Linda A. Bowman, Esq.
Debra B. Robinson, Esq.
BOWMAN & ROBINSON
499 West Plumb Lane, Suite 4
Reno, NV 89509
(702) 334-1400

Attorneys for
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
LANCE S. WILSON
CLERK
BY DEPUTY

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

93

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

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

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

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

ARGUMENT

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

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

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

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

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

> [i]n 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 or in part of excluding such person or corporation from any interest therein, 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.

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

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

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

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

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

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

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

NRCP 4(e)(1)(ii), the authority upon which Mineral County relies to seek leave to make service by publication, is applicable where the "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 service. . . ." In its Motion, Mineral County has failed to adduce competent evidence that the defendants that it seeks to serve by publication satisfy those requirements.

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

---

[1] Federal Rule of Civil Procedure 4(e)(1) additionally permits a party to accomplish service "pursuant to the law of the state . . . in which service is effected." To that end, Mineral County might rely upon California's service rules to effect service upon the potential defendants who are residents of California. However, in the pending motion, Mineral County relied solely upon the NRCP 4 as grounds for making service on *all* of the potential defendants who have not waived service. As set forth above, Mineral County cannot properly rely on NRCP 4(e)(1)(ii) to make service on those defendants whose water rights are not located in the State of Nevada.

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

> Mineral County has identified the existence of unascertainable parties. Whether two hundred of the parties or sixteen of the potential parties to this litigation are unascertainable is unknown to any party, but the District Court has ruled that those parties must be personally served is 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.

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

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

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

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

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

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

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

II. TO PERMIT SERVICE BY PUBLICATION UNDER THE FACTS PRESENTED TO THIS COURT WOULD RESULT IN A DENIAL OF DUE PROCESS TO THE POTENTIAL DEFENDANTS AND COULD RESULT IN AN UNENFORCIBLE JUDGMENT.

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

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

///

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

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

> [e]ven though affidavits were filed and publication was accomplished pursuant to a valid court order, such service as ineffective as to appellant. A party in actual possession of real property which is the subject of a quiet title action cannot be regarded as a dead or unknown person within 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.

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

CONCLUSION

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

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

Dated this 10th day of March, 1997.

BOWMAN & ROBINSON

By

LINDA A. BOWMAN, ESQ.
DEBRA B. ROBINSON, ESQ.
499 West Plumb Lane, Suite 4
Reno, NV 89509

Attorneys for
U.S. BOARD OF WATER COMMISSIONERS

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:

Shirley A. Smith, Esq.
Assistant U.S. Attorney
100 West Liberty, Suite 600
Reno, NV 89501

Marta Adams, Esq.
Deputy Attorney General
Division of Water Resources
198 South Carson Street
Carson City, NV 89710

Jim Weishaupt
WRID
Post Office Box 820
Yerington, NV 89447

James T. Markle, Esq.
State Water Resources
Control Board
Post Office Box 100
Sacramento, CA 95814

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

Kelly R. Chase, Esq.
P.O. Box 2800
Minden, NV 89423

Richard R. Greenfield, Esq.
Field Solicitor's Office
Department of Interior
Two North Central Avenue, Suite 500
Phoenix, AZ 85004

Robert L. Hunter
Superintendent
Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

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

Scott McElroy, Esq.
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

Mathew R. Campbell, Esq.
McCutchen, Doyle, Brown, et al.
Three Embarcadero Center, Suite 1800
San Francisco, CA 94111

John P. Lange, Esq.
U.S. Department of Justice
Environment & Natural Resources
Division
999 - 18th Street, Suite 945
Denver, CO 80202

Ross E. deLipkau, Esq.
Marshall, Hill, Cassas &
deLipkau
Post Office Box 2790
Reno, NV 89505-2790

Gordon H. DePaoli, Esq.
Woodburn and Wedge
Post Office Box 2311
Reno, NV 89505-2790

Garry Stone
290 South Arlington
Reno, NV 89501

James S. Spoo, Esq.
Treva J. Hearne, Esq.
Zeh Polaha Spoo & Hearne
575 Forest Street
Reno, NV 89509

Roger Johnson
Water Resources Control Board
State of California
Post Office Box 2000
Sacramento, CA 95810

Mary Hackenbracht, Esq.
Deputy Attorney General
State of California
2101 Webster Street, 12th Floor
Oakland, CA 94612-3049

Roger E. Bezayiff
Chief Deputy Water Commissioner
U.S. Bd. of Water Commissioners
Post Office Box 853
Yerington, NV 89447

Michael Neville
Deputy Attorney General
State of California
50 Freemont Street, #300
San Francisco, CA 94105

DATED this 10th day of March, 1996.

Darci Bertram
DARCI BERTRAM

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

U.S. Court of Appeals Docket Number: 96-15885
Lower Court Docket Number: CV-73-00128-ECR

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WALKER RIVER IRRIGATION DISTRICT,
a corporation; STATE OF NEVADA,

Defendants - Appellees,

vs.

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor - Appellant

_____/

APPELLANT'S OPENING BRIEF

TREVA J. HEARNE, ESQ.
ZEH, POLAHA, SPOO & HEARNE
575 Forest Street
Reno, Nevada 89509
Attorney for Plaintiff-Intervenor/
Appellant

Zeh, Polaha, Spoo & Hearne
575 Forest Street • Reno, Nevada 89509
(702) 323-5700 • Fax (702) 786-8183

Zeh, Polaha, Spoo & Hearne
575 Forest Street • Reno, Nevada 89509
(702) 323-5700 • Fax (702) 786-8183

prohibited Appellant's entrance into the litigation by ordering the personal service of papers upon parties that cannot be ascertained. Mineral County has identified the existence of unascertainable parties. Whether two hundred of the parties or sixteen of the potential parties to this litigation are unascertainable is unknown to any party, but the District Court has ruled that those parties must be personally served is clear (Tab 15). 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.

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

(A Serious And Unsettled Question)

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

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

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

VI.

CONCLUSION AND REQUEST FOR RELIEF

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

DATED this 22nd day of June, 1996.

ZEH, POLAHA, SPOO & HEARNE

By _____
TREVA J. HEARNE

Zeh, Polaha, Spoo & Hearne
575 Forest Street • Reno, Nevada 89509
(702) 323-5700 • Fax (702) 786-8183

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 10th day of March, 1997.

DEBRA B. ROBINSON

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

Notary Public

DARCI DAWN BERTRAM
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 95-3591-2 - EXPIRES JULY 29, 2000