RECEIVED
IN DROP BOX
97 SEP 16 PM 5:24
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

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

Attorneys for UNITED STATES BOARD OF WATER COMMISSIONERS and CHIEF DEPUTY WATER COMMISSIONER, ROGER BEZAYIFF

U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
SEP 16 1997
CLERK, U.S. DISTRICT COURT
BY DLR DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,

Defendant.

/

MINERAL COUNTY,

Proposed Plaintiff-Intervenor,

vs.

WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.,

Proposed Defendants.

/

IN EQUITY NO. C-125
SUBFILE NO. C-125-C-ECR(RAM)

UNITED STATES BOARD OF WATER COMMISSIONERS' BRIEF OF ISSUES TO BE SETTLED AT HEARING

INTRODUCTION

The United States Board of Water Commissioners (hereinafter "Board of Water Commissioners") was created in 1936 by judicial order. The Board of Water Commissioners is obligated by its order of appointment to oversee the distribution of the waters of the Walker River to all who hold water rights thereon. The Board of Water Commissioners acts as a special master.

150

In the instant law suit, Mineral County attempts to intervene for the purpose of securing for Mineral County substantial water rights and corresponding priority sufficient to create a minimum pool of water in the Walker Lake, which is located in Mineral County. The Walker River terminates in Walker Lake. Despite the fact that adjudication concerning the waters of the Walker River was initiated in 1926, this is the first time in seventy years that Mineral County has attempted to intervene and obtain water rights.

In order to intervene, Mineral County necessarily must provide notice and due process to the existing water right holders. Because the waters of the Walker River are fully allocated, any rights ultimately obtained by Mineral County through this lawsuit necessarily would alter the quantity of the rights available to the present water rights holders. The issue now before this Court concerns whether the actions that have been taken by Mineral County as to their intervention are sufficient to comply with the requirements of due process which must be accorded to the potential defendants, the present water right holders.

A hearing has been set for September 23, 1997 at which time the Court will consider whether Mineral County, the proposed intervenor, has in fact made proper service upon all identified holders of Walker River water rights. The Court has ordered the parties to file briefs regarding the issues to be settled concerning the sufficiency of the actions thus far undertaken by Mineral County, and regarding potential completion of service by publication.

STATEMENT OF FACTS

Rather than restate the facts and procedural posture of this case, the Board of Water Commissioners incorporates herein the statement of Background set forth in pages 1 through 3 of the State of Nevada's Memorandum of Points and Authorities Concerning Whether Mineral County has Properly Served All Identified Walker River Claimants.

POSITION OF THE BOARD OF WATER COMMISSIONERS

The Board of Water Commissioners does not have any property right at stake. Rather, the Board's interest is in these proceedings is to see that due process is observed so that any potential reallocation of water rights which may result from this lawsuit properly will be enforceable by the Board of Water Commissioners. It is the Board's understanding that the Walker River Irrigation

District ("WRID"), which is more intimately involved with the property rights aspect of this case, will be submitting to the Court a detailed report on the status of service on each of the identified water rights users. The Board of Water Commissioners will not attempt to address herein the status of service on particular individuals, but rather, will set forth herein the general issues of concern to the Board as to why the requirements of due process have not been satisfied by Mineral County.

I. IDENTIFIED WATER RIGHTS HOLDERS MUST BE PERSONALLY SERVED IN SATISFACTION OF THE REQUIREMENTS OF NRCP 4(d).

NRCP 4(d) governs personal service. Rule 4(d)(6) governs service upon most individuals living within Nevada, and presumably is applicable to the majority of the Walker River water rights holders who reside in Nevada. Pursuant to that rule, personal service is complete when the appropriate papers have been given to the defendant personally, left at the dwelling place with a person of suitable age and discretion who resides at the dwelling place; or by delivering the papers to an agent authorized to receive service on behalf of the intended defendant. NRCP 4(g) governs the return of service which is filed with the Court for the purpose of proving that service was completed. Where an individual completes the service, which seems to be the manner in which Mineral County has attempted to make service, NRCP 4(g)(2) requires that proof of service be made promptly to the court in the form of an affidavit by the person making the service, stating the date, place and manner in which the service was completed.

In the case at bar, Mineral County has not complied with the requirements of Rule 4(g). Thus, absent polling each of the potential defendants, it is impossible to ascertain whether service was properly accomplished on many of the identified potential defendants. As is detailed in the Brief submitted by WRID, it would appear that service was not performed in a manner which satisfies the requirements of Rule 4(d) with regard to numerous of the identified potential defendants. Areas of concern include whether the appropriate papers were included within the document "served; where substituted service was attempted, whether delivery was accomplished to a person suitable to accept service; and whether adequate service was made in situations where more than one water right holder resides in the same residence.

II. SERVICE BY PUBLICATION IS APPROPRIATE ONLY WHEN THE PROPOSED DEFENDANT RESIDES OUT OF STATE OR CANNOT, AFTER DUE DILIGENCE, BE LOCATED IN THE STATE.

Service by publication is governed by NRCP 4(e). It is an appropriate mode of service upon potential defendants who reside outside the state, or cannot, after due diligence, be found within the state. Thus, it would appear that service by publication is not an appropriate form of service for "identified" defendants, if they reside in the state and can be located here.

There appears to be confusion among the parties as to which potential defendants must be served by personal service, and which can be served by publication. The Board of Water Commissioners respectfully submits that this is an issue which needs to be resolved between the parties and the Court so that effort and funds are not wasted on forms of service which might be inappropriate for the particular potential defendant.

Respectfully submitted this 16th day of September, 1997.

BOWMAN & ROBINSON

By Linda A. Bowman

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

Attorneys for UNITED STATES BOARD OF WATER COMMISSIONERS and CHIEF DEPUTY WATER COMMISSIONER, ROGER BEZAYIFF

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of Bowman & Robinson and that on September 16, 1997, I mailed a true and correct copy of the UNITED STATES BOARD OF WATER COMMISSIONERS' BRIEF OF ISSUES TO BE SETTLED AT HEARING, postage prepaid, addressed to:

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

Marta Adams, Esq.
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717

Jim Weishaupt
WRID
Post Office Box 820
Yerington, NV 89447

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

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

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

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

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

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

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

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

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

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

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

Garry Stone
290 South Arlington
Reno, NV 89501

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

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

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

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

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

Stuart L. Somcah, Esq.
Donald B. Gilbert
DeCuir & Somach
400 Capitol Mall, Suite 1900
Sacramento, CA 95814

Timothy A. Lukas, Esq.
Hale, Lane, Peek, Dennison, Howard,
Anderson and Pearl
100 West Liberty Street, Tenth Floor
Post Office Box 3237
Reno, NV 89505

DATED this 16th day of September, 1997.

Darci Bertram
DARCI BERTRAM