

Water rights adjudications involving thousands of parties/water claimants take years, typically decades, to complete. Indeed, there are at this time four water rights adjudications that have been pending in this Court for over four decades.^{1/} Movants charge that this adjudication is proceeding at an unacceptable pace and that the United States is largely responsible for the delay. See Movants' Memorandum of Law in Support of Motion, p. 3. Movants distort the record. This adjudication was filed in 2001.^{2/} The early stages of this adjudication (i.e., 2001-02) were focused primarily on the development and entry of a case management plan designed to advance the adjudication as expeditiously as possible with the least amount of disruption to the defendants/claimants. See Docket Nos. 60, 65, 75, 76, 77, 79, 80, 81, 82, 83, 92, 95, 96, 98, 99, 102, 103 and 110. Much of the deliberations at that time centered around the issue of which party, the New Mexico State Engineer or the United States, would take on the responsibility for funding and conducting the Basin's hydrographic survey. To move the case along, the United States proposed that it fund and conduct the hydrographic survey of two specific areas in the Zuni River basin. See Docket Nos. 60, 65, 96 and 103. Ultimately, the United States agreed to

^{1/} *New Mexico, ex rel. State Engineer v. Aamodi, et al.*, Civ. No. 6639 (D. N.M.), **filed 1966**; *New Mexico, ex rel. State Engineer v. Abbott*, Civ. Nos. 7488 & 8650 (D. N.M.), **filed 1966**; *New Mexico, ex rel. State Engineer v. Abeyta*, Civ. Nos. 7896 SC & 7939 SC (D. N.M.), **filed 1969**; and *New Mexico, ex rel. State Engineer v. Aragon*, Civ. No. 7941 (D. N.M.), **filed 1969**.

^{2/} Prior to filing, the United States provided the New Mexico Attorney General with written notice of the intent to file the lawsuit. The Attorney General was reminded that the suit continues the history of litigation of the waters of the Zuni River Basin initiated by the Zuni Tribe, the State of New Mexico and the City of Gallup. In 1982, the Zuni Tribe filed an adjudication in this Court, which the United States joined. The State and the City of Gallup in 1984 filed a competing adjudication in state court. The United States and the Zuni Tribe agreed to dismiss the federal action on the condition the State limit further water appropriations pending water studies by the United States and the State. The United States prepared a hydrographic survey of the basin. In 1990, the state court, sua sponte, dismissed the action with prejudice for failure to timely prosecute the case.

fund and conduct the hydrographic survey of the entire basin. The United States, through its contractor, has begun to survey water use in the Basin. If federal funding continues as expected, it is anticipated that offers of judgment will have been proffered to all water claimants in the Basin by the year 2007-08, or approximately 8-9 years after the suit was commenced.

Other time consuming issues covering a period of approximately 12 months focused on the identification of the geographic extent of the surface and groundwater of the Zuni River basin. See Docket Nos. 123, 153, 156, 157, 158, 159, 162, 164, 166, 167, 168, 169, 170, 171, 173, 174, 175, 176, 183, 186, 188. The issue was finally resolved approximately six months ago with this Court adopting the boundaries as lying within the surface water drainage basin as described originally by the United States and depicted on its map of December, 2002.^{3y} Docket No. 200.

Movants argue that the United States' proposed schedule to describe specifically the water right claims of the Tribes until 2007-08 may cause Defendants to remain in the suit longer than necessary and therefore be prejudicial to the Defendants and is therefore grounds for dismissal.^{4y} See Memorandum of Law in Support of Motion, p. 4. Movants misunderstand this

^{3y} Essentially, the entire debate concerning the geographic boundary of the case area centered around the State Engineer's instance that the adjudication include also the Puerco River and Carrizo Wash basins. The United States and now this Court are not been willing to expand the scope of the adjudication to include those two basins. Docket No. 200.

^{4y} Movants improperly distort the record when arguing that the United States advised that "it would not proceed on a parallel tract [to investigate simultaneously the non-federal and federal/Indian water right claims]." Movant's Motion, p. 4. The United States made clear at the status conference of September 9, 2003, that the Bureau of Indian Affairs is presently funding *both* the hydrographic survey as well as certain investigations/studies needed to development the full water right claims of the Zuni Tribe and Navajo Nation and *both* tasks are proceeding forward *simultaneously* to completion. The United States advised the Court and interested

adjudication's case management strategy. It has always been contemplated that the hydrographic survey and ultimate adjudication of non-federal water right claims will proceed simultaneously with the preparation and adjudication of the federal water right claims. See Docket Nos. 123, 152, 255. Movants should know by now that this Court intends to avoid a situation where federal and Indian water right claims are prepared and litigated long after non-federal water right claims have been judicially confirmed. As stated above and in open Court, the United States' Bureau of Indian Affairs is presently conducting both the hydrographic survey as well as certain investigations/studies needed to development the full water right claims of the Zuni Tribe and Navajo Nation. See n. 4, *infra*, and Docket Nos. 152, 264. It is anticipated that offers of judgment to non-federal claimants will be made as the survey progresses and as the federal water right claims are developed. The federal and tribal claims will be adjudicated at the time the survey is completed. It is the Court's intention to enter a final decree of all rights, both non-federal and federal/Tribal, within 10 years of the filing of the amended complaint, or 2011.⁵⁷ See Docket No. 255. Movants have not shown that they have suffered any actual prejudice by their perceived inaction of the United States.

Alternatively, Movants seek to stay the filing of the Court ordered notice of *lis pendens*. Movant's motion comes too late. In July, 2003, the Special Master ordered the United States,

parties that the obligation to fund both tasks may delay until 2007-08 the development and filing of the Tribes' water right claims as well as the completion of the hydrographic survey.

⁵⁷ If Movants are truly desirous of litigating sooner rather than later federal water right claims, it should file immediately appropriate papers with the Court expressing support of the United States' and the Zuni Tribe's proposal to adjudicate in 2004-05 that Tribe's claims to the use of the Zuni River Basin's groundwater resources. See Docket No. 264.

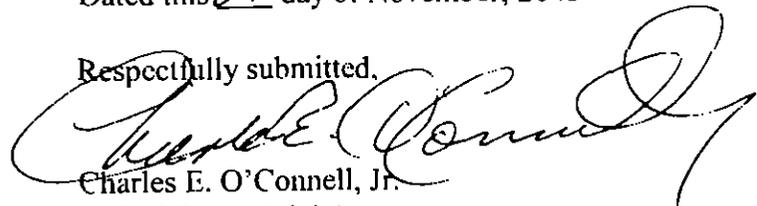
inter alia, to file on or before October 1, 2003, at appropriate sites notices of *lis pendens*. Docket No. 215. In accordance with that Order and receiving no objections or suggestions from other parties,⁹ the United States filed timely notices of the pendency of this lawsuit with the Clerks of Catron, Cibola, and McKinley Counties. Accordingly, Movant's Motion of September 30, 2003, being out of time, is moot.

III. SUMMARY

This Circuit recognizes that "[n]o precise rule can be laid down as to what circumstances justify dismissal for failure to prosecute but the procedural history of each case must be examined in order to make such determination." *Davis v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967). The record simply does not support Movant's motion to dismiss this adjudication for lack of prosecution. This adjudication has moved and is now moving at a pace set by the Court and Special Master and Movants have failed to point to a single instance where the United States' action or inaction has prejudiced their rights or interests or has otherwise delayed unreasonably the orderly and expeditious disposition of this water rights adjudication. Movant's motion to dismiss this lawsuit is without merit and should be summarily DENIED. Movant's motion to stay filing of the notice of *lis pendens* is moot and should likewise be DENIED.

Dated this 21st day of November, 2003

Respectfully submitted,


Charles E. O'Connell, Jr.
United States Trial Attorney

⁹ The Special Master's Order provided that any party interested in the content or siting of the notices were to contact the United States prior to filing. Docket No. 215.

CERTIFICATE OF SERVICE

I hereby certify that on or before this 21st day of November, 2003, a true and correct copy of the foregoing was served by United States Postal Service first class, postage pre-paid mail to the following:

Charnas, Stephen, Esq.
Sutin, Thayer & Browne PC
P.O. Box 1945
Albuquerque, NM 87103-1945

Drennan, Jocelyn Esq.
Rodey, Dickason, Sloan & Robb
P.O. Box 1888
Albuquerque, NM 87103

Ionta, Robert W., Esq.
McKim, Head & Ionta
P.O. Box 1059
Gallup, NM 87305
Telephone: (505) 863-4438
Facsimile: (505) 772-3479

Shadle, Stephen P., Esq.
Westover, Shadle, Carter & Walsma, PLC
2260 S. Fourth Ave., #2000
Yuma, AZ 85364

Stripp, William G., Esq.
P.O. Box 159
Ramah, NM 87321
Telephone: (505) 783-4138
Facsimile: (505) 783-4139

Haas, James E., Esq.
Losee, Carson & Haas P.A.
Box 1720
Artesia, NM 88211

Dahl, Jeffrey A., Esq.
Lamb, Metzgar, Lines & Dahl, PA
P.O. Box 987
Albuquerque, NM 87103
Telephone: (505) 247-0100
Facsimile: (505) 247-9249

Gardner, David R., Esq.
P.O. Box 62
Bernalillo, NM 87004
Telephone: (505) 867-4689
Facsimile: (505) 867-6496

Joca, Mary Ann, Esq.
U.S. Dept. of Agriculture
P.O. Box 586
Albuquerque, NM 87103
Telephone: (505) 248-6010
Facsimile: (505) 248-6013

Marx, Jane, Esq.
3800 Rio Grande Blvd., N.W.
PMB 167
Albuquerque, New Mexico 87107
Telephone: (505) 344-1176
Facsimile: (505) 344-8694

Pollack, Stanley M., Esq.
Navajo Nation Dept. of Justice
P.O. Box 2010
Window Rock, AZ 86515-2010
Telephone: (928) 871-6931
Facsimile: (928) 871-6200

Smith, Mark A., Esq.
Rodey, Dickason, Sloan Akin & Robb
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765- 5900
Facsimile: (505) 768- 7395

Greg Mehojah
Department of the Interior
Office of the Solicitor
Southwest Regional Office
505 Marquette Avenue, N.W.
Suite 1800
Albuquerque, NM 87102

Williams, Pamela, Esq.
Division of Indian Affairs
Office of the Solicitor
1849 C St., N.W., Rm 6456
Washington, DC 20240

Drullinger, Sandra S., Pro Se
818 E. Maple St.
Hoopeston, IL 60942

Gugliotta, Kimberly J., Pro Se
158 W. William Casey St.
Corona, AZ 85641
Telephone: (520) 762-9804

Lebeck, David R., Pro Se
P.O. Drawer 38
Gallup, NM 87305
Telephone: (505) 863-4471

McBride, Gerlad F., Pro Se
2725 Aliso Dr., N.E.
Albuquerque, NM 87110

Bunch, Steven L., Esq.
N. M. Highway & Trans. Dept.
P.O. Box 1149
Santa Fe, NM 87504-1149
Telephone: (505) 827-5431
Facsimile: (505) 827-0700

Cassutt, Kenneth J., Esq.
530-B Harkle Road
Santa Fe, NM 87505
Telephone: (505) 989-1434
Facsimile: (505) 992-8378

~~Davidson, Tessa T., Esq.
Swaim, Schrandt & Davidson
4830 Juan Tabo, N.E., Suite F
Albuquerque, NM 87111
Telephone: (505) 237-0064
Facsimile: (505) 237-9440~~

Shoenfeld, Peter B., Esq.
P.O. Box 2421
Santa Fe, NM 87504-2421
Telephone: (505) 982-3566
Facsimile: (505) 982-5520

Stephen G. Hughes, Esq.
N.M. State Land Office
P.O. Box 1148
Santa Fe, NM 87504-1148
Telephone: (505) 827-1261
Facsimile: (505) 827-4262

Gehlert, David W., Esq.
USDOJ-ENRD
999 18th St., Suite 945
Denver, Colorado 80202
Telephone: (303) 312-7352
Telephone: (303) 312-7324
Facsimile: (303) 312-7331

Nixon, Sunny J., Esq.
Rodey, Dickason, Sloan, Akin, & Robb, P.A.
P.O. Box 1357
Santa Fe NM 87504-1357
Telephone: (505) 954-3917
Facsimile: (505) 954-3942

Sanchez, Dorothy C., Esq.
715 Tijeras N.W.
Albuquerque, NM 87102
Telephone: (505) 842-5924
Facsimile: (505) 242-3125

Barnhouse, Randolph H., Esq.
Jordan & Rosebrough
P.O. Box 1744
Gallup, NM 87305-1744
Telephone: (505) 722-9121
Facsimile: (505) 722-9490

Bushnell, Darcy S., Esq.
U.S. District Court
333 Lomas Blvd., N.W.
Albuquerque, NM 87102-2272
Telephone: (505) 348-2000
Facsimile: (505) 348-2212

Gabin, Special Master Vickie L.
U.S. District Court
P.O. Box 2384
Sante Fe, NM 87504-2384
Telephone: (505) 888-6481

Beardsley, Ann Hambleton,
Pro Se
HC 61, Box 747
Ramah, NM 87321
(505)783-4646

Boynton, Bruce, Esq.
P.O. Box 1239
Grants, NM 87020
Telephone: (505) 285-4242
Facsimile: (505) 285-6687

Brodrick, Ted, Pro Se
P.O. Box 219
Ramah, NM 87321

Fahmy, Peter, Esq.
Office of Regional Solicitor
755 Parfet St., Suite 151
Lakewood, CO 80215

Clara M. Mercer
1017 S. 10th Avenue
Yuma, AZ 85364

DePauli, Louis E., Pro Se
1610 Redrock Drive
Gallup, NM 87031
Telephone: (505) 863-3483
Facsimile: (505) 863-3148

Saunders, D.L., Esq.
Bagley, Ted, Esq.
Office of State Engineer
P.O. Box 25102
Sante Fe, NM 87504-5102
Telephone: (505) 827-6150
Facsimile: (505) 827-3887

Lebeck, Albert O., Pro Se
P.O. Box 38
Gallup, NM 87305
Telephone: (505) 863-4471

Law and Resource Planning Assoc.
201 3rd St., N.W., Suite 1370
Albuquerque, NM 87102

McBride, Myrrl W., Pro Se
2725 Aliso Drive, N.E.
Albuquerque, NM 87110

Shaw, Mark H., Esq.
3733 Eubank Blvd., N.E.
Albuquerque, NM 87111
Telephone: (505) 294-7000
Facsimile: (505) 293-0831

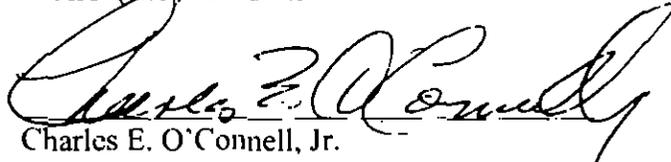
Weldon, John B., Esq.
Lewis, M. Byron, Esq.
McGinnis, Mark A., Esq
2850 East Camelback Road, Suite
Phoenix, AZ 85016
Telephone: (602) 801- 9063
Telephone: (602) 801-9060
Facsimile: (602) 801-9070

Nelson, Stephen R., Esq.
P.O. Box 25547
Albuquerque, NM 87125-5547
Telephone: (505) 764-9900
Facsimile: (505) 764-9901

David Candelaria, Pro Se
12,000 Ice Caves Rd.
Grants, NM 87020

Christina Bruff DuMars, Esq.
Charles T. DuMars, Esq.
201 Third St. NW, Suite 1370
Albuquerque, NM 87102
Tele: (505)346-0998
FAX: (505)346-0997

Mark K Adams, Esq.
Rodey, Dickason, Akin & Robb, P.A.
315 Pasco de Peralta
Santa Fe, NM 87501
Tele: (505) 954-3903
FAX: (505) 954-3942



Charles E. O'Connell, Jr.
Attorney for United States