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 ZUNI RIVER BASIN ADJUDICATION Subfile No. ZRB-3-0090

OPPOSITION TO MOTION TO SET ASIDE ENTRY OF DEFAULT

The Plaintiffs United States of America ("United States") and New Mexico ex rel. State Engineer ("State") hereby respond in opposition to the Defendant David Kessler's *Motion to Set Aside Entry of Default* filed April 14, 2008 (Doc. No. 1729) ("Kessler Motion"). For the following reasons, the Defendant's motion fails to show good cause, pursuant to Fed.R.Civ.P. 55(c), why the *Clerk's Certificate of Default* filed March 3, 2008 (Doc. No. 1618) should be set aside as to Subfile ZRB-3-0090; and further fails to satisfy the requirements of Fed.R.Civ.P. 60(b) for relief from the April 7, 2008 *Order Granting Default Judgment* as to Subfile ZRB-3-0090 (Doc. No. 1706).

1. The United States timely served the Defendants David Kessler and Lisa Kessler with all documents required to be included in the service packet for Subfile ZRB-3-0090 mandated by Part II of 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. No. 561) ("Procedural and Scheduling Order"). See *Declaration of Gary A. Durr in Support of United States' Motion for Default Judgment* for Subfile ZRB-3-0090 (Doc. No. 1690-2); see also Kessler Motion at 1 ("In May 2006 I received the service packet . . . .").

2. The Procedural and Scheduling Order, at 4, required that any defendant who disagreed with any element of the proposed Consent Order included in a service packet return a Request for Consultation to the United States no later than June 12, 2006. The Procedural and Scheduling Order, at 6, further provided that a defendant's failure to request consultation no later than June 12, 2006 "shall be considered grounds for entry of a default order that incorporates the proposed Consent Order . . . ." The Special Master's *Notice of Water Rights Adjudication*, included in each service packet pursuant to the Procedural and Scheduling Order, and the cover letter for each service packet from counsel for the United States (Exhibit 1 to this Opposition), also emphasized the mandatory character of consultation, and that failure to return a Request for Consultation could result in entry of a default judgment. Nonetheless, the Defendants David Kessler and Lisa Kessler have never returned a Request for Consultation concerning Subfile ZRB-3-0090 or otherwise indicated any intent to participate in good faith in consultation.

3. The Procedural and Scheduling Order, at 5, further provided that any defendant who still disagreed with the proposed Consent Order after consultation with the United

States and the State "shall file the form Answer included in the service packet with the Court" (emphasis added) no later than August 12, 2006. At page 6, Paragraph II.C.2, the Procedural and Scheduling Order also provided that: "**A Claimant's failure to sign and return a Consent Order or file a form Answer by August 12, 2006 shall be considered grounds for entry of a default order which incorporates the proposed Consent Order.**" (Emphasis in original.) This consequence of failure to timely file an answer with the Court was also detailed in the Special Master's *Notice of Water Rights Adjudication*, in the cover letter for each service packet from counsel for the United States, and in a prominent box on the last page of the form Subfile Answer included in the service packet received by Defendants. Nonetheless, the Clerk's docket for this case reflects that Defendants David Kessler and Lisa Kessler have never filed a Subfile Answer.

4. The cover letter from counsel for the United States included in the service packet also cautioned Defendants:

> **NOTE:** If you file an *Answer*, you must also mail a copy to the United States; however, mailing the copy to the United States does not relieve you of the obligation to file the original with the Court. **Counsel for the United States cannot file an *Answer* for you.** Failure to timely file an *Answer* may also result in entry of a default judgment.

(Emphasis in original.) Nonetheless, on June 5, 2006, the United States received a form Answer from David S. Kessler and Lisa Kessler which appeared to be the original document. (Exhibit 2 to this Opposition.) Counsel for the United States promptly, on June 6, 2006, wrote to the Kesslers (Exhibit 3 to this Opposition), warning them again that (1) counsel for the United States could not file an Answer for the Kesslers; (2) they were, in any event, required to return a Request for Consultation if they disagreed with the proposed Consent Order; and (3) that failure

to follow the procedures established by the Special Master could result in entry of a default judgment. The United States received no further communications from the Kesslers until after the March 3, 2008 entry of the *Clerk's Certificate of Default* concerning, *inter alia*, Subfile ZRB-3-0090.

5. Whether to set aside an entry of default is a matter committed to the discretion of the trial court. Ashby v. McKenna, 331 F.3d 1148, 1152 (10th Cir. 2003); United States v. Timbers Preserve, 999 F.2d 452, 454 (10th Cir. 1993); Bollacker v. Oxford Collection Agency, Inc., Slip copy, 2007 WL 3274435 at *1 (D. Colo. 2007). Fed.R.Civ.P. 55(c) provides: "[t]he court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." Courts commonly identify three principal factors in determining whether a defendant has satisfied the requirement of showing good cause: "(1) whether the default was the result of culpable conduct of defendant, (2) whether plaintiff would be prejudiced if the default should be set aside, and (3) whether defendant presented a meritorious defense." Hunt v. Ford Motor Co., 65 F.3d 178, 1995 WL 523646 at *3 (10th Cir. 1995) (unpublished)(citing In re Dierschke, 975 F.2d 181, 183 (5th Cir. 1992)); Crutcher v. Coleman, 205 F.R.D. 581, 584 (D. Kan. 2001); see also United States v. Timbers Preserve at 454 (considering substantially the same factors with respect to a motion to set aside a default judgment under Rule 60(b)). "These factors are not 'talismanic' and the court may consider other factors. . . . However, the court need not consider all the factors. If the default was the result of the defendant's culpable conduct, the district court may refuse to set aside the default on that basis alone." Hunt (citing Dierschke at 184 and Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388 (9th Cir.1988), cert. denied, 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124

(1989)). Receiving actual notice of a complaint and failing to respond is culpable conduct. Hunt at *4; Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir.), cert. denied, 484 U.S. 976, 108 S.Ct. 486, 487, 98 L.Ed.2d 485 (1987).

6. Here, the Defendant acknowledges receipt of the service packet required by the Procedural and Scheduling Order, which included a copy of the United States *Amended Complaint* (Doc. No. 222), but pretends ignorance of the requirements that he express any disagreement with the Consent Order offered for his subfile by (1) returning a *Request for Consultation* form by June 12, 2006, and (2) after participating in good faith in consultation, filing a Subfile Answer with the Court by August 12, 2006. He offers this pretense despite the fact he was advised of both requirements by multiple documents included in the service packet he received, and again by the June 6, 2006 letter from counsel for the United States which specifically warned Defendant that he had not properly filed his Subfile Answer and had failed to return a *Request for Consultation*, and, further, that either of those failures could result in entry of a default judgment. Despite those repeated warnings, Defendant took no action to comply with this Court's Procedural and Scheduling Order, or otherwise file a response to the United States' *Amended Complaint*, for over a year and ten months. The entry of the default that Defendant now challenges was clearly the result of his own culpable conduct.

7. In the absence of an applicable local rule or court order, the time for filing papers with the Court is governed by Fed.R.Civ.P. 5(d)(1), which provides: "Any paper after the complaint that is required to be served – together with a certificate of service – must be filed within a reasonable time after service." The undersigned counsel for the United States has found authorities recognizing that a "reasonable time" may be as long as 4 or 6 days. Claybrook

Drilling Co. v. Divanco, Inc., 336 F.2d 697, 700 (10 Cir. 1964) (4 days); Katz v. Morgenthau, 709 F.Supp. 1219, 1226 (S.D.N.Y. 1989) (6 days). No authority suggests that failing to file a served Answer for over a year and a half is reasonable. Moreover, Rule 5(d) is only a "default rule" which does not prevail over a specific filing deadline set by a court. Raymond v. Ameritech Corp., 442 F.3d 600, 605 (7th Cir. 2006). In the present case, the Procedural and Scheduling Order specifically mandates (1) that "**NO LATER THAN JUNE 12, 2006**, Clamants who disagree with any element of the proposed Consent Order shall return to the United States their Request for Consultation . . ." and (2) that "**NO LATER THAN AUGUST 12, 2006**, Claimants who still disagree with the proposed Consent Order after consultation with the United States and the State shall file the form Answer included in the service packet with the Court . . . ." (Emphasis in original.) Defendant Kessler, though given multiple warnings concerning these deadlines set by the Court, met neither of them and is therefore in default as a result of his own culpable conduct.

8. Defendant Kessler has also failed to show that he has a meritorious defense. Discussing this requirement, the Tenth Circuit Court of Appeals has stated: "In an attempt to determine the meritorious nature of a defense, the trial court must have before it more than mere allegations that a defense exists." Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970). Citing Gomes, the court in Olson v. Stone, 588 F.2d 1316, 1319 (10th Cir. 1978) explained:

> Unlike the simple notice pleading required in original actions, the rule relating to relief from default judgments contemplates more than mere legal conclusions, general denials, or simple assertions that the movant has a meritorious defense. . . . The rule requires a sufficient elaboration of facts to permit the trial court to judge whether the defense, if movant's version were believed, would be meritorious.

(Internal citations omitted.) Here, the Defendant's motion asserts only that he believes there is good cause to set aside the default. There are some significant discrepancies between the Subfile Answer Defendant served on the United States in June of 2006 and the one attached to his motion.[1] However, neither document contains any specific allegations of historic beneficial use of water. Instead, the original answer contains no assertions whatsoever concerning water use and the more recent document contains vague and speculative assertions that the quantities offered in the proposed Consent Order "may not be adequate," that "livestock have been using the land in question" and that "my children may build on the land + [sic] I will need more water." Defendant has never asserted that he has made beneficial use of water in excess of the quantities offered by the United States and the State for Subfile ZRB-3-0090, which quantities have been incorporated in the *Order Granting Default Judgment* entered for the Subfile (Doc. No. 1706). This Court has already held, in its June 15, 2006 *Memorandum Opinion and Order* (Doc. No. 733), that New Mexico law is clear that "beneficial use defines the extent of a water right." Accordingly, the Defendant has failed to show that he has a meritorious defense.

9. It is true that the "preferred disposition of any case is upon its merits and not by default judgment." Gomes v. Williams, 420 F.2d at 1366.

> However, this judicial preference is counterbalanced by considerations of social goals, justice and expediency, a weighing process which lies largely within the domain of the trial judge's discretion. Thus, the trial court ought not reopen a default judgment simply because a request is made by

[1] In particular, Defendant's more recent unfiled Subfile Answer indicates his co-defendant, who does not join in his motion to set aside the default and has not signed the Subfile Answer, has the name "Lisa de St. Croi" or "Lisa de St. Crox." No such person is a party to this case. Lisa Kessler, who was joined as a party on April 5, 2006 (Doc. No. 616) and waived service by that name on June 6, 2006 (Doc. No. 719), is the co-defendant of record on Subfile ZRB-3-0090. She has never notified the Court or the parties of any change in her name and also does not join in either the motion to set aside the default or the Answer attached thereto.

> the defaulting party; rather, that party must show that there was good reason for the default and that he has a meritorious defense to the action.

Id. Defendant Kessler has wholly failed to show that there was good reason for the default, or that he has a meritorious defense. Accordingly, the Court should deny the Defendant's motion and should not set aside either the March 3, 2008 *Clerk's Certificate of Default* or the April 7, 2008 *Order Granting Default Judgment* concerning Subfile ZRB-3-0090.

DATED: April 23, 2008

Electronically Filed

/s/Bradley S. Bridgewater

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 23, 2008, I filed the foregoing *Opposition To Motion To Set Aside Entry Of Default* 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.

I FURTHER CERTIFY that, on April 23, 2008, the foregoing was served on the following non-CM/ECF Participants by U.S. Mail, postage prepaid:

David S. Kessler & Lisa Kessler
P.O. Box 467
Zuni, NM 87327

_____/s/_____
Bradley S. Bridgewater