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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR - 2 / 2007	
By _____	Clerk
_____	Deputy Clerk

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

)
) ORDER GRANTING MOTION TO FILE
) LATE NOTICE OF CLAIM (McCain
) Foods USA, Inc.)
)
) For water right claim: 45-13970
)
)
)

I. BRIEF PROCEDURAL BACKGROUND

1. On September 8, 2006, McCain Foods USA, Inc. (McCain), by and through counsel, Josephine P. Beeman, filed a *Motion to File Late Notice of Claim* for water right claim 45-13970. The claim is to a beneficial use right alleged to precede a license subsequently issued for the same water use.¹ All elements of the beneficial use claim and the licensed right are identical in all respects except for the priority date.

2. A hearing was held on the *Motion* on December 19, 2006. At the hearing the Court initially communicated its intention to deny the *Motion* based on the priority date contained in the subsequently issued license. The Court viewed the matter as a collateral attack on a license. McCain and counsel for the Idaho Department of Water Resources (IDWR) requested the opportunity to submit additional information and/or briefing to the

¹ The term 'beneficial use' right as used herein refers to a water right established by diversion and application to beneficial use at a time prior to Idaho's permit system becoming mandatory.

Court prior to the Court rendering its decision. Per the request of the parties the matter was taken under advisement.

3. On January 26, 2007, both McCain and IDWR filed additional information and/or briefing. The Court also reviewed a *Supplemental Director's Report* filed by IDWR in subcase 63-15170 (Buchanan), which involves the same issue and is currently before a special master.

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

The last filing in this matter occurred on January 26, 2007. No additional briefing was requested and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or January 29, 2007.

III. STANDARD OF REVIEW FOR A LATE CLAIM

In the SRBA a motion to file a late claim is reviewed pursuant to I.R.C.P. 55(c), which sets forth the standard for setting aside the entry of a default. *See Administrative Order 1 (AO1)* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires)). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), a "good cause" standard is applied. I.R.C.P. 55(c). *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279. In applying the I.R.C.P. 55(c) "good cause" standard to the context of a motion to file a late claim the Court has consistently applied the following factors:

- 1) Whether the untimeliness was willful;
- 2) Whether granting the late claim would prejudice other parties to the adjudication who timely filed and adjudicated their claims; and
- 3) Whether a meritorious position has been presented.

See e.g. Order On permissive Review and Order of Recommitment (subcases 45-12475 *et al.*) (*Bedke Late Objection*) (August 2, 2005).

IV. DISCUSSION

A license was issued for the subject groundwater right at issue to McCain's predecessor-in-interest. The license specifies a priority date of January 23, 1962. McCain's late claim is to the same water use but claims an earlier priority of January 10, 1957, with all other elements the same as in the license. In support of its *Motion*, McCain has provided information that the water usage by its predecessor-in-interest actually originated in 1957, despite the priority date provided in the license. Since the claimed priority precedes the mandatory permit requirements for appropriating groundwater,² McCain seeks to base its claim on the earlier beneficial use method of appropriation as opposed to relying on the subsequent license issued for the water right.

The Court's initial assessment was that McCain's position is inconsistent with the law-of-the-case in the SRBA prohibiting collateral attacks on the elements of license. ***Order on Challenge of the Consolidated Issue of "Facility Volume" and "Additional Evidence Issue***, subcase no. 36-02708 *et seq.* (Dec. 1999); ***Memorandum Decision and Order on Challenge (River Grove Farms)***, subcase no. 36-08099 (Jan. 11, 2000). This assessment was based on the reasoning that the license was issued pursuant to a comprehensive administrative process in effect at the time and as such, any judicial review of the ultimate outcome should have been timely pursued in conjunction with the procedures provided for in the licensing statute and the *Administrative Procedures Act*, not a subsequent general adjudication. This reasoning considers the legal effect of the license similar to that of a prior decree issued for a particular water use. McCain's argues that its position is distinguishable, because its beneficial use of the water predated the mandatory permit requirement for appropriating ground water and therefore the water right could still be appropriated using the beneficial use method. McCain argues that it is simply proceeding on the beneficial use basis for the claim.

Consistent with McCain's argument, IDWR represented to the Court that where water use is claimed to have occurred prior to a licensed priority date, IDWR's policy is to recommend the earlier priority date if such use is demonstrated by the claimant. *See*

² On March 25, 1963, the permit system for the appropriation of groundwater became mandatory. Senate Bill No. 232, Idaho Sess. Laws ch. 216, §1, p. 623 codified in Idaho Code § 42-229.

IDWR Claims Investigation Handbook, § II.B.3, PRIORITY, Page 24. IDWR's policy is based on its interpretation of the cases of *Joyce v. Rubin*, 23 Idaho 297, 130 P. 793 (1913) and *Newport Water Co. v Kellogg*, 31 Idaho 574, 174 P. 602 (1918), which purport to stand for the proposition that the issuance a license does not extinguish any pre-existing beneficial use rights the appropriator may have developed. IDWR explained that it was not uncommon for beneficial use water right holders to obtain licenses for their water rights in order to document the existence of their water rights in lieu of initiating a judicial proceeding. By law however, IDWR was restricted to licensing the water right with a priority no earlier than the date the permit application was filed. *See* I.C. § 42-419(4).

After hearing the arguments, reviewing the materials submitted and reviewing the opinions in *Joyce* and *Newport Water Co.*, the Court is not conclusively convinced that claiming an earlier priority date based on beneficial use is not a collateral attack on a license. Somewhat implicit in the policy of allowing a claimant to seek an earlier priority date based on beneficial use is the notion of two parallel but separate water rights, one based on a license and the other on beneficial use and the claimant is simply pursuing the beneficial use right. It should however be acknowledged that prior to mandatory permitting, even though there was more than one method for appropriating a water right, there was only one water use and the elements and existence of that use were defined and confirmed through an administrative process, which among other things provided procedural due process including notice and an opportunity to be heard, together with a protest procedure and judicial review of the administrative determination.³ *See e.g.* Idaho Code § 42-203A and predecessor versions providing for an administrative grievance process.

As such, the Court has difficulty distinguishing this case from the situation where a water right was previously decreed via a consent decree and the claimant now claims in the SRBA an earlier priority based on the argument that the right actually used was

³ This situation is distinguishable from a dual-based claim where a claimant, typically the United States, files a claim to one water right based on the alternative legal theories of state and federal law. The distinguishing factor is that there has never been a prior judicial or administrative determination of the existence and elements of the water right.

different from the one adjudicated because it was appropriated earlier than specified in the consent decree and the claimant was merely using the earlier right.

The *Joyce* case is distinguishable because the posted notice method for appropriating a water right was more akin to a notice provision as opposed to an administrative process with the right of judicial review. In *Newport Water Co.*, the rationale enunciated in *Joyce* was arguably extended to licenses. However, the heart of the issue in *Newport Water Co.* was an evidentiary ruling regarding whether the lower court erred in admitting the license into evidence. In upholding the admission of the license the court in *Newport Water Co.* court correctly noted that even without the license being admitted into evidence the claimant could still establish a water right and stated “[b]y obtaining the issuance of this license, respondent did not waive any rights it may have had previously through the actual diversion and application to beneficial use.” *Newport Water Co.* at 578. The issue of whether a license precluded pursuing an earlier beneficial use claim for the same use was never squarely put before the Court. In fact, had the license been excluded from evidence there would be no issue regarding a collateral attack on the licensed right. Similarly, to the extent a prior decree is not introduced into evidence there also would not be an issue regarding *res judicata* and arguably the claimant could pursue the earlier priority date.

IDWR points out that it has recommended numerous rights based on this policy and these rights ultimately have been decreed and has provided examples of such. To the extent the claim was uncontested or the Court is not made aware of the existence of a license the issue would never be squarely before the Court. The same would be true for a prior decree. That being said, the Court acknowledges that there is still a colorable argument and justiciable controversy with respect to IDWR’s interpretation of, and reliance on the *Newport Water Co.* and *Joyce* opinions and therefore the issue remains unresolved at this time. Therefore in the context of the application of the meritorious defense requirement of the good cause standard the Court need not decide the issue in order to allow the late claim to proceed. The Court also acknowledges that McCain’s late claim is uncontested. In the event the director’s recommendation is also uncontested on the issue of priority the Court need not reach the issue. Finally, the Court notes that a

similar issue is currently on appeal before the Idaho Supreme Court with respect to a dual-based federal claim where the state-law basis for the claim was subsequently licensed. The resolution of that issue may be dispositive of the issues raised herein. Accordingly, McCain Foods has met the applicable standard and the *Motion* may be granted.

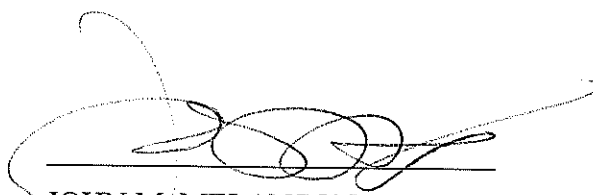
V. ORDER

THEREFORE, IT IS ORDERED, that the *Motion to File a Late Notice of Claim* for water right no. 45-13970 is **granted**.

The original Notice of Claim, as well as any attached filing fees, and a copy of this **Order** will be forwarded to the Idaho Department of Water Resources for further action.

The Court's same reasoning would apply to uncontested water right 63-15170 (Buchanan), involving the same issue and currently before a special master. A copy of this opinion will be provided to the special master assigned to the subcase.

Dated: March 1st, 2007



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

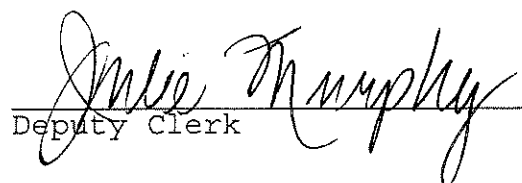
CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO FILE LATE NOTICE OF CLAIM was mailed on March 02, 2007, with sufficient first-class postage to the following:

MCCAIN FOODS USA INC

Represented by:
JOSEPHINE P. BEEMAN
409 WEST JEFFERSON STREET
BOISE, ID 83702
Phone: 208-331-0950

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".

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

CIVIL CASE NUMBER: 39576

Ident. Number 45-13970

Date Received

Receipt Number

LATE NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

2006 SEP 20 AM 10 21
FILED
TWIN FALLS CO., IDAHO
DISTRICT COURT

Please type or print clearly

1. Name of Claimant(s) McCain Foods USA, Inc. Phone 208-678-6723
Mailing Address P.O. Box 10
City, State, Zip Burley, Idaho 83318
2. Date of Priority (Only one (1) per claim) January 10, 1957
3. Source of water supply (a) ground water

Which is tributary to (b)

4. a. Location of point of diversion is: Township 10S Range 22E Section 23
SWSW Lot 3 within Cassia County
SWSESW Lot 2 within Cassia County
SESESW Lot 2 within Cassia County
SWSWSE Lot 1 within Cassia County
SESWSE Lot 1 within Cassia County

Additional points of diversion if any:

b. If instream flow, beginning point of claimed instream flow is:

Township _____ Range _____ Section _____, _____ ¼ of _____ ¼ of
_____ ¼, Govt. Lot _____ B.M., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc.), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well.
6. Water is claimed for the following purposes:
- | | (cfs) | (acre feet) |
|--|-----------|-------------|
| For Industrial purposes from 01/01 to 12/31 amount | 2.660 cfs | |
7. Total quantity claimed (a) 2.660 (cfs) and/or (b) (acre feet)
8. Total consumptive use claimed is
9. Non-irrigation uses; describe fully. (Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.)

10. Description of place of use:
- If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
 - If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

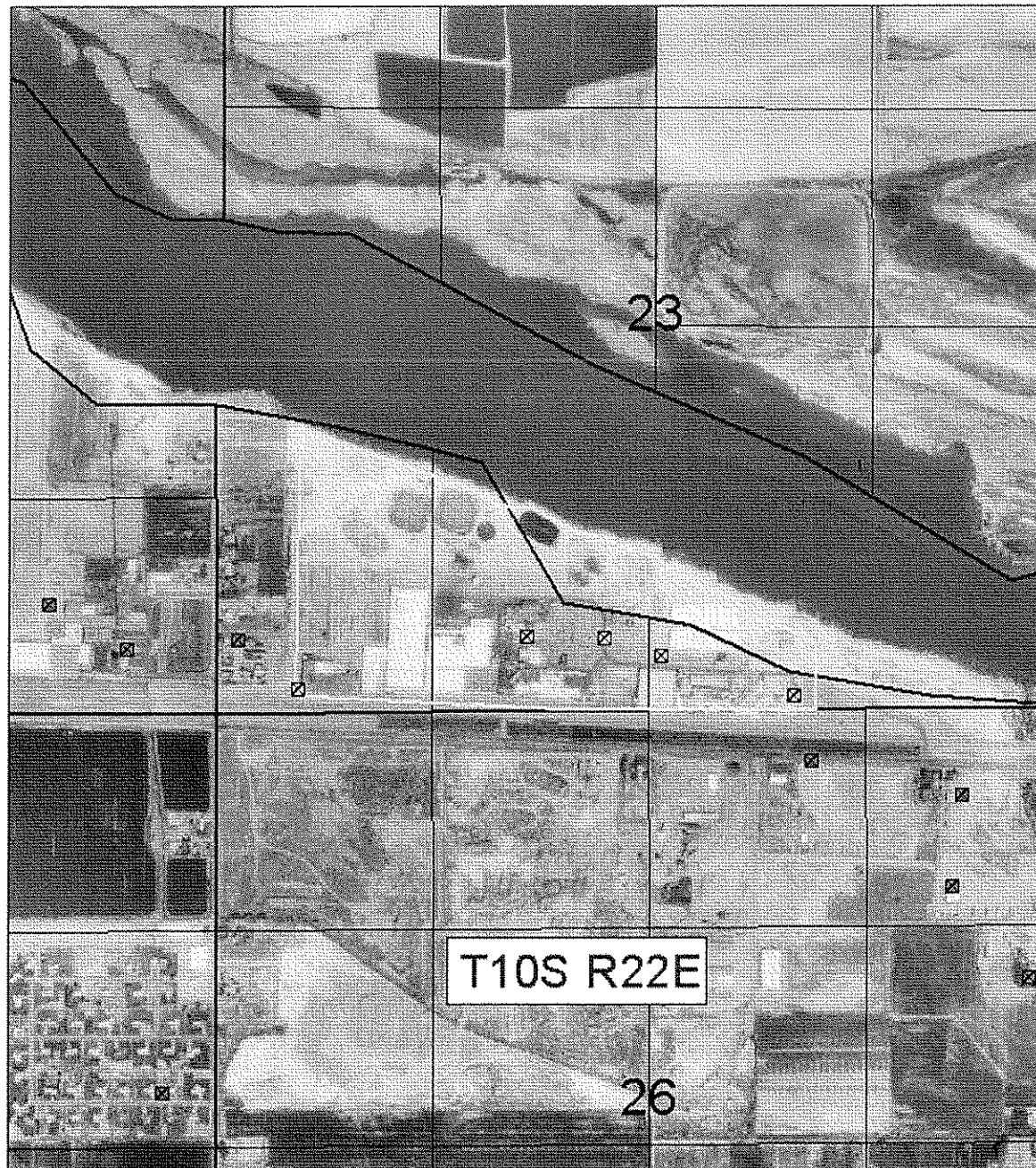
TWP	RNG	SEC	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
			¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	¼	
10S	22E	23											L3	L1			L2		
													I	I			I		

Total number of acres irrigated

11. In which county(ies) are lands listed above as place of use located? Cassia
12. Do you own the property listed above as place of use? Yes X No
If your answer is No, describe in Remarks below the authority you have to claim this water right.
13. Describe any other water rights used at the same place and for the same purposes as described above.
14. Remarks: 45-2747, 45-2748, 45-2749, 45-2758, and 45-7137 share these points of diversion and place of use with 45-13970
15. Basis of Claim (Check One) Beneficial Use X Posted Notice License Permit Decree
If applicable provide IDWR Water Right Number: License
Court Case Number Decree Date
Plaintiff vs Defendant

IDAHO DEPARTMENT OF WATER RESOURCES

45-2747, 45-2748, 45-2749,
45-2758, 45-2763 & 45-7137



-  Section Lines
-  Quarter/Quarter Lines
-  Place of Use
-  Point(s) of Diversion



GIS PLACE OF USE PRESENTATION
PHOTOGRAPHY: 1987 and/or 1988 NAPP
DATA ENTRY: 6/22/2004
DOUGLAS JONES

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read, and understood the form entitled "How you will received notice in the Snake River Basin Adjudication." I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of Attachments _____

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s) _____ Date _____

For Organizations: I do solemnly swear or affirm that I am _____ Plant Manager
Title
of McCain Foods USA, Inc. (McCain Foods) – Burley, ID, that I have signed the foregoing
Organization
document in the space below as _____ Plant Manager of McCain Foods – Burley, ID
Title Organization
and that the statements contained in the foregoing document are true and correct.

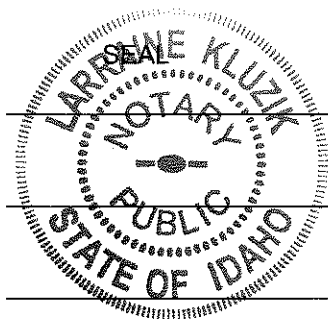
Signature of Authorized Agent David B Hines

Title and Organization _____ Plant Manager, McCain Foods – Burley, ID Date September 20, 2006

State of Idaho/or _____)

County of CASSIA) SS.
)

Subscribed and sworn (or affirmed) before me this 20 day of SEPTEMBER 2006



Notary Public

Larraine Kluzik

Residing at

1121-21st Highway ID 83336

My Commission Expires

08/27/2011

17. Notice of Appearance:

Notice is hereby given that I, _____ will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature _____

Address _____

Date _____

z/2099/6781