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MINERAL COUNTY

FILED
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LANCE S. WILSON
CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al. Defendants.	Case No. CV-N-73-128-ECR (C-125-C) MOTION FOR ORDER OF PUBLICATION

Pursuant to Federal Rules of Civil Procedure 4(e), Proposed Intervenor, Mineral County, Nevada, moves the Court for an Order of Publication of Service in order to complete service, pursuant to the Court's Order requiring service of process of Mineral County's intervention papers upon the persons holding an entitlement to rights in the Walker River.

The grounds for this motion are as follows:

(a) Mineral County's service of process to water rights' holders on the Walker River was completed by February 1,

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88.

1996, pursuant to the Court's Order of November, 1995;

(b) Mineral County has exercised due diligence in finding and serving process in that Mineral County has made a good faith and extensive effort to complete service of process and has, in fact, served substantially all known water rights' holders on the Walker River; and

(c) Mineral County believes unascertained and unascertainable parties exist that may hold entitlement or water rights in the Walker River;

(d) Mineral County has expended approximately $80,000.00 in expenditures and service to accomplish service and any further expenditures to investigate and determine parties will be so financially burdensome as to foreclose Mineral County from pursuing its claim;

This motion is based upon the accompanying points and authorities, the declaration of Treva J. Hearne, counsel for Mineral County, the papers and records on file herein and the Memorandum of the Ninth Circuit Court of Appeals.

DATED this 20th day of February, 1997.

ZEH, POLAHA, SPOO & HEARNE

By _____
TREVA J. HEARNE
Attorneys for Mineral County

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POINTS AND AUTHORITIES

I

RULES PERTINENT TO SERVICE BY PUBLICATION

Pursuant to Federal Rules of Civil Procedure, Rule 4(e), service according to "the law of the State in which the district court is located . . .". The Nevada Rules of Civil Procedure further provide for publication in Rule 4(e)(1)[1]/

This Court's Order and direction affirms that the holders of entitlement to water rights on the Walker River are necessary or proper parties to this action (see Order, August 12, 1995). This case involves a property right, water rights to the Walker River.

Nevada Rules of Civil Procedure, Rule 4, provides as follows:

> (4)(e)(ii). Property. In any action which relates to, or the subject of which is, real or personal property in this state in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, herein, or in which the relief demanded consists wholly or in part of excluding such person or corporation from any interest therein, and the said defendant resides out of the state or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, the judge or justice may make an order that the service be made by the publication of summons; said service by publication shall be made in the same manner as now provided in all cases of service by publication.

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[1]/ Service by Publication is proper "when the person on whom service is to be made . . . cannot, after due diligence, be found . . .".

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II

MINERAL COUNTY'S SERVICE IS A PARTICULARLY ATTRACTIVE CANDIDATE FOR SERVICE BY PUBLICATION

Mineral County has compiled a list of water rights holders from the records of the County Recorders of the counties wherein the Walker River is located, from the records of the Watermaster, from the records of the State Engineer and from the records of the Walker River Irrigation District.

During April, 1995, request for waivers of service of process and the pleadings were served on the list of water rights holders of the Walker River (see Affidavit of Kelvin Buchanan, filed in C-125-C in August, 1995). During May and June of 1995, Walker River Irrigation District, a party herein, and Walker River Users Group, sent letters to Walker River water rights holders encouraging them not to waive service (see Affidavit of Louis Thompson, filed in C-125-C, August, 1995). A small percentage of waivers were returned (see Affidavit of Kelvin Buchanan, filed in C-125-C, August, 1995).

The Court then ordered Mineral County to personally serve several hundred persons as potential water rights holders in the Walker River by October 1, 1995 (see, Order, August, 1995). Citizens and supporters of Mineral County accomplished service on nearly four hundred (400) persons during September, 1995 (see Affidavit of James Spoo, filed in C-125-C, September 28, 1995).

On September 29, 1995, the Court granted an extension of time in which to complete service, which gave Mineral County until February 1, 1996, to complete service. Mineral County has completed service pursuant to the Court's Order prior to February

1, 1996, and filed the Proofs of Service. Mineral County, with its small budget, expended in excess of $78,000.00, for service of process in this matter, plus $10,000.00, spent by the Walker Lake Working Group. Volunteers assisted by donating more than 1000 man-hours for serving process (see Affidavit of Treva J. Hearne, filed February 1, 1996.

Certainly, state law contemplates service by publication on water rights holders. See Section 533.095 N.R.S. The notice provisions of the state law used for water adjudication are pertinent and applicable in any water rights litigation.

Mineral County has exercised due diligence to ascertain, find and serve the potential water rights holders. Mineral County has personally served a significant number of potential water rights holders. Publication, plus mailing, of service will assure that service of process is complete.

For the above-stated reasons, Mineral County, Nevada, respectfully requests that this Court issue an Order of Publication for Mineral County's intervention documents.

DATED this 20th day of February, 1997.

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By _____
TREVA J. HEARNE
Attorneys for Mineral County

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NOTICE OF MOTION

TO: All parties above named and their counsel of record:

PLEASE TAKE NOTICE that a hearing on the attached Motion for Order of Publication will be held in Department ____ of the above-entitled Court on the ____ day of _____, 1997, at the hour of _____ o'clock ___.M.

DATED this ____ day of February, 1997.

ZEH, POLAHA, SPOO & HEARNE

By _____
TREVA J. HEARNE
Attorneys for Mineral County

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of ZEH, POLAHA, SPOO & HEARNE, and that I deposited for mailing, at Reno, Nevada, a true copy of **MOTION FOR ORDER OF PUBLICATION/ NOTICE OF MOTION ** AFFIDAVIT FOR PUBLICATION OF SUMMONS ** to:**

Roger Bezayiff
Chief Deputy Water Commissioner
U.S. Board of Water Commissioners
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Yerington, NV 89447

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on the 20 day of February, 1997.

Lorraine Strickley

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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.	Case No. CV-N-73-128-ECR (C-125-C) AFFIDAVIT FOR PUBLICATION OF SUMMONS

STATE OF NEVADA)
) SS
COUNTY OF WASHOE)

TREVA J. HEARNE hereby affirms, under penalty of perjury, that the assertions of this affidavit are true;

That I am an attorney with the law firm of ZEH, POLAHA, SPOO & HEARNE, licensed to practice in the States of California and Nevada;

That I am co-counsel for Intervenor, Mineral County, in the above entitled action;

That this is an action to adjudicate the rights to the use of water from the Walker River located in California and Nevada;

That there are potentially in excess of 800 water rights holders in the Walker River.

The potential water rights holders have not been identified, live in several states, and, in some instances, are deceased;

That the affidavits filed in this action prior to this motion have recited the facts upon which Mineral County asserts that the parties to be served are unascertainable;

That these are still the facts and no act by any party or Mineral County has changed that condition or circumstance;

FURTHER, AFFIANT SAYETH NAUGHT.

TREVA J. HEARNE

Subscribed and sworn to before me this 20th day of February, 1997.

Lorraine Strickley
Notary Public

LORRAINE STRICKLEY
Notary Public - State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES JULY 31, 1997

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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.	Case No. CV-N-73-128-ECR (C-125-C) P R O P O S E D O R D E R

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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.	Case No. CV-N-73-128-ECR (C-125-C) ORDER FOR PUBLICATION OF SUMMONS

Upon reading the Motion of Intervenor, Mineral County, duly filed herein, it appears to the satisfaction of the Court, and the Court finds that certain holders of entitlements to water rights in the Walker River may be unascertainable, whereabouts unknown, identity unknown, but believed to have an interest in water rights, real property in the State of Nevada and that summons herein cannot be served upon them, and it appearing from the Motion and referenced affidavits therein, and the Court here finds, that a cause of action exists for Intervenor, Mineral County, and against holders of entitlements to water rights in the Walker River, that those holders of entitlements to the Walker River may be unascertainable, and that their addresses and names are unknown, and it further appearing that certain newspapers published in the location where the Walker River flows and

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reaches are the following:

Mineral County Independent News
501 D Street
Hawthorne, NV 89415

Mason Valley News
41 N. Main Street
Yerington, NV 89447

Nevada Appeal
P.O. Box 2288
200 Bath Street
Carson City, NV 89702

Record Courier
1503 Highway 395 N
Gardnerville, NV 89410

Reno Gazette-Journal
955 Kuenzli
Reno, NV 89502

and are most likely to give notice to the holders of entitlements to water rights in the Walker River of the pendency of this intervention.

NOW, THEREFORE, IT IS ORDERED that summons in this suit be served on the holders of entitlement to rights in the Walker River, by publication thereof in the above-named newspaper, and that said publication be made for a period of four weeks and at least once a week during said time;

IT IS FURTHER ORDERED that due service of a copy of the summons and a copy of the complaint on holders of entitlements to water rights in the Walker River, in person in the State of Nevada, shall be equivalent to complete service by publication, and that such process may be served upon holders of entitlements to water rights in the Walker River as prescribed by statute.

DATED this ____ day of _____, 1997.

_____
UNITED STATES DISTRICT JUDGE

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