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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
SUBFILE NO. C-125-C

STATE OF NEVADA'S RESPONSE TO MINERAL COUNTY'S MOTION FOR ORDER OF PUBLICATION

I.

INTRODUCTION

Mineral County, Nevada ("Mineral County") is attempting to intervene in the above-entitled action by asserting a new water right and a reallocation of the waters of the Walker River so as to establish a minimum lake level at Walker Lake.[1] By order dated March 22, 1996, this Court required Mineral County to effect personal service pursuant to Federal Rule of Civil Procedure (Rule) 4 upon all water rights holders on the Walker River.

[1]The case, United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939) was concluded with a final judgment entered on April 14, 1936, and amended on April 24, 1940.

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Despite the interlocutory nature of this Court's order, Mineral County attempted an appeal to the United States Court of Appeals for the Ninth Circuit. Following oral argument, the Ninth Circuit dismissed Mineral County's appeal for lack of jurisdiction, finding, inter alia, that the Court's March 22, 1996 order requiring Rule 4 service is interlocutory and not within an exception to the finality requirement. Although the Ninth Circuit indicated that Mineral County's proposed intervention "could" be considered eligible for publication at the appropriate time, the Court clearly stated that Mineral County's request for service by publication required a properly supported motion to the district court. See, Memorandum, No. 96-15885, February 12, 1997.[2]

Mineral County has filed a Motion for Order of Publication accompanied by an Affidavit for Publication of Summons by Treva J. Hearne, co-counsel for Mineral County. For the reasons articulated below, Mineral County has not presented this Court with a properly supported motion which complies with Nevada Rule of Civil Procedure (NRCP) 4(e)(1). Because Mineral County has not set forth the facts necessary to warrant an order allowing for service by publication, the State of Nevada respectfully submits that the County's Motion should be denied until Mineral County can present the Court with a properly supported motion.

II.

MINERAL COUNTY HAS NOT SATISFIED THE BASIC REQUIREMENTS FOR SERVICE BY PUBLICATION.

A. Mineral County Has Not Presented the Court With A List Identifying The Proper Persons To Be Served.

Federal Rule 4(e)(1) allows for service "upon an individual from whom a waiver has not been obtained and filed" according to the provisions of state law in the state where the district court is located. NRCP 4(e)(1)(ii) provides for service by publication in cases relating to property rights, including, as is the case here, water rights. The Nevada rule states, in pertinent part:

> . . . 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, therein, or in which the relief demanded consists wholly

[2] Memorandum attached as Exhibit A for the Court's convenience.

> 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. (emphasis added.)

The Nevada rule contemplates that the entity seeking to accomplish service identify the persons to be served. Mineral County has not shown by affidavit or otherwise who the defendants are. In addition, Mineral County has not demonstrated that particular defendants reside out of state, have departed from Nevada, are concealing themselves to avoid service, or cannot after due diligence be located within Nevada. Because Mineral County has not established any of these fundamental facts, the elements for service by publication contained in NRCP 4(e)(1) are not satisfied. The Court simply cannot order publication without a showing that these essential requirements are met.

In the Affidavit For Publication of Summons accompanying Mineral County's Motion, Treva Hearne states that there are "potentially in excess of 800 water rights holders" who have not been identified and are, according to the County, "unascertainable." Interestingly, Mineral County does not indicate how it arrived at the 800 figure or how it determined that these water rights holders live in several states or are deceased. Mineral County has not, by its own admission, ascertained the identity of the very persons whose water rights Mineral County would affect by its claims. Under the terms of NRCP 4(e)(1)(ii), the Court cannot allow Mineral County the relief it seeks.

B. Mineral County Has Failed to Show Due Diligence.

Mineral County has not presented the Court with a comprehensive list of water rights holders on the Walker River nor has it shown how it arrived at the conclusion that there are "potentially" over 800 water rights holders who are incapable of identification. NRCP 4(e)(1)(ii) permits service by publication when the person to be served resides out of state or cannot be found within the state after a demonstration of due diligence.

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The County has failed to identify the persons to be served and has failed to show that it has pursued the identity and whereabouts of the proper persons with any degree of due diligence. If this Court were to allow service by publication without the requisite showing of due diligence, the Court's exercise of personal jurisdiction over the unnamed water rights holders is invalid and any judgment on the merits of Mineral County's claims is void. *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1418, 906 P. 2d 258 (1995).

In *Gassett v. Snappy Car Rental*, the Nevada Supreme Court found that one visit to an old address combined with service by publication fails to constitute due diligence. Id. In another Nevada case, *Price v. Dunn*, 106 Nev. 100, 787 P. 2d 785 (1990), the Nevada Supreme Court found that even where a plaintiff technically complied with NRCP 4(e)(1)(i), the plaintiff's actual efforts did not afford the defendant his fundamental rights to due process. *Price v. Dunn*, 106 Nev. at 103, 787 P.2d at 787.

Here, Mineral County has failed to present facts which either technically or substantively comply with the publication requirement of due diligence. As grounds for its motion, Mineral County argues that it has excercised due diligence in finding and serving process upon "substantially all known water rights' holders on the Walker River" in spite of the fact that Mineral County believes unascertained and unascertainable parties exist that may hold entitlement to water rights in the Walker River. Clearly, the County's arguments are contradictory. Although it claims to have substantially complied with the Court's service order, there are either "unascertained" or "unascertainable" parties over whom the Court has no jurisdiction or even a hope of reaching through service by publication if it were allowed.

The record in these proceedings does not reveal the precise steps the County followed in identifying Walker River water rights holders. Mineral County has not prepared a list of water rights holders for the Court's approval. It has not, apparently, devoted the time and resources to the research and field investigations necessary to ascertain the water rights holders. That the County has not developed a comprehensive list does not translate into "unascertainable" defendants

or detract from Mineral County's responsibility for service as a new would-be plaintiff.

Based on the unsupported, conclusory assertions of the County, the Court has no way of determining the diligence or lack thereof of the County's efforts at service. Reliance on publication as the means of providing notice of the County's proposed intervention to a universe of "unascertained" defendants runs contrary to the requirements of due process.

The well known principle announced in *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950) states: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . .".

Where parties are ascertainable, "mere" constructive notice provided by publication is inadequate to afford due process to the water rights holders. *Continental Insurance Company v. Sister Moseley*, 100 Nev. 337, 338, 683 P.2d 20 (1984) citing *Mullane v. Central Hanover Trust Company*, 339 U. S. 306 (1950) and *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706 (1983).

III.

PUBLICATION UNDER NRS 533.095 IS INAPPLICABLE TO THIS FEDERAL ADJUDICATION WHICH HAS BEEN COMPLETE FOR SIXTY YEARS.

Counsel for Mineral County seems to be confused about the nature of this case. For some reason, the County seems to think that the adjudication of the waters of the Walker River is not complete. At page 5 of its Points and Authorities, Mineral County argues that "state law contemplates service by publication" pursuant to the provisions of NRS 533.095. As has been emphasized in prior pleadings, this case is an adjudication commenced by the United States in federal district court and completed over sixty years ago. NRS 533.095 is but one aspect of the statutory scheme for adjudications conducted by the State Engineer and is wholly inapplicable to the claims being pursued by Mineral County in this Court.

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IV.

CONCLUSION

Based on the foregoing, the State of Nevada respectfully submits that Mineral County's Motion For Order of Publication be denied until such time as the County is able to provide the Court with a motion properly supported by the facts required for service by publication.

Dated this 6th day of March, 1996.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada and that on this day, I deposited for mailing, postage prepaid, at Carson City, Nevada, true and correct copies of the foregoing document addressed to the following:

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FEB 1 1997
OFFICE OF ATTORNEY GENERAL

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 12 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff, v. WALKER RIVER IRRIGATION DISTRICT, a corporation; STATE OF NEVADA, Defendants-Appellees. v. WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor-Appellant.	No. 96-15885 D.C. No. CV-73-00128-ECR MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Argued and Submitted
February 10, 1997--San Francisco, California

Before: GOODWIN, LEAVY and THOMAS, Circuit Judges.

Mineral County, Nevada ("Mineral County" or "the County") appeals the district court's interlocutory order refusing to relieve it from its obligation to serve personally all parties whose interests could be affected by the rights its seeks in an intervention in an action dealing with water rights to the Walker River. We dismiss the appeal for lack of jurisdiction.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

EXHIBIT "A"

The Courts of Appeals generally have jurisdiction to review only "final decisions" of the district courts. 28 U.S.C. § 1291. The collateral order doctrine is a "practical construction" of this final decision rule under which certain orders that do not end the litigation on the merits are appealable on an interlocutory basis. See Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, __, 114 S. Ct. 1992, 1995, 128 L. Ed. 2d 842 (1994). The doctrine applies only to district court decisions that (1) are conclusive, (2) resolve important questions completely separate from the merits, and (3) would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. Alaska v. United States, 64 F.3d 1352, 1354 (9th Cir. 1995) (quoting Digital Equip., 511 U.S. at __, 114 S. Ct. at 1995-96).

The district court's order requiring Mineral County to serve personally all the claimants to the Walker River satisfies none of these requirements. It is not conclusive because it is incomplete--it did not address Mineral County's suggestion that it be permitted to publish notice of its proposed intervention in accordance with Nevada law in lieu of further service of process, probably because the County never made a formal motion for such relief. See Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 2d 1528 (1949) ("So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."). With a properly supported motion for service by publication, the district court very well might grant Mineral County the relief it seeks. Indeed, this case could be a

particularly attractive candidate for service by publication at the appropriate time.

Nor is the order sufficiently important to warrant immediate review--it is not "weightier than the societal interests advanced by the ordinary operation of final judgment principles." Digital Equip. Corp., 511 U.S. at __, 114 S. Ct. at 2002. When service of process is complete and whether a plaintiff should be relieved of further service are questions dependent on the facts in a particular case and subject to the discretion of the district court judge. Under these circumstances, immediate review is inappropriate. See In re Kemble, 776 F.2d 802, 806 (9th Cir. 1985); Sobol v. Heckler Congressional Comm., 709 F.2d 129, 131 (1st Cir. 1983).

Finally, the order is not "effectively unreviewable" absent an immediate appeal. It does not "involve[] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 498-99, 109 S. Ct. 1976, 1978, 104 L. Ed. 2d 548 (1989) (internal quotation marks omitted). See also Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431, 105 S. Ct. 2757, 2761, 86 L. Ed. 2d 340 (1985) (the court must determine that absent an immediate appeal, the asserted right would be "irretrievably lost"). That an erroneous ruling may result in additional litigation expense "is not sufficient to set aside the finality requirement [of § 1291]." Id. at 499, 109 S. Ct. at 1978 (quoting Richardson-Merrell, 472 U.S. at 436, 105 S. Ct. at 2764). Further, the expense of personal service is hardly "irretrievably

lost" when it can be recovered from any party that refused to waive service without good cause, see Fed. R. Civ. P. 4(d)(2), despite the County's argument that recovering such costs would be "impractical."

Mineral County urges this Court to review the district court's order because compliance with the order is sufficiently burdensome to induce the County to abandon its attempted intervention, spelling the end of this action. This argument is premature, given that the district court has yet to rule on whether to permit publication of notice.

DISMISSED