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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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 Subproceedings: C-125-B & C-125-C 3:73-CV-00127-ECR- WGC & 3:73-CV-00128-ECR- WGC **RESPONSE IN OPPOSITION TO THE 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**

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I. INTRODUCTION

The United States of America ("United States") and the Walker River Paiute Tribe ("Tribe")(Plaintiff and Plaintiff-Intervenor in subproceeding C-125-B) and Mineral County (Proposed Plaintiff-Intervenor in subproceeding C-125-C)(collectively "Plaintiff Parties") respectfully submit this Joint Response in Opposition to the *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* and *Walker River Irrigation District's Points and Authorities in Support of 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* (B-#1652, C-#543 ("Obj."), B-#1653, C-#544 ("WRID").[1] The Walker River Irrigation District ("WRID") objects to the *Order Approving Revised Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* ("Order") issued by Magistrate Judge Leavitt.[2]

Plaintiff Parties are on the verge of completing service of process in their respective subproceedings. In this effort and to address future case management, following a status conference on October 19, 2010, Plaintiff Parties submitted a proposed order to address

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[1] C-125-B documents are prefaced "B-" and C-125-C documents are prefaced "C-".

[2] On August 24, 2011, the Magistrate Judge issued identical *Revised Proposed Orders Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-B and C-125-C. (B-#1649, C-#540). On August 26, 2011, he issued an *Amended Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-B. (B-#1650), and on September 6, 2011, issued an identical *Amended Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* in C-125-C. (C-#542) The amended orders (collectively "Order"), contain attachments omitted from the initial orders, but are otherwise identical.

WRID also objected to the other two service-related Orders issued by the Magistrate Judge: 1. the *Order Concerning Service Cut-Off Date* (Sept. 19, 2011, B-#1656), addressing Phase I of the C-125-B litigation; and 2. The *Order* addressing Mineral County's 2008 Service Report (Sept. 27, 2011, C-#547). Responses to those objections are being filed separately.

treatment of successors-in-interest following *inter vivos transfers* and the death of a defendant (collectively "successors").[3] WRID objected and submitted its own proposal.[4] Plaintiff Parties responded in detail, modified their proposed Order, and requested that the Magistrate Judge approve procedures that are consistent with the Federal Rules of Civil Procedure and due process, do not create unreasonable burdens and obstacles for Plaintiff Parties, and allow the Court to reach the merits.[5]

WRID insinuates that the Magistrate Judge issued the Order without considering all filings. WRID at 11. WRID's filing and Plaintiff Parties' filings and proposed Orders were before the Magistrate Judge when he ruled. The Order expressly states he considered all filings.[6] Order at 2. The Magistrate Judge clearly considered and rejected WRID's arguments. WRID simply repeats its proposals and asks the Court to substitute them for the Order. WRID at 3, 27.[7]

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[3] *Submission of Proposed Order Concerning Service Issues Pertaining to Defendants Who Have Been Served* (Nov. 30, 2010, B-#1614, C-#516 ("Initial Proposed Order")).

[4] *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* at 26 (Jan. 7, 2011, B-#1621)("Initial Objections").

[5] *Reply to Walker River Irrigation District's Objections to Proposed Order Concerning Service Issues Pertaining To Defendants Who Have Been Served* (Feb. 23, 2011, B-#1639, C-535) ("Plaintiff Parties' Reply").

[6] Plaintiff Parties' failure to address any of WRID's points does not indicate their agreement.

[7] Only WRID objected to the Order. Circle Bar N Ranch LLC, and Mica Farms LLC joined WRID's Initial Objections and the instant Objections. (B-##1623, 1665, C- ##525, 554). The U.S. Board of Water Commissioners ("Board") also joined WRID's Initial Objections. (B-#1622, C-#524). The Court created the Board in 1937 to distribute the waters of Walker River pursuant to the C-125 Decree. The Board and its attorney are "bound by the Code of Judicial Conduct, and [are] obligated to conduct [themselves] in an impartial, unbiased manner." *Order* at 4 (Feb. 13, 1990, C-#162)(it is inappropriate for the same attorney to continue representing both WRID and the Board). The Board must avoid the appearance of impropriety or partiality. *Id.* at 5. While it is proper for the Board's attorney to review and comment on service lists, formally taking a side over the process to join successors and establish a cut-off date for service violates the Board's duty to administer justice impartially. At a minimum, the Board's action creates an appearance of impropriety and/or partiality. Plaintiff Parties have appreciated the Board attorney's assistance to identify service issues to be clarified or corrected, but the Board's decision to join WRID's Objections is clearly improper.

WRID fails to show the Order is clearly erroneous or contrary to law. Rule 25 and long settled law establish that it is unnecessary to substitute successors to water rights of served defendants to move these subproceedings to judgment and bind successors. This is particularly clear in *in rem* proceedings. Rule 25(c) does not require Plaintiff Parties to track defendants' transfers continuously and move to substitute successors. Nor does Rule 25(a) require Plaintiff Parties to track defendants' continued existence and substitute successors as a result of death. A timely motion to substitute must be filed if a proper notice of death is filed; otherwise, as with *inter vivos* transfers, successors are bound before or after judgment, regardless of substitution.

WRID's assertion that successors must be actively tracked and personally served under Rule 4 is incorrect as a matter of law and would delay resolution of the merits *ad infinitum* and require perpetual updating of service before and after judgment to bind future successors. WRID's proposal should be recognized for what it is: an attempt to prevent this case from moving forward in an orderly fashion and prevent the Court from ever reaching the merits of the Plaintiff Parties' claims.[8] No plaintiff should be forced to react constantly to a pair of moving goalposts, which is essentially WRID's demand. WRID asserts incorrectly that Rule 19 is the proper procedural vehicle to join every successor to the water right claim of an already-served defendant. Applying Rule 19 to join these successors as new parties would create unnecessary substantive and practical complications.

Due process requires notice that is reasonable under the circumstances. Now that service is almost completed, the most reasonable process is to provide notice of these proceedings to known successors at subsequent critical junctures. This process would be similar to notice by mail and publication used in Nevada and California State water rights adjudications and other

[8] While WRID criticizes the Order's use of "perpetually," WRID at 2, WRID's proposal would effectively prevent Plaintiff Parties from reaching the merits indefinitely.

federal water rights adjudications. If mailing and publication in State adjudications satisfy due process, Rule 4 service, followed by selected mailings to known successors and periodic publication, should be at least equally sufficient.

In WRID's view, the "central goal" of "service and joinder" is "to ensur[e] that when each of these multi-year proceedings are [sic] concluded, the judgment in each will bind all persons who have an interest related to the subject of each, and the litigation will be over." WRID at 6. WRID seeks perfection in service and would treat successors as Rule 19 new parties as a means to this end. The issue before the Court, however, is whether the Magistrate Judge's Order is clearly erroneous or contrary to law. WRID fails to make this showing. Furthermore, WRID's proposed treatment of successors is contrary to law, would not attain the goal it contends is necessary, and would place impractical and onerous burdens and undue costs on Plaintiff Parties and mire these proceedings in endless delays.

II. History of Service Efforts in Subproceedings C-125-B and C-125-C

C-125-B and C-125-C are part of litigation over water rights in the Walker River system that commenced in 1924 when upstream users prevented water from reaching the Walker River Paiute Reservation. In 1936, the Court entered a judicial Decree[9], which it amended in 1940 to address the 9th Circuit's partial reversal and incorporate the parties' stipulation that:

> This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries as of the 14th day of April, 1936 . . . .

Decree at 72, ¶XII. The Court retained jurisdiction "for the purpose of changing the duty of water or for correcting or modifying this decree; also for regulatory purposes. . . ." *Id.* at 72-73,

[9] Decree, (Apr. 15, 1936), modified, *Order for Entry of Amended Final Decree to Conform to Writ of Mandate* (Apr. 24, 1940)("Decree"). The Decree provides 26.25 cfs to irrigate 2,100 acres on the Reservation, plus sufficient water for domestic, stockwatering and power purposes.

XIV. Thereafter, it has exercised ongoing authority over and supervision of these proceedings, including approving administrative rules, addressing requests to amend the Decree, appointing Water Masters and the Board's Water Commissioners, and designating three subproceedings.

A. Subproceeding C-125-B:

The Court designated subproceeding C-125-B in 1992, after the Tribe filed a counterclaim in subproceeding C-125-A (A-#12E)[10] for water rights for lands restored to the Reservation subsequent to the Decree and for storage in Weber Reservoir. *Order* (May 18, 1992, A-#34). The United States filed a similar counterclaim in its trust capacity. (B-#3). WRID moved to dismiss or require joinder and service on all existing claimants to water in the Walker River basin. (B-#5). The Court determined that "[i]n accordance with Rule 19, all [existing] claimants to the waters of the Walker River and its tributaries must be joined as parties to the claim" and served under Rule 4. *Order* at 6 (Oct. 27, 1992, B-#15)("1992 Order").[11] Thereafter, the Court granted a series of stipulated extensions for the United States to investigate, identify, and serve the necessary additional parties. In April 1994, the United States sought instructions addressing whether it was required to serve groundwater users. (B-#23). In July 1994, the Court determined that the information before it did not require joinder of groundwater claimants under Rule 19. *Order* (July 8, 1994, B-#30).

In 1997, the United States and Tribe filed amended counterclaims to include groundwater under and adjacent to the Reservation, asserting the Walker River Basin's surface and groundwater systems are interconnected so that taking water from one affects the other

[10] C-125-A addressed WRID's petition for relief after California issued administrative orders regarding instream and minimum pool objectives at WRID's Topaz and Bridgewater reservoirs. (#A-3). WRID argued California was acting inconsistently with the Decree and interfering with the federal court's retained jurisdiction. These claims were settled.

[11] The Court determined the counterclaims were cross-claims since they arose out of the same transaction or occurrence regarding property that is the subject of the original action. *Id.* at 4-5.

(collectively "Tribal Claims").[12] The United States also claimed surface and groundwater for additional federal interests not addressed in C-125 ("Federal Claims"). In August 1998, the United States and Tribe sought leave to serve their amended counterclaims and join groundwater users, and for approval of a procedure for service.[13] Nevada moved for a more definite statement and WRID moved for a scheduling and planning conference.[14] In May 1999, the Court determined to hold a scheduling conference to "place the case on some sort of proper procedural track." *Minutes of the Court*, at 3 (May 11, 1999, B-#81). Part of its concern was whether groundwater users should be joined and, if so, whether they should be identified and served.

After extensive briefings, the Court issued a Case Management Order ("CMO") on April 18, 2000, in which it acknowledged the potential complexity of trying the claims and bifurcated the Tribal Claims from the Federal Claims. CMO at 2 (B-#108). The CMO requires the "U.S./Tribe" to effect service pursuant to Rule 4, Fed. R. Civ. P., on nine categories of persons and entities, including successors to all water rights holders in the 1936 Decree and holders of permits or certificates to pump groundwater in specific sub-basins. *Id.* at 5-6, ¶3. The CMO authorizes the Magistrate Judge to decide "all issues" pertaining to service, including scheduling its completion, adjusting categories to be served, addressing publication and whether service efforts are adequate and complete, and determining how the U.S./Tribe shall obtain information to identify defendants and "the responsibilities of the respective parties to provide such information and at whose cost." *Id.* at 3, 6-8, ¶¶ 4-9. The CMO bifurcates the Tribal Claims into Phase I to identify and address threshold issues and Phase II to "involve completion and

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[12] *First Amended Counterclaim of the Walker River Paiute Tribe*; *First Amended Counterclaim of the United States of America* (July 31, 1997, B-##58, 59).

[13] *United States' and Walker River Paiute Tribe's Joint Motion for Leave to Serve First Amended Counterclaims* (Aug. 20, 1998, B-#62).

[14] B-##64, 67.

determination on the merits of all matters" relating to the Tribal Claims, and provides that the list of Threshold Issues for Phase I "will not be finally resolved and settled by the Magistrate Judge until all appropriate parties are joined." *Id.* at 9, ¶¶11, 12.

The Court's position on the mechanics of service has evolved over the years. The CMO, for example, required filing *lis pendens* for each person or entity served. Magistrate Judge McQuaid, however, removed this requirement in 2001, after ascertaining that *lis pendens* could require "mini trials" at the State level for each defendant and neither Nevada nor California did such filings in their water rights adjudications. Instead, the Court approved a form based on a WRID proposal to require defendants to identify when they transfer interests subject to the proceeding. *E.g.*, *Minutes of Court* (Mar. 20, 2001, B-#136; Apr. 20, 2011, B-#140); *Order Regarding Changes in Ownership of Water Rights* (July 16, 2003, B-#207).

Before the Court authorized service, WRID and other defendants reviewed and approved the contents of the service package. Once the Court approved the last of these materials in July 2003, the United States initiated service. Shortly before then, the parties began an extensive effort to mediate both subproceedings, which ended in 2006.

B. Subproceeding C-125-C:

In October 1994, Mineral County filed its Motion and Petition to Intervene (B-##31, 32), for which the Court created subfile C-125-C. *Minutes of the Court*, at 1 (Jan. 3, 1995, C-#1). 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 sufficient to restore and maintain the Lake in a reasonable state of ecological health and sustain its historical and immeasurable values as a wildlife habitat, and recreational, economic, environmental and scenic resource. In February1995, the Court ordered Mineral

County to file and serve revised filings on all claimants to the Walker River and its tributaries pursuant to Rule 4.[15] Mineral County filed its revisions in March 1995. *Mineral County's Amended Complaint in Intervention* (Mar. 10, 1995, C-#20). In September 1995, the Court identified the documents that it required Mineral County to serve and reiterated that persons or entities that are served or waive personal service, but do not appear and respond, will be deemed to have notice of all subsequent filings with the Court. *Order* at 2, 4 (Sept. 29, 1995, C-#48).

Mineral County compiled the list of claimants by reviewing records at the county and State level. The sheer number of claimants, plus the fact that few records were accurate, made the difficult task time-consuming and expensive. In this effort, which preceded service in C-125-B, the Court directed Mineral County to identify the persons and entities to be served and then reach consensus with the other parties, including WRID, on the proper list of persons and entities to be served. *Minute Order* (Oct. 24, 1997, C-#156). This effort took several years. In January1998, the Court issued the caption that has been the basis of Mineral County's service efforts, and in May 1998, issued an Order indicating that the Court and parties had agreed upon the list of defendants to be served. *Order* at 2 (May 13, 1998, C-#196).[16] Thereafter, Mineral County dedicated significant time and resources to conduct service as directed by the Court.

C. Status of Service in Subproceedings C-125-B and C-125-C:

As the Court predicted,[17] implementing service as required by the CMO has been neither economical nor easy. Plaintiff Parties have spent significant time and resources serving the

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[15] *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶¶ 2, 3 (Feb. 9, 1995, C-#19).

[16] In contrast and as reported in its periodic service reports, the United States updated its caption on the materials it served, but has not yet filed an updated caption.

[17] When it required Rule 4 service, the Court stated: "We are sympathetic to the struggles of the United States and the Tribe to serve parties for C-125-B. . . . Altering water rights on a river

categories of persons and entities they were directed to identify and serve under Rule 4. Despite difficulties inherent in conducting the necessary investigations and extensive service, including interference by upstream claimants, this process is nearly complete.[18]

In C-125-B, the United States mailed over 3,850 service packages, personally served over 1,500 persons and entities, and obtained review and approval of its efforts by the Court and Defendants in sixteen Service Reports and five proofs of service by process servers. In response to Defendants' concerns, the United States worked to complete service by the end of 2008[19] and continued its efforts in 2009 after Magistrate Judge McQuaid recused himself. (Mar. 12, 2009, B-#-1510; C-#499). But for questions regarding successors and service cut-off date, no one has claimed that service has not been accomplished on the categories of persons and entities that the Court directed to be served.[20] As a result of the United States' service efforts, there are currently over 3,000 defendants in C-125-B.

In C-125-C, Mineral County has served well over a thousand claimants and its list of un-served claimants is relatively short. Although the process took significant time and resources

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system divided more than sixty years ago is no easy task. There will be considerable time and expense in pursuing an action." Order at 6, 8 n.2 (June 11, 2001, B-#522).

[18] WRID advised its members not to return waivers in C-125-C; the Walker River Water Users Association, whose board is appointed by WRID and the Bridgeport Valley Land Owners Association, sent its members a letter warning them of the impending federal service; hostile articles, including one in which a defendant advised that no one return waivers in C-125-B, ran in local newspapers; and one individual, after being served, chased after the federal process server in his truck and repeatedly tried to run the process server's vehicle off the road. *See e.g., Points and Authorities in Opposition to WRID's Motion to Vacate Schedule and in Support of Counter Motion for Sanctions* (July 6, 1995, C-#31); *Mineral County's Points and Authorities in Reply to WRID's Response and Request for Hearing* (Aug. 4, 1995, C-#42).

[19] This does not include such issues as challenges to service, publication, and any determination whether service is complete.

[20] One issue remaining before the Court is whether certain persons and entities belong in the categories to be served. *See Sixteenth Report of the United States of America Concerning Status of Service on Certain Persons and Entities and Request for Guidance* (Oct. 14, 2010, #1609). Once this issue is addressed, the United States can prepare and file a 17th Service Report.

and met numerous obstacles, the Court commended the County's efforts more than once and ratified service on most claimants listed in the approved caption or their substituted successors.[21] At no time did WRID or Nevada provide Mineral County with the ownership updates they provided the United States. In 2008, Mineral County filed a service report requesting that the Court amend certain names in the caption, strike certain names from the caption and substitute other names in their stead, ratify service efforts for several proposed defendants, and clarify the status of service on several proposed defendants. *Mineral County Report Concerning Status of Service on Proposed Defendants* (Aug. 29, 2008, C-#479). *See also* WRID Response (Nov. 21, 2008, C-#488); Mineral County Reply (Jan. 23, 2009, #C-496). On September 27, 2011, after ruling on the related successor issues, Magistrate Leavitt issued an *Order Concerning Service Issues*, which granted Mineral County's Service Report requests (C-#547). Among other things, the Order confirms that the short list of water rights holders remaining to be served. (WRID objected to this Order. (C-##552 & 553).)

Having successfully argued for extensive service it knew would tie up this litigation for years,[22] WRID has the temerity to suggest the successor issue is critical because "Plaintiff Parties have been allowed 19 and 17 years, respectively, to make service." WRID at 27. WRID insinuates that service could have been completed more quickly had Plaintiff Parties devoted

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[21] *Order*, at 2 (June 4, 1998, C-#210); *Order Concerning Status of Service on Defendants* (Apr. 3, 2000, C-#327); *Order* (Dec. 19, 2001, C-#397); *Order* (June 18, 2002, C-#414).

[22] "[A]ny case management order must recognize that identifying all surface and groundwater claimants within the Walker River water shed is no easy task. . . . [I]t is likely that a substantial period of time will be needed to complete service of process." *WRID and Nevada's Points and Authorities in Support of Motion Concerning Case Management*, 5, 6 (Jan. 21, 2000, B-#97).

more resources. *Id.* at 3. WRID's aspersions aside, the record shows continued efforts by Plaintiff Parties to implement difficult, expensive and time-consuming service requirements.[23]

III. Standard of Review: Non-Dispositive Pre-Trial Matters

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 a pretrial matter under 28 U.S.C. § 636(b)(1)(A) and LR IB 3-1(a), but invites *de novo* review of the entire decision, based on a misreading of *Grimes*, *Laxalt*, and *Beverly Glen*. *See* WRID at 11.

In *Grimes*, the 9th Circuit 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)(citations omitted).[24] In reviewing nondispositive pretrial matters, "[t]he district court shall defer to the magistrate's orders unless they are clearly erroneous or contrary to law." *Id.* at 240, *citing* Rule 72(a). In particular, the reviewing court "may not simply substitute its judgment for that of the deciding court." *Id.* at 241.[25] Thus, WRID's suggestion that *de novo* review is appropriate here is incorrect.[26]

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[23] The United States has now spent over $1.5 million on service. Plaintiff Parties also devoted a number of years during this period to unfruitful mediation efforts, for which the United States also paid 43.8% of the Mediator's fees and expenses, in addition to funding staff and experts to support these settlement efforts. Mediation Process Agreement at §3.2.1.1, Att. 2 to *Joint Motion for Entry of Order Governing Mediation Process* (May 9, 2003, #566).

[24] *Gomez v. United States*, 490 U.S. 858 (1989); *Trustees of No. Nev. Oper. Eng. Health & Welfare, Trust Fund 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 erroneous or contrary to law" standard for pretrial matters) *with* LR IB 3-2(b)("*de novo*" standard for dispositive matters).

[25] *Laxalt* did not 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). *Beverly Glen* appears

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,* 2009 at *1, 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, *2 (N.D. Cal., Aug. 25, 2011)(citation omitted); *Na Pali Haweo Community Ass'n v. Grande,* 252 F.R.D. 672, 674 (D. HI. 2008). Of particular relevance:

> "[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 at *1* (viewing objections as possible delaying tactic and quoting *Colon v. Wyeth Pharmaceutical,* 611 F. Supp. 2d 110, 116 (D.P.R. 2009)).

IV. ARGUMENT

Having failed to convince the Magistrate Judge to adopt its view of successors, WRID attempts to influence the Court's treatment of successors using a similar and equally unsupported approach. Without demonstrating that the Order is clearly erroneous[27] or contrary to law, WRID

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to have 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., May 24, 2007). *Beverly* is plainly mistaken and contradicted by controlling precedent.

[26] If a district judge finds that a magistrate judge's ruling is clearly erroneous or contrary to law, the judge may affirm, reverse, or modify the ruling, in whole or in part, and may remand the same to the magistrate judge with instructions. LR IB 3-1(b).

[27] WRID makes no serious effort to argue that the Order contains "clearly erroneous" findings of fact and acknowledges that its Objections "relate to the Magistrate Judge's legal conclusions." WRID at 11. Although WRID identifies various "assumptions" in the Order that it believes are incorrect, some of which appear to be factual, they are not findings nor does WRID challenge them as "clearly erroneous." For example, WRID suggests Plaintiff Parties' assertion that the "Court has required" service on "significant numbers of water rights holders," is somehow disingenuous. *Id.* at 2. The simple fact is that the Court, not the Constitution nor the Federal

simply asserts that the Court should substitute WRID's approach for the approach adopted by the Magistrate Judge. In making this argument, WRID mischaracterizes this *in rem* proceeding and asks the Court to ignore settled caselaw regarding the legal status of successors, primarily because WRID contends its approach will be easier to implement. WRID's approach is legally unwarranted and would create additional substantive and practical complications and impediments that would effectively prevent the Court from reaching the merits indefinitely.

A. WRID Mischaracterizes the *In Rem* Nature of These Proceedings.

In an attempt to convince the Court to impose unnecessarily burdensome and complicated service and substitution requirements on Plaintiff Parties, WRID mischaracterizes the *in rem* nature of these proceedings. While the parties agree that due process requirements apply regardless of whether a case is characterized as *in rem* or *in personam*, the nature of the case helps determine the process that is due. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-314 (1950). Because *in rem* jurisdiction "is secured by the power of the court over the *res*," the degree of notice and service of process required to subject claimants of an interest in the res to the court's jurisdiction and judgment is generally less than in an *in personam* action. *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 72-75, 55 N.E. 812, 812-14 (Mass. 1900)(Holmes, C.J.).

This Court has long recognized that this case is *in rem*, as it confirmed in directing the scope of service in C-125-C:

> Normally, it is true that a plaintiff exercises a fair degree of control over what entities or individuals are named as defendant in a case. In many respects, Mineral County is in the position of a plaintiff – it has been required to serve all defendants with notice of its claims. However, we cannot allow Mineral County complete freedom here to determine who the proper defendants are or should be. *This case is essentially an action in rem to*

Rules, determined the scope of service in each subproceeding, *see* CMO; *Order* at 4 (Mar. 2, 1999, C-#257), and the number of persons and entities served is significant.

> *quiet title to property – that property being the water (or rather the right to take the water) of the Walker River and its tributaries. . . .*

Order at 4 (Mar. 2, 1999, C-#257)(emphasis added), citing *Minute Order* at 2 (Apr. 1, 1997, C-#99)("The instant action is in the nature of a suit to quiet title to water rights; as such it is an action the subject of which is real property."). This is the law of the case. WRID has repeatedly agreed that these proceeding are *in rem* or at least *quasi in rem* when such a characterization has served its interests. *See Position Paper of the Walker River Irrigation District Re: May 30, 2001, Status Conference* at 6 (May 25, 2001, B-#145)(quoting *Order* (C-#257)); *Status Report of the WRID and U.S. Board of Water Commissioners* (Apr. 26, 2002, C-#411)(Attachment: Letter dated Apr. 23, 2002 at 2, Dale Ferguson, Counsel for WRID to Treva Hearne, Counsel for Mineral County, *quoting Order* (C-#257) and *Minute Order* (C-#99)). Despite its prior contradictory statements, WRID now contends the subproceedings are claims among individuals and are neither *in rem* nor analogous to water rights adjudications. WRID at 3. WRID's attempt to revise history fails.[28] Absent a change of controlling law, a party may not recharacterize the nature of a case mid-stream, particularly when it agreed repeatedly with the Court's characterization for over a decade.

One attribute of an *in rem* proceeding is that if a court asserts jurisdiction over the property involved, here the waters of the Walker River Basin, it is vested with exclusive right to

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[28] WRID argues there is no difference between the subproceedings and *Pitt v. Rogers*, 104 F. 387 (9th Cir. 1900), an *in personam* action among six individuals:

> The number of adverse claimants is the only discernable difference, and it surely is a difference of no import in determining what will be required to bind successors to surface and groundwater rights to any final judgment here.

WRID at 22. This position is disingenuous. There are over 3,000 defendants in C-125-B and approximately 1,000 defendants in C-125-C. Moreover, unlike *Pitt*, this Court identified and directed on whom service shall be made, which is akin to outlining the scope of a water rights adjudication. *See* CMO at 5; *Order* at 4 (Mar. 2, 1999, C-#257)(quoted above).

control and administer it. *E.g. United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-13 (9th Cir. 1999). As a result, this Court retained exclusive jurisdiction over the Decree and has stated that it is the "only forum within which to resolve disputes." *Order* (June 8, 2001, C-#522)(addressing service in C-125-B and C-125-C). In another proceeding involving the Walker River Basin (in which Mineral County and WRID were parties), the Nevada Supreme Court rejected Mineral County's effort to address the Public Trust Doctrine on behalf of Walker Lake precisely because C-125-C was pending before this Court. *Mineral County v. State, Dept. of Conservation and Natural Resources*, 117 Nev. 235, 20 P.3d 800 (2001). The Nevada Supreme Court acknowledged this Court has had "continuing involvement in the monitoring of the Walker River for more than eighty years" and that "a consistent and controlling interpretation by a federal court of competent jurisdiction is more appropriate," stating "'to construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity.'" *Id.*, at 245, 20 P.3d at 807, quoting *Alpine*, 174 F.3d at 1013. Indeed, Respondents in that case, one of which was WRID, argued that "the Decree Court has exclusive jurisdiction to resolve water disputes involving water in the *Walker River system*." *Id*. (emphasis added).

Similarly, there should be no debate that C-125 and its subproceedings are analogous to a water rights adjudication. The Supreme Court has recognized that water rights adjudications are *in rem* or *quasi in rem*. *Nevada v. United States*, 463 U.S. 110, 143-44 (1983); *Colorado River*

Water Cons. Dist. v. U.S., 424 U.S. 800, 822 (1976).[29] In Nevada and California, as in sister Western states, water rights adjudications are *in rem* actions: [30]

> Suits to adjudicate [water rights] are to quiet title to realty. *Rickey Land & Cattle Co. v. Miller & Lux* (C.C.A.) 152 F. 11, 15, affirmed 218 U.S. 258. . . . Such suits are not in personam but in rem or quasi in rem, for that, though directed against defendants personally, the real object is to deal with and settle and protect title to and enjoyment of particular property, and to invalidate unfounded claims asserted thereto. And that converts actions otherwise in personam into actions in rem or quasi in rem. See 1 C.J. 929 and cases; 51 C.J. 141, 281 and cases; *Pennoyer v. Neff*, 95 U.S. 714.

Sain v. Montana Power Co., 20 F. Supp. 843, 846 (D. Mont. 1937). Because this suit is essentially one to quiet title to property, it is properly considered an adjudication. *See Order* at 4 (Mar. 2, 1999, C-#257), citing *Minute Order* at 2 (Apr. 1, 1997, C-#99)("The instant action is in the nature of a suit to quiet title to water rights; as such it is an action the subject of which is real property."). The Nevada Supreme Court found as much when it held this Court is the proper forum for litigation regarding the Walker River basin and C-125-C:

> The United States Supreme Court has held that the adjudication of water rights is properly classified as an *in rem* proceeding. Nevada law treats water rights as real property. The general rule is that the first court, whether state or federal, which assumes jurisdiction over real property is entitled to maintain continuing and exclusive jurisdiction over that property.

Mineral County, 117 Nev. at 244, 20 P.3d at 806 (footnotes omitted).

The very nature of a water rights adjudication differs from an *in personam* action. C-125-B and C-125-C do not address any individual's liability. Instead, both claims seek recognition of rights in the waters of the Walker River system, which is the *res* in this case. This does not change the attributes of anyone else's water rights, which will retain the same quantity,

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[29] *See also State Engineer v. South Fork Bank of the TeMoak Tribe of Western Shoshone Indians*, 339 F.3d 804, 810-11 (9th Cir. 2003); *Alpine*, 174 F.3d at 1010-12).

[30] *Alpine*, 174 F.3d at 1013 (analogizing Alpine and Orr Ditch Decrees to *in rem* actions); *State Engineer v. South Fork Bank of the Te-Moak Tribe of Western Shoshone Indians*, 66 F. Supp. 2d 1163, 1168 (D. Nev. 1999), *vacated on other grounds*, 114 F. Supp. 2d 1051 (D. Nev. 2000); *Pleasant Valley Canal Co.* v. *Borror*, 61 Cal. App. 4th 742, 754 (Cal. App. 1998).

priority, point of diversion, etc. It appears beyond debate that water rights adjudications are *in rem* proceedings. Thus, this case is clearly and properly characterized as an *in rem* adjudication.

In an attempt to complicate service further, WRID would divide the case into *in rem* and *in personam* segments. First, WRID claims the subproceedings are separate actions because there is already a final decree in C-125. WRID at 3. This argument directly contradicts this Court's retention of jurisdiction, Decree at 72-73, XIV, and its determination that C-125 and all subproceedings constitute a single action:

> The entire case, including all of the sub files, C-125, C-125-A, C-125-B, and C-125-C constitute one action. All of these issues and claims also constitute a single law suit. The issues may overlap between the various claims and files which have been established.
>
> No claims are to be prejudiced in any way because of their separation into a separate sub-file. The separation of the files is for record keeping purposes only.

Minutes of Court (Jan. 3, 1995, B-#46). *See* 1992 Order (B-#15)("Subfile C-125-B is part of [a] larger case concerning rights to the water in the Walker River."); *Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶1 (Feb. 9, 1995, C-#19)(creating C-125-C for "administrative convenience"); *see also Mineral County*, 117 Nev. at 245, 20 P.3d at 805 (acknowledging this Court's retention of jurisdiction in the Decree and that the U.S. Supreme Court "recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings," quoting *Colorado River*, 424 U.S. at 819).

Second, WRID contends, without legal authority, that the groundwater claims in C-125-B cannot be *in rem* because groundwater rights have not been adjudicated and the Court has never taken jurisdiction over groundwater. A completed adjudication, however, is not a prerequisite to determining the nature of a proceeding. WRID further claims that "the Court must acquire personal jurisdiction over groundwater users, and the Plaintiff Parties must provide notice to

groundwater users in accordance with Fed. R. Civ. P. 4." WRID at 3. The fact that the United States and Tribe were required to conduct Rule 4 service on certain categories of groundwater users has no bearing on whether this action is *in rem*. Moreover, the United States and Tribe complied with this requirement and the Court has acquired jurisdiction over the groundwater users. While the Court has not yet decided whether it will exercise this jurisdiction, this decision depends in part on whether surface and groundwater are connected.[31] If this connection exists, groundwater is certainly part of the waters of the Walker River over which this Court has continuing and exclusive jurisdiction.[32] WRID's attempts to separate and subdivide service in these subproceedings are baseless.

B. The Order is Not Contrary to Law.

1. Successors-in-Interest Are Properly Addressed Under Fed. R. Civ. P. 25.

WRID argues that the Order is contrary to law because its "effect" is that "[af]ter litigation has been commenced, the substitution or joinder of a successor-in-interest is governed *exclusively* by Fed. R. Civ. P. 25." Obj. 1 (emphasis added).[33] The Order does not say

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[31] The Court identified categories of groundwater users to be served "because of the claim that underground and surface waters constitute a single source." CMO at 3.

[32] Nevada maintains it has jurisdiction over groundwater, based on the discredited position that there is no interaction between surface and groundwater in the Walker River Basin.

[33] Previously, WRID claimed Rule 25(c) is inapplicable to C-125-C because litigation has not "commenced." Initial Obj. at 12. 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. (B-##31, 32; C-##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 at 9 n.5. 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 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.

"exclusively." Instead it reads: "The Court finds that after litigation has been commenced, the substitution or joinder of a successor-in-interest is governed by Federal Rule of Civil Procedure 25." Order at 3. This statement is grounded in settled caselaw and clearly not contrary to law.

As discussed in the Plaintiff Parties' Reply before the Magistrate Judge, WRID's criticism and approach ignores the proper roles of and relationship between Rules 19 and 25. (B-#1639; C-#535). *See, e.g., In re Bernal*, 207 F.3d 595, 597-98 (9th Cir. 2000)(successor's attempt at joinder pursuant to Rule 19 was "misguided"). WRID apparently believes the Order should acknowledge that there may be circumstances at some future point when it might be appropriate to use Rule 15[34] or Rule 19, instead of Rule 25. WRID at 27. The Order merely establishes that Rule 25 governs presumptively the treatment of successors following an *inter vivos* transfer from or death of a properly served defendant. Nothing in the Order prohibits the Court from applying Rule 19 (to bring in persons or entities not already before it) or Rule 15 (to correct a party's name or identity) if the circumstances require and a relevant issue is properly before the Court. At this point, the need to apply these or other rules is pure speculation. That future circumstances might require invoking Rule 15 or Rule 19 does not in any way demonstrate that the Order is contrary to law.

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, B-#46). *See also Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County*, ¶1 (Feb. 9, 1995, C-#19). *Hilbrands v. Far East Trading Co., Inc.*, 509 F.2d 1321 (9th Cir. 1975), provides WRID no support whatsoever; it addresses erroneous treatment of a Plaintiff who had transferred her interest to another under Fed. R. Civ. P. 17 when there had been no motion to substitute.

[34] Rule 15, which WRID raises for the first time in this filing, addresses amended and supplemental pleadings. Parties are added under Rule 15 to correct the way by which they have been named or identified, including the capacity in which they are sued; the rule does not address substituting a successor for a properly named and served defendant. *See also* 3-15 Moore's Federal Practice - Civil §15.02.

2. Successors-In-Interest Need Not Be Substituted into this Action to be Bound to the Conduct of Litigation and Any Resulting Judgment.

WRID asserts, without support, that allowing these matters to proceed to judgment absent continual service on all successors raises the "very real possibility that any final judgment will be void, or if not void, not capable of being administered, perhaps after decades of litigation." Obj. 3, WRID at 16. That someone down the road might claim to be "un-bound" from the Decree is baseless and speculative, and appears intended to raise fears as to finality where none would otherwise exist. Such fears do not establish that the Order is contrary to law. Settled case law supports the Magistrate Judge's determination that Rule 25 is the appropriate mechanism to bind a successor and successors need not be substituted or joined to be bound by a final judgment.

a. WRID's Focus on Purported Necessary Procedures Under Rule 25(c) Is Misplaced and Designed to Create the Appearance of Complexity.

Substitution under Rule 25(c) is a discretionary procedural determination that substitution would facilitate the litigation. *Bernal*, 207 F.3d at 598, citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1958 (2d Ed.1986). While the ability to bind successors to a judgment depends on the substantive law giving rise to the underlying claims, "[a] person who is liable as a successor in interest under the applicable substantive law may be bound by the judgment even if no motion under Rule 25(c) is filed and the person is not joined or substituted." 6-25 Moore's Federal Practice – Civil § 25.32.[35]

WRID ignores this settled law in attempting to distinguish four cases (*Bernal; Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir.1993); *P P Inc. v. McGuire*, 509 F.

[35] *E.g.*, 7C Charles Alan Wright, *Fed. Prac. & Proc. Civ.* §§ 1952, 1958 (3d Ed. 2007); *In the Matter of Covington Grain Co.*, 638 F.2d 1357 (5th Cir. 1981); *Froning's*, 568 F.2d at 110 (citing Wright & Miller).

Supp. 1079 (D.N.J. 1981); *Froning's, Inc. v. Johnston Feed Service, Inc.*, 568 F.2d 108 (8th Cir. 1978), that support the following statement in the Order:

> where a defendant has been served in a subproceeding and subsequently sells or otherwise conveys a water right or a portion of a water right subject to that subproceeding, a successor-in-interest need not be reserved, but will be bound by the results of this litigation.

Order at 4, ¶2. All four cases clearly support the basic principle for which they are cited, that: "[t]he most significant feature of Rule 25(c) is that it does not require that anything be done after an interest is transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor-in-interest even though he is not named." *Id.* at 3, ¶2.

WRID attempts to use *Bernal* and *Luxliner* to speculate that successors will not be bound by Rule 25 substitution absent motions, service, and complicated individual hearings to determine whether they are successors, and that such potential problems make Rule 25 impracticable. WRID fails to acknowledge, however, that transferees in this case are successors by definition and will be bound regardless of a Rule 25 motion to substitute. *See infra*. WRID creates the appearance of complexity where none exists.

WRID mischaracterizes *Bernal* by claiming it "did not directly involve Rule 25(c)," and stands for the proposition that transferees may only be bound by a judgment if they are served and given an opportunity to be heard. WRID at 15. In *Bernal*, the Court rejected the Education Credit Management Corp.'s ("ECMC") effort under Rules 24 and 19 to intervene and join a proceeding after its predecessor defaulted. The 9th Circuit made clear that the case was a "classic situation" for applying Rule 25(c):

> *The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named.* An order of joinder is merely a

> discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation.

207 F.3d at 598, citing 7C Charles Alan Wright, Arthur B. Miller & Mary Kay Kane, Federal Practice and Procedure § 1958 (2d Ed.1986)(emphasis added). The 9th Circuit stressed that the successor's attempted use of Rule 19 or 24 to avoid being bound to all that had already occurred in the case was misplaced:

> To slightly paraphrase what the Fifth Circuit said over 50 years ago, when it was faced with a similar attempt to wriggle out of a situation created by an assignor:
>
> > [ECMC] ignores the undisputed fact of record that [it] was not a party to the original suit, but acquired whatever rights it may have in the property, if any, only by virtue of the assignment from [CSAC], and must therefore stand in [its] shoes with respect to all phases of the litigation. The fact that [CSAC's] litigation may have impaired or adversely affected the rights of [ECMC] under the assignment would not justify our disturbing all prior orders and decrees entered in this controversy and unfavorable to [ECMC] which were binding upon [CSAC] ... when made.

Id. at 598 (brackets in the original; citations omitted). Thus, ECMC was bound by the default even in the absence of a motion for substitution. *Bernal* clearly stands for the proposition cited, that absent a Rule 25(c) motion or accompanying service, the successor is still bound by the judgment.

WRID similarly misrepresents *Luxliner* by claiming it stands for the proposition that a court must always give successors an opportunity to be heard on a Rule 25(c) motion. WRID at 15. In *Luxliner*, which addressed breach of contract, tortious interference with contractual relations and fraud, the Plaintiff moved under Rule 25(c) to substitute a corporate successor for a defendant corporation that had defaulted. Despite conflicting affidavits regarding the assets transferred, the trial court identified the successor without a hearing. The 3rd Circuit recognized:

> Rule 25(c) "does not require that anything be done after an interest has been transferred." See 7C Wright, Miller & Kane, Federal Civil Procedure . . . §1958 at 555 (2d ed. 1986). When a defendant corporation has merged with another corporation, for example, the

> case may be continued against the original defendant and the judgment will be binding on the successor even if the successor is not named in the lawsuit.

Luxliner, 13 F.3d at 71 (citations omitted). The issue confronted was that Rule 25(c):

> does not specify a method for deciding motions or a standard to use in determining whether motions can be decided on the papers. This gap . . . most likely stems from the fact that the rule does not easily lend itself to contested motions practice; it permits automatic continuation of a lawsuit against an original corporate party, although the outcome will bind the successor corporation, unless the court believes the transferee's presence would facilitate the conduct of the litigation.

Id., at 72. If competing affidavits focus on a **material issue**, the court must conduct an evidentiary hearing only if it does not determine that the affidavits show no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law. *Id.*, citing Rule 56(c).[36] In an *in rem* adjudication where, by definition, a transferee is a successor, it is highly unlikely that there would ever be a good faith need for a hearing to identify the successor, and even more unlikely that there would be any genuine dispute as to the identity of the successor.

WRID inappropriately relies on *Herrera v. Singh*, 118 F. Supp. 2d 1120 (E.D. Wash. 2000), to contend that the Order will require "a far more complicated individual hearing on each motion than would be required for a similar motion filed today before judgment." WRID at 16. As Plaintiff Parties made clear before the Magistrate Judge, *Herrera* is inapplicable because it addresses the federal successorship doctrine, which determines whether a purchaser of property

[36] If a Rule 25(c) motion to substitute is filed, the successor, if not already a party, is served under Rule 4. WRID dismisses *PP, Inc*., and *Froning* because both concern a plaintiff who seeks to add a successor. Both cite the same authorities and principles referenced in the Order. In *PP, Inc.*, when the plaintiff sought to add the entity to which it had transferred its interest in the action, the court determined the "sounder course" was to substitute the new holder, rather than name an additional plaintiff. *Froning* involved a breach of contract in which plaintiff's sole shareholder died after judgment and its shares were assigned. The Defendant moved for a directed verdict because the case was not prosecuted by the real party in interest. The Court held that Rule 25(c) governed because the original plaintiff was the correct party when the action was commenced; since no one, including the defendant, moved for substitution, the action could continue in the name of the original plaintiff.

is a successor and subject to personal liability. Plaintiff Parties' Reply at 27-28 (B-#1639; C-#535).[37] This doctrine is irrelevant where, as here, the issue is a straightforward matter of whether ownership of a water right has been transferred.

There is no basis whatsoever for WRID's admonition that Rule 25 will require significant time and resources to file and serve substitution motions and conduct complicated hearings to determine if an entity is a successor. WRID at 15-16. In any event, potential difficulties in implementing the Order in a case of this size, whether real or speculative, do not make the Order contrary to law. The cases cited in the Order make it clear that Rule 25 does not require a motion for substitution be filed as a prerequisite to binding a successor. Even if a motion is filed, a hearing is only necessary if there is a genuine issue as to successor status. In cases such as this one, by definition, the purchaser of a property right in an *in rem* proceeding is the successor.[38]

b. Successors-in-Interest Will Be Bound Regardless of Substitution.

WRID also contends that substantive law provides no assurance that unsubstituted successors will be bound by the judgment and that it will be necessary to move for substitution after judgment. WRID at 16. Without justification or support, WRID advances a categorical

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[37] The doctrine originated in and is most often applied to employment and corporate merger and acquisition cases where a successor may be bound by a judgment when it purchases assets to which a judgment may attach. *Herrera* pertains only to issues of personal liability for debts or torts and is irrelevant to these subproceedings.

[38] The Order also approves a form motion for use by transferors and transferees of a water right, which "are not the exclusive means by which successors may be substituted into this action." Order at 5, ¶7. WRID told the Magistrate Judge that these forms were too complicated, Initial Objections at 2 n.1, but now appears unsatisfied that this is the only format Plaintiff Parties drafted. WRID at 2. Other forms can be developed for these uses. In addition, Rule 5(c) allows the Court to limit the extent to which defendants must serve pleadings and replies. Magistrate Judge McQuaid used this mechanism to limit service of filings during the initial service effort. *Order Regarding Service by the Clerk's Office* (Feb. 1, 2008, B-#1300). The Magistrate Judge has authority under the CMO and Order to develop reasonable strategies to limit complications for defendants and their successors without placing further costs and burdens on the Plaintiff Parties.

dismissal of the cases cited by Plaintiff Parties (*Golden State Bottling Co. v. Nat'l Labor Relations Board*; *Moyer v. Mathas*; *Behrens v. Skelly*; *Farwest Steel Corp. v. Barge Sea-Span*), WRID at 22, which state just the opposite, that successors will be bound regardless of notice or substitution. WRID fails to acknowledge that in *in rem* proceedings involving successors to a property interest, it is well settled that the action continues in the served defendant's name and binds a successor regardless of whether the successor is made a party. *Mellen v. Moline Malleable Iron Works*, 131 U.S. 352, 370–371 (1889).

According to the Supreme Court, "[p]ersons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973); *see also Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972)(successors to property are in privity with predecessors for *res judicata*); *Behrens v. Skelly*, 173 F.2d 715, 718-19 (3d Cir.1949); *Farwest Steel Corp.v. Barge Sea-Span 241*, 828 F.2d 522, 524 (9th Cir. 1987); *United States v. Griffith Amusement Co.*, 94 F. Supp. 747, 752 (W.D. Okla. 1950)(citing *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9 (1945), and a long line of decisions holding non-parties who acquire interest in subject matter of action could be bound by the judgment without having been made a party); Wright and Miller § 4462 ("Ordinarily a judgment is binding on a nonparty who took by transfer from a party after judgment or while suit was pending . . . ."). Further,

> Purchasers of property involved in a pending suit may be admitted as parties in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complaint (sic) if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite* . . . Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.

Mellen, 131 U.S. at 371 (citations omitted).

Moreover, the Restatement of Judgments reflects the long standing common law rule that a successor to property is bound by the results of litigation concerning that property when the transferor is a party to that litigation:

> the burden properly is placed on the successor. . . . [t]he successor usually has an express or implied right of indemnity against the transferor for loss resulting from the judgment; the successor changed the status quo regarding ownership and may justly be burdened with losses which might be expected possibly to result; and, *if the rule were otherwise, the stabilizing effect of a judgment concerning the property could indefinitely be postponed by successive transfers*.

Restatement (Second) of Judgments § 44 (1982)(emphasis added).[39] The issue before the Court concerns the transfer of the specific property interest before the Court from an existing party, as transferor, to his successor.[40]

WRID claims Plaintiff Parties ignored the exceptions in Section 44 of the Restatement and suggests that these exceptions apply, require additional information and "present the probability of numerous post-judgment fact specific proceedings." WRID at 23. The exception for statutory procedures is irrelevant because none are applicable here. The second exception addresses whether the opposing party knew of the transfer and the successor was unaware of the pending action. The commentary to Section 44 explains this limited exception:

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[39] Similarly, although WRID argues that water rights transferors have a right to be dismissed, transferors are responsible to move for substitution if they no longer wish to be part of the case. Certainly, WRID cannot logically suggest that a Defendant's purported right to be dismissed prevents this case from proceeding.

[40] WRID also voices concern that Rule 25 does not define "interest." WRID at 2. Rule 25 plainly extends to property interests and allows

> an action to continue unabated when an interest in a lawsuit changes hands, without initiating an entirely new suit. *"If a transferee is joined or substituted as a plaintiff or defendant, it is not because its substantive rights are in question, but rather because it has come to own the property in issue."*

Software Freedom Conservancy v. Best Buy Co., 2010 WL 4860780, *2, 3 (S.D.N.Y., Nov. 29, 2010)("A purchaser of real property may succeed to the prior owner's interest in litigation . . . involving the . . . property.")(emphasis added).

> If the successor is not aware of the pending action concerning the property, the problem is one of choosing between burdening him with the judgment in an action in which he had no actual opportunity to participate and burdening the opposing party with having to relitigate a controversy that he had every reason to suppose had been put to rest by the judgment against the transferor. When the equities are in this balance, the burden is properly placed on the successor. Aside from whatever weight may be given to the principle of caveat emptor are the considerations that the successor usually has an express or implied right of indemnity against the transferor for loss resulting from the judgment; the successor changed the status quo regarding ownership and may justly be burdened with losses which might be expected possibly to result; and if the rule were otherwise, the stabilizing effect of a judgment concerning the property could indefinitely be postponed by successive transfers.

Restatement (Second) Judgments, §44 Comment a. As they already affirmed to the Magistrate Judge, to the extent Plaintiff Parties are notified of transfers, they intend to provide notice by mail to known successors.

c. State Adjudication Procedures Do Not Require Continual Service and Substitution of Successors-in-Interest.

Nevada and California adjudications provide the most closely analogous procedures to notify successors of the pending action and are instructive regarding procedures to bind successors. Neither State's adjudication statute expressly addresses successors or requires ongoing substitution or joinder of new successors. In both States, the structure of the proceedings, provision for periodic notice by mail and publication, and imposition of an affirmative duty on claimants to keep the adjudicating authority informed of their current mailing addresses, all clearly reflect the fact that their water rights adjudications are *in rem* proceedings in which notice by mail and/or publication will bind water right claimants and their successors to the judgment or decree. *See* NRS §§ 533.095, 533.110, 533.150, 533.160, 533.165, & 533.170(5); Cal. Water Code §§ 2526, 2527, 2529, 2551, 2553, 2555, 2577, 2604, 2650, 2701, 2753, 2754, 2756, & 2759.[41] Both States also place the duty on claimants to participate in the

[41] Neither State applies its *lis pendens* statute in water rights adjudications, and the Court already has determined that *lis pendens* filings are inappropriate here. WRID's focus on *lis*

adjudication on the rationale that when one claims a water right, the right claimed is a right to use a common public resource that is heavily regulated by the State, and therefore the claimant subjects himself to the jurisdiction and oversight of the State and/or court.[42]

As one leading commentator notes: "[f]inal decrees are conclusive against parties to the adjudication and those in privity with them, *including parties with a duty to participate in the adjudication*." A. Dan Tarlock, Law of Water Rights and Resources § 7:22 (2009)(emphasis added). Consistent with the principle that "[p]reclusion may extend to a nonparty who did not participate in an action on the ground that the nonparty should have participated,"[43] when a decree is entered in California, any claimant who failed to appear and submit proof of his claim shall be barred and estopped from subsequently asserting rights and deemed to forfeit all rights not provided for in the decree. Cal. Water Code § 2774 (2009); *cf.* NRS § 533.125(2); *cf. LU Ranching Co.*, 138 Idaho 606, 67 P.3d 85, 87-88 (Idaho 2003). In neither State is there any obligation to substitute or join new successors constantly. The notice provisions in Nevada's and California's adjudication statutes are instructive; assuming reasonable provisions for notice by

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pendens is a red herring. Although a notice is filed in a California adjudication, it is not, strictly speaking, a *lis pendens*. More importantly, in neither state is a water right claimant required to file any notice of that sort in an adjudication. In California, only the State Water Resources Control Board responsible for presiding over the adjudication has to file a notice of the proceeding.

[42] Cal. Water Code §§ 2526(c) & 2528 (imposing the duty on water rights claimants to: (1) file notifications of their intention to file proofs of claims that include their addresses for service by mail; (2) to appear; and (3) to submit proof of their respective claims); Cal. Water Code § 2774; NRS § 533.095 (requiring claimants to make proof of claims); NRS § 533.125 (if no proof of claim is filed, the State Engineer shall determine the right of such person from such evidence as the State Engineer may obtain or have on file); NRS § 533.130 (petition to intervene may be filed by interested person not served); *Interim Procedural Order Requiring All Water Rights Claimants to Update Their Water Rights Files With the State Engineer, United States v. A & R Productions*, 01 cv 00072 BB/WWD-ACE, at 2 (D. N.M. June 24, 2003)(Zuni River Basin Adjudication); *Procedural And Scheduling Order For Federal And Indian Water Rights Claims, United States v. A & R Productions*, 01 cv 00072 BB/WWD-ACE (Apr. 5, 2004); *In re Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992).

[43] Charles Alan Wright, et al., 18A Fed. Prac. & Proc. Juris. § 4452 (2d ed. 2010).

mail and publication are followed, the responsibility is properly with defendants to notify their successors that a lawsuit is pending and on successors to inform themselves.

3. Successors-In-Interest Resulting From the Death of a Previously-Served Water Right Claimant Will Be Bound By the Court's Judgment.

WRID objects to the Order as contrary to law to the extent it states that "[a]bsent service of a statement noting the death in a subproceeding, the case may proceed against the original named parties in that subproceeding and will bind any and all successor-in-interest." Obj. 4, quoting Order at II.11; WRID at 4, 24.[44] WRID's view, unsupported by legal authority, is that a successor to the water right of a served defendant who has died will not be bound unless Plaintiff Parties track down, personally serve, and substitute the successor. *Id.* WRID would have the Court require that Plaintiff Parties determine, through continuous or at least periodic tracking, whether the defendants in the case are still *alive*. The United States and Tribe would have to track the continued existence of over 3,000 people. Mineral County would have to track approximately 1,000 people. This is absurd. Not surprisingly, WRID's proposal is contrary to fundamental rules of law that successors to a property interest at issue in an *in rem* proceeding are bound by the judgment in that proceeding,[45] and a successor as a result of death who resists

[44] Plaintiff Parties identified and served successors of claimants who died before service. WRID does not object to any other part of Section II ("Treatment of Successors-in-Interest As a Result of Death"), including the requirement that a Rule 25(a) statement noting a death identify successors, which WRID previously argued was Plaintiff Parties' responsibility to investigate.

[45] *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

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 successors as a result of death and requires no action by anyone other than to respond timely to a properly filed statement noting death. Rule 25(a) allows any party, as well as representatives and successors of the deceased, the discretion to file a statement of death and/or motion to substitute.[46] If no one files a statement noting death or moves 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 By and Through Lindsay 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 original plaintiff's name until appellate court *sua sponte* ordered substitution.); *Fariss v. Lynchburg Foundary,* 769 F.2d 958, 962 (4th Cir. 1985)(Rule 25(a) imposes no time limit for

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voluntary or involuntary conveyance of title or other interest in the property."); *Golden State*, 414 U.S. at 179.

Analogous Nevada and California State water adjudication procedures do not treat a claimant's death any differently than an *inter vivos* transfer; both States require all water rights owners, including heirs, to keep ownership records current with the State Engineer or Water Resources Control Board, irrigation district or other applicable agency. Periodic notice is provided to all owners of record, including identified heirs.

[46] Rule 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."

substitution except following filing and service of a statement of death.). WRID does not address these authorities.[47]

4. Properly-Served Defendants and Their Successors-In Interest Are Responsible for Keeping Track of *Inter Vivos* Transfers and Substituting Successors-In-Interest.

WRID argues the Order is contrary to law because it shifts to Defendants the burden of keeping track of *inter vivos* transfers and substituting successors. Obj. 2; WRID at 12-13. WRID claims there is no authority for this provision and that it is inappropriate to place the burden on defendants to join or substitute successors in litigation that Plaintiff Parties initiated. Order at ¶¶ 3-4. This provision merely acknowledges that successors need not be substituted to be bound, and if defendants wish to be dismissed or their successors wish to be substituted, it is their prerogative to move for substitution.

Contrary to WRID's assertion, the Order is consistent with the Court's prior orders. First, Plaintiff Parties are complying with the Court's orders that direct how and on whom each must make Rule 4 service. *See* CMO at 4-6, ¶3; *Order*, (Feb. 9, 1995, C-#19). Second, the Court's 1992 Order (B-#15) regarding Rule 19 joinder of existing claimants when C-125-B was initiated does not apply to successors to served defendants. Finally, the Court's Order of June 1, 2001 (B-#522) is irrelevant because it addresses the obligation to identify water rights holders for initial service. In Plaintiff Parties' view, defendants are responsible to determine for themselves

[47] 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 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 under Rule 4 on the executrix, a non-party, as Rule 25 requires under such circumstances.

whether substitution is appropriate.[48] Rule 4(m) has no bearing on this issue; it addresses the time period for plaintiffs to implement initial service of process.

WRID cites no authority to support its contention that all burdens and responsibilities in a case, particularly one with this many defendants, rest with plaintiffs throughout the litigation.[49] Rule 25 does not require Plaintiff Parties –or anyone else –to file a motion to substitute following the transfer of a served defendant's interest or to file a statement noting the death of a served defendant. Thus, if a defendant sells its interest and wishes to be dismissed from the case, it move to substitute the proper successor. And if a defendant sells part of its interests, it should have the responsibility to identify those distinctions to the Court. Similarly, a defendant should bear the consequences if it does not identify these proceedings to any transferee or if it falsely represents that it should be dismissed from the case. As pointed out above, in analogous water rights adjudications, the initial notice is done by less than Rule 4 service and water rights holders are required to update the appropriate adjudication entity for notice purposes. *See* Sec. IV(B)(3)(c), above.[50]

Finally, the Walker River Decree applies to and binds all users and their successors. Decree at XI, XII. Purchasers from one whose title rests on a judicial decree take with

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[48] At this point, defendants in C-125-B have been personally served pursuant to Rule 4, and their service packages include a form to disclaim ownership of any relevant water rights and a Court Order requiring them to notify the Court and the United States if they transfer any of their interests. (B-##206, 207).

[49] Moreover, the CMO in C-125-B does not place all burdens on the U.S./Tribe. For example, the Magistrate Judge can allocate costs and responsibilities for identifying persons and entities to be served among the parties. And in C-125-C, the Court, in 1995, ordered that served defendants who failed to appear or respond, will be deemed to have notice of all subsequent filings with the Court. *Order* at 2, 4 (C-#48).

[50] WRID points again to the *lis pendens* requirements that – eleven years ago -- Magistrate Judge McQuaid removed from the CMO. WRID at 7. Among other things, *lis pendens* provisions in Nevada are treated as liens, rather than simply notices of the pendency of an action. As such, they have the potential to impede sales and other transfers of the interest by the defendant, which Plaintiff Parties do not intend to hinder.

constructive notice of the title under the decree, *Edwards v. Puckett*, 268 S.W.2d 582 (Tenn. 1954); 92A CJS § 560, and of defects apparent on the face of the record in the proceedings in which the decree was entered, *Bradbury v. Green*, 251 P.2d 807, 809 (Okla. 1952). It follows that claimants to such water rights properly are charged with the responsibility of taking affirmative action to participate in this case.

5. The Order's Notice Requirements Comply with the Federal Rules.

WRID fundamentally misunderstands the Order's periodic notice requirement and points to nothing about it that is contrary to law. Obj. 5, WRID at 24. First, the Order contemplates that the Magistrate Judge will further define this requirement. There is nothing improper about defining these requirements at a later stage. Second, WRID argues that persons and entities who have been properly served are entitled to be served pursuant to Rule 5 and that there is no exception for "periodic notice of developments." WRID at 24. No one has suggested that proper service under Rule 5 should not be made by any party when proper and appropriate and consistent with other rulings of the Court. The Order addresses only successors and does not affect Rule 5 service requirements on served parties.

Finally, WRID appears to argue that the Order should have required Plaintiff Parties to serve the approved service packages by mail on all non-party successors of whom they are currently aware. It is not clear if WRID seeks Rule 5 service on non-party successors, or service by mail as a precursor to requiring Rule 4 service on them. There is no legal requirement for either approach. As explained below, Plaintiff Parties agree to provide notice of this pending action to known successors, but not in the manner demanded by WRID.

6. The Court Properly May and Should Require Defendants to Provide Regular Updates of Water Rights Ownership.

WRID objects to the Order as contrary to law because it requires "the District [to] regularly provide updated water right ownership information to the Court and to the Plaintiff Parties." Obj. 6, WRID at 5-6, 25-26. The relevant portion of the Order states:

> The Walker River Irrigation District, the Nevada State Engineer and the California Water Resources Control Board shall regularly provide updated water right ownership information to the Court and to the Plaintiff Parties. This information may be used to provide notice of the pending proceedings to any new water rights owners.

Order at 8, ¶ 20. Instead of explaining how this direction is contrary to law, WRID argues that Plaintiff Parties have shown no authority for this requirement. Neither Nevada nor California objected to the Order, although WRID purports to oppose this requirement on their behalf. WRID at 25. WRID has established nothing remotely contrary to law about this requirement.

The Order is a non-dispositive pre-trial matter within the Magistrate Judge's authorities under 28 U.S.C. § 636(b)(1)(A) and 28 U.S.C. § 636(b)(3).[51] This portion of the Order is also supported by the CMO, which authorizes the Magistrate Judge to consider and decide "all issues" that may arise regarding service, including how the U.S./Tribe shall obtain information to identify counterdefendants, responsibilities of "the respective parties to provide such information and at whose cost," and "how, when, and at whose cost information regarding changes or modification in the individuals or entities with such water rights clam shall be provided as between the parties and the entities which receive information respecting any such changes, until service of process is complete on the counterclaims." CMO at 7-8, ¶¶ 6, 8.

The Order does not define the scope of information that the Magistrate Judge might require to be produced or whether the Magistrate Judge might expand these requirements to other

[51] In addition, this Court, as a federal court sitting in equity, has broad authority and discretion over case management decisions.

parties, such as the Board. WRID agrees to continue providing certain information to the United States, as it has done on a periodic basis, and to begin providing this information to Mineral County and the Court, but contends any further requirement is contrary to law. WRID at 25. The authority to further define and implement the Order rests with the Magistrate Judge, not WRID.[52] WRID's desire to limit the information it must provide does not constitute a showing that the Order is contrary to law. There is no reason for the Court to curtail the Magistrate Judge's authority preemptively.

WRID points to two cases, which it acknowledges are imperfect analogies, to support its argument that the Order is contrary to law. Neither provides such support. To the contrary, the primary case cited, *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978), supports the Magistrate Judge's authority. In *Oppenheimer* the Supreme Court stated that "where a defendant can perform one of the tasks necessary to send notice, such as identification, more efficiently than the . . . plaintiff, the district court has discretion to order him to perform the task." *Id.* at 350.[53] Thus, the Magistrate Judge has authority to issue and administer this portion of the Order, and it is not contrary to law.

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[52] The United States used the periodic ownership updates that WRID and Nevada provided during its investigation and service efforts to identify recent transfers of water rights. While helpful, they were of limited use because they do not identify all ownership changes in Nevada and do not address California defendants, other than possibly WRID members. In addition, WRID's updates only provide certain information that its members elect to bring to WRID. WRID and Nevada consistently maintained that they have no obligation to provide any information to the United States, that most people will not comply with the State's statutory reporting requirement, and that information provided them is unreliable and they will not confirm its accuracy in any manner. Indeed, WRID stamps the information it provides as "Provisional" or "Unofficial."

[53] *SEC v. Sloan*, 369 F. Supp. 994 (S.D.N.Y. 1973), simply deals with the effort of one party to obtain through discovery a copy of the transcript of a public hearing that was equally available for purchase to all parties, and has no bearing to these circumstances.

7. **The Order Is Fully Consistent With Due Process.**

WRID attacks the Order on procedural due process grounds, offering a host of semi-formed arguments, none of which are pertinent. Indeed, none of the cases or statutory provisions WRID cites remotely pertains to a situation in which Rule 4 service has been completed on a defendant who owns a property interest at issue at the time of service and subsequently transfers that interest to a successor.

To begin with, WRID attempts to sidestep the universally applicable standard that constitutionally adequate notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.[54] Reasonableness is a function of the existence and feasibility of alternative forms of notice, *Greene v. Lindsey*, 456 U.S. 444 (1982), and "notice required will vary with the circumstances and conditions." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). Thus, personal service pursuant to Rule 4 is not the sole measure of due process. *See Mullane*, 339 U.S. at 314 ("Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents."); *LU Ranching Co*, 138 Idaho at 606-10, 67 P.3d at 88-89 (upholding constitutionality of first class letter notice because personal service was impractical in a basin-wide water rights adjudication). Further, the Federal District Court in Nevada has recognized that requiring a party to serve its objections to an order of determination on every other party in a stream system would "impose an intolerable burden on the court as well

[54] As the Supreme Court held in *Mullane*, if these conditions are "reasonably met" "with due regard for the practicalities and peculiarities of the case . . . the constitutional requirements are satisfied." 339 U.S. at 314-315. Thus, the Court observed that it "ha[d] not committed itself to any formula achieving a balance between . . . interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet." *Id.* at 314.

as the litigants. In many instances the cost of objecting would be prohibitive." *Humboldt Land & Cattle Co. v. Allen*, 14 F.2d 650, 653 (D. Nev. 1926).[55]

Rather than recognize and apply the straightforward reasonableness under the circumstances test of *Mullane*, WRID attempts to extend the holding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), to successors. WRID's reliance on *Mennonite* is misplaced because that case dealt only with the requirements of original service on a defendant who possessed a property interest at the commencement of the action. In *Mennonite*, a mortgagee with a property interest at the commencement of the underlying action was never given *any* notice, let alone proper service pursuant to Rule 4, as in this case. *Id.* at 793-794. The Court did not consider and *Mennonite* did not address transfer of a property interest held by a properly served defendant. Accordingly, *Mennonite* does not hold that the transferee of that same property interest must be served all over again. The Court should not adopt WRID's misconstruction of *Mennonite's* inapposite holding to require continually renewed service on every successor to properly served defendants, but instead, should adhere to the appropriate "reasonableness under the circumstances" analysis under *Mullane* and its progeny. *E.g. Dusenberry v. United States*, 534 U.S. 164, 167-68 (2002).

WRID revisits two early cases considered below that identify the nature of the case as the key factor to inform the court's consideration of process reasonably due "under all the circumstances" pursuant to *Mullane*. Unfortunately, WRID gets lost in irrelevant details concerning the specific dispute in *Tyler v. Judges of the Court of Registration*, confuses the roles of the parties and the import of the holding in *Pitt v. Rodgers*, and confuses the central points of

[55] WRID dismisses *Humboldt* and *LU Ranching* because they do not address notice obligations to successors. WRID at 12-13. This misses the point. These cases held that significantly less notice on the original claimants was constitutionally permissible than the Court required in these subproceedings where defendants were personally served under Rule 4.

both cases. In *Tyler*, the specifics of the 110 year old Massachusetts real estate dispute are irrelevant to this case. As explained in Plaintiff Parties' Reply below, B-#1639; C-#535 at 13-14, the germane teaching of Chief Justice Holmes' opinion in *Tyler* concerns the central nature of actions traditionally labeled *in rem* or *quasi in rem* as they pertain to the assessment of what process or notice is reasonably due in a given case. Notwithstanding WRID's misrepresentation of the facts, *Tyler* involved a lesser, not greater, degree of notice than has been provided to defendants in this case. *See* 175 Mass. 72-73, 55 N.E. at 812-13.

Similarly, WRID reverses the roles and status of the parties in *Pitt*, and misconstrues that case's holding.[56] As explained in Plaintiff Parties' Reply below, B-#1639; C-#535 at 27, because *Pitt* was partially superseded by the subsequent adoption of Nevada's adjudication statute, and because the Rule 4 service required in this case already exceeds the level of notice required under both Nevada and California water law governing adjudications, the Order meets due process and successors will be bound by any judgment.

WRID also attempts to argue that the usufructuary nature of defendants' claimed water rights in this case somehow entitles them to a greater degree of due process protections than other property interests, but cites absolutely no legal authority to support this novel and illogical notion. WRID slips in a citation to one Nevada case, but that does not support WRID's argument and makes only a passing reference to the usufructuary nature of a water right. *See Desert Irrigation Ltd. v. Nevada*, 113 Nev. 1049, 1059-60, 944 P.2d 835, 842 (1997). Both logic and law dictate that a mere usufructuary right is to some degree a lesser form of property right or interest than full fee title to real property. As such, water rights typically are considered

[56] Rogers, the successor to one of the state court plaintiffs (not defendants) initiated a new case in federal court and sued the original state court defendants (not plaintiffs). *Pitt* is really a choice of forum case in that the federal court determined it would ultimately determine a matter that had originated in state court, but languished and no action was taken.

somewhat contingent on the ultimate public ownership of the waters of states such as Nevada and California and subject to greater regulation by and potential loss to the State. *See, e.g., id.* at 842 (discussing NRS §§ 533.025, 533.030, 533.395, and 533.425). Two connected natural correlatives of this status are: (1) the expectation that a water right owner or claimant bears greater responsibility to proactively protect his interest and inform the relevant governmental authorities and parties of his interest; and (2) the presumption that a lesser form of notice than personal service suffices to put a water right owner or claimant on notice of an adjudication that may affect his interest. [57] Accordingly, WRID's claim that the usufructuary nature of water rights somehow confers greater due process protections on claimants of such rights than possessors of other property interests lacks any merit.

In this connection, WRID's attempt to characterize isolated provisions from Nevada and California water law as demonstrating a fundamental difference between other water rights adjudications and this case is misleading and invalid. *See supra*, Section IV(B)(3)(c). Similarly, WRID's attempt to use a few isolated statutory provisions to support its claim of procedural deficiencies in this case does not comport with the law concerning the nature of the case and the record of service in this case, discussed above at Sec. IV(B), and in Plaintiff Parties' Reply below, B-#1639; C-#535 at 13-17, 22, 24-25. For instance, contrary to WRID's assertion, WRID at 23, the provisions in Nevada and California law to which WRID cites as providing for multiple notices during the course of a water rights adjudication do not, in fact, differ meaningfully from the repeated notices contemplated by the Order that Plaintiff Parties proposed below. Order at 8, ¶19; B-#1639; C-#535 at 38.

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[57] *See* NRS §§ 533.095, 533.110, 533.150, 533.160, 533.165, 533.170(5), 533.384; Cal. Water Code §§ 2526, 2527, 2529, 2551, 2553, 2555, 2577, 2604, 2650, 2701, 2753, 2754, 2756, 2759, 5101, 5103 – 5107; Cal. Admin. Code § 831; Plaintiff Parties' Reply (B-#1639; C-#535 at 22, 24-25, 37).

Thus, the Order neither violates any requirement of due process, nor does it deviate from the procedural norms in analogous proceedings under Nevada and California state law. The Order simply acknowledges basic common sense that after a certain point in time and once Rule 4 service has been completed on the water right claimants at the time of service, due process is satisfied by periodic mailings to known successors who are not defendants in the proceedings, coupled with publication of notice at key junctures in the case. As explained previously in this Response and in Plaintiff Parties' Reply below (B-#1639; C-#535 at 24-25, 36-37), the combination of initial Rule 4 service on all water right claimants and the Order's provision for prospective notice to successors exceeds the level of notice provided for in Nevada and California water rights adjudication procedures that have been held to satisfy the requirements of due process. *See Order, United States v. Orr Ditch Water Ditch Co.,* at 3 (Case No. 3:73-cv-00003-LDG, Sept. 17, 2009)(#1027). Accordingly, it is beyond reasonable dispute that the Order meets the requirements of due process and is not contrary to law.[58]

WRID's suggestion that the Court require Plaintiff Parties to perform Rule 4 service on all successors who become "readily ascertainable" at any point during the litigation, WRID at 3, is not warranted by the law and would be inconsistent with the Court's previous acknowledgements that service will have a defined end point. Indeed, if personal service on all successors were constitutionally necessary to bind them to the outcome of water rights litigation, no state adjudication would be constitutional, no judgment would be secure, and no case involving successors would be able to bind them, absent ongoing substitution.

[58] The adequacy of such notice can be reinforced by broader use of the Court's e-file system and development and maintenance of a website, as recently implemented in the Orr Ditch case and previously discussed by the parties and the Court in this case. *Order, United States v. Orr Water Ditch Co.*, (Case No. 3:73-cv-00003-LDG, July 2, 2010)(#1105)(allowing *pro se* parties to register for electronic delivery of documents from the Court's CM/ECF system.).

The approach set forth in the Order is equitable, reasonable, and efficient. It follows practices used in other adjudications, providing periodic notice by mail and publication, while holding properly served defendants and their successors responsible for keeping abreast of litigation developments. Nothing about this approach is contrary to law and WRID's objection to this portion of the Order is baseless.

C. WRID's Alternative Proposal is Contrary to Law, Would Not Achieve Its Purported Goals, and Would Create Inappropriate and Unnecessary Burdens for Plaintiff Parties.

Instead of establishing that the Order is factually erroneous or contrary to law, WRID asks the Court to second-guess the Magistrate Judge and substitute WRID's rejected proposal for the treatment of successors, based on factually unsupported and legally erroneous speculation that successors will not be bound to the litigation or any judgment unless its proposal is followed. No one can guarantee the future. In a case with this many parties, there will always be a risk that someone will argue he is not bound by its resolution. The reality of the risk does not mean Rule 25 and relevant substantive law regarding the treatment of successors can or should be discarded.

WRID's arguments in favor of its proposal are based on a fundamental misunderstanding of the interplay between Rules 19 and 25,[59] and the far-fetched assertion that Rule 19 substitution is required at every stage of this litigation. The proper roles of and relationship between Rules 19 and 25 are discussed thoroughly in the Plaintiff Parties' Reply Brief below at pages 17-20. (B-#1639; C-#535). In its Objections, WRID cites no new authority to alter the settled law and analysis that Plaintiff Parties already have presented to the Court and the Magistrate Judge

[59] *See Weiss v. Regal Collections*, 385 F.3d 337, 342 (3rd Cir. 2004); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 658 (D.C. Cir. 1960); *Canister Co. v. Leahy*, 182 F.2d 510, 514 (3rd Cir. 1950); *In re Vioxx Products Liability Litigation*, 235 F.R.D. 334, 342 (E.D. La. 2006); *Trombino v. Transit Casualty Co.*, 110 F.R.D. 139, 147 (D.R.I. 1986).

properly has found to be controlling. *Id.*; *Order* at 3-6. WRID's alternative approach is legally incorrect. Rule 19 brings into a case individuals or entities possessing rights or interests in its subject matter that are not already represented, and allows the court to control the entire subject matter necessary for a final adjudication. Rule 25 addresses changes in ownership or possession of interests in the subject matter of the case at a later point in the proceeding, including after judgment.

> Rule 25(c) does not apply to transfers of interest that occur prior to the filing of the action that is in issue, because substitution expressly applies only to transfers of interest that take place during litigation. If a transfer occurs before the commencement of suit, the status of the parties is controlled by Rule 17 and Rule 19.

2-13 Moore's Manual – Federal Practice and Procedure §13.34 [1] (citations omitted).[60] Once a Rule 19 party is served and its interest or right thereby brought under the court's jurisdiction, Rule 25 governs any transfer of that interest or right and ensures the Court's jurisdiction over the case and subject matter is not defeated.[61] Applying Rule 19 to *inter vivos* successors of properly-served defendants as a blanket rule, would render Rule 25(c) a nullity,[62] and trap the case in endless Rule 4 service on successors to property rights already before the Court.[63]

WRID offers merely that its approach is supported by the 1992 Order, in which the Court ordered the United States and Tribe to join and serve all existing claimants to water of the

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[60] *See also Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629, 634 (1st Cir. 1989)(possession of a "direct and substantial interest" in the "action at the moment the complaint was filed" determines Rules 19's applicability, as opposed to a "later transfer of interest to trigger Rule 25(c)").

[61] *Hilbrands*, 509 F.2d at 1323; *Dingwell*, 884 F.2d at 634; *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144, 146 (D. Minn. 1987)(citing *Froning's*, 568 F.2d at 110); *P P Inc.*, 509 F. Supp. at 1083 (citing 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1958 (1972)).

[62] If Rule 19 governed successors, Rule 25 would be superfluous, which violates a cardinal rule of statutory construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

[63] WRID's approach would prevent federal courts from exercising where federal court jurisdiction is proper and contemplated. *See Mellen*, 131 U.S. at 370-72.

Walker River and its tributaries under Rule 19. 1992 Order at 5-7 (B-#15). That order and a similar one entered in C-125-C,[64] were entered at the commencement of each subproceeding and pertained to initial service on the water right claimants existing at that time; they do not address, nor do they govern, successors to properly served defendants. As such, they are consistent with the proper interplay between Rules 19 and 25. In addition, as described above, Plaintiff Parties have met or are in the process of meeting the requirements of these early orders regarding current claimants of all water rights at the time of initial service.

Further, WRID's own proposal would not achieve the certainty WRID claims is required before any of the merits of these subproceedings can be reached or any judgment on the merits entered. Even if WRID's approach were adopted, periodic cessations of the litigation with renewed requirements for Plaintiff Parties to track and serve all successors-in-interest to previously properly served defendants would still not change the fact that transfers of defendants' interests will occur continuously throughout the life of this litigation and beyond entry of any judgment. Thus, the sisyphean burden that WRID would have the Court impose on Plaintiff Parties of never-ending tracking and repeated service to cover the same claimed water rights again and again would bring the Court and the parties no closer to finality, and would serve only to postpone any final judgment on the merits. Despite settled law to the contrary, if successors are brought into the case as new parties, they might argue they are not bound by all issues already addressed, which would continue the cycle of unnecessary delay and expense. And if the response to this concern is that successors are bound by the rulings in the litigation because they are successors, this only confirms the settled law and the lack of merit of WRID's proposal. That a person or entity may claim, either during or after the litigation has concluded,

[64] *See also Order*, ¶¶ 2, 3 (C-#19)(Mineral County service requirements).

that it is not bound by the Court's rulings does not alter settled law. To adopt WRID's approach would make a mockery of the Court's exercise of federal equity jurisdiction over this interstate stream system.

WRID's proposal would place a continuing duty on Plaintiff Parties to monitor the status of each defendant, investigate and identify all water rights transfers, investigate and identify all water right transferees, and join transferees as new parties under Rule 19. This would require Plaintiff Parties to track constantly and re-serve each water right every time it is transferred (and possibly subdivided) as if it were an entirely new right (or rights) that had not already been served and brought under the Court's jurisdiction and to monitor whether each defendant is still living. WRID's proposal would also force Plaintiff Parties to expend significant resources to repeat service throughout the duration of this litigation and beyond the entry of judgment on water rights that the Court already had determined were properly served and under its jurisdiction. This is plainly inconsistent with the approach consistently adopted in the cases, state statutory water law and leading treatises discussed above.[65] WRID cites no case or other proceeding in which such a continuing and potentially unending burden has been imposed on any party.

V. CONCLUSION

For the reasons set forth above, Magistrate Judge Leavitt's Order is not clearly erroneous or contrary to law in any regard and should be approved by this Court. Plaintiff Parties respectfully request the Court to reject WRID's Objections and affirm the Magistrate Judge's Order, which establishes an efficient and reasonable procedure for providing notice to

[65] Although WRID points to orders in Orr Ditch, WRID at Ex. A & B, the parties elected to identify successors long after the judgment was issued and the Court did not require successive service throughout its lengthy litigation.

successors-in-interest to defendants' water right claims, and an equitable, workable procedure for the substitution of such successors-in-interest.

Dated: December 2, 2011

Respectfully submitted,

By /s/ Susan L. Schneider
SUSAN L. SCHNEIDER
Attorneys for the United States of America

Dated: December 2, 2011

Respectfully submitted,

By /s/ Wes Williams Jr.
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Dated: December 2, 2011

Respectfully submitted,

By /s/ Simeon M. Herskovits
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2011, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO THE 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** 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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and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 2nd day of December 2011:

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