

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

UNITED STATES OF AMERICA,	)	
and	)	
STATE OF NEW MEXICO, <i>ex rel.</i> STATE	)	
ENGINEER,	)	
	)	
Plaintiffs,	)	
	)	No. 01cv00072 BB
and	)	
	)	ZUNI RIVER BASIN
ZUNI INDIAN TRIBE, NAVAJO NATION,	)	ADJUDICATION
	)	
Plaintiffs in Intervention,	)	Subfile No. ZRB-1-0058
	)	
v.	)	
	)	
A&R PRODUCTIONS, et al.	)	
	)	
Defendants.	)	
_____	)	

**REPLY IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT**

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The Plaintiffs United States of America (“United States”) and New Mexico ex rel. State Engineer (“State”), by their undersigned counsel, hereby reply to the *Answer Brief in Opposition to Motion for Default Judgment* filed July 9, 2008 (“Schepps Opposition”) by Joseph W. Schepps, Trustee for the Joseph W. Schepps Corporate Trust (“Schepps Corporate”) [Doc. No. 1813]. The Schepps Opposition is without merit and provides no grounds for denying the Plaintiffs’ June 25, 2008 *Motion for Default Judgment* as to the Richard Davis Mallery Revocable Trust (“Mallery Trust”) for Subfile ZRB-1-0058 [Doc. No. 1797].

BACKGROUND

The Mallery Trust was joined as a defendant by this Court's March 25, 2008 *Order Granting Motion to Join Additional Party Defendant Nunc Pro Tunc* [Doc. No. 1665]. Under the terms of that order, the joinder was made effective as of August 29, 2001, the date when Richard Davis Mallery in his capacity as Trustee of the Richard Davis Mallery Revocable Trust voluntarily appeared, via counsel, in this action [Doc. No. 84].

Pursuant to the September 9, 2005 *Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System* [Doc. No. 387] ("Amended 4 & 8 Procedural Order"), the United States, on September 27, 2006, served counsel for Mr. Mallery with a service packet for Subfile ZRB-1-0058 including a proposed consent order and a form subfile answer in the name of the Mallery Trust. The proposed consent order described two surveyed water uses: Pond 4A-3-SP34 and Well 4A-3-W14.

Paragraph III.C.2 of the Amended 4 & 8 Procedural Order provided that "A Claimant's failure to sign and return a *Consent Order* or file a form *Answer* by January 10, 2006 shall be considered grounds for entry of a default order which incorporates the proposed *Consent Order*." That deadline for Subfile ZRB-1-0058 was extended once, by the order of May 4, 2006 [Doc. No. 688], to August 31, 2006. However, the record in this case reflects that no Subfile Answer has ever been filed for Subfile ZRB-1-0058 – a point conceded by the June 13, 2008 *Response to Application for Default* filed by Schepps Corporate [Doc. No. 1786], at 3. Notably, at the time of the

Mallery Trust's August 31, 2006 default, the Trustee of the Mallery Trust was represented by the same law firm that now represents Schepps Corporate.

ARGUMENT

**The Schepps Response Does Not Establish That Schepps is the Successor-in-Interest of the Richard Davis Mallery Revocable Trust With Respect to Subfile ZRB-1-0058**

The Schepps Opposition, at 1, asserts that Schepps Corporate "recently purchased land on which the two points of diversion [for Subfile ZRB-1-0058] are located" and characterizes Exhibit A to the Schepps Opposition as consisting of "*Warranty Deeds conveying Lots 4, 5, and 6 of the El Muerto Creek Subdivision to the Joseph W. Schepps Corporate Trust . . .*" However, only one of the two deeds in Exhibit A documents a conveyance of property to Schepps Corporate, and that concerns only lot 4 of the El Muerto Creek subdivision. The other deed concerns a conveyance of Lots 5 and 6 to Joseph W. Schepps in his capacity as Trustee of the "Joseph W. Schepps Revocable Trust U/A dated November 11, 2004" ("Schepps Revocable Trust") which, on the face of these documents, appears to be a distinct legal entity from Schepps Corporate.

Moreover, the two warranty deeds attached as Exhibit A to the Schepps Response, both of which are expressly "subject to reservations, restrictions and easements of record," fail to establish that Schepps Corporate has acquired the legal rights to the water uses surveyed for Subfile ZRB-1-0058. The property legal descriptions provided in the two deeds appear to relate to a subdivision created in October of 2007. Although the deed concerning the one lot Schepps Corporate owns indicates the subdivision is in the same section (5) as the water use features surveyed for Subfile ZRB-1-0058, it would be pure speculation to conclude that Pond 4A-3-SP14 or

Well 4A-3-W14 are located either on that lot or on the two lots apparently owned by the Schepps Revocable Trust.

Thus, insofar as any evidence has been provided to this Court, Schepps Corporate may be a stranger to the rights involved in Subfile ZRB-1-0058, and lack any standing to oppose the entry of a default concerning that subfile.

**Even if the Interest of the Mallery Trust in Subfile ZRB-1-0058 Has Been Conveyed to Schepps Corporate, This Action Should Proceed With the Default Against the Mallery Trust.**

Fed.R.Civ.P. 25(c) provides: “If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).” No motion pursuant to Rule 25(c) has been filed or served as required, nor would one change the effect of the Mallery Trust’s default.

According to 7C The Late Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1958 (3<sup>rd</sup> ed. 2008) (“Wright, Miller, & Kane”),

[t]he most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor is not named. An order of joinder is merely a discretionary determination by the trial court that the transferee’s presence would facilitate the conduct of the litigation.

In Collateral Control Corp. v. Deal (Matter of Covington Grain Co., Inc.), 638 F.2d 1362, 1364 (5<sup>th</sup> Cir. 1981), the court explained that “Rule 25(c) is not designed to create new relationships among parties to a suit but is designed to allow the action to continue unabated when an interest in the lawsuit changes hands.” Accordingly, even if Schepps

were to properly move for, and be granted, substitution based on a transfer of the interests in Subfile ZRB-1-0058, Schepps would then step into the shoes of Mallery Trust with respect to the default judgment requested by the Plaintiffs' motion. The substitution would not create a different relationship between Plaintiffs and Schepps than exists now between Plaintiffs and the Mallery Trust.

In Educational Credit Management Corp. v. Bernal (In re Bernal), 223 B.R. 542 (9<sup>th</sup> Cir. BAP 1998), the panel affirmed a Bankruptcy Court's denial of an assignee's motion to intervene in a proceeding where the assignor had defaulted. The panel explained its decision as follows:

To hold that [the assignor] "inadequately represented" [the assignee] opens the floodgates to a possible abuse of the intervention doctrine by allowing parties to sleep on their rights, neglect their duties with respect to litigation, and thereafter avoid the consequences of such conduct by merely assigning the subject matter to a third party after defaulting. If the third party is allowed to acquire the subject matter and to intervene after the original defendant defaults, the third party is less likely to pursue its remedies against the truly culpable party: the defaulting assignor. At the same time, the interests of innocent plaintiffs may be jeopardized. Justice dictates that the third party be bound by the representation of the assignor in the litigation through the time of the assignment.

Id. at 548. This discussion accurately maps the situation presented by the Schepps Opposition: the Mallery Trust, after being initially active in the case, slept on its rights with respect to Subfile ZRB-1-0058,<sup>1</sup> neglected the duties imposed on it by the Special Master's Amended 4 & 8 Procedural Order, and thereafter sought to avoid the consequences of its default by merely assigning the subject matter to a third party. Any harm Schepps Corporate has experienced as a result of that conduct is not the Plaintiffs' fault, and Schepps Corporate's remedy for such harm should lie against the truly culpable party: the Mallery Trust.

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<sup>1</sup> The Mallery Trust has also defaulted with respect to Subfile ZRB-5-0050. Schepps Corporate has not opposed Plaintiffs' Motion for Default Judgment as to that subfile [Doc.No. 1796].

Moreover, In re Bernal, 207 F.3d 595, 597-98 (9<sup>th</sup> Cir. 2000), affirmed the Bernal Bankruptcy Appellate Panel's decision, but observed that the reasoning from that decision quoted above "points to the fact that the whole procedure [i.e., the attempt by the assignor to intervene], including the standards that surrounded it, was inapposite. This is a classic situation where the rules for substitution of parties must apply." Id. at 598. Noting that the bankruptcy rules applicable to Bernal merely incorporated Fed.R.Civ.P. 25(c) by reference, the Ninth Circuit quoted with approval the Collateral Control Corp. and Wright, Miller, & Kane passages cited supra at 4. Concluding with a reference to the opinion in Deauville Assoc. v. Murrell, 180 F.2d 275, 277 (5<sup>th</sup> Cir. 1950), the Bernal court said:

To slightly paraphrase what the Fifth Circuit said over 50 years ago, when it was faced with a similar attempt to wriggle out of a situation created by an assignor:

[the assignee] ignores the undisputed fact of record that [it] was not a party to the original suit, but acquired whatever rights it may have in the property, if any, only by virtue of the assignment from [the assignor], and must therefore stand in [its] shoes with respect to all phases of the litigation. The fact that [the assignor's] litigation may have impaired or adversely affected the rights of [the assignee] under the assignment would not justify our disturbing all prior orders and decrees entered in this controversy and unfavorable to [the assignee] which were binding upon [the assignor] when made.

207 F.3d at 598 (party designations bracketed by the Ninth Circuit replaced by "the assignee" and "the assignor").

Here, the Schepps Opposition is nothing but a transparent attempt by Schepps Corporate to wriggle out of a situation created by the Mallery Trust while it was represented by the same attorneys now representing Schepps Corporate. Even if (a) the ownership issues discussed supra at 3 - 4 can be resolved, and (b) the Court, upon a properly-served motion, exercises its discretion to substitute Schepps Corporate in this

subfile for the Mallery Trust, the Schepps Opposition must nonetheless be overruled and the Plaintiffs' Motion for Default Judgment should be granted.

### **The Default of the Richard Davis Mallery Revocable Trust is Undisputed**

As shown above, the applicable Special Master's procedural and scheduling order, as amended, required the Mallery Trust to file a form Answer for Subfile ZRB-1-0058 no later than August 31, 2006. The record reflects, and Schepps Corporate's June 13, 2008 filing concedes, that the Mallery Trust failed to file any such Subfile Answer. Indeed, the Schepps Opposition nowhere suggests that the Mallery Trust did file a timely Subfile Answer. Accordingly, the default is undisputed.

### **The Soldiers and Sailors Relief Act is Inapplicable**

The Schepps Opposition, at 5 – 6, includes an entirely spurious invocation of Section 201 of the Servicemembers Civil Relief Act, 50 App. U.S.C. §521.<sup>2</sup> Even assuming that Schepps Corporate has standing to contest entry of a default judgment against the Mallery Trust, §521, on its face, does not apply here. The first sentence of the statutory language quoted on page 5 of the Schepps Opposition provides “This section applies to any civil action or proceeding . . . in which the defendant does not make an appearance.” (Emphasis added.) As noted, supra at 2, the Mallery Trust, via its trustee and counsel, voluntarily appeared in this action on August 29, 2001 and, as conceded by the Schepps Opposition, was thereafter for a time quite active in the proceeding before opting to ignore the Court's procedural and scheduling orders. Accordingly, the statutory language quoted by the Schepps Opposition, on its face, has no application to the present

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<sup>2</sup> That Act has an express purpose in furtherance of the national defense, Section 2 of the Act, 50 App. U.S.C. §502, and, as the Schepps Objection admits at 6, is intended to protect “the civil rights of servicemembers during their military service.” Id. Nonetheless, the Schepps Opposition contains no assertion, or even a suggestion, that Schepps Corporate, the trustee of the Mallery Trust, or any other party remotely interested in Subfile ZRB-1-0058, is, or was at any time pertinent to this action, a servicemember.

matter. See Johnson v. City of Philadelphia, No. 07-2966, 2007 WL 3342413, at \*1 (E.D. Pa. Nov. 6, 2007) (section 521 held inapplicable to a servicemember who had appeared in the case via counsel); see also Lightner v. Boone, 22 S.E.2d 426, 429 (N.C. 1942) (construing earlier version of the Act), aff'd sub nom. Boone v. Lightner, 319 U.S. 561 (1943); Blankenship v. Blankenship, 82 So.2d 335, 339-40 (Ala. 1955) (following Lightner).

### CONCLUSION

For the reasons set forth herein, the Plaintiffs urge the Court to overrule the Schepps Opposition and enter the requested Default Judgment as to Subfile ZRB-1-0058.

Respectfully submitted July 11, 2008.

Electronically filed.

\_\_\_\_\_/s/\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on July 11, 2008, I filed the foregoing *Reply In Support Of Motion For Default Judgment* 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/\_\_\_\_\_  
Bradley S. Bridgewater