

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED *MLP*  
2011 JUL 20 AM 11:16

**STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT**

**STATE OF NEW MEXICO, *ex rel.*  
STATE ENGINEER,**

**Plaintiff,**

**v.**

**THE UNITED STATES OF AMERICA,  
*et al.*,**

**Defendants,**

**CV-75-184**

**HON. JAMES J. WECHSLER  
PRESIDING JUDGE**

**SAN JUAN RIVER  
ADJUDICATION**

**Claims of Navajo Nation  
Case No: AB-07-1**

**SPECIAL MASTER'S ORDER FOLLOWING  
JULY 19, 2011 SCHEDULING CONFERENCE**

THIS MATTER came before the Special Master for a scheduling conference on July 19, 2011. The purpose of the scheduling conference was to determine whether the United States of America, the Navajo Nation and the State of New Mexico (the "Settling Parties") gave notice of this expedited *inter se* proceeding in the manner required by Rule 1-071.2.C, this Court's Order Establishing Initial Procedures for Entry of Partial Final Judgment and Decree of Water Rights of the Navajo Nation, filed on August 19, 2010 and two orders amending that order filed on March 16, 2011 and May 16, 2011. For ease of reference, the August 19, 2010 Order as amended is collectively referred to as "the August Order"

At the Scheduling Conference, I first addressed two preliminary matters raised by the Entry of Appearance, filed by Victor R. Marshall & Associates ("Mr. Marshall") on July 5, 2011. I then took up the question of the Settling Parties' compliance with Rule 1-071.2.C and the August Order.

A. Mr. Marshall's Entry of Appearance

Mr. Marshall's entry of appearance identifies by name as his clients twenty-three irrigation districts, water associations and similar organizations (the "Irrigation Ditches"), and states that Mr. Marshall's firm "also enters its appearance on behalf of the water users and water owners who are members" of the Irrigation Ditches. However, Mr. Marshall's entry of appearance does not name individual members who have retained him, even though the Court record reveals that numerous water rights claimants have filed Notices of Intent to Participate in this proceeding ("Notices of Intent") naming Mr. Marshall as their attorney. By not naming individual members, the entry of appearance creates an ambiguity about whether Mr. Marshall has been specifically retained by the members who have filed Notices of Intent or whether the Irrigation Ditches simply purport to have standing to represent their members.

Whether an organization has standing to represent its members depends on the circumstances. *See, e.g. ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, 188 P.3d 1222 (N.M. 2008); *Forest Guardians, v. Powell*, 2001-NMCA-028, 24 P.3d 803 (N.M. App. 2001). The Court record must clearly state whether Mr. Marshall has been retained directly by the members, or whether the Irrigation Districts claim they can appear on behalf of their members, through Mr. Marshall.

Further, an entry of appearance is neither tantamount to, nor a substitute for, the filing of the Notice of Intent required by the August 2010 order. The August Order is clear regarding this matter. Any person who wants to appear in this proceeding must file a Notice of Intent by the September 16, 2011 Deadline. This requirement applies to the Irrigation Districts and their members alike. *Mr. Marshall's entry of appearance is not a substitute for a Notice of Intent and*

its filing does not relieve either the Irrigation Districts or their members of the obligation to file a Notice of Intent.<sup>1</sup>

B. Compliance with Rule 1-071.2 and the August, 2010 Order.

After addressing the concerns raised by Mr. Marshall's entry of appearance, I addressed the question of whether the Settling Parties had provided notice of this proceeding in the manner required by Rule 1-071.2.C and the August Order.

Prior to the Scheduling Conference, on July 14, 2011, the Settling Parties filed a Joint Certificate of Fulfillment of Service of Notice of Navajo Expedited *Inter Se* Proceeding and Compliance with Court Orders (the "Joint Certificate") attesting they had served notice of this proceeding in the required manner. The Joint Certificate consists of a narrative summary of the steps the Settling Parties have taken to provide notice, together with twenty attachments describing the records used to compile the mailing list for service of notice by mail, the names and addresses of the 19,501 persons to whom notices were mailed by first class mail, the names and addresses of mailed notices returned as undeliverable, the steps taken to forward returned mail to other addresses, proofs of service of notice by publication, an affidavit summarizing what transpired at five public meetings conducted by the Settling Parties pursuant to the August Order and affidavits attesting to the placing of radio and newspaper advertisements of the public meetings.

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<sup>1</sup> On July 20, 2011, Mr. Marshall filed a motion on the Irrigation Districts' behalf requesting that the Special Master determine whether the Irrigation Districts can represent their members without the need for each member to file a Notice of Intent. In their July 20, 2011 motion the Irrigation Districts argue that the question of Mr. Marshall's right to represent their members must be resolved before the September 16 deadline for filing Notices of Intent; otherwise members who refrained from filing Notices of Intent based on their belief that the Irrigation Districts could appear on their behalf would be prejudiced if the Court ultimately determined that the Irrigation Districts do not have standing to represent their members. The Irrigation Districts' concern is unwarranted. If the Court ultimately determines that the Irrigation Districts do not have standing, prejudice to any affected members who relied on their district's standing can be prevented by granting them additional time to file Notices of Intent.

Mr. Horner and the Irrigations Districts raised concerns at the Scheduling Conference about the manner in which notice of the proposed settlement was provided. Both Mr. Horner and the Irrigation Districts argued that the *Settling Parties* improperly advocated the benefits of their settlement at the public meetings, thereby discouraging water rights claimants from filing Notices of Intent. The Irrigations Districts also questioned Ms. Arianne Singer, counsel for the State, and Katherine Tribbett, a paralegal employed by the United States, about the compilation of the mailing list.

With respect to the issue of whether the *Settling Parties* improperly touted the benefits of the settlement at the public meetings, it is apparent the *Setting Parties* explained the benefits of the settlement, as they perceived the benefits to be, at the public meeting. See Memorandum Entitled "Navajo Water Settlement Offers Benefits for Everyone", marked for identification at the Scheduling Conference as Exhibit 1. While prudence, if nothing else, should dictate that the *Settling Parties* refrain from touting the settlement's benefits, a low key explanation of the benefits of any settlement, as the parties perceive them to be, is an essential component of any meaningful description of a settlement. Nothing was presented at the Scheduling Conference to suggest that the *Settling Parties'* explanations at the public meetings of their reasons for entering into the settlement rose to the level of inappropriate advocacy. Moreover, nothing was presented at the Scheduling Conference to suggest that the *Settling Parties* did not clearly describe at the public meetings the steps water rights claimants must take to participate in this proceeding or that the *Settling Parties* discouraged claimants from participating. At the conclusion of three of the five public meetings, Mr. Marshall met with meeting participants to describe his clients' concerns. Mr. Marshall's meetings served as a counterpoint to whatever "advocacy" may have occurred at the public meetings.

Two issues concerning the compilation of the mailing lists were raised by Mr. Marshall's questioning of Ms. Singer and Ms. Tribbett. First, Mr. Marshall expressed concern that his questioning revealed that the Settling Parties relied on the San Juan County assessor's 2010, rather than the more current 2011, records when compiling the mailing list. In response, Ms. Singer explained that compiling a mailing list from the assessor's records is a time consuming task and that the 2011 records were not available in sufficient time to enable the Settling Parties to compile the mailing list by the required date. Moreover, the accuracy of the mailing list is not dependent upon the accuracy of the assessor's records. The mailing list was compiled from a variety of sources precisely because no single set of records contains an accurate and up-to-date list of San Juan water rights claimants.

Second, Mr. Marshall's questioning resulted in some initial confusion about whether all membership lists of all known irrigation districts, including the Hammond Irrigation District, had been obtained when assembling the mailing list. However, by the conclusion of Ms. Tribbett's testimony it was clear that, except for five districts that did not respond to Ms. Tribbett's inquiries, the membership list of the Hammond Irrigation District and the other known districts were part of the Settling Parties' mailing list.

Based on the Certificate of Compliance, Ms. Singer's and Ms. Tribbett's responses to Mr. Marshall's questions and the statements of counsel, I determine that the Settling Parties gave notice of this proceeding in the manner required by Rule 1-071.2.C and the August Order.

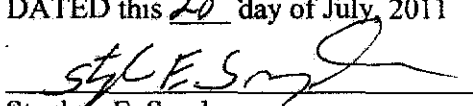
Accordingly, IT IS ORDERED THAT:

1. Based on my determination that the Settling Parties provided notice of this proceeding in the manner required, no further steps need be taken by the Settling Parties to provide notice of this proceeding to water rights claimants in the San Juan basin.

2. Mr. Marshall, on or before September 31, 2011, shall file an amended entry of appearance pursuant to Rule 1-089, identifying by name each and every person who has specifically retained him to represent them.

3. At the upcoming October 3, 2011 scheduling conference I will set deadlines for resolving certain preliminary matters, including a deadline for the filing of motions challenging the standing of any party. Absent extraordinary circumstances, I will not set any matters for hearing prior to that time. Setting matters for hearing prior to October 3 would be premature, since the time for filing Notices of Intent has not yet expired.

DATED this <sup>th</sup> 20 day of July, 2011

  
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Stephen E. Snyder  
Special Master  
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