JAMES SPOO, ESQ.
TREVA J. HEARNE, ESQ.
ZEH, POLAHA, SPOO & HEARNE
575 Forest Street
Reno, Nevada 89509
Telephone: (702) 323-5700

Attorneys for Plaintiff-Intervenor
MINERAL COUNTY

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-C-ECR **MINERAL COUNTY'S POINTS AND AUTHORITIES IN REPLY TO WRID'S RESPONSE AND REQUEST FOR HEARING**

INTRODUCTION

This reply serves as a reply to the Points and Authorities filed by the Walker River Irrigation District, but makes no response to the letter filed by Stewart Somach, who does not represent any party presently in this case.

I

RETURNING WAIVER OF SERVICE DOES NOT WAIVE RIGHTS OF A RECIPIENT TO FILE CHALLENGES TO SUFFICIENCY OF PROCESS UNDER FRCP 12(b)(4)

The response of the Walker River Irrigation District

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(WRID) fails to state the premise of law that supports its argument that the recipients of the Waiver of Service, by the act of executing and returning that waiver have given up rights to challenge sufficiency of service (Affidavit of DePaoli, P. 4, L. 1, 2). No premise of law supports that statement. On the contrary, it is quite clear that a challenge to sufficiency of process is filed as a Motion under FRCP 12(b)(4) prior to filing the Answer or simultaneous with filing the answer.

> To clear up any misconception on the part of plaintiff, it should be made clear that it was not necessary for defendants to object to jurisdiction and service of process prior to their Answer.
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> U.S. v. Marple Community Record, Inc., 335 F.Supp. 95, 100, 101 (E.D.Pa.1971). Also see O'Brien v. O'Brien, 998 F.2d 1394 (7th Cir. 1992).

The very legal analysis upon which the WRID counsel advised the water rights holders of the Walker River to not return the Waiver of Service to Mineral County was incorrect and ill-advised. WRID counsel is a learned and well-experienced counsel and would not have overlooked the rights of defendants to challenge sufficiency of process under FRCP 12(b)4. This lends further weight to the argument that the interference in service by WRID was purposely done to delay these proceedings and to cause Mineral County exorbitant costs, thereby, foreclosing it of a right to pursue the merits of its claim. Mineral County believes that this supports its argument that sanctions should be imposed

and that WRID et al.[1]/ should be made to complete the service upon the water rights holders in this matter.

Mineral County cannot conceive of a scenario where it can accomplish effective service given the description of it by WRID et al.: **"Mineral County has begun the attack"** and **"Today the dreams of our forefathers (and your water rights). . . are being threatened by Mineral County."** (See, Affidavit of Louis Thompson, Attachment). The water rights holders who received this sensationalized newsletter sent by WRID et al, will, no doubt, be reticent to accept service from Mineral County by any means.

The harm was done by WRID. The remedy is for WRID to be required to accomplish service. The Tribe has yet to begin its service, perhaps, WRID can now assist them since the newsletter poisoned the service waters for them as well. WRID, whether it has shared such with Mineral County or not, no doubt, has an up-to-date list of water rights holders on the Walker River for assessment purposes.[2]/ Even if WRID counsel is not authorized to accept service on behalf of the Walker River water rights holders (Affidavit of Depaoli, pp. 6-7, Lns. 17-21, 1),

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1/ Once again Mineral County states that it does not know without further discovery and hearing which entity WRID or the Walker River Users Group acted to frustrate its attempts to serve the water rights holders on the Walker River, but would refer to all those involved as WRID et al.

2/ Mineral County believed that if different addresses and different water rights were attributable to the same person or entity then each address had to be served, and since WRID has alleged duplication of service then all of those duplications can be sorted out with the special knowledge available to WRID as revealed by WRID counsel. (WRID Reply, pages 7-8, Footnote).

WRID certainly has access to those persons and entities for making effective service upon them.

II

THE PURPOSE OF SERVICE IS TO PROVIDE THE DEFENDANT WITH REASONABLE NOTICE THAT A LAWSUIT IS PENDING

Likewise, WRID has stated that the service of documents by Mineral County were not sufficient upon which the recipients could formulate an answer. WRID maintains that the affidavits supporting the Preliminary Injunction and the Motion for Intervention were documents critical to understanding the basis of the claims against the defendants. No law was cited to support this contention either.

Moreover, additional documents filed with the complaint and summons was challenged recently on grounds of insufficiency of process. The challenger stated that because of the confusion that arose with the service of so many documents, the intent of the Rule to give notice of the claims against the defendant was compromised. In the particular instance the Court denied the challenge stating that the documents filed in addition to the complaint were mere surplusage.

> . . . the argument that service of process was ineffective because the defendants were served with copies of the two pending amended complaints as well as the original complaint is without merit. The defendants were in fact served with the filed complaint which is <u>what Rule 4 requires</u>. Nothing in Rule 4 mandates that surplusage material served with the complaint and summons renders the service of

process invalid. (Emphasis Added.)

Inter-City Products Corp. v. Willey, 149 F.R.D. 563, 569 (M.D.Tenn. 1993).

Mineral County had feared that service of so many documents would confuse the recipients. A considerably relied upon treatise states that the complaint and summons must advise the defendant of a statement of the facts, nature or object of action and amount demanded. "Process," 62B Am Jur 2d 811 (Section 93). The only case that recently upheld an insufficiency of process was when a plaintiff served the defendant with a draft of the filed complaint which lacked seven pages and thus failed to serve the defendant with the filed complaint. West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990). Mineral County believes contrary to WRID's allegation that all packets contained the Complaint-in-Intervention, the essential element required by Rule 4 and the Order of this Court. (See, Affidavit of Kel Buchanan).[3]

This research done by Mineral County prior to service did alert Mineral County to the problem of filing too many documents and causing confusion. It is clear that the complaint must be the complaint filed in the matter. It is not clear, however, how many other documents can be filed at the same time before the

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[3] Paragraph 4 of the Court's Order is clear - "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 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 and the attached Waiver of Personal Service of Order, Motions". P. 3 (Emphasis Added).

requirements of Rule 4 are clouded. Contrary to the allegations of WRID, research indicates that fewer documents filed, as long as the essential elements of Rule 4 are met, is preferred by the Rule. The purpose of the Rule is to give notice that a lawsuit is pending, not to confuse the recipient of service with thousands of pages of filed court documents. WRID can cite no premise of law that these Rule 4 Waiver of Service documents are intended to give defendants all information neede3d to file an Answer.

III

THE COURT CAN DETERMINE THE SERVICE NULL BECAUSE OF THE INTERFERENCE OF WRID ET AL, AND ORDER SERVICE BY OTHER MEANS

The Ninth Circuit has indicated that if mail service under Rule 4(c)(2)(C)(ii) is "ineffective, then the party making service should be free to treat the attempt as null." Electrical Specialty v. Road and Ranch Supply, 967 F.2d 309, 313 (9th Cir. 1992). Under the circumstances the most important issue is how to accomplish effective service on the water rights holders of the Walker River now that the initial service has been so tainted by WRID et al. Since the 9th Circuit has endorsed alternative service if the Rule 4(c)(2)(C)(ii) service is ineffective[4]/, then the Court should again order service to be made upon the water rights holders of the Walker River. Since this double attempt at service is required by the interference of WRID et.al. for no arguable legal basis, then WRID et al should bear the expense of the Court ordered service and should compensate

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4/ The rule as enacted does not foreclose the possibility that service could also be secured by other means reasonably intended to assure actual notice. Electrical Specialty v. Road and Ranch Supply, supra, p.313, 314.

Mineral County for the interference by reimbursing Mineral County for its first service which it attempted and carried out in good faith.

Moreover, Mineral County should be reimbursed for the attorneys fees incurred by it to thwart WRID's spurious attempt to interfere in Mineral County's goal to reach a decision on its meritorious claim. It is well known to WRID that continual delays and spurious actions such as this will cause Mineral County to be unable to bear the burden of the costs of pursuing this matter and, therefore, WRID will prevail by default.

FOR THE ABOVE-STATED REASONS and those reasons stated in Mineral County's earlier response and Motion for Sanctions, Mineral County respectfully requests that this Court set oral argument so that a full airing of these matters can be heard or that the Court direct WRID to accomplish service on the water rights holders of the Walker River by the means WRID believes to be most effective within sixty (60) days of the date of the Court's Order and that Mineral County be reimbursed for its costs of service and attorney's fees by WRID and its counsel.

DATED this 4th day of August, 1995.

ZEH, POLAHA, SPOO & HEARNE
Attorneys for Plaintiff-Intervenor
MINERAL COUNTY

By _____
JAMES SPOO

By _____
TREVA J. HEARNE

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify I am an employee of ZEH, POLAHA, SPOO & HEARNE, and that I deposited for mailing, at Reno, Nevada, a true copy of ** **MINERAL COUNTY'S POINTS AND AUTHORITIES IN REPLY TO WRID'S RESPONSE AND REQUEST FOR HEARING** to:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty, #600
Reno, NV 89509

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

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

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

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

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

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

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

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

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

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

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

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

Gary Stone
290 South Arlington
Reno, NV 89510

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

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

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

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

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

Gordon H. DePaoli, Esq.
Dale E. Ferguson, Esq.
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505

this 4 day of August, 1995.

Lorraine Strickley