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U.S. BOARD OF WATER COMMISSIONERS

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA ,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT,

a corporation, et. al. ,

Defendant.

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

OPPOSITION TO MINERAL COUNTY'S  
MOTION FOR LEAVE TO MAKE SERVICE  
BY PUBLICATION

FILED  
CLARENCE WILSON  
DEPUTY  
MARCH 10 PM 3:26

The UNITED STATES BOARD OF WATER COMMISSIONERS (hereinafter "Water Commissioners"), by and through its legal counsel, BOWMAN & ROBINSON, hereby opposes Mineral County's Motion for Leave to Make Service By Publication on the bases that 1) Mineral County has not complied with the applicable statutes governing service by publication; and 2) to allow service by publication under the existing facts would result in a violation of the potential defendants' rights to due process of law.

INTRODUCTION

Mineral County seeks to intervene in the above-captioned action for the purpose of seeking to obtain rights to the waters of the Walker River for Walker Lake. As the waters of the Walker River

98.

1 already are appropriated fully, Mineral County necessarily will have to interfere with the rights of  
2 existing water rights holders in order to succeed under its Complaint in Intervention.

3 Now at issue before this Court is the question of what notice must be provided by Mineral  
4 County to the existing water rights holders from whom Mineral County seeks to take water rights or to  
5 obtain priority over. Mineral County has petitioned this Court to allow Mineral County to serve process  
6 upon the prospective defendants by publication.

7 The circumstances under which service may be made by publication are governed by the rules  
8 of civil procedure. The governing rules are drawn so as to protect the potential defendants' rights of due  
9 process. In the absence of strict adherence to the governing rules of civil procedure, any judgment  
10 ultimately obtained by Mineral County may be suspect as an infringement upon the due process rights  
11 of those whose property rights are effected by the judgment. To permit Mineral County to proceed  
12 without properly protecting the due process rights of the potential defendants would be a waste of the  
13 time and assets of this Court and of all of the parties.

14 Because the Water Commissioners believe that Mineral County has not demonstrated that it has  
15 complied with the requirements of the applicable rules governing service of process, and because the  
16 Water Commissioners believe that Mineral County's failure to satisfy the procedural rules will result  
17 in a violation of the due process rights of the potential defendants and could render a resulting judgment  
18 unenforceable and the administration of the Decree impossible, the Water Commissioners oppose  
19 Mineral County's Motion for Leave to Make Service by Publication.

20 ARGUMENT

21 I. MINERAL COUNTY HAS FAILED TO  
22 ESTABLISH THAT IT HAS COMPLIED  
23 WITH THE REQUIREMENTS REQUISITE  
TO OBTAINING LEAVE TO MAKE  
SERVICE BY PUBLICATION.

24 Federal Rule of Civil Procedure 4 governs the procedure for service of process. The Federal  
25 Rules do not, themselves, provide any procedure for making service by publication.

26 Fed.R. Civ. P. 4(d) concerns requests to waive service, which was the form of service initially  
27 undertaken by Mineral County in this action. Rule 4(e) sets forth other avenues for completing service.  
28 Of import to the case at bar is Rule 4(e)(1). It states in pertinent part that service upon an individual

1 from whom a waiver has not been obtained may be effected "pursuant to the law of the state in which  
2 the district court is located . . ."

3 In fact, Mineral County relies upon the Nevada Rules of Civil Procedure ("NRCP") to make the  
4 pending motion to allow service by publication. The Nevada Rules of Civil Procedure do allow for  
5 service by publication under specific circumstances. NRCP 4(e)(1)(ii), upon which Mineral County  
6 relies in its Motion, governs service by publication in actions concerning property rights, such as that  
7 which Mineral County seeks to institute. It states,

8 [i]n any action which relates to, or the subject of which is, real or  
9 personal property in this state in which such person defendant or  
10 corporation defendant has or claims a lien or interest, actual or  
11 contingent, therein, or in which the relief demanded consists wholly or  
12 in part of excluding such person or corporation from any interest therein,  
13 and the said defendant resides out 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.

14 NRCP 4(e)(1)(iii) describes the requirements governing the actual publication.

15 Thus, NRCP 4(e)(1)(ii) allows for service of publication where: 1) the subject of the litigation  
16 is real or personal property in the State of Nevada; and 2) the defendant : a) resides out of the State of  
17 Nevada; or b) has departed the State of Nevada; or c) cannot after due diligence be found in the State  
18 of Nevada; or d) conceals himself to avoid service of process.

19 A. Mineral County has failed to direct this Court to competent authority which would  
20 authorize Mineral County to accomplish service by publication upon potential defendants who hold  
21 property rights outside the State of Nevada.

22 Mineral County's proposed Amended Complaint in Intervention alleges that the proposed  
23 defendants "are all water users on the Walker River and its tributaries as set forth in the Final Decree  
24 or have statutory or regulatory authority over the allocation and protection of waters on the Walker  
25 River." (Proposed Amended Complaint in Intervention, paragraph 4). Since the Walker River and its  
26 tributaries are located in the States of Nevada and California, at least as to those potential defendants  
27 who own water rights that were decreed to the owners of real property in California, Mineral County's  
28 proposed Complaint in Intervention seeks to adjudicate real property rights which lie outside the State

1 of Nevada. Mineral County has failed to direct this Court to any legal authority which would permit  
 2 Mineral County to accomplish service by publication on those potential defendants.

3 “The statutory provisions for acquiring jurisdiction over a defendant by other than personal  
 4 service must be strictly pursued.” Foster v. Lewis, 78 Nev. 330, 332, 372 P.2d 679, 682 (1962). The  
 5 rule upon which Mineral County has relied in moving for leave to make service by publication permits  
 6 service by publication only where the subject of the adjudication relates to real or personal property in  
 7 Nevada. Mineral County’s request for leave to make service upon the potential defendants who hold  
 8 rights appurtenant to California property under NRCP 4(e)(1)(ii) must be denied.<sup>1</sup>

9 B. Mineral County has failed to demonstrate by competent evidence that the Defendants  
 10 whom Mineral County seeks to serve fall within the categories delineated in NRCP 4(e)(1)(ii).

11 NRCP 4(e)(1)(ii), the authority upon which Mineral County relies to seek leave to make service  
 12 by publication, is applicable where the “defendant resides out of the state or has departed from the state,  
 13 or cannot after due diligence be found within the state, or conceals himself to avoid service. . . .” In its  
 14 Motion, Mineral County has failed to adduce competent evidence that the defendants that it seeks to  
 15 serve by publication satisfy those requirements.

16 Mineral County states in the pending Motion that “Mineral County believes unascertained and  
 17 unascertainable parties exist that may hold entitlement or water rights in the Walker River.” (Motion  
 18 for Order of Publication; p.2, ll. 7-9). Mineral County admits that it has not even identified all of the  
 19 potential defendants. (See Hearne’s Affidavit for Publication of Summons, filed in support of the  
 20 Motion for Order of Publication stating “[t]he potential water rights holders have not been identified .

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21  
 22 <sup>1</sup> Federal Rule of Civil Procedure 4(e)(1) additionally permits a party to accomplish service  
 23 “pursuant to the law of the state . . . in which service is effected.” To that end, Mineral County might  
 24 rely upon California’s service rules to effect service upon the potential defendants who are residents of  
 25 California. However, in the pending motion, Mineral County relied solely upon the NRCP 4 as grounds  
 26 for making service on *all* of the potential defendants who have not waived service. As set forth above,  
 27 Mineral County cannot properly rely on NRCP 4(e)(1)(ii) to make service on those defendants whose  
 28 water rights are not located in the State of Nevada.

1 . . .") Mineral County's admissions in this regard in its Opening Brief to the Ninth Circuit Court of  
2 Appeals were more forthright. Therein, Mineral County asserted,

3 Mineral County has identified the existence of unascertainable parties.  
4 Whether two hundred of the parties or sixteen of the potential parties to  
5 this litigation are unascertainable is unknown to any party, but the  
6 District Court has ruled that those parties must be personally served is  
7 clear. All parties that have been identified have been served. Mineral  
County is being punished unduly for its honesty in pointing out that,  
because of flaws in the recording system in the State of Nevada, more  
parties may hold water rights in the Walker River who have not been  
found or ascertained.

8 (Exhibit A; Excerpt From Mineral County's Opening Brief).

9 Certainly, if Mineral County does not even know the identities of all of the persons or entities  
10 with whose water rights Mineral County seeks to interfere, Mineral County cannot competently attest  
11 that said potential defendants reside out of Nevada, have departed Nevada, cannot be found in Nevada,  
12 or have concealed themselves from service, as required under rule 4(e)(1)(ii).

13 Additionally, the Affidavit filed by Ms. Hearne is not competent to show that Mineral County  
14 has satisfied the requirements of NRCP 4(e) even as those potential defendants whose identities have  
15 been established by Mineral County. It merely states in a conclusory fashion that "the affidavits filed  
16 in this action prior to this motion have recited the facts upon which Mineral County asserts that the  
17 parties to be served are unascertainable." However, Ms. Hearne's affidavit does not make those  
18 affidavits exhibits to her affidavit or otherwise advise the Court as to which particular affidavits she  
19 refers. The burden of affording proper notice rests on the plaintiff. It cannot be avoided by the  
20 perfunctory judicial approval of an unsupported conclusion of 'due diligence.'" Pioneer Federal Savings  
21 Bank v. Driver, 804 P.2d 118, 122 (Ariz.App. 1990) citing Armstrong v. Manzo 380 U.S. 545 (1965).

22 Generally speaking, it appears that throughout this litigation, Mineral County has relied upon  
23 others to compile the list of Walker River water right holders and water users. Mineral County has not  
24 submitted to this Court what steps it has taken, if any, to ascertain the accuracy of lists which have been  
25 provided to it, and if inaccuracies were discovered, what steps were taken to correct them.

26 "Where other reasonable methods exist for locating the whereabouts of a defendant, plaintiff  
27 should exercise those methods [before asserting that it has used due diligence and has been unsuccessful  
28 in locating the defendant.]" Price v. Dunn, 106 Nev. 100, 103 , 787 P.2d 785, 787 (1990).

1 Because Mineral County has failed to meet its burden of proof to establish that it cannot, by the use of  
 2 due diligence, make personal service upon the potential defendants who hold water rights appurtenant  
 3 to Nevada lands, Mineral County's motion for leave to make service by publication on those potential  
 4 defendants must be denied.

5 Finally, there is a whole category of potential defendants whom Mineral County has identified  
 6 and has requested to waive personal service. Some have refused to do so. As to those potential  
 7 defendants, there are many for whom Mineral County has an address within the State of Nevada.  
 8 Mineral County cannot, in good faith, contend that those persons fall within the category of defendant  
 9 contemplated by NRCP 4(e)(ii).

10 II. TO PERMIT SERVICE BY PUBLICATION UNDER THE  
 11 FACTS PRESENTED TO THIS COURT WOULD RESULT  
 12 IN A DENIAL OF DUE PROCESS TO THE POTENTIAL  
 DEFENDANTS AND COULD RESULT IN AN UNEN-  
 FORCIBLE JUDGMENT.

13 The fact that Mineral County seeks to use service by publication to provide notice to potential  
 14 Defendants who have not even been identified by Mineral County is highly contradictory to the concept  
 15 of fundamental due process. If allowed to proceed in this manner, Mineral County would eventually  
 16 ask this Court to take away the water rights of unidentified persons or entities and award them to Mineral  
 17 County. This begs the obvious question: How can the Court transfer rights to Mineral County without  
 18 first ascertaining who now owns those rights, and establishing that the rights which Mineral County  
 19 seeks to abrogate actually exist?

20 "It is axiomatic that service of process is a fundamental requirement of due process of law . . .  
 21 and personal service is preferred to constructive service by publication." Hustance v. Kapuni, 718 P.2d  
 22 1109, 1114 (Haw.App. 1986)(citations omitted). An elementary requirement of due process in any  
 23 proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances,  
 24 to apprise interested parties of the pendency of the action and afford them an opportunity to present their  
 25 objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Where Mineral  
 26 County has not even identified the individuals and entities whose rights it seeks to take, it is difficult to  
 27 calculate how to best convey to those potential defendants the notice to which they are entitled.

28 ///



1 Mineral County has not directed this Court to any authority holding that under these  
 2 circumstances Mineral County may proceed to take away the property rights of defendants who have  
 3 not even been identified. Counsel for the Water Commissioners is not aware of any Nevada rule which  
 4 specifically authorizes a plaintiff to proceed against a defendant whose identity is unknown.

5 If Mineral County ultimately receives a judgment in this action against defendants who were not  
 6 afforded due process of law, the judgment will be void. This is demonstrated in a Pennsylvania case  
 7 seeking to quiet title to real property. (It is interesting to note that the Pennsylvania service statute  
 8 affirmatively permits a plaintiff to seek Court permission to make service by publication upon a  
 9 defendant whose identity is unknown.) Reversing the Decree which wrested possession away from the  
 10 prior property right owner, the Court stated,

11 [e]ven though affidavits were filed and publication was accomplished  
 12 pursuant to a valid court order, such service as ineffective as to appellant.  
 13 A party in actual possession of real property which is the subject of a  
 14 quiet title action cannot be regarded as a dead or unknown person within  
 15 the meaning of Rule 1064(c) as to be bound by a judgment based upon  
 service by publication. This is especially true when, as in the case at bar,  
 that party is not only in actual possession but, in fact, has title. To hold  
 otherwise would be a blatant violation of procedural due process.

16 Burns v. Mitchell, 381 A.2d 487, 490 (Pa. Super. 1977) (emphasis supplied). The same reasoning  
 17 applies here. It is undisputed that the potential defendants in the case at bar hold title to the water rights  
 18 which Mineral County seeks to take away. Certainly, with ingenuity and perseverance Mineral County  
 19 can identify the title holders who it seeks to bind by its Complaint in Intervention.

#### 20 CONCLUSION


21 Mineral County has not properly demonstrated that NRCP 4(e)(1)(ii) authorizes the use of  
 22 service by publication under the facts presented here. First, Mineral County cannot make service by  
 23 publication pursuant to NRCP 4(e)(1)(ii) as to potential defendants who hold water rights appurtenant  
 24 to property situated in California. Second, Mineral County's contention that the identity of some  
 25 potential defendants is unascertainable is belied by the very fact that these potential defendants hold a  
 26 legal title which, by its nature, must be verifiable. Third, the record is clear that Mineral County has  
 27 verified Nevada addresses for hundreds of the potential defendants which it has not personally served.  
 28 As to defendants within that category who have not waived personal service, Mineral County is

1 obligated as a matter of law to personally serve them with process. Finally, Mineral County has failed  
2 to demonstrate by competent evidence that it has satisfied the due diligence requirement inherent in the  
3 service by publication statute. If Mineral County is allowed to proceed without satisfying the  
4 requirements of due process, the results of a time consuming and costly litigation will be meaningless.  
5 It does Mineral County no benefit to proceed if the court has not obtained appropriate jurisdiction over  
6 the defendants, for any judgment obtain by Mineral County would be void, rendering administration of  
7 the Decree difficult, if not impossible. Based on the record before the Court, Mineral County's Motion  
8 for Leave to Make Service by Publication should be denied.

9 Dated this 10<sup>th</sup> day of March, 1997.

10 BOWMAN & ROBINSON

11 By

12   
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15 Attorneys for  
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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Bowman & Robinson and that on March 10, 1997, I mailed a true and correct copy of the foregoing OPPOSITION TO MINERAL COUNTY'S MOTION FOR LEAVE TO MAKE SERVICE BY PUBLICATION, postage prepaid, addressed to:

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DATED this 10<sup>th</sup> day of March, 1996.

  
DARCI BERTRAM

# **EXHIBIT A**

1  
2 UNITED STATES COURT OF APPEALS

3 FOR THE NINTH CIRCUIT

4 \* \* \*

5 U.S. Court of Appeals Docket Number: 96-15885

6 Lower Court Docket Number: CV-73-00128-ECR

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.

10 WALKER RIVER IRRIGATION DISTRICT,

11 a corporation; STATE OF NEVADA,

12 Defendants - Appellees,

13 vs.

14 WALKER RIVER PAIUTE TRIBE,

15 Plaintiff-Intervenor - Appellant

16  
17 APPELLANT'S OPENING BRIEF

18  
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20  
21  
22  
23  
24  
25 TREVA J. HEARNE, ESQ.  
26 ZEH, POLAHA, SPOO & HEARNE  
27 575 Forest Street  
28 Reno, Nevada 89509  
Attorney for Plaintiff-Intervenor/  
Appellant

1 prohibited Appellant's entrance into the litigation by ordering  
 2 the personal service of papers upon parties that cannot be as-  
 3 certained. Mineral County has identified the existence of  
 4 unascertainable parties. Whether two hundred of the parties or  
 5 sixteen of the potential parties to this litigation are  
 6 unascertainable is unknown to any party, but the District Court  
 7 has ruled that those parties must be personally served is clear  
 8 (Tab 15). All parties that have been identified have been  
 9 served. Mineral County is being punished unduly for its honesty  
 10 in pointing out that, because of flaws in the recording system in  
 11 the State of Nevada, more parties may hold water rights in the  
 12 Walker River who have not been found or ascertained.

13 With the District Court's strict adherence to personal  
 14 service under Rule 4(d) and without relief or an alternative for  
 15 service, appellant's Motion for Intervention will not be heard,  
 16 "... (this) question . . . is serious, and too important to  
 17 await review in conjunction with the appeal from a final judg-  
 18 ment." Fred Weber, Inc. v. Shell Oil Co., supra, p. 607. "Al-  
 19 lowing the plaintiff to appeal the order now is far more conso-  
 20 nant with principles of efficiency and fairness". In re Pan Am  
 21 Corp., 16 F.3d 513 (2nd Cir. 1994).

22 (A Serious And Unsettled Question)

23  
 24 When the FRCP prior Rule 4(c)(2)(C)(ii) was in force, which  
 25 rule is similar to the present 4(d), the courts were split on how  
 26 service could be handled if waivers were not successful. Welko-  
 27 witz, "The Trouble with Service by Mail", 167 Neb.L.Rev. 289  
 28 (1988). Also, see: Combs v. Nick Garin Trucking, 825 F.2d 437

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1 with service, the appropriate step was to seek relief from the  
 2 District Court to adopt an alternative route to effective  
 3 service. Just as Mineral County has requested the District Court  
 4 herein to abandon the federal service and allow it to peruse  
 5 state alternatives for service, specifically, publication.

6 The Third Circuit recommended that the district court should  
 7 quash service and leave the plaintiffs free to effect proper  
 8 service. Similarly, in this case, the District Court should  
 9 recognize that personal service will not accomplish effective  
 10 service on unascertainable parties and leave the intervenor free  
 11 to effect proper service by whatever means it can accomplish  
 12 effective service.

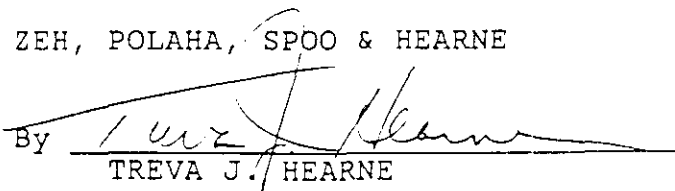
#### 13 VI.

#### 14 CONCLUSION AND REQUEST FOR RELIEF

15 Mineral County respectfully requests that this Court  
 16 overrule the District Court's denial of its Motion requesting  
 17 relief from further service of process pursuant to FRCP, Rule  
 18 5(c). In the alternative, Mineral County respectfully requests  
 19 that the Court overrule the District Court's Order wherein it  
 20 states that once federal service has begun by mailing request for  
 21 waivers that personal service must be made on any party not  
 22 executing a waiver, but that the Court order the District Court  
 23 to allow publication according to state law in order to give  
 24 notice to all unascertainable parties.

25 DATED this 22<sup>nd</sup> day of June, 1996.

26 ZEH, POLAHA, SPOO & HEARNE

27 By   
 28 TREVA J. HEARNE

# **EXHIBIT B**



## AFFIDAVIT OF DEBRA B. ROBINSON

STATE OF NEVADA )

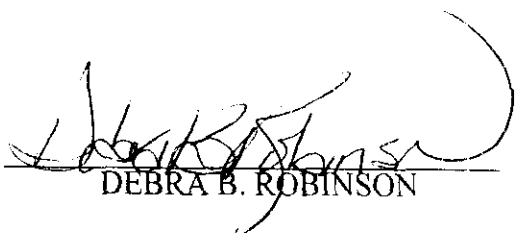
COUNTY OF WASHOE )

I, Debra B. Robinson, do swear under penalty of perjury that the assertions set forth in this Affidavit are true and the facts personally known to me, and if required to do so I am competent to testify to these facts in a court of law.

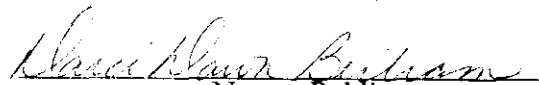
1. I am an attorney licensed to practice law in the States of Nevada and California, and I am licensed to practice in the United States District Court for the District of Nevada. My law firm has been retained to represent the United States Board of Water Commissioners in a matter pending before the United States District Court for the District of Nevada which has been assigned the Equity Number C-125, Subfile Number C-125-C.

2. The Exhibit which has been appended as Exhibit A to the U.S. Board of Water Commissioners' Opposition to Mineral County's Motion for Leave to Make Service by Publication consists of true and correct copies of pages from the Opening Brief submitted by Mineral County to the Ninth Circuit Court of Appeals. Said Brief was submitted with regard to an appeal taken by Mineral County on a previous ruling made by the United States District Court for the District of Nevada in the action referenced in paragraph 1, above.

Dated this 10<sup>th</sup> day of March, 1997.

  
DEBRA B. ROBINSON

This Affidavit was acknowledged before me this 10<sup>th</sup> day of March, 1997 by DEBRA B. ROBINSON.

  
Notary Public

