

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CIV 01-72 BB
Zuni River Basin

A&R PRODUCTIONS, STATE OF NEW
MEXICO, ex rel State Engineer, et al.,

Defendants.

AFFIRMANCE OF SCHEDULING ORDER
AND
DENIAL OF PENDING MOTION TO DISMISS

THIS MATTER is before the Court on the Special Master's Report of October 2, 2003, and the Motion of the Western New Mexico Water Preservation Association ("Association") to Dismiss for Failure to Prosecute. The Court having reviewed the Special Master's Report and the submissions of counsel, Affirms and Adopts the Special Master's Report and Denies the Motion to Dismiss with a caveat regarding the *Lis Pendens*.

Discussion

Plaintiff United States filed this lawsuit in January 2001. It now appears clear this was done with little planning or understanding of Plaintiff's

responsibility for the litigation or its duty as fiduciary for the Native American Tribes.

The case was originally filed as a quiet title suit against a large number of property owners in Cibola and McKinley Counties. This needlessly caused great anxiety and potential harm to hundreds of individuals. Over two years later, based on repeated prodding from the Special Master, the United States got around to amending its complaint to frame this case properly as a water rights adjudication. This delay resulted largely from the failure of the United States and the State of New Mexico to fulfill their responsibilities to properly fund a hydrographic survey. Nonetheless, the Special Master set very tolerant time tables to allow both the United States and New Mexico to get organized and obtain the funding they should have dedicated to this case initially. See *Interim Procedural Order* [doc. 208] and extension [doc. 239].

The United States now complains it lacks the resources to comply with even the lenient schedule established by the Special Master. It is the plaintiff's obligation to move the case to trial. *West v. City of New York*, 130 F.R.D. 522 (S.D.N.Y. 1990). Recognizing this and in light of the representations as to its future intent, the Association filed a Motion to Dismiss without prejudice pursuant to Federal Rule of Civil Procedure 41(B) [doc. 246]. When such a

motion is before the court it must consider the need to manage its docket; the public interest in the expeditious resolution of litigation; the policy favoring the disposition of cases on their merits; and the potential risk of prejudice to the defendants from the delay. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991). If the Special Master's current schedule is adhered to, the interest of the Court and the public will be reasonably protected.


Even with the current schedule, however, the non-Indian Defendants may be required to remain as litigants while substantial disputes between the Tribes, New Mexico, and the United States are resolved. This could result in prejudice if these Defendants' property interests are impacted for a long period. The potential for prejudice to the Association members will be greatly exacerbated by the proposal of the United States to file a traditional *lis pendens* as it may result in a cloud on the real estate titles of these Defendants.

While *lis pendens* is now generally a creature of State statute,¹ it derives from common law equity jurisprudence. *White v. Wensauer*, 702 P.2d 15 (Okla. 1985); *Kelly v. Perry*, 531 P.2d 139 (Az. 1975). Thus, if the doctrine should prove arbitrary or harsh, courts should not recognize its legal effect. *Id.*; see also *Fravega v. Security Sav. & Loan Ass'n*, 469 A.2d 531 (N.J. Super. 1983).

¹ See § 38-1-14 NMSA 1978 (1998 Repl. Pamp.).

Therefore, unless the United States is committed to completion of this suit by resolving the claims of Association members and other non-Indian litigants on the schedule proposed by the Special Master, the traditional form of *lis pendens* appears inappropriate.

SO ORDERED this 9th day of December, 2003.



BRUCE D. BLACK
United States District Judge