate, and the determined efforts of water right claimants coached by
16 WRID to avoid service, made the task exceptionally time-consuming, expensive, and difficult. It
17 took several years for the parties to reach consensus on the proper list of persons to be served,
18 but on January 12, 1998, the Court issued a caption that has been the basis of Mineral County's
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22 the merits of its motion to intervene before the Court would direct the clerk to "file" its proposed
23 Amended Complaint. This result would be profoundly illogical. WRID's argument is empty
24 sophistry.

25 Moreover, the Court retained continuing jurisdiction, Decree at ¶XIV, and expressly
26 established C-125-C to receive filings as part of an existing proceeding. Minutes of Court (Jan.
27 3, 1995, C-125-B Doc. 46). *See also* February 9, 1995, Service Order, at 1, ¶1 (Feb. 9, 1995)
28 (Doc. 19).

1 service efforts since that date. On May 13, 1998, the Court issued an Order indicating that the
2 list of defendants had been agreed upon. Order, at ¶ 2(a) (Apr. 30, 1998) (Doc. 196).

3 Mineral County has dedicated enormous time and resources to the task of serving all
4 claimants to the Walker River and its tributaries as directed by the Court. The difficulties and
5 costs associated with this effort were substantially increased by the interference and evasion of
6 upstream claimants, which led to complications and delays that otherwise could have been
7 avoided. *See* Points and Authorities in Opposition to WRID's Motion to Vacate Schedule and in
8 Support of Counter Motion for Sanctions (July 6, 1995) (Doc. 31); *see also* Mineral County's
9 Points and Authorities in Reply to WRID's Response and Request for Hearing (Aug. 4, 1995)
10 (Doc. 42). To date, Mineral County has served well over a thousand claimants and the list of un-
11 served claimants at this time is relatively short. Although the process has taken significant time
12 and resources and has met with obstacles, the Court has more than once commended Mineral
13 County's efforts, and has ratified service on most of the claimants listed in the January 12, 1998
14 caption or their substituted successors-in-interest. Order, at 2 (June 4, 1998) (Doc. 210); Order
15 Concerning Status of Service on Defendants (Apr. 3, 2000) (Doc. 327); Order (Dec. 19, 2001)
16 (Doc. 397); Order (June 18, 2002) (Doc. 414).

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19 As detailed in the 2008 Service Report,⁴ Mineral County has updated this list of unserved
20 potential defendants to reflect current ownership and is prepared to begin service on these
21 individuals once the Court approves an updated service packet.⁵ At this stage, service in the C-
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24 ⁴ Mineral County's Service Report, at 3-7 (Aug. 29, 2008) (Doc. 479).

25 ⁵ In filings before the Magistrate Judge in early 2009, WRID and Mineral County agreed on this
26 list, which was attached to Mineral County's Reply to WRID's Objections as Exhibit 6 (Doc.
27 496).

1 125-C case is close to complete, and Mineral County is prepared to finish the last instances of
2 feasible personal service and wrap up remaining limited service issues over the next several
3 months so that the Court and parties can move on to the merits of this important Public Trust
4 case.

5 **III. STANDARD OF REVIEW**

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7 Magistrate Judges are authorized to resolve pretrial matters subject to district court
8 review under a “clearly erroneous or contrary to law” standard. 28 U.S.C. § 636(b)(1)A); Fed.
9 R. Civ. P. 72(a). WRID agrees the Order is subject to review under the clearly erroneous or
10 contrary to law standard, but invites *de novo* review based on a misreading and misuse of the
11 *Grimes*, *Laxalt*, and *Beverly Glen* cases. WRID, at 10. *Grimes* actually stated that “[p]retrial
12 orders of a magistrate . . . are reviewable under the ‘clearly erroneous and contrary to law’
13 standard; they are *not* subject to *de novo* determination” *Grimes v. City & County of San*
14 *Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (emphasis added).⁶ In particular, the reviewing
15 court “may not simply substitute its judgment for that of the deciding court.” *Grimes*, 951 F.2d
16 at 241. *Laxalt* did not even involve the contrary to law standard and made no such assertion
17 regarding *de novo* review. See *Laxalt v. McClatchy*, 602 F. Supp. 214 (D. Nev. 1985). Finally,
18 WRID’s reliance on *Beverly Glen* is misplaced, because the court in *Beverly Glen* clearly
19 miscited *Grimes* for the proposition that *de novo* review is appropriate under the contrary to law
20 standard. See *26 Beverly Glen, LLC. v. Wykoff Newberg Corp.*, 2007 WL 1560330 (D. Nev.
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24 ⁶ See also *Gomez v. United States*, 490 U.S. 858 (1989); *Trustees of No. Nev. Oper. Eng. v.*
25 *Mach 4 Construction, LLC*, 2009 WL 1940087 (D. Nev., July 7, 2009); *Montgomery v. Etreppid*
26 *Technologies, LLC*, 2010 WL 1416771 (D. Nev., Apr. 5, 2010); Fed. R. Civ. P. 72(a). The Local
27 Rules for the District of Nevada make the same distinction. Compare LR IB 3-1(a) (“clearly
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1 2007). Because *Beverly Glen* is plainly mistaken and is contradicted by controlling precedent, it
2 is not good law. Thus, WRID's suggestion that *de novo* review is appropriate here is incorrect
3 and misplaced, and should be rejected. While *de novo* review is appropriate where a Magistrate
4 Judge has made a ruling outside the scope of matters delegated to him, citing *United States v.*
5 *Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004). In this case it is undisputed that the
6 Service Report Order is well within the scope of matters delegated to the Magistrate Judge.
7 Indeed, WRID does not suggest that the Magistrate Judge's Service Report Order was outside
8 the scope of matters delegated to him. So WRID's reference to that inapplicable standard is
9 either mistaken or an attempt to confuse the Court.
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11 A finding of fact is "clearly erroneous" only if the reviewing court is left with 'a definite
12 and firm conviction that a mistake has been committed.'" *Mach 4*, quoting *United States v. U.S.*
13 *Gypsum Co.*, 333 U.S. 364, 395 (1948). "A decision is contrary to law if it applies an incorrect
14 legal standard or fails to consider an element of the applicable standard." *E.g.*, *Doubt v. NCR*
15 *Corp.*, 2011 WL 3740853 (N.D. Cal., Aug. 25, 2011); *Na Pali Haweo Community Ass'n v.*
16 *Grande*, 2532 F.R.D. 672, 674 (D. Haw. 2008).

17 Particularly relevant here is that,
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19 [a party] may not simply address the same arguments the magistrate judge considered and
20 expect the Court to treat the filing seriously. Instead, [he] ought to explain to the
21 reviewing Court citing proper authority, why the magistrate judge's application of law to
22 facts is legally unsound.

23 *Mach 4* (viewing objections as possible delaying tactic and quoting *Colon v. Wyeth*
24 *Pharmaceutical*, 611 F. Supp. 2d 110, 116 (D.P.R. 2009)).

25 erroneous or contrary to law" standard for pretrial matters) with LR IB 3-2(a) ("de novo"
26 standard for dispositive matters).

1 **IV. ARGUMENT**

2 **A. Introduction:**

3 Just as in its Objections to the Magistrate Judge’s Successors-in-Interest Order,
4 throughout its Objections, WRID misrepresents the history of service in C-125-C and
5 misconstrues the orders of the Court regarding service. Such mischaracterizations and
6 misrepresentations are designed to create the appearance of inconsistencies and complexities
7 where none exist, and should be disregarded by the Court. First, WRID suggests that Magistrate
8 Judge Leavitt’s September 27, 2011, Service Report Order is inconsistent with the amended
9 order of September 6, 2011, on successor-in-interest issues. Either WRID has misunderstood
10 both orders or has intentionally misrepresented both to create the appearance of inconsistency
11 where there is none. Throughout its Objections WRID conflates issues of substitution of
12 successors-in-interest who already have been served with substitution of and service on
13 successors-in-interest to defendants who have not yet been served. The two orders plainly
14 address different topics and have different purposes. The Service Report Order addresses
15 substitution and service for successors-in-interest to defendants who have not yet been served
16 and who Mineral County agrees remain to be served, while the Amended Successor-in-Interest
17 Order addresses the issue of successors-in-interest to those who already have been served and
18 need not be reserved to be bound. *See* Plaintiff Parties Response in Opposition to Walker River
19 Irrigation District’s Objections to Rulings of Magistrate Judge with Respect to Revised Proposed
20 Orders and Amended Orders Concerning Service Issues Pertaining to Defendants Who Have
21 Been Served (Dec. 2, 2011) (“Plaintiff Parties Response in Opposition to WRID Successor-in-
22 Interest Order Objections”).
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1 The Service Report Order clearly is consistent with and reflective of the fact that the
2 Amended Successor-in-Interest Order does not change Mineral County's obligation to substitute
3 and serve successors-in-interest to defendants who have not yet been served. Moreover, the
4 Service Report Order is consistent with the Successor-in-Interest Order's treatment of
5 successors-in-interest to defendants who already have been served, because it requires no further
6 service on those water rights holders. WRID's conflation of the two issues to suggest that the
7 Service Report Order is contrary to law is an attempt to muddy the waters and create the
8 appearance of complexity where the issues really are straightforward.

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10 WRID also raises questions as to what documents Mineral County served and when.
11 WRID claims that in limited instances early on in Mineral County's service efforts it is unclear
12 whether Mineral County included the required service orders as part of its service packet. WRID
13 suggests that if the order was omitted that calls into question the sufficiency of service. WRID
14 fails to mention, however that the notice in lieu of summons and the waiver form also informed
15 served defendants of the requirement that they respond and that they would be deemed to have
16 notice of all further pleadings regardless of whether they responded. Thus, irrespective of
17 whether Mineral County's service efforts were perfect, they clearly satisfied the requirements of
18 due process, as reflected in the various orders of the Court which ratified these service efforts
19 and as explained below, *infra*, Section IV(D). Indeed, WRID made no such argument in its
20 objections before the Magistrate Judge, and its belated attempt to call Mineral County's long-
21 ratified service efforts into question on this basis is without merit and should be rejected.

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24 WRID's derogatory reference to the passage of time during service efforts since the
25 commencement of this action fails to acknowledge the enormity of the task that service has
26 entailed in this case, the history of obstruction and evasion of Mineral County's service efforts
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1 that WRID played a major part in encouraging, the Court ordered mediation process that took
2 place and consumed much of Mineral County's resources over the course of several years, and
3 the fact that lengthy time periods for the completion of service in complex actions like this one
4 (e.g., water rights adjudications) are not uncommon. Indeed, in the C-125-B action, seven years
5 elapsed between the commencement of the action and even the *commencement* of concrete
6 service efforts. The C-125-B action has been pending longer than the C-125-C action and is only
7 now approaching completion of service; and the joint plaintiffs in the C-125-B action include the
8 United States with its vastly superior greater resources than those of an impoverished county like
9 Mineral County.

11 In fact, as the Court has more than once acknowledged, Mineral County has overcome
12 enormous obstacles and accomplished commendable results in successfully completing the vast
13 majority of service in this action. *See* Order of June 4, 1998, at 2 (Doc. 210); Order Concerning
14 Status of Service on Defendants (Apr. 3, 2000) (Doc. 327); Order of December 19, 2001 (Doc.
15 397); Order of June 18, 2002 (Doc. 414). At this point in the process all that remains is to clarify
16 the limited set of water right claimants who remain to be served and resolve some ancillary
17 issues, so that Mineral County has clear direction that will allow it to complete service over the
18 next several months. WRID's self-serving denigration of Mineral County's earlier struggles
19 with service does nothing to advance these objectives.

21 Partially based on this meritless argument, WRID also suggests that Mineral County must
22 send materials updating response deadlines to those for whom the Court already has ratified
23 service and who have not entered appearances in this case. Without support, WRID suggests
24 that before year 2000, served parties were not required to file entries of appearance and that
25 parties served before that date must be reserved by mail with updated paperwork which includes
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1 updated response deadlines. However, WRID fails to mention that all orders governing service
2 in this case required those who were served to appear and respond. *See, e.g.*, February 9, 1995,
3 Service Order, at 4-5, ¶ 7 (Feb. 9, 1995) (Doc. 19). WRID suggests that because an entry of
4 appearance form was not required before 2000 that these persons must be reserved by mail with
5 an updated schedule. However, the Court chose not to include an entry of appearance form,
6 instead, ordering that the service order, which included a requirement that defendants appear, be
7 made a part of the service packet. So, WRID's assertion that "[m]ost of those persons and
8 entities were not required to file any document with the Court," WRID Objections, at 9, clearly
9 is a misstatement and should be disregarded. The truth is that served individuals had all of the
10 information necessary to respond and file a notice of appearance. For those who received service
11 and chose to do nothing, they are deemed to have further notice of proceedings, including
12 updates to any briefing schedules. *See, e.g.*, February 9, 1995, Service Order, at 4-5, ¶ 7 (Feb. 9,
13 1995) (Doc. 19). It would not be equitable to burden Mineral County with the duty to
14 continually update previously served water rights holders who could not be bothered responding
15 to the service packet they received.

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18 Further, WRID's should not be permitted to revisit previously ratified service efforts that
19 it had the opportunity to object to previously. The Court already has found that service is
20 complete for these water rights holders. To suggest now that service was insufficient for these
21 parties is untimely and is merely an attempt to throw yet another obstacle between the Court and
22 the merits of this case.
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2 **B. The Service Report Order Properly Confirms that the Caption Submitted by**
3 **Mineral County is Accurate and Valid**

4 WRID appears to have no real argument as to why the caption submitted by Mineral
5 County is invalid, but attempts to call it into question anyway.⁷ WRID begins its attack on the
6 updated caption with a fundamental misunderstanding of its contents and purpose. WRID
7 suggests that the caption is outdated and to the extent that the Order contemplates service only on
8 those who held water rights in 2001, it should be rejected. However, Mineral County made it
9 clear in the 2008 Service Report that the caption was submitted as a starting point for further
10 updates and is meant only to reflect all previous orders of the Court that added and dismissed
11 parties. Mineral County Service Report, at 3, 6-7 (Aug. 29, 2008) (Doc. 928). Thus, in its
12 Service Report, Mineral County proposed that once the Court had approved the caption and had
13 ruled on the changes to it that were requested in the Service Report, Mineral County would file
14 an updated proposed caption reflecting those changes for approval. *Id.* at 6-7. Mineral County
15 did not include a caption reflecting 2008 ownership with the Service Report filing, because such
16 a filing would have been premature until the Magistrate ruled on the proposed additions and
17 deletions. Thus, it is misleading to suggest that the caption does not contemplate notice for
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21 ⁷ WRID suggests that the Magistrate Judge does not state a purpose for approving the caption.
22 However, when read in conjunction with Mineral County's request for approval, the purpose is
23 clear. The approved caption reflects orders of the Court adding and dismissing defendants and is
24 meant as a starting point for further updates of the caption by Mineral County which will reflect
25 current ownership for successors-in-interest to unserved defendants. WRID also attempts to
26 suggest that the standard against which the caption is measured for accuracy is not revealed.
27 However, that standard is clear. The caption is a simple update based solely upon orders of this
28 Court. It is not difficult to confirm its accuracy based on those orders. WRID did not object to
the caption's accuracy in its Response to Mineral County's Service Report, and yet now makes
the general statement that somehow ratification of this simple update is unsupported.

1 anyone who has acquired water rights since 2001, because the caption was filed as the starting
2 point for updates that will guide all future service efforts and lead to the completion of service.

3 As stated in the Service Report, Mineral County is prepared to file an updated caption
4 that reflects the successors-in-interest to defendants who have not yet been served by substituting
5 them for their predecessors based on the Magistrate Judge's rulings. Consistent with the
6 Successor-in-Interest Order, the updated caption Mineral County intends to file does not reflect
7 transfers to successors-in-interest from those for whom service already has been ratified by the
8 Court, because pursuant to the Court's Successor-in-Interest Order it is not necessary to
9 substitute them for their served predecessors. They will be bound regardless of substitution.
10

11 **C. The Service Report Order Properly Adds Successors-in-Interest to Unserved**
12 **Defendants and Dismisses Defendants Who No Longer Own Water Rights**

13 WRID's suggestion that successors-in-interest to unserved parties may not properly be
14 substituted for their predecessors and served as the proper defendants in this case is unsupported
15 and is based on a fundamental misunderstanding and mischaracterization of the Service Report
16 Order. Again, WRID conflates successors-in-interest to *unserved* defendants, who were
17 addressed by the Service Report Order, with successors-in-interest to *served* defendants who are
18 addressed by the Magistrate Judge's Successor-in-Interest Order. WRID suggests that but for the
19 fact that the Successor-in-Interest Order places the burden of joining successors-in-interest on
20 defendants, the District would not object to this substitution. WRID Objections, at 13. This
21 objection makes no sense. Mineral County has never disputed that Plaintiffs have the burden to
22 substitute and serve, via Rule 4 service, successors-in-interest to *unserved* water rights claimants.
23 This is precisely what the Service Order requires. Because this objection is based on a
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1 fundamental misunderstanding of the briefing before the Magistrate Judge and the orders at
2 issue, and because the Service Report Order's provisions actually comport with all of the parties'
3 shared position regarding substitution for unserved defendants, WRID's argument should be
4 rejected.

5 WRID also suggests that the Service Report Order uses the word "substitute" improperly.
6 Regardless of the terminology used, the effect of the Service Report Order is clear and proper.
7 Because the Service Report Order addresses defendants who have not yet been served, it clearly
8 is proper for the Court to add the names of successors-in-interest to the caption and order Rule 4
9 service on those defendants, and as WRID recognizes, Magistrate McQuaid routinely has
10 ordered these additions without any motion. *See* WRID Objections, at 8 (Oct. 14, 2011) (Doc.
11 553). As to proposed dismissals, all parties addressed in Mineral County's Service Report were
12 served with that Service Report and have had an opportunity to respond. Based on Mineral
13 County's requests in its Service Report filings, the Court has the authority to dismiss defendants
14 who no longer own water rights. However, if the Court so orders, Mineral County is prepared to
15 file motions to dismiss for each of these defendants.

16
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18 **D. Mineral County Need Not Re-Serve Properly Served Defendants Who Failed to**
19 **Respond to Mineral County's Original Rule 4 Service**

20 WRID suggests that somehow the passage of time since defendants were served relieves
21 them of the duty to respond to Mineral County's Intervention Documents and file appearances in
22 this proceeding, and that Mineral County should be required to complete service on these
23 individuals and entities all over again. Without justification, WRID attempts to gloss over and
24 dismiss the fundamental requirement imposed by the Court, as well as by the Federal Rules of
25 Civil Procedure, that served defendants must respond to the Intervention Documents, at the very
26 least, by filing a notice of appearance in order to receive notice of further filings. *E.g.*, February
27

1 9, 1995, Service Order, at 4-5, ¶ 7 (Feb. 9, 1995) (Doc. 19); Fed. R. Civ. Pro. 5(a)(2). Indeed,
2 the requirement that a served defendant must respond or face default is fundamental to any
3 lawsuit. Although the Court has determined that in this case no default will be entered for failure
4 to appear, the burden is still on the defendant to appear if that defendant wishes to receive further
5 notice of filings in this case. *Id.* Indeed, this rule, recognized by the Court in its February 9,
6 1995, Service Order, is essential to the proper functioning of the judicial system. If defendants
7 were permitted to not respond at all when served and demand to be re-served at any time during
8 the litigation, cases never be unable to proceed to resolution.

9
10 The fact that the date for responses to Mineral County's Intervention Documents has
11 been changed by orders of the Court has no bearing on the requirement that a defendant must file
12 an entry of appearance after being served in order to receive further notice of filings from the
13 Court and other parties. The documents served by Mineral County made it clear that if
14 defendants failed to respond, they would nonetheless be deemed to have notice of further orders
15 of the court, including any order that changed response deadlines. WRID's suggestion that
16 Mineral County has a duty to provide further notice despite a defendant's failure to act is
17 contrary to law and would unduly burden Mineral County. Mineral County agrees that those
18 defendants who have entered appearances are entitled to receive notice of all filings of the Court.

19
20 WRID bases its argument on the incorrect assertion that until 2000, served defendants
21 were required only to file responses and were not required to file notices of appearance. This
22 assertion is directly contradicted by the Court's February 9, 1995, Service Order which the Court
23 ordered Mineral County to serve with its Intervention Documents. That order states:

24
25 "Persons, corporations, institutions, associations or other entities properly
26 served with Mineral County's Intervention Documents who do not *appear*
27 *and respond* to Mineral County's Motion to Intervene shall nevertheless
28 be deemed to have notice of subsequent orders of the Court with respect to

1 answers or other response to the proposed complaint-in-intervention or
2 responses to any motion for preliminary injunctive relief filed and served
3 by Mineral County.”

4 February 9, 1995, Service Order, at 4-5, ¶ 7 (Feb. 9, 1995) (C-125-C Doc. 19) (emphasis
5 added).⁸ Further, the waiver of personal service form served by Mineral County provides
6 additional notification that defendants who have been served must respond to receive further
7 notice from the Court. For example, the waiver form used for original service in 1995, and
8 attached to the February 9, 1995, Service Order states: “I understand, that if I . . . do not appear
9 and respond to the motion to intervene, by July 11, 1995, and if the Court enters further orders
10 with respect to answers or other responses to the proposed complaint-in-intervention or
11 responses to the Motion for Preliminary Injunction, that I . . . shall nevertheless be deemed to
12 have notice of those subsequent orders of the court.” *Id.* at attached Waiver of Personal Service
13 of Motions, at 2-3. Further, the notices in lieu of summons that were personally served notify the
14 served defendants of the requirement to respond. *See, e.g., id.* at attached Notice in Lieu of
15 Summons, at 1-2. Thus, there can be no debate that served defendants were on notice that they
16 were required to, and possessed the information necessary to, file a notice of appearance
17 sufficient to receive further notices of the Court, including adjustments to the response schedule,
18 and any suggestion to the contrary is without merit.

21
22 ⁸As a final attack, WRID claims that the Service Report Order, if read broadly, would relieve
23 Mineral County of all future Rule 5 service on defendants. That is preposterous and insulting to
24 the Court. The Service Report Order does no such thing and on its face plainly is directed solely
25 at the issue of original Rule 4 service on defendants. There has never been any debate that
26 Mineral County, as well as each other party, has a duty to comply with Rule 5 with regard to
27 service on all parties who have entered appearances in this case. Since the Service Report Order
28 plainly deals only with Rule 4 service issues, and since Mineral County has never questioned its
duty to comply with Rule 5, there is no need to modify the Service Report Order to inject Rule 5
into it.

1 As just explained, from the very beginning of this case, defendants have been on notice
2 that they were required to appear in the case in order to receive notice of future filings, and
3 WRID's suggestion that served defendants were not required to file notices of appearance until
4 2000 is simply incorrect and misleading. Mineral County complied with the service orders of
5 this Court and should not now be required to perform additional and unnecessary service based
6 on the fact that those service orders have evolved slightly as the case progressed. The Court has
7 ratified service on these served defendants in recognition that Mineral County has provided
8 sufficient notice to them. WRID's attempt to now claim that these previously served defendants
9 must be served all over again despite the Court's ratification of that service is a transparently
10 meritless effort to continue obstructing Mineral County's efforts to complete service and the
11 Court's ability ever to reach the merits of this subproceeding.
12

13
14 **E. Further Guidance from the Court on Proper Service Packet**

15 Mineral County is in agreement with WRID that further guidance from the Court is
16 necessary before service may commence. Before completing service, Mineral County will file
17 an updated caption, as described above, and a service packet for approval by the Court. Mineral
18 County will include the attachments to the Successor-in-Interest Order in that service packet. In
19 addition, Mineral County will make a filing with a proposed final deadline for completion of
20 service.
21

22 **F. The Service Order Correctly States that Successors-in-Interest to Served
23 Deceased Defendants Need Not Be Substituted To Be Bound**

24 To the extent that WRID suggests that Mineral County must serve successors-in-interest
25 by death to defendants who have not yet been served, Mineral County agrees and notes that this
26 point never has been in dispute and is not contradicted by anything in the Service Report Order.
27 For those defendants who have not yet been served, it has always been Mineral County's
28

1 position, and practice, to track deaths and substitute and serve the proper successor-in-interest.
2 However, to the extent that WRID is suggesting that Mineral County continually monitor every
3 served defendant, track deaths, and re-serve all successors-in-interest by death to those properly
4 served defendants, WRID is simply wrong.

5 As pointed out in the Plaintiff Parties' Joint Response to WRID's Successor-in-Interest
6 Order Objections, WRID's view that a successor-in-interest to a served defendant who has died
7 will not be bound unless the Plaintiff Parties track down, personally serve and substitute the
8 successor-in-interest, is at odds with all applicable legal authority. Plaintiff Parties Response in
9 Opposition to WRID Successor-in-Interest Order Objections (Dec. 2, 2011). WRID would have
10 the Court require Mineral County to determine, through continuous or at least periodic tracking,
11 whether the defendants in the case are still *alive*. This approach would require Mineral County
12 to continually track approximately 1,000 people and their successors-in-interest for deaths in
13 perpetuity. WRID points to no basis in either law or equity for imposing such a patently
14 unreasonable burden on Mineral County.⁹ In fact, there is no authority suggesting that a
15 plaintiff, especially one who does not know of a death, must bear the burden of discovering and
16 filing a notice of death.¹⁰ WRID even goes as far as to suggest that unless Mineral County
17 substitutes and serves all successors-in-interest as a result of death, the Order departs from the
18 procedure adopted by Magistrate Judge McQuaid. However, the Court's previous orders on
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21

22
23 ⁹ Mineral County has never suggested that it will not substitute and serve successors-in-interest
24 should a notice of death be filed as required by Rule 25(a).

25 ¹⁰ WRID suggests that the Service Report Order and Successor-in-Interest Order shift the burden
26 of substitution of successors-in-interest under 25(a) to defendants. This is a
27 mischaracterization, because whether or not these successors-in-interest are substituted, they will
28 be bound. Thus, this is not a case of shifting any burden to defendants, because there is no

1 Rule 4 service, to which WRID refers, clearly relate only to successors-in-interest to defendants
2 who have not been served, and not to successors-in-interest to defendants who have been served.
3 This attempt to rewrite the history of the case should be rejected.

4 Not surprisingly, WRID's proposal is also contrary to fundamental rules of law that
5 successors-in-interest to a property interest at issue in an *in rem* proceeding are bound by the
6 judgment in that proceeding,¹¹ and a successor-in-interest as a result of death who resists the
7 court's jurisdiction and venue may be brought under its jurisdiction and bound by its judgment.
8 *See Dolgow v. Anderson*, 45 F.R.D. 470, 473 (E.D.N.Y. 1968)(Weinstein, J.)(noting "the strong
9 policy embodied in the federal rules of deciding entire disputes on the merits as speedily and
10 cheaply as possible").

11
12 Rule 25(a) does not require any party to identify or move for substitution of a successor-
13 in-interest as a result of death and requires no action by anyone other than responding timely to a
14 properly filed statement noting death. As WRID correctly notes, Rule 25 allows any party, as
15 well as representatives and successors-in-interest of the deceased, the discretion to file a
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20 burden to shift. Plaintiff Parties Response in Opposition to WRID Successor-in-Interest Order
Objections, at 32 (Dec. 2, 2011).

21 ¹¹ *See* Restatement (Second) of Judgments § 44 (1982); Restatement (First) of Judgments § 89
22 Comment c. (1942)("The rule applies to any form of transfer whether by purchase, gift or
23 operation of law. Thus, it applies to *heirs, devisees and others taking by succession*, to
24 purchasers, donees, mortgagees and others taking by conveyance and to receivers, trustee in
25 bankruptcy, purchasers at judicial sale and others taking by action of law or judicial process.");
id. at Comment f ("The rule stated in this Section applies to all persons who acquire interests in
26 the property after the beginning of the action, whether or not before judgment, irrespective of
27 their knowledge that proceedings have been begun or that a judgment has been rendered. This
includes, as stated in Comment c, all persons who acquire interests in the property by way of
28 voluntary or involuntary conveyance of title or other interest in the property.").

1 statement of death and/or motion to substitute.¹² If no one files a statement noting death or a
2 motion for substitution following a defendant's death, the Court may proceed to judgment with
3 the original parties. 6 Moore's Federal Practice, § 25.12 [5] & n.20 (citing *Ciccone v. Sec'y of*
4 *Dep't of Health and Human Servs.*, 861 F.2d 14, 15 n.1 (2d Cir. 1988)); *Copier v. Smith &*
5 *Wesson Corp.*, 138 F.3d 833, 835 (10th Cir. 1998)(when plaintiff died and no motion to substitute
6 was made in trial court, case continued in name of original plaintiff until court of appeals *sua*
7 *sponte* ordered substitution on appeal); *Fariss v. Lynchburg Foundary*, 769 F.2d 958, 962 (4th
8 Cir. 1985)(Rule 25(a) imposes no time limit for substitution other than following filing and
9 service of a statement of death). WRID does not address these authorities.¹³

11 Instead, WRID cites *First Idaho Corp. v. Davis*, 867 F.2d 1241 (9th Cir. 1989), for the
12 proposition that the Court has the power to order a plaintiff to substitute a successor-in-interest to
13 a deceased party if the plaintiff does not act. However, in *First Idaho*, the court was faced with
14 the unique set of facts that bear no resemblance to any existing or anticipated circumstances in
15 this case. While no notice of death was formally filed in that case, the death *was* noted on the
16 record, and the court advised the plaintiff that it would permit substitution of the successor-in-
17 interest. Based on those facts, when the plaintiff "refused" to act, even after the court suggested
18

20 ¹² Fed. R. Civ. Pro. 25(a)(A "motion for substitution may be made by any party or by the
21 decedent's successor or representative."); Advis. Committee's Notes to Rule 25(a)(1963
22 Amdt.)("If a party or the representative of the deceased party desires to limit the time within
23 which another may make the motion, he *may* do so by suggesting the death upon the
24 record.")(emphasis added). This is consistent with Rule 1's objective to "secure the just, speedy,
25 and inexpensive determination of every action and proceeding."

26 ¹³ WRID's citation to *Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971), for the proposition that
27 there can be no certainty that such successors-in-interest will be bound is misplaced because the
28 case addressed a circumstance where the party's death was suggested on the record, but the
motion to substitute was not served on the executrix, a non-party, under Rule 4 as required under
such circumstances by Rule 25.

1 it ought to, the court ordered the plaintiff to act on the information. *See id.* at 1242. The facts of
2 that case make *First Idaho's* holding irrelevant to this case. In this case, neither Mineral County
3 nor either of the other Plaintiff Parties has any practical way to track deaths, and in most
4 instances will not have knowledge of deaths. Accordingly, both WRID's premise and argument
5 concerning treatment of successors-in-interest to served defendants as a result of death are
6 without merit, and the Court should reject them.¹⁴
7

8 **G. Mineral County's Requested Dismissal of Michael Sherlock is Withdrawn**

9 Mineral County hereby withdraws its request to dismiss Michael Sherlock from this case.
10 Mineral County will serve Mr. Sherlock pursuant to Rule 4.

11 **V. Conclusion**

12 For the reasons set forth above, Magistrate Judge Leavitt's Service Report Order is not
13 clearly erroneous or contrary to law. Therefore, Mineral County respectfully requests the Court
14 to reject WRID's Objections and affirm the Magistrate Judge's Service Report Order with only
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18 ¹⁴ WRID does not present its arguments regarding the treatment of successors-in-interest as a
19 result of *inter vivos* transfer in its Objections to the Service Report Order. WRID Objections, at
20 17. However, WRID does argue that the Service Report Order's requirement that it and the
21 states of Nevada and California provide updated water rights ownership information to Plaintiff
22 Parties is inconsistent with the Successor-in-Interest Order's finding that successors-in-interest
23 need not be substituted in order to be bound. *Id.* This argument is contradicted by the express
24 language of the Successor-in-Interest Order itself, which includes the same requirement. As
25 explained in the Plaintiff Parties' Joint Response to WRID's Objections to the Successor-in-
26 Interest Order, there is nothing about the requirement to provide updated information that is
27 inconsistent with the rest of the Successor-in-Interest Order because the Magistrate Judge and the
28 Plaintiff Parties, including Mineral County, agree that periodic updated notice by mail should be
provided to known successors-in-interest regardless of whether substitution is required. *See*
Plaintiff Parties Response in Opposition to WRID Successor-in-Interest Order Objections (Dec.
2, 2011). As set forth in the Joint Response to WRID's Objections to the Magistrate Judge's
Successor-in-Interest Order submitted by Plaintiff Parties, *see id.*, WRID's argument that

1 the following limited modifications: (1) Michael Sherlock should remain in the caption and
2 should not be dismissed; and (2) the Service Report Order should expressly provide for the filing
3 of an updated caption reflecting the Service Order additions and deletions, and an updated
4 service packet by Mineral County for Court approval before Mineral County embarks on its final
5 service efforts.
6

7
8 Respectfully submitted this 2nd day of December, 2011,
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10

11 _____
12 /s/ Simeon Herskovits

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21
22
23
24

25 _____
26 successors-in-interest to served defendants need to be substituted or served to be bound by orders
27 of the Court is at odds with well settled law.
28

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2011, I electronically filed the foregoing **MINERAL COUNTY RESPONSE TO WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO SEPTEMBER 27, 2011 ORDER CONCERNING SERVICE ISSUES** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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1 I further certify that I served a copy of the foregoing **MINERAL COUNTY**
2 **RESPONSE TO WALKER RIVER IRRIGATION DISTRICT'S OBJECTIONS TO**
3 **RULINGS OF MAGISTRATE JUDGE WITH RESPECT TO SEPTEMBER 27, 2011**
4 **ORDER CONCERNING SERVICE ISSUES** on the following non-CM/ECF participants by
5 U.S Mail, postage prepaid, this 2nd day of December, 2011:

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