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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

IN EQUITY NO. C-125

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

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

v.

**STATE OF NEVADA'S
RESPONSE TO MINERAL
COUNTY'S MOTION FOR
ORDER OF PUBLICATION
(Second Request)**

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

Defendants.

MINERAL COUNTY,

Proposed-Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT,
a corporation, et al.

I. INTRODUCTION

Mineral County, Nevada ("Mineral County") is attempting to intervene in the above-entitled action by asserting a new water right and a reallocation of the waters of the Walker River so as to

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1 establish a minimum lake level at Walker Lake.¹ By order dated March 22, 1996, this Court
 2 required Mineral County to effect personal service pursuant to Federal Rule of Civil Procedure
 3 (Rule) 4 upon all water rights holders on the Walker River.

4 Despite the interlocutory nature of this Court's order, Mineral County attempted an appeal
 5 to the United States Court of Appeals for the Ninth Circuit. Following oral argument, the Ninth
 6 Circuit dismissed Mineral County's appeal for lack of jurisdiction, finding, inter alia, that the
 7 Court's March 22, 1996 order requiring Rule 4 service is interlocutory and not within an exception
 8 to the finality requirement. Although the Ninth Circuit indicated that Mineral County's proposed
 9 intervention "could" be considered eligible for publication at the appropriate time, the Court clearly
 10 stated that Mineral County's request for service by publication required a properly supported
 11 motion to the district court. See, Memorandum, No. 96-15885, February 12, 1997.

12 By Minute Order dated April 1, 1997, this Court granted Mineral County leave to serve
 13 unidentified defendants by publication. Minutes of Court, April 1, 1997, p. 4. Now, Mineral
 14 County has filed a second Motion for Order of Publication accompanied by an Affidavit for
 15 Publication of Summons by Treva J. Hearne, co-counsel for Mineral County. In its Motion and
 16 in its Points and Authorities, the County seeks permission again to serve by publication
 17 "unidentified" parties. See, Motion For Order of Publication, p. 2, line 2; Points and Authorities,
 18 p. 6, line 3. As discussed below, the undersigned believes that Mineral County is actually seeking
 19 authority to publish notice to identified water rights holders, but is confused as to why the County
 20 would request publication for "unidentified" water rights holders for the purposes of this motion.

21 The County persistently complains that the service requirements being applied to it are
 22 unfair and unprecedented within the context of a water rights adjudication. This complaint is
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 27 ¹ The case, *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), was concluded with
 28 a final judgment entered on April 14, 1936, and amended on April 24, 1940.

1 wholly unsupportable in light of the fact that this particular adjudication is final and resulted in a
2 decree which is approximately sixty years old. Contrary to Mineral County's misapprehension of
3 the nature of this action, the findings of this Court resulting in the Walker River Decree
4 determining the relative water rights on the system are *res judicata*.

5 This proceeding is not, by any stretch of the imagination, an adjudication of water rights
6 in its early stages where publication to possible owners of water rights could be generally
7 appropriate where compliance with publication requirements can be demonstrated. In fact, as this
8 Court has repeatedly emphasized, Mineral County is seeking to interject itself into the Walker River
9 Decree as a "would-be plaintiff" attempting to assert a significant claim against decreed water
10 rights. By seeking to reallocate the decreed water rights on the Walker River system, Mineral
11 County needs to adequately serve water rights owners so as to ultimately bind them by this Court's
12 decision on the merits. Clearly, at a minimum, all the water rights owners are entitled to notice
13 of Mineral County's attempted intervention which could ultimately impact their property rights.

14
15 For the reasons articulated below, Mineral County has not presented this Court with a
16 properly supported motion which complies with Nevada Rule of Civil Procedure (NRCP) 4(e)(1).
17 Because Mineral County has not set forth the facts necessary to warrant an order allowing for
18 service by publication, the State of Nevada respectfully submits that the County's Motion should
19 be denied.
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21 II. MINERAL COUNTY HAS NOT SATISFIED THE BASIC REQUIREMENTS
22 FOR SERVICE BY PUBLICATION.

23 Federal Rule 4(e)(1) allows for service "upon an individual from whom a waiver has not
24 been obtained and filed" according to the provisions of state law in the state where the district court
25 is located. Nevada Rule of Civil Procedure (NRCP) 4(e)(1)(i) requires:

26 When the person on whom service is to be made resides out of the
27 state, or has departed from the state, or cannot, after due diligence,
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1 be found within the state, or conceals himself to avoid the service of
2 summons, and the fact shall appear, by affidavit, to the satisfaction
3 of the court or judge thereof, and it shall appear, either by affidavit
4 or by a verified complaint on file, that a cause of action exists against
5 the defendant in respect to whom the service is to be made, and that
6 the defendant is a necessary or proper party to the action, such court
7 or judge may grant an order that the service be made by the
8 publication of summons. (emphasis added).

6 NRCP 4(e)(1)(ii) provides for service by publication in cases relating to property rights,
7 including, as is the case here, water rights. The Nevada rule further states, in pertinent part:

8 In any action which relates to, or the subject of which is, real or
9 personal property in this state in which such person defendant or
10 corporation defendant has or claims a lien or interest, actual or
11 contingent, therein, or in which the relief demanded consists wholly
12 or in part of excluding such person or corporation from any interest
13 therein, and the said defendant resides out of the state or has departed
14 from the state, or cannot after due diligence be found within the state,
15 or conceals himself to avoid the service of summons, the judge or
16 justice may make an order that the service be made by the publication
17 of summons; said service by publication shall be made in the same
18 manner as now provided in all cases of service by publication.
19 (emphasis added.)

15 The Nevada rule contemplates that the entity seeking to accomplish service identify the
16 persons to be served. Following identification, the party seeking publication must show by
17 affidavit, to the satisfaction of the court, that after due diligence, personal service cannot be
18 accomplished. Here, after a protracted period during which the service list has been augmented,
19 Mineral County produced a list of water rights owners. Upon completion of its service list, the
20 County is now required to demonstrate which particular defendants reside out of state or have
21 otherwise departed from the state, and which defendants are concealing themselves to avoid service,
22 or cannot after due diligence be located. The State respectfully submits that Mineral County has
23 not yet established these fundamental facts which comprise the elements for service by publication
24 contained in NRCP 4(e)(1). The Court simply cannot order publication without a showing that
25 these essential requirements are met.
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1 In its Minute Order of April 14, 1998, the Court ordered Mineral County to file an Affidavit
2 "regarding service and Motion for Publication" by April 21, 1998. By the close of business on
3 April 23, 1998, the State has not yet received any factual support for the County's request to
4 publish notice with respect to the 23 persons referred to in the County's supporting affidavit. See,
5 Affidavit of Treva J. Hearne, p. 5, line 25.

6 In the Affidavit, Treva Hearne states that the original list utilized by the County contains
7 1107 persons, all of whom have been sent requests for waivers of service. Affidavit of Treva J.
8 Hearne, p. 3. At present, the list contains 1043 persons or entities owning water rights. Affidavit
9 of Treva J. Hearne, p. 5. The Affidavit states that 23 of the persons or entities "cannot be found
10 or have not been served." Affidavit of Treva J. Hearne, p. 5. Other than this conclusory statement,
11 there have not been individual affidavits offered attesting to the due diligence of the County and
12 other pertinent facts relating to the unserved person or entity.

13 Under the terms of NRCP 4(e)(1)(ii), the County must show, by individual affidavit, that
14 each of the 23 individuals or entities cannot be served in spite of due diligence on the part of the
15 County. Until this condition is met, publication should not be allowed. If this Court were to allow
16 service by publication without the requisite showing of due diligence, the Court's exercise of
17 personal jurisdiction over the unnamed water rights holders is invalid and any judgment on the
18 merits of Mineral County's claims is void. *Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1418,
19 906 P. 2d 258 (1995).

20 In *Gassett v. Snappy Car Rental*, the Nevada Supreme Court found that one visit to an old
21 address combined with service by publication fails to constitute due diligence. *Id.* In another
22 Nevada case, *Price v. Dunn*, 106 Nev. 100, 787 P. 2d 785 (1990), the Nevada Supreme Court
23 found that even where a plaintiff technically complied with NRCP 4(e)(1)(i), the plaintiff's actual
24 efforts did not afford the defendant his fundamental rights to due process. *Price v. Dunn*, 106 Nev.

at 103, 787 P.2d at 787.

Here, Mineral County has failed to present facts which either technically or substantively comply with the publication requirement of due diligence. Based on the unsupported, conclusory assertions of the County, the Court has no way of determining the diligence or lack thereof of the County's efforts at service. Reliance on publication as the means of providing notice of the County's proposed intervention to the unserved defendants runs contrary to the requirements of due process.

The well known principle announced in *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950) states:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .

"[M]ere" constructive notice provided by publication is inadequate to afford due process to the water rights holders. *Continental Insurance Company v. Sister Moseley*, 100 Nev. 337, 338, 683 P.2d 20 (1984) citing *Mullane v. Central Hanover Trust Company*, 339 U. S. 306 (1950) and *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706 (1983).

CONCLUSION

Based on the foregoing, the State of Nevada respectfully submits that Mineral County's second Motion For Order of Publication should be denied.

Dated this 28th day of April, 1998.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada and that on this day, I deposited for mailing, postage prepaid, at Carson City, Nevada, true and correct copies of the foregoing document addressed to the following:

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