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Harry Richard Bass, Richard Brandau,
Ted Blackstock, Joyce Livestock and
Chipmunk Grazing Association

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

IN RE:
SRBA

Subcases Nos. 57-11124
et al.

Case No. 39756

MEMORANDUM IN SUPPORT OF
MOTIONS TO EXTEND TIME
FOR RESPONDING TO UNITED
STATES FIRST SET OF
INTERROGATORIES, REQUESTS
FOR ADMISSIONS AND REQUEST
PRODUCTION OF DOCUMENTS

The claimants-objectors have filed motions to extend the time for responding to the United States First Set of Interrogatories, Requests for Admissions and Request for Production of Documents. On June 18, 1996 the United States discovery documents were received by counsel for the claimants-objectors. As shown by the affidavit filed in support of the Motions for Extension, the claimant-objectors are not corporate ranchers. They are individual ranchers

who are responsible for the daily operational chores of running their ranches. As also shown by the affidavit of Dr. Chad Gibson, the month beginning with the date the United States discovery documents were served is one of the busiest months for these ranchers who operate on the west side of Owyhee County. It is the time of season when the ranchers must devote priority to moving livestock so that BLM restrictions will not be violated. It is the time of season when the high temperatures make movement of newly born calves very hazardous and they must be watched closely throughout the stock movements. It is the time when haying chores become critical because if the hay is not cut as soon as possible, there will not be enough moisture for the production of any further crop during the year. Moreover, this year, the daily chores of the ranchers were complicated by the necessity of fighting fire which threatened and destroyed winter feed in thousands of acres of this portion of Owyhee County. The daily chores, and the necessity of fighting the fires, could not be assigned to a ranch staff because these claimants-objectors are the "ranch staff" for their operations. The month following receipt of the United States discovery documents was one of the worst possible months for the claimants to be able to search out their documents showing chain of operation and to be able to sit down with counsel to put together responses to discovery.

A Motion to Extend time for responding to discovery was

filed requesting extension to July 3, 1996 (even though, under Rule 36(a), Idaho Rules of Civil Procedure the due date would be July 3, not July 1 as previously indicated by the United States). The claimants accepted the July 1 due date and requested an extension in good faith believing that the extra two days would give them sufficient time to meet with counsel and prepare responses. The reasons for that extension were spelled out in the Motion. The counsel for the United States stipulated to the extension, and the extension was granted by the Court.

In the meantime, wild fire broke out in the vast area extending from west of Swan Falls along the Snake River over the Murphy Flat. The fires covered several thousand acres and burned for the better part of six days. As pointed out in the Second Motion to Extend Time, the fire threatend and destroyed winter feed of Joyce Livestock. All of the claimants-objectors participated in the fire fighting effort while also keeping up with their daily chores on their ranches. Just as the main fire was brought under control, another fire caused by fire works broke out near the Jump Creek area where the spring feed of Ted Blackstock exists.

The urgency of the ranch chores, coupled with the urgency of fighting fires, prevented the claimants from meeting with counsel and completing responses. Counsel for the United States was advised of the emergency fire situation and the reason for the delay beyond the date of July 3. Counsel did not stipulate to a further extension,

but did advise the office of counsel for the claimants that the summary judgment memorandum for the Government had been completed and was being circulated for approval. Counsel should have formally moved for further extension, but did not do so, believing that finalization of responses was imminent. A second motion for extension was finally filed, requesting extension to and including July 16, 1996.

When the responses were completed (with the exception of production of many documents which claimants are seeking to collect), a Third Motion for Extension was filed with the responses, and the Motion set forth the chronology of events leading to the delay. The United States filed no motion to compel. The United States Motion for Summary Judgment and Memorandum in Support of Summary Judgment were received by counsel for the claimants-objectors on July 22, 1996, one week after the due date. (The due date set by the Court was Saturday, July 13, 1996; the United States considered, as did the claimants-objectors, Monday, July 15, 1996 to be the due date because of the week-end situation.) The Memorandum set forth the ground of exclusivity as the reason for seeking summary judgment. The argument in support of that ground is the same with or without the responses to discovery. The content of the Memorandum makes it apparent that the argument in support of that ground is the argument which the United States had completed and was in the process of reviewing when discussions as to delays in discovery responses were entered into between counsel

for the United States and counsel for the claimants. So, the United States has not been prejudiced by the 16 day delay in responding to the first discovery served on the claimants. Had the United States been prejudiced, it could have requested an extension of time for filing its Motion and Memorandum. It did not do so. On the other hand, to hold these claimants to admission to the Requests for Admissions calling for admission of contested issues because of delays caused by the critical chores facing the claimants at this particular time of year would be highly prejudicial to them. To hold them to such a harsh result would not be consistent with the purpose of the Rules of Civil Procedure as stated in Rule 1: "These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." The claimants respectfully request that the Court exercise its sound discretion and grant the motions to extend time for responding to discovery because of the good cause shown by the claimants for the short delay.

Claimants recognize, and respect, the Court's statement that as a general matter the Court will not grant a motion to extend which is filed after the due date. Because of the circumstances in this case which prevented the claimants from being able to finalize their responses in the time provided by Rule 36(a), the claimants request that the Court grant the motions to extend in this particular case so that the issues as to beneficial use can be determined on the

merits.

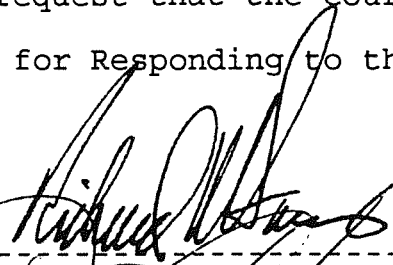
Claimants request that the Court consider the lack of "unfair prejudice" to the United States resulting from the delay, and consider this lack of prejudice in exercising its discretion. See *Nahas v. Hulet*, 114 Idaho 23, 752 P.2d 625 (App. 1988). Rule 6(b), Idaho Rules of Civil Procedure allow the Court to grant the motions even though the time for response expired before the motions were formally filed. There is excusable neglect present in this case because of the critical ranching events which prevented the claimants from locating documents and meeting with counsel to finalize responses. Counsel should have filed the formal motions to extend, but continually believed that finalization of responses was imminent. Counsel did maintain communication with counsel for the United States regarding the delays, but should have filed formal motions prior to deadline. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L. Ed.2d 74 (1993), the United States Supreme Court pointed out that the determination whether to extend time pursuant to Rule 6(b) is "an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good

faith." 113 S.Ct. at 1498. In the instant case, the length of delay is short indeed---just 16 days from the original due date on first discovery served. The danger of prejudice to the United States is slight, given the issue which the United States has raised in its brief, given the fact that the United States brief was drafted prior to the first request for extension and given the fact that the United States was not required to request an extension for filing its Motion and Memorandum. The delay will not prejudice the time schedule for final motions for summary judgment and for trial set by the Court. But, denial of the extension will severely prejudice the factual presentations of the claimants, so the potential impact of the denial on these proceedings will be a denial of findings on the merits as to the claimant's position as to "first in time". There is nothing in the record to show bad faith on the part of the claimants designed to unduly delay these proceedings. Given the facts and circumstances, the claimants believe they meet the guidelines for a grant of extension of time as set forth in Pioneer Investment Services, supra. Courts generally have liberally interpreted the Rules regarding extension of time in situations not involving a jurisdictional time limit so that substantial justice can be achieved. See Traguth v. Zuck, 710 F.2d 90 (2d Cir. 1983) and other cases cited in Moore's Federal Practice, Section 6.08 "Practice Under Rule 6(b)". The claimants respectfully request that this Court grant that same liberal interpretation to the Rules and

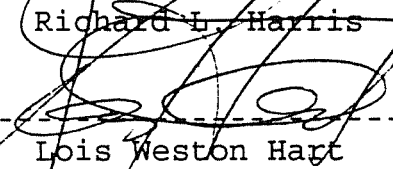
grant the motions to extend time for responding to the United States first set of discovery.

CONCLUSION

The claimants respectfully request that the Court grant the Motions to Extend Time for Responding to the United States discovery.



Richard L. Harris



Lois Weston Hart