

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

UNITED STATES OF AMERICA,)	
ET AL.,)	
)	
PLAINTIFFS,)	
)	
)	
v.)	CIV NO. 01- 00072 BDB/WDS
)	
)	ZUNI RIVER BASIN
STATE OF NEW MEXICO)	ADJUDICATION
COMMISSIONER OF PUBLIC)	
LANDS, ET AL.,)	Subfile No. ZRB-1-0058
)	
DEFENDANTS.)	
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**ANSWER BRIEF IN OPPOSITION TO MOTION FOR
DEFAULT JUDGMENT (Doc. 1797)**

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., hereby responds to the Motion for Default Judgment filed by the United States and the New Mexico State Engineer in Subfile ZRB-1-0058 on June 25, 2008 (Doc. 1797).

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

¹ Another motion filed by the Plaintiffs also seeks an entry of default in Subfile ZRB-5-0050, also previously owned by Mallery. (Doc. 1796). This property has not been purchased by Joseph W. Schepps.

Mallery in August 2007. *See* Warranty Deed (conveying property from Richard Davis Mallery Revocable Trust, dated February 27, 1998 to El Muerto Creek, LLC, a New Mexico limited liability company), attached hereto as Exhibit B. Schepps is in the process of filing the requisite Change of Ownership forms with the State Engineer and notifying the Plaintiffs in this action of the recent change.²

In their joint motion for default judgment, the United States of America (“USA”) and the New Mexico State Engineer (“OSE”) erroneously assert that the named defendant, the Richard Davis Mallery Revocable Trust, “is in default for failure to appear, answer, or otherwise defend in ZRB-1-0058 within the time limitations imposed . . .” As extensively discussed in Schepps’ response to the Plaintiffs’ earlier application to the clerk for an entry of default (Doc 1786), the Plaintiffs’ assertion is flat wrong.

As pointed out in the earlier filing, until he sold his property, Mallery 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)

² Schepps has needed to correct technical problems with the conveyance and will be completing that process shortly. In addition, the Change of Ownership forms for this adjudication require the signature of the former owner. This substantially slows down the process given that there have been two changes of ownership of these water rights since the inception of this litigation. Schepps is currently proceeding with this task as well.

- 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, Mallery sold the property containing the diversion points for the water rights reflected in Subfile ZRB-1-0058 and has 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.

Whether to grant a motion for default judgment lies squarely in the discretion of the Court. *Garrett v. Seymour*, 217 2007 WL 549388, 2 (10th Cir. 2007) (District courts have “broad discretion in deciding a default judgment question”). 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.* *See also Roberts v. Paulson*, 2008 WL 313685, 2 (10th Cir. 2008) (“In light of the strong preference for the disposition of litigation on the merits, and the lack of any allegation of

prejudice . . . , the district court did not abuse its discretion in denying [the] motion for default judgment.”).

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. Under these circumstances, 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 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 cannot be considered to be in default under Fed. R. Civ. P. 55.

Because water adjudications are in the nature of *in rem* proceedings, entry of a default against Mallery affects not only Mallery personally, but establishes the nature and extent of the water right for now and in the future. *Nevada v. U.S.*, 463 U.S. 110, 144, 103 S.Ct. 2906, 2925 (1983); *Mineral County v. State, Dept. of Conservation and Natural Resources*, 117 Nev. 235, 244, 20 P.3d 800, 806 (2001). Whatever negligent or intentional culpability Mallery might have for failing to file a subfile answer for his particular water right, Schepps does not share in that culpability. 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 Court should decline to enter a default in the matter to fulfill the public policy goal of determining disputes on the merits. Furthermore, Mallery’s

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). The Court should, in the exercise of its discretion, allow this matter to be decided on the merits, and not based upon the default of a previous owner who no longer has any interest in, or connection to, the property.

In addition, the Plaintiffs have not complied with federal law in seeking this default judgment. The Soldiers and Sailors Relief Act, 50 U.S.C. app. § 521 (2008), is quite clear in its requirement that Plaintiffs seeking a default judgment must demonstrate through an affidavit that the defendant is not a member of the armed forces on active duty. Specifically, that statute provides as follows:

(a) Applicability of section

This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.

(b) Affidavit requirement

(1) Plaintiff to file affidavit

In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

The statute on its face applies to *any civil action*, which would include water adjudications. It further provides that the court shall require an affidavit setting forth the military status of the defendant *before entering judgment* against the defendant. This provision is mandatory and, in the words of a Tennessee Federal District Court “means exactly what it

says.” *U.S. v. Simmons*, 508 F.Supp. 552, 552 (D.C.Tenn., 1980). *See, generally*, Wright, Miller & Kane, 10A *Federal Practice and Procedure: Civil 3d* § 2691, at 77 (1998). This statute is intended to protect the interests of military personnel in not having defaults entered against them in any civil action. A cursory perusal of the motions for default judgment filed by the Plaintiffs did not turn up a single motion that complies with this statute. The oversight is particularly egregious given the potential number of defendants serving in the Iraq and Afghanistan wars. For this reason alone, the Court should deny the pending Motion for Default Judgment, thus requiring the Plaintiffs to comply with federal law.

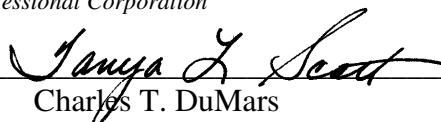
CONCLUSION

Defendant Joseph W. Schepps respectfully requests that the Court deny the Motion for Default Judgment, thus allowing Schepps the opportunity to seek an extension of time for filing a subfile answer in ZRB 1-0058.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By: _____



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Attorneys at Law

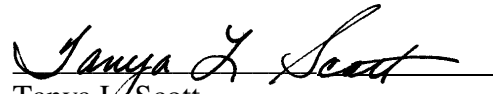
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 9, 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