

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

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| UNITED STATES OF AMERICA, |) | IN EQUITY NO. C-125-RCJ |
| |) | Subproceedings: C-125-B and C-125-C |
| Plaintiff(s), |) | |
| |) | 3:73-CV-0125-RCJ-WGC |
| |) | 3:73-CV-0127-RCJ-WGC |
| vs. |) | 3:73-CV-0128-RCJ-WGC |
| |) | |
| WALKER RIVER IRRIGATION, et al., |) | MINUTES OF PROCEEDINGS |
| |) | |
| Defendant(s). |) | DATED: August 6, 2013 |
| |) | |
| |) | |

PRESENT: HONORABLE WILLIAM G. COBB, U.S. MAGISTRATE JUDGE

Deputy Clerk: Katie Lynn Ogden Reporter: Donna Davidson

Counsel Present: Gordon DePaoli, Dale Ferguson, Therese Ure, Karen Peterson, Andrew Guarino, Simeon Herskovits, Christopher Mixson, and Harry Swainston

Counsel Appearing Telephonically: Wes Williams, Jr., David Negri, Marta Adams, George Benesch, Erin Mahaney, Nhu Q. Nguyen, Iris Thornton, Brian Stockton, and Michael Neville

PROCEEDINGS: STATUS CONFERENCE

1:38 p.m. Court convenes.

The court and counsel confer regarding the agenda items as outlined in the *Court's Agenda for August 6, 2013, Status Conference* (Doc. # 1180 in Case No. 3:73-CV-125-RCJ-WGC; Doc. # 1915 in Case No. 3:73-CV-127-RCJ-WGC; and Doc. #717 in Case No. 3:73-CV-128-RCJ-WGC). Counsel present their respective positions as to each of the items.

- (a) Modification of the e-service order in 3:73-cv-00127-RCJ-WGC and the proposed e-service order in 3:73-cv-00128-RCJ-WGC to comply with comments made by Chief Judge Jones at the July 25, 2013, status conference, and whether the post card revision to the e-service order is going to have to be implemented before the parties proceed with their briefings on any motions.

To date, the results of the 950 e-service orders served is as follows:

- 142 entities elected to receive electronic service;
- 75 entities elected to receive traditional service via United States Postal Service;
- 113 e-service orders were returned undeliverable; and
- 620 entities have not responded.

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The court and parties agree that the focus concerning service should be the 620 entities that have not responded. Furthermore, the parties should address the concern expressed by Chief Judge Jones during the July 25, 2013, Status Conference, regarding paragraph 17 of the e-Service Order in subproceeding C-125-B, Doc. # 1874:

“Any Unrepresented Party who fails to complete and return the attached Notice shall be deemed to have consented to receive subsequent notice and service of all filings in this matter by taking responsibility to check the public website at www.nvd.uscourts.gov and shall be deemed to have received notice of all subsequent order and other filings in this matter.”

The court and parties address the notion of implementing service by postcard, which would parallel the procedure adopted in the *United States of America vs. Orr Water Ditch Co., et al*, Case No. 3:73-cv-00031-LDG, Doc. # 1198.

Several parties express their concern regarding the implementation of serving postcards. Adding this procedure will essentially incur an additional expense for all parties, including *Pro Per* litigants and the court. One consideration suggested to minimize the expense would be to limit the postcard notification to motions that only affect substantive rights. Although this may be one consideration to elaborate more on, the court expresses its concern that this may not fulfill the requirements of the Federal Rules of Civil Procedure.

(b) Whether the parties will proceed with service by publication.

Mr. Herskovits explains that service by publication was contemplated and approved by the court early in the proceedings so entities that were not identified throughout the service process are afforded the opportunity to assert water rights.

Mr. Guarino advises the court there remains approximately forty (40) outstanding entities that need to be personally served with regard to subproceeding C-125-B. The United States anticipates to move for service by publication once personal service is complete. However, due to budget constraints, the United States is unable to predict when service will be complete and, potentially, the motion to serve by publication may not be filed until the end of the year.

During the interim of completing service, the United States and Mineral County are exchanging drafts of the motion to serve by publication and proposed order in effort to draft an order that is parallel to one another; however, each case present circumstances that will create some differences. The draft for the motion to serve by publication and proposed order will be circulated to other principal parties to comment and/or add any language to the motion or proposed order.

Mr. Herskovits anticipates that Mineral County's motion for service by publication will be submitted prior to that of United States and prior to the end of the year.

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The court directs that this topic be added as an agenda item for the next status conference set for September.

- (c) Whether postcard notification should be utilized with respect to the motion to dismiss and briefing of threshold issues.

Mr. DePaoli notes an additional consideration to address with regard to service is the provision in Rule 5(c), which would relieve defendants from serving other defendants.

The court briefly discusses the original case management order entered by Judge Reed concerning *in rem* jurisdiction (subproceeding C-125-B, Doc. # 1711, pg. 10). The court quotes from the order “While due process requirements apply regardless of whether a case is characterized as *in rem* or *in personam*, because *in rem* jurisdiction “is secured by the power of the court over the *res*,” the degree of notice and service of process required for a judgment is less than in an *in personam* action.” The court notes that this topic in Judge Reed’s order is instructive in that, if this case is characterized as *in rem*, the degree of service is less than what would be required in an *in personam* action.

Hearing from the parties and the discussions had today, the consensus appears to be that there is a framework from which the parties can use to modify the current e-service order that would be consistent with what the law requires and what Chief Judge Jones has expressed concern regarding the current e-Service order. The concerns expressed today reflects that a modified e-service order would entail a lower level of service to some degree that would minimize the expense of service, both for the parties involved and the court.

The court directs the parties to meet and prepare a draft Proposed Modified E-Service Order to be considered by Chief Judge Jones. However, the court will schedule a status conference to address and discuss the proposed order prior to submitting the document to Chief Judge Jones. The court schedules a Status Conference for **Friday, September 6, 2013, at 10:00 a.m.** The parties shall file the draft Proposed Modified E-Service Order by close of business on **Thursday, August 29, 2013.**

- (d) Implementation of briefing on the “threshold” issues and what the term encompasses.

The court will defer any briefing schedule(s) for threshold issues until the question of service is clarified and how service will proceed in these matters.

The court and parties discuss what the term “threshold issues” may encompass. Mr. Herskovits refers to the July 25, 2013, Status Conference, and indicates that, from his understanding, jurisdictional questions are to be raised first as a threshold issue. Furthermore, another potential threshold issue might be *claim preclusion* or *res judicata*. The court questioned how procedurally “threshold issues” would be addressed and how such briefing would be applied to the cases under Federal Rules of Civil Procedure.

