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, and ZUNI INDIAN TRIBE, NAVAJO NATION, Plaintiffs in Intervention, v. A&R PRODUCTIONS, et al. Defendants.	No. 01cv00072 BB-WDS ZUNI RIVER BASIN ADJUDICATION Subfile No. ZRB-1-0100

PLAINTIFFS' RESPONSE TO OBJECTIONS TO SPECIAL MASTER'S REPORT

The Plaintiffs United States of America ("United States") and State of New Mexico ex rel. State Engineer ("State") hereby respond to the *Objections to Special Master's Report on Motion to Set Aside Default Judgment* filed December 10, 2009 by the Defendant Joann Strickland, Trustee for the Joann Strickland Trust (Doc. No. 2490) ("Objections"). Plaintiffs submit that Defendant has failed to show that the default judgment entered against her in Subfile No. ZRB-1-0100 was due to mistake, inadvertence, surprise, or excusable neglect remediable pursuant to Fed.R.Civ.P. 60(b)(1). Accordingly, the Court should enter an order consistent with the recommendation made by the November 20, 2009 *Special Master's Report on Motion to Set Aside Default Judgment* (Doc. No. 2476) and deny Defendant's April 13, 2009 *Motion to Set Aside Default Judgment* (Doc. No. 2305) ("Motion to Set Aside").

Defendant Has Not Alleged Grounds for Relief Under Fed.R.Civ.P. 60(b)(1)

1. In the interests of avoiding duplication, Plaintiffs incorporate herein by reference the assertions and authorities presented in their April 24, 2009 *Response to Motion to Set Aside Default Judgment* (Doc. No. 2322) ("Response to Motion to Set Aside"), including specifically Exhibit A filed therewith (Doc. No. 2322-2).

2. Notably absent from all pleadings and affidavits Defendant has filed in support of her Motion to Set Aside is any reference to, much less an explanation of, the fact that Defendant failed to respond to Plaintiffs' February 4, 2009 *Motion for Default Judgment or, in the Alternative, Summary Judgment* (Doc. No. 2095) ("Plaintiffs' Motion"). This is despite the fact that, as contended in Plaintiffs' Response to Motion to Set Aside at 3-4 and never disputed by Defendant, Defendant's counsel was both aware of Plaintiffs' Motion, and acting on Defendant's behalf, on the day the Plaintiffs' Motion was filed. D.N.M.LR-Civ. 7.1(b) provides, *inter alia*, that "[t]he failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion."[1]

3. Federal Rule of Civil Procedure 60(b)(1) provides four grounds for relief from a final judgment, order or proceeding: mistake, inadvertence, surprise, or excusable neglect. Defendant has invoked only the first three grounds. (See Motion to Set Aside at 1, Objections at 2.) She has never even alleged that her failure to respond to Plaintiffs' Motion is due to excusable neglect.

[1] Defendant's Motion to Set Aside asserts, at 2 n. 1, that "in an attempt to resolve the matter without having a default judgment entered" she provided counsel for the United States with the affidavit she later submitted to the Court as Exhibit A to the Motion to Set Aside. However, while that affidavit is dated February 13, 2009, the Notary's attestation establishes that it was signed by Defendant on February 27, 2009, which was already after her response to Plaintiffs' Motion was due to be filed and served. Therefore, Defendant could not possibly have sent the affidavit to either Plaintiffs' counsel before the time when, under the plain language of Local Rule 7.1(b), she had already consented to the granting of Plaintiffs' Motion.

4. Defendant's Motion to Set Aside and her Objections cumulatively offer the Court arguments, citations to legal authorities, and two affidavits she claims show she did not default and that she has a meritorious defense. However, her pleadings nowhere assert that she was unable to present those same arguments, authorities and sworn statements to the Court before entry of the Default Judgment she now seeks to have set aside. "Rule 60(b)(1) is not available to allow a party merely to reargue an issue previously addressed by the court when the reargument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument." Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996). Here, all of the alleged facts that Defendant now claims entitle her to relief from the Court's Default Judgment were available for presentation at the time her response to Plaintiffs' Motion was due. None of her assertions relates to circumstances arising or first made known to Defendant after February 23, 2009. Accordingly, they were all available for presentation at the time the Court considered the arguments offered in support of Plaintiffs' Motion.

5. The closest any document submitted by Defendant comes to showing the mistake, inadvertence, or surprise she claims entitles her to relief under Rule 60(b)(1) is in the last paragraph on the third page of her Motion to Set Aside. There, she asserts that "she was surprised when Plaintiff United States sought a default judgment against her, alleging that it had never received her Request for Consultation." However, she nowhere explains how her shock at that event could have been so great that, even with the immediate assistance of counsel, she could not file a timely response to Plaintiffs' Motion, or at least a motion for an extension of time. Later in the same paragraph of the Motion to Set Aside, Defendant asserts: "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." However, she nowhere alleges that her failure to protect her rights through submission of a timely response to Plaintiffs' Motion was the result of either inadvertence or mistake.

6. In Yapp v. Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999), the court explained:

> the kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against, such as counsel acting without authority. Thus, a party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes.

(Citations omitted.) As recited in more detail in the Response to Motion to Set Aside at 4, the attorney now representing Defendant also previously appeared for Defendant in this action, but withdrew that appearance on October 23, 2008 (Doc. No. 1930). Counsel then re-entered her appearance for Defendant on April 13, 2009. Other than the fact that Defendant has never disputed Plaintiffs' assertion in the Response to Motion to Set Aside that her attorney was actively representing Defendant in the email exchange included in Doc. No. 2322-2, Plaintiffs have no information concerning whether Defendant's counsel was formally authorized to act on Defendant's behalf between October 23, 2008 and April 13, 2009. However, it is clear that Defendant's failure to respond to Plaintiffs' Motion cannot be attributed to counsel acting without authority. In either event, nothing alleged by Defendant indicates that her failure to respond to Plaintiffs' Motion was due to anything that entitles her to relief under Rule 60(b)(1).

Defendant Has Not Alleged a Meritorious Defense

7. In Cashner, 98 F.3d 572 n.2, the Tenth Circuit noted that "[w]hen a party asserts an excusable failure to comply with procedural requirements, we have often imposed an additional requirement for Rule 60(b)(1) relief that the party demonstrate that his or her claim is 'meritorious.'" However, having already determined that the party seeking the relief in that case had "failed to meet the threshold requirements for Rule 60(b)(1) relief," the Cashner court held that it had no need to consider whether the party had a meritorious claim. Id. Likewise, the foregoing Paragraphs 1 - 6 of this Response demonstrate that Defendant has failed to meet the threshold requirements for Rule 60(b)(1) relief from the consequences of her failure to respond to Plaintiffs' Motion. Accordingly, the Court need not consider the question of whether any combination of the various documents Defendant has submitted, or claims to have submitted, state a meritorious claim.

8. Nonetheless, because the Special Master gave consideration to the issue and the bulk of Defendants' Objections concern it, Plaintiffs feel obliged to point out that none of the documents submitted by Defendant, even construed in their most favorable light, present "more than mere legal conclusions, general denials, or simple assertions that the movant has a meritorious defense." In re Stone, 588 F.2d 1316, 1319 (10th Cir. 1978).[2] For example, Defendants' Objections, at 3, quote the following from page 4 of her Motion to Set Aside:

> 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 had placed to beneficial use for cattle.

[2] There is a consistent typographical error in the citations to this case in Defendant's Objections. The case is reported in Volume 588 of Federal Reporter, Second Series, not Volume 558.

Defendant's Objections, at 3, characterize this as a "succinct statement that the amounts offered by the Plaintiffs are not representative of the amounts that she has placed to beneficial use for livestock raising on her property." These statements are precisely equivalent to a denial that the Plaintiffs' contentions concerning Defendants' beneficial use, as stated in the consent order offered to Defendant and in the Plaintiffs' Motion, are true. They are not, for example, allegations that Defendant has put any specific quantity of water, either greater or less than the quantities asserted by Plaintiffs, to beneficial use. Defendant's Objections also make reference to allegations contained in a new affidavit, dated December 9, 2009. However, accepting the allegations in that affidavit in their entirety as true (including even her characterizations of statements made in the course of compromise negotiations, which should not be admissible under Fed.R.Evid 408(a)(2)) also would not allow this Court to reach any conclusion about the specific quantities of water beneficially used by Defendant on the pertinent portion of her property or whether those quantities are greater or less than the amounts identified by Plaintiffs' hydrographic survey. In particular, Defendant makes a number of assertions about her livestock, but she never specifies how many livestock she has actually had at any point in time on the property involved in Subfile No. ZRB-1-0100, or how much water she believes those livestock, or any other beneficial uses on her property, have consumed in any year.[3] The entire tenor of the affidavit is simply a denial that Plaintiffs' offered quantities of water are correct.

[3] Another interesting feature of the affidavit is the fact that Defendant asserts her permitted domestic well is being used to serve not only livestock but also multiple households. Yet, she does not assert that the terms of her permit allow such uses. Plaintiffs' hydrographic survey has identified the well as authorized for "72-12-1 DOMESTIC ONE HOUSEHOLD" use. See Declaration of Kit F. Nielsen, P.E., filed as Exhibit 2 to Plaintiffs' Motion (Doc. No. 2095-3). Any beneficial uses of water in violation of the terms of Defendants' permit would be unlawful and could not give rise to a water right. See State ex rel. Bliss v. Dority, 55 N.M. 12, 19, 225 P.2d 1007, 1011 (1950) ("No right to the use of water from such sources was obtained by its use by defendants in violation of law, nor can it be.")

9. By comparison, the defendant, Stone, who sought relief under Rule 60(b) in In re Stone had asserted in his motion for relief that, *inter alia*:

> (a) The allegations in the Complaint alleging that the Defendant committed acts constituting false pretenses and false representations are false.
>
> (b) The allegations contained in the Complaint that the Defendant committed acts constituting conversion which were malicious and willful are false.
>
> (c) The allegations contained in the Complaint which allege that the Defendant committed acts which constituted willful and malicious injury to Plaintiff's property are false.

588 F.2d at 1320 n.4. Questioned repeatedly at oral argument, the attorney for that defendant insisted that "'the defendant's meritorious claim, and his only possible claim with regard to these matters, is [that the plaintiff's] factual allegations are untrue.'" Id. at 1320. The Tenth Circuit held that "[n]either this explanation nor the general allegations in Stone's motion for relief constituted a demonstration of meritorious defense . . . ." Id. Likewise, in the present case Defendant's repeated general allegations that she disputes the quantities Plaintiffs' have offered for her water rights, without any statement of an affirmative claim for different quantities, are not a demonstration of meritorious defense.

10. Defendant's Objections, at 4, attempt to construe language in Defendant's Subfile Answer (the operative portion of which apparently was never filed with the Court) as an assertion that she has used three acre feet per annum from the permitted domestic well in Subfile No. ZRB-1-0100. Defendant's construction is no more than a selective picking of words out of their context. The sentence in question reads, in full: "[t]he 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." (Emphasis

added.) The reading that Defendant now proposes for this sentence requires the reader to not only ignore the initial disjunctive "or" but, more importantly, to treat the words "up to" as entirely meaningless. As written, the sentence says nothing at all about how much water Defendant has used – or intends to use – from her well, except that the quantity is not greater than three acre feet per year. For all that can be discerned from this sentence, Defendant may not have used any water at all from the well. In the context of the remainder of the "defense" quoted in full on page 3 of Plaintiffs' Response to Motion to Set Aside, the only fair reading of the sentence is that Defendant is asserting she has a water right to three acre feet per year without regard to how much water she has actually used. As accurately stated in the Special Master's November 20, 2009 Report, that contention has already been rejected, as a matter of law, by this Court's June 15, 2006 *Memorandum Opinion and Order* (Doc. No. 733). Accordingly, Defendant has not stated a meritorious defense.

Granting Defendant's Motion to Set Aside Would Adversely Impact These Proceedings

11. The Plaintiffs have not asserted they would be prejudiced by granting Defendants' Motion to Set Aside because, as a practical matter, their interests in this regard are indistinguishable from the Court's. Plaintiffs have complied with the Court's Procedural and Scheduling Orders in this matter, and Subfile No. ZRB-1-0100 was concluded as provided for by those orders. It does indeed seem unfair to now require Plaintiffs to reopen the subfile for the benefit of a Defendant who simply slept on her rights while the time for responding to Plaintiffs' Motion was passing. Nonetheless, viewed in isolation, the additional litigation expense caused to Plaintiffs by granting the Motion to Set Aside may seem insignificant and, procedurally, one could argue that granting the motion does no more than move Subfile No. ZRB-1-0100 from the

list of completed subfiles and add it back to the list of 156 unfinished subfiles that Plaintiffs reported in their January 15, 2010 *Status Report Re: Adjudication of Subfiles* (Doc. No. 2510). However, viewed in the context of the other 258 subfiles for which a default judgment has been entered, Defendant's Motion to Set Aside portends a significant obstacle to the orderly completion of this adjudication. Defendant is asking that the Court overlook Defendants' lack of compliance with the Court's Local Rules of Civil Procedure, based on affidavits and contentions offered for the first time in connection with a Rule 60(b)(1) motion to set aside and even as late as her Objections filed to the Special Master's Report concerning the Motion to Set Aside. Granting Defendants' motion would lead other defendants who have ignored the procedural orders and failed to respond to Plaintiff's Default Judgment motions to believe that they can likewise escape the consequences of their inaction by simply conjuring up new affidavits. Plaintiffs urge the Court to discourage that view.

CONCLUSION

Defendants' failure to respond to Plaintiffs' Motion was unexcused and is still entirely unexplained. Defendant is not entitled to relief under Fed.R.Civ.P. 60(b)(1) based on a tardy offering of legal and factual contentions she could have offered before the judgment against her was entered. Accordingly, the Plaintiffs are entitled, as a matter of law, to an order denying Defendant's Motion to Set Aside.

DATED: January 27, 2010

Electronically Filed

/s/ Bradley S. Bridgewater

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BRADLEY S. BRIDGEWATER
U.S. Department of Justice
1961 Stout Street – 8th Floor
Denver, CO 80294
(303) 844-1359

COUNSEL FOR THE UNITED STATES

___(approved 1/27/2010)_

EDWARD BAGLEY
Office of the State Engineer, Legal Division
P.O. Box 25102
Santa Fe, NM 87504
(505) 827-6150

COUNSEL FOR THE STATE OF NEW MEXICO
EX REL. STATE ENGINEER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 27, 2010, 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