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,	
	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.	

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

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 files this Reply in Support of Objections to Special Master's Report on Motion to Set Aside Default Judgment [Doc. 2476].

Among people, especially pro se litigants, there is a lot of mistrust of the federal government in general, and the federal government's actions in water adjudication in particular. The Department of Justice's year-long effort to obtain a default judgment against the Joanne Strickland Trust, rather than an actual adjudication of the merits of its water rights, does nothing to dispel that mistrust.

Initially, the United States filed no timely objections to the Special Master's Report. As such, it has accepted its findings and is precluded from arguing against them. *Cf. United States v. Bodie Island*, 262 F. Supp. 190, 203 (E.D.N.C. 1967) ("The written objections to the Report filed by the Government within the time required and the supporting brief filed thereon did not contain any objection to the findings relating to severance damages. Thus the Government's argument since then on the severance damage question is not 'timely objections' as explicitly required by *United States v. Merz*, 376 U.S. 192 (1964) and Federal Rule 53."). Thus, the United States has waived any argument against the Special Master's specific findings, taking Defendant's allegations as true, (1) that "Defendant timely returned her Request for Consultation," (2) that she "never received notification that her subfile had been set for consultation," (3) that "[o]nce she received notice of a pending motion for default, [Defendant] attempted, unsuccessfully, to resolve the matter with the United States," (4) that the United States "do[es] not alleged future prejudice should this Court set aside the Default Order," and (5) that the United States "do[es] not allege that this late filing [of Defendant's Subfile Answer] prejudiced them in any way" in part because "extensions of time for adjudication scheduling order deadlines are given freely so that cases are considered on their merits."

Given those concessions, it is truly remarkable that the United States would claim that it has "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." *See* Response [Doc. No. 2514], at 8. That is patently untrue. Because Defendant did, in fact, file a request for consultation in November of 2005, the United States was required to facilitate a consultation. That did not happen. Indeed, the Procedural and Scheduling Order provides that "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 . . . ." *See* Order [Doc. No. 387], at III(B)(2)(emphasis added). Thus, the United States' entire basis for moving for default—that Defendant's pro se Subfile Answer was filed 40 days late—is predicated on a series of events *of which it was the primary cause* when it neglected to offer a consultation to Defendant.

The United States chides Defendant, then acting pro se, for not responding to the Motion for Default. The United States implies that she was being represented by counsel and thus there was no excusable neglect justifying relief from the default judgment. In fact, at the time of entry of the default judgment, she was not being represented by counsel, but was, as specifically found by the Special Master, trying to informally resolve the matter with the United States. Special Master's Report [Doc. No. 2476] at 4. *See* Affidavit of Tanya Scott, attached hereto as Exhibit A.

Given the United States' lack of objections to the Special Master's Report, the only question raised by Defendant's objections to that Report is whether the Special Master erred in concluding that Defendant presented no "meritorious defense" sufficient to allow Rule 60 relief from default. That is a question of law, reviewed de novo. *See* Fed. R. Civ. P. 53(f)(4). There are at least two reasons why this conclusion is erroneous.

First, the Special Master erred in only looking to Defendant's pro se form answer to the Subfile Offer of Judgment, rather than the additional defenses raised in the subsequent pleadings. This is simply error. *See In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978) (noting that the court looks to the allegations "contained in the moving papers" to determine whether they present "sufficient elaboration of facts to permit the trial court to judge whether the defense, if movant's version were believed, would be meritorious"). If the Special Master were correct to limit the

review to the filed answer, there would almost never be any possibility of Rule 60 relief from a Rule 55 Default Judgment for the simple fact that a Default Judgment is predicated *on the failure to file an answer at all*. There is an irony here—because Defendant did, in fact, file a Subfile Answer (on the sparse form provided by the Court, which includes a limited number of lines for factual recitation)—the Special Master held her to a higher standard than a litigant that had filed no answer at all. In the latter case, a court evaluating a motion for Rule 60 relief would look to the defenses raised in the motion for relief. Tellingly, not even the United States attempts to justify the Special Master's Report on these grounds. *See* Response [Doc. No. 2514], at 5-8.

Second, both the Report and the United States' Response to the Objections to that Report erroneously conclude that an answer challenging the proffered amount of water actually put to beneficial use is not a meritorious defense to an offer of judgment in an adjudication suit. Even narrowly focusing on the pro se answer actually filed in this case, it is clear that it is sufficient. One of the elements of a water rights adjudication offer of judgment is the amount of the water right. Thus, a response to such an offer that simply states that the Defendant has used more water than alleged in the offer is sufficient. Defendant's pro se answer claimed that she "has used or intends to use up to three acre feet," which was more than the .7 acre feet offered. The United States tries to make much of the use of the disjunctive "or" in that answer, and tries to put the burden on Defendant to put an actual amount in the answer, rather than a simple denial of the amount offered by the United States. *See* Response [Doc. No. 2514], at 8. That argument ignores entirely the concept of notice pleading. Further, Defendant's motion to set aside the default judgment notes that, if the default is lifted, she intends to amend her answer to provide the detail the United States claims is lacking. As noted, the Special Master found that the United States had alleged no prejudice from such a proposed course of action.

In sum, Defendant, then acting pro se, requested a consultation five years ago, which was ignored, filed an answer challenging the amount of the water right proposed by the United States, and informally tried to get the United States to drop the motion for default judgment filed over a year ago. The Special Master found that the United States could not even allege prejudice in lifting the default to allow the adjudication. Defendant respectfully requests that this Court lift the default and allow the adjudication of Defendant's water rights on the merits, rather than this year-long process for obtaining a default.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 12, 2010, I filed the foregoing Reply in Support of 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