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,	
Plaintiffs,	
and	**CIV. NO. 01-00072 BDB/WDS**
ZUNI INDIAN TRIBE, NAVAJO NATION,	**ZUNI RIVER BASIN ADJUDICATION**
Plaintiffs-in-Intervention,	**Subfile No. ZRB 1-0100 JOANN STRICKLAND TRUST**
v.	
A & R PRODUCTIONS, et al.,	
Defendants.	

REPLY IN SUPPORT OF
MOTION TO SET ASIDE DEFAULT JUDGMENT (DOC. 2208)

Defendant JoAnn Strickland, Trustee for the JoAnn Strickland Trust ("Defendant"), by and through her attorneys of record, Law & Resource Planning Associates, P.C. ("LRPA"), hereby respectfully submits this Reply in Support of Motion to Set Aside Default Judgment (Doc. 2208). For the following reasons, the United States has shown no basis why a party that has demonstrated diligence in participating in this adjudication should be denied an opportunity to litigate her water rights on the merits. Accordingly, Defendant respectfully submits that the default judgment entered against her should be set aside.

The United States makes the conclusory argument that Defendant has demonstrated "either an intent to thwart judicial proceedings or a reckless disregard for the effect of [her] conduct on judicial proceedings." *See* Response, at 4. Based on this bare assertion, the United

States argues that Defendant cannot meet her burden for relief under Fed. R. Civ. P. 60 because "[s]uch relief is extraordinary and may be granted only in exceptional circumstances." *Id.* In so arguing, the United States misstates both the law and the facts.

As the affidavit attached to Defendant's Motion to Set Aside Default Judgment indicates, Defendant did, in fact, return her request for consultation in November, 2005. That being the case, the failure of the United States to enter into consultations as requested should preclude its argument that Defendant has not complied with the letter of Amended Procedural and Scheduling Order because she filed her answer a little over 40 days after the deadline. *See* Amended Procedural and Scheduling Order [Doc. 387] at III(B)(2) ("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 on or before January 10, 2006." (emphasis added)). Although Defendant's answer was technically late, the procedure contemplated by the Amended Procedural and Scheduling Order had already been disrupted when the consultation did not occur as requested.

On the record of this case, default judgment is simply inappropriate. Defendant returned her request for consultation, as required. She filed an answer, as required, despite the fact that she was never contacted regarding consultation. She participated in consultations of her family members. She presented this information to the United States in an attempt to have it withdraw the motion for default judgment. Even though the United States did not consult with her as requested, even though Defendant has shown a diligent interest in this adjudication, and even though Defendant provided this information to the United States in an attempt to get it to withdraw the motion for default judgment, the United States argues that she has demonstrated

"either an intent to thwart judicial proceedings or a reckless disregard for the effect of [her] conduct on judicial proceedings." This claim obviously has no merit.

The United States also ignores precedent in describing the standard for relief under Fed. R. Civ. P. 60. The United States completely ignores that the general standards applicable to that rule are balanced against the "strong policies [that] favor resolution of disputes on their merits" and against the fact that "the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party." *Cessna Finance Corp. v. Bielenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983) (quotation marks and quoted authority omitted). Further, "[b]ecause a default judgment is a harsh sanction, due process requires that failure is a sufficient ground only when it is the result of willfulness, bad faith, or [some] fault of petitioner rather than inability to comply." *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872 (10th Cir. 1987) (quotation marks and quoted authority omitted).

Simply put, on these facts, the United States has shown no reason why Defendant's water rights should not be resolved on their merits rather than procedure. Due process strongly favors resolution of Defendant's property rights on their merits, particularly where there is, and can be, no specific allegation of harm to the United States to require such a hearing. The ultimately irony is that had the United States put the same efforts into ensuring that consultation or resolution of the dispute on its merits had occurred as it has in seeking a judgment on procedural grounds, this factual dispute may well have been resolved by now.

For the foregoing reasons, as well as those asserted in her Motion to Set Aside Default Judgment, Defendant respectfully requests that this Court set aside the default judgment (Doc. 2208) entered against Defendant and that the matter proceed to a hearing on the merits.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2008, I filed the foregoing Reply in Support of 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