

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

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STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT

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

Plaintiff,

vs.

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

Defendants,

vs.

THE JICARILLA APACHE TRIBE  
AND THE NAVAJO NATION,

Defendant-Intervenors.

No. CV 75-184  
Honorable James J. Wechsler  
Presiding Judge

SAN JUAN RIVER BASIN  
ADJUDICATION

SAN JUAN RIVER  
GENERAL STREAM  
LITIGATION

**NOTICE OF CONSTITUTIONAL DEFECT IN SERVICE LIST**

Defendants hereby give notice that there is a constitutional defect in the service list which was prepared by the Settling Parties and used by the Court. Many water users in the San Juan Basin have reported that they did not receive a mailing from the Court notifying them of this proceeding, even though they are listed on County records as the owners of irrigated property, or shown on ditch membership lists. Other evidence also establishes that the Settling Parties provided the Court with a mailing list which does not meet the requirements of:

- (A) the United States Constitution;
- (B) the New Mexico Constitution;
- (C) the New Mexico Rules of Civil Procedure, including Rules 1-071.1, 1-071.2, and 1-004; and
- (D) the orders of the Court and the Special Master.

D ✓

Beginning in the latter part of 2010, the undersigned defendants made numerous attempts over period of months to assist the Settling Parties in assembling the best possible mailing list from a variety of sources, including ditch membership lists. The defendants' efforts were rebuffed by the Settling Parties, and in particular the OSE. Despite numerous requests, the Settling Parties even refused to provide a copy of their mailing list to defendants so that it could be improved. *See* the live and written testimony of Shirley A. Meridith on October 26, 2011, including defendants' Exhibit 1.

In addition, the testimony of Arianne Singer during the hearing on July 19, 2011 establishes that the current OSE and the Settling Parties do not know how the mailing list was assembled, or how it was processed, or what original sources were used, or the dates of the source materials. The bulk of the information in the mailing list was more than a year old, but the Settling Parties made no effort to update it before they made their mailing in May 2011, even though the defendants repeatedly offered to help them obtain more current and accurate ditch membership lists.

These defects could have been cured with reasonable effort before the mailing was made, but the Settling Parties made no effort to do so. Their mailing list does not comply with the requirements of the Constitutions of the United States and the State of New Mexico, and the other authorities listed above. Under the law, the Settling Parties as plaintiffs were required to use the best available sources to assemble the mailing list, and they did not do so. Although it may not be feasible to prepare a mailing list that is absolutely perfect, the law requires the Settling Parties to do much more than they did. The problem is compounded by the absence of the mandatory hydrographic survey required by NMSA 1978, §§ 72-4-13 through -17. A real hydrographic survey would have identified the

current owners of all the irrigated tracts in the San Juan Basin, but the OSE and the Settling Parties did not do one.

The problem of a grossly defective mailing list is not solved by publication, because notice by publication is in addition to, not a substitute for, preparation of a service list from the best available sources.

This constitutional defect is somewhat reduced, but not solved, by the entries of appearances and notices of intent to participate filed on September 15, 2011 by the undersigned law firm on behalf of 10,025 named defendants. If the Court recognizes those entries and notices of intent as listed, subject to amendment, then those listed persons would have little basis for a challenge based on inadequacy of notice, since they have been given the opportunity to participate through counsel. If not, then the constitutional problem grows much bigger.

Regardless of the September 15 entries of appearance, the defendants have no way of curing the constitutional defect with respect to the persons who are not on the September 15 lists, and who did not receive notice. There are many such persons, given the gross inadequacy of the mailing list which the Settling Parties provided.

Accordingly, the current adjudication efforts of the Court, the Special Master, and all the litigants are subject to a very real risk that this proceeding, whatever its outcome, can be nullified by persons who did not get notice. The Navajo *inter se* is off to a false start, constitutionally speaking.

The Court can cure this constitutional defect right now, by ordering the Settling Parties to actually do what they were already ordered to do: prepare a comprehensive mailing list from the best available current sources. One of those available sources is the

ditch membership lists filed on September 15, 2011. There are other sources which the Settling Parties can obtain by diligent effort. Through a merge/purge process, the new mailing list can be compared to the old mailing list, so that the Settling Parties are only mailing to the people they missed the first time around.

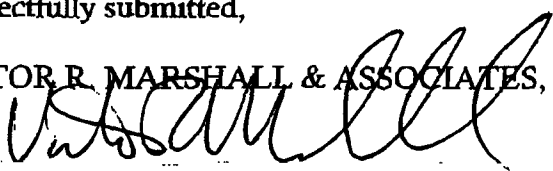
This is a notice, not a motion by the undersigned defendants. The defendants have already wasted too much time and money trying to reduce this problem. The defendants do not have the power to cure this constitutional defect; only the Court does. And it is the Settling Parties' duty and burden to prepare an adequate service list, not the defendants' burden.

This problem should be addressed by the Court, and also by the incoming State Engineer, whoever that might be.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By

  
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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by email to the attorneys electing email service at: [wrattonney@11thjdc.com](mailto:wrattonney@11thjdc.com) and to the La Plata parties electing email service at [wrlaplata@11thjdc.com](mailto:wrlaplata@11thjdc.com) this 31st day of October, 2011

