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IN THE 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, et al., Defendants. vs. MINERAL COUNTY, Proposed Plaintiff-Intervenor,	In Equity No. C-125-ECR Subfile No. C-125-C **JOINT RESPONSE AND POINTS OF AUTHORITIES OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO MINERAL COUNTY'S MOTION FOR ORDER OF PUBLICATION AND AFFIDAVIT OF SERVICE**

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INTRODUCTION

On October 25, 1994 - over three years ago - Mineral County filed a motion to intervene in this case. Mineral County has been attempting to complete service of process since that time. The question before the Court today is whether Mineral County should be allowed to complete service of process by publication, given the efforts it has made to accomplish service. As the Court is aware, there have been a number of status conferences held on this matter over the last several months. The most recent status conference was held on April 14, 1998.

THE COURT SHOULD PERMIT MINERAL COUNTY TO COMPLETE SERVICE OF PROCESS BY PUBLICATION

On April 21, 1998, in accordance with the Court's Order of April 14, 1998, Mineral County filed a motion for an Order of Publication pursuant to Rule 4(e) of the Federal Rules of Civil Procedure. By its motion Mineral County seeks to complete its service of process by publication of a Notice in Lieu of Summons "for all unidentified parties who may be holders of water rights in the Walker River...." Mineral County contends that the Court should permit publication but appears also to argue that publication may not be necessary if the Court finds that the due diligence of Mineral County to complete personal service to date has been sufficiently carried out so as not to require any more effort to complete service, whether by publication or otherwise. *SEE, MINERAL COUNTY'S MOTION FOR ORDER OF PUBLICATION, AT 2 (APRIL 21, 1998).*

The United States and the Walker River Paiute Tribe, for the reasons set forth below, have no objection to the Court permitting completion of service by publication. We do not believe, however, that the Court should conclude that no further service of any kind is in order. Service by publication will ensure that any water users who may have a claim to the waters of the Walker River, but have not for some reason been served, will be placed on notice of Mineral

County's intentions to intervene in this suit.

We now turn to the rules relevant to service of process in this case. Rule 4(e), Fed. R. Civ. P., in pertinent part, provides that service on individuals may be effected:

> pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State ...."

In this regard, Rule 4(e)(1) of the Nevada Rules of Civil Procedure allows for service by publication under circumstances where a defendant, "resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons..."

Thus, the question presented is whether Mineral County has exercised due diligence in its efforts to complete service and whether the Court should permit the service to be completed by publication.

In the Affidavit of Treva J. Hearne, attached to Mineral County's motion, the affiant states that Mineral County "sent request for waivers of service to 1107 persons" and that 122 were "returned signed." *AFFIDAVIT, PARAGRAPHS 3,4 AT 3.* The affiant further states that Mineral County has "expended over $110,000.00" and expended far in excess of 1000 hours of time, including volunteer time, and "served or attempted service on over 1100 persons and entities." *AFFIDAVIT, PARAGRAPH 12, AT 6.* The affiant goes on throughout the affidavit to describe in considerable detail the leviathan efforts Mineral County has expended to complete service.

We have no reason to dispute the veracity of the efforts Mineral County describes here in attempting to complete its service of process. It would appear that Mineral County has exercised due diligence and that the Court should permit Mineral County to complete the service by

publication. We note that Mineral County has been attempting to complete service in this case for more that three years. As part of that effort, Mineral County, in the past, requested the Court to allow it to complete service by publication. The Court initially denied that request by Minute Order, dated March 22, 1996. Mineral County appealed the denial to the Ninth Circuit. Although the appeal was dismissed for lack of jurisdiction, the Ninth Circuit went out of its way to note that Mineral County's intervention attempt appeared to be a "particularly attractive candidate for service by publication at the appropriate time." United States v. Walker River Irr. Dist., No. 96-15885(9th Cir. Feb.12, 1997).

CONCLUSION

As set forth in the Affidavit of Treva J. Hearne, Mineral County has expended a great deal of money, time , and effort to complete the service since the Ninth Circuit made its observation. We believe it is now time to allow Mineral County to complete service by publication.

DATED the 27th day of April, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of April 1997, served a true copy of the foregoing **JOINT RESPONSE AND POINTS OF AUTHORITIES OF THE UNITED STATES OF AMERICA AND THE WALKER RIVER PAIUTE TRIBE TO MINERAL COUNTY'S MOTION FOR ORDER OF PUBLICATION AND AFFIDAVIT OF SERVICE** by placing same in the U. S. mails, postage prepaid, addressed as follows:

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