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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER
APPROPRIATORS, INC, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and BINGHAM GROUND WATER
DISTRICT,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER
RESOURCES and GARY SPACKMAN in
his official capacity as Director of the Idaho
Department of Water Resources,

Respondents.

Case No.: CV01-23-8187

**MCCAIN FOODS USA, INC.'S
RESPONSE IN GROUND WATER
DISTRICTS' MOTION TO STAY,
MOTION FOR INJUNCTIVE RELIEF,
MOTION TO COMPEL, MOTION FOR
EXPEDITED DECISION AND
APPLICATION FOR ORDER TO
SHOW CAUSE**

IN THE MATTER OF THE DISTRBUTION
OF WATER RIGHTS TO VARIOUS
RIGHTS HELD BY AND FOR THE
BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS
RESERVOIR DISTRICT NO. 2, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, MINIDOKA
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY

COMES NOW, McCain Foods USA, Inc. (“McCain”) by and through the undersigned counsel and joins the Ground Water Districts’ *Motion for Stay, Motion for Injunctive Relief, Motion to Compel, and Motion for Expedited Decision, and Application for Order to Show Cause* (collectively “GWD Motions”) filed on May 19, 2023 in this matter.

BACKGROUND

McCain is not a party to the underlying delivery call action that prompted the *Amended Fifth Methodology Order for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Fifth Methodology Order”). McCain did not receive notice of the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* (“As-Applied Order”) nor notice of the May 5, 2023, deadline contained therein to provide mitigation for water rights junior to December 31, 1953, or be curtailed. Nor did McCain receive notice of the hearing date set six weeks after the Fifth Methodology Order and the As-Applied Order were issued. McCain only received notice of the Fifth Methodology Order, As-Applied Order, (collectively the “2023 Orders”), the May 5th deadline and the hearing because its counsel, McHugh Bromley, PLLC, also represents a number of cities on the Eastern Snake Plain who are directly involved in the Surface Water Coalition delivery call. The first time McCain received anything from the Department was on May 12, 2023 via a letter that said water rights junior to December 31, 1953 were subject to curtailment. Declaration of McHugh, Ex. A. This letter did not identify any water right numbers. McCain has no water rights senior to December 31, 1953. McCain has never been on the curtailment list for the SWC Delivery call until this year when IDWR, without prior notice, changed from the use of a steady-state model to transient model.

Because Ms. McHugh was aware of the SWC delivery call and the 2023 Orders, she advised McCain of the 2023 Orders and authorized her to file a Request for Hearing and

Objection. Declaration of McHugh Ex. B. This was followed by a Statement of Issues.

Declaration of McHugh Ex. H.

Ms. McHugh advised McCain on or about early December of 2022 that the Director and the Department were looking to amend the way they administer water rights on the Eastern Snake Plain Aquifer. As part of that process, Ms. McHugh advised McCain that IDWR was considering changing from the use of steady-state modeling to transient modeling to determine the priority date that would be curtailed to in the event there was a forecasted injury to a member of the Surface Water Coalition. Declaration of McHugh ¶ 8. In early January 2023, McCain authorized Ms. McHugh to contact the attorney for the SWC and to engage an expert to explore a possible mitigation plan; thus, Ms. McHugh contacted Travis Thompson, attorney for a number of the entities that make up the SWC. On or around the end of January 2023, Ms. McHugh became aware that IDWR staff was not recommending the use of transient modelling to determine the priority date cut. Declaration of McHugh Ex. C. Nonetheless, McCain continued to work towards gathering information on its diversion and use and engaged technical experts to evaluate what amount of water McCain consumes and to explore mitigation options. Ms. McHugh was in contact with Mr. Thompson a couple more times during this period saying McCain was gathering information which it would share with him as soon as it was done with its analysis. On or about April 6, 2023, Ms. McHugh received a preliminary report which would assist McCain in developing a mitigation plan. McHugh Declaration at ¶ 12. During this time, Ms. McHugh again reached out to Mr. Thompson saying that McCain continued to be interested in working with the SWC to develop a mitigation plan and that McCain had been in the process of analyzing its water use. Id.

Before McCain could fully evaluate the preliminary report and develop a proposed mitigation plan, the Director issued the Fifth Methodology Order and As-Applied Order on April 21, 2023. Ms. McHugh advised McCain of the May 5, 2023 deadline contained in the As-Applied Order, pre-hearing date of April 28, 2023 and the hearing date of June 6, 2023. McCain authorized Ms. McHugh to file a Request for Hearing and Objection to the 2023 Orders for various reasons, one being a lack of due process. Declaration of McHugh Ex. B. McCain also authorized Ms. McHugh to contact Southwest Irrigation District to inquire if McCain could join it and its mitigation plan. By letter to SWID, McCain requested to join SWID. Declaration of McHugh Ex. D. McCain also filed a Notice of Mitigation meeting the May 5, 2023 deadline. Declaration of McHugh Ex. E.

Joining SWID was McCain's only option to meet the May 5, 2023, deadline based on the Director's comments on the record that developing an individual mitigation plan was likely not going to be considered timely. Declaration of McHugh, ¶13 and Ex. F Spackman Tr: 46:13-25 (those without mitigation plans "better hurry up" but our "processes might prevent them, honestly.") In addition, the Department published on its website a document titled: *Surface Water Coalition Delivery Call, Amended 5th Methodology and April 2023 As-Applied Orders FAQs* which stated:

• What if I am a processor NOT participating in an approved mitigation plan?

You are subject to curtailment. However, you do have the option to join an approved mitigation plan. This is based on the parties in the approved mitigation plan to agree to add additional members.

• Can I submit a mitigation plan now and get it approved in time for this coming irrigation season?

It is unlikely that a mitigation plan can be approved before a potential curtailment order is issued. Once a plan is submitted, the plan must be advertised and is then subject to a protest deadline. The plan is subject to hearing if protested or if the Director determines a hearing is necessary. This process can take many months.

Declaration of McHugh Ex. G. Given the Director's comments and the FAQs, McCain had no option but to abandon its own mitigation plan to protect its water rights and business and thus, McCain joined SWID. See Declaration of McHugh Ex. E and I.

ARGUMENT

Without reiterating the arguments contained in the GWD's Brief in Support of the GWD's Motion, McCain joins in those arguments, but wants to highlight the due process issue it faced and continues to face under the 2023 Orders. As stated above, McCain did not actually receive any notice of the 2023 Orders of the May 5, 2023 deadline. Fortunately, it shared legal counsel with the Cities and was therefore made aware of the 2023 Orders that seek to curtail all of its water rights at its Burley facility. Declaration of McHugh at ¶¶ 3-5; see too the As-Applied Order p. 6.

McCain understands from the Director's comments that he will not actually curtail its water rights until "after" the hearing in June. Declaration of McHugh Ex. F. However, when he does decide to curtail, users will have no ability to mitigate unless they are covered by a previously approved mitigation plan. Declaration of McHugh, Exs. A, F, G and As-Applied Order at p. 6. Therefore, the process that the Director has undertaken has destroyed McCain's ability to protect its own water rights, without notice and without reasonable due process. Because water rights are real property rights, I.C. § 55-101, McCain should not be deprived or threatened with their deprivation without prior due process, *Clear Springs Foods, Inc. v. Idaho Dept. of Water Res.*, 150 Idaho 790, 814, 252 P.3d 71, 95 ("the owner of a water right must be afforded due

process of law”). However, that is exactly what the Director’s 2023 Orders do:

On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan. **If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.**

As-Applied Order at 6. (emphasis added)

Furthermore, the letter he issued (dated May 1, 2023 but received by McCain in Burley on May 12, 2023) stated:

Holders of ground water rights potentially subject to curtailment may also submit a proposed mitigation plan to the Director in accordance with Conjunctive Management Rule 43.1 See IDAPA 37.03.11.043. However, **please be aware the approval process for a mitigation plan is time-consuming. A proposed mitigation plan submitted now may not be approved in time for the 2023 irrigation season.** Upon receipt of a proposed mitigation plan, the Director will publish notice for two successive weeks, after which ten days will be allowed for the filing of protests. The Director may hold a hearing if necessary to determine whether a proposed mitigation plan will mitigate injury to the SWC caused by diversions of ground water authorized by junior priority ground water rights. If the proposed mitigation plan is protested, the Director will hold a hearing. **Please be advised that a curtailment order is not stayed pending evaluation of a mitigation plan.**

Declaration of McHugh, Ex. A (emphasis added). Thus, the Director really provided no real due process solution to McCain and other water users in the same situation. McCain’s only option is to now rely on a separate entity to stay in compliance with its mitigation plan or again face curtailment which was reiterated via an email from IDWR’s counsel Garrick Baxter to Ms. McHugh. Declaration of McHugh Ex. I; see too Exs. A, F, G.

CONCLUSION

The process set forth in the 2023 Orders deprived, and continues to deprive, McCain of the ability to protect its water rights through its own mitigation plan without due process. McCain received **no** notice until after the May 5, 2023 deadline and after all of the dates were set and it was too late to comply. This simply cannot be the way in which water administration in Idaho is done. Based on the foregoing, McCain joins the GWD's Motion and Requests for Relief.

DATED this 30th day of May, 2023.

/s/ Candice M. McHugh

Candice M. McHugh
Attorney for McCain

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May, 2023, I served a true and correct copy of the foregoing document was served through iCourt on the person(s) whose names and addresses appear below and on any other persons who have entered notices of appearance through iCourt:

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