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

UNITED STATE OF AMERICA, for Itself and as Trustee for the Zuni Indian Tribe, Navajo Nation and Ramah Band of Navahos 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. 01cv00072-MV/WPL** ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-2-0014**

REPLY IN SUPPORT OF MOTION TO DISMISS EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK CROSS-CLAIM AGAINST THE NEW MEXICO COMMISSIONER OF PUBLIC LANDS

Ray Powell, in his capacity as the Commissioner of Public Lands of the State of New Mexico (the "Land Commissioner"), by and through his attorney, below-listed, submits this reply to the *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* [Doc. 2936].

I. THE BAWOLEKS' CROSS-CLAIM DOES SEEK TO CIRCUMVENT THE ESTABLISHED SUBFILE PROCESS.

Notwithstanding the Bawoleks' contention that they are not seeking an expedited *inter se*, that is in fact the effect of the Bawolek Cross-Claim. As stated in the Bawolek Cross-Claim [Doc. 2928], the Bawoleks seek a judgment against the Land Commissioner "recognizing that the Bawoleks are the legitimate owners of water rights associated with Well 10C-4-W15 and Pond 10C-4-SP33," referring to two water features incorporated into the 115-page Consent Order entered in Subfile ZRB-1-0075 (consolidated) as between the Land Commissioner and Plaintiffs United States and State of New Mexico *ex rel.* State Engineer. Because the Bawolek Cross-Claim seeks a judgment *inter se* between the Bawoleks and the Land Commissioner, it violates the procedures the Court has established for this adjudication.

As set forth in 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"), subfile proceedings involve proposed consent orders served by the Plaintiffs (the United States and the State Engineer) on water rights claimants identified in the hydrographic survey reports. *Id.* at 2-4. In response, the water rights claimant must either agree to the proposed consent order or file a subfile answer setting forth the basis for their disagreement with the proposed consent order. *Id.* There is no provision for the water rights claimant to make cross-claims against other parties prior to the *inter se* process.

For the same reason that the Court denied the Bawoleks' motion to intervene in Subfile ZRB-1-0075 (*i.e.*, that adjudication between a subfile defendant and parties other than the Plaintiffs must await the *inter se* portion of the adjudication), *see* Order Denying Motion to Intervene [Doc. 2805] at 2, the Court should dismiss the Bawolek Cross-Claim, without

prejudice pending commencement of *inter se* proceedings. The Cross-Claim's request for relief against the Land Commissioner is, categorically, *inter se* between the Bawoleks and the Land Commissioner, contrary to both the Order denying the Bawoleks' motion to intervene in Subfile ZRB-1-0075 and the Procedural and Scheduling Order. The fact that the Bawolek Cross-Claim seeks relief against the Land Commissioner only, and not against all other parties to the general adjudication, does not mean that the cross-claim is not *inter se* between the Bawoleks and someone other than Plaintiffs. Indeed, the fact that the Cross-Claim seeks to initiate a limited, partial *inter se* exacerbates the problem; *i.e.*, it creates an additional, expedited, limited *inter se* prior to the general *inter se*, which is neither an orderly nor efficient manner of proceeding. Contrary to the Bawoleks' contention that the Cross-Claim allows the Court to "decide the Bawoleks' rights in their entirety," any determination arising from the Cross-Claim would still be subject to challenge during the general *inter se* process.

The implication of the Order denying the Bawoleks' motion to intervene in Subfile No. ZRB-1-0075 stands, regardless of whether the Bawoleks obtained purportedly "new" information that supposedly supports their attack on the water rights set forth in the Subfile ZRB-1-0075 Consent Order. (As discussed in more detail below, the Land Commissioner disputes the Bawoleks' contention that the purportedly "new" information has any implications with the respect to the water rights at issue.) Moreover, the Bawoleks' motion to intervene in Subfile ZRB-1-0075 invoked "the nature and extent of the water rights of each of the parties in the Zuni River Basin Adjudication, and in particular the rights of individuals holding Grazing Leases issued by the Commissioner." *See Motion to Intervene of Edward J. Bawolek and Suzan J. Bawolek* [Doc. 2795] at 2. Thus, the Bawoleks raised the "issue of ownership" of the water

rights associated with their State Land Office grazing lease in their motion to intervene in Subfile No. ZRB-1-0075, and the Court denied intervention as contrary to the established subfile adjudication process.

II. THE LAND COMMISSIONER'S MOTION SEEKS DISMISSAL WITHOUT PREJUDICE TO THE CLAIMS THE BAWOLEKS ASSERT IN THEIR CROSS-CLAIM.

The Land Commissioner's Motion to Dismiss seeks dismissal of the Bawolek Cross-Claim on the grounds that it is premature and not ripe for adjudication. Such a dismissal is without prejudice to the claims asserted. *See*, *e.g.*, *Georgia Advocacy Office, Inc. v. Camp*, 172 F.3d 1294, 1299 (11th Cir. 1999) (holding that dismissal for lack of ripeness was without prejudice). Further, the Land Commissioner's motion does not invoke ripeness in the sense of constitutional Article III jurisdiction, but rather ripeness in the prudential sense, which is a matter for the Court's discretion. *See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 980 (9th Cir. 2011) (stating that "Article III ripeness is a matter of constitutional law [and] is jurisdictional, while [p]rudential considerations of ripeness are discretionary") (internal quotation marks and citations omitted).[1]

The Bawoleks mistakenly cite authority requiring "extreme circumstances" and a five-factor analysis before a complaint is dismissed *with prejudice*, pursuant to Fed.R.Civ.P. 41(b), as a sanction for failing to comply with a court order. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (affirming dismissal of complaint as sanction for plaintiff's failure to comply

[1] The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n. 18 (1993); *see also Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.1985) (stating that prudential ripeness doctrine "requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances").

with Court order directing plaintiff to name all defendants, and applying standard used "[i]n determining whether to dismiss a case for failure to comply with a court order"). Because the Land Commissioner's motion does not invoke Rule 41(b) and merely seeks to dismiss the Bawolek Cross-Claim without prejudice pending commencement of the *inter se* portion of this adjudication, the *Ferdik* five-factor "extreme circumstances" standard does not apply.

Moreover, the Land Commissioner's Motion to Dismiss merely seeks to require compliance with the Court's Procedural and Scheduling Order and an orderly and efficient process for managing a large general stream adjudication. Under Fed.R.Civ.P. 16, the Court has authority to manage the litigation in a manner that aids the final disposition, including "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed.R.Civ.P. 16(c)(2)(L). Thus, notwithstanding the provision of Fed.R.Civ.P. 13(g) regarding cross-claims, the Court can, and has, established special procedures for adjudicating water rights as between and among water rights claimants only after the subfile proceedings between the Plaintiffs and water rights claimants. These special procedures are commonly used in general stream adjudications, and the Bawoleks have shown no special prejudice to them arising from having to comply with those procedures. Regardless of the Bawoleks' efforts to confer with the State Land Office regarding the existence of lease records evidencing ownership of the water rights at issue, the Bawolek Cross-Claim is not properly presented at this time and should be dismissed.

The Land Commissioner disputes the Bawoleks' contention that the State Land Office recognized the Bawoleks' ownership of water rights by sending the August 2012 letter attached to the Bawolek Cross-Claim [Doc. 2982-3]. The letter – a form letter sent to all grazing lessees

regarding the upcoming hunting season -- simply reflects the general understanding that a State Land Office lessee who constructs authorized improvements on state trust lands owns those improvements. *See* NMSA 1978, §§ 19-7-14 & 19-7-15.[2] Moreover, while the August 2012 letter states that hunters should not attach blinds to physical improvements such as water wells, tanks or windmills, the letter says nothing about diversion or use of water or ownership of water rights. Regardless of whether the Bawoleks own physical improvements used to divert and store water of the type mentioned in the August 2012 letter, that does not mean that the Bawoleks own the water rights associated with those improvements. Notably, the lessee-prepared improvement listing attached to the Bawoleks' lease does not include water rights. *See* Bawolek Cross-Claim, Exh. B [Doc. 2928-2].

Similarly, the Bawoleks err in their contention that delayed adjudication of their Cross-Claim creates legal uncertainty regarding their ownership of "water features" and hinders their ability to make decision regarding repairs and maintenance. Again, ownership of the water well, windmill and stock tank is distinct from ownership of the water rights associated with those improvements. Moreover, the need to repair and maintain physical equipment for stock watering presumably exists (or does not exist) independent of whether the Bawoleks own the associated water rights. Thus, the court should reject the Bawoleks claim that they will suffer special prejudice from being required to follow the established procedures for subfile adjudication *vis a vis* the Plaintiffs, followed by *inter se* proceedings.

[2] Under this regime, the lessee or other owner of an authorized improvement is entitled to be paid for the value of the improvement by a subsequent lessee or purchaser of the land. *See* NMSA 1978, § 19-7-14. Appurtenant water rights may be owned by the lessee and compensable under Section 19-7-14. *See* NMSA 1978, § 19-7-15. In general, improvements are considered permanent and may not be moved off of the land. *See* NMSA 1978, § 19-7-51.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 24, 2014, I filed the foregoing *Reply in Support of Motion to Dismiss Edward J. Bawolek and Suzan J. Bawolek Cross-Claim Against the 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.

/S/ John L. Sullivan
JOHN L. SULLIVAN