GORDON H. DePAOLI
State Bar No. 000195
DALE E. FERGUSON
State Bar No. 004986
WOODBURN and WEDGE
One East First Street
Suite 1600
P.O. Box 2311
Reno, Nevada 89505
Telephone: (702) 688-3000
Attorneys for
WALKER RIVER IRRIGATION DISTRICT

JUL 2 1 1995

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 **WALKER RIVER IRRIGATION DISTRICT'S REPLY TO WALKER RIVER PAIUTE TRIBE'S RESPONSE AND MINERAL COUNTY'S OPPOSITION TO MOTION TO VACATE SCHEDULE; AND OPPOSITION TO MINERAL COUNTY'S COUNTERMOTION FOR SANCTIONS**

39

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY 1

I. STATEMENT OF FACTS 3
- A. Mineral County's Initial Filing 3
- B. The Service Order 4
- C. Mineral County's Second Filing 5
- D. The Relief Sought By Mineral County 7
- E. Mineral County's Attempted Compliance With The Service Order 7
- F. Questions From District Electors 8
- F. Mineral County's Proposal to Send a Reminder 11

II. MINERAL COUNTY MUST COMPLETE SERVICE IN THIS MATTER IN ACCORDANCE WITH RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS DIRECTED IN THE SERVICE ORDER 12
- A. Mineral County's "Sufficient Notice" Argument is Irrelevant for Purposes of Determining Sufficient Service of Process in this Matter 14
- B. The Fact that Defendants May Ultimately Be Represented by the Same Counsel Does Not Obviate the Need for Proper Service of Process on Each Defendant 16
- C. Conclusion 17

III. RULE 4(d) PROVIDES THE SOLE AND EXCLUSIVE AUTHORITY UNDER WHICH A PARTY MAY SEEK THE RECOVERY OF COSTS OF SERVICE AS A RESULT OF FAILING TO RETURN WAIVERS OF SERVICE 17

IV. THE MOTION FOR SANCTIONS FAILS TO STATE ANY LEGAL OR FACTUAL BASIS FOR IMPOSING SANCTIONS ON ANY INDIVIDUAL OR ENTITY IN THIS MATTER 22
- A. Background 22
- B. Rules 11, 26(g), 37(b) and 56(g) Provide No Basis For Sanctions Here . . 23
- C. Sanctions Cannot be Imposed Under 28 U.S.C. § 1927 24
- D. THE COURT SHOULD NOT IMPOSE SANCTIONS UNDER ITS INHERENT POWER TO SANCTION LITIGANTS OR ATTORNEYS FOR BAD FAITH CONDUCT 27

V. CONCLUSION 31

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

TABLE OF AUTHORITIES

Page(s)

Cases:

Baker Indus., Inc. v. Cerberus Limited,
764 F.2d 204 (3d Cir. 1985) 25, 26

Barnd v. City of Tacoma,
664 F.2d 1339 (9th Cir. 1982) 25

Capitol Hardware Manufacturing Co., Inc. v. Natco, Inc.,
707 F.Supp. 374 (N.D.Ill. 1989) 19

Chambers v. Nasco, Inc.,
501 U.S. 32 (1991) 28

Combs v. Nick Garin Trucking,
825 F.2d 437 (D.C. Cir. 1987) 16

Electrical Specialty Company v. Road and Ranch Supply, Inc.,
967 F.2d 309 (9th Cir. 1992) 16

Henry v. Glaize Maryland Orchards, Inc.,
110 F.R.D. 589 (D.Md. 1984) 19

In Re Alexander Grant & Co. Litigation,
110 F.R.D. 544 (S.D. Fla. 1986) 15

In re Peoro,
793 F.2d 1048 (9th Cir. 1986) 25, 26

Lockary v. Kayfetz,
974 F.2d 1166 (9th Cir. 1992), cert. denied, Pacific Legal Found. v. Kayfetz, 113 S. Ct. 2399 (1993) 24

Mason v. Genisco Technology Corp.,
960 F.2d 849 (9th Cir. 1992) 13, 19

Nikwei v. Ross School of Aviation, Inc.,
822 F.2d 939 (10th Cir. 1987) 16

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Overnite Transp. Co. v. Chicago Indus. Tire Co.,
697 F.2d 789 (9th Cir. 1983) 25, 27

Sanderford v. Prudential Ins. Co. of America,
902 F.2d 897 (11th Cir. 1990) 16

Stitt v. Williams,
919 F.2d 516 (9th Cir. 1990) 28

United States v. Associated Convalescent Enterprises, Inc.,
766 F.2d 1342 (9th Cir. 1985) 25

United States v. Blodgett,
709 F.2d 608 (9th Cir. 1983) 25

United States v. Stoneberger,
805 F.2d 1391 (9th Cir. 1986) 28

Worrell v. B.F. Goodrich Co.,
845 F.2d 840 (9th Cir. 1988) 13, 19

Statutes and Rules:

28 U.S.C. § 1927 . . . . . 24-26, 28, 29

F.R.C.P., Rule 11 . . . . . 23, 24

F.R.C.P., Rule 26 . . . . . 23, 24

F.R.C.P., Rule 37 . . . . . 23, 24

F.R.C.P., Rule 4 . . . . . 2, 6, 7, 10, 13-22, 25, 31

F.R.C.P., Rule 56 . . . . . 23, 24

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

SUMMARY

On June 22, 1995, the Walker River Irrigation District (the "District") served its Motion to Vacate Schedule for Serving Responses to Mineral County Motion to Intervene; to Establish Date for Completion of Service; to Establish Schedule for Responses to Mineral County Motion to Intervene After Completion of Service (the "Motion to Vacate Schedule"). The Motion to Vacate Schedule is based on the ground that, to date, Mineral County's attempted service in this matter is substantially incomplete.

In response to the Motion to Vacate Schedule, Mineral County filed Points and Authorities in Opposition to the District's Motion to Vacate Schedule and in Support of Counter Motion for Sanctions ("Mineral County's Opposition and Counter Motion")[1]. Mineral County's Opposition and Counter Motion moves the Court for an order: (1) relieving Mineral County of any further obligations to serve all claimants to the waters of the Walker River and its tributaries (the "Walker River Claimants"); (2) declaring that Mineral County's attempted service to date provided the Walker River Claimants with sufficient notice of the Mineral County Intervention Documents; (3) to show cause why sanctions should not be imposed against the District and its manager, chairperson and board of directors, Gordon DePaoli, Woodburn and Wedge, and Stuart Somach; (4) imposing sanctions against these individuals and entities to recover costs related to Mineral County's attempted service of the Mineral County Intervention Documents, and attorney's fees and costs related to the filing of Mineral County's Opposition and Counter Motion; (5) awarding Mineral County any costs incurred in effecting personal service of the Mineral County Intervention Documents; and (6) denying the Motion to Vacate

---

[1]For convenience purposes, hereinafter, that portion of Mineral County's Opposition and Counter Motion requesting sanctions will be referred to as the "Motion for Sanctions," and, that portion of the motion opposing the District's Motion to Vacate Schedule will be referred to as "Mineral County's Opposition."

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Schedule.

The United States filed a response stating that it had no objection to the Motion to Vacate Schedule. Nevada joined in the Motion to Vacate Schedule.

The Walker River Paiute Tribe filed a response to the Motion to Vacate Schedule on June 24, 1995 (the "Tribe's Response"). The Tribe's Response agrees with the District's position that Mineral County's attempted service in this matter is incomplete at this point in time. Tribe's Response at para. 2. However, the Tribe's Response also suggests that the District actively sought to frustrate or impair Mineral County's attempt to complete service. Tribe's Response at para. 3. As discussed below, the District strongly objects to any suggestion that it attempted to frustrate Mineral County's attempted service.

The only issues properly before the Court at this time relate to whether service as ordered by the Court is complete. If it is complete, or if Mineral County is relieved of completing it, there is no basis for the imposition of costs. If it is not complete, Mineral County must complete service and issues related to the imposition of costs must be decided under the "good cause" analysis, set forth in Rule 4(d), for failing to return waivers of service.

As a matter of fact and law service is not complete. Rule 4(d) provides a method by which waivers of service may be sought. Service is only complete, however, when a waiver is returned and filed. When it is not returned and filed, the party must effect personal service under the other applicable provisions of Rule 4. Once a party completes personal service it may seek recovery of its costs of that service under Rule 4(d) and each person against whom such costs are sought may attempt to show good cause for not returning the waiver of service and thereby avoid the payment of those costs.

It is premature for Mineral County to seek costs at this time. Moreover, as a matter of law Mineral County may not recover the costs of its initial mailing which sought waivers of

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

service.

Although these conclusions are correct and obvious, the "shotgun" approach set forth in Mineral County's Opposition and Counter Motion requires the detailed factual and legal discussion which follows.

I. STATEMENT OF FACTS

A. Mineral County's Initial Filing.

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, 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 Burch, 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).[2] 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 District.

---

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

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

As a result of Mineral County filing the Original Intervention Documents, on approximately November 15, 1994, several interested parties entered into a stipulation requesting a pretrial conference and requiring 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.

B. **The Service Order.**

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 file. The documents filed pursuant to this paragraph 2 are hereinafter sometimes collectively referred to as "Mineral County's Intervention Documents."

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Service Order at paragraph 2.

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 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.

C. Mineral County's Second Filing.

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 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

---

[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."

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 638-3000

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.[4] It is important to note that the Revised Intervention Documents refer to and rely upon all of the exhibits and attachments included with 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.

To a substantial extent, paragraph two of the Service Order allowed Mineral County to control the cost it would incur in serving "Mineral County's Intervention Documents" by allowing Mineral County to revise all of its documents. Thus, it was within Mineral County's discretion to reduce or eliminate reliance on lengthy exhibits. However, instead, Mineral County included new lengthy exhibits and continued to rely on prior filed exhibits when it submitted the Revised Intervention Documents.

Second, it was within Mineral County's discretion to file a motion for preliminary injunction and supporting documents. Mineral County chose to file such a motion and thus filed additional exhibits. Finally, the Service Order left it to Mineral County to decide which method of service to use under Rule 4. It allowed, but did not require Mineral County to seek waivers of service. By providing for service of a Notice in Lieu of Summons when service was not waived, the Service Order made it clear that ultimately service consistent with Rule 4 would be required.

---

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

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

D. The Relief Sought By Mineral County.

Mineral County seeks permission to intervene and file an "Amended Complaint in Intervention." Mineral County's proposed "Amended Complaint in Intervention" seeks "an adjudication and reallocation of the waters of Walker River to preserve minimum levels in Walker Lake." To achieve that goal, Mineral County seeks "the right to, at least, 127,000 acre feet of flows annually reserved from the Walker River." Mineral County's Points and Authorities in Support of its Motion to Intervene relies upon the October 25, 1994 Declaration of Kelvin J. Buchanan, the October 24, 1994 Declaration of Herman Staat, the October 25, 1994 Declaration of Marlene Bunch, Exhibit B to its October 25, 1994 Points and Authorities and the October 25, 1994 Declaration of Louis Thompson.

In its Motion for Preliminary Injunction Mineral County seeks to require water right holders on the Walker River system to allow 260,000 acre feet of water to reach Walker Lake in 1995. It asks that thereafter water right holders be enjoined so that 240,000 acre feet of water reaches Walker Lake annually until this litigation is concluded. The points and authorities in support of that motion rely upon all previously filed declarations and attachments thereto, a second affidavit of Kelvin J. Buchanan, an affidavit of Gary L. Vinyard and four additional exhibits attached thereto.

E. Mineral County's Attempted Compliance With The Service Order.

Mineral County has attempted service under the waiver provisions of Rule 4(d) of the Federal Rules of Civil Procedure as discussed in paragraph 4 of the Service Order. In seeking waivers of service, Mineral County attempted to mail the following documents to the individuals and entities[5] described in paragraph 3 of the Order: (1) the Revised Intervention

---

[5] Although it is not entirely clear, it appears, from Mineral County's Proof of Service by Mailing filed herein on June 2, 1995, that Mineral County mailed multiple copies

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Documents; (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 any one of four addresses. It is not entirely clear that every mailing included all of those documents. See, Affidavit of Gordon H. DePaoli at para. 8.

It is clear, however, that Mineral County's mailing failed to include any of the affidavits, exhibits or attachments relied on by Mineral County in the Revised Intervention Documents, including those 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 A; DePaoli Affidavit at paras. 8 and 13.

F. Questions From District Electors.

Near the middle of April, 1995, the District staff in Yerington began receiving numerous inquiries from electors within the District who had received Mineral County's mailing. See, DePaoli Affidavit at para. 4. Several of those persons who contacted the District requested information on their rights and obligations regarding the return of the document entitled Waiver of Personal Service of Motions (the "Waiver of Service"). Id.

---

of the same documents to a number of the water right holders. The attachment to the affidavit of Buchanan confirms this fact. It is not clear why Mineral County would mail multiple copies of the same documents to the same person.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

The District staff believed that the District could not simply ignore those inquiries. Therefore, the District contacted its legal counsel, Gordon DePaoli of Woodburn and Wedge, and requested that he provide it with advice concerning an appropriate response. Id.

After receiving the District's request for legal advice, its counsel made an initial review of the content of several envelopes mailed by Mineral County. Id. at para. 8. This review revealed that Mineral County had in one instance not included the Complaint-in-Intervention and in all others excluded the affidavits, exhibits, and attachments that it had relied on to support the Revised Intervention Documents. Id. Preliminarily, counsel determined that by excluding these documents from its mailings, Mineral County had failed to comply with the Service Order. Id. However, counsel required additional time to consider an ultimate response by the District to those inquiries. Id. Therefore, initially, the District sent a notice to its electors which requested that "at this time" you not return the waiver of personal service. See Exhibit A to the DePaoli Affidavit. The notice sent by the District stated that additional information would be provided by May 1, 1995. Id.

After further review the District's counsel concluded that Mineral County indeed had failed to comply with the Service Order and that persons returning the waiver of service would waive that non-compliance. DePaoli Affidavit at paras. 13-22. This determination was made based on several grounds. Most importantly, the plain language of the Service Order requires Mineral County to serve the exhibits, affidavits and attachments. Also, the Service Order required the served parties to respond to Mineral County's Motion to Intervene by July 11, 1995. Without the exhibits, affidavits and attachments, it would have been virtually impossible for a party to make an informed decision regarding his or her participation with regard to the Revised Intervention Documents. Likewise, if a party decided to file a response by July 11, 1995, a review of the exhibits, affidavits and attachments would have been

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

necessary in order to prepare an appropriate response. DePaoli Affidavit at paras. 20-21.

Moreover, depending upon the decision of the Court with respect to Mineral County's Motion to Intervene, served parties might be required to respond to the Motion for Preliminary Injunction filed by Mineral County. Again a review of the exhibits, affidavits and other documents supporting that motion would have been essential in order to prepare an appropriate response. Id.

In addition, counsel for the District realized that if an individual or entity returned the Waiver of Service they would waive their right to object to any defect in the manner in which the affidavits, exhibits and attachments had been provided. DePaoli Affidavit at para. 13. Therefore, individuals who returned the Waiver of Service would incur the costs involved in obtaining the factual support documents relied upon by Mineral County in the Revised Intervention Documents. Clearly, in compliance with Rule 4, the Service Order intended that Mineral County would pay for the costs involved in providing the Walker River Claimants with copies of these documents.

Counsel advised the District accordingly and assisted the District in preparing a notice to District electors which would constitute the District's final response to the many inquiries it had received.[6] Id. at para. 19. In applicable part that notice provided:

> IT IS REQUESTED THAT YOU NOT RETURN THE WAIVER OF PERSONAL SERVICE. Counsel from the Walker River Irrigation District believes that there is a serious defect in Mineral County's mailing. Returning the Waiver is likely to cure that defect and adversely affect your rights.
>
> At this time, it is the judgment of counsel for the Irrigation District that it is not in your best interest to return the waiver of personal service. However, if the judgment of the Irrigation

[6]The April 14, 1995, and May 2, 1995, notices sent by the District are hereinafter collectively referred to as the "District's Notices."

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

> District's counsel is later found to be incorrect by the Court, you might be required to bear the cost which Mineral County incurs in personally delivering documents to you. Therefore you may wish to consult with your personal attorney on this matter. If you do, please ask that attorney to contact the Irrigation District's or Water Users Association's attorneys concerning this matter. The Irrigation District's attorneys are Gordon H. DePaoli and Dale Ferguson and their phone number is (702) 688-3000. The Water Users Association's attorneys are Stuart Somach and Don Gilbert and their phone number is (16) 446-7979.

See Exhibit E to the DePaoli Affidavit.

The District's Notices[7] provide the District's electors with information concerning Mineral County's mailing, and, based on Mineral County's defective service request that the electors not return the Waiver of Service. The District's Notices constitute notice from the District to its electors based on advice the District received from its legal counsel. Contrary to Mineral County's arguments, the District's Notices do not represent advice given by the District's legal counsel in representation of the District's electors. In fact, in addressing the individual electors, the District's Notices clearly stated that the individual elector, may want "to consult with your personal attorney on this matter. If you do, please ask that attorney to contact the Irrigation District's or Water Users Association's attorneys concerning this matter." Exhibit E to the DePaoli Affidavit.

F. Mineral County's Proposal to Send a Reminder.

On April 26, 1995, counsel for the District received a facsimile from counsel for Mineral County. DePaoli Affidavit at para. 14; Exhibit B. The facsimile stated that Mineral

---

[7]In discussing the District's Notices, Mineral County's Opposition and Counter Motion confuses the identities of the District and the Walker River Water Users Association ("WRWUA"). The District and WRWUA are separate and distinct entities. The District issued the District's Notices. The WRWUA publishes the Walker River Advocate referred to in Mineral County's Opposition and Counter Motion as the "newsletter." See, DePaoli Affidavit at para. 26.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

County was going to send a "reminder" to all parties to whom it had mailed documents. Mineral County requested comments concerning the proposed "reminder." Id.

In the judgment of counsel for the District the proposed letter, which in effect solicited the return of waivers of personal service, was not accurate legally or factually. Therefore, counsel for Mineral County was advised of the objections of counsel for the District. DePaoli Affidavit at para. 15; Exhibit C. On April 28, 1995, counsel for the District received another facsimile from counsel for Mineral County. DePaoli Affidavit at para. 17; Exhibit D. Thereafter, District counsel heard nothing further concerning the Mineral County letter. Id.

Obviously, Mineral County believed it was appropriate for it to solicit the return of Waivers of Service from persons who it did not represent and against whom it was asserting adverse claims. Mineral County also believed it was appropriate to advise those persons on how their rights might or might not be affected by a return of the Waiver of Service. Yet, Mineral County contends that sanctions should be imposed on the District's counsel for providing legal advice to the District and on the District for providing information to its electors concerning those very same issues.

II. MINERAL COUNTY MUST COMPLETE SERVICE IN THIS MATTER IN ACCORDANCE WITH RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE AS DIRECTED IN THE SERVICE ORDER

Mineral County's Opposition states that the "threshold question to be considered" is whether the District may properly challenge service of process in this matter because the District's counsel has received copies of all documents filed by Mineral County with the Court.[8] Mineral County's Opposition at 9. This argument misses the point for two reasons. First,

---

[8]The District is one of only a few parties presently in a position to challenge the status of Mineral County's service. Parties who failed to return a Waiver of Service are not parties to this lawsuit under the Federal Rules of Civil Procedure and therefore have no reason to challenge the status of Mineral County's service.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

irrespective of who did or did not receive all of the Revised Intervention Documents, the fact remains that persons who did not return Waivers of Service have not been served and this matter cannot proceed until they are served. Cf., Mason v. Genisco Technology Corp., 960 F.2d 849, 852 (9th Cir. 1992); Worrell v. B.F. Goodrich Co., 845 F.2d 840, 841 (9th Cir. 1988). That is the only issue raised by the District's Motion to Vacate Schedule.

It is entirety proper for the District to raise the question of completion of service here. The District is a named party in docket C-125-C with a substantial interest in the outcome of this litigation. Therefore, the District has a vital interest in ensuring that Mineral County effects proper service so that all Walker River Water Claimants are properly joined in this matter and that any final judgment entered by the Court is binding on all affected persons.

The District's Motion to Vacate merely points out Mineral County's failure to comply with the Service Order. The legal effect of that non-compliance in the context of a motion to recover costs under Rule 4(d)(5) should not be decided now. As discussed below, it must be decided in the context of a motion by Mineral County to recover its costs of completing service after that service is complete.

Mineral County must complete service under the provisions of Rule 4 as ordered by this Court. The Service Order specifically required Mineral County to effect service of process in this matter as follows:

> 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-

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

> Intervention of Mineral County and Request for Waiver of Personal Service of Motions[9] 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 (emphasis added). Mineral County proceeded by requesting waivers of service in accordance with the waiver provisions of Rule 4(d), as referenced in paragraph 4 of the Service Order. Mineral County must now serve those individuals and entities who did not return the Waiver of Service under the other relevant provisions of Rule 4.

Under Rule 4(d), Mineral County's attempted service was not completed by merely mailing portions of the Revised Intervention Documents and Waiver of Service forms. As stated in the Advisory Committee comments to Rule 4, "if the waiver is not returned and filed, . . . the action will not otherwise proceed until formal service of process is effected." Cf., Mason, 960 F.2d 849; Worrell, 845 F.2d 840.

A. Mineral County's "Sufficient Notice" Argument is Irrelevant for Purposes of Determining Sufficient Service of Process in this Matter.

In Mineral County's Opposition, Mineral County argues that service of process is complete because recipients of the mailed documents were provided with "sufficient notice" of the pending action. See Mineral County's Opposition and Counter Motion at 9 - 14. Mineral County's Opposition states that:

---

[9] 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."

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 683-3000

> [c]ertainly, the recipient received 1) a Request for Waiver of Service, personally addressed to him, which terms contained therein were agreed to by all parties; 2) an Order whose wording was agreed to by all parties; and, 3) documents that indicated the nature of the action. All recipients received adequate notice as required by Rule 4.

Id. To begin with, Mineral County's mailing was neither certified, registered or made return receipt requested. Therefore, the identity of the parties who actually received documents from Mineral County by mail cannot be determined. Indeed, the Buchanan Affidavit attached to Mineral County's Opposition indicates that a number of mailings were returned by the Postal Service. See, Buchanan Affidavit at para. 6. Furthermore, the actual content of each package mailed by Mineral County cannot be verified. See, DePaoli Affidavit at para. 8.

Mineral County's position, if accepted, would stand Rule 4 on its head. It ignores the express provisions of Rule 4(d)(4). It would result in the same confusion which the 1993 amendment to the Rule 4 was intended to eliminate, i.e., the provisions do not provide for service by mail; they provide for a process by which service can be waived.

A similar issue arose in In Re Alexander Grant & Co. Litigation, 110 F.R.D. 544 (S.D. Fla. 1986). Although that case was decided under former Rule 4(c)(2)(C)(ii), its rationale applies with equal force here. There the plaintiff had mailed to 470 defendants. Only four acknowledgements were completed and returned; six mailings came back undeliverable. The court stated that, although it was likely that the remaining defendants received the mailing and knew of the litigation, mailing alone was not sufficient service under Rule 4. A plaintiff must complete personal service and if it believes it is entitled to its costs of that service, seek those costs under the applicable provisions of the Rule 4. Id. at 545.

Mineral County relies upon four cases in support of its argument that merely providing notice of the action is the equivalent of sufficient service of process under Rule 4.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 683-3000

However, none of those cases involved the application of the waiver of service provisions of Rule 4(d).

Mineral County cites Nikwei v. Ross School of Aviation, Inc., 822 F.2d 939 (10th Cir. 1987), and Sanderford v. Prudential Ins. Co. of America, 902 F.2d 897 (11th Cir. 1990), for the proposition that mere irregularities or technical omissions in the "form or content" of the service of process do not render it defective. However, Mineral County's failure to include the affidavits, exhibits and attachment in its mailing cannot be considered a "mere irregularity or technical omission." More importantly, regardless of the severity of Mineral County's omission of these documents from its mailing, under Rule 4(d) Mineral County must still complete service in accordance with Rule 4 on those parties who did not return a Waiver of Service.

Mineral County also cites Combs v. Nick Garin Trucking, 825 F.2d 437 (D.C. Cir. 1987), and Electrical Specialty Company v. Road and Ranch Supply, Inc., 967 F.2d 309 (9th Cir. 1992), to support the following propositions: (1) defendants who refuse to return waivers without good cause should bear the costs of follow up service, and (2) Rule 4 provides flexibility in serving process. While these general observations concerning Rule 4 are correct, they do not suggest that a party may be relived from completing service simply because it requested and failed to obtain a waiver of service.

B. The Fact that Defendants May Ultimately Be Represented by the Same Counsel Does Not Obviate the Need for Proper Service of Process on Each Defendant.

In its sanctions motion, Mineral County suggests that the Court may determine that Woodburn and Wedge represents all members of the District and it would be "appropriate that Woodburn and Wedge accept service for all members of" the District. Mineral County's Opposition and Counter Motion at 15. This bit of gamesmanship is created so that Mineral

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

County may continue to avoid its obligation to serve the defendants whose water rights it seeks to so drastically affect.

At this point in time Woodburn and Wedge represents only the District with regard to this matter. Whether it may later represent other defendants remains to be seen. Even if that happens, Woodburn and Wedge is not presently authorized to accept service on behalf of any defendant other than the District. See, DePaoli Affidavit at para. 27.

If Mineral County believes that this litigation may proceed in some manner that involves representative parties, the Federal Rules of Civil Procedure establish the appropriate procedures to be followed and it is Mineral County's obligation to invoke them.[10] The rules concerning representative parties are not satisfied by the mere fact that affected parties may have the same attorneys.

C. Conclusion.

Without question service is not complete. There is no basis to relieve Mineral County of its obligation to complete service. The District's Motion to Vacate should be granted.

III. RULE 4(d) PROVIDES THE SOLE AND EXCLUSIVE AUTHORITY UNDER WHICH A PARTY MAY SEEK THE RECOVERY OF COSTS OF SERVICE AS A RESULT OF FAILING TO RETURN WAIVERS OF SERVICE

Rule 4(d) sets forth the circumstances under which a party may request a waiver of service and recover costs, if the requested waiver of service is not returned. Mineral County's mailing and its request for costs must be measured by the requirements of that Rule and not under provisions wholly unrelated to and never intended to deal with the issues at hand.

In applicable part, Rule 4(d) provides:

---

[10] In order to avoid any misunderstanding about the District's position on whether this matter is susceptible to a defendants' class action, Mineral County should be advised that the District does not believe that the applicable requirements of Rule 23 can be satisfied here.

> (2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons.
>
> . . .
>
> If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.
>
> . . .
>
> (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

Fed.R.Civ.P. 4(d). Those provisions and the Notes of the Advisory Committee make a number of points clear.

First, under the Rule as amended and prior to amendment, it is clear that service is <u>not</u> effected unless the waiver is returned and filed. Rule 4(d)(4) expressly provides:

> (4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

In part, the Advisory Committee Note states:

> Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. *E.g., Morse v. Elmira Country Club,* 752 F.2d 35 (2d Cir. 1984). *Cf. Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980).

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 683-3000

> The provisions in former subdivision (c)(2)(C)(ii) of this rule may have been misleading to some parties. Some plaintiffs, not reading the rule carefully, supposed that receipt by the defendant of the mailed complaint had the effect both of establishing the jurisdiction of the court over the defendant's person and of tolling the statute of limitations in actions in which service of the summons is required to toll the limitations period. The revised rule is clear that, if the waiver is not returned and filed, the limitations period under such a law is not tolled and the action will not otherwise proceed until formal service of process is effected.

See also, Mason, 960 F.2d 849; Worrell, 845 F.2d 840.

Second, costs may not be imposed on a defendant who has failed to return a waiver if the defendant had "good cause" for the failure. Under the applicable provisions of Rule 4(d), the "good cause" inquiry necessarily is one which examines individually for each person or entity the reasons that person or entity failed to return a waiver of service. When and if the Court conducts an inquiry in this matter, it may then consider whether Mineral County's unilateral decision to not comply with the Service Order was good cause for failing to return a Waiver of Service and whether there were any other reasons that a particular person or entity did not return it.

For example, perhaps some persons did not receive the mailing. See, Buchanan Affidavit at para. 6; Henry v. Glaize Maryland Orchards, Inc., 110 F.R.D. 589, 590 (D.Md. 1984). Perhaps the package which some received was not understandable.[11] Perhaps some persons or entities were not subject to the Rule at all or the notice to that entity did not comply with the requirements of the Rule. See, Capitol Hardware Manufacturing Co., Inc. v. Natco, Inc., 707 F.Supp. 374, 375-76 (N.D.Ill. 1989). For example, the provisions of Rule 4(d) do not apply to infants or incompetents, to the United States, its agencies, corporations and officers or

[11] Mineral County duplex copied the documents it served. As a result documents which individually might be clear may have been extremely confusing.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

to foreign, state or local governments. See Rule 4(d)(2); Rule 4(g), (i) and (j). Thus, the mailings by Mineral County to entities like the California Department of Fish and Game, Lyon County, Nevada Department of Wildlife, California Department of Parks and United States Bureau of Indian Affairs are wholly ineffective because Rule 4(d) simply does not apply to those entities. Id.

Rule 4(d)(2)(A) requires that a notice and request to a corporation, partnership or other unincorporated association subject to service under Rule 4(h) be addressed to "an officer or managing agent or general agent (or other agent authorized by appointment or law to receive service of process)." In situations too numerous to list here, Mineral County's mailing to corporations, partnerships and other unincorporated associations did not satisfy the requirements of Rule 4(d)(2)(A).

Third, the costs to be imposed are not the costs of the initial mailing. That initial mailing provides the essential foundation for a party to contend that a defendant has not complied with his duty to save costs of service. It is a cost which must be incurred if a party chooses to seek a waiver of service. The costs to be imposed are those "subsequently incurred in effecting service on the defendant." See Rule 4(d)(2); Rule 4(d)(5). Therefore, not only has Mineral County not incurred the only costs recoverable under Rule 4(d), it seeks to entirely avoid incurring those costs.

Thus, in the context of the Rule which deals expressly with the question of the recovery of costs incurred as a result of a failure to return a waiver of service not excused by good cause, Mineral County's Motion for Sanctions is premature and wholly without merit. Mineral County must proceed by effecting service under the other applicable provisions of Rule 4. Those provisions require personal service of the Revised Intervention Documents. Subsequent to that service, Mineral County may file a motion to recover costs of the personal service and

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

costs and attorney's fees incurred in filing the motion. Mineral County cannot recover the cost of its mailings.[12]

Moreover, in the context of its present motion, Mineral County in effect asks this Court to draw two conclusions. First, that persons who failed to return waivers cannot show good cause for that failure. There is no direct evidence which suggests that the District's Notices were the sole reason that waivers were not returned. As a matter of fact the Buchanan Affidavit demonstrates that substantially more waivers were returned after the District Notices than before. Buchanan Affidavit at para. 7. In a somewhat analogous situation, involving service by mail on water right holders on the Newlands Project, similar return results were experienced in the absence of the issuance of notices asking individuals to not return waivers. DePaoli Affidavit at 18. As has been established above, there may be many reasons which constitute good cause for a defendant's failure to return waivers. That issue must be explored one defendant at a time.

Finally, it is absolutely clear that Mineral County's failure to comply with the Service Order is good cause for not returning a waiver of service. Mineral County's failure to include documents essential to respond to the matters initially before the Court, the Motion to Intervene and the Motion for Preliminary Injunction, is analogous to a mailing in an ordinary case which did not include a copy of the complaint as required by Rule 4(d)(2)(C).[13] Surely costs could

---

[12] It is clear that Mineral County incurred unnecessary mailing and copying expenses by mailing multiple copies of the same documents to the same person.

[13] Mineral County's assertion that the Service Order required that it only send the "complaint-in-intervention" and that everything else it sent was gratuitous is incredible. Mineral County's Opposition and Counter Motion at pgs. 9-10. Mineral County relies on paragraph 2 of the Service Order for this assertion. That paragraph allowed Mineral County 30 days to revise its filing. It designated all such documents, including "any other supporting documents which Mineral County may choose to file" as the "Mineral County Intervention Documents." Paragraph 3 of the Service Order required Mineral County to serve the "Mineral County

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

not be imposed where a mailing did not comply with the express requirements of the Rule; similarly they should not be imposed where the mailing fails to comply with a special order issued by the court with respect to service.

IV. THE MOTION FOR SANCTIONS FAILS TO STATE ANY LEGAL OR FACTUAL BASIS FOR IMPOSING SANCTIONS ON ANY INDIVIDUAL OR ENTITY IN THIS MATTER

A. Background.

The Motion for Sanctions asks this Court to impose sanctions against the District, its board of directors, Woodburn and Wedge and several individuals for their alleged interference with, and frustration of, Mineral County's attempted service of the Revised Motion to Intervene. The Motion for Sanctions fails to offer any legal or factual basis for this Court to impose sanctions in this matter. In effect, the Motion for Sanctions is Mineral County's attempt to avoid costs which it must incur to maintain its asserted claims and it ignores several important facts.

First, it was Mineral County who decided to seek waivers of service of the Revised Intervention Documents under the waiver provisions contained in Rule 4(d). More importantly, it was Mineral County who unilaterally decided not to follow the Service Order by excluding the affidavits, exhibits and attachments in an effort to reduce its costs.[14] If Mineral County wanted to reduce its costs in connection with its mailing, it could have drafted the Original Intervention Documents in a more concise manner with fewer affidavits, exhibits

---

Intervention Documents" not merely the proposed Complaint-in-Intervention.

[14] Mineral County included a notice in its mailing stating that the "exhibits referred to in the pleadings of Mineral County are available for review at" any one of four locations. Mineral County's mailings occurred on or about April 11, 12, and 18, 1995. See Mineral County's Opposition and Counter Motion at 3. However, these "exhibits" were not received by the Lyon County Library, one of the four locations listed, until April 18 or 19, 1995. See DePaoli Affidavit at para. 24.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 638-3000

and attachments. Mineral County had a second opportunity to reduce the size of these documents when it filed the Revised Intervention Documents. Mineral County not only failed to take advantage of that opportunity, it added to its costs by adding additional documents.

Mineral County now asks the Court to impose sanctions in an effort to recover costs related to its unilateral decisions. Through the Motion for Sanctions, Mineral County attempts to "shift" the costs of effecting proper service in accordance with the Service Order.

The Motion for Sanctions places great emphasis on the fact that the District did not file a motion or choose some other method, besides the District's Notices,[15] to inform Mineral County of its failure to comply. However, the District and the District's legal counsel had no obligation to inform Mineral County of its failure to adhere to the provisions of the Service Order. The District's legal counsel justifiably assumed that the mailings were complete by the time the District's first Notice was prepared. DePaoli Affidavit to para. 10. The Service Order clearly states that Mineral County "shall serve Mineral County's Intervention Documents" which include the exhibits, affidavits and attachments relied upon by Mineral County. See Service Order at paragraphs 2 and 3. Moreover, by the time the District's legal counsel provided advice to the District and the District provided final information to its electors, Mineral County had completed all of its mailings.[16]

B. Rules 11, 26(g), 37(b) and 56(g) Provide No Basis For Sanctions Here.

Mineral County relies upon Rules 11, 26(g), 37(b) and 56(g) of the Federal Rules

---

[15] The Motion for Sanctions attributes information in the Walker River Advocate to the District. However, that publication is prepared by the Walker River Water Users Association an entity separate from the District. DePaoli Affidavit at para. 26.

[16] The Affidavit of Louis D. Thompson states that he "personally" received copies of the District Notices. However, he does not say whether he received the first notice before the last mailing on April 18, 1995. Thompson Affidavit at para. 5.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

of Civil Procedure as a basis for the imposition of sanctions. Rule 11 applies exclusively to pleadings, written motions and other papers filed with or submitted to the Court. See Advisory Committee Notes, 1993 Amendment to Rule 11. Therefore, because the Motion for Sanctions is based on the District's Notices, which were not submitted to the Court, Rule 11 does not apply.

Furthermore, Rule 11 specifically requires that "[a] motion for sanctions under this rule shall be made separately from other motions or requests." Fed.R.Civ.P. 11(c)(1)(A). Therefore, Mineral County cannot base its Motion for Sanctions on Rule 11 because it was combined with Mineral County's Opposition.

Rules 26(g) and 37(b) address sanctions in the context of discovery proceedings and therefore do not apply under the circumstances presented here. Likewise, Rule 56(g) applies to sanctions in the context of affidavits filed in support of motions for summary judgment and is therefore inapplicable.

C. Sanctions Cannot be Imposed Under 28 U.S.C. § 1927.

Mineral County also relies on 28 U.S.C. § 1927. That section is specifically limited to attorney misconduct. Lockary v. Kayfetz, 974 F.2d 1166, 1170 (9th Cir. 1992), cert. denied, Pacific Legal Found. v. Kayfetz, 113 S. Ct. 2399 (1993). Thus, by definition, section 1927 cannot apply to Mineral County's request for sanctions against any person who is not an attorney.

28 U.S.C. §1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Assuming for the sake of argument, that by providing advice to the District, its attorney can be said to have "multiplied the proceedings unreasonably and vexatiously," the sanctions which can be imposed are the "excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Again Mineral County's motion is without merit.

First, Mineral County seeks recovery of the costs and expenses of its mailing. Those costs and expenses were incurred before and not because of any conduct on the part of the District's counsel. They may not be recovered under 28 U.S.C. §1927. Cf., United States v. Blodgett, 709 F.2d 608, 610-611 (9th Cir. 1983); United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1347-48 (9th Cir. 1985).

Second, the excess costs and expenses which logically result from failures to return waivers of service are the precise expenses provided for in Rule 4(d)(5). Those are costs and expenses which Mineral County has not incurred and by its motion seeks never to incur. When and if Mineral County incurs those expenses it may seek to recover them under Rule 4(d)(5).

Moreover, the provisions of 28 U.S.C. §1927 do not apply to the conduct of the District's counsel here. Under that section sanctions may be imposed only when an attorney both (1) multiplies the proceedings and (2) does so in a vexatious and unreasonable fashion. Overnite Transp. Co. v. Chicago Indus. Tire Co., 697 F.2d 789, 794 (9th Cir. 1983). In addition, the imposition of liability under this statute requires a finding that an attorney has acted "recklessly or in bad faith." United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1346 (9th Cir. 1985) (quoting United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983), and Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982).

The Motion for Sanctions erroneously cites Baker Indus., Inc. v. Cerberus Limited, 764 F.2d 204 (3d Cir. 1985), and In re Peoro, 793 F.2d 1048 (9th Cir. 1986), to

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

support the conclusion that a finding of "bad faith" is unnecessary for the imposition of sanctions under 28 U.S.C. § 1927. In Baker, the district court did not make an explicit finding of bad faith by using the words "bad faith" in its decision. However, the Baker Court concluded "that before attorney's fees and costs may be taxed under section 1927, there must be a finding of willful bad faith on the part of the offending attorney." Id. at 209. Therefore, the Baker Court upheld the imposition of sanctions because it was:

> clearly evident from the district court's expressions and from the record as a whole, that the district court found, albeit implicitly, [the attorney's] conduct to be in bad faith. While it is far preferable for the district court to make express findings, rather than remit us to a review of the record, we are convinced from our independent review of the record that the district court's expressions are sufficient to constitute findings satisfying the willfulness and bad faith requirements for an assessment of costs and fees under section 1927.

Id. 209.

More importantly, the Ninth Circuit adopted a similar approach in the Peoro case. In Peoro, an attorney argued for the reversal of an award of sanctions under 28 U.S.C. § 1927 based on the district court's failure to make express findings of bad faith. The Peoro Court first acknowledged "that a finding of bad faith is usually necessary to support an award of attorneys' fees under 28 U.S.C. § 1927." Peoro, 793 F.2d at 1051. The Peoro Court then reviewed the content of the district court's findings and concluded as follows:

> [a]dmittedly, these findings do not include the words "bad faith." But these words are not talismans required for affirmance. We have affirmed awards that did not contain the words "bad faith." [citation omitted].
>
> We think the statements "undoubtedly unmeritorious" and "vexatious litigation which has unreasonably increased the costs and multiplied the proceedings in this court," made after full hearings [and included in the court's findings], are sufficient.

Id. Based on this holding, and contrary to Mineral County's assertion in the Motion for

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Sanctions, it is clear that a court must make an explicit or implicit finding of bad faith to support an award of sanctions under section 1927.

The conduct of the District's counsel has not multiplied these proceedings. As the court noted in Overnite, section 1927 was intended to deal with actions taken to needlessly delay ongoing litigation. Assuming, this matter can be considered "ongoing" litigation before service of process is complete, it is not needlessly delayed by requiring compliance with the Service Order. If there has been needless delay, it arises from Mineral County's unilateral decision to not include all of the "Mineral County Intervention Documents" with its mailing. If the proceedings have been multiplied, they have been multiplied by a patently meritless motion for sanctions.

Conduct is not reckless, in bad faith or vexatious if there is a legal basis for it, even if it is later found to be legally incorrect. Overnite, 697 F.2d at 795. Without question the Service Order provides a legal basis for the conclusion that Mineral County was required to include all of the "Mineral County Intervention Documents" with its mailing. Service Order paras. 2 and 3. It is also reasonable to conclude that by executing and returning a waiver of service a defendant would have waived the right to require Mineral County to provide the documents not mailed. There is solid legal basis to believe that Mineral County's noncompliance with the Service Order is good cause for not returning a Waiver of Service. Therefore, it was not bad faith or reckless or vexatious for the District's counsel to so advise the District for the purpose of responding to inquiries from water users who are the constituents to whom the District and its staff are legally responsible.

D. THE COURT SHOULD NOT IMPOSE SANCTIONS UNDER ITS INHERENT POWER TO SANCTION LITIGANTS OR ATTORNEYS FOR BAD FAITH CONDUCT

Mineral County also asks the Court to impose sanctions under its inherent power

to sanction litigants or attorneys for bad-faith conduct. Courts may impose sanctions under their inherent power when "counsel has willfully abused the judicial process or otherwise conducted litigation in bad faith." Stitt v. Williams, 919 F.2d 516, 531 (9th Cir. 1990). However, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991). Like the imposition of sanctions under 28 U.S.C. § 1927, a specific finding of bad faith must precede any sanction imposed under a court's inherent power. United States v. Stoneberger, 805 F.2d 1391, 1393 (9th Cir. 1986).

The Supreme Court's decision in Chambers provides a good example of "bad faith conduct" that warrants the imposition of sanctions under a federal court's inherent powers. Chambers, the owner of a television station, breached his agreement to sell the station's facilities and broadcast license to a corporation, NASCO. On the day before NASCO filed suit for specific performance, Chambers and his attorney, Gray, attempted to place the television station property beyond the court's jurisdiction by manufacturing the sale of the property to a trust created by Chambers and Gray. Gray then intentionally withheld information from the court concerning the transfer to the trust despite the court's inquiry regarding any sales to third parties.

In addition to his attempt to deprive the court of jurisdiction through fraud, the district court also found that Chambers had violated its preliminary injunctions, filed numerous false and frivolous pleadings, and attempted other tactics involving delay, oppression, harassment and massive expense. Based on these actions, the District Court imposed sanctions against Chambers under its inherent powers in the form of attorney's fees and expenses totaling $996,644.65. The Court of Appeals upheld the District Court's imposition of sanctions and the Supreme Court affirmed by finding that Chambers' "entire course of conduct throughout the

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 683-3000

lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court." Id. at 51.

Mineral County cannot seriously maintain that "bad faith conduct," necessary for the court to impose sanctions under its inherent power or 28 U.S.C. § 1927, was engaged in with regard to the issuance of the District's Notices. To the contrary, the issuance of the District's Notices became necessary as a result of the circumstances created by Mineral County. It was Mineral County who chose to unilaterally disobey the Service Order by excluding the affidavits, exhibits and attachments in an attempt to save costs connected with service. The District had no alternative except to respond to inquiries of its electors based upon the facts as created by Mineral County and in accordance with the law. Clearly, the District's notification was made necessary by Mineral County's actions and cannot be classified as "bad faith conduct."

Finally, in its effort to establish bad faith, Mineral County makes the unsupported statement that "[a]n indication of bad faith can be found when the acts violated the Code of Professional Responsibility." Mineral County's Opposition and Counter Motion at 17. The Motion for Sanctions then alleges violations of the Model Rules of Professional Conduct, specifically rules 3.2, 4.3, 3.5 and 8.4.[17]

To begin with, it is difficult to understand the applicability of rules 3.5 and 8.4 with regard to the particular circumstances present in this matter. Rule 3.5 is entitled "Impartiality and Decorum of the Tribunal" and addresses the exercise of improper influence upon, or conduct intended to disrupt, a tribunal. The section of Rule 8.4 relied upon by Mineral

---

[17] Although Mineral County apparently cites to the Model Rules of Professional Conduct, practice before this Court is governed by "the Code of Professional Responsibility and the Model Rules of Professional Conduct as such may be adopted from time to time by the Supreme Court of Nevada except as such may be modified by this court." LRIA 10-7. Therefore, the Nevada Rules of Professional Conduct comprise the appropriate legal authority in this area.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

County prohibits conduct prejudicial to the administration of justice. Possibly, Mineral County contends that the District's counsel engaged in conduct that violated rules 3.5 and 8.4 by somehow frustrating the intent of the Service Order. However, if any party frustrated the intent of the Service Order it was Mineral County through its decision to violate that order by failing to serve all of the necessary documents. The District's counsel merely advised the District with regard to the legal consequences of Mineral County's non-compliance.

The Motion for Sanctions also alleges a violation of rule 3.2 which requires an attorney to "make reasonable efforts to expedite litigation consistent with the interests of the client." Contrary to Mineral County's assertions, the District's counsel fully complied with Rule 3.2 by advising the District concerning Mineral County's defective mailing and by filing the Motion to Vacate Schedule. Clearly, an attorney is not required to give a client bad advice simply to expedite litigation. Moreover, absent the filing of the Motion to Vacate Schedule, this litigation would have been further delayed at some point in time after responses to Mineral County's Motion to Intervene were originally due. At that time, when Mineral County finally served the Revised Intervention Documents in accordance with the Service Order, numerous additional parties would have been entitled to file responses. These proceedings would have been further delayed and any order entered by the Court in the interim would have been subject to challenge or reconsideration.

Finally, the Motion to Intervene alleges a violation of Rule 4.3 entitled "Dealing with Unrepresented Person". Rule 4.3 states that:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Rule 4.3 is directed at prohibiting a lawyer from misleading unrepresented persons with regard to that lawyer's role in a matter.

Apparently, the alleged violation of Rule 4.3 offered by Mineral County is based on the content of the District's Notices directed to its constituents. However, nothing in the District's Notices misrepresented the role of the District's attorney as legal counsel to the District with regard to this matter. As stated above, the District's Notices informed the electors that they may want to consult their own attorneys concerning the content of Mineral County's mailing. The statement clarifies the attorney's role as the District's legal counsel with regard to Mineral County's attempt to intervene in this matter.

V. CONCLUSION

The Court should not permit Mineral County to "shift" the costs of proper service to the District or any other person through its Motion for Sanctions. The Motion for Sanctions is unfounded both in fact and law and is merely a further attempt by Mineral County to avoid the costs related to service of the Revised Intervention Documents.

Mineral County should be held accountable for the decisions it made with regard to service of the Revised Intervention Documents. Mineral County decided to seek waivers of service under the waiver provisions of Rule 4(d). Mineral County also decided to attempt to save costs related to that service by excluding the affidavits, exhibits and attachments from the mailing in direct violation of the Service Order.

The Court must require Mineral County to complete service by personal service on those individuals and entities who failed to return a Waiver of Service. The costs related to personal service must be paid for by Mineral County in accordance with Rule 4. Subsequent to personally serving the Mineral County Intervention Documents, Mineral County may move to tax the costs of personal service on those individuals who failed to return a Waiver of Service.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

Without question the schedule for serving responses to Mineral County's Motion to Intervene must be vacated. A new date must be established for completion of service and if Mineral County fails to meet it, its Motion to Intervene should be summarily denied. A new schedule should be established for responses to the Motion to Intervene. In its Motion to Vacate Schedule the District suggested a schedule consistent with the time frames in the original schedule, i.e., 60 days after completion of service. However, the District has no objection to a shorter schedule, i.e., 30 days after completion of service.

DATED this 25th day of July, 1995.

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

By Gordon H. DePaoli
GORDON H. DePAOLI
Attorney for the Walker River
Irrigation District

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000

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 A

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:

Shirley A. Smith
Asst. U.S. Attorney
100 W. Liberty St., #600
Reno, Nevada 89509

Richard R. Greenfield
Dept. of the Interior
Two North Central Ave., #500
Phoenix, AZ 85004

George Benesch
Benesch & Fermoile
P.O. Box 3197
Reno, NV 89505

Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

Jim Weishaupt, General Manager
WRID
P.O. Box 820
Yerington, NV 89447

R. Michael Turnipseed, P.E.
Division of Water Resources
State of Nevada
123 West Nye Lane
Carson City, NV 89710

James T. Markle
State Water Resources
Control Board
P.O. Box 100
Sacramento, CA 95814

Scott McElroy
Greene, Meyer & McElroy
1007 Pearl Street
Boulder, CO 80302

John Kramer
Dept. of Water Resources
1416 Ninth Street
Sacramento, CA 95814

David Moser, Esq.
McCutchen, Doyle, Brown &
Enerson
Three Embarcadero Center
San Francisco, CA 94111

Richard E. Olson, Jr.
Claassen and Olson
P.O. Box 2101
Carson City, NV 89702

John P. Lange
Land and Natural Resources
Federal Bldg., Dr. 3607
999 18th Street, Ste. 945
Denver, CO 80202

Ross E. deLipkau
P.O. Box 2790
Reno, Nevada 89505

Roger Johnson
Water Resources Control Board
State of California
P.O. Box 2000
Sacramento, CA 95810

Garry Stone
290 South Arlington
Reno, NV 89510

Linda Bowman
Vargas & Bartlett
P.O. Box 281
Reno, Nevada 89504

Susan Joseph-Taylor
Deputy Attorney General
State of Nevada
198 So. Carson Street
Carson City, Nevada 89710

Jim Spoo
Zeh, Polaha, Spoo & Hearne
575 Forest Street
Reno, Nevada 89509

Mary Hackenbracht
Deputy Attorney General
State of California
2101 Webster Street
Oakland, CA 94612-3049

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

DATED this 25th day of July, 1995.

WOODBURN AND WEDGE
ATTORNEYS
ONE EAST FIRST STREET
RENO, NEVADA 89501
(702) 688-3000