

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2017 SEP 11 PM 4: 47

STATE OF NEW MEXICO
ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO, *ex rel.*
STATE ENGINEER,

Plaintiff,

v.

THE UNITED STATES OF AMERICA
et al.,

Defendants,

vs.

THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,

Defendant-Intervenors.

CV-75-184

Hon. James J. Wechsler
Presiding Judge

SAN JUAN RIVER STREAM SYSTEM
ADJUDICATION

LA PLATA RIVER SECTION

Stephen & Mary McCarty Revocable Trust
UTA 4/29/1990

Subfile No. SJLP 005-0054
Court Case No. AF-01-217

Subfile No. SJLP 005-0055
Court Case No. AF-01-250

Subfile No. SJLP 005-0059
Court Case No. AF-01-253

MCCARTY TRUST'S APPLICATION FOR DEFAULT (SUMMARY) JUDGMENT
(Revised Dates)

COMES NOW Priscilla A. Shannon, Esq., attorney for the Defendant McCarty Trust, pursuant to Rule 1-055 NMRA, and respectfully moves the Court for a default judgment as against the State of New Mexico, based upon its failure to respond to THE MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT, which was filed in the present matter on June 21, 2017, in the above referenced cause.

As and for good cause for said Application Defendant states:

1. The Court's attention is directed to the MCCARTY TRUST'S RESPONSE TO THE

*McCarty's Application for
Default (Summary) Judgment*

STATES *UNOPPOSED* MOTION TO STAY BRIEFING ON THE MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT, (hereinafter referred to as the "McCarty's Response"); as well as the ENTRY OF DEFAULT, which have both been filed concurrently herewith, and are hereby incorporated herein by reference.

2. As set forth in the McCarty's Response, the MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT was filed in the present matter on June 21, 2017. The State's Response to said Motion for Summary Judgment was due by at least August 25, 2017. Although the State requested of the McCarty Trust, and the McCarty Trust agreed to an extension of time until September 8, 2017 for the State to file a response to said Motion for Summary Judgment, the State never filed a motion for such extension. Further, even said September 8, 2017 deadline has now passed without the State filing such Response.

3. On September 5, 2017, rather than filing a response to said Motion for Summary Judgment, the State filed an asserted *UNOPPOSED* MOTION TO STAY BRIEFING ON THE MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT, (hereinafter referred to as the "Motion to Stay"). In fact, the McCarty Trust opposes said Motion to Stay, and was never consulted about the filing of said Motion to Stay. Pursuant to said Motion to Stay, the State seeks an indefinite stay with respect to its obligation to respond to the McCarty Trust's Motion for Summary Judgment.

4. The facts of this case have been fully set forth pursuant to the McCarty Trust's Motion for Summary Judgment. The State has chosen: not to file its own Motion for Summary Judgment; not to respond to the McCarty Trust's Motion for Summary Judgment; and now to seek an indefinite stay with respect to its obligation to respond to the McCarty Trust's Motion for

Summary Judgment.

5. The State is now in default with respect to its obligation to respond to the McCarty Trust's Motion for Summary Judgment and appears to be intentionally attempting to delay these proceedings, as well as the subsequent *inter se* proceedings in the La Plata Section, and further proceedings in the main adjudication suit itself (which are currently anticipated to be commenced sometime after the completion of the La Plata *inter se* proceeding).

6. Default judgment must normally be viewed as available only when adversary process has been halted because of an essentially unresponsive party, in which instance the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights; furthermore, possibility of default is a deterrent to those parties who choose delay as part of their litigative strategy. *Gallegos v. Franklin*, 89 N.M. 118, 547 P.2d 1160 (Ct.App.) cert. denied, 89 N.M. 206, 549 P.2d 284 (1976). Judgment goes by default whenever between commencement of suit and its anticipated decision in court either of the parties omits or refuses to pursue, in the regular method, ordinary measures of prosecution or defense. *Schmider v. Sapir*, 82 N.M. 355, 482 P.2d 58 (1971).

7. The McCarty Trust has been diligently trying to protect its water rights in this matter. The State, on the other hand, has now proposed an interminable delay with respect to the McCarty Trust's ability to protect its rights. The water rights the McCarty Trust seeks to protect have been recognized since at least 1922. Further, such water rights were previously adjudicated pursuant to the 1948 Echo Ditch Decree. This case was initially filed on March 13, 1975 - more than 42 years ago. The Petition for Commencement of Proceedings in the present matter was filed on June 2, 2008, more than nine years ago. The Certificate of Service of Settlement

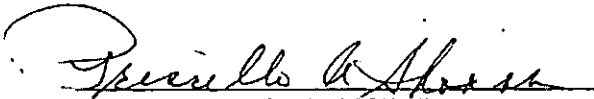
Package, with respect to the subject Defendants, was filed on August 14, 2008 - more than nine years ago. The McCarty Trust has expended considerable effort, money and resources, including the hiring of an attorney and engineering experts, in this matter, to protect its previously adjudicated water rights - only to be faced with unreasonable positions, and interminable delay, by the State.

8. In that regard, there should be a default judgment entered in the present matter in accordance with THE MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT, which was filed in the present matter on June 21, 2017, in the above referenced cause.

PRAYER FOR RELIEF

WHEREFORE, the McCarty Trust prays the Court for a default judgment as against the State of New Mexico, in accordance with THE MCCARTY TRUST'S MOTION FOR SUMMARY JUDGMENT, which was filed in the present matter on June 21, 2017, in the above referenced cause.

Respectfully, submitted by:


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September 11, 2017

Date

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was emailed and mailed by first-class postage, or delivered, to the following individuals this 11th day of September, 2017:

Attorney for the State of New Mexico, ex rel. State Engineer:

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