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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation; MINERAL COUNTY NEVADA, Proposed-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.	**In Equity No. C-125-ECR** **Subfile No. C-125-C** **PREBRIEF OF SERVICE ISSUES**

155.

PREBRIEF OF SERVICE ISSUES

I.

MINERAL COUNTY HAS SERVED PROPER DOCUMENTS FOR PURPOSES OF PERSONAL SERVICE

Mineral County has served substantially the same documents in all attempts at personal service since it began personal service of water rights holders in October 1995. (See Affidavit of Treva J. Hearne). When Mineral County began service of process by personal service, the Court prescribed the documents that were required for the service to be adequate. Those documents have been served in each instance since that date. When Mineral County made a few more attempts and was able to complete personal service on some California water rights holders and close neighbors who were established to be water rights holders in the Walker River, Mineral County served the same documents that had been ordered by the Court for service in previous orders with the addition of a summons based again upon the Court's order.

The Court has always directed the acts in the service of this matter. Mineral County has made every attempt to comply in what has been a very difficult and costly process. Mineral County believes that the nomenclature adopted by the parties in the hearing recently held before this court referring to the documents served by Mineral County as "old documents" was misleading and plainly incorrect. Mineral County has suffered the constant interference in its attempts at service by Walker River Irrigation District ("WRID") and Walker River Users Group ("WRUG"). Mineral County has incurred excessive expenses because of acts of the counsel representing these groups. Mineral County is once again being accused of serving inaccurate documents when the Courts orders are the basis of the documents to be served. There is no confusion because of the dates that cannot be remedied rather easily by a simple mailing to those parties of the agreed upon Notice in Lieu of Summons that will be ordered by this Court on October 22, 1997.

The Court in its Order of August 16, 1995, stated that "the Court's Order not the technical requirements of service of process that apply" to the service of process in this matter. (Order, August 16, 1995, p.5) The Court in its order iterated what documents were to be served:

> However, this Court's order made clear that service of the intervention documents was to be accomplished as though it were service of original process and summons pursuant to Rule 4.

(Minutes of the Court, April 1, 1997, p. 4)

Those documents included the following:

1. Summons
2. Mineral County's Notice of Motion and Motion to Intervene
3. Mineral County's Proposed Petition in Intervention
4. Mineral County's Complaint in Intervention
5. Mineral County's Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint
6. Mineral County's Motion for Preliminary Injunction.

Mineral County served these documents on the parties. If the parties had been even remotely interested in intervening in this litigation, the top page of the service documents which was a summons that informed them that they had 20 days within which to respond, would have hastened them to retain counsel to inquire as to the response necessary to intervene or make an appearance in this matter. The only persons to have intervened have done so through counsel for the Walker River Users Group in an attempt to quash service of some mailed documents.

No other pleadings have been filed in this matter that would be appropriate to serve upon the parties in order to give them notice of the pending action. FRCP, Rule 4 requires that the recipient of notice be fairly apprised of the action. An analogy to what FRCP requires as adequate notice is

relevant. The Courts have been quite clear about what is sufficient notice. MINERAL COUNTY's service was more than sufficient to give notice of the action.

The courts have generally required that the notice serve to advise the defendant of the nature of the case:

> It has long been settled that "statutory provisions shall be liberally construed to promote their object....It is accepted that "mere irregularities in the form of process do not render it void where such defective process " is sufficient to advise the defendant of the nature of the case, the court in which it is filed, and his interest therein. . .(citations omitted)....

Nikwei v. Ross School of Aviation, Inc. 822 F. 2d 939, 944 (10th Cir. 1987)

The Ninth Circuit Court of Appeals has had an opportunity to interpret the sufficiency of service when the service was governed by FRCP 4(c)(2)(C)(ii):

> Our interpretation of Rule 4(c)(2)(C)(ii) fulfills the goals of Rule 4, which was designed to provide maximum freedom and flexibility in the procedures for giving all defendants. . . notice of commencement of the action and to eliminate unnecessary technicality in connection with service of process. 4 C. Wright and A. Miller, Federal Practice and Procedure, Section 1061, at 216 (2d ed. 1987)(citing cases).

Electrical Specialty Company v. Road and Ranch Supply, Inc., 967 F.2d 309. 314 (9th Cir. 1992).

Certainly, MINERAL COUNTY succeeded in giving adequate notice when it complied with the Order of the Court and served the Complaint in Intervention and all other pleadings as directed by the Court. These documents apprise the persons who hold water rights in the Walker River of the action contemplated by Mineral County. The only possible confusion is the dates of the Notice in Lieu of Summons issued in 1995 and the Summons issued in 1997. This is simply cured by mailing a copy of the Court-approved Notice in Lieu of Summons to all parties. This has to be done anyway since the times have changed significantly since the first Notice in Lieu of Summons was issued. No person receiving personal service has a correct date for response. This will be cured by the mailing

of a Notice in Lieu of Summons.

The Court made a very persuasive statement in stating that this proceeding is different and unusual and the Court's Order overrides the technicalities of Rule 4. That is certainly true. This service has been expensive and difficult. The office of the recorder of deeds in the counties where the Walker River is located did not have complete records. The State Engineer does not have complete records. WRID initially gave Mineral County a list that was prepared in or around 1988 and which was found to be considerably out-of-date. The Watermaster's list does not contain the secondary permit holders. We have also now found that the California State Water Resources Control Board list has on it names of deceased persons and persons that cannot be found. We are dealing with multiple parties.

MINERAL COUNTY deserves an opportunity to intervene in this case and have that Motion heard on its merits. The opposing parties have been extremely successful in delaying this process for over two years. MINERAL COUNTY has exercised due diligence in its attempts to serve the water rights holders of the Walker River.

WHEREFORE THE ABOVE-STATED REASONS, MINERAL COUNTY respectfully requests that this Court order Mineral County to mail the Notice in Lieu of Summons to all persons

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on the final list prepared by the COUNTY and to publish the Notice in Lieu of Summons in the newspapers of general circulation in the area as listed by the Honorable Edward C. Reed.

DATED this 15th day of October, 1997.

ZEH, POLAHA, SPOO, HEARNE & PICKER

By _____

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AFFIDAVIT OF TREVA J. HEARNE

STATE OF NEVADA)
) ss:
COUNTY OF WASHOE)

I, Treva J. Hearne, being over the age of twenty-one years do state as follows:

1. I am an attorney admitted to practice in Nevada and California. I am presently a member of the law firm of Zeh, Polaha, Spoo, Hearne & Picker in Reno, Nevada.

2. The firm has represented Mineral County since it made its Motion to Intervene in C-125 in 1994.

3. I have observed and prepared the documents that were collated for service by waiver and by personal service in this matter. In each instance, the intervention documents as defined by the Court in its orders regarding Mineral County service have been included for service. In 1995 personal service included a Notice in Lieu of Summons. In 1997 a Summons was prepared and placed on top of the Notice in Lieu of Summons in each packet of documents for personal service.

Further affiant sayeth naught.

DATED this 15th day of October, 1997.

TREVA J. HEARNE

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of ZEH, POLAHA, SPOO, HEARNE & PICKER, and that I caused the foregoing **PREBRIEF OF SERVICE ISSUES** to be served on all parties to this action by:

_X_ placing an original or true copy thereof in a sealed, postage prepaid envelope in the United States Mail, at Reno, Nevada

_____ personal delivery

_____ facsimile (fax)

_____ Federal express/UPS or other overnight delivery

_____ Reno/Carson Messenger Service

fully addressed as follows:

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Dated this 15th day of October, 1997.

Carol Elewski

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