Memorandum in Opposition to Appellee's Motions to Dismiss, *Sandia Pueblo v. Bernalillo Mun. Sch. Dist. Bd. of Educ.*, No. 71-1092 (10th Cir. Mar. 3, 1971).

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 71 - 1092

SANDIA PUEBLO, ET AL.,

Appellants,

vs.

BERNALILLO MUNICIPAL
SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Appellees.

MEMORANDUM IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS

STATEMENT OF FACTS

This case arises in the Bernalillo Municipal School District which is near Albuquerque, New Mexico. Appellants, four Indian pueblos and several individual Indians, sued the Board of Education, certain local officials, the State Board of Education, several state officials, and officials of the United States Department of Interior and its Bureau of Indian Affairs and the U.S. Office of Education. The scope of the suit is wide and its allegations serious.

The five claims of the complaint (R. 10 et seq.) include various forms of racial discrimination against appellants, breach of a multi-party lease contract, gross and unlawful misuse of federal funds, breach of federal trust obligations to Indians with respect to education, and illegal and improper composition of the Bernalillo School Board. The claims are more fully described in appellants' Docketing Statement.

After motions to dismiss by all the defendants-appellees, a hearing was held and the court ruled from the bench that the action could not be maintained as a class action and that all causes of action would be dismissed. The First and the Fifth Claims were dismissed without prejudice and the others with prejudice. Appellants appeal from the ruling that the action could not be maintained as a class action and the dismissals of the Second, Third and Fourth Claims.

All of the appellees have moved to dismiss the appeal. Some of the motions are made on the ground that the order was not final and appealable. Others are made on the ground that the notice of appeal was filed one day beyond the period provided by the Rules, although within an extension of time for filing granted by the district court.

ARGUMENT

I

THE DISTRICT COURT RENDERED A FINAL, APPEALABLE ORDER UNDER 28 USC §1291

Appellants do not dispute that to be appealable an order must be "final" under 28 USC §1291 unless it is an appeal from an interlocutory order provided for by statute. Several qualifications of the finality rule have been developed judicially within the overall policy of preventing piecemeal handling of cases and eliminating delays in litigation. See, generally, 6 Moore's Federal Practice ¶110.06 et seq. The question here is whether an order which guts this case of any real meaning is final for the purposes of an appeal.

A. Under the Cohen Rule the order is final and appealable.

A leading case on the question of appealability is Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 (1949). Cohen held that orders not completely disposing of a case are final for purposes of appeal if they finally determine:

> "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546.

The Supreme Court explained, "This Court has long given this provision of the statute [28 USC §1291] this practical rather than a technical construction." Id. Cohen involved an appeal from an order requiring the posting of security, but the language and reasoning of Cohen are particularly applicable to this case.

1. The Class Action Determination

By ruling that the action cannot be maintained as a class action the district court has rendered many of the claims meaningless and much of the relief sought impossible. Upon amending the First and Fifth Claims the individual plaintiffs will be able to show discrimination and harm to them, but cannot themselves demonstrate that each and every grievance raised by the complaint affected one of them. Differences in the scope of claims do not prevent the particular plaintiffs from acting as representatives of a class. E.g., Eisen v. Carlisle and Jacquelin, 391 F. 2d 555 (2nd Cir. 1968), cert. denied 386 US 1035. As representatives of the class it would

be the plaintiffs' right and duty to show the full realm of discriminatory actions affecting others similarly situated; as individual plaintiffs they are limited to the acts and omissions of the defendants which affect them directly.[1]

For instance, if none of the named individuals has yet been physically mistreated by employees of the school district, as it is alleged to be the practice with Indian children, or if none of those named happens to live far enough from school to need to ride the school bus, and thus is not affected by the inferior school bus transportation furnished to Indians, no relief on these important claims is possible. With the graduation, drop out, or expulsion of each plaintiff school child the suit becomes moot as to him.

If only individual plaintiffs are retained, relief will be limited to remedies necessary to redress or protect only the rights of those individuals. Where the discrimination alleged is common to all Indians and is manifested in diverse ways, individual relief is of little use in changing the practices of the school system. Should each Indian school child, employee, or potential employee have to vindicate his rights individually? In Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970),

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1. It has been recognized in cases such as this that it is helpful to the court to have more than individual plaintiffs before it. The court in Brunson v. Board of Trustees of School District No. 1., 311 F.2d 107 (4th Cir. 1962) said at p.109:

> "The court's consideration of these problems [of racial discrimination by a school district] is facilitated by the presence of multiple plaintiffs. The effect of a particular practice or procedure may be determined more readily in the light of its impact upon a number rather than upon one alone."

cert. denied 39 U.S.L.W. 3246 (Dec. 8, 1970) the court supported a class action even though the individuals (Negroes alleging employment discrimination) each had different circumstances. The important point was that they were all Negroes and the assertion of the plaintiffs was discrimination against Negroes. The court said, at p.65 that to require each aggrieved Negro to pursue his own remedy "would result in a multiplicity of suits and a waste of time and money for all interested parties." In a case such as ours it is not only unlikely, but impossible as a practical matter, for each aggrieved Indian to bring a separate suit. From the standpoint of counsel there is little motivation to litigate such matters one at a time. Eisen v. Carlisle and Jacquelin, supra, recognized that the availability of competent attorneys (and, consequently, access to the courts) often depends on the ability to bring a class suit.

Before the Second Circuit Court of Appeals decided the Eisen case, supra, it heard a motion to dismiss the appeal from the order that the action could not be maintained as a class action on the ground that the order was not appealable Eisen v. Carlin and Jacquelin, 370 F.2d 119 (2nd Cir. 1966), cert. denied 386 U.S. 1035 (1967). The court held the order to be appealable noting that the "alternatives are to appeal now or to end the lawsuit for all practical purposes." Id. at 120. It added: "If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23." Id. at 120. The court concluded: "Where the effect of a district court's order, if not reviewed, is the death knell of the action, review shall be allowed." Id. at 121.

In Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir. 1962), on a motion to dismiss the appeal of an order dismissing an action as to a class, the Fourth Circuit Court of Appeals ruled that the order was appealable. That case was brought as a class action by Negro school children against a school board which was making distinctions in its school system based on race. The district court struck the class and "allegations inappropriate to a personal action" by the first named plaintiff, Brunson. Brunson graduated from school a few days following the order, rendering the case moot. The court noted that the practical effect of the order was a dismissal and went on to state:

> "the limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief to an order requiring the admission of a particular plaintiff to a school of his choice. . . .The order, therefore, was a denial of the broad injunctive relief which the plaintiffs sought, which presumably would have affected all schools and all grades in the school district." Id. at 108.

For this reason the court concluded even if the order was not appealable under 28 USC §1291, it would be appealable under §1292(a)(1) (providing for interlocutory appeals from orders denying injunctions).

2. The Dismissals

The cases relating to orders denying class actions, supra, apply Cohen to situations similar to ours. The rest of

the order appealed from dismisses claims for illegal misuse of federal funds, breach of trust, and breach of contract. In order to apply the Cohen rule to the dismissal of the claims of the complaint it must be shown that the claims dismissed were independent and separable from the remaining claims and that the rights asserted are "too important" for review to be deferred.

The relief asked in the complaint in this case is broad and is geared to claims of entire classes of poor Indian school children and Indian employees of the school district in question. Each of the five claims is independent and separable from one another and each is completely independent and separable from the two claims dismissed without prejudice. The operative facts of each claim while relating to the same educational system which is attacked by all five claims, are largely different. Although each of the claims is sufficient to sustain a separate lawsuit, they were joined in a single lawsuit for expedience and economy. Dismissal of the claims having to do with misuse of federal funds, breach of trust, and breach of contract, taken together with the dismissal of the class, effectively ends the action as to all important matters.[2] Furthermore, the dismissal of the Second, Third and Fourth Claims has the effect of dismissing all the federal defendants in that no relief is sought against them for the First and Fifth Claims.

In addition to the independence and separability of the claims it must be shown that the rights asserted are "too important" for review to be deferred in order for a case to come within the Cohen rule.

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2. For this reason appellants had no choice but to elect the route of taking this appeal in favor of amendment of the two amendable claims.

The very significant question of standing is raised in each of the three claims, which were dismissed with prejudice. The district court ruled that the appellant school children could not raise questions of misuse of federal funds by the state and the school district, (i.e., violation of federal statutes and regulations governing use of substantial amounts of funds for appellants' benefit.) (T. p. 62, ll. 23-25 - p.63, ll. 1-4). It is true that the law of standing has changed radically since the days of Frothingham v. Mellon, 262 U.S. 447 (1923), and in light of recent developments in this area it now seems clear that the court was wrong in denying appellants a forum.[3] In fact, at least two federal district courts have recently ruled that plaintiff school children and parents do have standing to challenge the misuse of Title I funds. Colpitts v. Richardson, Civil Action No. 1838 (D. Me. October 20, 1970); Babbidge v. Richardson, Civil Action No. 4410 (D.R.I. February 18, 1971). Federal courts have routinely allowed challenges of the administration of school lunch programs. E.g., Marquez v. Hardin, Civil No. 544, 616 (N.D. Cal. Sept. 5, 1969).

3. Recent cases on the standing issue include: Rosado v. Wyman, 397 U.S. 397 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Associated Data Processing v. Camp. 397 U.S. 150 (1970); King v. Smith, 392 U.S. 309 (1968); Flast v. Cohen, 392 U.S. 83 (1968); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Environmental Defense Fund, Inc. v. Ruckelshaus, No. 23,813 (D.C. Cir. Jan. 7, 1971); Environmental Defense Fund Inc. v. Hickel, 428 F. 2d 1093 (D.C. Cir. 1970) North City Area Wide Council v. Romney, 428 F. 2d 754 (1970); Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Civ. 1970); Scanwell Laboratories v. Shaffer, 424 F. 2d 859 (D.C. Cir. 1970); Curran v. Laird, 420 F. 2d 122 (D.C. Cir. 1969) Peoples v. U.S. Department of Agriculture. F.2d (D.C. Cir. 1970); Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969); U.S. ex rel Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968). Nearly all these cases were cited to the court in briefs or oral argument. Apparently the thrust of these cases was ignored. The court stated in the course of its oral bench ruling "Now, I read all your briefs and all of that, but naturally, I didn't have time to read all the cases that were cited. It would take too much time for me to do that, and I just didn't have the time, so I just have to rule the best I know how." (T. 125, ll. 10-14)

In addition to the question of standing, there are other issues of vital importance which are threshold questions, the decision of which can make the judicial machinery work to adjudicate the rights of the parties or force it to grind to a halt. These include the question of sovereign immunity of the federal government, applicability of the Administrative Procedure Act (5 USC §§701 et seq.) to the acts of federal officials, enforceability of the federal trust duties owed to Indians, and jurisdiction under the mandamus statute (28 USC §1361) and other statutes. It is not enough that appellants have been prevented from asserting their rights in court by a questionable ruling, but if this appeal should be dismissed, they would be barred from review of that ruling which blocks the courthouse door and from obtaining much needed injunctive relief until there are amendments and two claims based primarily on civil rights violations are adjudicated as to the individual plaintiffs left in the suit. As the discussion below concludes, those civil rights claims have been rendered meaningless by the order denying the right to maintain a class action and there is little impetus or reason for them to go forward.

Further delay in getting a determination on the merits of this case will result in irreparable harm to the plaintiffs-appellants. Taking the allegations of the complaint as true, as the court must at this point, serious and grave harm will come to appellants with the passage of time. Courts have recognized the special importance of equal educational opportunities, especially for disadvantaged or minority children.

"For the disadvantaged child, handicapped as he is by home and community circumstances, the school remains as the last hope for overcoming academic deficiencies. . .it also has a significant role to play in shaping the student's emotional and psychological make-up." Hobson v. Hansen, 269 F.Supp. 401 483 (D.D.C. 1967), aff'd sub nom.; Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969).

The United States Supreme Court has recognized that: "today education is perhaps the most important function of state and local governments. . .Today it is the principle instrument in awakening the child to cultured values in preparing him for later professional training, and in helping him adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succed in life if he is denied the opportunity for an education." Brown v. Board of Education, 347 U.S. 483, 493 (1954).

The continued course of illegal, improper, and discriminatory conduct by appellees will result in further psychological and physical harm to the Indians of the Bernalillo District and a loss of educational opportunities. The magnitude and nature of this harm dictates avoidance of further procedural dodges and coming to grips with the issues as expediently as possible.

B. Failure to allow this appeal would do violence to the policy of the finality requirement.

The "practical, not technical" approach of the Cohen case, supra, was applied and expanded in Gillespie v. United States Steel, 379 U.S. 148 (1964). In that case the Supreme

Court held that an order striking claims based on Ohio wrongful death and survival statutes, while retaining a Jones Act claim, was final and appealable. The Court said, in language here quoted at length because of its applicability to our case, that in determining finality in such marginal cases:

> "The most important competing considerations are 'the inconvenience and costs or piecemeal review on the one hand and the danger of denying justice by delay on the other.' Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sister's rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands." Id. at 153-54.

In this case appellants have filed their notice of appeal, and bond for costs, ordered and paid for an expensive transcript, prepared a lengthy and documented docketing statement, and paid a docketing fee. A Record of over 900 pages has been prepared and transmitted to the Court of Appeals. Even if appellants would amend and carry the vestige of their lawsuit to some kind of conclusion it would only mean a return to this court and a necessary duplication of the steps already taken some months, or perhaps years, in the future.

> "The final judgment rule is aimed at the evil of piecemeal appeals. But once an appeal has been taken in good faith, and the attendant expense of time, money and manpower has been suffered, a court of appeals is not powerless to prevent further useless expenditures," 6 Moore's Federal Pra tice ¶110.12, p.151.

In order to get the substantial, vexing issues of the Second, Third and Fourth Claims before the court, other individuals would have to bring a separate class action, thus increasing the litigation burdens of the district court and all parties. Not only would justice be delayed by a failure to hear this appeal, but a piecemeal handling of the case - precisely the evil sought to be avoided by the finality rule - would result.

C. The Court intended that this order would be appealled.

It has been held that in deciding whether or not an order is final, an appellate court should determine the intent of the court below by looking at the circumstances surrounding appeal, rather than following "rigid procedural formality", Jung v. K&D Mining, 246 F.2d 281 (2d Cir. 1957). In Crutcher v.

Joyce, 134 F.2d 809 (10th Cir. 1943) several family members sued other family members on various claims to funds inherited, transferred, and managed by and between family members. The order of the district court for the District of New Mexico dismissed some of the causes of action as to some of the plaintiffs insofar as certain relief was sought and gave leave to amend. The court allowed the appeal of one of the plaintiffs stating that questions of his rights were completely removed from the case and the order was final as to him for purposes of appeal. This court noted that it was evident that the trial court intended the order to be final.

That the order extending time for appeal (R. 267) was not intended by the judge as a certification under Rule 54(b), Federal Rules of Civil Procedure is conclusive of nothing. The district judge wrote a letter (attached to the federal appellees' motion to dismiss the appeal) following an informal meeting of the lawyers in this case stating that the extension order was not a Rule 54(b) order. It is obvious from the order (and the motion sought no such determination) that it was not a Rule 54(b) order.[4]

Certainly this is the type of multiple claim case in which a district court might well certify an order as appealable, but appellants have always taken the position that the order as it stands is an appealable one, and at no time has an order

4. If there is any serious question as to the court's intent, the case should be remanded to the district court for a determination of whether or not the court will certify that the conditions required under Rule 54(b) exist.

under Rule 54(b) been sought.[5] Nevertheless, the fact that the court, in its discretion saw fit to allow the appeal to go forward is a further indication of its expectation that the order would be appealed. Nothing in the judge's letter is to the contrary. In fact, the letter, in pointing out that the order extending time for appeal was not a Rule 54(b) order, states that the judge has "no objection to the matter being presented to the Circuit Court" and that he does "not want to hinder appeal of the case as it stands."

Repeatedly during the hearing on Appellees' Motions to Dismiss, the district judge stated that the particular orders could be appealed and seemed to contemplate, if not invite it.

THE COURT: That's the feeling of the Court. The same thing is true with the Johnson-O'Malley Act funds. I don't know who the proper party is to bring such an action against the district, but I don't think it is some school child. I may be wrong, but that's the opinion of the Court. . . .Now, if anyone wants to - - if anyone sees that differently, of course, the circuit courts are open to review what I have said, and that is why I said what I did if you want to bring in a new action. [Emphasis added.] (T. 63, ll. 5-9, 21-24.)

THE COURT: When it comes to the breach of contract part, breach of trust part, I'm dismissing these items with prejudice. So that if you're not happy with the court action, why, of course you may appeal those matters to the Tenth Circuit. . . ." [Emphasis added.] (T. 123, ll. 7-11.)

MR. GETCHES: Your Honor, with respect to the third claim, misuse of funds, we believe that we can frame that to comport with the recent cases. Is that dismissed with prejudice, also?

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5. As the record will confirm, the federal defendants' motion at p.2 is in error in suggesting that a certification was sought fn. continued on pg. 15.

THE COURT: Yes, that's dismissed with prejudice, and you can appeal that if you'd like, and if the circuit court says that's for me to determine, why I will determine it; but I am taking the position at this time that these plaintiffs are not proper persons to raise that question. Now, I don't know who is the proper person under the Johnson-O'Malley Act and so on, whether it's the federal government or some official or some federal agency.

MR. GETCHES: So we could not, with these plaintiffs at least, amend to include those claims?

THE COURT: No. No. I'm dismissing that with prejudice. So if you are not happy with that, as I said, you can appeal that. [Emphasis added] (T. 125, 15-25 --126, 11. 1-8)

THE COURT: Yes. Would you prepare [an order] and submit it to opposing counsel. I'm not asking you to approve it, except as to form. If there's something wrong with the form, of course. But I don't want you to approve it, yourself, out of court. That's what I'm trying to get at. In other words, if you want to appeal, you have a perfect right to do so.

MR. GETCHES: Would the order include findings and conclusions as well as --

THE COURT: No, I don't think I need to make further findings and conclusions. I think what I've said here is sufficient, and I'll let them be the findings and conclusions of the Court. I've tried to explain each and every ruling that I've made in some detail here, so that if you want to appeal, the Court will know, the upper court will know what I said and did, so just an order will be sufficient. (T. 129. 11.5-21)

fn. 5 cont. by appellants. It was discussed at a meeting of counsel after the clerk of the district court on his own motion refused to transmit the record to the court of appeals because, in his opinion, the order was not appealable. No certification was ever formally requested.

THE COURT: I just have to rule the way I see the law and, as I say, it is subject to appeal. We have a Tenth Circuit who can look over my shoulders, and if I make mistakes, why, they haven't been hesitant in the past to correct me, and I don't think they will now if I have made any mistakes. [Emphasis added] (T. 130, ll. 3-8)

In addition to the remarks made by the court indicating an intent that there would be an appeal, counsel for all parties signed a stipulation submitted to the court regarding the order which was ultimately signed by the court and entered which recited:

> "Whereas, defendants included paragraph 7 in the proposed Order believing it to be part of the Court's ruling and for plaintiffs' benefit but plaintiffs have requested its removal on the grounds that it may affect the appealability of the Order, and, further, would more properly be included in findings of fact and conclusions of law;" (R.236)

The recital was one of the conditions under which appellants' counsel and opposing counsel agreed to the form of the proposed order.

The intent of the court, at worst, was not to discourage or hinder appeal. From every ostensible indication the intent was that there would be an appeal. The judge seemed to be asking for guidance from the circuit court in this complex case. Not only is the order soundly within the Cohen rule and in harmony with the rationale of Gillespie, it is in accord with the expec-

tations and intentions of the district judge who made the order.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING APPELLANTS MOTION TO EXTEND TIME FOR APPEAL BY ONE DAY

Some of the appellees seek to dismiss this appeal on the ground that the notice of appeal was not timely filed. The district court, after considering the arguments in the briefs which each of the appellees filed with it, found that there was "excusable neglect" within the meaning of Rule 4(a) of the Federal Rules of Appellate Procedure and granted appellants' motion to extend time by one day for the filing of the notice of appeal. (R.267). The procedure followed was clearly correct. E.g., Ferguson v. Prudential Life Insurance Company, 399 F.2d 47 (6th Cir. 1968); C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952 (2d Cir. 1968); Evans v. Jones, 366 F.2d 772 (4th Cir. 1966); United States v. Brown, 263 F. Supp. 777 (E.D.N.C. 1966).

The granting of appellants motion was a matter of discretion for the trial judge which should not ordinarily be set aside, especially where, as here, appellees received notice of the motion and presented their arguments to the district judge. In Harris Truck Lines v. Cherry Meat Packers, 371 U.S. 215 (1962), the Court placed emphasis on the fact that opposing counsel had the opportunity to oppose the motion for extension of time and the obvious great hardship to a party who relies upon the trial judge's finding of excusable neglect and then suffers reversal of that finding. The Court also underscored the more traditional policy that rulings of the trial court are

entitled to great deference, and held that the Court of Appeals ought not to have disturbed the district judge's ruling, Id. at 215.

In this case the "excusable neglect" upon which the trial court based its Order was occasioned by a delay in the mails during the Christmas season. In retrospect, plaintiffs' counsel's failure to anticipate a possible delay in the mails during the Christmas season might well be characterized as "neglect," but the trial court on the basis of the facts before it found that this "neglect" was "excusable" within the meaning of Rule 4(a).[6] Delay in the mails was precisely the situation envisaged by the Advisory Committee on Appellate Rules of the Judicial Conference of the United States in its revision of Rule 4(a). See, Stern, Changes in Appellate Rules, 41 F.R.D. 298-299.

Defendants reliance on Maryland Casualty Company v. Conner, 382 F.2d 13 (10th Cir. 1967), is misplaced. Maryland Casualty merely held that the fact that counsel was busy with other matters does not justify a finding of "excusable neglect." Indeed, in discussing the 1966 amendment to the Rules, this court quotes with approval the statement of Mr. Robert Stern of the Advisory Committee on the Rules to the general effect that the "most obvious" situation in which a finding of excusable neglect is warranted is where there is "undue delay in the mails." Id. at 16.

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6. The papers filed on behalf of the New Mexico Officials appear to question the veracity of appellants' counsel. Clearly such matters, when raised, are best considered by the District Court.

In this case a notice of appeal was filed a single day late and the defect was promptly corrected by the district judge in the manner prescribed by the Rules after a thorough consideration of the circumstances. No prejudice to any of the appellees is even suggested. Clearly, the district judge did not abuse this discretion in so doing and acted in accord with the requirement of Rule 1 of the Federal Rules of Civil Procedure that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

CONCLUSION

From the beginning of this case Appellants have been plagued with problems, economic and political[7] which have frustrated its progress. The impecunious Pueblos and individual Indians have placed their faith and trust in the courts, have made sacrifices, and have taken risks to make this action possible and to pursue it. Appellees have been content to force the parties into a procedural bog and have made every effort to prevent the merits from being heard by attempting to wear down appellants whose resources they know are limited.[8] Appellants now prevail upon this Court to cut the Gordian knot which has

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7. The case was originally prepared by the attorneys now handling the case, but a long interruption in their activity in the case exists due to the fact that attorneys for the United States prevailed upon the office of Economic Opportunity to place a condition in a federal grant under which the attorneys were operating which prohibited their continuing in it. The attorneys are now supported by private grants and contributions.

8. A glance at the docket entries in the district court reveals a plethora of procedural motions including motions to quash service, discovery motions, motions to strike, and motions to dismiss.

stymied the advancement of this case.

This court might say that the order in this case leaves a breath of life in the case and prevents the order from being fined. This would be an easy way to remove an appeal which raises difficult questions from the calendar of a busy court, but it would avoid the spirit of 28 U.S.C. 1291, as defined in Cohen and Gillespie, by relying on a technicality rather than an apprehension of the practical effect of the court's order. Most importantly, urgent relief, vitally needed by Indians in the Bernalillo Muncipal School District will be delayed or denied.

Appellants respectfully urge this court to find the order appealled to be final and appealable and to take jurisdiction of the matter.

March 3 1971

Respectfully submitted,

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