

FILED

98 JAN 22 4:15

BY: *[Signature]*

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

G & S CONSTRUCTION, INC., a Nevada Corporation and AMERICAN INTERNATIONAL RESOURCES, INC., a Nevada Corporation,

Plaintiffs,

-vs-

SILVER INTERNATIONAL, INC., a Nevada Corporation, EINAR C. ERICKSON, individually and as an officer, Director, and/or shareholder of SILVER INTERNATIONAL, INC., a Nevada Corporation, and as an officer, Director, and/or shareholder of SILVER VIKING CORPORATION, INC., a Nevada Corporation, SILVER VIKING CORPORATION, INC., a Nevada Corporation, DOE I through DOE X; and DOE CORPORATIONS I through X,

Defendants.

I.

PROCEDURAL HISTORY

Plaintiff filed a complaint on July 25, 1991. Plaintiff

filed an Affidavit in Support of Service of Process Upon Secretary

BOOK 317 PAGES 50



SEVENTH JUDICIAL DISTRICT COURT
MERYLN H. HOYT
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

of state on October 25, 1993. An order Directing For Service of
 Process Upon Secretary of State was filed on November 22, 1993.
 Plaintiff filed a Praecipe for Default on December 30, 1993. The
 District Court Clerk entered a Default on December 30, 1993. The
 District Court Clerk filed an Affidavit of Posting of the Summons in
 this case on January 4, 1994. Plaintiff filed an Affidavit in
 Support of Default Judgment on January 26, 1994. This Court filed a
 Judgment by Default on January 28, 1994. Defendants filed a
 Motion to Set Aside Default Judgment on December 5, 1997. Plaintiff
 filed an opposition to Motion to Set-Aside [sic] Default Judgment on
 December 16, 1997. This matter came before the Court on December
 16, 1997. Plaintiff was represented by GARY FAIRMAN, ESQ., and
 Defendants were represented by STEVE DOBRJESCU, ESQ.
 II.
DISCUSSION
 Defendants raise several objections to the default
 Judgment granted four years ago. In all of them, Defendants argue
 that the default Judgment should be set aside as void under N.R.C.P.
 60(b).
 A.
IMPROPER ENTRY OF DEFAULT
 Plaintiff did not comply with the procedures for obtaining
 a default Judgment. N.R.C.P. 4 provides, in pertinent part:
 (d) Summons: Personal Service. The summons and
 complaint shall be served together. The plaintiff shall
 furnish the person making service with such copies as are
 necessary, service shall be made by delivering a copy of the
 summons attached to a copy of the complaint as follows:



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

(1) If the suit is against a corporation formed under the laws of this state; to the president or other head of the corporation, secretary, cashier, managing agent, or resident agent thereof; provided, when for any reason service cannot be had in the manner hereinabove provided, then service may be made upon such corporation by delivering to the secretary of state, or his deputy, a copy of said summons attached to a copy of the complaint, and by posting a copy of said process in the office of the clerk of the court in which such action is brought or pending; defendant shall have twenty (20) days after such service and posting in which to appear and answer (boldface in original, underlining added)

According to the Affidavit of Posting, the clerk of the court posted the summons and complaint on January 4, 1994. Therefore, Defendant had up to and including January 25, 1994 in which to appear and answer. The clerk entered the default in this action on December 30, 1993, five days before Defendants' time to appear and answer even started. Before the clerk can enter a default, a defendant's time to answer must have expired. Because that did not happen in this case, the default, filed December 30, 1993, is void. Even though Defendant failed to answer within the twenty (20) day period after January 4, 1994, that cannot relate back to this void default and make it valid. The clerk should have entered the default after January 25, 1994. "[A] default judgment entered before a valid default has been entered is void." Jacobs v. Sheriff, Washoe County, 108 Nev. 726, 729 (1992). Because there is no valid default in this case, the Default Judgment, filed January 27, 1994, is also void. Therefore, under N.R.C.P. 60(b)(3), the Default Judgment is set aside.



SEVENTH JUDICIAL DISTRICT CLERK
 MERLYN I. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DELAY IN SERVING PROCESS

B.

Service of process is a long story in this case. Plaintiff's counsel argued in court that he originally employed a private process server to serve process upon Defendants. However, that process server would not provide Plaintiff's counsel with a proper return of service required by N.R.C.P. 4(g). After two years, to get proper proof of service, Plaintiff's counsel had the Sheriff of White Pine County try to serve process upon Defendants. Unsuccessful in those attempts, Plaintiff asked the court to authorize service of process upon the Secretary of State, and the court did enter an order on November 25, 1993. Defendants argue that the federal judgment is void, and, in fact, the entire action should be dismissed, because Plaintiff did not serve the summons and complaint within one hundred twenty (120) days after the filing of the complaint, pursuant to N.R.C.P. 4(1). Defendant points to a typographical error in the Affidavit in support of Service of Process Upon Secretary of State filed on October 25, 1993. That Affidavit said that the complaint was filed on July 25, 1993, instead of its actual filing date of July 25, 1991. Defendant argues that the court would have dismissed the action if the proper date of filing of the complaint was before it. Plaintiff points out that the court did review the complaint, and therefore it saw the actual filing date and decided not to dismiss the case. Even if what Plaintiff argues is true, the court would



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1 have inadvertently overlooked the actual filing date on the
 2 Complaint. If the Court did know the actual filing date of the
 3 Complaint, it would have engaged in the analysis in which it now
 4 engages below.
 5 A party can avoid dismissal for failure to comply with
 6 N.R.C.P. 4(i) if he can show good cause why service was not made
 7 within the one hundred twenty (120) day period. In the Supplemental
 8 Points and Authorities to Opposition to Motion to Set Aside Default
 9 Judgment, Plaintiff's counsel details his difficulties in trying to
 10 get a proper return of service from his process server for two
 11 years, and how he finally turned to the Sheriff. Lacey v. Wen-Neva,
 12 Inc., 109 Nev. 341 (1993), is somewhat instructive on this issue.
 13 The plaintiff in that case defectively served the defendant, who
 14 immediately told the plaintiff that and who refused to answer the
 15 complaint until it received proper service. Lacey's counsel assumed
 16 that the case would settle out of court, and he decided not to
 17 perfect service. Wen-Neva took the opportunity that Lacey's counsel
 18 created and moved to dismiss under N.R.C.P. 4(i). The district court
 19 granted that motion. In affirming the district court, the Supreme
 20 Court stated:
 21 "Service against Wendy's was untimely because Lacey's counsel
 22 was notified that the original service on Wendy's was improper.
 23 We conclude that Lacey failed to show 'good cause' for the
 24 untimely service of Wendy's. If counsel's error in failing to
 25 timely serve a complaint were sufficient to constitute 'good
 26 cause,' thereby preventing dismissal of the action, N.R.C.P. 4(i),
 requiring dismissal when a complaint is not timely served,
 would be rendered nugatory." Lacey, 109 Nev. at 346.



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN, AND EUREKA COUNTIES
 STATE OF NEVADA

1 The failure to serve process within 120 days in the instant case was
 2 due to the error of Plaintiff's counsel. In the Supplemental Points
 3 and Authorities to Opposition to Motion to Set Aside Default
 4 Judgment, a chain of events becomes evident. Plaintiff filed his
 5 complaint on July 25, 1991. The process server told Plaintiff's
 6 counsel in late August or early September, 1991, that he served LYNN
 7 ERICKSON, resident agent, on August 24, 1991. However, the process
 8 server would not return the original summons with a completed
 9 Affidavit of Service. At this point, apparently there were more
 10 than 60 days left in which to serve the complaint and summons.
 11 After a couple of failed requests to get the required documents from
 12 the process server, Plaintiff's counsel should have thought that,
 13 perhaps, his process server did not actually serve process and was
 14 just stringing him along. He then should have used another process
 15 server, such as the Sheriff. Under those circumstances, if service
 16 was a little bit late, there might have been good cause for the
 17 delay. However, in this case, Plaintiff's counsel waited for two
 18 years before realizing that he would not get the proper documents.
 19 At some point, counsel's inability to obtain the summons and
 20 affidavit of service from the process server became counsel's error
 21 in not ensuring proper service through other means. It is simply
 22 too much to ask this Court to call Plaintiff's explanation for a two
 23 year delay in effecting service "good cause."
 24
 25
 26



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUFFICIENCY OF SUBSTITUTED SERVICE AFFIDAVIT

c.

Defendants object to the substituted service on the Secretary of State. They argue that Plaintiff did not show the due diligence, required by N.R.C.P. 4(d)(1), in trying to effect personal service or notice upon the officers or agents of Defendant corporations before substituting service through the Secretary of State.

Plaintiff's affidavit was insufficient to justify such substituted service. N.R.C.P. 4(d)(1) provides, in pertinent part,

"[B]efore such service shall be authorized, plaintiff shall make or cause to be made and filed in such cause an affidavit setting forth the facts showing that personal service or notice to the officers, managing agent or resident agent of said corporation cannot be had within the state"

The emphasized phrase is key to this issue. Plaintiff's action is at least partially based upon an alleged contract between Plaintiff and at least some Defendants. Plaintiff's complaint has a copy of the alleged contract attached as Exhibit "A." On pages 9-10 of that contract, paragraph 25 states:

"25. Communications of NOTICES, Notices, demands and communications desired to be given by any party or parties to this Agreement shall be deemed validly served and given when personally served or addressed to the other party or parties by registered or certified mail, postage fully prepaid, addressed to the address or addresses of such party or parties hereinafter set forth:

DEVELOPER: SILVER INTERNATIONAL, INC.
 709 Cline Street
 Las Vegas, Nevada 89128

OPERATOR:

G & S CONSTRUCTION, INC.
 2330 West third, Los Angeles 90048 (sic)



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The date appearing on the registered or certified mail receipt shall be deemed prima facie evidence of the date on which Notice was sent. Any party to this Agreement shall have the right to change designation of address to which notices are to be addressed by notification in the manner herein set forth."

There are two ways to interpret this paragraph. First, taken liberally, this paragraph can be an agreement for the parties to effect service of process upon each other in a manner in addition to the procedure in N.R.C.P. 4(d). Under this interpretation, a party can serve process upon another party through registered or certified mail. Second, taken more narrowly, this paragraph can be a provision for notice of the commencement of an action. Finally, interpretations aside, the paragraph gave Plaintiff an address at which it could attempt to serve process upon one or more of the Defendants. The Affidavit in Support of Service of Process Upon Secretary of State does not mention any attempts to serve process upon Defendants, or to give them notice, at the Las Vegas address given in paragraph 25 of the alleged contract. The court finds this odd, because this is an action founded upon that alleged contract. In the hearing, it was suggested that the Las Vegas office was closed at the time in 1993 that Plaintiff sought substituted service upon the Secretary of State. Even if that were true, Plaintiff should have tried to serve process or to give notice pursuant to N.R.C.P. 4(d)(1) at that address, and then should have reflected the failure of the attempt in the Affidavit. Moreover, it was

WITH A COPY TO:
 ERICKSON C. ERICKSON
 Box 415, 1000 Avenue "G"
 East Ely, Nevada 89315



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

1 uncontested at the hearing that the office was open in 1991 and
 2 1992. The court does not understand why Plaintiff did not serve
 3 process or give notice to Defendants at that Las Vegas office,
 4 pursuant to paragraph 25, during those times, especially because
 5 Plaintiff had problems with the process server in Ely, as discussed
 6 above. Therefore, the Affidavit in Support of Service of Process
 7 upon Secretary of State was insufficient to justify service of
 8 process upon the Secretary of State, the service of process upon the
 9 Secretary of State was improper, and the default judgment resulting
 10 from that service was void.

D.

SERVICE OF PROCESS UPON EMPLOYEE

13 Defendants also object to whom process was served at the
 14 office of the Secretary of State. The Affidavit of Service reflects
 15 that a "Rick Jordan, at the Secretary of State's Office," accepted
 16 the service of process. Defendants note that Rick Jordan was
 17 neither the Secretary of the State, nor a Deputy Secretary of State,
 18 on November 26, 1993, the date of service. Defendants argue that
 19 N.R.C.P. 4(d)(1) literally requires service upon "the secretary of
 20 state, or his deputy," and that service upon an employee does not
 21 comply with the rule. The court does not agree with Defendants'
 22 interpretation of N.R.C.P. 4(d)(1). The court instead agrees with
 23 the argument that Plaintiff gave at the hearing. It is extremely
 24 doubtful that the Secretary of State, or a Deputy Secretary of
 25 State, would receive process servers. They are busy people;
 26 receiving process servers all day would disrupt their schedules, and



SEVENTH JUDICIAL DISTRICT COURT
 MERLYN H. HOYT
 DISTRICT JUDGE
 DEPARTMENT 1
 WHITE PINE, LINCOLN AND EUREKA COUNTIES
 STATE OF NEVADA

26
25
24
23
22
21
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1

1 their duties often require them to be in meetings or out of the
 2 office, thus frustrating attempts to serve process upon them. It is
 3 more reasonable to believe that the Secretary of State would
 4 designate certain employees to receive process servers, and, absent
 5 any proof to the contrary, Rick Jordan was probably one of those
 6 employees. Therefore, service of process upon Rick Jordan would
 7 have been proper if service of process upon the Secretary of State
 8 would have been proper.

III.

CONCLUSION

11 Service of process was defective in more ways than one in
 12 this case. Without proper service of process, any default granted
 13 by the Clerk of the Court is void, and any default judgment granted
 14 by the Court is also void. Moreover, the failure to show good cause
 15 for a more than two-year delay in service of process indicates that
 16 the action should be dismissed. Good cause appearing, therefore;
 17 IT IS HEREBY ORDERED that the judgment by Default, filed
 18 January 28, 1994, is VACATED.
 19 IT IS FURTHER ORDERED that the action is DISMISSED WITHOUT
 20 PREJUDICE.

DATED this 22nd day of January, 1998.

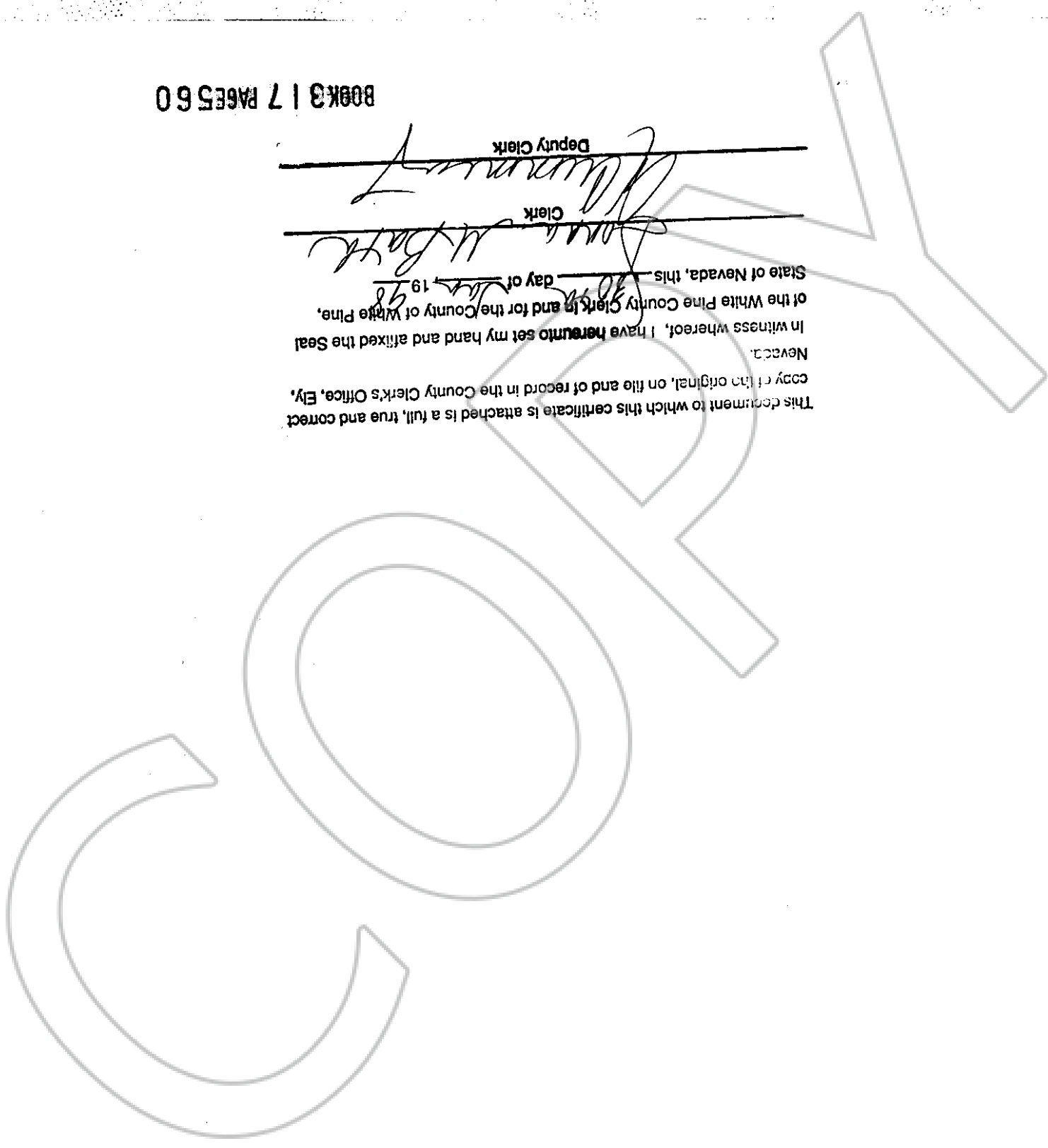
[Handwritten signature]
 CHIEF DISTRICT COURT JUDGE

BOOK 3 | 7 PAGES 60

Deputy Clerk
[Signature]

Clerk
[Signature]

This document to which this certificate is attached is a full, true and correct copy of the original, on file and of record in the County Clerk's Office, Ely, Nevada.
In witness whereof, I have hereunto set my hand and affixed the Seal of the White Pine County Clerk in and for the County of White Pine, State of Nevada, this 30th day of Feb 1998



169685

FILE NO.
EUREKA COUNTY NEVADA
MIL. LEGAL RECORDER
FEES 17.00

BOOK 317 PAGE 50
OFFICIAL RECORDS
RECORDED AT THE REQUEST OF
[Signature]
98 FEB - 4 PM 1:16
EUREKA COUNTY NEVADA