ORIGINAL

GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986
WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511
Telephone: (775) 688-3000

Attorneys for Defendant,
WALKER RIVER IRRIGATION DISTRICT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, et al., Defendants.	In Equity No. C-125-ECR Subfile No. C-125-C **WALKER RIVER IRRIGATION DISTRICT'S RESPONSE TO MOTION FOR ORDER OF PUBLICATION (FIFTH REQUEST)**
MINERAL COUNTY, Proposed Plaintiff-Intervenor, v. WALKER RIVER IRRIGATION DISTRICT, et al., Proposed Defendants.	

420

I. INTRODUCTION

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

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

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

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

> 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.**

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

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

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

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

In the Publication Motion, Mineral County argues that it should be required to publish only the Notice in Lieu of Summons. Publication Motion at 4, 5.[1] The Court, however, has already designated the documents which Mineral County must publish. By order dated April 1, 1997, the Court directed Mineral County to publish the following documents in connection with its service upon unidentified individuals:

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).

---

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

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

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

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

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

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

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

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

A. The Court Has Rejected the Idea That "Overall Due Diligence" Satisfies the Requirements for Publication.

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

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

B. The Court Has Rejected Mineral County's Argument That The Expense Involved to Accomplish Service is Somehow Relevant.

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

> 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

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

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

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

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

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

> 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 <u>not</u> 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).

. . . . .

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

Doc. No. 252 at 18-20.

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

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

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

> Due diligence is difficult to accomplish; in the past eight years the Nevada Supreme Court has considered the meaning of due diligence four times, rejecting as inadequate the serving party's efforts each time. Gassett v. Snappy 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.

Doc. No. 210 at 8, 9.

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

> affidavits of due diligence should demonstrate by specific, probative evidence that Mineral County has checked at least the following:
>
> a) telephone directories for communities near the Walker River,

b) official land, tax, and probate records of Mineral, Lyon, and Douglas Counties,

c) voter registration lists,

d) motor vehicle registration lists,

e) relatives, friends, employers, employees, and neighbors,

f) attorneys, agents, managers, and insurers, and

g) records of the Nevada State Engineer.

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

Doc. No. 210 at 9.

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

> [T]he affidavit must allege (1) the place of residence or last known place of residence of the defendant; (2) recent inquiries of all known relatives, friends, and other persons likely to know the whereabouts of the defendant, together with the names and addresses of such persons, and the dates and result of such inquiries; (3) recent search of the latest city directory (if issued within five years), the latest telephone directory, the latest tax rolls, and the latest register of voters, covering the place . . . where the defendant is known to have lived, . . . together with the dates and results of such searches and of the follow-up of identical names; (4) and recent inquiries of all occupants and of neighbors of real estate involved in the action which is not alleged to be vacant, together with dates, names and addresses of such persons, and the result of such inquiries. *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.

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

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

1. Adams, Gregory Burton

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

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

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

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

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

2. Adams, Richard Taylor

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

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

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

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

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

3. Boardman, Dennis

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

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

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

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

4. Moreda, Iginia M.

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

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

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

5. Del Porto, Julia A.

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

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

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

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

6. Emery, Bret

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

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

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

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

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

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

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

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

7. Gerbig, Arden, Evilo, and Josephine

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

8. Gover, Edward E.

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

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

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

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

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

9. Hardy, Karen Lund

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

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

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

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

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

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

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

10. Hervin, Patricia

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

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

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

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

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

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

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

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

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

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

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

11. Jones, Marjorie Ann

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

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

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

12. Nagel, Helen

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

13. Nugent, Evelyn & George D.

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

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

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

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

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

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

15. Sepulveda, Mariana

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

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

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

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

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

16. Sweetwater Land and Cattle Co.

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

VI. CONCLUSION

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

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

Doc No. 252 at 11, lns. 15-21. Thus, the Court should not consider any supplemental affidavits or documentation filed by Mineral County with its reply in support of the Publication Motion. To the extent that Mineral County does file any supplemental affidavits and/or documentation

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

Dated this 19th day of July, 2002.

WOODBURN AND WEDGE
6100 Neil Road, Suite 500
Post Office Box 2311
Reno, Nevada 89511

By: Dale E. Ferguson
GORDON H. DEPAOLI
Nevada State Bar 00195
DALE E. FERGUSON
Nevada State Bar 04986

Attorneys for WALKER RIVER IRRIGATION DISTRICT

C:\WP\WRID\0083\Response to Motion for Order of Publication.doc

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:

Shirley A. Smith
Assistant U.S. Attorney
100 West Liberty Street, #600
Reno, NV 89509

William W. Quinn
Office of the Field Solicitor
Department of the Interior
401 West Washington Street, SPC 44
Phoenix, AZ 85003

George Benesch
P.O. Box 3498
Reno, NV 89505

Western Nevada Agency
Bureau of Indian Affairs
1677 Hot Springs Road
Carson City, NV 89706

Kenneth Spooner
General Manager
Walker River Irrigation District
P.O. Box 820
Yerington, NV 89447

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

Garry Stone
United States District Court Water Master
290 South Arlington Avenue
Third Floor
Reno, NV 89501

Alice E. Walker
Greene, Meyer & McElroy
1007 Pearl Street, Suite 220
Boulder, CO 80302

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

Matthew R. Campbell, Esq.
David Moser, Esq.
McCutchen, Doyle, Brown & Enerson
Three Embarcadero Center
San Francisco, CA 94111

Michael W. Neville
California Attorney General's Office
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-3664

Ross E. de Lipkau
Marshall, Hill, Cassas & de Lipkau
P.O. Box 2790
Reno, NV 89505

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000

Susan Schneider
Indian Resources Section
U.S. Department of Justice
999 18th Street
Suite 945, North Tower
Denver, CO 80202

Marta Adams
Deputy Attorney General
State of Nevada
100 North Carson street
Carson City, NV 89701

Mary Hackenbracht
Deputy Attorney General
State of California
1515 Clay Street, 20th Floor
Oakland, CA 94612-1413

Treva J. Hearne
Zeh, Spoo, Quade & Hearne
575 Forest Service
Reno, NV 89509

James Shaw
Water Master
U.S. Board of Water Commissioners
P.O. Box 853
Yerington, NV 89447

Hank Meshorer
United States Department of Justice
Natural Resources Division
Ben Franklin Station
P.O. Box 7397
Washington, D.C. 20044

Linda Bowman
540 Hammill Lane
Reno, NV 89511

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

Dated this 19th day of July, 2002.

Penelope H. Colter

Penelope H. Colter

WOODBURN AND WEDGE
6100 Neil Road
Reno, Nevada 89511
Tel: (775) 688-3000