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FILED
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LARRY R. ... CLERK
BY ... DEPUTY

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, a corporation, et al., Defendants.	IN EQUITY NO. C-125-ECR SUBFILE NO. C-125-C **MOTION TO VACATE SCHEDULE FOR SERVING RESPONSES TO MINERAL COUNTY MOTION TO INTERVENE; TO ESTABLISH DATE FOR COMPLETION TO SERVICE; TO ESTABLISH SCHEDULE FOR RESPONSES TO MINERAL COUNTY MOTION TO INTERVENE AFTER COMPLETION OF SERVICE**

Pursuant to Rule 6 of the Federal Rules of Civil Procedure and Rule 150 of the Rules of Practice of this Court, the Walker River Irrigation District (the "District") moves the Court for:

(1) An order vacating the schedule for serving responses to Mineral County's Motion

to Intervene ("Responses"), which schedule was set forth in paragraph 6 of this Court's February 9, 1995, Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County (the "Service Order");

(2) An order establishing a date for Mineral County to complete service of Mineral County's Intervention Documents as required by the Service Order; and

(3) An order establishing a new schedule for service of responses to Mineral County's Motion to Intervene after completion of service as required by the Service Order and any amendment thereto.

This Motion is made on the ground that service in this matter is not complete and that until service is complete the Court should not require the service of any responses to Mineral County's Motion to Intervene. This Motion is based upon all of the pleadings and papers on file herein and on the points and authorities which follow.

DATED this 22nd day of June, 1995.

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By Gordon H. DePaoli
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POINTS AND AUTHORITIES

I. BACKGROUND

On or about October 25, 1994, Mineral County, Nevada filed several documents with this Court in an attempt to intervene in the subproceeding which bears docket number C-125-B. The documents filed included the following: (1) Notice of Motion and Motion of Mineral County of Nevada for Intervention; (2) Mineral County's Proposed Petition to Intervene and an attached Proposed Order granting intervention; (3) Memorandum of Points and Authorities in Support of Mineral County's Proposed Petition to Intervene (the "Memorandum"), together with a State of Nevada Certificate of Appropriation of Water held by the Nevada Department of Wildlife attached as Exhibit A, and a Resolution of the Board of Mineral County Commissioners attached as Exhibit B; (4) Affidavits in support of the Memorandum of Marlene Bunch, Herman F. Staat, Louis Thompson (including several attached statistical graphs) and Kelvin J. Buchanan (together with Attachment A consisting of the Walker River Basin Water Rights Model, Nevada Department of Conservation and Resources, June, 1993, and Attachment B consisting of the Office of Assessment Technology Memorandum, August, 1993).[1] Mineral County mailed the Original Intervention Documents to various parties including the United States, the Walker River Paiute Tribe, the California State Water Resources Control Board, California Trout, the United States Board of Water Commissioners and the Walker River Irrigation District (the "District").

As a result of Mineral County filing the Original Intervention Documents, on approximately November 15, 1994, several interested parties entered into a stipulation

[1]For convenience these pleadings, affidavits, exhibits and attachments are hereinafter collectively referred to as the "Original Intervention Documents."

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concerning Mineral County's Motion to Intervene and for Pretrial Conference Thereon (the "Stipulation"). The Stipulation requested a pretrial conference and required the parties to file reports prior to that conference addressing the identity of the persons who should receive notice of and an opportunity to respond to the Original Intervention Documents. The Court approved the Stipulation through Minutes of the Court dated November, 17, 1994.

The parties to the Stipulation filed their respective reports and a pretrial conference was held on January 3, 1995. Several issues were discussed by the parties at the pretrial conference including the need for Mineral County to clarify its Proposed Petition to Intervene. In addition, counsel for Mineral County stated a motion for preliminary injunction might be filed.

As a result of the conference, on February 9, 1995, the Court entered an Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County (the "Service Order"). The Service Order directed the Court Clerk to establish a new subfile, C-125-C, for filings related to the Original Intervention Documents. It also provided that:

> 2. Within thirty (30) days of the entry of this Order, Mineral County shall file: (a) its revised motion to intervene; (b) its revised points and authorities in support thereof; (c) a revised proposed complaint-in-intervention which clarifies the basis for Mineral County's claims to water from the Walker River for Walker Lake and which identifies the persons or entities against whom such claims are proposed to be asserted; and (d) any motion for preliminary injunction, supporting points and authorities and any other supporting documents which Mineral County may choose to filed. The documents filed pursuant to this paragraph 2 are hereinafter sometimes collectively referred to as "Mineral County's Intervention Documents."

Service Order at paragraph 2.

In response to paragraph 2 of the Service Order, on approximately March 10, 1995, Mineral County filed the following documents: (1) Mineral County's Amended Complaint in

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Intervention; (2) Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint in Intervention; (3) Motion for Preliminary Injunction; Memorandum of Points and Authorities; Affidavit of Kelvin J. Buchanan, P.E.; Affidavit Gary L. Vinyard, PhD. This second affidavit of Kelvin J. Buchanan (the first having been filed with the Original Intervention Documents), included a Ditch Map, USDA, as Attachment C, copies of several photographs as Attachment D, several statistical charts as Attachment E, and an article entitled Walker Lake Proposal as Attachment F.[2] It is important to note that the Revised Intervention Documents refer to and rely upon some of the Original Intervention Documents and that the proposed amended Complaint-in-Intervention does not expressly identify the persons or entities against whom Mineral County's claims are proposed to be asserted.

II. MINERAL COUNTY'S ATTEMPTED COMPLIANCE WITH THE SERVICE ORDER TO DATE

The Service Order outlined the procedure to be followed with regard to service of Mineral County's Intervention Documents, as defined in paragraph 2 of the Service Order. The Service Order provided:

> 3. On or before May 10, 1995, pursuant to Rule 4 of the Federal Rules of Civil Procedure, Mineral County shall serve Mineral County's Intervention Documents on all claimants to the waters of the Walker River and its tributaries...
>
> 4. If Mineral County intends to seek a waiver of service of Mineral County's Intervention Documents pursuant to the provisions of Rule 4(d) of the Federal Rules of Civil Procedure, Mineral County shall allow the person served 30 days to return the waiver of service and shall include with the mailing the attached Notice of Motion to Intervene, Proposed Complaint-in-Intervention of Mineral County and Request for Waiver of

[2]For convenience these pleadings, affidavits, exhibits and attachments are hereinafter referred to as the "Revised Intervention Documents."

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> Personal Service of Motions[3] and the attached Waiver of Personal Service of Motions.
>
> 5. In any situation where service of Mineral County's Intervention Documents is not waived, in addition to Mineral County's Intervention Documents, Mineral County shall also serve the attached Notice in Lieu of Summons properly issued by the Clerk of the Court.

Service Order, at paragraphs 3, 4 and 5. Mineral County has attempted service in accordance with the waiver provisions of Rule 4(d) of the Federal Rules of Civil Procedure as discussed in paragraph 4 of the Order.

In seeking waivers of service, Mineral County attempted to mail the following documents to the individuals and entities described in paragraph 3 of the Order: (1) the Revised Intervention Documents[4]; (2) Notice of Motion to Intervene, Proposed Complaint-In-Intervention and Motion for Preliminary Injunction of Mineral County and Request for Waiver of Personal Service of Motions; (3) Waiver of Personal Service of Motions; (4) Duty to Avoid Unnecessary Costs of Service of Summons and Other Documents; (5) the Service Order; and (6) a "Notice" stating that the "exhibits referred to in the pleadings of Mineral County are available for review" at one of four addresses. See, Proof of Service by Mailing without attachments, attached hereto as Exhibit A. It is not entirely clear that every mailing included all of those documents.

It is clear, however, that Mineral County's mailing failed to include any of the affidavits or exhibits relied on by Mineral County in the Revised Intervention Documents, including those

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[3]This document, attached to the Service Order, was actually styled "Notice of Motion to Intervene, Proposed Complaint-In-Intervention and Motion for Preliminary Injunction of Mineral County and Request for Waiver of Personal Service."

[4]As explained fully below, the Revised Intervention Documents mailed by Mineral County did not include any attachments or exhibits.

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which were filed with the Original Intervention Documents. Mineral County failed to serve the two exhibits, six affidavits, and six attachments to those affidavits, that it relied on to support the Revised Intervention Documents. Instead, Mineral County served a notice which stated that these exhibits, affidavits and attachments could be reviewed at one of four locations. See Notice, attached hereto as Exhibit B.

In not serving the exhibits, affidavits and attachments on which it relied, Mineral County failed to comply with paragraph 3 of the Service Order. Paragraph 3 of the Service Order specifically required Mineral County to serve the documents described in paragraph 2 of the Service Order. The documents described in paragraph 2 included the exhibits, affidavits and attachments relied upon by Mineral County in the Revised Intervention Documents. Nothing contained in the Order allowed Mineral County to unilaterally decide not to serve the exhibits, affidavits and attachments, and instead place them on file at certain locations. However, the Waiver of Personal Service sought by Mineral County provides for a waiver of "objections based on a defect, if any, in the manner in which these documents have been provided to me." [Emphasis added]. See Waiver attached as Exhibit C.

Paragraph 3 of the Service Order requires service pursuant to Rule 4 of the Federal Rules of Civil Procedure on more than 1,000 persons or entities. See Attachment to Proof of Service by Mailing, Docket No. 23. Under Rule 4(d), service is not completed by merely mailing a request for waiver of service. As stated in the comments to that Rule, "if the waiver is not returned and filed, . . . the action will not otherwise proceed until formal service is effected." As of June 20, 1995, not one waiver of service has been filed in this matter. Counsel for Mineral County has stated that less than 10% of the persons served had returned waivers. Mineral County's failure to comply with the Service Order, by not mailing all of the documents on which it relied, played a major part in the low percentage of return of waivers

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of service. It is not clear why the waivers which have been returned have not been filed with the Court.

III. THE COURT SHOULD VACATE THE SCHEDULE FOR SERVING RESPONSES TO MINERAL COUNTY'S MOTION TO INTERVENE, ESTABLISH A DATE BY WHICH SERVICE IS TO BE COMPLETE AND ESTABLISH A NEW SCHEDULE FOR RESPONSES TO THE MOTION TO INTERVENE AT LEAST SIXTY (60) DAYS AFTER MINERAL COUNTY HAS COMPLETED SERVICE

The Service Order resulted from the Court's ruling on January 3, 1995, that Mineral County's motion to intervene must be served on all persons who might be affected by it. The service was to comply with Rule 4 of the Federal Rules of Civil Procedure and was to be completed by May 10, 1995. The July 11, 1995 schedule for responding to the motion to intervene was established based upon an assumption that service would be completed by May 10, 1995 and that all persons should have at least 60 days to respond to the motion. It was intended that all persons required to be served have an opportunity to participate in the issues related to the intervention of Mineral County in this action.

It is clear that service in compliance with the Service Order is not complete. Although Mineral County filed a document entitled "Proof of Service by Mailing" on June 2, 1995, that mailing was not the service required by Rule 4 or the Service Order.[5] As of June 20, 1995, the Court's file reflected that not one waiver of service had been filed. There is no proof of personal service with respect to any person who did not return a waiver of service. Under Rule 4(d)(4) and the Service Order, this proceeding cannot and should not proceed until service is complete. In order to make certain that all persons to be served under paragraph 2 of the Service Order have an opportunity to participate in the issues related to the Revised Intervention

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[5]The Proof of Service by Mailing is quite confusing. One cannot tell the date on which a mailing was made to a specific person. Moreover, the attachments suggest that multiple mailings may have been made to the same person at the same address.

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Documents, the date for serving Responses should be vacated, a date for completion of service in compliance with Rule 4 and the Service Order should be established and a new schedule for responding to the Motion to Intervene should be established. Moreover, if Mineral County complies with the provision in the Service Order which requires it to identify in its proposed complaint-in-intervention the persons or entities it seeks to sue, the possibility of serving multiple copies of the Mineral County Intervention Documents on the same person will be avoided.

DATED this 22nd day of June, 1995.

GORDON H. DePAOLI
DALE E. FERGUSON
WOODBURN AND WEDGE
P.O. Box 2311
Reno, Nevada 89505

By Gordon H. DePaoli
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TREVA J. HEARNE, ESQ. (Bar No. 004450)
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Attorneys for Intervenor
MINERAL COUNTY OF NEVADA

FILED
LANCE S. WILSON
CLERK
BY
DEPUTY

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, a corporation, et al. Defendants.	IN EQUITY NO. C-125s Subfile No. C-125-B **PROOF OF SERVICE BY MAILING**

EXHIBIT A

WALKER RIVER IRRIGATION DISTRICT,

Petitioner,

vs.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, W. DON MAUGHAN, EDWIN H. FINSTER, ELISEO M. SAMANIEGO, JOHN CAFFREY and DARLENE E. RUIZ, Members of the California Water Resources Control Board,

Respondents.

PROOF OF SERVICE BY MAILING

We are each over the age of 18 years and not parties to the within action. Our addresses are P.O. Box 476, Mina, Nevada 89422 and Po box 750 Hawthorne NV 89415, respectively.

On April 10, 12, 18, 1995, we served:

NOTICE OF MOTION; MOTION OF MINERAL COUNTY OF NEVADA FOR INTERVENTION AND AMENDED POINTS AND AUTHORITIES IN SUPPORT THEREOF; MINERAL COUNTY'S AMENDED COMPLAINT-IN-INTERVENTION; AMENDED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MINERAL COUNTY'S AMENDED COMPLAINT-IN-INTERVENTION; MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; ORDER REQUIRING SERVICE OF AND ESTABLISHING SCHEDULE REGARDING THE MOTION TO INTERVENE OF MINERAL COUNTY AND NOTICE OF MOTION TO INTERVENE; PROPOSED COMPLAINT-IN-INTERVENTION AND MOTION FOR PRELIMINARY INJUNCTION OF MINERAL COUNTY AND REQUEST FOR WAIVER OF PERSONAL SERVICE OF MOTIONS

on each person or entity named below by enclosing a copy in an envelope addressed as shown on the attached sheets and personally placing the envelopes for collection and mailing on the date and at the place shown below.

Date of Mailing: 4/10/95, 4/12/95, 4/18/95.
Place of Mailing: U.S. Post Office, Hawthorne, Nevada. & Mina, Nevada

We declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

We declare that we made this mailing at the direction of a member of the bar of this Court.

Executed this 29 day of May, 1995, at Hawthorne, Nevada.

Louis Thompson

James Scott

N O T I C E

The exhibits referred to in the pleadings of Mineral County are available for review at the following addresses:

The United States District Court
300 Booth St.
Reno, Nevada

The law offices of:
Zeh, Spoo and Hearne
450 Marsh Ave.
Reno, Nevada

The Lyon County Library
20 Nevin Way
Yerrington, Nevada

The Mono County Library
94 School Street North
Bridgeport, California

Any questions, call (702)--323-4599.

EXHIBIT B

TREVA J. HEARNE, ESQ.
JAMES SPOO, ESQ.
ZEH, SPOO & HEARNE
450 Marsh Avenue
Reno, Nevada 89509
(702)323-4599

Attorneys for Intervenor
MINERAL COUNTY OF NEVADA

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, a corporation, et al., Defendants.	IN EQUITY NO. C-125-ECR SUBFILE NO. C-125-C **WAIVER OF PERSONAL SERVICE OF MOTIONS**

TO: Zeh, Spoo & Hearne, attorneys for proposed Plaintiff/Intervenor, Mineral County, Nevada

I acknowledge receipt of your request that I waive personal service of the documents involving the motion to intervene of Mineral County, Nevada, in the action of United States of America, Plaintiff v. Walker River Irrigation District et al., Defendants, which is Case No. C-125, Subfile No. C-125-C, in the United States District Court for the District of Nevada. I have also received a copy of the motion to intervene of Mineral County, the proposed complaint-in-intervention of Mineral County

EXHIBIT C

the motion for preliminary injunction of Mineral County, and the Order Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of Mineral County, along with two copies of this Waiver. I have also received a means by which I can return this signed waiver to you without cost to me.

I agree to save the cost of personal service of the documents, as above-described, by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Federal Rules of Civil Procedure, Rule 4. I (or the entity on whose behalf I am acting) will retain all defenses or objections to this matter or to the jurisdiction or venue of the Court except for objections based on a defect, if any, in the manner in which these documents have been provided to me.

I understand, that if I (or the entity on whose behalf I am acting) do not appear and respond to the motion to intervene, by July 11, 1995, and if the Court enters further orders with respect to answers or other responses to the proposed complaint-in-intervention or responses to the Motion for Preliminary Injunction, that I (or the entity on whose behalf I am acting)

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shall nevertheless be deemed to have notice of those subsequent orders of the Court.

DATED this ____ day of _____, 1995.

_____
(Signature)

_____
(Printed name and title, if any)

_____
(Company or entity, if any)

CERTIFICATE OF SERVICE BY MAIL

I certify that I am an employee of Woodburn and Wedge, and that on this date, pursuant to FRCP 5(b), I deposited in the United States mail at Reno, Nevada, a true copy of the foregoing document, addressed to:

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Reno, Nevada 89509

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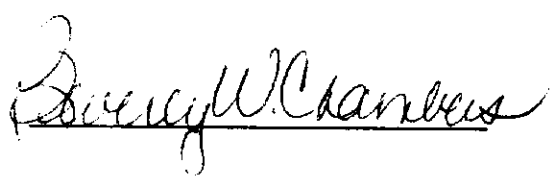
Roger Bezayiff
Water Master
U.S. Board of Water
Commissioners
P.O. Box 853
Yerington, Nevada 89447

VIA HAND DELIVERY:
Jim Spoo
Zeh, Spoo & Hearne
450 Marsh Avenue
Reno, Nevada 89509

DATED this 22nd day of June, 1995.



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