

**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	)	
	)	

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**No. 01cv00072-MV/WPL**

ZUNI RIVER BASIN  
ADJUDICATION

**Subfile No. ZRB-2-0014**

**BAWOLEKS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS EDWARD J.  
BAWOLEK AND SUZAN J. BAWOLEK CROSS-CLAIM AGAINST THE NEW  
MEXICO COMMISSIONER OF PUBLIC LANDS**

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the "Bawoleks"), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, hereby responds in opposition to the February 28, 2014 *Motion to Dismiss Edward J. Bawolek and Suzan J. Bawolek Cross-Claim Against the New Mexico Commissioner of Public Lands* [Doc. 2931, hereinafter the "Commissioner's Motion"]. This brief also responds to the *United States' Response in Support to the Commissioner of Public Lands' Motion to Dismiss Edward J. Bawolek and Suzan J. Bawolek Cross-Claim* [Doc. 2932, hereinafter the "USA Response"]. In the discussion *infra*, Plaintiff United States of America will be referred to as "USA"; Defendant New Mexico Commissioner of Public Lands will be referred to as the "Commissioner."

## INTRODUCTION

The legal standard for dismissal of a claim is demanding; in *Michael Henry Ferdik v. Joe Bonzelet, Sheriff, et al.*, 963 F.2d 1258 (1992) the Court opined:

'...dismissal is a harsh penalty and, therefore, it should only be imposed in extreme circumstances. *Hamilton Copper & Steel Corp. v. Primary Steel, Inc.*, 898 F.2d 1428, 1429 (9th Cir.1990); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

In determining whether to dismiss a case for failure to comply with a court order the district court must weigh five factors including: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives.' *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423-24."

Neither the Commissioner's Motion nor the USA Response cite any authorities that support the Commissioner's Motion, apart from reference to certain of the Court's orders entered in this case. Those references do not surpass the standard imposed supra; further, the Bawoleks will demonstrate that the USA's and the Commissioner's arguments are inconsistent. The Bawoleks request that the Court deny the Commissioner's Motion, and in support thereof, state as follows:

**I. The Bawoleks Are Not Attempting to Circumvent the *inter se* Proceeding.**

The Bawoleks' Cross-Claim is motivated by new information which became available subsequent to the completion of briefs pertaining to the Bawoleks' Motion to Intervene [Doc. 2795]. A Notice of Briefing Complete [Doc. 2802] was filed on 7/30/2102. Subsequent to that decision, the Commissioner published a letter [Doc. 2928-3] dated 8/27/2012 which de-facto affirmed the Bawoleks' ownership of the water features at issue in their Cross-Claim.

Accordingly, the Bawoleks' Cross Claim represents a new issue apart from those addressed by the Court in its Order Denying Motion to Intervene [Doc. 2805]. Specifically, that Court Order states that "the Bawoleks will have an opportunity to raise their concerns in the '*inter se*' phase before a final decree is entered in this action." The "concerns" to which the Court addressed itself should be taken as being limited to the subject matter raised in the Bawoleks' Motion to Intervene, *viz.*, a material interest in the Commissioner's settlement of his water rights with the Plaintiffs in this action. The threshold issue in the Bawoleks' Cross-Claim is not concern with settlement of the Commissioner's water rights, but rather an issue of ownership: Specifically, 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.

Further, the Commissioner and the USA would have the Court believe that the Bawoleks are disrupting this adjudication, without regard for the "orderly, fair, and phased approach that the Court has established." The Bawoleks actually made a concerted effort to avoid the necessity of filing their Cross-Claim: Prior to filing their claim, on 1/22/2014 Edward J. Bawolek contacted Mr. Harry Relkin, NMSLO General Counsel, by electronic mail and outlined the Bawoleks' contemplation of filing their Cross-Claim, as well as their legal basis for doing do. In

that communication, Edward J. Bawolek noted that said Cross-Claim could be without merit if the water rights associated with the water features at issue had been assigned to the Commissioner at some time past. Edward J Bawolek then requested any relevant documentation that would clarify ownership of those water rights. Responsive to inquiries from Mr. Relkin, Edward J. Bawolek further provided documentation on 1/26/2014 and 1/27/2014 supporting the Bawoleks' ownership of deeded lands and transfer of grazing rights on adjacent leased land. Mr. Relkin's office failed to provide any information responsive to the Bawoleks' inquiry; the Bawoleks' proceeded to file their Cross-Claim. If the Commissioner were truly interested in judicial efficiency, then He should simply have provided the Bawoleks with the requested documentation, foregoing any need for litigation.

## **II. The Bawoleks' Cross-Claim is Appropriate.**

The USA Response at pg.3 references the *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 9 and 10 of the Zuni River Stream System* [Doc. 436] ("Procedural and Scheduling Order") as establishing the subfile phase and *inter se* phase of the adjudication, and elaborates: "In the subfile phase each subfile is a potential dispute between the United States, New Mexico, and the individual claimant." By the USA's own definition, the matter instant rightfully should be considered as a subfile issue because the Bawoleks' Cross-Claim places the water features at issue into a dispute which necessarily involves the United States, New Mexico, and the individual claimant (i.e., the Bawoleks).

Further, the USA Response asserts: "The subfile is based on the water rights associated with specific property in the Zuni River Basin and based on ownership of that property to the

extent that ownership can be discerned." This is exactly the point in the matter instant; namely that the Bawoleks' ownership of the water features at issue is acknowledged by the Commissioner (Attachment 3 to the Bawolek's Cross-Claim [Doc. 2928-3]), hence the water rights enumerated for that property rightfully belong in the Bawoleks' subfile. In effect, the Bawoleks' Cross-Claim implends the Court to do what the Commissioner and USA should have already done as a matter of routine, namely, to correct the relevant subfiles and properly reflect ownership of water features and water rights which were known, or should have been known on the basis of information already available to the Commissioner, to be the property of the Bawoleks.

### **III. The Bawoleks' Cross-Claim is Timely.**

Given the Bawoleks' demonstration that their Cross-Claim relates directly to water features that should rightfully be included in the Bawoleks' subfile (ZRB-2-0014) and that the matter instant is therefore inappropriate for relegation to the *inter se* proceeding, the Bawoleks' Cross-Claim is timely. Further, nothing in Fed.R.Civ.P. 13(g) establishes a timetable limiting the filing of a Cross-Claim.

The Bawoleks also note that both of the Commissioner and the USA have requested modifications to the "orderly, fair, and phased approach" of this adjudication with motions to extend time or to amend schedules [e.g., Docs. 238, 298, 663, 1763, 2491, 2803, 2848]. Assuming *arguendo* that the matter of the Bawoleks' Cross-Claim were relegated to the *inter se* phase of this adjudication, there is no compelling argument premised on the strength of the Bawoleks' claims to show how such relegation improves judicial efficiency: Rather than decide the Bawoleks' rights in their entirety, the Bawoleks will be forced to re-open litigation with the

USA and the Plaintiff New Mexico State Engineer. By the USA's own characterization, a litigation involving the Bawoleks, the USA, and the State Engineer rightfully belongs in the subfile phase of this litigation.

#### **IV. The Bawoleks Will Be Prejudiced if Their Cross-Claim is Dismissed.**

Dismissing the Bawoleks' Cross-Claim will require the Bawoleks to separately re-open and re-litigate their rights as pertain to the water features at issue which they arguably own. By denying the Bawoleks the opportunity to have all of their water rights enumerated in a single subfile, the Court will, in effect, have vested the Plaintiffs with authority in deciding property ownership. That is, by allowing the Plaintiffs to decide which water features are included or excluded from a subfile, a de-facto situation is created in which the Plaintiffs, and not the Court, makes an initial determination of ownership without oversight or accountability.

Delaying resolution of this matter will further harm the Bawoleks by impeding their ability to beneficially utilize their leased property and the water features therein. In particular, the Bawoleks are contemplating needed repairs and maintenance for the water features in question, and the uncertain legal status of those features impairs the Bawoleks' ability to make fully informed decisions as to those activities. This impacts the Bawoleks economically as well as emotionally.

### CONCLUSION

The Commissioner's Motion fails to meet the Court's standard for allowing dismissal of the Bawoleks' Cross-Claim. The analysis supra shows that Commissioner's arguments are fundamentally flawed, even when considered from the limited scope of procedural considerations. For reasons articulated, the Bawoleks pray this Court to deny the Commissioner's Motion to Dismiss.

Dated March 11, 2014.

Respectfully submitted,

By: /s/ Edward J. Bawolek and /s/ Suzan J. Bawolek  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 11, 2014, I filed the foregoing BAWOLEKS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK CROSS-CLAIM AGAINST THE NEW MEXICO COMMISSIONER OF PUBLIC LANDS electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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