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

O R D E R

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

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

BACKGROUND

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

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

DISCUSSION

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

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

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

I. "Individualized" Due Diligence

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

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

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

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

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

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

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

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

II. Individual Defendants

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

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

Helen Nagel
Robert D. Olson
Harold and Sherri Porter
Gary C. and Tildean L. Silva
A Company of Spragues
Roberta and Richard W. Stebbins
Donald and Barbara Terschluse
Robert W. and Marie Terschluse
Jack C. Zippwald

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

A. The Law

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

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

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

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

1. Nevada Publication Law

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

a. Resides out of the state,

b. Has departed from the state,

c. Conceals himself to avoid the service of summons, or

d. Cannot after due diligence be found within the state.

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

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

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authority to quiet title to property in California. Cf. Sherrill 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).

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

Mineral County does not assert that any of the 31 parties are concealing themselves to avoid service of summons. Accordingly, assuming their water rights are appurtenant to Nevada land, the primary issue is whether Mineral County has exercised due diligence in serving them. 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. E.g., Penn Moultrie Corp. v. Eighth Judicial District Court, 382 P.2d 397, 398 n.2 (Nev. 1963); Foster v. Lewis, 372 P.2d 679, 682 (Nev. 1962); State ex rel. Crummer v. Fourth Judicial District Court, 238 P.2d 1125, 1127 (Nev. 1951).

The record is unclear as to precisely what steps Mineral County has taken to "find within the state" the 31 parties it seeks to serve by publication. Because of the low esteem in which service by publication is held by the Nevada Supreme Court, 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.

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

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

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

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

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

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

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

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

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

2. California Publication Law

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

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

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

a) relatives, friends, and acquaintances,

b) employers,

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[2]Although Civil Procedure Code § 763.010 deals with service in 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]

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

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

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

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

CONCLUSION

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

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

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

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

DATED: June 2, 1998.

Edward C. Reed.

UNITED STATES DISTRICT JUDGE