

**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

**ZUNI RIVER BASIN
ADJUDICATION**

RESPONSE TO APPLICATION FOR DEFAULT [DOC. NO. 1775]

COMES NOW, Joseph W. Schepps, Trustee for the Joseph W. Schepps Corporate Trust (“Schepps”), by and through his attorneys of record, Law & Resource Planning Associates, P.C., and hereby responds to the Application for Default filed by the United States and the New Mexico State Engineer in Subfile ZRB-1-0058¹ on June 4, 2008.

The prospective water right covered by Subfile ZRB-1-0058 was owned by Richard Davis Mallery (“Mallery”) until very recently. Joseph W. Schepps, Trustee of the Joseph W. Schepps Corporate Trust, recently purchased land on which the point of diversion is located. See Warranty Deeds purchasing Lots 4, 5, and 6 of the El Muerto Creek Subdivision attached hereto as Exhibit A. Schepps purchased the property from El Muerto Creek, LLC, which had apparently purchased it from Richard Davis Mallery sometime earlier.

¹ The Application also seeks an entry of default in Subfile ZRB-5-0050.

Until the sale of this property, Mallery has actively participated in this litigation in a variety of ways, including filing the following pleadings, motions and other comments:

- Answer to Complaint (Doc 85)
- Comments on Proposed Scheduling Order (Doc 107)
- Objections to the Special Master's Report (Doc 124)
- Comments on Interim Procedural Order (Doc 172)
- Comments regarding Zuni River Basin Field Trip (Doc 181)
- Various procedural motions (Docs 238, 265, 298,
- Motion to Stay Filing of Notice of *Lis Pendens* with supporting brief (Doc 246, 247)
- Answer to Amended Complaint (Doc 248)
- Objections to Special Master's Report (Doc 284)
- Motion to Expunge Notice of *Lis Pendens* (Doc 289)
- Comments on Draft Procedural Order (Doc 310)
- Comments on Proposed Administrative Order (Doc 335)
- Response to Order to Show Cause (Doc 337)
- Additional Comments on Order to Show Cause (Doc 383)
- Motion to Certify Questions to the New Mexico Supreme Court (Doc 396, 460)
- Comments on Proposed Scheduling Order (Doc 401)

In addition, Mallery apparently filed a Request for Consultation following the receipt of his Consent Order, and participated in the consultation process with the United States and the New Mexico State Engineer. *See* ¶ 5 of the United States' Motion to join the Richard Davis Mallery Revocable Trust *nunc pro tunc*. (Doc 1631). Thereafter, it is believed that Mallery sold the property containing the diversion point of the water right reflected in Subfile ZRB-1-0058 and had no further interest in the property or this proceeding. *See* Motion to Withdraw, (Doc 1383) whereby Mallery's counsel informed the Court that they had lost contact with him. When the property was sold to El Muerto Creek, LLC, neither Mallery nor El Muerto Creek, LLC filed change of ownership documents with the Court. Because of Schepps' very recent purchase of the property, he is still in the process of completing the documents informing the Court and the parties of the ownership change. As the new owner of the property, Schepps fully intends to participate in the adjudication process and pursue all water rights that may be located on the property.

Defaults are not favored in the law. *Wendt v. Pratt*, 154 F.R.D. 229, 230 (D.Minn.1994) (“There is a strong public policy, supported by concepts of fundamental fairness, in favor of trial on the merits.”) Because of these public policy concerns, the entry of a default judgment should only be done in extreme circumstances. *Id.* Even though the United States is proceeding under Fed. R. Civ. P. 55(a) and is not yet seeking a default judgment, the request for the entry of a default is but the first step in the process. *See, e.g., Doug Brady, Inc. v. New Jersey Bldg. Laborers Statewide Funds*, 2008 WL 940782, 6 (D.N.J. 2008).

A default is generally not favored, but is particularly inappropriate when a defendant has appeared and indicated a desire to defend the action. *Wendt*, 154 F.R.D. at 230. In such case, the Court may exercise its discretion in entering a default so as to foster the public policy goal of deciding disputes on the merits. *Id.* In the case at bar, Mallery while he owned the property, filed in a number of pleadings, comments, and motions and fully participated in the consultation process before apparently failing to file a subfile answer before he sold the property. He clearly evidenced a desire to defend the action. His extensive participation in the litigation demonstrates that he otherwise defended the litigation, and thus was not in default under Fed. R. Civ. P. 55(a).

Under this rule, the Clerk’s role is not merely perfunctory. The Clerk must examine the affidavits and find that they meet the requirements of Rule 55(a). *Wright, Miller & Kane*, 10A *Federal Practice and Procedure: Civil 3d* § 2682, at 19 (1998), citing *U.S. v. Herlong*, 9 F.R.D. 194, 195 (D.C.S.C. 1949). In the case at bar, the United States has not filed any affidavits.

Finally, it is not at all clear that Fed. R. Civ. P. 55(a) even applies to this situation. As noted by the Tenth Circuit Court of Appeals, there is a split of authority as to whether this rule applies only to failures to reply to those pleadings enumerated in Fed. R. Civ. P. 7. *EBI*

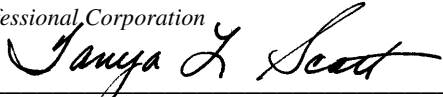
Securities Corp., Inc. v. Net Command Tech, Inc., 2003 WL 22995502, 3 (10th Cir 2003).² In the case at bar, Mallery clearly filed an answer to the Complaint and an Answer to the Amended Complaint. (Doc. 85 and 248). He only missed filing an answer to the subfile, which is required under the Court's scheduling order, but is not a pleading listed in Fed. R. Civ. P. 7.

As previously noted, Schepps intends to pursue all water rights that may be available to him as the new owner of the property. As soon as the Change of Ownership forms are filed with the State Engineer, and the Court is officially notified of the Change, he will seek an extension of time in which to file a Subfile Answer. In the meantime, the Clerk should decline to enter a default in the matter because he has filed all pleadings required by Fed. R. Civ. P. 7. Furthermore, his extensive participation in this litigation exhibited his intent to actively defend his water rights, thereby "otherwise defend[ing]" this litigation as provided under Rule 55(a). As public policy dictates, this matter should be decided on the merits, and not based upon the default of a previous owner who no longer has any connection with the property.

WHEREFORE, Schepps respectfully requests that the Clerk decline the request to enter a default in this subfile.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

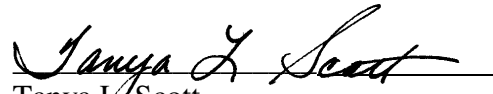
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² The Tenth Circuit declined to resolve the conflict because it found that a default was appropriate under a different rule of civil procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2008, I filed the foregoing pleading electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.


Tanya L. Scott