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BY
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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.

CV-N-73-128-ECR

IN EQUITY NO. C-125;
SUBFILE NO. C-125-C

ORDER

Before the Court is Proposed Intervenor Mineral County's renewed Motion (#183) for Publication of Notice in Lieu of Summons. A Response has been filed by the United States and the Walker River Paiute Tribe (collectively, "the Tribe") (#188), and Oppositions have been filed by the Walker River Irrigation District ("the District") (#189), the U.S. Board of Water Commissioners ("the Board") (#190), and the State of Nevada ("Nevada") (#191); Mineral

1 County has replied (#199). We DEFER decision on the motion for
2 publication pending supplemental briefing.

3 BACKGROUND

4 Mineral County filed its Petition for Intervention on January
5 3, 1995. Petition (#3). We ordered Mineral County to serve its
6 Peition, among other documents, on all claimants to Walker River
7 water rights in accordance with Fed.R.Civ.P. 4. Order (#19). We
8 have repeatedly extended the time to effect service. E.g., Order
9 (#48). On August 14, 1997 we referred the matter of service to the
10 Magistrate Judge for a settlement conference. Minutes (#140).
11 After considerable effort by the Magistrate Judge and the parties,
12 a number of matters were settled; we have outlined our view of
13 these matters in a previous Order filed May 13, 1998 (#196).

14 One issue settled by the Magistrate Judge was the form of
15 notice in lieu of summons. Minutes (#152). Mineral County has
16 moved (#183), for a second time, for an order of publication of
17 said notice. This motion is now ripe.

18 DISCUSSION

19 We first commend Mineral County for its herculean efforts at
20 service. Although it has taken some time, Mineral County has
21 effected most of the service we required of it.

22 Additionally, as noted by the District, the Board, and
23 Nevada, the present motion is not about serving unidentified water
24 rights holders by publication--we have already granted Mineral
25 County's request to so serve them. Minute Order (#99). Instead,
26 the present motion is about serving identified water rights holders

1 who have not, for whatever reason, yet been served. Mineral County
2 does not dispute this. Reply (#199).

3 **I. "Individualized" Due Diligence**

4 Except for the question of serving unidentified water rights
5 holders, the principal argument of Nevada, the Board, and the
6 District is that Mineral County must demonstrate due diligence on
7 a case by case basis, as to each individual water rights holder,
8 before service by publication is justified. That is, Mineral
9 County must demonstrate "individualized" due diligence, rather
10 than, as the Tribe and Mineral County suggest, "overall" due
11 diligence. No party offers any legal authority directly on point.
12 In particular, although the District asserts that the U.S. effected
13 service individually in U.S. v. Truckee-Carson Irrigation District,
14 649 F.2d 1286 (9th Cir. 1981), amended, 666 F.2d 351 (9th Cir.
15 1982), rev'd in part sub nom., Nevada v. U.S., 463 U.S. 110 (1983),
16 nothing in that case holds that individualized due diligence is
17 required.

18 Nonetheless, we conclude that individualized showings of due
19 diligence are necessary. First, the Ninth Circuit has suggested
20 that lack of individualized service divests a court of jurisdiction
21 over a particular defendant: "A federal court does not have
22 jurisdiction over a defendant unless the defendant has been served
23 properly under Fed.R.Civ.P. 4." Direct Mail Specialists, Inc. v.
24 Eclat Computerized Technologies, Inc., 840 F.2d 685, 688 (9th Cir.
25 1988). Proper service is a jurisdictional issue because due
26 process and fundamental fairness require "notice reasonably

1 calculated, under all the circumstances, to apprise interested
 2 parties of the pendency of the action and afford them an
 3 opportunity to present their objections." Mullane v. Central
 4 Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). This principle
 5 applies both in quiet title actions and in large-scale water rights
 6 adjudications. U.S. v. Ahtanum Irrigation District, 236 F.2d 321,
 7 339 (9th Cir. 1956); Bentley v. Rosebud County, 230 F.2d 1, 6 (9th
 8 Cir. 1956). This implies that compliance with Rule 4 must be
 9 examined on a defendant-by-defendant basis, or else we lack
 10 jurisdiction over, and will violate the due process rights of, a
 11 particular defendant.

12 Second, Nevada law regarding system-wide water rights
 13 adjudications by the Nevada State Engineer in administrative
 14 proceedings provides for individualized service, although both the
 15 degree of diligence required and the manner of service called for
 16 are less stringent than that required for judicial proceedings.
 17 Nev.Rev.Stat. 533.110(2) (notice is required to "such claimants as
 18 can be reasonably ascertained"). Moreover, Nevada's service rule
 19 suggests that due diligence determinations must be individualized,
 20 since the rule speaks of individual "persons": "When the person on
 21 whom service is to be made . . . cannot, after due diligence, be
 22 found within the state" Nev.R.Civ.P. 4(e)(1)(i) (emphasis
 23 added); accord Nev.R.Civ.P. 4(e)(1)(ii).

24 Third, even in class actions if a class member is identifiable
 25 she must receive "individual notice." Fed.R.Civ.P. 23(c)(2); see
 26 In re Agent Orange Product Liability Litigation, 818 F.2d 145, 168

1 (2d Cir. 1987). This, too, suggests that sufficiency of service
2 must be examined on an individualized basis.

3 Finally, we risk wasting scarce judicial resources, as well as
4 the time and effort of the parties, if we allow this case to
5 proceed with even a small number of water rights holders lacking
6 notice of the action. If we fail to properly acquire jurisdiction
7 by service of process, a single party adversely affected by a
8 judgment entered in this case and who was not properly served could
9 conceivably later challenge the validity of that judgment,
10 notwithstanding the extensive work that will no doubt be necessary
11 to adjudicate Mineral County's claim.

12 In short, no matter how many identified defendants remain to
13 be personally served, the propriety of service by publication must
14 be determined on a case by case basis and not merely on the basis
15 that Mineral County's heroic efforts and considerable expense alone
16 warrant service by publication.

17 **II. Individual Defendants**

18 Mineral County seeks service by publication with respect to
19 the following parties:

20 Kimberly Ash
21 Jerry L. and Anna Blades
22 Loretta Beth Eitel
23 Brett Emory
24 Ronald W. and Sandra A. Goss
25 Deborah Hartline
26 Isidro V. and Audelia P. Hernandez
George Hughes
John and Marilyn Ithuburu
Joyce Jenkins
Charles F. Mann
Judith Mausbach
Mildred K. McWhirter

1 Helen Nagel
 2 Robert D. Olson
 3 Harold and Sherri Porter
 4 Gary C. and Tildean L. Silva
 5 A Company of Spragues
 6 Roberta and Richard W. Stebbins
 7 Donald and Barbara Terschluse
 8 Robert W. and Marie Terschluse
 9 Jack C. Zippwald

10 Response (#199, Ex. 2). Counting pairs of individuals (presumably
 11 spouses) as two parties, this list contains 31 defendants as to
 12 which Mineral County seeks service by publication. Since
 13 publication is the only issue raised by the present motion, and
 14 these 31 are the only defendants as to which Mineral County seeks
 15 service by publication, we will limit our consideration of the
 16 remaining issues raised in the District's Opposition (#189) to the
 17 question of whether publication is warranted as to these parties.

18 A. The Law

19 Service of process is governed by Fed.R.Civ.P. 4, which
 20 requires (for individuals) personal service in accordance with Rule
 21 4(e)(2) or service "pursuant to the law of the state in which the
 22 district court is located, or in which service is effected."
 23 Fed.R.Civ.P. 4(e)(1). For present purposes, the service rule with
 24 respect to corporations--in this case, presumably "A Company of
 25 Spragues"--is to the same effect. Fed.R.Civ.P. 4(h)(1).

26 We have already determined that Nevada Rule of Civil Procedure
 4(e)(1)(ii) applies to this action because it is essentially one to
 quiet title to property.¹ Minute Order at 2 (#99); Ahtanum

¹We note that because this case involves federal question jurisdiction, rather than diversity jurisdiction, we possess the

1 Irrigation District, 236 F.2d at 339. We have also determined that
 2 Nevada law does not apply to those holders of water rights
 3 appurtenant to land in California; as to those defendants we must
 4 apply California's law of service by publication. Minute Order at
 5 3 (#99). Indeed, this has been the law since the Walker River
 6 Decree first issued. See U.S. v. Walker River Irrigation District,
 7 11 F.Supp. 158, 170 (D.Nev. 1935) (citing Rickey Land & Cattle Co.
 8 v. Miller & Lux, 218 U.S. 258, 261-63 (1910)), rev'd on other
 9 grounds, 104 F.2d 334 (9th Cir. 1939).

10 1. Nevada Publication Law

11 Under Nevada law, to be entitled to service by publication on
 12 a particular defendant Mineral County must demonstrate by affidavit
 13 or other evidence that the defendant:

- 14 a. Resides out of the state,
- 15 b. Has departed from the state,
- 16 c. Conceals himself to avoid the service of summons, or
- 17 d. Cannot after due diligence be found within the state.

18 Nev.R.Civ.P. 4(e)(1)(ii).

19 Although the evidence is somewhat unclear, it appears from
 20 Mineral County's Reply that at least four parties, Kimberly Ash,
 21 Joyce Jenkins, and Robert W. and Marie Terschlude, live in
 22 California. If this is so, and if Mineral County offers an
 23 affidavit stating as to each of these four parties that 1) they

24 _____
 25 authority to quiet title to property in California. Cf. Sherrill
 26 v. McShan, 356 F.2d 607, 610 (9th Cir.1966) (court sitting in
 diversity is merely an adjunct to state court, and lacks power over
 realty outside forum state).

1 reside out of Nevada or have departed from Nevada, and 2) their
 2 water rights are appurtenant to Nevada land, then service by
 3 publication would be appropriate as to each of these four
 4 defendants. Gambs v. Morgenthauer, 423 P.2d 670, 674 (Nev. 1967)
 5 (service by publication may be made on non-residents of Nevada);
 6 State ex rel. Crummer v. Fourth Judicial District Court, 249 P.2d
 7 226, 230 (Nev. 1952) (evidence showing non-residence must be
 8 reliable). Additionally, of course, if these same two facts are
 9 demonstrated by affidavit as to other parties, publication would be
 10 appropriate as to them as well. Since Mineral County has offered
 11 no evidence satisfying this standard as to any party, service by
 12 publication on the basis of non-residency is not yet warranted.

13 Mineral County does not assert that any of the 31 parties are
 14 concealing themselves to avoid service of summons. Accordingly,
 15 assuming their water rights are appurtenant to Nevada land, the
 16 primary issue is whether Mineral County has exercised due diligence
 17 in serving them. Due diligence is difficult to accomplish; in the
 18 past eight years the Nevada Supreme Court has considered the
 19 meaning of due diligence four times, rejecting as inadequate the
 20 serving party's efforts each time. Gassett v. Snappy Car Rental,
 21 906 P.2d 258, 261 (Nev. 1995); McNair v. Rivera, 874 P.2d 1240,
 22 1244 (Nev. 1994); Price v. Dunn, 787 P.2d 785, 787 (Nev. 1990),
 23 overruled on other grounds, Epstein v. Epstein, 950 P.2d 771, 773
 24 (Nev. 1997); see also Browning v. Dixon, 954 P.2d 741, 1998 WL
 25 84567, *3 (Nev. Feb. 26, 1998) (construing NRS 14.070(2)). Indeed,
 26 we have yet to find a Nevada Supreme Court opinion holding the due

1 diligence requirement to be satisfied. E.g., Penn Moultrie Corp.
2 v. Eighth Judicial District Court, 382 P.2d 397, 398 n.2 (Nev.
3 1963); Foster v. Lewis, 372 P.2d 679, 682 (Nev. 1962); State ex
4 rel. Crummer v. Fourth Judicial District Court, 238 P.2d 1125, 1127
5 (Nev. 1951).

6 The record is unclear as to precisely what steps Mineral
7 County has taken to "find within the state" the 31 parties it seeks
8 to serve by publication. Because of the low esteem in which
9 service by publication is held by the Nevada Supreme Court,
10 affidavits of due diligence should demonstrate by specific,
11 probative evidence that Mineral County has checked at least the
12 following:

- 13 a) telephone directories for communities near the Walker
14 River,
15 b) official land, tax, and probate records of Mineral, Lyon,
16 and Douglas Counties,
17 c) voter registration lists,
18 d) motor vehicle registration lists,
19 e) relatives, friends, employers, employees, and neighbors,
20 f) attorneys, agents, managers, and insurers, and
21 g) records of the Nevada State Engineer.

22 Mere recitation that these information sources have been checked is
23 not enough; the affidavits should indicate dates of inquiry, names
24 of persons spoken to, and the results of each inquiry. The burden
25 is on Mineral County to establish due diligence.
26

1 Nevada case law provides more specific requirements of due
2 diligence, which we summarize as follows:

3 1. Affidavits of due diligence must be specific and not
4 conclusory, and must be based on reliable information. Penn
5 Moultrie, 382 P.2d at 398 n.2; Crummer, 238 P.2d at 1127.

6 2. If the party's employer or insurer can be determined, you
7 must try to locate the party through them. Browning, 1998 WL 84567
8 at *3.

9 3. If the party's property manager or agent can be
10 determined, you must try to locate the party through them. Foster,
11 372 P.2d at 682.

12 4. If the party is or was represented by an attorney, you
13 must try to locate the party through her. Gassett, 906 P.2d at
14 261.

15 5. The serving party must contact all known relatives and,
16 if apprised only of the party's general location, search the
17 telephone book in the area of the party's residence. Price, 787
18 P.2d at 787.

19 6. If the party is on pretrial release, and thus subject to
20 significant restrictions on his liberty, attempting service at his
21 address (and nothing more) is not enough. McNair, 874 P.2d at
22 1244.

23 Additionally, though not directly on point, Bell v. Anderson
24 suggests that due diligence requires a search of title records and
25 tax assessment records. 849 P.2d 350, 352 (Nev. 1993) (county tax
26

1 collector must notify both title owner of property and taxpayer on
2 property before holding tax delinquency sale).

3 2. California Publication Law

4 We cannot tell precisely who among the 31 parties listed above
5 own water rights appurtenant to California land, although it is
6 likely that at least some do own such water rights and therefore
7 must be served pursuant to California law.

8 Under California law, to be entitled to service by publication
9 on a particular defendant Mineral County must demonstrate by
10 affidavit that "the party to be served cannot with reasonable
11 diligence be served in another manner specified" in the California
12 Code of Civil Procedure. Cal.Civ.Proc.Code § 415.50(a) (Deering
13 1997).² This is of course not the same as the Nevada "cannot after
14 due diligence be found within the state" rule, but "due diligence"
15 and "reasonable diligence" are similar.

16 The California Judicial Council commentary to Section 415.50
17 defines "reasonable diligence" as "a thorough, systematic
18 investigation and inquiry conducted in good faith by the party or
19 his agent or attorney." Cal.Civ.Proc.Code § 415.50 commentary
20 (Deering 1997). Specifically, the Judicial Council recommends
21 inquiry of:

- 22 a) relatives, friends, and acquaintances,
- 23 b) employers,

25 ²Although Civil Procedure Code § 763.010 deals with service in
26 quiet title actions, this section only applies to unidentified
defendants.

- c) telephone directories (and "city directories"),
- d) voter registration lists, and
- e) property indices at the assessor's office.

Id.. This recommendation has been cited repeatedly by California appellate courts. E.g., In re Christiano S., 68 Cal.Rptr.2d 631, 633 (Cal.App.2d 1997). The California Court of Appeal has also endorsed the Los Angeles Superior Court's procedure:

[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 results 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 results of such inquiries.

Sanford v. Smith, 90 Cal.Rptr. 256, 262-63 (Cal.App.1st 1970).

Other requirements established by the case law include:

1. The affidavit must detail probative facts based on personal knowledge, rather than legal conclusions, and must be specific about the names of persons contacted and the dates contacted. Olvera v. Olvera, 283 Cal.Rptr. 271, 278 (Cal.App.4th 1991); Kott v. Superior Court, 53 Cal.Rptr.2d 215, 221 (Cal.App.2d 1996).³

³Although the affidavit must also state that the defendant claims an interest in a Walker River water right, since the parties

1 sufficient to deny service by publication, since an affidavit is
2 required under the law of both Nevada and California.

3 More importantly, the Response, though it represents a
4 considerable amount of effort and attempt at detail, falls far
5 short of meeting the "due" or "reasonable" diligence requirements.
6 For many parties, the Response says simply "cannot find" or "unable
7 to serve"; this is of course totally insufficient. Other parties
8 apparently have or had addresses known to Mineral County: Isidro V.
9 and Audelia P. Hernandez, George Hughes, Joyce Jenkins, Charles F.
10 Mann, Mildred K. McWhirter, Helen Nagel, Gary C. and Tildean L.
11 Silva, and Donald and Barbara Terschlude. This is a good start,
12 and may permit waiver of service under Cal.Civ.Proc.Code 415.30,
13 but alone this does not reflect due or reasonable diligence. Three
14 parties, Kimberly Ash and Robert W. and Marie Terschlude, were not
15 located by the "L.A. Sheriff." This, too, is a good start, but
16 more detail is required.

17 It may be that more detail may be found on the individual
18 returns of service, but the parties are in a better position to
19 locate this information than is the Court. Accordingly, we will
20 permit Mineral County another period within which to document its
21 diligence, and to effect service on those parties not yet served.

22 CONCLUSION

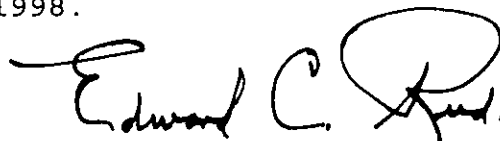
23 Although considerable time has passed since Mineral County
24 first began serving Walker River water rights holders, there has
25 been enough uncertainty regarding the requirements of service by
26 publication that another extension of time within which to serve is

1 warranted. During this period, which we set at 60 days, Mineral
2 County should further attempt to serve parties without publication,
3 document its diligence for purposes of the motion for publication,
4 and generally attempt to resolve those questions raised in the
5 District's Opposition (#189). We will address other matters raised
6 by Mineral County and the District after Mineral County has
7 documented its diligence; in particular, what documents should be
8 published, and the manner of publication, will be determined at a
9 later time.

10
11 IT IS, THEREFORE, HEREBY ORDERED that decision on Mineral County's
12 renewed motion (#183) for service by publication is DEFERRED
13 pending supplemental briefing as provided below.

14 IT IS FURTHER ORDERED that Mineral County shall have until August
15 1, 1998 within which to supplement its motion for service by
16 publication (#183) with affidavits and evidence as outlined above.
17 All other parties shall thereafter have 30 days within which to
18 supplement their Oppositions, and Mineral County shall have 15 days
19 within which to reply.

20
21 DATED: June 2, 1998.

22
23 

24 UNITED STATES DISTRICT JUDGE
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26