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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants. MINERAL COUNTY, Proposed-Plaintiff-Intervenor vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. 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**

COMES NOW, Mineral County, Nevada, by and through its counsel, Simeon Herskovits of Advocates for Community and Environment, and responds to the Walker River Irrigation District's ("WRID's") Objections to Rulings of Magistrate Judge with Respect to September 27, 2011 Order Concerning Service Issues as follows:

I. MAGISTRATE JUDGE PROCEEDINGS REGARDING MINERAL COUNTY'S 2008 SERVICE REPORT

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

[1] Unless otherwise indicated, all document numbers refer to subproceeding C-125-C documents.

Report Response on January 23, 2009. Mineral County Reply to Walker River Irrigation District's Response to Mineral County's Service Report (Jan. 23, 2009) (Doc. 496).

In mid-2009, Magistrate Judge McQuaid recused himself and Magistrate Judge Leavitt was assigned to this case. After reviewing the file and at the request of Plaintiff Parties, Magistrate Judge Leavitt held a telephonic status conference on October 19, 2010 for the purpose of addressing Mineral County's pending service report and related service issues. (Order, C-125-B Doc. 1598; C-125-C Doc. 512). At that status conference it was determined that Mineral County's Service Report and the C-125-B service cutoff date issue would not be ruled on until fundamental issues concerning the treatment of successors-in-interest had been addressed.

Thus, pursuant to the status conference and by Stipulation and Order dated December 9, 2010, and December 15, 2010, the Court established a schedule for filing a proposed service cutoff order in C-125-B and successor-in-interest orders in C-125-B and C-125-C as well as memoranda related to objections, if any, to the proposed orders. (C-125-B Doc. 1616; C-125-C Doc. 518).

Pursuant to the Court's direction, on November 30, 2010, the United States and Walker River Paiute Tribe filed a Proposed Service Cut-Off Order in subproceeding C-125-B (C-125-B Doc. 1613) and the United States, Walker River Paiute Tribe, and Mineral County ("Plaintiff Parties") filed joint proposed Successor-in-Interest Orders in subproceedings C-125-B and C-125-C. (C-125-B Doc. 1614; C-125-C Doc. 516).

WRID filed an opposition to the proposed Successor-in-Interest Orders on January 7, 2011. 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 (Jan. 7, 2011) (C-125-B Doc. 1621; C-125-C Doc. 523). The Plaintiff

Parties filed a joint Reply to WRID's opposition on February 23, 2011 along with a revised proposed order. Reply to Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served (Feb. 23, 2011) (C-125-B Doc. 1639; C-125-C Doc. 535); Revised Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served (Feb. 23, 2011) (C-125-B Doc. 1639-1; C-125-C Doc. 535-1).

On August 24, 2011, after reviewing all the pertinent filings, Magistrate Judge Leavitt issued identical Revised Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served in both subproceedings C-125-B and C-125-C. (C-125-B Doc. 1649; C-125-C Doc. 540). On September 6, 2011, Magistrate Judge Leavitt issued an Amended Order Concerning Service Issues Pertaining to Defendants Who Have Been Served in subproceeding C-125-C. (Doc. 542) ("Successor-in-Interest Order").[2] The amended order contained attachments not included in the August 24, 2011, orders, but is otherwise identical to the August 24 orders.

On September 12, 2011, WRID filed Objections to Rulings of Magistrate Judge With Respect to Revised Proposed Orders and Amended Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served, challenging the Magistrate Judge's August 24, August 26, and September 6 orders. (C-125-B Docs. 1652 & 1653; C-125-C Docs. 543 & 544). Circle Bar N Ranch, LLC, and Mica Farms, LLC joined in WRID's objections to the Successor-in-Interest Order. (C-125-B Doc. 1654; C-125-C Doc. 545).

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

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

II. HISTORY OF C-125-C SERVICE

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

On January 3, 1995 the Court created subfile C-125-C, or 3:73-CV-128-ECR-RAM. Minutes of the Court, at 1 (Doc. 1). On February 9, 1995 the Court ordered Mineral County to file revised Intervention Documents and to serve these Intervention Documents on all claimants to the waters of the Walker River and its tributaries pursuant to Federal Rule of Civil Procedure 4. Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County, at ¶¶ 2, 3 (Doc. 19) (Feb. 9, 1995) ("February 9, 1995, Service Order"). Mineral County filed its Amended Complaint in Intervention on March 10, 1995. Mineral County's Amended Complaint in Intervention (Mar. 10, 1995) (Doc. 20).[3] On

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[3] Previously, WRID claimed Rule 25(c) is inapplicable to C-125-C because litigation has not "commenced." WRID Objections to Proposed Order Concerning Service Issues for Defendants Who Have Been Served and to Proposed Order Concerning Service Cut-off Date, at 12 (Jan. 7, 2011) (Doc. 523). An action commences upon filing and serving a pleading. *See* 1A C.J.S. *Actions* § 315 (2010). Mineral County filed a Motion for Intervention and a Proposed Petition to Intervene in the ongoing Walker River Decree proceedings, and filed an Amended Complaint in Intervention at the Court's direction. (C-125-B Docs. 31, 32; C-125-C Docs. 2, 3, 20) WRID now claims, citing no relevant authority, that the Clerk erroneously "filed" the Amended 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

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

Identifying all claimants to the waters of the Walker River and its tributaries has been a daunting task, which has been largely completed in the teeth of determined opposition, recalcitrance, and outright evasion on the part of many upstream water claimants who were egged on by WRID, among others. Mineral County compiled the list of claimants to the waters of the Walker River and its tributaries from county recorders' offices, records of the Federal Water Master, State Engineer databases, and the records of WRID. The sheer number of claimants, combined with the fact that few of the records and databases consulted or lists received were initially accurate, and the determined efforts of water right claimants coached by WRID to avoid service, made the task exceptionally time-consuming, expensive, and difficult. It took several years for the parties to reach consensus on the proper list of persons to be served, but on January 12, 1998, the Court issued a caption that has been the basis of Mineral County's

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the merits of its motion to intervene before the Court would direct the clerk to "file" its proposed Amended Complaint. This result would be profoundly illogical. WRID's argument is empty sophistry.

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

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

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

As detailed in the 2008 Service Report,[4] Mineral County has updated this list of unserved potential defendants to reflect current ownership and is prepared to begin service on these individuals once the Court approves an updated service packet.[5] At this stage, service in the C-

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[4] Mineral County's Service Report, at 3-7 (Aug. 29, 2008) (Doc. 479).

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

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

III. STANDARD OF REVIEW

Magistrate Judges are authorized to resolve pretrial matters subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)A); Fed. R. Civ. P. 72(a). WRID agrees the Order is subject to review under the clearly erroneous or contrary to law standard, but invites *de novo* review based on a misreading and misuse of the *Grimes*, *Laxalt*, and *Beverly Glen* cases. WRID, at 10. *Grimes* actually stated that "[p]retrial orders of a magistrate . . . are reviewable under the 'clearly erroneous and contrary to law' standard; they are *not* subject to de novo determination . . . ." *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (emphasis added).[6] In particular, the reviewing court "may not simply substitute its judgment for that of the deciding court." *Grimes*, 951 F.2d at 241. *Laxalt* did not even involve the contrary to law standard and made no such assertion regarding *de novo* review. *See Laxalt v. McClatchy*, 602 F. Supp. 214 (D. Nev. 1985). Finally, WRID's reliance on *Beverly Glen* is misplaced, because the court in *Beverly Glen* clearly miscited *Grimes* for the proposition that *de novo* review is appropriate under the contrary to law standard. *See 26 Beverly Glen, LLC. v. Wykoff Newberg Corp.*, 2007 WL 1560330 (D. Nev.

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[6] *See also Gomez v. United States*, 490 U.S. 858 (1989); *Trustees of No. Nev. Oper. Eng. v. Mach 4 Construction, LLC*, 2009 WL 1940087 (D. Nev., July 7, 2009); *Montgomery v. Etreppid Technologies, LLC*, 2010 WL 1416771 (D. Nev., Apr. 5, 2010); Fed. R. Civ. P. 72(a). The Local Rules for the District of Nevada make the same distinction. *Compare* LR IB 3-1(a)("clearly

2007). Because *Beverly Glen* is plainly mistaken and is contradicted by controlling precedent, it is not good law. Thus, WRID's suggestion that *de novo* review is appropriate here is incorrect and misplaced, and should be rejected. While *de novo* review is appropriate where a Magistrate Judge has made a ruling outside the scope of matters delegated to him, citing *United States v. Rivera-Guerroro*, 377 F.3d 1064, 1071 (9th Cir. 2004). In this case it is undisputed that the Service Report Order is well within the scope of matters delegated to the Magistrate Judge. Indeed, WRID does not suggest that the Magistrate Judge's Service Report Order was outside the scope of matters delegated to him. So WRID's reference to that inapplicable standard is either mistaken or an attempt to confuse the Court.

A finding of fact is "clearly erroneous" only if the reviewing court is left with 'a definite and firm conviction that a mistake has been committed.'" *Mach 4*, quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "A decision is contrary to law if it applies an incorrect legal standard or fails to consider an element of the applicable standard." *E.g., Doubt v. NCR Corp.*, 2011 WL 3740853 (N.D. Cal., Aug. 25, 2011); *Na Pali Haweo Community Ass'n v. Grande*, 2532 F.R.D. 672, 674 (D. Haw. 2008).

Particularly relevant here is that,

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

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

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

IV. ARGUMENT

A. Introduction:

Just as in its Objections to the Magistrate Judge's Successors-in-Interest Order, throughout its Objections, WRID misrepresents the history of service in C-125-C and misconstrues the orders of the Court regarding service. Such mischaracterizations and misrepresentations are designed to create the appearance of inconsistencies and complexities where none exist, and should be disregarded by the Court. First, WRID suggests that Magistrate Judge Leavitt's September 27, 2011, Service Report Order is inconsistent with the amended order of September 6, 2011, on successor-in-interest issues. Either WRID has misunderstood both orders or has intentionally misrepresented both to create the appearance of inconsistency where there is none. Throughout its Objections WRID conflates issues of substitution of successors-in-interest who already have been served with substitution of and service on successors-in-interest to defendants who have not yet been served. The two orders plainly address different topics and have different purposes. The Service Report Order addresses substitution and service for successors-in-interest to defendants who have not yet been served and who Mineral County agrees remain to be served, while the Amended Successor-in-Interest Order addresses the issue of successors-in-interest to those who already have been served and need not be reserved to be bound. *See* Plaintiff Parties Response in Opposition to Walker River Irrigation District's Objections to Rulings of Magistrate Judge with Respect to Revised Proposed Orders and Amended Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served (Dec. 2, 2011) ("Plaintiff Parties Response in Opposition to WRID Successor-in-Interest Order Objections").

The Service Report Order clearly is consistent with and reflective of the fact that the Amended Successor-in-Interest Order does not change Mineral County's obligation to substitute and serve successors-in-interest to defendants who have not yet been served. Moreover, the Service Report Order is consistent with the Successor-in-Interest Order's treatment of successors-in-interest to defendants who already have been served, because it requires no further service on those water rights holders. WRID's conflation of the two issues to suggest that the Service Report Order is contrary to law is an attempt to muddy the waters and create the appearance of complexity where the issues really are straightforward.

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

WRID's derogatory reference to the passage of time during service efforts since the commencement of this action fails to acknowledge the enormity of the task that service has entailed in this case, the history of obstruction and evasion of Mineral County's service efforts

that WRID played a major part in encouraging, the Court ordered mediation process that took place and consumed much of Mineral County's resources over the course of several years, and the fact that lengthy time periods for the completion of service in complex actions like this one (*e.g.*, water rights adjudications) are not uncommon. Indeed, in the C-125-B action, seven years elapsed between the commencement of the action and even the *commencement* of concrete service efforts. The C-125-B action has been pending longer than the C-125-C action and is only now approaching completion of service; and the joint plaintiffs in the C-125-B action include the United States with its vastly superior greater resources than those of an impoverished county like Mineral County.

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

Partially based on this meritless argument, WRID also suggests that Mineral County must send materials updating response deadlines to those for whom the Court already has ratified service and who have not entered appearances in this case. Without support, WRID suggests that before year 2000, served parties were not required to file entries of appearance and that parties served before that date must be reserved by mail with updated paperwork which includes

updated response deadlines. However, WRID fails to mention that all orders governing service in this case required those who were served to appear and respond. *See, e.g.*, February 9, 1995, Service Order, at 4-5, ¶ 7 (Feb. 9, 1995) (Doc. 19). WRID suggests that because an entry of appearance form was not required before 2000 that these persons must be reserved by mail with an updated schedule. However, the Court chose not to include an entry of appearance form, instead, ordering that the service order, which included a requirement that defendants appear, be made a part of the service packet. So, WRID's assertion that "[m]ost of those persons and entities were not required to file any document with the Court," WRID Objections, at 9, clearly is a misstatement and should be disregarded. The truth is that served individuals had all of the information necessary to respond and file a notice of appearance. For those who received service and chose to do nothing, they are deemed to have further notice of proceedings, including updates to any briefing schedules. *See, e.g.*, February 9, 1995, Service Order, at 4-5, ¶ 7 (Feb. 9, 1995) (Doc. 19). It would not be equitable to burden Mineral County with the duty to continually update previously served water rights holders who could not be bothered responding to the service packet they received.

Further, WRID's should not be permitted to revisit previously ratified service efforts that it had the opportunity to object to previously. The Court already has found that service is complete for these water rights holders. To suggest now that service was insufficient for these parties is untimely and is merely an attempt to throw yet another obstacle between the Court and the merits of this case.

B. The Service Report Order Properly Confirms that the Caption Submitted by Mineral County is Accurate and Valid

WRID appears to have no real argument as to why the caption submitted by Mineral County is invalid, but attempts to call it into question anyway.[7] WRID begins its attack on the updated caption with a fundamental misunderstanding of its contents and purpose. WRID suggests that the caption is outdated and to the extent that the Order contemplates service only on those who held water rights in 2001, it should be rejected. However, Mineral County made it clear in the 2008 Service Report that the caption was submitted as a starting point for further updates and is meant only to reflect all previous orders of the Court that added and dismissed parties. Mineral County Service Report, at 3, 6-7 (Aug. 29, 2008) (Doc. 928). Thus, in its Service Report, Mineral County proposed that once the Court had approved the caption and had ruled on the changes to it that were requested in the Service Report, Mineral County would file an updated proposed caption reflecting those changes for approval. *Id*. at 6-7. Mineral County did not include a caption reflecting 2008 ownership with the Service Report filing, because such a filing would have been premature until the Magistrate ruled on the proposed additions and deletions. Thus, it is misleading to suggest that the caption does not contemplate notice for

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[7] WRID suggests that the Magistrate Judge does not state a purpose for approving the caption. However, when read in conjunction with Mineral County's request for approval, the purpose is clear. The approved caption reflects orders of the Court adding and dismissing defendants and is meant as a starting point for further updates of the caption by Mineral County which will reflect current ownership for successors-in-interest to unserved defendants. WRID also attempts to suggest that the standard against which the caption is measured for accuracy is not revealed. However, that standard is clear. The caption is a simple update based solely upon orders of this 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.

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

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

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

WRID's suggestion that successors-in-interest to unserved parties may not properly be substituted for their predecessors and served as the proper defendants in this case is unsupported and is based on a fundamental misunderstanding and mischaracterization of the Service Report Order. Again, WRID conflates successors-in-interest to *unserved* defendants, who were addressed by the Service Report Order, with successors-in-interest to *served* defendants who are addressed by the Magistrate Judge's Successor-in-Interest Order. WRID suggests that but for the fact that the Successor-in-Interest Order places the burden of joining successors-in-interest on defendants, the District would not object to this substitution. WRID Objections, at 13. This objection makes no sense. Mineral County has never disputed that Plaintiffs have the burden to substitute and serve, via Rule 4 service, successors-in-interest to *unserved* water rights claimants. This is precisely what the Service Order requires. Because this objection is based on a

fundamental misunderstanding of the briefing before the Magistrate Judge and the orders at issue, and because the Service Report Order's provisions actually comport with all of the parties' shared position regarding substitution for unserved defendants, WRID's argument should be rejected.

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

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

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

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

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

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

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

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

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

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[8]As a final attack, WRID claims that the Service Report Order, if read broadly, would relieve Mineral County of all future Rule 5 service on defendants. That is preposterous and insulting to the Court. The Service Report Order does no such thing and on its face plainly is directed solely at the issue of original Rule 4 service on defendants. There has never been any debate that Mineral County, as well as each other party, has a duty to comply with Rule 5 with regard to service on all parties who have entered appearances in this case. Since the Service Report Order 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.

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

E. Further Guidance from the Court on Proper Service Packet

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

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

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

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

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

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

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

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

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

Rule 25(a) does not require any party to identify or move for substitution of a successor-in-interest as a result of death and requires no action by anyone other than responding timely to a properly filed statement noting death. As WRID correctly notes, Rule 25 allows any party, as well as representatives and successors-in-interest of the deceased, the discretion to file a

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burden to shift. Plaintiff Parties Response in Opposition to WRID Successor-in-Interest Order Objections, at 32 (Dec. 2, 2011).

[11] *See* Restatement (Second) of Judgments § 44 (1982); Restatement (First) of Judgments § 89 Comment c. (1942)("The rule applies to any form of transfer whether by purchase, gift or operation of law. Thus, it applies to *heirs, devisees and others taking by succession,* to purchasers, donees, mortgagees and others taking by conveyance and to receivers, trustee in 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 the property after the beginning of the action, whether or not before judgment, irrespective of 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 voluntary or involuntary conveyance of title or other interest in the property.").

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

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

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

[13] WRID's citation to *Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971), for the proposition that there can be no certainty that such successors-in-interest will be bound is misplaced because the 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.

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

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

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

V. Conclusion

For the reasons set forth above, Magistrate Judge Leavitt's Service Report Order is not clearly erroneous or contrary to law. Therefore, Mineral County respectfully requests the Court to reject WRID's Objections and affirm the Magistrate Judge's Service Report Order with only

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[14] WRID does not present its arguments regarding the treatment of successors-in-interest as a result of *inter vivos* transfer in its Objections to the Service Report Order. WRID Objections, at 17. However, WRID does argue that the Service Report Order's requirement that it and the states of Nevada and California provide updated water rights ownership information to Plaintiff Parties is inconsistent with the Successor-in-Interest Order's finding that successors-in-interest need not be substituted in order to be bound. *Id.* This argument is contradicted by the express language of the Successor-in-Interest Order itself, which includes the same requirement. As explained in the Plaintiff Parties' Joint Response to WRID's Objections to the Successor-in-Interest Order, there is nothing about the requirement to provide updated information that is inconsistent with the rest of the Successor-in-Interest Order because the Magistrate Judge and the 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

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

Respectfully submitted this 2nd day of December, 2011,

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

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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I further certify that I served a copy of 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** on the following non-CM/ECF participants by U.S Mail, postage prepaid, this 2nd day of December, 2011:

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