

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, 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

APR 2 9 15 AM '97
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DEPT. OF JUSTICE

FILED

MINUTES OF THE COURT

DATE: April 1, 1997

PRESENT: EDWARD C. REED, JR. U.S. District Judge

Deputy Clerk: OMAL ROSE Reporter: NONE APPEARING
Counsel for Plaintiff(s) NONE APPEARING
Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

Proposed Intervenor Mineral County, Nevada moves (Doc. #88) for leave to serve by publication unidentified holders of water rights appurtenant to lands located within the Walker River system. This court by Order filed March 22, 1996 instructed the County to serve personally all holders of water rights on the Walker River system pursuant to Fed. R. Civ. P. 4. The County appealed that Order to the U.S. Court of Appeals for the Ninth Circuit; that appeal was dismissed (Doc. #89) for want of jurisdiction on the grounds that the order appealed from was neither a final appealable order under 28 U.S.C. § 1291, nor an appealable collateral order under the exception to Section 1291 described in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). United States v. Walker River Irrigation Dist., No. 96-15885 (9th Cir. Feb. 12, 1997) (mem.).

The Federal Rules of Civil Procedure permit service of process upon individuals, from whom waivers of service are not obtained under Fed. R. Civ. P. 4(d), "pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State" Fed. R. Civ. P. 4(e)(1). Mineral County proposes to serve unidentified water rights holders under the provision of the Nevada Rules of Civil Procedure permitting service by publication.

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Those Rules provide, in relevant 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 or in part of excluding such person or corporation from any interest therein, and the said defendant resides outside the state or has departed from the state, or cannot after due diligence be found within the state, or conceals [her]self to avoid the service of summons, the judge or justice may make an order that the service be made by publication of summons; said service by publication shall be made in the same manner as now provided in all cases of service by publication.

Nev. R. Civ. P. 4(e)(1)(ii) (Michie 1996).

The instant action is in the nature of a suit to quiet title to water rights; as such it is an action the subject of which is real property. By Order filed August 12, 1995, this court determined that all holders of water rights appurtenant to lands located within the Walker River system were necessary and proper parties to this action. Mineral County relies on the language in this rule permitting service by publication on defendants who "cannot after due diligence be found within the state."

Mineral County has compiled a list of the names and addresses of Walker River water rights holders from (1) the recorders' offices of the counties in Nevada through which the river flows, (2) the records of the Watermaster, (3) the records of the Nevada State Engineer, and (4) the records of Defendant Walker River Irrigation District. The County asserts that it has effected personal service upon all Walker River water rights holders which it has been able to identify. The County seeks leave to serve by publication pursuant to Nev. R. Civ. P. 4(e)(1)(ii) only those parties whose identity it has been unable to discover from any of the above-described sources.

The State of Nevada, the U.S. Board of Water Commissioners, and the Walker River Irrigation District, all resist Mineral County's Motion. They argue that Mineral County has not shown the requisite degree of due diligence sufficient to entitle it to serve any potential unidentified water rights holders by publication, as required by the express language of the rule. They argue that the County has not demonstrated to their satisfaction that these potential unidentified defendants reside outside of Nevada, have left the state, are concealing themselves to avoid service of process, or cannot be located through the exercise of due diligence. They seek to use to their advantage the fact that the County cannot identify these potential defendants. This argument reeks of the double bind. If the County knew these people's names, it would certainly be easier to locate them. It is precisely because their names are unavailable that the County seeks to notify all potential defendants of the instant action through summons by publication.

In an action to quiet title such as this one, a party plaintiff may acquire personal jurisdiction over unknown parties defendant on the basis of an affidavit stating "that the unknown defendants to be served by published notice of the pending suit were unknown and that their whereabouts could not be discovered after due inquiry and search has been made." Campbell v. Doherty, 206 P.2d 1145, 1150 (N.M. 1949) (internal quotation omitted). Prerequisite to service of summons by publication is a statement, by affidavit, of "the reasons why personal service cannot be made as well as the nature and extent of the investigation utilized to determine the whereabouts of potential defendants." Deer Park Lumber, Inc. v. Major, 559 A.2d 941, 943 (Pa. Super. Ct. 1989). Where, for example, a plaintiff in an action to quiet title to real property affirmed that he did not know the identity of the minor children of the deceased title owner, such affirmation was held sufficient to support service by publication on those children, where the published summons denominated them as the unknown heirs of the specified decedent. Archuleta v. Landers, 356 P.2d 443 (N.M. 1960). In the present action, given the attempts by the County to identify all the holders of water rights appurtenant to land located within the Walker River system, and given the County's forthright admission that the names of such holders which it has been able to acquire may not include all such holders, it seems not the least bit inappropriate to permit the County to notify as-yet-unidentified holders through summons by publication. Indeed, in its order dismissing the appeal in this case, the Court of Appeals has already favorably noted the possibility that the County could notify those as-yet-unidentified water rights holders in precisely the manner for which the County now seeks leave of this court.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States constrains the exercise of judicial jurisdiction. A decree purporting directly and adversely to affect a person's legally protected interests -- such as the right to take or use water -- is void as in violation of the Due Process clause unless the party plaintiff employs a method of notifying such person of the pendency of the suit which is reasonably calculated to give them knowledge of the action at a meaningful time and in a meaningful manner. Personal service is not always required before a court adjudicates the legal rights of a natural person or of a corporation. If with due regard for the practicalities and peculiarities of the case, these conditions of notice are met, the Due Process Clause is satisfied. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

One issue remains for consideration. The Irrigation District, the State, and the Board of Water Commissioners point out, correctly, that because the Walker River flows across the California-Nevada border, a decree adjudicating water rights appurtenant to all lands situated within the Walker River system might naturally affect holders of water rights appurtenant to lands outside this State. Under the terms of Nev. R. Civ. P. 4(e)(1)(ii), service by publication in the present matter is proper only with respect to water rights appurtenant to Nevada lands, and not to lands in California. To the extent Mineral County seeks leave to serve by publication holders of water rights appurtenant to California real property, its request must therefore be denied.

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For the foregoing reasons, IT IS THEREFORE ORDERED that the Motion (Doc. #88) filed by Proposed Intervenor Mineral County for leave to serve unidentified Defendants by Publication pursuant to Nev. R. Civ. P. 4(e)(1)(ii) is HEREBY GRANTED.

IT IS FURTHER HEREBY ORDERED that the Motion (Doc. #92) filed by Defendant Walker River Irrigation District to require Mineral County to identify and file a report concerning the status of service on each individual claimant to water rights appurtenant land located within the Walker River system is DENIED.

IT IS FURTHER HEREBY ORDERED that Proposed Intervenor Mineral County shall publish in the Miner County Independent News in Hawthorne, Nevada, the Record-Courier in Gardnerville, Nevada, the Mason Valley News in Yerington, Nevada, and the Review-Herald in Mammoth Lakes, Nevada, for a period of four (4) weeks, and at least once a week during said time, the following documents:

1. Summons to all holders of water rights appurtenant to lands located in the Nevada portion of the Walker River System who have not yet been served with process in this action;
2. Mineral County's Notice of Motion and Motion to Intervene (Doc. #2);
3. Mineral County's Proposed Petition in Intervention (Doc. #3);
4. Mineral County's Amended Complaint in Intervention (Doc. #20);
5. Mineral County's Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint in Intervention (Doc. #21); and
6. Mineral County's Motion for Preliminary Injunction (Doc. #22).

LANCE S. WILSON, CLERK

By *Uma L. Rose*
Deputy Clerk