Frankie Sue Del Papa, Attorney General
Marta Adams, Deputy Attorney General
Nevada Bar No. 1564
100 North Carson Street
Carson City, Nevada 89701
Tel. (702) 687-7319
Fax. (702) 687-5798

Attorneys for State of Nevada

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

Plaintiff-Intervenor,

v.

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

Defendants.

_____/

MINERAL COUNTY,

Proposed-Plaintiff-Intervenor,

v.

WALKER RIVER IRRIGATION DISTRICT, a corporation, et al.

_____/

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

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

FILED
98 APR 28 PM 4:07
LARRY R. WILSON
CLERK
BY _____ DEPUTY

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

191

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

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

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

The County persistently complains that the service requirements being applied to it are unfair and unprecedented within the context of a water rights adjudication. This complaint is

[1] The case, *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939), was concluded with a final judgment entered on April 14, 1936, and amended on April 24, 1940.

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

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

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

For the reasons articulated below, Mineral County has not presented this Court with a properly supported motion which complies with Nevada Rule of Civil Procedure (NRCP) 4(e)(1). Because Mineral County has not set forth the facts necessary to warrant an order allowing for service by publication, the State of Nevada respectfully submits that the County's Motion should be denied.

II. MINERAL COUNTY HAS NOT SATISFIED THE BASIC REQUIREMENTS FOR SERVICE BY PUBLICATION.

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

> When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence,

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

> be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, and that the defendant is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of summons. (emphasis added).

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

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

The Nevada rule contemplates that the entity seeking to accomplish service identify the persons to be served. Following identification, the party seeking publication must show by affidavit, to the satisfaction of the court, that after due diligence, personal service cannot be accomplished. Here, after a protracted period during which the service list has been augmented, Mineral County produced a list of water rights owners. Upon completion of its service list, the County is now required to demonstrate which particular defendants reside out of state or have otherwise departed from the state, and which defendants are concealing themselves to avoid service, or cannot after due diligence be located. The State respectfully submits that Mineral County has not yet established these fundamental facts which comprise the elements for service by publication contained in NRCP 4(e)(1). The Court simply cannot order publication without a showing that these essential requirements are met.

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

In its Minute Order of April 14, 1998, the Court ordered Mineral County to file an Affidavit "regarding service and Motion for Publication" by April 21, 1998. By the close of business on April 23, 1998, the State has not yet received any factual support for the County's request to publish notice with respect to the 23 persons referred to in the County's supporting affidavit. *See*, Affidavit of Treva J. Hearne, p. 5, line 25.

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

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

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

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

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.

FRANKIE SUE DEL PAPA
Attorney General

By: Marta Adams
MARTA ADAMS
Deputy Attorney General

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

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:

GORDON H DEPAOLI ESQ
PO BOX 2311
RENO NV 89505

MARY E HACKENBRACHT
DEPUTY ATTORNEY GENERAL
2101 WEBSTER ST 12TH FLOOR
OAKLAND CA 94612-3049

SCOTT MCELROY ESQ
ALICE WALKER
1007 PEARL ST #220
BOULDER CO 80302

JOHN P LANGE
US DEPARTMENT OF JUSTICE
999 18TH ST #945
DENVER CO 80202

MATTHEW R CAMPBELL ESQ
DAVID E MOSER ESQ
THREE EMBARCADERO CENTER
SAN FRANCISCO CA 94111

LINDA BOWMAN ESQ
499 W PLUMB LN #4
RENO NV 89509

TREVA J HEARNE ESQ
JAMES SPOO ESQ
575 FOREST STREET
RENO NV 89509

MICHAEL W NEVILLE
DEPUTY ATTORNEY GENERAL
50 FREEMONT ST #300
SAN FRANCISCO CA 94105-2239

ALEX JA FLANGAS ESQ
100 W LIBERTY 10TH FL
RENO NV 89509

GEORGE BENESCH ESQ
POB 3498
RENO NV 89501

GARRY STONE WATER MASTER
290 S ARLINGTON AVE
RENO NV 89501

AUSA SHIRLEY SMITH
100 W LIBERTY #600
RENO NV 89501

JAMES T MARKLE
WATER RESOURCES CONTROL BD
POB 100
SACRAMENTO CA 95814

RICHARD R GREENFIELD
DEPT OF INTERIOR
TWO N CENTRAL AVE #500
PHOENIX AZ 85004

ROGER JOHNSON
WATER RESOURCES CONTROL BD
POB 2000
SACRAMENTO CA 95810

ROSS DELIPKAU
POB 2790
RENO NV 89505

WESTERN NEVADA AGENCY
BUREAU OF INDIAN AFFAIRS
1677 HOT SPRINGS RD
CARSON CITY NV 89706

JOHN KRAMER
DEPT OF WATER RESOURCES
1416 NINTH ST
SACRAMENTO CA 95814

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

ROGER BEZAYIFF
US BRD OF WATER COMM
POB 853
YERINGTON NV 89447

GENERAL MANAGER
WRID
POB 820
YERINGTON NV 89447

EVAN BEAVERS
POB 486
MINDEN NV 89423

STUART L SOMACH
400 CAPITOL MALL
SACRAMENTO CA 95814

Dated: 4-28-98

N. Clugage
Neoma Clugage

Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717