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

UNITED STATES OF AMERICA, and STATE OF NEW MEXICO, ex rel. STATE ENGINEER,	
Plaintiffs,	**CIV NO. 01- 00072 BDB/WDS**
and	**ZUNI RIVER BASIN ADJUDICATION**
ZUNI INDIAN TRIBE, NAVAJO NATION,	
Plaintiffs in Intervention,	**Subfile No. ZRB 1-0100 JOANN STRICKLAND TRUST**
v.	
A & R PRODUCTIONS, et al.	
Defendants.	

MOTION TO SET ASIDE DEFAULT JUDGMENT (DOC. 2208)

COMES NOW, JoAnn Strickland, Trustee for the JoAnn Strickland Trust, by and through her attorneys of record, Law & Resource Planning Associates, P.C. ("LRPA"), and hereby respectfully moves the Court pursuant to Fed. R. Civ. P. 55 and 60(b)(1) for an Order setting aside the Default Judgment entered against the Trust (Doc. 2208) on March 24, 2009. As grounds therefore, the Trustee states that she has complied with all procedural requirements as shown by the attached Affidavit and is not in default. If the Plaintiff United States, for whatever reason, did not receive or does not have her Request for Consultation, Strickland requests relief from the Default Judgment due to mistake, inadvertence, or surprise.

As demonstrated by the Affidavit attached as Exhibit A, JoAnn Strickland, Trustee, returned a Request for Consultation form for Subfile ZRB 1-0100 to the Plaintiff in November 2005. In addition, she attended a Consultation that was scheduled for her mother, sister and

brother-in-law. She never received notification that her own subfile had been set for a Consultation.[1]

"Relief from judgments, orders, or other proceedings rests in the sound discretion of the court and that discretion should ordinarily incline towards granting, rather than denying, relief." *In re Cremidas' Estate*, 14 F.R.D. 15, 17 (D. Alaska 1953). This is particularly true if no intervening rights have attached in reliance on the judgment and no actual injustice will result. *Id.*

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."). This same public policy concern guides the Court's discretion in determining whether to set aside a default judgment. *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863, 865 (9th Cir. 1959). As the *Patapoff* Court observed:

> Rule 60(b) is clearly designed to permit a desirable legal objective: that cases may be decided on their merits. 'The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.'

Id. (citations omitted). *See also U.S. v. One 1966 Chevrolet Pickup Truck*, 56 F.R.D. 459, 462 (E.D.Tex.1972) ("Since the interests of justice are best served by a trial on the merits, courts give Rule 60 a liberal construction.").

A default is generally not favored, but is particularly inappropriate when a defendant has indicated a desire to defend the action. *Wendt v. Pratt*, 154 F.R.D. at 230. In the case at bar, Strickland returned her Request for a Consultation. Strickland does not know if the Request was ever received by the United States or if it was lost or misplaced after receipt. Unquestionably,

[1] Ms. Strickland previously provided her Affidavit to counsel for the United States after being notified of a pending motion for default in an attempt to resolve the matter without having a default judgment entered. She did not receive any response.

however, she indicated her interest in the proceeding by appearing at a Consultation scheduled for her mother and sister and brother-in-law to witness how the process worked so that she would be better prepared when her own Consultation was scheduled. *See* Motion for Default Judgment (Doc. 2095) at ¶ 9. In addition, Ms. Strickland filed a subfile answer even though she had not participated in a consultation for her own subfile. *See* Subfile Answer (Doc. 495).

In considering a motion to set aside a default judgment under Rule 60(b)(1), the Court must consider the equitable factors set forth in Rule 55, as well as determine that one of the grounds for relief under Rule 60(b)(1) have been met. *Thompson v. American Home Assurance Co.*, 95 F.R.D. 429 (6th Cir. 1996). To meet the equitable requirements under Rule 55, the moving party must show that he or she was not culpable. To be culpable, the moving party must "display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on judicial proceedings." In the case at bar, Ms. Strickland clearly has not displayed an intent to thwart judicial proceedings nor has she shown a reckless disregard for the effect of her conduct on these proceedings. On the contrary, she has tried to comply with all requirements to the best of her abilities.

Believing that she had fully complied with the requirements of the scheduling order, she was surprised when Plaintiff United States sought a default judgment against her, alleging that it had never received her Request for Consultation. Despite her attempts to informally notify counsel for the United States that she had indeed returned her Request for Consultation by providing the attached Affidavit, her attempts went unacknowledged. If her attempts to protect her rights through the submission of the Request for Consultation were not adequate, this was the result of inadvertence and/or mistake. She has fully met the criteria for the setting aside of the default judgment pursuant to Fed. R. Civ. P. 55 and 60(b)(1).

Ms. Strickland also has a meritorious defense. *Stone v. Olson*, 588 F.2d 1316 (10th Cir. 1978). Not only does she contest the amounts offered her for her domestic well, NMSA 1978, § 72-12-1, but she also contests those amounts offered for her stock ponds and other wells. The amounts offered by the Plaintiffs do not fairly reflect the amounts that she has placed to beneficial use for cattle. The nature and extent of her water rights are questions whose merits should be determined after hearing, not in a default judgment.

The United States has claimed no prejudice at having apparently not received her Request for Consultation. (Doc. 2095). There are a number of consultations that still have not taken place and the United States will not be harmed at having to conduct an additional consultation. In the absence of prejudice, the Court should exercise its discretion and set aside the default judgment.

WHEREFORE, for the above stated reasons, the default judgment (Doc. 2208) entered against JoAnn Strickland as Trustee of the JoAnn Strickland Trust should be set aside and the matter should be allowed to proceed to a hearing on the merits.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By: Tanya L Scott

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2009, I filed the foregoing Motion to Set Aside Default Judgment (Doc. 2208) 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

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