UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE

Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,

Defendants.

IN EQUITY NO. C-125-ECR
SUBFILE NO. C-125-C

O R D E R

The Walker River Irrigation District (WRID)'s motion to vacate schedule etc. (Doc. #24) is now ripe for decision. Mineral County opposed (Doc. #31) and a reply has been filed (Doc. #39). New issues were raised by Mineral County in the opposition (Doc. #24). WRID responded to those issues in its reply (Doc. #29) and Mineral County replied (Doc. #42).

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DISCUSSION

A. SUMMARY

Mineral County seeks to intervene in this action. The Court previously ordered Mineral County to serve its "motion to intervene" and related documents, on all claimants to the waters of the Walker River and its tributaries. Order (Doc. #19) at p. 2, ln. 24 to p. 3, ln. 11. The Court made clear that service was to be made pursuant to the requirements for service of process under Federal Rule of Civil Procedure 4. Id. at p. 2, ln. 24. The Court further indicated that service pursuant to Rule 4 included the possibility that service could be satisfied by waiver of service as provided in Rule 4(d). Id. at p. 3, ln. 12-19.

The Court was careful to note however, that if service was not waived pursuant to Rule 4(d) that personal service would be required. Id. at p. 3, ln. 20-24; see also "Notice of Motion to Intervene . . ." (attached to Doc. #19) at p. 2, ln. 14-26 and the attached statement of "Duty to Avoid Unnecessary Costs of Service" which indicate that personal service would follow any failure to waive service.

There is no pending motion to reconsider, vacate or amend the Court's order (Doc. #19) requiring service pursuant to Rule 4.

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The documents which the Court ordered to be served by Mineral County were:

> (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.

Order (Doc. #19) at p. 2, ln. 12-21.

The Court further created a schedule pursuant to which service was to be accomplished and the "motion to intervene" would be briefed.

WRID now moves the Court (Doc. #24) to vacate and amend the established schedule because Mineral County has allegedly failed to serve the required intervention documents in a timely manner. WRID argues that until a person is served with the "motion to intervene", they will not be bound and that it is pointless to require WRID and the other parties who have been served with Mineral County's "motion to intervene" to respond to it until all persons have been served. The State of Nevada joins in WRID's motion to vacate the scheduling order. (Doc. #s 25 & 29). The United States indicates it does not oppose the motion to vacate the scheduling order. (Doc. #26). The Walker River Paiute Tribe (Tribe) has filed a response which does not take any firm position with respect to the motion to vacate other than to indicate that vacating the scheduling order is the only practical avenue to take

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and that after service has been accomplished, a lengthy briefing period is not necessary. (Doc. #27).

Mineral County opposes the motion to vacate on several bases and further moves for sanctions and other relief against WRID and other individuals. (Doc. #s 31 & 42).

Mineral County seeks to be relieved of any further obligation to serve its motion to intervene. Mineral County argues that mailing the request for waiver of service gave adequate notice of its claims and desire to intervene. Furthermore, Mineral County argues that if it is required to personally serve the various intervention documents that it should be reimbursed for costs of service from WRID and certain other individuals who are allegedly responsible for the refusal of the majority of the refusals to waive service.

B. HAS MINERAL COUNTY SERVED THE INTERVENTION DOCUMENTS

Two different issues are raised by this question. First, we must determine whether the requests for waiver of service are adequate service in themselves. Second, we must determine whether the failure to serve certain attachments to the moving papers (i.e. supporting affidavits etc.) renders service ineffective.

Before analyzing these issues, the Court first addresses the issue regarding those persons who did execute and return a waiver of service. Those persons have been validly served. The request for waiver of service included a waiver of any defect in service. This waiver makes it immaterial, as to these persons,

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whether certain affidavits were not attached. Further, if those persons believe the affidavits were or are material, they are now parties to this litigation and can themselves raise this issue.

1. Service by Mailing Request for Waiver of Service

The Court first notes that service pursuant to Rule 4 is normally not required for service of intervention documents. See Rule 24. The Court nevertheless determined that service pursuant to Rule 4 was preferable for a host of reasons which were discussed at the status conference of January 3, 1995. Thus, it is this Court's order and not the technical requirements of service of process that apply. However, this Court's order (Doc. #19) made clear that service of the intervention documents was to be accomplished as though it were service of original process and summons pursuant to Rule 4. The Court's order is still in effect and has not been vacated, modified or appealed from.

It is obvious that service pursuant to Rule 4 has not been accomplished. Therefore, service of the various intervention documents as the Court ordered has not been accomplished. Mineral County has attempted only to obtain waivers of service pursuant to Rule 4(d). Some persons who received the request for waiver of service have waived service. As to those persons, service pursuant to Rule 4 and this Court's order will be accomplished by filing the waivers with the Court.

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Apparently, the large majority of persons who received the request have refused to waive service. Those persons who have not waived service of the intervention documents must be personally served as the Court indicated in its order, (Doc. #19).

Mineral County has not explicitly requested the Court to reconsider its decision and order that service of the motion to intervene be accomplished pursuant to Rule 4 rather than Rule 5. Nor has Mineral County presented any compelling reason why this Court's earlier decision and order were wrong or ought to be vacated or modified.

All that Mineral County has done is to argue that a mailed request for waiver of service gives adequate notice and that formal compliance with Rule 4 is not necessary. However, the Court ordered service to be accomplished pursuant to Rule 4 and not merely to give "adequate notice." None of Mineral County's arguments address the Court's determination that service of the intervention documents should be made pursuant to Rule 4.

Absent a motion to reconsider the Court's previous order[1] and a sufficient showing in support of such motion indicating that service of the intervention documents need not be made pursuant to Rule 4, the Court will continue to insist on service pursuant to Rule 4.

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[1]. Although not necessarily stipulated to, the Court notes that its decision to require service of the intervention documents pursuant to Rule 4 was the result of the status conference of January 3, 1995 and was largely a collaborative effort. Mineral County would have to make a compelling showing indicating that service pursuant to Rule 4 is not necessary and excusing its failure to object earlier.

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2. Failure to Include Affidavits

This issue is largely duplicative of the first. Those persons who waived service also waived any technical defect in service. Furthermore, by waiving service, those persons are adequately positioned to represent themselves and WRID will not be heard to object on their behalf.

Those persons who refused to waive service of the intervention documents have not been served at all. Therefore there is no need to decide whether failure to include certain affidavits in the request for waiver of service somehow makes otherwise valid service ineffective.

Whether certain affidavits and other supporting documents were included in the requests for waiver of service may be important in determining whether persons who refused to waive service had "good cause" for refusing to do so. If this constitutes "good cause" for refusal to waive service, then Mineral County will not be able to recover its costs of service from those persons. See Rule 4(d)(2). However, if the failure to include these affidavits and supporting documents in the request for waiver of service does not constitute "good cause" and no other "good cause" is shown, Mineral County will be entitled to recover its costs of service from those persons who refused to waive service. Id.

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It is premature to decide whether failure to include the affidavits constitutes "good cause." Until Mineral County incurs costs in personally serving any person who refused to waive service and until such person claims "good cause" for refusing to waive service, the Court sees no need to decide this issue. Certainly there is no reason to allow WRID to litigate, this issue on behalf of persons who have not yet been served with the intervention documents.

However, with respect to personal service, it will be helpful to declare at this time whether personal service will be effective if the affidavits and supporting documents are not served with the complaint in intervention (Doc. #20), points and authorities in support thereof (Doc. #21) and motion for preliminary injunction (Doc. #22). The Court has reviewed these documents and they are intelligible on their face without reference to the supporting documents. It appears to the Court that the moving documents are adequate to inform the defendant/respondents of Mineral County's claims and to enable them to respond to those claims. In light of the substantial burden Mineral County faces in personally serving the other parties it is fair and reasonable to lighten that burden where possible and without prejudice to the rights of others.

On the other hand, since Mineral County is obligated to personally serve the moving documents, the only additional expense represented by serving the supporting documents is the cost of replicating the supporting documents. Furthermore, Mineral County

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might be able to recover these costs from the persons it personally serves.

For the reasons stated above the Court concludes that the temporary additional cost of serving the supporting documents along with the moving documents is not so burdensome as to entitle Mineral County to relief. Personal service of the moving documents (Doc. #s 20, 21 & 22), the supporting documents and the Notice in Lieu of Summons properly issued by the Clerk of the Court is required in order to comply with the Court's prior order (Doc. #19).

C. MOTION TO VACATE AND AMEND SCHEDULE FOR BRIEFING MOTION TO INTERVENE

The Court agrees with WRID and the Tribe that the current briefing schedule must be modified so that all persons who have an interest in Mineral County's motion to intervene and motion for preliminary injunction will have an opportunity to respond to those motions prior to the Court's decision. Therefore, the current briefing schedule is vacated.

On or before September 29, 1995 Mineral County shall serve its Intervention Documents on all claimants to the waters of the Walker River and its ,tributaries as provided in the Court's prior order (Doc. #19) at p. 2, ln. 24 to p. 3, ln. 11 and ln. 20-24. At such time as service is complete, Mineral County shall file a statement to that effect.

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Responses to Mineral County's motion to intervene and/or its points and authorities in support of intervention (Doc. #21) shall be served no later than October 27, 1995. Mineral County's reply in support of motion to intervene shall be served no later than November 17, 1995.

No answer or other response to the complaint-in-intervention will be required until a decision by the Court on the motion to intervene and then only upon a schedule to be established by further order of the Court.

No response to the motion for preliminary injunction filed and served by Mineral County will be required until a decision by the Court on the motion to intervene and then only upon a schedule to be established by further order of the Court.

D. MOTION FOR SANCTIONS

Mineral County seeks sanctions to be imposed against WRID and others for interfering with Mineral County's request for waiver of sanctions. WRID, certain officers and directors of WRID, Mr. Gordon DePaoli, the law firm of Woodburn and Wedge and Mr. Stewart Somach are allegedly responsible for mailing certain notices to the persons from whom Mineral County was requesting waiver of service. These notices informed or requested these persons not to waive service.

Mineral County is in essence complaining that but for these notices it would have received more waivers of service and its costs would be substantially lower. As a result of these

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notices Mineral County alleges its costs of service will be increased and some amount of delay will result. On this basis Mineral County alleges the above noted persons and entities unfairly interfered with its attempt to obtain waivers of service for improper purposes (i.e. for delay), and that they violated ethical rules by giving unsolicited legal advice to unrepresented persons.

Regardless of any impropriety involved in WRID et al's conduct, each person had the right to refuse to waive service of process. Furthermore, there is no indication how many persons were persuaded not to waive service because of the notice and how many would have refused to waive service regardless of the notice.

Assuming WRID et al, acted improperly they did not cause others to act improperly. Refusing to waive service is a legal right (exercisable at peril of being responsible for ultimate costs of service).

Moreover granting Mineral County sanctions at this point in time would be counterproductive and is unwarranted. Mineral County's excess costs cannot be determined until service is completed and costs of service have been paid by either Mineral County or the persons who refused to waive service. Only the costs of service not recoverable from those who refused to waive service on the basis of the notice are "excess costs" attributable to the notice.

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Until it is determined whether failure to include the supporting documents constituted "good cause" for refusing to waive service the Court cannot determine whether refusal to waive service on the advice of WRID et al was improper. Granting sanctions now will also remove any incentive Mineral County might have to minimize costs of service.

The Court notes that if there was no good cause for refusing to waive service, but a person refused to waive service on the advice or request included in WRID's notice, that person will be liable to pay costs of service. Furthermore, that person might be entitled to argue that WRID et al should indemnify her for costs of service. This is obviously an issue that is not ready for determination at this time. It does however indicate that the proper party to seek sanctions is not Mineral County, because it can recover costs for improper refusal to waive service. Rather the proper parties to seek sanctions are those persons who refused to waive service on advice of WRID et al, IF the refusal is determined to have been without good cause.

Mineral County's motion for sanctions is denied without prejudice to its ability to recover costs of service pursuant to Rule 4(d)(5) or a later motion for sanctions made after service has been completed and Mineral County's costs of service are established.

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IT IS, THEREFORE, HEREBY ORDERED that Walker River Irrigation District's motion to vacate and amend the schedule for briefing Mineral County's motion to intervene (Doc. #24) is **GRANTED**. The previously established briefing schedule is vacated and a new briefing schedule, as set forth in this order is adopted.

IT IS FURTHER ORDERED that Mineral County's motion to be relieved of further service (Doc. #31) and motion for sanctions (Doc. #31) are **DENIED**.

DATED: Aug 16, 1995.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

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