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**UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

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| UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,<br><br>Plaintiff,<br><br>v.<br><br>GREGORY D. MCKEE; T & L LIVESTOCK, INC.; MCKEE FARMS, INC.; AND GM FERTILIZER, INC.,<br><br>Defendants. | **REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' ANSWER, SET ASIDE DENIAL OF DEFAULT, AND ENTER DEFAULT JUDGMENT**<br><br>Civil Case No. 2:18-cv-00314-CW<br><br>Judge Clark Waddoups |

The Ute Indian Tribe (Tribe) submits this reply in support of its motion to strike Defendants' answer, set aside denial of default, and enter default judgment.

## INTRODUCTION

Before proceeding to the legal issues, the Tribe will first address material misstatements of fact and law that are contained in Defendants' memorandum. Parenthetically, it should be emphasized that Mr. McKee was afforded full due process of law in the Ute Indian Tribal Court in case number CV-12-285. Indeed, Mr. McKee appeared with his counsel and testified under oath at the TRO hearing conducted in the Tribal Court on March 26, 2013. Mr. McKee subsequently failed to respond to the Tribe's written discovery or to appear at a court-compelled deposition on July 1, 2018, and then failed to appear for the bench trial on July 13-14, 2015. The Tribe had the option of requesting entry of a default judgment, but it did not do so. Instead, the Tribe proceeded with a full presentation of its case in chief, including the introduction of documentary and testimonial evidence. Then after the Tribal Court judgment was entered, Mr. McKee failed to avail himself of the opportunity to appeal the judgment to the Ute Indian Appellate Court. Nor has Mr. McKee at any time approached the Tribe to address the judgment that was entered against him by the Tribal Court.

### No Issue of Utah State Law is Involved

Defendants are wrong in asserting (*i*) that the water at issue in case number CV-12-285 is water attributable to a state water right, 43-3011, or (*ii*) that the Ute Indian Irrigation Project (UIIP) is "*held and operated, and water therefore appropriated under the laws of the State of Utah*." Defendants' Mem., p. 2. The history of the Ute Indian Irrigation Project (UIIP) and the tribal water rights in the UIIP are discussed at length in multiple

federal court decisions.[1] When the Uintah and Ouray Reservation was opened to non-Indian settlement in 1905

> … officials on the reservation believed that state water law would be applied to the Indian reservation and that, without irrigation and water rights protection, the Indians would be left out of the Utah state scheme based on priority of use.[2]

For that reason, the Federal government applied to the Utah State Engineer in 1905 to appropriate water for the UIIP, which was subsequently authorized by Congress in 1906. The State of Utah did issue water right certificates to the United States for the UIIP; however, in 1908 the United States Supreme Court issued its seminal decision in *Winters v. United States*, 207, 564 (1908), a ruling now known as the "*Winters Doctrine*," subsequently affirmed by the Supreme Court in another seminal ruling, *Arizona v. California*, 373 U.S. 546, 598-601 (1963). The *Winters* Doctrine holds that when the United States establishes an Indian reservation, it impliedly reserves enough water to fulfill the purpose of the reservation. These "*Winters Reserved Water Rights*" or "*Indian Reserved Water Rights*" are rights vested in Indians under *federal* law—not state law.

In any event, the state-issued "water certificates" proved to be useless to the Ute Indians anyway. In 1916, as conflicts mounted between the Utes and their non-Indian neighbors over the waters of the Lakefork, Yellowstone, Uinta, and Whiterocks Rivers,

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[1] *E.g., Hackford v. Babbit*, 14 F.3d 1457, 1468 (10th Cir. 1994) ("though the individuals with irrigable land [within the UIIP] may have a right of user [sic] to the water, the water right itself is a tribal right."); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072,, 1121 (D. Utah 1981), *aff'd in part, rev'd in part and remanded*, 773 F.2d 1087 (1985) (en banc).

[2] *Hackford v. Babbit*, 14 F.3d at 1467.

the United States brought suit to adjudicate the Tribe's water rights on these rivers. *United States v. Cedarview Irrigation Company et al.,* No. 4427 (D. Utah), and *United States v. Dry Gulch Irrigation Company et al.,* No. 4418 (D. Utah). In 1923, the federal district court issued two decrees that determined the Utes' water rights to be Indian Reserved Water Rights. The 1923 decrees also established the quantity and priority of the Tribe's Reserved Water Rights and, importantly, the decrees prohibit non-Indian irrigators such as the McKee Defendants from interfering with these tribal waters.

The significance of the federal decrees cannot be overstated. Because of these decrees, the tribal waters that the McKee Defendants misappropriated are not simply federally *reserved* water rights (i.e., federally reserved but *unquantified* and *unadjudicated* rights)—rather, the misappropriated waters are federally *adjudicated* and *decreed* water rights. Utah state water law has no application.

**ARGUMENT**

Through this motion, the Tribe does not seek a "second bite at the apple," but rather, fair and impartial application of the rules. Furthermore, the Tribe is not trying to avoid a decision on the merits; it is simply trying to have the case resolved fairly (in compliance with the rules) and as timely as possible to protect its precious water resource. Contrary to Defendants' assertions, their inexcusable delay (42 days) in filing an Answer and their failure to file a motion requesting an extension warrant, and in fact, mandate, that the Court strike the Answer. For the following reasons, the Court must grant the Tribe's request to strike the Answer, set aside denial of default, and enter default judgment.

## I. Defendants' Answer Must be Stricken for Failure to File a Motion for an Extension of Time and Failure to Make a Showing of Excusable Neglect

As explained in the Tribe's motion, the U.S. Supreme Court has made clear that a party must move the court for order granting an extension once a filing deadline has passed. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Defendants failed to file the requisite motion prior to filing their Answer. In fact, to date, Defendants still have not filed such a motion, and they failed to respond to this argument in their Opposition because they have no excuse for the omission. Without a motion for an extension, this Court lacked discretion to permit the late Answer. *Smith v. District of Columbia*, 430 F.3d 450, 456-57 (D.C. Cir. 2005).

Even if Defendants had filed a motion for an extension of time, Defendants' failure to make a showing of excusable neglect precludes the Court from entertaining the Answer. The burden of showing excusable neglect rests with the party asserting it, yet Defendants did not even attempt to offer an explanation for their egregious tardiness until their February 11, 2019 response to this pending motion (nearly nine months after they missed their deadline).

In contesting the Tribe's position, Defendants rely heavily on *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). In upholding the lower court's decision to accept a late filing in that case, the Supreme Court found that "Congress plainly contemplated that the courts would be permitted, *where appropriate*, to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control." 507 U.S. at 381 (emphasis added). However, that case is easily distinguishable from the present case.

The delinquent party in *Pioneer* filed the document at issue only 20 days after the deadline. *Id*. at 384. *The delinquent party also filed a motion requesting that the court permit the late filing (which Defendants have not done)*. *Id*. *Unlike Defendants, the party in Pioneer gave a reasonable justification for the tardiness. Id* at 381, 398. All of these factors show that, while it was appropriate to accept the late filing in *Pioneer*, it was not appropriate to accept the late Answer in this case. The Answer filed herein 42 days late contained no explanation for the extreme lateness and no request for an extension of time. Indeed, Defendants did not ever respond to the Tribe's request for entry of default and default judgment. The first attempted assertion of excusable neglect by Defendants was not made until February 11, 2019, nearly nine months after the Answer was due. This apparent flaunting of the Federal Rules must not be condoned, much less rewarded.

Defendants erroneously cite to their attempt to retain counsel and a request to the Tribe's counsel for an extension in arguing that their delay was excusable. Merely setting out a reason for their late filing in response to a motion to strike is not the equivalent of demonstrating excusable neglect. Defendants themselves made no attempt to contact the Tribe regarding an extension of time prior to the deadline for the Answer. Furthermore, when an attorney who did not represent Defendants called the Tribe seeking an extension, the Tribe's counsel advised Defendants that he would discuss an extension <u>with an attorney representing Defendants</u>, but that he would not agree to an extension with someone who did <u>not</u> represent Defendants. Even today, there has been no showing of any attempt to file an answer prior to the required answer date. At the very least, Defendants could have filed a motion for extension of time on their own to inform

the Court that they were seeking counsel. Not only did Defendants fail to file a motion for extension of time, but they did not contact the Tribe themselves for an agreement for an extension of time. Furthermore, merely seeking an extension of time from opposing counsel is not adequate; it is the court that grants the extension of time. It is incumbent upon a defendant to contact the opposing party to find out if the opposing party agrees with an extension of time, but it is still necessary to file a motion and obtain the court's approval of the extension of time. The Tribe could not have granted the motion for an extension of time, and Defendants made no such request to the Court.

Furthermore, *Pioneer* involved interpretation of the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure. Interpretation by a bankruptcy court of the bankruptcy rules is not an appropriate basis for deciding the Tribe's motion. As the Supreme Court explained, "the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization." *Pioneer*, 507 U.S. at 389. This rationale does not apply to this Court interpreting the Federal Rules of Civil Procedure, and the *Pioneer* opinion does not support Defendants' position. In fact, the Supreme Court noted in *Pioneer* that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect' . . . ." *Id*. at 392.

Defendants also allege that the Tribe "waived" its right to strike the Answer, relying on FRCP Rule 12(f). This argument must fail because, while Rule 12(f) generally governs motions to strike, it does not apply where, as here, the filing to be stricken was not timely filed. Furthermore, courts have held that the time for filing under Rule 12(f) is not to be

strictly applied under certain circumstances. *See, e.g., United States v. Lot 65 Pine Meadow*, 976 F.2d 1155 at 1157 (8th Cir. 1992); *Univalor Trust, SA v. Columbia Petroleum LLC*, 2017 WL 2306491 (S.D. Ala. 2017).

> [F.R.C.P.] Rule 12 also authorizes the district court to act "upon the court's initiative at any time." . . . This grant of judicial discretion "has been interpreted to allow the [district] court to consider untimely motions to strike and to grant them if doing so is proper. . . . In light of this, **the time limitations in Rule 12(f) should not be applied strictly when the motion seems to have merit**."

*Lot 65 Pine Meadow*, 976 F.2d at 1157 (emphasis added) (citations omitted). Here, the grounds for the motion to strike are 1) the egregious untimeliness of Defendants' Answer, 2) the failure to request and receive the Court's grant of extension of time, and 3) the failure to show excusable neglect (no attempt was even made until the response to the current motion). There is no dispute about the deadline for filing the Answer or the fact that the Answer was filed 42 days late. The Tribe's motion does not just "seem" to have merit, it plainly has merit. If this Court finds that the time limitation in Rule 12(f)(2) does generally apply to late filings, that limitation should not be strictly applied because the motion to strike clearly has merit.

Finally, the Tribe's motion should not be denied as untimely because good cause exists for the timing of the Tribe's filing. The Tribe had the intention of filing (and did file) a motion to recuse in this case. The Tribe swiftly (four days later) filed its motion to strike after obtaining a ruling on its motion to recuse.[3] This, coupled with the fact that the Tribe's

[3] Defendants point out that the Tribe filed a Notice of Withdrawal of Counsel and two motions for admission of *pro hac vice* counsel between the time the Answer was filed and the time the motion to recuse was filed. However, these filings did not in any manner delay this case. Defendants also assert that the Tribe should have sought review of the

motion to recuse had to be filed prior to any request that the presiding judge issue a substantive ruling, constitutes good cause for the timing of the filing.

## II. The Order Denying Application and Request for Entry of Default Must be Set Aside

Because the Tribe complied with all applicable requirements for entry of default, the Order denying the Tribe's application and request must be set aside. Defendants assert that the Order was proper pursuant to the local rules because local rule DUCivR 55-1(a) permits denial of an application for default "for any reason." However, if the Clerk were permitted to deny an application for default for literally *any* reason, default applications would be dealt with arbitrarily and capriciously. Furthermore, granting the Clerk this discretion impermissibly conflicts with the Federal Rules. The expansive reading Defendants give to the local rule conflicts with FRCP Rules 55 and 83, and must therefore be rejected by this Court:

> [W]e remind the district courts within our jurisdiction that their considerable leeway for personal practice and local rules remains subject to Rule 83.

*Energy and Env't Legal Inst. V. EPEL*, 793 F.3d 1169, 1176 (10th Cir. 2015) (local rules must not conflict with the Federal Rules of Civil Procedure). *See also Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir. 1991) ("These local court rules, however, cannot conflict with the Federal Rules of Civil Procedure . . . ."); *Brown v. Crawford County, Ga.*, 960 F.2d

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Clerk's order denying entry of default rather than filing its motion for recusal. However, appealing the Clerk's order would be a request for substantive relief and a motion to recuse must be filed prior to a request seeking substantive relief. Defendants assert that nearly seven months of activity transpired since Defendants filed their Answer, However, as asserted above, the substantive relief sought by the motion to strike was requested just four days after the Tribe received the ruling on its motion to recuse.

1002, 1009 (11th Cir. 1992) ("District courts are not required to adopt local rules, but they *must not* circumvent the Federal Rules of Civil Procedure by implementing local rules or 'procedures' which do not afford parties rights that they are accorded under the Federal Rules." (emphasis in original) (citations omitted)).

There is an impermissible conflict between FRCP Rule 55 and DUCivR 55-1 because whereas the local rule grants the Court Clerk absolute discretion, FRCP Rule 55 unambiguously vests no discretion in the Court Clerk whatsoever. Rule 55(a) provides unequivocally:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, ***the clerk must enter the party's default***. (emphasis added)

Rule 55(b)(1) is similarly unequivocal:

> If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amounts dues—***must*** enter judgment for that amount and costs against a defendant who has been defaulted for not appearing…. (emphasis added)

The Tribe's motion for default judgment and its supporting affidavit satisfied the requisites for entry of default and default judgment under FRCP Rule 55(a) and (b)(1). In turn, the Court Clerk lacked discretion under Rule 55(a) and (b) to deny the entry of a default. Because Defendants' interpretation of the local rule here conflicts with FRCP Rules 55 and 83, that interpretation cannot be upheld and the Order denying the Tribe's application and request for default must be set aside.

Defendants' reliance on *Magnusson v. Ocwen Loan Servicing, LLC*, 2014 WL 4185672 (D. Utah 2014) is misplaced. The answer in *Magnusson* was filed only 8 days

late. In this case, in contrast, the answer was *42* days late. Further, on at least two occasions after the Tribe filed its motion for entry of default and default judgment, the Tribe contacted the Clerk's Office to inquire into what action if any was being taken on its motion for default. The Court Clerk's office informed the Tribe's counsel that the Court Clerk's Office was not following the requirements of FRCP Rule 55 because the motion had simply been forwarded to Judge Waddoups' chambers in contravention of the process required by Rule 55(a) (entering a default) and Rule 55(b)(1) (entry of default judgment by the Clerk).

In addition, Defendants erroneously claim that the three factors delineated in *Heber v. United States*, 145 F.R.D. 576 (D. Utah 1992), support their position that, even if the Clerk could not deny the Tribe's application for entry of default, any entry of default should be set aside. On the contrary, the factors show that it would be improper to set aside any entry of default: 1) the default was willful; 2) Defendants have no meritorious defense; and 3) prejudice will result to the Tribe.

First, Defendants displayed "an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on judicial proceedings" when they waited until 42 days after the deadline to file their Answer. *United States v. $22,050 U.S. Currency*, 595 F.3d 318, 327 (6th Cir. 2010). "Generally, a defendant's conduct is considered culpable if he has defaulted willfully or has no excuse for the default." *Porter v. Brancato,* 171 F.R.D. 303 (D. Kans. 1997) (citing *United States v. Timbers Preserve, Routt County, Colo.,* 999 F.2d 452, 454 (10th Cir.1993). Given the strained attempt by Defendants to justify this severe tardiness and the fact that no motion for an extension was ever filed,

the Court must conclude that their failure to comply with the Court's rules was a willful violation, disobedient conduct, or an attempt to intentionally delay the disposition of this matter. *See Arthur F. Williams, Inc. v. Helbig*, 208 F.R.D. 41 (E.D.N.Y. 2002). At the very least, Defendants acted with reckless disregard for the effect of their conduct on judicial proceedings and such conduct cannot be rewarded.

Defendants willfully and intentionally disregarded the judgment of the Tribal Court which is sought to be enforced in this action. Defendants have now established a pattern of disrespecting the judicial process, and such conduct warrants strict enforcement of the rules.

As to the second factor in *Heber,* Defendants have no meritorious defense. Tribal court jurisdiction over the underlying case, the ruling of which is sought to be enforced before this Court, is a matter of settled law, as detailed in the Complaint. The facts are not in dispute. It is plain on the face of the Answer that Defendants' have no meritorious defense.

Third, the Tribe would be prejudiced if default were entered and then set aside. Again, the action before this Court seeks enforcement of a judgment rendered on September 29, 2015, of the Ute Indian Tribal Court of the Uintah and Ouray Reservation enjoining Defendants from illegally diverting the Tribe's water and awarding damages to the Tribe for conversion of tribal water. Not only have Defendants snubbed the Tribal Court's order for damages, but they have willfully violated the Court's order enjoining Defendants' use of the Tribe's water. The longer this enforcement litigation proceeds, the greater the expense the Tribe must bear and the greater the loss of the Tribe to protect

its own interests through no fault of its own. The Tribe has a strong interest in protecting its most precious resource, water. If default were entered and then set aside, Defendants would be able to prolong this litigation and delay final resolution of this matter. If the Court finds, correctly, that the Clerk erred in failing to enter default, default must be entered and must not be set aside.

### III. The Court Should Grant the Tribe's Motion for Default Judgment

Finally, the Court should grant the Tribe's motion for default judgment because the seven factors that determine whether default judgment should be entered land in favor of the Tribe. 1) The delay caused by denial of the Tribe's motion would prejudice the Tribe as discussed above. 2) This case is a matter of legal issues, and settled law dictates that the Tribe should prevail on the merits. 3) The Complaint is more than sufficient, and Defendants have not challenged its sufficiency. 4) The substantial amount of money Defendants owe the Tribe supports granting the Tribe's motion. 5) There is no reason to expect a dispute of the material facts, and Defendants did not dispute them in their opposition to the Tribe's motion. 6) Defendants' default was not due excusable neglect, as discussed in section I, *supra*. Only the seventh factor, the policy favoring decisions on the merits, weighs against the Tribe. Because all but one of the factors support the Tribe, its motion for default must be granted. In addition, the Court should grant the Tribe's motion for public policy reasons. "[D]efault judgment has been recognized as a significant procedural tool for enforcing compliance with rules of procedure . . . and for disciplining the obstructionist adversary who willfully ignores the processes of the Court." *In re Uranium Antitrust Litigation*, 473 F.Supp. 382 (N.D. Ill. 2979). It is crucial to the judicial

process that rules of civil procedure be enforced and adhered to. Default judgment acts as a deterrent against subsequent violations of the rules like the one committed by Defendants, and it must be used here for that reason.

Respectfully submitted this 25th day of February, 2019.

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