

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

UNITED STATES OF AMERICA,)
ET AL.,)
)
 PLAINTIFFS,)
)
)
v.)
)
STATE OF NEW MEXICO)
COMMISSIONER OF PUBLIC)
LANDS, ET AL.,)
)
 DEFENDANTS.)
_____)

CIV NO. 01- 00072 BDB/WDS (ACE)

ZUNI RIVER BASIN ADJUDICATION

DEFENDANTS RICHARD DAVIS MALLERY, WOODSON ALLEN, CHARLIE ALLEN, GERALD ALLEN, WARNER AND RUTH ANDERSON, CAROL ANSLEY, J. PARLEY AND MARY ANSLEY, BILL AND KAREN ARMSTRONG, NANCY AUSTER, DAVID BACA, LILITH BAKER, WILLIAM AND INA JEAN BARNES, JOHN AND BETTY BAUMGARDNER, RONALD BLOCK, ROSS AND SIMMIE BOEHM, H. DARRELL BOGART, DEWARD AND GLORIA BOND, ELWIN AND ELLEN BOND, LAVERL BOND, MAUREEN BOND, GRACE BOND, CHARLES BRADY, JOHN BRAULT, WENDELL AND MARTHA BRIGGS, TED BRODERICK, ROBERT AND JANE BRUKER, TOMMY AND SANDY BURT, KENNETH AND GINGER CARLOCK, CLINT CARLSON, LARRY AND SALLY CARVER, DON CATOR, CROSSFIRE CATTLE CO., RON CAVIGGIA, LOIS CHEDSEY, HELEN CLAWSON, GRANT AND BLANCHE CLAWSON, KEITH AND LINDA CLAWSON, KIRK AND FLORA CLAWSON, JERRY COSPER, MRS. R.D. COUSINS, GLENNA COX, KATHLEEN DALLY, DUKE AND LYNNA DAVIS, RONNY AND CLAIR DEMARAY, ARDEN AND IRENE DENBLEYKER, CHRIS AND BARBARA DENTZEL, TOM DUCKETT, BILLY AND MARY DURHAM, A. R. AND DELPHA ENNISS, ROSS AND VERONICA FEAGIN, AFTON FISHER, JERRY AND EMILY FRAZIER, REX AND ROMONA FULLER, LEROY GABALDON, MICHAEL GARCIA, MAX GARCIA, LUCIANO AND ALICE GARCIA, RUSS GARNAAT, SANDRA GOMEZ, LAWRENCE GREEN, DENNIS GREEN, HENRY AND REBECCA GRIZZLE, RICHARD GRUDA, LES AND JACKIE HADDEN, JUNE GEORGE MITCHELL AND SANDRA HAIGHT, VIRGINIA HANSEN, WILLIAM HANSHAW, KENNETH HARRINGTON, BILL HARVEY, ELSIE BOYD HATCH, MILTON AND JONNIE HEAD, MELVIN AND JACKIE HEATH, ROBERT HEINE, ANN HENDERSON, GALE HENKE, FRANCES AND JAMES HERMAN, AMOS M. HINSHAW, JAMES W. HURLBUT / HURLBUT REALTY, NATALOU HYDER, LINDA AND ROBERT IONTA, WALLACE JACKSON, JR.,

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Defendants Richard Davis Mallery et al., members of the Western New Mexico Water Preservation Association (“WNMWPA”), by and through their undersigned attorneys, respectfully submit the following Memorandum of Law in Support of their Motion to Dismiss Without Prejudice Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for Failure to Prosecute or in the Alternative to Stay the Filing of *Lis Pendens*.

A defendant may move for dismissal of an action for failure of the plaintiff to prosecute. *See* Fed. R. Civ. P. 41(b). The purpose behind Rule 41 is to prevent undue delays in the disposition of pending cases. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962). And, the Court has authority to dismiss a case because of a plaintiff's failure to prosecute. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962).

There are several factors that the Court can apply to the circumstances of this case to determine whether to dismiss the case: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal; and 6) the meritoriousness of the claim or defense. *See Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3rd Cir. 1984).

The United States is responsible for much of the delay in this case. The United States did not file its Amended Complaint until over two and a half years after commencing this case. That two and a half year delay resulted in part from the United States' inability to agree with the New Mexico Office of the State Engineer on the geographic boundaries of the adjudication.

The United States' inability to agree with the State of New Mexico on the geographic scope of the adjudication was due in part to the financial ability of the United States to fund the hydrographic survey and reflects the United States' inadequate preparation prior to filing suit. *See* Administrative Order (Doc. No. 233, Sept. 11, 2003), wherein the Court found that "the United States filed the adjudication without engaging in sufficient consultation with the State of New Mexico, the party which has an equal or greater responsibility and financial burden in such

a case.” The Court found that fairness requires that, at least initially, the United States bear full responsibility for the Special Master’s costs and expenses.

The United States has informed the Court that it will not file claims for the Zuni Pueblo surface water or the Navajo Nation surface water and groundwater until 2007 or 2008; the lengthy delay a result of insufficient funding to prosecute this case.

There has been and will continue to be prejudice to the Defendants if the case is not dismissed and continues on the schedule proposed by the United States. *See Moore v. Telfon Comm. Corp.*, 589 F.2d 959, 967 (9th Cir. 1978)(failure to prosecute diligently alone justifies dismissal, even where actual prejudice to defendant is not shown; prejudice is presumed from unreasonable delay). This action was filed in January 2001 as a quiet title suit against a large number of property owners in Cibola and McKinley Counties, irrespective of whether they claimed any water rights, needlessly causing irreparable harm to possibly hundreds of individuals.

Two and a half years later the United States amended its Complaint to reflect the status of this case as a water adjudication, rather than a quiet title suit. However, the United States now intends to file a *lis pendens* on the title of all non-Indian landowners within the basin that will remain a cloud on the title of the non-Indian landowners until this case is resolved.

The dilatory nature of the prosecution of this case was evident at the commencement of this case by the United States’ inadequate preparation, as was noted by the Court. (Administrative Order, Doc. No. 233, Sept. 11, 2003)(“the United States filed the adjudication without engaging in sufficient consultation with the State of New Mexico”); (Special Master’s Report and Recommendations on Zuni River Basin Adjudication Procedure, Doc. No. 123, Apr. 26, 2002)(“the United States’ Complaint was filed before necessary hydrographic survey work

was performed, and without a statement describing the federal law-based claims which triggered the filing of the Complaint”).

The United States’ inadequate preparation has caused a needless two and a half year delay in this case. The only notable progress in the case during that two and a half years was that the Court accepted a definition of the geographic scope of the adjudication and Plaintiffs amended the Complaint to remove the quiet title language and reflect the status of the case as a water adjudication, and modified the caption of the case to show the realignment of the Office of the State Engineer as Plaintiff and the Zuni Tribe and Navajo Nation as Plaintiffs-in-Intervention.

It appears that the dilatory nature of the case will continue long into the future. At the February 14, 2002, status conference, the estimated time to prepare the federal and Indian claims was between two and three years. (Special Master’s Report and Recommendations on Zuni River Basin Adjudication Procedure, Doc. No. 123, Apr. 26, 2002). At the September 9, 2003, hearing the United States stated that the Zuni surface water claims and the Navajo claims would not be filed until 2007 or 2008. Previously, the Special Master noted that the failure of the United States to describe specifically the federal law-based claims at the beginning of the case means that Defendants, having settled their claims with the State and among each other, must remain in the suit for another period of years while the federal and Indian claims are prepared, submitted and reviewed for potential challenges. (Special Master’s Report and Recommendations on Zuni River Basin Adjudication Procedure, Doc. No. 123, Apr. 26, 2002).

Much case law indicates that a dismissal *with prejudice* is a harsh sanction and that the district court must consider the effectiveness of sanctions less drastic than dismissal *with prejudice* based upon the policy in favor of deciding cases on their merits. Defendants do not

argue that the action is frivolous, but rather seek dismissal *without* prejudice until the hydrographic survey is complete. The United States can bring this action again when it is prepared to diligently prosecute the case and obtain a decision on the merits.

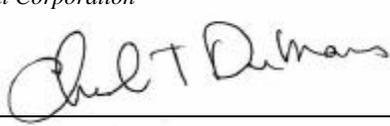
CONCLUSION

For the foregoing reasons, Defendants Richard Davis Mallery *et al.*, members of the Western New Mexico Water Preservation Association, respectfully request that the Court grant their Motion and dismiss this case without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute or in the alternative to place the case on the inactive docket and stay the filing of *lis pendens* and that the Court grant such other and further relief as the Court deems appropriate

Respectfully submitted,

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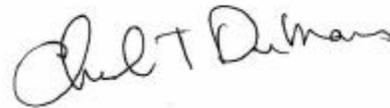
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