IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, and STATE OF NEW MEXICO, ex rel. STATE ENGINEER, Plaintiffs, and ZUNI INDIAN TRIBE, NAVAJO NATION, Plaintiffs in Intervention, v. A & R PRODUCTIONS, et al., Defendants.	)	No. 01-cv-0072 MV/WPL ZUNI RIVER BASIN ADJUDICATION **Subfile No.** ZRB-2-0014

ORDER GRANTING MOTION TO DISMISS

This matter is before the Court on the motion by the Commissioner of Public Lands of the State of New Mexico ("the Commissioner") to dismiss the "Cross-Claim" filed by Subfile Defendants Edward J. and Suzan J. Bawolek. (Doc. 2931.) The United States of America has filed a response in support of the motion to dismiss (Doc. 2932), while the Bawoleks have filed a response in opposition (Doc. 2936). The Commissioner also filed a reply. (Doc. 2945.) Having considered the pleadings, the parties' other filings, and the relevant law, and being otherwise fully advised in these matters, the Court grants the Commissioner's motion, dismisses the Bawoleks' "Cross-Claim" without prejudice, and strikes the "Cross-Claim" from the Court's docket.

The Bawoleks are lessees of New Mexico State Land Office lands with water features. Their predecessor in interest was formally added as a subfile defendant in this stream systems adjudication in January 2006. (Doc. 470 at 2.) In June 2012, after the Bawoleks themselves were substituted as parties (*see* Doc. 2794), they filed a motion to intervene (Doc. 2795) in Subfile No. ZRB-1-0075 Consolidated, which concerns water rights claims arising on lands held by the New Mexico State Land Office and which features the Commissioner as a subfile defendant.[1] In their motion, the Bawoleks argued that as lessees of certain State Land Office properties with water features, they had an interest in the outcome of that subfile proceeding. Plaintiffs opposed the attempted intervention, arguing in part that the Bawoleks' objections were untimely and could be resolved in the *inter se* phase of proceedings. (Doc. 2797 at 3-4; Doc. 2798 at 2.) The Bawoleks disagreed, contending that participation in the *inter se* phase would not protect their interest in negotiating the extent of water rights on lands they were leasing from the State Land Office, as the *inter se* phase typically resolves disputes between parties holding different claims to the same water rights and does not necessarily provide for the renegotiation of the extent of those rights. (Doc. 2799 at 7-9.)

The Court denied the Bawoleks' motion to intervene in the Commissioner's subfile proceeding, relying primarily on the fact that they were already parties to the action. (Doc. 2805 at 1-2.) However, the Court also noted that this water rights adjudication as a whole "is in the 'subfile phase.' Even assuming the Bawoleks' assertions requesting intervention are all true and that the resolution of ZRB-1-0075 Consolidated will not satisfy all concerns that the Bawoleks may have, the Bawoleks will have an opportunity to raise their concerns in the '*inter se*' phase

[1] The subfile proceedings in which the Commissioner was named as a subfile defendant were consolidated in May 2012 under Subfile No. ZRB-1-0075 Conslidated. (*See* Doc. 2782.)

before a final decree is entered in this action." (*Id.* at 2.) A consent decree in Subfile No. ZRB-1-0075 was filed in March 2013. (Doc. 2857.)

Pursuant to the relevant modified procedural and scheduling order (*see* Doc. 837 at 3), Plaintiffs served notice on December 10, 2013, that the consultation period in the instant Subfile Proceeding had ended (Doc. 2914), and the Bawoleks filed their first amended subfile answer (Doc. 2918) on December 21, 2013.[2] The Bawoleks filed the "Cross-Claim" at issue against the Commissioner in a standalone document on February 8, 2014. (Doc. 2928.) There, the Bawoleks argue that the Commissioner has implicitly recognized their ownership of the water features that exist on the land that they lease from the State Land Office, and they seek a declaratory judgment recognizing them as the legitimate owners of the water features in question and including the allegedly associated water rights in the scope of this Subfile Proceeding.

In response, the Commissioner filed a motion to dismiss the Bawolek's crossclaim. (Doc. 2931.) The Commissioner argues that the Bawoleks are effectively seeking to subvert the Court's denial of their motion to intervene in Subfile No. ZRB-1-0075 Consolidated by bringing the same contested water rights within the scope of this Subfile Proceeding, even though those water rights have already been adjudicated in the ZRB-1-0075 consent order. To grant the Bawoleks the relief they seek, argues the Commissioner, would be to allow them to essentially proceed with their own "expedited, limited inter se proceeding with respect to the Consent Order entered in Subfile No. ZRB-1-0075." (*Id.* at 3.)

The Bawoleks dispute the Commissioner's argument that the subject of their crossclaim is identical to the subject of their failed motion to intervene. While the first was limited to "a material interest in the Commissioner's settlement of his water rights with Plaintiffs," the second

[2] The Bawoleks' answer also includes a counterclaim against Plaintiffs (Doc. 2918 at 18-19), to which Plaintiffs have filed an answer (Doc. 2922).

is focused on "an issue of ownership: [s]pecifically, if the Bawoleks are the owners of the water features in question, adjudication of the associated water rights belongs in the subfile phase and not the *inter se* phase of this adjudication." (Doc. 2936.)

At a fundamental level, these arguments are moot. As Federal Rule of Civil Procedure 13 provides, "A *pleading* may state as a crossclaim any claim by one party against a coparty . . . ." FED. R. CIV. P. 13(g) (emphasis added). This construction comports with Rule 12, which states that a response to a crossclaim must be made "within 21 days after being served with the *pleading* that states the . . . crossclaim." FED. R. CIV. P. 12(a)(1)(B). A complaint, an answer to a complaint, and an answer to a crossclaim are all permissible pleadings; a standalone crossclaim is not. *See* FED. R. CIV. P. 7(a); *see also State Farm Mut. Auto. Ins. Co. v. Mathis*, No. 09-CV-0308-CV-TLW, 2009 WL 5065685, at *1 (N.D. Okla. Dec. 16, 2009) (unpublished).

Construing these rules together, the inevitable conclusion is that "a crossclaim must be asserted in an answer." *Mathis*, 2009 WL 5065685, at *1 (citations omitted); *see also Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 810 (3d Cir. 1992); *In re Cessna Distributorship Antitrust Litig.*, 532 F.2d 64, 67 & n.7 (8th Cir. 1976); *United States v. Finn*, 239 F.2d 679, 684 n.28 (9th Cir. 1956) ("The only way to file a cross-claim in a Federal court is to file an answer containing a cross-claim."); *United States v. Miljus*, Civ. No. 06-1832-PK, 2008 WL 3539946, at *4 (D. Or. Aug. 11, 2008) (unpublished) (citations omitted). The Bawoleks' crossclaim was not raised in their subfile answer and is therefore not cognizable. *See Miljus*, 2008 WL 3539946, at *4.

Moreover, even if the Court were to construe the Bawoleks' "Cross-Claim" as a motion for leave to amend their subfile answer to include their crossclaim,[3] the Court would deny the

[3] Notably, the Bawoleks have not requested this of the Court—they have not styled their "Cross-Claim" as an amendment to their subfile answer; the document was filed after the time allowed for the amendment of pleadings as a matter of course, *see* FED. R. CIV. P. 15(a)(1); and the Bawoleks did not expressly request leave of the Court to amend a pleading. *Cf. Mathis*, 2009 WL 5065685, at *2.

amendment as futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). First, it does not appear that the purported crossclaim "involves many of the same factual and legal issues present in the main action." *Spicer v. New Image Int'l, Inc.*, No. 04-2184-KHV-DJW, 2006 WL 3791972, at *3 (D. Kan. Dec. 26, 2006) (citing *Allstate Ins. Co. v. Daniels*, 87 F.R.D. 1, 5 (W.D. Okla. 1978)). A stream systems adjudication concerns "the priority, amount, purpose, periods and place of use" of water *rights* adjudged to each party, *see* N.M. STAT. ANN. § 72-4-19, rather than the ownership of water *features* on owned or leased lands.

Second, and more pertinently, to grant the Bawoleks the relief they seek would be to throw into disarray the carefully organized process designed to resolve this action. Although the Bawoleks have characterized their crossclaim as attempting to resolve "an issue of ownership," they acknowledge that their ultimate position is that the "adjudication of the [disputed] water rights [claims] belongs in the subfile phase and not the *inter se* phase of this adjudication." Yet as the relevant procedural and scheduling orders have stated for many years now, "Each [subfile] *Consent Order* is subject to challenge by other Claimants during the *inter se* proceedings, which will be scheduled following the completion of subfile activity." (*E.g.* Doc. 436 at 5.) In other words, pursuant to Rule 16(c)(2)(L), the Court has constructed an intricate procedure whereby disputes between water rights claimants are to be adjudicated during the *inter se* phase, whereas only determinations as to disputes between Plaintiffs and subfile defendants are to be resolved in the subfile phase. To accept the Bawoleks' invitation to import a dispute between claimants—a dispute that is inherently *inter se*—into the subfile phase would destroy that orderly process and could throw the remaining subfile adjudications into chaos. Such chaos would be multiplied when applied to water rights that have already been adjudicated but are subsequently called into question by crossclaims of this nature. The Court will not choose that path.

As the Court has previously advised, "[T]he Bawoleks will have an opportunity to raise their concerns" regarding competing claims to the water rights in question "in the '*inter se*' phase before a final decree is entered in this action." (Doc. 2805 at 2.) Accordingly, it would be inappropriate for the Court to consider these competing claims at this time.

Finally, the Court possesses the inherent power "to sanction procedural impropriety in an appropriate manner," including the striking of "potentially prejudicial procedural nonentities." *See Miljus*, 2008 WL 3539946, at *6 (citations omitted). Because no judgment can be entered on the Bawoleks' procedurally improper "Cross-Claim," and because "the presence of the purported cross-[]claims in the docket remains a potential source of prejudicial confusion to all parties," the Court will strike that document pursuant to its inherent power to control and manage its docket. *See id.*

CONCLUSION

Since the Bawoleks' "Cross-Claim" is not a cognizable pleading, and since amendment of their answer to allow inclusion of their crossclaim would be futile, the Commissioner's motion to dismiss (Doc. 2931) is hereby GRANTED. However, because the water rights disputes between the Commissioner and the Bawoleks may be resolved during *inter se* proceedings and any dispute as to property ownership could potentially be raised in another venue, the Court will dismiss the Bawoleks' crossclaim without prejudice. Finally, to avoid prejudicial confusion in an already complicated adjudication process, the Bawoleks' "Cross-Claim" (Doc. 2928) is hereby STRICKEN from the record.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Approved:

William P. Lynch
United States Magistrate Judge

A true copy of this order was served
on the date of entry--via mail or electronic
means--to counsel of record and any pro se
party as they are shown on the Court's docket.