

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-WDS |
| and |) | |
| |) | ZUNI RIVER BASIN |
| ZUNI INDIAN TRIBE, NAVAJO NATION, |) | ADJUDICATION |
| |) | |
| Plaintiffs in Intervention, |) | |
| |) | Subfile No. ZRB-1-0100 |
| v. |) | |
| |) | |
| A&R PRODUCTIONS, et al. |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

RESPONSE TO MOTION TO SET ASIDE DEFAULT JUDGMENT

The Plaintiffs United States of America (“United States”) and State of New Mexico *ex rel.* State Engineer (“State”) hereby respond in opposition to the *Motion to Set Aside Default Judgment* filed April 13, 2009 by the Defendant JoAnn Strickland acting as Trustee on behalf of the Defendant JoAnn Strickland Trust (Doc. No. 2305) and urge that the motion be denied for the following reasons:

1. On the record before the Court, it is undisputed that:
 - The Defendant Trustee, on October 11, 2005, received the service packet for Subfile ZRB-1-0100 required by the Special Master’s September 8, 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) (“Procedural and

- Scheduling Order”). That packet included, *inter alia*, a proposed Consent Order, a Request for Consultation form, a form Subfile Answer, and the Special Master’s approved *Notice of Water Rights Adjudication*. See February 4, 2009 *Motion for Default Judgment or, in the Alternative, Summary Judgment* (Doc. No. 2095) (“February 4, 2009 Motion”) at ¶ 3 and Exhibit 1. The Trustee therefore had actual notice of the procedures and deadlines established by the Special Master for the adjudication of Subfile ZRB-1-0100.
- Section III.C.2 of the Procedural and Scheduling Order provided that a defendant’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*.” This deadline was never extended. See February 4, 2009 Motion at ¶ 4.¹ No one acting on behalf of the Defendant Trust returned a signed Consent Order, or filed any form of Subfile Answer with respect to Subfile ZRB-1-0100, by the deadline established by the Procedural and Scheduling Order. February 4, 2009 Motion at ¶5.
 - On February 24, 2006, the Defendant Trustee filed with the Court a form Subfile Answer concerning Subfile ZRB-1-0100 (Doc. No. 495). A copy of the form Answer was received by Counsel for the United States on March 2, 2006. February 4, 2009 Motion at ¶10.
 - The sole basis asserted by Defendant’s Subfile Answer for objecting to the Consent Order proposed for Subfile ZRB-1-0100 was the following statement, on page 2 of

¹ The referenced paragraph 4 of the February 4, 2009 Motion contains a typographical error, citing to “Section III.B.2” of the Procedural and Scheduling Order while correctly quoting the language from Section III.C.2 of that order.

the Answer, which is a verbatim replication of a stock objection asserted in numerous other unrelated subfiles:

Defendant objects to Plaintiff's consent offer for a NMSA 1978, §72-12-1 well for any amount of water less than three acre feet per year, based upon the existence of a property or vested right for three acre feet per year as provided by statute and the rules and regulations of the State Engineer, and/or a property or vested right in a permit allowing the diversion of up to three acre feet per. The defendant has used or intends to use up to three acre feet per year for the irrigation of not more than one acre of noncommercial trees, lawn or garden; in household or other domestic uses and/or for livestock purposes.

February 4, 2009 Motion at ¶11.

- The Consent Order offered to the Defendant described a total of 22 distinct surveyed water uses: 16 ponds and 6 wells. Only one of the wells included in the subfile, the well identified by map label 8B-2-W01, was permitted under NMSA 1978 §72-12-1. The Defendant's Subfile Answer raised no issue plausibly pertinent to the other 21 water rights offered by Plaintiffs and Defendant has not otherwise advised Plaintiffs of any error in the hydrographic survey of any of the 22 uses included in the subfile.

February 4, 2009 Motion at ¶12.

- Although the Defendant Trustee has made a late assertion that she submitted a timely Request for Consultation for Subfile ZRB-1-0100 (which the Plaintiffs, supported by a declaration, dispute: see February 4, 2009 Motion, Exhibit 1, ¶C), she has not provided a copy of the document and has not indicated what grounds were allegedly asserted in the Request for Consultation for disputing the proposed Consent Order offered by the United States and the State.
- As demonstrated by the email exchange attached as Exhibit A to this Response, the Defendant Trustee received actual notice of the Plaintiffs' February 4, 2009 Motion,

and apparently discussed the matter with the attorney who has recently re-entered an appearance on behalf of the Trustee. Counsel for the Defendant Trustee previously entered an appearance on behalf of both the Trustee and the Trust on November 15, 2007 (Doc. No. 1394), but withdrew that appearance on October 23, 2008 (Doc. No. 1930). Nonetheless, Exhibit A demonstrates that counsel was in fact actively representing the Trustee when the February 4, 2009 Motion was filed. Despite having the assistance of counsel, the Trustee wholly failed to file any response to that motion, which was granted by the order the Trustee now seeks to set aside.

2. The Defendant Trustee's motion to set aside invokes Fed.R.Civ.P. 60(b)(1) which permits a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for "mistake, inadvertence, surprise, or excusable neglect." However, "[s]uch relief is 'extraordinary and may be granted only in exceptional circumstances.'" Breaux v. American Family Mutual Ins. Co., 554 F.3d 854, 870 (10th Cir. 2009) (quoting Beugler v. Burlington N. & Santa Fe Ry. Co., 490 F.3d 1224, 1229 (10th Cir. 2007)).

3. The Defendant Trustee's motion to set aside baldly asserts at page 1, that "she has complied with all procedural requirements," and, in a more qualified manner at page 3, that "she has tried to comply with all requirements to the best of her abilities." To the contrary, the record in this case makes unmistakably clear that the Trustee has "either an intent to thwart judicial proceedings or a reckless disregard for the effect of [her] conduct on judicial proceedings." Thompson v. American Home Assurance Co., 95 F.3d 429, 433 (6th Cir. 1996) (quoting INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 399 (6th

Cir. 1987)).² Although she has had actual notice of the procedural orders governing this case and other documents affecting her interests, and has had the benefit of the advice of counsel -- who also has had actual notice of all this Court's orders, she has repeatedly failed to comply with deadlines set by this Court's orders and by the Local Rules of Civil Procedure. There is no plausible basis for a finding that her default in this action is due to exceptional circumstances of "mistake, inadvertence, surprise or excusable neglect."

4. In addition, other than her assertion, in a subfile answer filed over 30 days late, of entitlement to a water right not based on beneficial use, the Defendant Trustee never informed Plaintiffs or the Court of any grounds for her disagreement with the Consent Order offered for Subfile ZRB-1-0100. The statement, on page 4 of her motion, that "she also contests those amounts offered for her stock ponds and other wells" is an extremely tardy attempt to amend her tardy subfile answer without leave of court and still "is so vague and ambiguous that the [Plaintiffs] cannot reasonably prepare a response." Cf. Fed.R.Civ.P. 12(e).

5. As noted in the February 4, 2009 Motion at pages 7-8, this Court has already rejected as unsupported by any authority the assertion that "domestic uses are exempt from the beneficial use requirement" applicable to all water rights arising under New Mexico law. June 15, 2006 *Memorandum Opinion and Order* (Doc. No. 733) at 5. Accordingly, the sole defense plead in the subfile answer filed in Subfile ZRB-1-0100 is without legal merit.

6. Plaintiffs otherwise adopt and incorporate as though fully set forth herein, the assertions and arguments in their February 4, 2009 Motion and, to the extent the Defendant

² Thompson v. American Home is incorrectly cited on page 3 of Defendant's motion as being in the Federal Rules Decisions.

Trustee's motion provides any grounds for the extraordinary relief of setting aside her default, Plaintiffs renew their motion for entry of summary judgment.

DATED: April 24, 2009

Electronically Filed

/s/ Bradley S. Bridgewater

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EX REL. STATE ENGINEER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 24, 2009, I filed the foregoing *Response To Motion To Set Aside 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