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.	

OBJECTIONS TO SPECIAL MASTER'S REPORT ON
MOTION TO SET ASIDE DEFAULT JUDGMENT [DOC. 2476]

COMES NOW, Defendant Joann Strickland, Trustee for the Joann Strickland Trust ("Defendant"), by and through her attorneys of record, Law & Resource Planning Associates, P.C. ("LRPA"), and pursuant to Fed. R. Civ. P. 53(f)(2), objects to the Report of the Special Master on Defendant's Motion to Set Aside Default Judgment (Doc. 2476). For the following reasons, the Special Master's Report on the Motion is erroneous and her recommendations that the Motion be denied should not be adopted.

As previously set forth in Defendant's Motion to Set Aside Default Judgment, Defendant has argued that the Default Judgment entered against her in this subfile proceeding on March 24, 2009 should be set aside for the simple fact she is not in default, having complied with the Scheduling Order by requesting a consultation on her subfile. Alternatively, if considered in

default, the default should be set aside by reason of mistake, inadvertence, or surprise. Fed. R. Civ. P. 60(b)(1). In considering the Motion, the Special Master accepted the Defendant's assertions that she tried to comply with extant scheduling requirements as true, citing *In re Stone,* 558 F.2d 1316 (10th Cir. 1978). (Doc. 2476 at 4). The Special Master further noted that Plaintiffs failed to allege future prejudice should the Court choose to set aside the Default Judgment. (Doc. 2476 at 4). Nevertheless, the Special Master concluded that the Defendant had not met her burden in demonstrating a meritorious defense to the complaint, based solely upon the defenses Defendant raised in the answer that she filed *pro se* in this litigation on February 24, 2006 (Doc. 495).[1] In this respect, the Special Master's Report employs an incorrect analysis and must be rejected by the Court.

In establishing a meritorious defense that would support the setting aside of a default judgment, the Tenth Circuit is quite clear that the parties are not litigating the truth of the defenses in the motion hearing. *In re Stone,* 558 F.2d at 1319. "Rather, the court examines the allegations *contained in the moving papers* to determine whether the movant's version of the factual circumstances surrounding the dispute, if true, would constitute a defense to the action." *Id.* (Emphasis added). While the threshold requirement is higher than a simple notice pleading, the burden is met with a "sufficient elaboration of facts to permit the trial court to judge whether the defense, if movant's version were believed, would be meritorious." *Id.*

The court in *In Re Stone,* further explains that there is no one "best" method of determining whether factual allegations in a motion to set aside a default judgment are sufficient to establish a meritorious defense. *Id.* "The critical concern is not with How the allegations are

[1] The Special Master's Report notes that Defendant's answer on file with the Court is incomplete. Ms. Strickland was unable to supply a complete copy of the answer she filed. However, she does not dispute the accuracy of Plaintiff United States' recitation of the contents of her answer, a complete copy of which was served upon counsel for the United States.

presented, but that they Are presented and presented in a timely enough fashion to permit the opposing party to question *the legal sufficiency* of the defense." (Italics added). *Id.* Indeed, such allegations may be satisfactorily presented "in the written motion itself, in an appended proposed answer or in attached affidavits." *Id.* at 1319-20.

In the case at bar, the Special Master chose to only focus upon the defense raised in the answer which Defendant filed on her own as a *pro se* litigant in 2006, concluding that the matters stated in her answer did not constitute a legal defense and thus was not sufficient to meet Defendant's burden in setting aside the default judgment. However, the Special Master totally ignores the recitation in the Motion itself of the following:

> 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.

Motion to Set Aside Default Judgment at 4 (Doc. 2305). A primary question in any water adjudication subfile is the amount of water that has been placed to beneficial use. *See, e.g., W. S. Ranch Co. v. Kaiser Steel Corp.*, 79 N.M. 65, 67, 439 P.2d 714, 716 (1968) (Noting that the purpose of adjudication legislation is to define various aspects of water rights based upon beneficial use). Defendant's 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 is certainly sufficient to allow the opposing party to question the legal sufficiency of the defense as contemplated in *In Re Stone.*

As the Tenth Circuit also noted in *In Re Stone*, the allegations that are presented in the moving papers will be deemed true for purposes of the meritorious defense aspect of a Rule 60(b) motion. *In Re Stone,* 558 F.2d. 1320. Nevertheless, the trial court may still, in its

discretion, consider evidence on the meritorious defense. Accordingly, attached hereto is the Affidavit of Joann Strickland that sets forth in more detail the objections that she has to the proposed Consent Order, as reflected in the default judgment entered against her.[2] Clearly, apart from the matters raised in her answer, she has a meritorious defense to the amount of water specified in the proposed Consent Order that was adopted by the Court in the default judgment.

Both the Plaintiffs in their arguments and the Special Master in her report seek to limit the defenses that may be considered as meritorious to those raised in the *pro se* answer filed by the Defendant in 2006. Not only is this inappropriate under *In Re Stone*, but defendants may generally amend their answers and leave to do so is liberally afforded when justice so requires. Fed. R. Civ. P. 15(a)(2). If the default judgment is set aside as requested, Defendant intends to amend her answer to accurately reflect all the defenses that she has in this action.

Even if consideration of Defendant's meritorious defenses were confined to those defenses raised in her answer, she has still stated a meritorious defense with respect to her well 8B-2-W01, permitted under NMSA 1978, § 72-12-1 (2003), which is used for both livestock and residential purposes. *See* Affidavit of Joann Strickland, ¶ 8. As quoted by the Plaintiffs in their answer brief (Doc. 2322, at 3), Defendant objected to the amounts offered in the proposed Consent Order, in part, because she "*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." Having been offered .7 acre foot per annum in the proposed Consent Order for this particular well, it is clear that a statement that Defendant has used three acre feet per annum from this well is a legally sufficient defense to the allegations contained in the complaint.

[2] *See also* Fed. R. Civ. P. 53(f)(1) (providing that the District Judge may receive evidence in acting on a Special Master's Report).

The Special Master's Report asserts that Defendant's interpretation of New Mexico law is incorrect with respect to whether Defendant has a "property or vested right for three acre feet per year as provided by statute," citing to the District Court's denial of a motion to certify certain questions to the New Mexico Supreme Court. (Doc. 733). The Special Master's Report, however, does not address in any fashion the defense raised by Defendant that she has a continuing right to divert up to three acre feet per annum pursuant to statute, regardless of whether she has previously perfected a vested right through beneficial use. Nor has this argument been decided by the District Court. While the District Court held that beneficial use is the basis for determination of whether a water right has been established, the issue of whether the Defendant can continue to divert water under a domestic well permit in order to advance the perfection of the water right through beneficial use has not been determined in this or any other litigation.

The Special Master's Report correctly concluded that Defendant had met her threshold burden of establishing justifiable grounds for the setting aside of the default judgment. The Report is in error, however, in concluding that Defendant had not demonstrated a meritorious defense to the complaint. Her moving papers and her *pro se* answer, bolstered by the attached Affidavit, clearly establish meritorious defenses to the allegations stated against her in this proceeding. As has been previously argued in her motion and supporting briefs, default judgments are not favored in the law and the Plaintiffs have asserted no claims of prejudice in having the default judgment set aside. *See Wendt v. Pratt*, 154 F.R.D. 229 (D. Minn. 1994). For the foregoing reasons, Defendant respectfully requests the Court to set aside the default judgment entered in this action on this Subfile.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 10, 2009, I filed the foregoing Objections to Special Master's Report on Motion to Set Aside Default Judgment [Doc. 2476] 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