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COPY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of)
Rights to the Use of Water from the)
Snake River Basin Water System)
)

Case No. 39576

The State of Idaho, ex rel. R.)
Keith Higginson in his official)
capacity as Director of the Idaho)
Department of Water Resources,)
Petitioner,)

MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE
OBJECTION TO THE
DIRECTOR'S REPORT

vs.)

Sub Case: 57-10917
57-10921
57-10923
57-10924
57-10944
57-10945
57-10947
57-10660

The United States; the State of)
Idaho; and all claimants to the)
use of Water from the Snake River)
Water System,)
Respondents.)

This Memorandum of Chipmunk Grazing Association, Inc., is filed in support of its Motion to file a late Objection to the Director's Report. In summary, Chipmunk Grazing Association urges the Court that the Motion should be granted because the exact same issues of fact and law are already before the Court with regard to other Objections filed by the Department of the Interior, as well

as other Objections filed by Chipmunk Grazing, and the Responses of each party, as well as Responses by the State of Idaho. Since the same issues of fact and law are already before the Court, there would be no harm or prejudice to any party that the late Objections be allowed and consolidated with the other Objections, and decided and determined by the Special Master and this Court.

PROCEDURE, FACTS AND BACKGROUND

A summary of the background of the various Objections filed by both the Department of the Interior and Chipmunk Grazing Association, Inc., is necessary to understand the issues before the Court.

a. The Water Right Claims of Chipmunk Grazing & Interior

The water right claims at issue in this matter between Chipmunk Grazing Association, the Department of the Interior, and the State of Idaho/Director of Water Resources, pertain to stockwater rights of Chipmunk Grazing Association, Inc., and alleged in-stream water right claims of Interior, with regard to certain creeks in Basin 57 of Southwestern Idaho. The sub-case numbers cited above relate to different creeks:

1. Sub-Case No. 10917 pertains to Chipmunk Grazing Association stock water claims in Little Squaw Creek, Sage Hen Gulch, Unnamed Stream, McBride Creek and its forks;
2. Sub-Case No. 10921 pertains to Chipmunk Grazing Association stock water claims in Jump Creek and Bridge Creek;
3. Sub-Case No. 10923 pertains to Chipmunk Grazing Association stock water claims in Jump Creek;
4. Sub-Case No. 10924 pertains to Chipmunk Grazing

Association stock water claims in Peters Gulch and Reynolds Creek;

5. Sub-Case No. 10944 pertains to Chipmunk Grazing Association stock water claims in a developed spring named Upper Rats Nest Spring;
6. Sub-Case No. 10945 pertains to Chipmunk Grazing Association stock water claims in a developed spring named Rosebud Spring;
7. Sub-Case No. 10947 pertains to Chipmunk Grazing Association stock water claims in Squaw Creek;
8. Sub-Case No. 10660 pertains to Chipmunk Grazing Association stock water claims in Little McBride Creek.

Prior to the Director's Report being issued, Chipmunk Grazing claimed stockwater rights in all of said creeks, including the main stem of the creeks and the extreme upper reaches of the creeks. Ted Blackstock and Chipmunk Grazing own cattle, and possess B.L.M. grazing permits, in and around said creeks, including the main stem of the creeks and the extreme upper reaches of the creeks.

Prior to the Director's Report being issued, the United States, Department of the Interior, claimed alleged in-stream water rights for the main stem of most of said creeks, excluding any stretch of the creeks that passed through deeded private property. The United States, Department of the Interior, also did not make any claim to alleged in-stream water rights for the extreme upper reaches of the creeks that were within the confines of public land administered by the B.L.M.

b/1. The Director's Report/Main Stem of Creeks.

The Director's Report then came out. The Director, State of

Idaho Department of Water Resources, recommended (in summary) that for the main stem of said creeks not within the confines of private land, the claimed in-stream water right should be awarded to the United States, Department of the Interior (B.L.M.). The Director reasoned that since the Department of the Interior owned the public land, then the claimed in-stream water right for those selected areas should be awarded to it. Shortly thereafter, Chipmunk Grazing Association, Inc./Ted Blackstock, filed a timely Objection to this recommendation of the Director's Report for, among other reasons, the fact that Chipmunk Grazing Association, Inc., possessed the permit allowing it to graze cattle upon the public lands surrounding the creeks and it was only Chipmunk Grazing Association/Ted Blackstock's cattle who were mainly responsible for making the beneficial use of the water out of the creeks. (Chipmunk Grazing Association, Inc., is a grazing association and Ted Blackstock is one of its members and shareholders, whose cattle graze in the areas surrounding the above named creeks.) Chipmunk Grazing Association asserted that its claimed stock water rights should have been granted instead of Interior's claimed water rights. The State of Idaho, Department of Water Resources, filed a Response to the Objection of Chipmunk Grazing Association. The U.S. Department of the Interior also filed a Response to the Objection of Chipmunk Grazing Association.

b/2. The Director's Report/Upper reaches of creeks.

In addition, the Director, State of Idaho Department of Water Resources, recommended that for the upper reaches of the creeks in

areas owned and administered by the B.L.M., the claimed stock water rights of Chipmunk Grazing Association, should be awarded to it because no other entity or person claimed any of said rights in the upper reaches of the creeks. Shortly thereafter, the U.S. Department of the Interior filed an Objection to the Director's Report. The State of Idaho thereafter filed a Response to Interior's Objection. Chipmunk Grazing Association also filed a timely Response to the Interior's Objection, and furthermore, within the Response, Chipmunk Grazing Association, stated the following:

"CHANGES TO THE DIRECTORS REPORT

Respondent (Chipmunk Grazing Association) would like the Director's Report to reject the BLM Objection and properly identify this water right as ours, together with the source, quantities, described points of diversion or in-stream flows, purpose of use, time of use, and place of use as requested and applied for in our original claim enclosed."

c. Motion to file Late Objection to Director's Report.

Chipmunk Grazing Association, Inc., acting without an Attorney, believed that the issues were properly framed before the Court. Indeed, it is respectfully urged that all issues are in any event before the Court because they are included within the various Objections/Responses that have already been filed in the 8 Sub-cases. However, even though the foregoing Objections and Responses were filed, Chipmunk Grazing Association/Blackstock learned that it may be wise to file a separate and supplemental Objection to the

Director's Report on the basis that the Director failed to affirmatively grant the main stem stock water right claims of Chipmunk Grazing Association, Inc. In other words, Chipmunk Grazing Association already had filed a timely Objection to the Director's Report on the basis that the Director erred in granting the claimed main stem creek in-stream water rights of Interior; however, Chipmunk Grazing Association, had not yet filed an Objection to the Director's Report for not granting the affirmative relief requested of Chipmunk Grazing Association in awarding to it its claimed main stem creek stock water rights. Chipmunk Grazing Association had assumed that if its Objection prevailed as to the Interior's main stem creek in-stream claim, then automatically the Chipmunk Grazing Association stock water right claim would be recommended because there would, at that time, be no other competing claim to the same water.

Regardless of what was, or was not, the procedural law in the case, on or about June 29, 1993 Chipmunk Grazing Association filed a Motion, and Late Objection, objecting to the Director's Report for not affirmatively granting the claimed stock water rights of Chipmunk Grazing Association in the main stem of the creeks. No party was taken off-guard and no party has or will be prejudiced by the late Objection. The issues were already before the Court.

ARGUMENT

Even to Attorneys, it is easy to see how a non-Attorney could be confused about the procedural framework relating to the

Director's Report, and Objections and Responses thereto. It becomes even more confusing when, as in this case, the cross-Objections of the litigants (Chipmunk Grazing Association and Interior) to the Director's Report, and the Responses thereto, appear to cover all issues. As stated previously, it is not even certain whether legally under the SRBA procedural framework it was, or is, necessary for Chipmunk Grazing Association in this matter to file the separate and supplemental Objection as to the Director's Report for the Director's alleged failure to affirmatively grant all relief requested by Chipmunk Grazing Association in its water right claims. In light of the foregoing, it was certainly excusable neglect for Chipmunk Grazing Association to file the late, separate and supplemental Objection. Attorneys and lay people alike, under the circumstances in these Sub-cases, could be confused as to how many Objections and Responses are actually necessary to preserve all rights and claims before the Court.

This Court has incorporated the Idaho Rules of Civil Procedure into this SRBA action. Rule 60(b) provides that:

On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .

Rule 60(b) may not be direct authority because no Judgment has been entered in the case. However, the Rule does permit a party to have relief from Orders when there has been mistake or excusable neglect, and the party does have a defense or justiciable issue to be decided, and no party has been harmed by the delay or

modification of the earlier Order. See, generally, Schraufnagel v. Quinowski, 113 Idaho 753 (App. 1987). In Schraufnagel, the Idaho Court of Appeals stated the following:

We are mindful of the general rule in Idaho that pro se litigants are normally held to the same rules as those represented by attorneys. (Cites). However, this is not a case where the pro se litigant seeks exemption from a rule. Rather, he seeks to invoke a rule, I.R.C.P. 60(b)(1), which is available to all litigants. In applying that rule we perceive a difference between persons whose indifference leads to entry of judgment by default, e.g. Newbold v. Anderson, supra, and those who take affirmative steps to plead their own case but fail because they misperceive the intent of a court document.

Our holding is consistent with Idaho's policy favoring disposition of cases on their merits. In Orange Transportation Co., v. Taylor, 71 Idaho 275, 280-81, 230 P.2d 689, 692-93 (1951), our Supreme Court said:

What constitutes excusable neglect, or just how a reasonable (sic) prudent person should act under similar circumstances are comparative terms and the decisions as to when a default and a judgment may be set aside and answer permitted, may appear at times to be somewhat in conflict Each case must be examined in the light of the facts presented, and the circumstances surrounding same.

* * * *

In doubtful cases, the general rule is to incline toward granting relief from the default and bring about a judgment on the merits.

113 Idaho at 755.

In the case at bar, there has been no Scheduling Order entered as of yet, no discovery has yet taken place, no hearings have been set in the Sub-cases, and no party has been without notice that Chipmunk Grazing Association, Inc., has claimed, and always claimed, that it wanted its stock water rights decreed just as originally set forth, despite the recommendation of the Director's

report. The timely filed Objections and Responses of Chipmunk Grazing Association gave notice of this position of Chipmunk Grazing Association.

The conduct of Chipmunk Grazing Association in delaying the filing of the last supplemental Objection was excusable. Chipmunk Grazing Association thought that the earlier filed pleadings (Objections and Responses) covered the issues. It is respectfully urged that the previously filed Objections and Responses have already placed before the Court the issues necessary to litigate Chipmunk Grazing Association's claims/objections to the Director's Report. No harm or prejudice has been suffered by any party. In light of the facts of this case, it is easy to understand how Chipmunk Grazing Association, acting without an Attorney, could be confused as to the procedural framework.

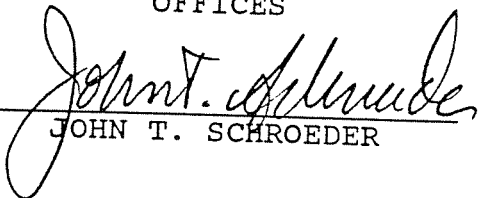
CONCLUSION

Chipmunk Grazing Association respectfully urges the Court to grant its Motion to file the supplemental late Objection to the Director's Report. The facts, law and issues are already before the Court as referenced in the previous, timely filed Objections and Responses by Chipmunk Grazing Association, Inc. Chipmunk Grazing Association has a defense and justiciable issue in the case because it is its (or member's) cattle that beneficially use the water. Chipmunk Grazing Association claims that the Director's Report should have awarded it the stock water rights on the main stem of the creeks. Idaho water law is based upon beneficial use.

A party making beneficial use of water can have such a water right claim upon property owned by another. Stock water rights are very important to Chipmunk Grazing Association, Inc., and its members; its continued operation depends upon them. Case law in Idaho favors having cases heard on the merits, as opposed to having cases decided by default. Chipmunk Grazing Association has not been negligent in preserving its claims. Chipmunk Grazing has been persistent in timely filing Objections and Responses, and it should be entitled to have its claimed stock water rights heard and decided upon the merits.

Respectfully submitted and dated this 13th day of October, 1993.

SCHROEDER & LEZAMIZ LAW
OFFICES

By 
JOHN T. SCHROEDER

CERTIFICATE OF HAND DELIVERY AND MAILING

I HEREBY CERTIFY That an un-signed copy of the foregoing Memorandum in Support of Motion to file Late Objection was mailed, postage pre-paid by first class mail, to the following Counsel on the 04th day of October, 1993, and I HEREBY CERTIFY That another copy of the foregoing Memorandum, duly signed, was hand delivered to the following Counsel on the 13th day of October, 1993:

Chief, Natural Resources Division
Office of Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

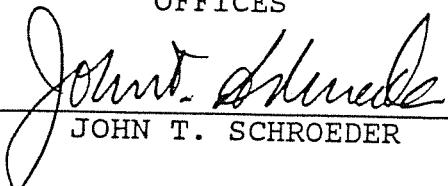
The United States Department of Justice
Environment and Natural Resources Division
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Ms. Daria Zane, Esq.
Boise Adjudication Team
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Mr. Alan Johnstone
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(mail only)

The purpose for the prior mailing on October 04, 1993 was to give said Counsel advance notice. Dated this 13th day of October, 1993.

SCHROEDER & LEZAMIZ LAW
OFFICES

By 
JOHN T. SCHROEDER

Affidavit of Ted Blackstock/Chipmunk
Grazing..... 10/14

Mr. Schroeder is sending copy
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