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CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	In Equity No. C-125-ECR Subfile C-125-C **ORDER**

On June 19, 2002, Proposed Intervenor Mineral County filed its Motion for Order of Publication (Fifth Request) (Doc. #415). Defendant Walker River Irrigation District ("WRID")has filed a response the motion (Doc. #420) and Mineral County has replied to that response (Doc. #421).

Mineral County's Motion for Publication requests that the court enter an order allowing Mineral County to effect service of its intervention documents through publication on all unidentified parties as well as sixteen identified parties. (Doc. #415). Additionally, the motion requests that Mineral County be allowed to publish only a Notice in Lieu of Summons with respect to its publication efforts. (Id.).

DISCUSSION

A. Service by Publication for Unidentified Parties

Mineral County request, as part of their motion, that the court enter an Order allowing Mineral County to effect service through publication on all "unidentified parties". (Doc. #415 at 2). This

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request has already been addressed by the court in a previous Order. On April 1, 1997, the court entered an Order stating that:

> For the foregoing reasons, **IT IS THEREFORE ORDERED** that the Motion (Doc. #88) filed by Proposed Intervenor Mineral County for leave to serve unidentified Defendants by Publication pursuant to Nev. R. Civ. P. 4(e)(1)(ii) is **HEREBY GRANTED.**

(Doc. #99 at 4).

Therefore, the court need not further address the issue on whether unidentified parties may be served through publication. However, the court notes that publication for unidentified parties shall not "actually begin until all service issues have been resolved for all defendants-that is, until all defendants have either been served, or Mineral County has been successful in requesting publication as to those defendants." (Doc. #252 at 11-12).

B. Documents to be Published

Mineral County also argues that it should only be required to publish the Notice in Lieu of Summons as it adequately informs persons of the action. (Doc. #415 at 4-5). However, as WRID points out (Doc. #420 at 3), the court has already addressed this issue and designated what documents Mineral County must publish. *See* Doc. #99 at 4; Doc. #122 at 2.

At present, Mineral County must, at a minimum, publish the following documents: (1) A Notice in Lieu of Summons; (2) Mineral County's Amended Complaint in Intervention (Doc. #20); (3) Mineral County's Amended Memorandum of Points and Authorities in Support of Mineral County's Amended Complaint in Intervention (Doc. #21); and (4) Mineral County's Motion for Preliminary Injunction (Doc. #22).

The court has stated that it "will address Mineral County's contention that it should not be required to publish all the documents we previously ordered published" at the time the court orders publication to begin. (Doc. #252 at 12, ll. 2-5). As such, the court will consider Mineral County's request for Publication to be limited to the Notice in Lieu of Summons at a later date.

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C. Service by Publication for Identified Parties

Mineral County requests publication for the following identified parties:

1. Adams, Gregory Burton
2. Adams, Richard Taylor
3. Boardman, Dennis
4. Moreda, Iginia M.
5. Del Porto, Julia A.
6. Emery, Bret
7. Gerbig, Arden, Evilo, and Josephine
8. Gover, Edward E.
9. Hardy, Karen Lund
10. Hervin, Patricia
11. Jones, Marjorie Ann
12. Nagel, Helen
13. Nugent, Evelyn & George D.
14. Romero Family Trust, Benito Antonio & Linda Irene Romero, Trustees
15. Sepulveda, Mariana
16. Sweetwater Land and Cattle Co.

(Doc. #415).

Mineral County's Motion for Publication contains affidavits of Treva J. Hearne ("Hearne Aff.'s") in support of the Motion for Publication. (Doc. #415, Hearne Aff.'s #1-16). WRID contends that Mineral County has failed to meet the requirements for publication for fifteen of the sixteen identified parties. (Doc. #420). The court will examine each party in turn.

Adams, Gregory Burton - As an initial matter, the Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. This is important because, as set forth in previous Orders, "Nevada law does not apply to those holders of water rights appurtenant to land in California; as to those defendants [the Court] must apply California's law of service by publication." (Doc. #210 at 7, ll. 1-4). Mineral County has ignored this distinction.

In any event, whether analyzed under either Nevada or California law, Mineral County has failed to meet the requirements for publication. The court has stated that under Nevada law, 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.

Doc. #210 at 9.

In stating the reasonable diligence standard under California law, the court has cited *Sanford v. Smith*, 90 Cal.Rptr. 256, 262-63 (Cal.App.1st 1970):

> [T]he affidavit must allege (1) the place of residence or last known place of residence of the defendant; (2)recent inquires of all known relatives, friends, and other persons likely to know the whereabouts or the defendant, together with the names and addresses of such persons, and the dates and results of such inquires; (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 inquires 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 inquires.

(Doc. #210 at 12).

First, the Hearne Affidavit states that the Sheriff of Nevada County stated that Gregory Adams appeared to be an absentee landowner of the property in Truckee and that he believed that Gregory Adams lived in Reno, Nevada. (Hearne Aff. #1). There is no statement of why or how the Sheriff came to this conclusion. The Hearne Affidavit also states that Ms. Hearne called and spoke to a Gregory Adams listed in the phone book in Reno, but that he wasn't the correct person. Ms. Hearne then stated that she believed the correct Gregory Adams "is no longer in Reno, Nevada, nor anywhere that I can locate him." (Id.). However, there are no records that agencies or entities located in Washoe County, other Norther Nevada counties or at the State of Nevada were researched.

Additionally, the Hearne Affidavit states that Ms. Hearne contacted Gregory Adams mother, Vivian Adams, but that she was unresponsive when asked about the whereabouts of her son. (Id.).

The court has previously stated that a parent's failure to provide there child's whereabouts does not establish diligence necessary to warrant service by publication. (Doc. #252 at 17, ll. 25-26). Given the above, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Adams, Richard Taylor - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Richard T. Adams lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #2).

The Hearne Affidavit states that the Sheriff of Nevada County, California stated that "Gregory Adams appeared to have abandoned his home in Truckee" apparently because no one was home and snow had not been removed from around the house. (Id.). The court assumes that Ms. Hearne meant Richard Adams instead of Gregory Adams. The Hearne Affidavit also states that Ms. Hearne "cannot find any forwarding address or another location for Richard T. Adams" and that his mother, Vivian Adams, was unresponsive when asked about his whereabouts. (Id.).

There is no record of agencies or entities researched in attempting to locate Richard T. Adams and as stated earlier, the fact that a parent does not disclose the whereabouts of their child does not amount to reasonable diligence. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Boardman, Dennis - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Dennis Boardman lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #3).

The Hearne Aff. states that the Sheriff of Lyon County, Nevada stated that Dennis Boardman had been evicted from his previous address. (Id.). However, the address from which Dennis Boardman had allegedly been evicted from was not stated and there is no mention that there was contact with the landlord of the residence.

Additionally, the Hearne Affidavit states that Ms. Hearne could not find a forwarding address for Dennis Boardman after she performed a "diligent search of the records at the Lyon County Recorders Office and making inquiry with the persons who work at the Lyon County Recorders Office and Sheriff's Office." (Id.). However, Ms. Hearne has not included the names, dates, and factual circumstances regarding these searches and there is no record that Ms. Hearne checked additional agencies or entities in Lyon County, other Northern Nevada counties or at the State of Nevada. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Moreda, Iginia M. - The record reflects that since Mineral County's Motion for Publication, Iginia M. Moreda has been personally served. (Doc. #424, Certificates of Return of Service). As such, the Motion for Publication is moot.

Del Porto, Julia A. - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Julia A. Del Porto lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #5).

First, the Hearne Affidavit relies on a Return of Service by the Lyon County Sheriff stating that Julia A. Del Porto "no longer lives at residence, or in area."[1] (Id., Attach. A). However, there is no record of any attempted follow up contact at the residence or reasons given why it is assumed that Julia A. Del Porto is no longer at the residence or in the area. Additionally, the Hearne Affidavit states that Julia A. Del Porto is not listed in the Yerington telephone book and there are no other addresses listed in the Recorder's Office of Lyon County. (Id.). Here again, there is no record that Ms. Hearne checked additional agencies or entities in Lyon County, other Northern Nevada counties or at the State of Nevada. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

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[1]Service was attempted at 155/157 North Highway 95A, Yerington, Nevada. (Hearne Aff. #5).

Emery, Bret - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Bret Emery lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #6).

The Hearne Affidavit states that there was an attempt to serve Bret Emery, trustee for Don Johnson, by sending him a letter at an address in Santa Cruz. (Id.). Upon receiving this letter, Emery called Ms. Hearne's office and gave another address which a process server was subsequently sent to after Emery allegedly said he would not sign a waiver. (Id.). The address given by Emery was apparently false and did not exist. Upon receiving a second letter, the Hearne Affidavit states that Emery called the office again stating that he would not sign a waiver or cooperate. (Id.).

The Hearne Affidavit does not contain the letters sent to Emery, the date they were sent or the address to which they were sent. Nor does the Hearne Affidavit indicate to whom the alleged phone conversations were with at Ms. Hearne's office or the content of the conversations.[2] Interestingly, the Hearne Affidavit does not state why service was not attempted at the address to which Emery apparently received the two letters.

The Hearne Affidavit also indicates that inquires were sent to the Post Office to attempt to locate Bret Emery or Don Johnson but received no helpful information. (Id.). However, there are no copies of the inquires or responses and the Hearne Affidavit does not specify the date the inquires were made or the location of the Post Office. Also, there is no record that Ms. Hearne checked additional agencies in Lyon County, Northern Nevada or at the State of Nevada in attempting to locate Bret Emery.

Finally, Ms. Hearne states that she believes that "Mr. Emery has made every effort to conceal himself for the purpose of service of process." (Id.). Although Mineral County need not demonstrate the same due diligence when attempting to serve someone who is concealing themselves as compared

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[2]The court has held that "due diligence would only be satisfied when Mineral County submitted affidavits demonstrating that a number of resources had been checked, including 'the dates of inquiry, names of persons spoken to, and the results of each inquiry.'" (Doc. #252 at 24, ll. 6-10; Id. at 65, ll. 9-14; Id. at 67, ll. 19-24; Id. at 81, ll. 9-15).

to someone who merely cannot be found, the facts here do not support the contention that Bret Emery is concealing himself. In fact, as stated in the Hearne Affidavit, Brett Emery has received multiple letters at some address and spoken with the Ms. Hearne's office. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Gerbig, Arden, Evilo, and Josephine - Mineral County's Motion for Publication did not contain an affidavit or any other evidence supporting attempted service on these individuals. *See* Doc. #415, Ex.7. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Gover, Edward E. - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Edward E. Gover lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #8).

First, Mineral County bases its request to serve Edward E. Grover by publication on his daughter's statement that he lives in Arizona. (Id.). However, Mineral County has failed to illustrate certain facts that would authorized publication of an out-of-state defendant under Nevada or California law. Under Nevada law, [t]o prove that a defendant resides out of state, it is enough to give the defendant's current, out-of-state address; or, if the current address is unknown, to give the last known address, the last date on which the defendant was known to live there, state that the defendant no longer lives there, that the defendant's current whereabouts are unknown, and that there is no reason to believe the defendant could be found in Nevada." (Doc. #252 at 19, ll. 5-11). Under California law, service by publication is only appropriate when service cannot be effected by other means as provided in Cal. Civ. P. Code § 415.40. (Id. at 19, ll. 15-26).

Here, it is not indicated in the Hearne Affidavit, or any other document, that Mineral County has attempted to locate or serve Edward E. Grover in Arizona. As such, the Motion for Publication is denied.

Hardy, Karen Lund - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there

is reason to believe that Karen Lund Hardy lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #9).

The Hearne Affidavit states that Ms. Hearne's office spoke with Karen Lund Hardy on the telephone and gave an address. However, when service was attempted, the address given was the Carson City Court House. (Id.). Subsequent to the attempted service, Ms. Hearne's office tried to call Karen Lund Hardy but the telephone was disconnected. (Id.). The Hearne Affidavit also states that a process server stated that other process had been attempted on Karen Lund Hardy for other reasons, but was not found for service. (Id.). For that reason, Ms. Hearne believes that Karen Lund Hardy is attempting to evade service.

The Hearne Affidavit fails to specify who spoke with Karen Lund Hardy during the telephone conversation or what number she was reached at. Nor does the Hearne Affidavit identify the name of the process server who stated that other process had been attempted, the date it was attempted or the reason for the process. Additionally, there is no record that Mineral County researched telephone directories or agencies in Carson City, other Northern Nevada counties, or at the State of Nevada or California for the purpose of locating Karen Lund Hardy.

Given the above, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Hervin, Patricia - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Patricia Hervin lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #10).

The Hearne Affidavit states that service was attempted for Patricia Hervin at the home of Rieko and Kurt Hervin where she is listed as residing. Rieko and Kurt Hervin told the Sheriff that she did not live there and had moved to Grass Valley, California. (Id.). Ms. Hearne states that she personally called the Post Office to determine whether Patricia Hervin was receiving mail in Grass Valley or Nevada City, California but was told that she was not. (Id.). The Hearne Affidavit also states that the Recorder of Deeds was checked but Patricia Hervin was not listed as a property owner.

(Id.). Additionally, the Hearne Affidavit states that information was called for a telephone number, which was not listed, and that the Sheriff of Nevada County and the dispatcher stated they did not have any information about the whereabouts of Patricia Hervin. (Id.).

First, the Hearne Affidavit does not indicate the relationship between Patricia Hervin and Rieko and Kurt Hervin. Nor does the Hearne Affidavit indicate whether agencies or entities located in Northern Nevada counties or at the State of Nevada were researched to verify that Patricia Hervin had left Nevada. This is important because under Nevada law, "[t]o prove that a defendant resides out of state, it is enough to give the defendant's current, out-of-state address; or, if the current address is unknown, to give the last known address, the last date on which the defendant was known to live there, state that the defendant no longer lives there, that the defendant's current whereabouts are unknown, and that there is no reason to believe the defendant could be found in Nevada." (Doc. #252 at 19, ll. 5-11). The Hearne Affidavit is deficient in that it does not provide any of this information.

Additionally, Ms. Hearne does not state when she contacted the Post Office or identify the person to whom she spoke with. The Hearne Affidavit also fails to state the date the Recorder of Deeds was contacted, where it is located, the name of the person who called and the name of the person spoken with. In regards to information, the Hearne Affidavit fails to identify who called information, the dates the calls where made and what cities the information was requested. Finally, there is no record that other agencies or entities in Grass Valley, Nevada City, other Northern Nevada and California Counties or at the State of Nevada or California were checked.

For the above reasons, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Jones, Marjorie Ann - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that Marjorie Ann Jones lives outside the state of Nevada and after due diligence cannot be found. (Hearne Aff. #11).

The Hearne Affidavit relies on a Return of Service form which indicates that a deputy of the Lyon County Sheriff's Office attempted service at 55 Manha Lane, Yerington, Nevada. (Id., Attach. B). The deputy was unable to find her at that address and could not find a phone number or any other evidence that Marjorie Ann Jones lives in Lyon County. (Id.).

The Hearne Affidavit states that Marjorie Ann Jones appears on a request for federal government subsidy with David Manha and that she appears on the WRID list as a water right holder with the Josephine E. Manha Family Trust. (Id., Attach. A). However, there is no record that Mineral County has attempted to contact David Manha or that agencies in Lyon County, other Northern Nevada and California counties, or at the State of Nevada or California were checked to determine the whereabouts of Marjorie Ann Jones.

As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Nagel, Helen - Ms. Hearne states that she believes Helen Nagel is deceased because her name no longer appears on the WRID list, and her daughter, Diane Nagel, told her this during a phone conversation and signed a waiver as the heir of Helen Nagle. (Hearne Aff. #12, Attach. A). Under these circumstances, Mineral County should file a motion to dismiss Helen Nagel and determine who the successor-in-interest is and substitute that person with respect to the water rights. The Motion for Publication is denied.

Nugent, Evelyn & George D. - The Hearne Affidavit does not contain information necessary for the court to determine whether Nevada or California law applies. The Hearne Affidavit states that there is reason to believe that George and Evelyn Nugent are not located in the state of Nevada or are attempting to avoid service of process. (Hearne Aff. #13).

The Hearne Affidavit relies on a Return of Service form where the process server states that the address was old. (Id.). The process server also stated that he spoke with a neighbor who had never heard of the Nugents.

The Hearne Affidavit does not state how the process server came to the conclusion that the address was "old" and there is no record that agencies or entities where checked in Lyon County, other

Northern Nevada and California counties, or at the State of Nevada or California to determine the location of the Nugents. Moreover, the fact that a neighbor has never heard of the Nugents does not, by itself, demonstrate due or reasonable diligence under Nevada or California law. Therefore, the Motion for Publication is denied.

Romero Family Trust, Benito Antonio & Linda Irene Romero, Trustees - The Hearne Affidavit states that Mr. Romero has been hostile and aggressive towards a unnamed process server and that the process server has deemed such behavior as threatening. (Hearne Aff. #14). The Hearne Affidavit also states that Mr. Romero could pose a physical threat to a process server that returns with service of process given past incidents. (Id.). WRID does not object to service by publication for Mr. Romero. Therefore, the Motion for Publication is granted.

Sepulveda, Mariana - The Hearne Affidavit states that there is reason to believe that Mariana Sepulveda is no longer in the State of Nevada. (Hearne Aff. #15). To support this conclusion, the Hearne Affidavit states that Ms. Hearne's office called Mariana Sepulveda and she stated that she lives in Florida. (Id.). The Hearne Affidavit fails to state who spoke with Mariana Sepulveda.

In any event, whether analyzed under either Nevada or California law, the Hearne Affidavit fails to state necessary facts that would warrant publication for an out-of-state defendant because there is no record that Mineral County has attempted to locate or serve Mariana Sepulveda in Florida. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

Sweetwater Land and Cattle Co. - The Hearne Affidavit states that there is reason to believe that Sweetwater Land & Cattle Co. is incorporated outside the States of Nevada and California. (Hearne Aff. #16). The Hearne Affidavit states that this name does not appear on the Secretary of State of California or the Secretary of State of Nevada. (Id.). The Hearne Affidavit also states that Sweetwater Land & Cattle Co. does not appear in the Recorder of Deeds in Lyon or Mono County and that there is no reference or key to its whereabouts. (Id.). Ms. Hearne states that she presumes that Sweetwater Land & Cattle Co. is the name Benny Romero used for his place, but was never incorporated legally. (Id.). Additionally, Mineral County has served the Sweetwater Family Limited

Partnership which claims that it does not have water rights in the Walker River and has served Sweetwater Partners Limited Partnership which does have water rights but claims that it is not associated with the Sweetwater Land & Cattle Company. (Id.).

The information provided by the Hearne Affidavit suggests that Sweetwater Land & Cattle Co. may no longer exist.[3] If such is the case, Mineral County should make a motion to dismiss Sweetwater Land & Cattle Co. and, if necessary, substitute its successor-in-interest with respect to the water rights. At this time, however, there is no information in the Hearne Affidavit that would warrant publication for an out-of-state defendant under either Nevada or California law. As such, due or reasonable diligence has not been demonstrated under Nevada or California law and the Motion for Publication is denied.

CONCLUSION

IT IS THEREFORE ORDERED that Mineral County's Motion for Order of Publication (Fifth Request) (Doc. #415) is **GRANTED IN PART AND DENIED IN PART**, as follows:

The Motion is **DENIED** as moot as to Mineral County's request to serve unidentified parties through publication.

The Motion is **DENIED** as moot as to Mineral County's request to serve by publication Defendant Iginia M. Moreda.

The Motion is **DENIED**, without prejudice, as to Mineral County's request that it only be required to publish the Notice in Lieu of Summons.

The Motion is **GRANTED** as to Defendant Romero Family Trust, Benito Antonio & Linda Irene Romero, Trustees. The Motion is **DENIED**, without prejudice, as to all other Defendants.

DATED: June 17, 2003.

UNITED STATES MAGISTRATE JUDGE

[3]The Hearne Affidavit states that Sweetwater Land & Cattle Co. was on a list provided by WRID in 1995. However, the name does not appear on the WRID assessment list. (Hearne Aff. #16).