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FILED
JUL 19 2002
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8
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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF NEVADA
12

13 UNITED STATES OF AMERICA,
14 Plaintiff,

) In Equity No. C-125-ECR
) Subfile No. C-125-C

15 WALKER RIVER PAIUTE TRIBE,
16 Plaintiff-Intervenor,

) **WALKER RIVER IRRIGATION
DISTRICT'S RESPONSE TO MOTION
FOR ORDER OF PUBLICATION
(FIFTH REQUEST)**

17 v.
18

19 WALKER RIVER IRRIGATION DISTRICT,
et al.,
20 Defendants.
21

22 MINERAL COUNTY,
23 Proposed Plaintiff-
24 Intervenor,
25

26 v.
27

26 WALKER RIVER IRRIGATION DISTRICT,
27 et al.,
28 Proposed Defendants.

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1 **I. INTRODUCTION**

2 On or about June 19, 2002, Mineral County filed its *Motion for Order of*
3 *Publication, Fifth Request* (the "Publication Motion"). Mineral County also placed several
4 Affidavits of Treva J. Hearne (collectively referred to herein as the "Hearne Affidavits") in
5 support of the Publication Motion with Kinko's for copying and distribution to the parties.

6 The Publication Motion requests that the Court enter an order allowing Mineral
7 County to effect service of its intervention documents through publication on all unidentified
8 parties as well as on sixteen identified parties. The Publication Motion also requests that
9 Mineral County be allowed to publish only the Notice in Lieu of Summons with respect to its
10 publication efforts. The response of the Walker River Irrigation District (the "District") to the
11 Publication Motion and Hearne Affidavits is set forth below.

12 **II. THE COURT HAS ALREADY GRANTED MINERAL COUNTY PERMISSION**
13 **TO SERVE UNIDENTIFIED PARTIES THROUGH PUBLICATION AND,**
14 **THEREFORE, THIS REQUEST BY MINERAL COUNTY IS NOT**
NECESSARY

15 The Publication Motion requests that the Court enter an order allowing Mineral County
16 to effect service through publication on "all unidentified parties." See, Publication Motion at 2.
17 On April 1, 1997, the Court entered an order which stated the following:

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

21 Doc. No. 99 at 4. In a subsequent order, the Court confirmed that it had granted Mineral
22 County permission to effect service through publication "only with respect to unidentified and
23 unserved potential defendants." Doc. No. 114 at 1.

24 The Court has already granted Mineral County permission to serve unidentified
25 potential defendants through publication. The Publication Motion is unnecessary and
26 redundant to the extent that it once again seeks the Court's approval to serve unidentified
27 potential defendants through publication.

28

1 Finally, while the Court has granted Mineral County permission to serve
2 unidentified parties through publication, it has also ordered that publication shall not "actually
3 begin until all service issues have been resolved for all defendants -- that is, until all
4 defendants have either been served, or Mineral County has been successful in requesting
5 publication as to those defendants." Doc. No. 252 at 11, 12. Therefore, although Mineral
6 County has been granted permission to serve unidentified defendants through publication, the
7 County should not actually initiate its publication efforts until specifically authorized to do so
8 by the Court.

9 **III. THE COURT HAS ALREADY ENTERED AN ORDER DESIGNATING THE**
10 **DOCUMENTS WHICH MINERAL COUNTY MUST PUBLISH.**

11 In the Publication Motion, Mineral County argues that it should be required to publish
12 only the Notice in Lieu of Summons. Publication Motion at 4, 5.¹ The Court, however, has
13 already designated the documents which Mineral County must publish. By order dated April 1,
14 1997, the Court directed Mineral County to publish the following documents in connection
15 with its service upon unidentified individuals:

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

26
27 ¹ The Publication Motion also states that "[c]ounsel for Mineral County will list its own
28 phone number for persons to call for information regarding the nature of the case." Publication
Motion at 5, Ins. 1-2. To avoid conflicts, however, it is clear that legal counsel for the plaintiff
cannot advise defendants concerning the "nature of the case".

1 Doc. No. 99 at 4. Based upon a stipulation to which Mineral County was a party, the Court
2 later amended its April 1, 1997, order by requiring Mineral County to publish a Notice in Lieu
3 of Summons instead of the summons (referred to in paragraph 1) and by relieving Mineral
4 County of any obligation to publish Mineral County's Notice of Motion and Motion to
5 Intervene (referred to in paragraph 2) and Mineral County's Proposed Petition in Intervention
6 (referred to in paragraph 3). *See*, Doc. No. 122 at 2.

7 Thus, the Court has already ordered that Mineral County must publish, at a minimum,
8 the following documents:

- 9 1. A Notice in Lieu of Summons
- 10 2. Mineral County's Amended Complaint in Intervention (Doc. No. #20);
- 11 3. Mineral County's Amended Memorandum of Points and Authorities in Support
12 of Mineral County's Amended Complaint in Intervention (Doc. #21)); and
- 13 4. Mineral County's Motion for Preliminary Injunction (Doc. #22).

14 Finally, the Court has also stated that it "will address Mineral County's contention that
15 it should not be required to publish all [of] the documents" listed above, only when the Court
16 actually orders publication to begin. Doc No. 252 at 12, lns. 2-5; *See Also* Doc. No. 210 at 15,
17 lns. 5-9 (Court will address identification of what documents should be published and the
18 manner of publication at a later time).

19 **IV. THE COURT HAS ALREADY ESTABLISHED THE LAW OF THE CASE TO**
20 **BE APPLIED TO MINERAL COUNTY'S REQUEST TO SERVE IDENTIFIED**
21 **PARTIES THROUGH PUBLICATION**

22 On June 4, 1998, the Court entered an order (Doc. No. 210) that addressed a previous
23 motion for publication filed by Mineral County. That order set forth in great detail both the law
24 of Nevada and California to be applied to Mineral County's requests to effect service of its
25 intervention documents through publication. On February 25, 1999, the Court entered another
26 order (Doc. No. 252) addressing yet another previous motion for publication filed by Mineral
27 County. That order further elaborated on the law to be applied to Mineral County's request to
28 serve identified parties by publication.

1 The District will not burden the record by repeating the legal discussions concerning
2 publication contained in Doc. Nos. 210 and 252, however, certain rulings of the Court in those
3 orders apply specifically to arguments made by Mineral County in its current Publication
4 Motion. Those rulings are discussed below.

5 **A. The Court Has Rejected the Idea That “Overall Due Diligence” Satisfies the**
6 **Requirements for Publication.**

7 In the Publication Motion Mineral County again offers the unsupported legal
8 conclusion that it “has exercised due diligence in its search and service of process on the water
9 rights’ holders in the Walker River.” Publication Motion at 4, Ins. 15-17. The Hearne
10 Affidavits also contain unsupported legal conclusions, at Paragraphs 3, that the party at issue
11 “has an interest in water rights in the Walker River resides out of the state or has departed from
12 the state and after due diligence cannot be found within the state or he is concealing himself in
13 order to avoid service of summons.”

14 The Court, however, has rejected the idea that broad or “overall” statements of
15 diligence or statements containing unsupported conclusions of law are relevant and, instead,
16 held “that individualized showings of due diligence are necessary” and that “the propriety of
17 service by publication must be determined on a case by case basis.” Doc. No. 210 at 3, Ins. 18-
18 19; at 5, Ins. 13-15. Thus, the Court should reject Mineral County’s assertions that diligence
19 has been established based on broad or “overall” statements or statements that contain
20 unsupported conclusions of law.

21 **B. The Court Has Rejected Mineral County’s Argument That The Expense**
22 **Involved to Accomplish Service is Somehow Relevant.**

23 In the Publication Motion, Mineral County alleges that it has already “made a
24 huge expenditure of funds” and that it “has now become so cost prohibitive that Mineral
25 County will be foreclosed from the litigation altogether if it must publish all the documents
26 ordered by the Court.” In the February 25, 1999 order, however, the Court rejected Mineral
27 County’s arguments that excessive costs are somehow relevant to the publication analysis:

28 One final argument of Mineral County’s also needs to be addressed –
that is, the constant refrain that Mineral County has already spent a lot of money

1 and time trying to get to this point, and that it just is not fair that it should have
2 to spend any more money before being able to argue its case on the merits. We
3 are well aware of the laudable goals of environmental protection that motivated
4 Mineral County to undertake this action. But we find it difficult to believe that
5 the County ever could have thought that fighting this battle would be easy,
6 cheap, or quick. No matter how noble the County's goals are, we cannot simply
7 dispense with the Federal Rules of Civil Procedure just so those goals can be
8 accomplished more easily. The requirement of serving individual defendants is
9 not some arcane, administrative hoop that we are arbitrarily making Mineral
10 County jump through. The requirement that every defendant be informed of
11 actions that may deprive him or her of property is a fundamental right of due
12 process, and our procedural rules have developed as the best way to protect that
13 right. We will not disregard the rules because Mineral County is understaffed or
14 short on funds.

15 Doc. No. 252 at 10. Thus, the Court has held that the costs incurred by Mineral County in
16 serving its intervention documents are not relevant with respect to the publication analysis.

17 **C. Mineral County Has Failed To Recognize Important Differences Between
18 Nevada And California Law Concerning Publication As Set Forth In
19 Previous Court Orders.**

20 In its June 4, 1998 order, the Court specifically acknowledged some of the differences
21 between Nevada and California law concerning service through publication. These differences
22 are important because "Nevada law does not apply to those holders of water rights appurtenant
23 to land in California; as to those defendants [the Court] must apply California's law of service
24 by publication." Doc. No. 210 at 7, lns. 1-4.

25 One of the primary differences involves service through publication on out-of-state
26 defendants. With respect to service through publication on out-of-state defendants, Nevada and
27 California law differ as follows:

28 Under Nevada law, due diligence must be exercised to find a defendant "within
the state." Once it has shown by reliable evidence that the defendant is
somewhere else, and not within the state, then publication is appropriate.
Essentially, showing that the defendant is outside Nevada is a substitute for the
exercise of due diligence to find the defendant within the state. If the out-of-
state defendant's address is known, a copy of the papers must also be sent to that
address; if the address is unknown, then the defendant is basically out of luck.
To prove that a defendant resides out of state, it is enough to give the
defendant's current, out-of-state address; or, if the current address is unknown,
to give the last known address, the last date on which the defendant was known
to live there, state that the defendant no longer lives there, that the defendant's
current whereabouts are unknown, and that there is no reason to believe the
defendant could be found in Nevada. Nev. R. Civ. P. 4(e)(1)(i).

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4 Under California law, however, service by publication is not appropriate
5 simply because a defendant is non-resident, as it is in Nevada. Service by
6 publication is only appropriate in California when service cannot be effected by
7 any other method provided for in the code. Cal. Civ. Proc. Code § 415.50(a).
8 The California publication statute does not differentiate between in-state and
9 out-of-state residents. The only difference for out-of-state residents is that one
10 additional method of service is provided for such defendants – that is, service by
11 first class mail, return receipt requested. Cal. Civ. Proc. Code § 415.40. Even
12 when all indications point to a defendant living out of state, reasonable diligence
13 must still be exercised to find that defendant. Kott v. Superior Court of Los
14 Angeles County, 53 Cal. Rptr. 2d 215, 220-22 (Cal. Ct. App. 1996).
15

16 Doc. No. 252 at 18-20.

17 As set forth below, in the Publication Motion and Hearne Affidavits Mineral County
18 has ignored the distinction between Nevada and California law concerning publication on out-
19 of-state defendants.
20

21 **D. The Contents Of The Hearne Affidavits Fail To Meet The Burden For
22 Diligence Under Nevada or California Law As Established By Previous
23 Orders Of This Court**

24 With respect to Nevada law concerning service through publication, the Court has said:

25 Due diligence is difficult to accomplish; in the past eight years the Nevada
26 Supreme Court has considered the meaning of due diligence four times,
27 rejecting as inadequate the serving party's efforts each time. Gassett v. Snappy
28 Car Rental, 906 P.2d 258, 261 (Nev. 1995); McNair v. Rivera, 874 P.2d 1240,
1244 (Nev. 1994); Price v. Dunn, 787 P.2d 785, 787 (Nev. 1990), overruled on
other grounds, Epstein v. Epstein, 950 P.2d 771, 773 (Nev. 1997); see also
Browning v. Dixon, 954 P.2d 741, 1998 WL 84567, *3 (Nev. Feb. 26, 1998)
(construing NRS 14.070(2)). Indeed, we have yet to find a Nevada Supreme
Court opinion holding the due diligence requirement to be satisfied.

29 Doc. No. 210 at 8, 9.

30 In light of the Nevada Supreme Court's reluctance to honor service by publication, this
31 Court stated the following concerning the contents of affidavits of due diligence filed by
32 Mineral County:
33

34 affidavits of due diligence should demonstrate by specific, probative evidence
35 that Mineral County has checked at least the following:

- 36 a) telephone directories for communities near the Walker River,
37
38

- 1 b) official land, tax, and probate records of Mineral, Lyon, and
- 2 Douglas Counties,
- 3 c) voter registration lists,
- 4 d) motor vehicle registration lists,
- 5 e) relatives, friends, employers, employees, and neighbors,
- 6 f) attorneys, agents, managers, and insurers, and
- 7 g) records of the Nevada State Engineer.

8 Mere recitation that these information sources have been checked is not enough,
9 the affidavits should indicate dates of inquiry, names of persons spoken to, and
10 the results of each inquiry. The burden is on Mineral County to establish due
11 diligence.

12 Doc. No. 210 at 9.

13 The Court has also held that, under California law, Mineral County must demonstrate
14 by affidavit that it has exercised “reasonable diligence” in attempting to serve parties. Doc. No.
15 210 at 11. The Court acknowledged the following discussion by a California State Court
16 concerning the reasonable diligence standard:

17 [T]he affidavit must allege (1) the place of residence or last known place of
18 residence of the defendant; (2) recent inquiries of all known relatives, friends,
19 and other persons likely to know the whereabouts of the defendant, together
20 with the names and addresses of such persons, and the dates and result of such
21 inquiries; (3) recent search of the latest city directory (if issued within five
22 years), the latest telephone directory, the latest tax rolls, and the latest register of
23 voters, covering the place . . . where the defendant is known to have lived, . . .
24 together with the dates and results of such searches and of the follow-up of
25 identical names; (4) and recent inquiries of all occupants and of neighbors of
26 real estate involved in the action which is not alleged to be vacant, together with
27 dates, names and addresses of such persons, and the result of such inquiries.
28 *Sanford v. Smith*, 90 Cal. Rptr. 256, 262-63 (Cal.App.1st 1970).

Doc No. 210 at 12.

 In the February 25, 1999 order, the Court repeatedly held that “due diligence would
only be satisfied when Mineral County submitted affidavits demonstrating that a number of
enumerated sources had been checked, including ‘the dates of inquiry, names of persons
spoken to, and the results of each inquiry.’” Doc. No. 252 at p.24, lns. 6-10; p.65, lns. 9-14; p.
67, lns 19-24; p. 81, lns. 9-15. As demonstrated below, the Hearne Affidavits fail to make
these requisite showings of fact in order to demonstrate due or reasonable diligence.

1 **V. THE HEARNE AFFIDAVITS FOR FIFTEEN OF THE SIXTEEN IDENTIFIED**
2 **PARTIES FAIL TO DEMONSTRATE THE DILIGENCE NECESSARY TO**
3 **WARRANT SERVICE BY PUBLICATION**

4 As set forth below, Mineral County has failed to meet the requirements for publication
5 for fifteen of the sixteen parties identified in the Publication Motion.

6 **1. Adams, Gregory Burton**

7 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
8 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
9 does not set forth the necessary facts with the required specificity to demonstrate due or
10 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
11 the Court to determine if Nevada or California law applies. See Section IV. C. above.

12 The Hearne Affidavit states that Mineral County contacted the Sheriff of Nevada
13 County who stated that he believed Gregory Adams was an absentee landowner that resided in
14 Reno, Nevada. The name of this Sheriff and the date of contact, however, are not stated. There
15 is no statement concerning why the Sheriff believed Gregory Adams was absentee landowner
16 that lived in Reno. Apparently, no other records of agencies or entities located in Nevada
17 County, other Northern California Counties or at the State of California were researched.

18 The Hearne Affidavit states Ms. Hearne spoke with an individual who stated that he
19 was not the correct Gregory Adams. The date of this contact is not stated. Based on this
20 telephone conversation with an individual claiming to be the incorrect Gregory Adams, Ms.
21 Hearne concludes that the correct Gregory Adams "is no longer in Reno, Nevada, nor anywhere
22 that I can locate him." Apparently, no other records of agencies or entities located in Washoe
23 County, other Northern Nevada Counties or at the State of Nevada were researched.

24 Finally, the Hearne Affidavit states that Vivian Adams, Gregory's mother, would not
25 reveal his whereabouts. The Court has already held, however, that a mother's failure to provide
26 her daughter's location does not establish reasonable diligence. Doc. No. 252 at p. 17, lns. 25 -
27 26; p. 18, lns. 1 - 16.

28 Under these circumstances, the Court should deny service through publication for
Gregory Burton Adams.

1 **2. Adams, Richard Taylor**

2 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
3 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
4 does not set forth the necessary facts with the required specificity to demonstrate due or
5 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
6 the Court to determine if Nevada or California law applies. See Section IV. C. above.

7 The Hearne Affidavit states that Mineral County contacted the Sheriff of Nevada
8 County. The name of this Sheriff, the date of contact and the facts surrounding the Sheriff's
9 investigation of Mr. Adams home are not stated. The Hearne Affidavit states that the Sheriff
10 apparently concluded that "Gregory Adams" appeared to have abandoned his home because
11 snow had not been disturbed or removed. Assuming Ms. Hearne meant "Richard Adams," the
12 fact that snow had not been disturbed or removed does not establish that the home was
13 abandoned. Mr. Adams could have been on vacation or away from his home for some other
14 purpose for a prolonged period of time. No other records of agencies or entities located in
15 Nevada County, other Northern California Counties or at the State of California were
16 researched to determine Mr. Adams location.

17 The Hearne Affidavit states that Ms. Hearne "cannot find any forwarding address or
18 another location for Richard T. Adams." The Hearne Affidavit, however, fails to state the facts
19 upon which this conclusion is based. There is no identification of any sources of information
20 that were checked in an attempt to locate Richard T. Adams.

21 Finally, the Hearne Affidavit states that Vivian Adams, Gregory's mother, would not
22 reveal his whereabouts. The Court has already held, however, that a mother's failure to provide
23 her daughter's location does not establish reasonable diligence. Doc. No. 252 at p. 17, lns. 25 -
24 26; p. 18, lns. 1 - 16.

25 Under these circumstances, the Court should deny service through publication for
26 Richard Taylor Adams.

1 **3. Boardman, Dennis**

2 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
3 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
4 does not set forth the necessary facts with the required specificity to demonstrate due or
5 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
6 the Court to determine if Nevada or California law applies. See Section IV. C. above.

7 Paragraph 5 of the Hearne Affidavit indicates that the Lyon County Sheriff stated that
8 "Dennis Boardman had been evicted from the only address we had for him and he had left no
9 forwarding address." The name of this Sheriff, the date of contact and the facts surrounding the
10 Sheriff's conclusion that Mr. Boardman had been evicted are not stated, however. For example,
11 the address from which Mr. Boardman was allegedly evicted, the name of his landlord and the
12 content of any discussions with the landlord are not set forth in the Hearne Affidavit.

13 In Paragraph 6, Ms. Hearne states that she "cannot find any forwarding address or
14 another location" based on research and inquiry at the Lyon County Recorder's Office and
15 Lyon County Sheriff's Office. Once again, the names, dates and specific facts surrounding
16 these inquiries are not included in the Hearne Affidavit. Finally, there is no indication that Ms.
17 Hearne checked any other records of agencies and entities in Lyon County, other Northern
18 Nevada Counties or at the State of Nevada in an attempt to determine Dennis Boardman's
19 whereabouts.

20 Under these circumstances, the Court should deny service through publication for
21 Dennis Boardman.

22 **4. Moreda, Iginia M.**

23 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
24 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
25 does not set forth the necessary facts with the required specificity to demonstrate due or
26 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
27 the Court to determine if Nevada or California law applies. See Section IV. C. above.
28

1 The Hearne Affidavit relies on a Return of Service form wherein the Lyon County
2 Sheriff stated that Iginia M. Moreda "no longer lives in the area." *See* Hearne Affidavit at
3 Exhibit B. Apparently, Mineral County has attempted no follow up contact with the Sheriff,
4 however, to determine why he could not execute service at 155/157 North Highway 95A or
5 how he reached the conclusion that Ms. Moreda no longer lives in the area.

6 At Paragraph 7, the Hearne Affidavit states that Ms. Moreda is not listed in the
7 Yerington telephone book and that "no other address [is] listed for her in the Recorder's Office
8 of Lyon County." It does not state when or who conducted the inquiry of the telephone book
9 and at the Lyon County Recorder's Office. Furthermore, the Hearne Affidavit indicates that
10 Mineral County also failed to inquire at any other agencies or entities in Lyon County, other
11 Northern Nevada or California Counties or at the State of Nevada or California in an attempt to
12 locate Ms. Moreda. Thus, the Hearne Affidavit does not demonstrate the level of diligence
13 required by the previous orders of the Court. *See* Doc. No. 210 at 7-14. Under these
14 circumstances, the Court should deny publication for Iginia M. Moreda.

15 **5. Del Porto, Julia A.**

16 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
17 not establish due or reasonable diligence. *See* Section IV. A. above. The Hearne Affidavit
18 does not set forth the necessary facts with the required specificity to demonstrate due or
19 reasonable diligence. *See* Section IV. D. above. It does not contain information necessary for
20 the Court to determine if Nevada or California law applies. *See* Section IV. C. above.

21 The Hearne Affidavit relies on a Return of Service form wherein the Lyon County
22 Sheriff stated that Julia A. Del Porto "no longer lives at residence, or in area." *See* Hearne
23 Affidavit at Exhibit B. Apparently, Mineral County has attempted no follow up contact with
24 the Sheriff, however, to determine why he could not execute service at 155/157 North Highway
25 95A or how he reached the conclusion that Ms. Del Porto no longer lives at the residence or in
26 the area.

27 At Paragraph 7, the Hearne Affidavit states that Ms. Del Porto is not listed in the
28 Yerington telephone book and that "no other address [is] listed for her in the Recorder's Office

1 of Lyon County." It does not state when or who conducted the inquiry of the telephone book
2 and at the Lyon County Recorder's Office. Furthermore, the Hearne Affidavit indicates that
3 Mineral County also failed to inquire at any other agencies or entities in Lyon County, other
4 Northern Nevada or California Counties or at the State of Nevada or California in an attempt to
5 locate Ms. Del Porto. Thus, the Hearne Affidavit does not demonstrate the level of diligence
6 required by the previous orders of the Court. *See* Doc. No. 210 at 7-14. Under these
7 circumstances, the Court should deny publication for Julia A. Del Porto.

8 **6. Emery, Bret**

9 Paragraphs 3 and 7 of the Hearne Affidavit contain unsupported conclusions of law that
10 do not establish due or reasonable diligence. *See* Section IV. A. above. The Hearne Affidavit
11 does not set forth the necessary facts with the required specificity to demonstrate due or
12 reasonable diligence. *See* Section IV. D. above. It does not contain information necessary for
13 the Court to determine if Nevada or California law applies. *See* Section IV. C. above.

14 Paragraph 4 of the Hearne Affidavit indicates that Brett Emery contacted Ms. Hearne's
15 office after it had sent a letter to Mr. Emery in Santa Cruz. Apparently as a result of receiving
16 the letter Mr. Emery contacted Ms. Hearne's office and provided an address that later proved to
17 be false. The Hearne Affidavit does not include a copy of the letter sent to Mr. Emery, state the
18 date of that letter or the address to which it was sent. It does not state the date Mr. Emery
19 called Ms. Hearne's office or identify the individual who spoke with Mr. Emery or the specific
20 content of their conversation.

21 Paragraph 5 of the Hearne Affidavit states that Ms. Hearne sent a second letter to Mr.
22 Emery. Apparently as a result of receiving this second letter, Mr. Emery again contacted Ms.
23 Hearne's office. The Hearne Affidavit does not contain a copy of this second letter, state the
24 date of the second letter or identify the individual who spoke with Mr. Emery over the
25 telephone for the second time. Oddly, the Hearne Affidavit does not explain why Mineral
26 County did not attempt to serve Mr. Emery at the address at which he apparently received two
27 letters from Mineral County.
28

1 Paragraph 6 of the Hearne Affidavit states that "[w]e sent inquiries to the post office to
2 attempt to locate" Mr. Emery "and received them back with no helpful information." It does
3 not attach copies of these inquires, identify the dates on which they were sent or the location of
4 the post office that apparently received them. It does not attach copies of or provide
5 information concerning the returned inquiries.

6 The Hearne Affidavit also indicates that Mineral County failed to inquire at any other
7 agencies or entities in Lyon County, other Northern Nevada or California Counties or at the
8 State of Nevada or California to attempt to locate Mr. Emery.

9 For all these reasons, the Hearne Affidavit does not demonstrate the level of diligence
10 required by the previous orders of the Court to support the conclusion that Mr. Emery cannot
11 be found in Nevada or California or is concealing himself to avoid service of process. *See*
12 *Doc. No. 210 at 7-14.*

13 The Hearne Affidavit also fails to set forth the necessary facts to authorize service
14 through publication on an out-of-state defendant under Nevada law. Under Nevada law, to
15 prove that a defendant resides out of state, the plaintiff must give the defendant's current, out-
16 of-state address; or, if the current address is unknown, give the last known address, the last date
17 on which the defendant was known to live there and state that the defendant no longer lives
18 there. *Doc. No. 252 at 19. Ins. 1-14.* The Hearne Affidavit fails to provide this information.

19 Under the circumstances, the Court should deny publication for Brett Emery.

20 **7. Gerbig, Arden, Evilo, and Josephine**

21 The documents received by the District's counsel from Kinko's did not contain an
22 Affidavit of Treva Hearne or supporting documentation of any type for these parties. The
23 Court should deny publication for Arden, Evilo and Josephine Gerbig until Mineral County
24 provides an affidavit that supports service through publication with respect to these parties.

25 **8. Gover, Edward E.**

26 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
27 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
28 does not set forth the necessary facts with the required specificity to demonstrate due or

1 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
2 the Court to determine if Nevada or California law applies. See Section IV. C. above.

3 Mineral County apparently bases its request to serve Mr. Gover by publication on his
4 daughter's statement that he lives in Arizona. See Paragraphs 6 and 8. The Hearne Affidavit,
5 however, fails to set forth the necessary facts to authorize service through publication on an
6 out-of-state defendant under either Nevada or California law. Under both Nevada and
7 California law, Mineral County must at least make some initial effort to determine Mr. Gover's
8 address in Arizona. This is because under Nevada law, to prove that a defendant resides out of
9 state, the plaintiff must give the defendant's current, out-of-state address; or, if the current
10 address is unknown, give the last known address, the last date on which the defendant was
11 known to live there and state that the defendant no longer lives there. Doc. No. 252 at 19, Ins.
12 1-14. The Hearne Affidavit fails to provide this information.

13 Under California law, Mineral County must attempt to locate Mr. Gover in Arizona and
14 attempt to serve him by some method other than publication as provided for in the California
15 Code of Civil Procedure. Doc. No. 252 at 19, Ins. 15-26. Once again, nothing in the Hearne
16 Affidavit establishes that Mineral County has attempted to locate or serve Mr. Gover in
17 Arizona.

18 Under these circumstances, the Court should deny service through publication for
19 Edward E. Gover.

20 **9. Hardy, Karen Lund**

21 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
22 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
23 does not set forth the necessary facts with the required specificity to demonstrate due or
24 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
25 the Court to determine if Nevada or California law applies. See Section IV. C. above.

26 Paragraph 6 of the Hearne Affidavit states that, in a telephone conversation, Ms. Lund
27 provided an address that turned out to be the address of the Carson City Court House. A
28 second attempt to reach Ms. Lund revealed that her telephone had been disconnected.

1 Paragraph 8 states that a process server indicated that "other process" had been attempted
2 unsuccessfully. For these reasons, Mr. Hearne concludes that Ms. Hardy (Lund) is attempting
3 to evade service.

4 The Hearne Affidavit, however, does not state the date of the first telephone
5 conversation or the identity of the person who spoke with Ms Hardy. It does not state the
6 telephone numbers dialed when Mineral County contacted and attempted to contact Ms. Lund
7 by telephone. It does not state that Mineral County attempted to find Ms. Lund's correct
8 address by conducting research in the telephone directories for Carson City and other Northern
9 Nevada communities.

10 The Hearne Affidavit does not identify the name of the process server who stated that
11 "other process" had been attempted unsuccessfully on Ms. Lund. It does not state the nature of
12 the "other process" or when it occurred or even the date on which the conversation with the
13 process server occurred.

14 Finally, the Hearne Affidavit indicates that no other records of agencies or entities
15 located in Carson City, other Northern Nevada and California Counties or at the State of
16 Nevada or California were researched to determine Ms. Lund's whereabouts.

17 Under these circumstances, the Court should deny service through publication for Karen
18 Hardy Lund.

19 **10. Hervin, Patricia**

20 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
21 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
22 does not set forth the necessary facts with the required specificity to demonstrate due or
23 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
24 the Court to determine if Nevada or California law applies. See Section IV. C. above.

25 Mineral County is apparently requesting service through publication on Patricia Hervin
26 as an out-of-state defendant. See Paragraph 4. Under Nevada law, however, due diligence must
27 first be exercised to find the defendant "within the state" before service by publication may be
28 appropriate on the out-of-state defendant. The sole basis for Mineral County determining that

1 Patricia Hervin has left Nevada is a statement made by Rieko and Kurt Hervin. *Id.* The Hearne
2 Affidavit, however, does not reveal the relationship between Rieko, Kurt and Patricia Hervin.
3 It does not indicate when the conversation between Rieko and Kurt and the Sheriff took place
4 or any specifics concerning the content of that conversation.

5 The Hearne Affidavit does not state that Mineral County did anything else to verify that
6 Patricia Hervin had in fact left Nevada. No records of agencies or entities located in any
7 Northern Nevada Counties or at the State of Nevada were researched.

8 The Hearne Affidavit also does not satisfy the requirements for publication on an out-
9 of-state defendant. Under Nevada law, to prove that a defendant resides out of state, the
10 plaintiff must give the defendant's current, out-of-state address; or, if the current address is
11 unknown, give the last known address, the last date on which the defendant was known to live
12 there and state that the defendant no longer lives there. See Doc. No. 252 at 19, lns. 1-19. The
13 Hearne Affidavit fails to provide this information.

14 Furthermore, the information contained in the Hearne Affidavit concerning Mineral
15 County's research in Grass Valley and Nevada City, California is deficient. In Paragraph 5,
16 Ms. Hearne states that she "personally called the Post Office to determine if she was receiving
17 mail in Grass Valley or in Nevada City in California and was told that she was not." Ms.
18 Hearne does not, however, state the date on which these telephone calls were made or identify
19 the person with whom she spoke or their position with the Post Office.

20 In Paragraph 6, the Hearne Affidavit states that "[w]e also called the Recorder of Deeds
21 and her name is not listed as a property owner." It does not, however, identify who called
22 the Recorder of Deeds, the dates on which those calls were placed, the county or counties in
23 which the Recorder of Deeds is located, the identity of the person(s) spoken to or the content of
24 the telephone conversation(s).

25 In Paragraph 7, the Hearne Affidavit states that "[w]e called information for a telephone
26 number and she is not listed." It does not, however, identify who called information, the dates
27 on which the calls were made or the name of the city or cities from which telephone number
28 listing information was requested.

1 Paragraph 8 of the Hearne Affidavit states that "[w]e also called the Sheriff of Nevada
2 County and the dispatcher stated to us that they had no information regarding the whereabouts
3 of Patricia Herwin." It does not, however, identify who called the Sheriff's dispatcher, the date
4 on which the call was made, the name of the dispatcher or the nature of the information
5 requested of the dispatcher.

6 Finally, the Hearne Affidavit indicates that, other than the "Post Office," "Recorder of
7 Deeds," telephone company and "Sheriff's dispatcher," no inquiries were made at other
8 agencies or entities located in Grass Valley, Nevada City, Northern Nevada or California
9 Counties or at the State of Nevada or California to attempt to determine Ms. Herwin's
10 whereabouts.

11 Under these circumstances, the Court should deny service through publication for Karen
12 Hardy Lund.

13 **11. Jones, Marjorie Ann**

14 Paragraph 3 of the Hearne Affidavit contains unsupported conclusions of law that do
15 not establish due or reasonable diligence. See Section IV. A. above. The Hearne Affidavit
16 does not set forth the necessary facts with the required specificity to demonstrate due or
17 reasonable diligence. See Section IV. D. above. It does not contain information necessary for
18 the Court to determine if Nevada or California law applies. See Section IV. C. above.

19 The Hearne Affidavit relies on a Return of Service form wherein the Lyon County
20 Sheriff stated that Ms. Jones did not live at the address where service was attempted and that he
21 had unsuccessfully inquired in the phone book and at the Post Office for Ms. Jones' address.
22 See Hearne Affidavit at Exhibit B. Apparently, Mineral County has attempted no follow up
23 contact with the Sheriff, however, to determine how he concluded that Ms. Jones did not live at
24 55 Manha Lane, Yerington, Nevada. Likewise, Mineral County has apparently not attempted
25 to contact David Manha to determine Ms. Jones' whereabouts after learning that Mr. Manha
26 and Ms. Jones appear together on recorded documents in the "records of Lyon County."
27 Hearne Affidavit at 4.

28

1 Mineral County also failed to inquire at any other agencies or entities in Lyon County,
2 other Northern Nevada and California Counties or at the State of Nevada or California to
3 attempt to locate Ms. Jones. Thus, the Hearne Affidavit does not demonstrate the level of
4 diligence required by the previous orders of the Court. *See* Doc. No. 210 at 7-14. Under these
5 circumstances, the Court should deny publication for Marjorie Ann Jones.

6 **12. Nagel, Helen**

7 Paragraph 3 of the Hearne Affidavit sets forth information to support Mineral County's
8 conclusion that Helen Nagel is deceased. Under these circumstances, Mineral County should
9 file the appropriate motion to dismiss Helen Nagel and, if necessary, to substitute her
10 successor-in-interest with respect to the relevant water rights. The Court should deny
11 publication for Helen Nagel.

12 **13. Nugent, Evelyn & George D.**

13 Paragraphs 3 and 4 of the Hearne Affidavit contain unsupported conclusions of law that
14 do not establish due or reasonable diligence. *See* Section IV. A. above. The Hearne Affidavit
15 does not set forth the necessary facts with the required specificity to demonstrate due or
16 reasonable diligence. *See* Section IV. D. above. It does not contain information necessary for
17 the Court to determine if Nevada or California law applies. *See* Section IV. C. above.

18 The Hearne Affidavit contains no information concerning George D. Nugent other than
19 the unsupported conclusions of law contained in Paragraphs 3 and 4. The Court should deny
20 publication for George D. Nugent.

21 With respect to Evelyn Nugent, The Hearne Affidavit relies on a Return of Service
22 Form wherein the process server commented that: "P.O Box, old address, Post Office says try
23 Smithgage, no luck; talked to M. Shehady, lives on Smithgage 40 years, never heard of them."
24 *See* Hearne Affidavit at Exhibit A. The Hearne Affidavit, however, does not provide
25 information concerning how the process server determined that the address was old, what
26 exactly was meant by "no luck" and no information concerning the process server's
27 conversation with M. Shehady.
28

1 Mineral County also failed to inquire at any other agencies or entities in Lyon County,
2 other Nevada or California Counties or at the State of Nevada or California to attempt to locate
3 Evelyn or George Nugent. Thus, the Hearne Affidavit does not demonstrate the level of
4 diligence required by the previous orders of the Court. *See* Doc. No. 210 at 7-14. Under these
5 circumstances, the Court should deny publication for Evelyn and George Nugent.

6 **14. Romero Family Trust, Benito Antonio & Linda Irene Romero, Trustees**

7 The Hearne Affidavit indicates that Mineral County requests service through
8 publication on Benny Romero because Mr. Romero has previously demonstrated hostility
9 towards an unnamed process server. Although it would be preferable to have an affidavit from
10 the process server as opposed to Ms. Hearne, the District has no objection to service by
11 publication on Mr. Romero.

12 **15. Sepulveda, Mariana**

13 The Hearne Affidavit apparently requests publication on Mariana Sepulveda based on
14 her status as an out-of-state defendant. To support this conclusion, the Hearne Affidavit relies
15 on the content of a telephone conversation wherein Ms. Sepulveda stated she lived in Florida.
16 The Hearne Affidavit does not state the date of the telephone conversation or identify the
17 individual who spoke with Ms. Sepulveda. More importantly, however, it does not contain
18 information necessary for the Court to determine if Nevada or California law applies. *See*
19 Section IV. C. above.

20 In any event, the Hearne Affidavit fails to set forth the necessary facts to authorize
21 service through publication on an out-of-state defendant under either Nevada or California law.
22 Under Nevada law, to prove that a defendant resides out of state, the plaintiff must give the
23 defendant's current, out-of-state address; or, if the current address is unknown, give the last
24 known address, the last date on which the defendant was known to live there and state that the
25 defendant no longer lives there. *See* Doc No. 252 at 19, *Ins.* 1-14. The Hearne Affidavit fails
26 to provide this information.

27 Under California law, Mineral County must attempt to locate Ms. Sepulveda in Florida
28 and attempt to serve her by some method other than publication as provided for in the

1 California Code of Civil Procedure. See Doc. No. 252 at 19, lns. 15-26. Once again, nothing
2 in the Hearne Affidavit establishes that Mineral County has attempted to locate or serve Mr.
3 Sepulveda in Florida.

4 Under these circumstances, the Court should deny publication for Mariana Sepulveda.

5 **16. Sweetwater Land and Cattle Co.**

6 The Hearne Affidavit sets forth information that suggests that Sweetwater Land and
7 Cattle Co. should be dismissed. Under these circumstances, Mineral County should make the
8 appropriate motion to dismiss Sweetwater Land and Cattle Co. and, if necessary, to substitute
9 its successor-in-interest with respect to the relevant water rights. The Court should deny
10 publication for Sweetwater Land and Cattle Co..

11 **VI. CONCLUSION**

12 As set forth above, the Court should deny Mineral County's request to serve its
13 intervention documents through publication on fifteen of the sixteen parties identified in the
14 Publication Motion. In previous motions for publication, Mineral County has filed
15 supplemental supporting affidavits and documentation with its reply. The Court has said the
16 following with respect to this approach by Mineral County:

17 Should Mineral County wish to file a fourth motion for publication, it shall do
18 so within 120 days of the date of this order. This time, however, all affidavits in
19 support of such motion shall be filed at the same time as the motion itself – not
20 with the reply, and not after briefing on the motion is complete. Late-filed
21 affidavits will not be considered in ruling on the motion.

22 Doc No. 252 at 11, lns. 15-21. Thus, the Court should not consider any supplemental affidavits
23 or documentation filed by Mineral County with its reply in support of the Publication Motion.

24 To the extent that Mineral County does file any supplemental affidavits and/or documentation
25
26
27
28

1 and the Court decides to consider them, the District hereby requests an opportunity to respond
2 to these supplemental affidavits and documentation.

3 Dated this 19th day of July, 2002.

4
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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***WALKER RIVER IRRIGATION DISTRICT'S RESPONSE TO MOTION FOR ORDER OF PUBLICATION (FIFTH REQUEST)*** in an envelope addressed to and where indicated by an asterisk by facsimile also:

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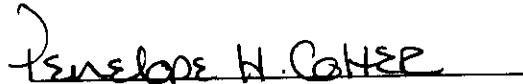
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Dated this 19th day of July, 2002.


Penelope H. Colter