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DEPARTMENT OF
WATER RESOURCES

**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

Case No. 39576

)
) Subcase No. 45-13970
)
) **SUPPLEMENTAL MEMORANDUM IN**
) **SUPPORT OF MOTION TO FILE LATE**
) **NOTICE OF CLAIM**
)

INTRODUCTION

McCain Foods USA, Inc. (McCain) filed its *Motion to File Late Notice of Claim 45-13970* to establish a more senior priority date of January 10, 1957 for, and ultimately replace, SRBA ground water right claim 45-2763, which was previously licensed, claimed, and recommended with a priority date of January 23, 1962.

On December 19, 2006, McCain's *Motion to File Late Notice of Claim 45-13970* was heard by SRBA Judge John Melanson. During the hearing, the Idaho Department of Water Resources (IDWR) requested the opportunity to present a list of already approved water right claims at the SRBA court which, like McCain's beneficial use Claim 45-13970, established earlier priority beneficial use rights predating and thus replacing junior priority licensed water rights. Any ruling on McCain's *Motion to File Late Notice of Claim 45-13970* was held until after the January 26, 2007 deadline for IDWR to submit this information

This *Supplemental Memorandum In Support of Motion to File Late Notice of Claim* discusses the Idaho Court decisions that support the longstanding practice of IDWR

recommending , and this Court approving, senior priority beneficial use claims¹ to replace previously issued junior priority licenses.

I. “IDWR has long had a policy allowing people to prove the existence of beneficial use rights that were subsequently documented with licenses having junior priority dates.”

The issue presented before this court is whether McCain can file a *Late Notice of Claim* for a beneficial use right that was established before a license was sought for the same use. This is not a new issue for IDWR. “IDWR has long has a policy allowing people to prove the existence of beneficial use rights that were subsequently documented with licenses having junior priority dates. IDWR has recommended hundreds of such rights, and perhaps even several thousand.”²

a. Buchanan claim No. 63-15170: an example of IDWR recommending a beneficial use claim that predates the license priority date.

The recent case of claim number 63-15170 is illustrative here. The original water right was licensed on November 13, 1969 with a priority date of June 14, 1967. Claimants Donna and Peggy Buchanan filed their beneficial use claim in the SRBA on March 28, 1989, claiming a beneficial use priority date of January 1, 1880. In addition, their claim contained the following remark:

THIS CLAIM REPLACES LICENSE NO. 63-7004 AS THE PRIORITY DATE
WAS NOT THE ACTUAL DATE OF FIRST USE AND THE IRRGATED
ACRES TOTALED MORE THAN 18 ACRES.³

On December 12, 2005, IDWR issued a recommendation with an April 1, 1900 priority date for the water right.⁴ The claimants, representing themselves *pro se*, claimed a January 1, 1880

¹ A detailed recitation of the procedural and factual background related to McCain’s beneficial use claim 45-143970 is included in the *Memorandum in Support of Motion to File Late Notice of Claim*, submitted by McCain on September 27th, 2006.

² *Supplemental Director’s Report Regarding Subcase No. 63-15170*, submitted to the SRBA District Court, Special Master Theodore Booth, on November 29, 2006, page 3.

³ *Supplemental Director’s Report Regarding Subcase No. 63-15170*, page 2.

priority date based on family documentation, but told IDWR agents that they would still “be satisfied with a 1900 priority date.”⁵ Thus, in the *Supplemental Director’s Report* submitted to the SRBA on November 29, 2006, IDWR deferred to its recommendation of an April 1, 1900 priority date in accordance with its policy recommending beneficial use rights that predate subsequent licenses, and because the claimants “satisfied” with this date.

It is IDWR’s legal basis for implementing this policy that is probative here. The *Supplemental Director’s Report* acknowledged the dilemma of an appropriator of a beneficial use right who needs to establish legal documentation of his right but has “no practical alternative other than to file an application for a permit . . . and ultimately receive a license for the right.”⁶ The *Supplemental Director’s Report* highlights the critical problem with this statutory procedure: the applicant cannot obtain a priority date that predates the application for permit, even though the beneficial use of the water commenced several years earlier. IDWR framed the issue as: “If an appropriator of a beneficial use right subsequently obtains a license for the right, does he lose the original beneficial use priority date?”⁷ The *Supplemental Director’s Report* provided this justification for IDWR’s policy of recommending earlier beneficial use claims:

Two early Idaho cases address this question.

In *Joyce v. Rubin*, 23 Idaho 297, 130 P. 793 (1913), an issue raised on appeal was the priority date of a water right. While not directly stated, it appears that the appellant asserted that the proper priority date of respondent Bennett’s right was the date of posted notice, the statutory procedure for recording a water right at that time, and not the date that the water was diverted and put to beneficial use. The Idaho Supreme Court addressed that issue as follows:

⁴ “As part of providing proof of beneficial use in order to obtain the license, the licensee submitted three affidavits of individual having knowledge of that use. While one of the affidavits attested to knowledge of beneficial use dating back to 1952, two of the affidavits attested to beneficial use dating back to 1900.” *Supplemental Director’s Report Regarding Subcase No. 63-15170*, page 8.

⁵ *Supplemental Director’s Report Regarding Subcase No. 63-15170*, page 8.

⁶ *Supplemental Director’s Report Regarding Subcase No. 63-15170*, page 4.

⁷ *Supplemental Director’s Report Regarding Subcase No. 63-15170*, page 4.

[I]t appears that the Bennetts posted water right notices on the first day of June, 1889 . . . The evidence shows that ditches for the conveyance of such water had been constructed years before the posting of said notices, and that water had been conducted through them from year to year up to the time of posting such notices . . . The posting of such notices in no way deprived them of the date of priority to which they were entitled under their actual appropriation of such water. (Emphasis added by IDWR.)

23 Idaho at 306.

In the case of *Newport Water Co. v. Kellogg*, 31 Idaho 574, 174 P. 602 (1918) the Idaho Supreme Court extended the holding in *Joyce, supra*, to water right licenses stating the matter simply as follows:

By obtaining the issuance of this license, respondent did not waived any rights it may have had previously through actual diversion and application to a beneficial use.

31 Idaho at 578.

IDWR has interpreted Idaho Code § 42-219(4) and these cases as providing that, although an appropriator who obtains a license can obtain with that license only a priority date of the day the application for permit was filed, the issuance of that license does not extinguish any pre-existing beneficial use rights the appropriator may have developed. In the SRBA, IDWR therefore has adopted a policy that any claimant may claim, and prove the existence of a pre-existing beneficial use right even if the right were subsequently licensed. IDWR does not view this as modifying the license; rather, it views it as merely recognizing a pre-existing beneficial use right as required by the *Joyce* and *Newport Water Co.* cases. (Emphasis added.)⁸

b. The McCain and Buchanan claims have critical similarities which make it appropriate to claim an earlier beneficial use priority date under both IDWR policy and Idaho case law.

McCain's claim 45-13970 has critical similarities to the Buchanan case which make it appropriate for the SRBA court to allow the *Late Notice of Claim* to allow a beneficial use claim with a priority date of January 10, 1957. First, there is no question in either case that beneficial use of the water right predates the priority date on the license. Second, in both cases, the claimants requested (via a *Notice of Claim* for Buchanan, and via a *Standard Form 1 Objection*

⁸ *Supplemental Director's Report Regarding Subcase No. 63-15170*, pages 4 – 6.

and *Motion to Amend Claim* for McCain) earlier priority dates that were at odds with what IDWR recommended for their claims. Third, and most importantly, in both cases IDWR was not opposed to, and has not objected to, the claimant filing a beneficial use claim that predates that license claim because it accords with IDWR's policy discussed *supra*.

There is one difference between McCain and Buchanan which must be addressed. The Buchanan *Notice of Claim* requested an earlier priority date than the license, whereas the McCain *Notice of Claim* requested the same priority date as the license. This is where the facts diverge in these two cases. At the time the Buchanan's filed their *Notice of Claim*, "evidence of the claimed 1880 priority date had [already] been found."⁹ This is why the 1880 priority date was claimed in the *Notice of Claim*. The McCain *Notice of Claim* stated the 1962 priority date on the license because no information supporting an earlier date of beneficial use was known at the time. Only after IDWR issued the *Director's Report* which recommended that the SRBA court decree the 1962 priority date did a review of documents at the Idaho Historical Library in Boise, Idaho reveal that the use of water had begun in 1957.¹⁰ However, in both Buchanan and McCain , as soon as the claimants had proof of their earlier beneficial use, IDWR did not contest the filing of beneficial use claims predicated on earlier priority dates.

II. The River Grove Farms and Facility Volume SRBA decisions are factually and legally distinguishable from McCain's claim 45-13970.

Because this *Supplemental Memorandum* discusses the binding effect of prior licenses, the *Memorandum Decision and Order on Facility Volume*, and the *River Grove Farms Memorandum Decision and Order* must be mentioned. However, these two decisions are factually and legally distinguishable from McCain and Buchanan.

⁹ *Supplemental Director's Report*, page 8.

¹⁰ See Affidavit of Celeste Thaine in Support of *Motion to Amend SRBA Claim 45-2763*, Exhibits A and B. This affidavit is Exhibit L to the Affidavit of Celeste Thaine in Support of *Motion to File Late Claim 45-13970*, submitted on September 27, 2006.

The *Facility Volume* decision and the *River Grove Farms* decision addressed issues related to differences between SRBA recommendations and previously licensed water rights. Neither case involved the existence of an earlier priority date water right (by actual diversion and application to a beneficial use) predating the application for license.

The *Facility Volume* decision addressed what the SRBA court described as IDWR's efforts to retroactively insert restrictive language (the facility volume "remark") into licenses. The SRBA court rejected the language after finding that the remark itself was at least tacitly "intended to directly deal with regulating [fish] production."¹¹ SRBA Judge Wood quoted Special Master Haemmerle that, "To the extent ... IDWR considered facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220."¹² Only the license was at issue in the *Facility Volume* decision.

In the *River Grove Farms* decision, a subordination clause from the IDWR licensing process was maintained in the SRBA recommendation for the licensed right. Just as in the *Facility Volume* decision, only the license was at issue.

Both Buchanan and McCain submitted beneficial use claims with priorities predating the license priorities because Idaho Code § 42-219(4) would otherwise corner the applicant into a priority date that corresponds with the date of application,¹³ even when the beneficial use

¹¹ *In Re SRBA 39576, Order on Challenge of the Consolidated Issue of "Facility Volume"*, December 29, 1999, page 9. (Emphasis added.)

¹² *In Re SRBA 39576, Order on Challenge of the Consolidated Issue of "Facility Volume"*, December 29, 1999, page 10; *quoting Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, July 31, 1998, page 9.

¹³ "The date of priority confirmed by the license shall be the date of the application for the permit for the construction of the works from which the water is taken, to which the right relates, provided there has been no loss of priority under the provisions of this chapter." Idaho Code § 42-219(4).

commenced years earlier.¹⁴ The licensed right and beneficial use claim are essentially separated, so the issuance of the license does not extinguish any pre-existing beneficial use rights.

Furthermore, “IDWR does not view this as modifying the license; rather, it views it as merely recognizing a pre-existing beneficial use right . . .”¹⁵

In addition, IDWR does not regard the Buchanan or the McCain beneficial use claims as “collateral attacks” on the license. It is highly probative that the “collateral attack” language of the *Facility Volume* decision does not appear anywhere in IDWR’s *Supplemental Director’s Report* analyzing the validity of the Buchanan beneficial use claim that predates the license priority date. The *Facility Volume* decision was not considered in the *Supplemental Director’s Report* because IDWR correctly recognized that the Buchanan claim (and now the McCain claim) are factually distinguishable from the *Facility Volume* decision. This is not a “collateral attack” fact pattern – *Facility Volume* does not apply.

The *Facility Volume* and *River Grove* decisions were not appealed to the Idaho Supreme Court. The *Facility Volume* decision has been cited as SRBA law of the case on the issue that the SRBA is not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings. Most recently, this application of the *Facility Volume* decision is seen in the SRBA court’s Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law (subcase 29-11609, October 6, 2006), pages 12, 13. The decision and order in subcase 29-11609 has been appealed to the Idaho Supreme Court. Notwithstanding any future outcome of this appeal, it can be noted that SRBA subcase 29-11609 presents issues related to interpretation of federal law, the Pocatello Townsite Act, and is

¹⁴ See discussion *supra*, pages 3-4.

¹⁵ *Supplemental Director’s Report*, page 6. (Emphasis added.)

distinguishable from McCain's 1957 priority beneficial use claim 45-13970 based on established Idaho law.

CONCLUSION

Based on the foregoing, McCain Foods USA, Inc., respectfully requests that its Motion to File Late Notice Claim 45-13970 be granted.

RESPECTFULLY SUBMITTED this 26th day of January 2007.

BEEMAN & ASSOCIATES, P.C.

By Josephine P. Beeman
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of January 2007, a true and correct copy of the foregoing document was sent to the following by the method indicated:

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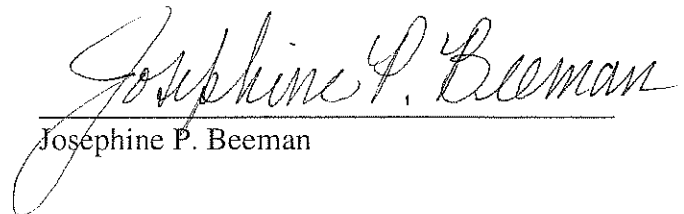
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