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

UNITED STATE OF AMERICA, and STATE OF NEW MEXICO ex rel. STATE ENGINEER,	)	**No. 01cv00072-MV/WPL**
Plaintiffs,	)	ZUNI RIVER BASIN ADJUDICATION
and	)	**Subfile No. ZRB-3-0022**
ZUNI INDIAN TRIBE, NAVAJO NATION,	)	
Plaintiffs-in-Intervention,	)	
-v-	)	
A & R PRODUCTIONS, *et. al.*,	)	
Defendants.	)	

JOINT RESPONSE TO THE MOTION TO VACATE DEFAULT JUDGMENT

Plaintiff United States of America ("United States") and the State of New Mexico jointly respond to the *Motion to Vacate Default Judgment* ("Neas Motion") (Doc. 2934) filed by Joseph F. Neas on behalf of the Joseph F. Neas and Susan S. Neas Revocable Trust. The United States and New Mexico ask this Court to deny the motion.

CONCERNING REPRESENTATION OF THE JOSEPH F. NEAS AND SUSAN S. NEAS REVOCABLE TRUST

From the face of the Neas Motion it can be discerned that Joseph F. Neas and Susan S. Neas are trustees for the Joseph F. Neas and Susan S. Neas Revocable Trust ("the Trust"). According to documents presented with the Neas Motion, the Trust owns the track of land on which the well previously designated by the United States as 7A-3-

W17 is located (hereafter the well that is the subject to the Neas Motion will simply be referred to as "the Well"). The Trust has been the owner of the land since May 23, 2007.

From the face of the Neas Motion, although Mr. Neas is not an attorney, it is evident that Mr. Neas is attempting to appear before this Court to represent the property interests of the Trust. The Local Civil Rules of the United States District Court for the District of New Mexico provide that "[a] corporation, partnership or **business entity other than a natural person** must be represented by an attorney authorized to practice before this Court." D.N.M.LR-Civ. 83.7 (emphasis added). Because Mr. Neas appears to be arguing on behalf of the Trust, he is representing a "business entity other than a natural person." As such, it appears that Mr. Neas should not be able to appear and represent the Trust's interests before the Court. If the circumstances outline here are in fact correct, this Court should instruct Mr. Neas that he may not further appear before this Court to represent the Trust's interests and that the Trust's interests may only be represented by an attorney licensed to practice in New Mexico.[1]

Nonetheless, because the issue that the Neas Motion presents potentially impacts how the United States and New Mexico have handled and will continue to handle subfile actions in default and because only one appropriate solution to the Neas Motion exists, the United States and New Mexico will address the merits of the motion at this time.

BACKGROUND

1. On or about 2005 and 2006, based on county property records the United States

[1] Of course, if the interest in property were held simply in the name of Mr. Neas (as opposed to the Trust) and Mr. Neas appeared before this court to represent himself, he would be a *pro se* litigant and would not run afoul of D.N.M.LR-Civ. 83.7.

determined that the following individuals had a real property interest in the track of land on which the Well is located: Debbie Byington, John Byington, Carla Ferong, and Konrad Knoll.

2. The United States secured service on these persons by either securing a waiver of service or by personal service: Debbie Byington – May 13, 2005 (Doc.362), John Byington – signed May 30, 2006 (Doc. 727 at page 10), Carla Ferong – served August 15, 2008 (Doc. 1853 at page 15), and Konrad Knoll – served August 15, 2008 (Doc. 1853 at page 18).

3. With respect to Subfile ZRB-3-0022, subfile Defendants were subject to the Special Master's March 7, 2006 *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Area 7 of the Zuni River Stream System* (Doc. 561) ("Procedural and Scheduling Order"), which established a deadline of August 12, 2006 for the submission of a Request for Consultation or the return of a signed Consent Order.

4. Subsequent to being served, Ms. Byington, Mr. Byington, Ms. Ferong, and Mr. Knoll took no action (*i.e.* did not request consultation with the United States or New Mexico and filed no answer in response to the proposed consent decree) as outlined in the Procedural and Scheduling Order.

5. On October 8, 2008, the Clerk of the Court properly entered his Certificate of Default for ZRB-3-0022 for failure to appear, answer, or otherwise defend. (Doc. 1908).

6. On January 5, 2010, the United States and New Mexico moved this Court for entry of default judgment concerning the tract of land in question consistent with the proposed consent order. *Motion for Default Judgment* (Doc. 2499).

7. On March 1, 2010, the Court granted the *Motion for Default Judgment* and entered judgment against Ms. Byington, Mr. Byington, Ms. Ferong, and Mr. Knoll, and adjudicated the water rights associated with the tract of land in question. *Order Granting Default Judgment* (Doc. 2532).

8. According to the document provided with the Neas Motion, the Trust obtained from only Mr. Byington a real property interest in the tract of land in question on May 23, 2007. Neas Motion (Doc. 2934 at page 4). Therefore, the Trust obtained an interest in the property **well after** the United States and New Mexico had properly served Mr. Byington and joined him to this adjudication.

9. At no time since June 14, 2006 was a motion for substitution of parties presented to the Court pursuant to Fed. R. Civ. P. 25(c).

ARGUMENT

The Default Judgment was properly entered and must not be disturbed.

The Neas Motion alleges that the default judgment associated with Subfile ZRB-3-0022 was improperly entered because the Trust was not served with a summons or otherwise notified of the default motion.

Once a default judgment is entered, such a judgment is treated as any other judgment on the merits and may only be set aside if the criteria of Fed. R. Civ. P. 60(b) are met. Fed. R. Civ. P. 55(c).

> [The] court may relieve a party . . . from a final judgment . . . for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

The Motion makes no assertion that meets the challenging criteria of Fed. R. Civ. P. 60(b). The core thrust of the argument presented in the Neas Motion is that the United States or New Mexico should have re-served the transferee of the subject property or otherwise joined the transferee to this subfile action. However, it is well-established that the United States and New Mexico have absolutely no obligation re-serve or otherwise join subsequent property transferees.

Fed. R. Civ. P. 25(c) provides "[i]f 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." *Id.* (emphasis added). It is undisputed that neither Mr. Byington nor the Trust made a motion to substitute the Trust into this subfile action.

> The 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.

Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1958 (3d ed. 2008) ("Wright, Miller, & Kane")

In *Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 223 B.R. 542 (9th 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: 1) Mr. Byington, after being served slept on his rights with respect to Subfile ZRB-3-0022, neglected the duties imposed on him by the Procedural and Scheduling Order, and 2) Mr. Byington merely assigned the property interest to the Trust without meeting any obligation associated with this adjudication. Any harm the Trust has experienced as a result of these events is not the United States or New Mexico's fault. Any remedy that the Trust might have, if at all, lies against Mr. Byington.

The concluding statements of the *Bernal* court are directly on point to the circumstances of this subfile action:

> 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.

In re Bernal, 207 F.3d 595, 598-99, *quoting Deauville Assoc. v. Murrell*, 180 F.2d 275, 277 (5th Cir. 1950) (party designations bracketed by the Ninth Circuit replaced by "the assignee" and "the assignor").

As described in the paragraphs above, and as admitted in the Neas Motion, the Trust's interest transferred from Mr. Byington in 2007. Mr. Byington had been properly served and joined to this adjudication a year before. As such, the Trusts' interest in the property continued to be subject to the requirements of this adjudication. Once proper service was secured on the property owner, the United States and New Mexico had no obligation to incorporate into this adjudication subsequent property ownership transfers. Particularly in the context of the Zuni Basin Adjudication with literally thousands of tracts of land and a greater number of potential property owners, imposing on the United States and New Mexico the obligation of tracking the multitude of property transfers and then trying to serve property transferees is simply unrealistic and frankly impossible to attempt or achieve.

Default judgment was properly pursued by the United States and New Mexico in Subfile ZRB-3-0022, judgment was properly entered, and no basis exists under Fed. R. Civ. P. 60(b) to disturb this Courts' judgment.

WHEREFORE, the United States requests that the Court deny the Neas Motion.

DATED this 19th day of March, 2014.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 19, 2014, I filed the foregoing *JOINT RESPONSE TO THE MOTION TO VACATE 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.

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participants in the manner indicated:

Via U.S. Mail, Postage Pre-paid:

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