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**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. 47-17438
)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO FILE LATE NOTICE OF**
) **CLAIM**
)

COMES NOW the claimant, ConAgra Foods Packaged Foods Co., Inc., by and through its counsel, Josephine P. Beeman, of the firm Beeman & Associates, P.C., and moves this Court pursuant to Administrative Order 1, Rule 4, and Idaho Rule of Civil Procedure 55(c), for an order granting ConAgra Foods Packaged Foods Co., Inc.'s (ConAgra) Motion to File Late Notice of Claim 47-17438, to establish a 1961 priority ground water right for its processing plant in Twin Falls, Idaho.

PROCEDURAL AND FACTUAL BACKGROUND

In August 1994, ConAgra purchased a potato processing plant in Twin Falls, Idaho, as part of ConAgra's purchase of Universal Frozen Foods.¹ ConAgra made an effort in the late 1990s to determine if an SRBA claim could be filed for the prior beneficial use of the plant well. Based particularly on the only available drilling reports at that time, ConAgra was advised that

¹ SRBA first round notice for the Twin Falls area was in Basin 47 on September 5, 1988, with a filing deadline of January 11, 1989. The second round notice was sent on March 27, 2006, with a deadline of June 26, 2006.

no SRBA claim could be filed because the plant well was drilled after the mandatory deadline for ground water rights.² For this reason, no SRBA claim was filed. *See* Affidavit of David Kubosumi in Support of SRBA Claim 47-17438, at para. 2. Several years later, ConAgra renewed investigation of the prior beneficial use of ground water at the plant. *See* Affidavit of David Kubosumi in Support of SRBA Claim 47-17438, at para. 3. In particular, because of electronic retrieval capabilities at IDWR, now available but not in place in the late 1990s, ConAgra was able to confirm that the plant well had been drilled and had begun use in 1961. The following documents, attached as exhibits to the Affidavit of David Kubosumi, help establish and support the 1961 date when the plant was established and water use began. *See* Affidavit of David Kubosumi in Support of SRBA Claim 47-17438, Exhibit A (*The Idaho Frozen Food Story*, Quick Frozen Foods June, 1968), Exhibit B (Welcome to Idaho Frozen Foods Corp. Employee Handbook, Exhibit C (October 16, 1961 Layne and Bowler Pump Company Well Test Report, and Exhibit D (Driller's Report, October 21, 1961 Well Log and Report by Mack Gray Well Drilling).

Late Claim 47-17438 describes this ground water use established in 1961. The plant had been built in 1961 by Idaho Frozen Foods to initiate its frozen French fry business. At the time the plant was being built in 1961, Idaho Frozen Foods drilled a well to supply water for the plant's operation, sanitation, and fire protection. Water use at the plant began in 1961, and the processing of frozen french fries began in 1962. The beneficial use water right was established by diversion and application to beneficial use. *See* Affidavit of David Kubosumi in Support of SRBA Claim 47-17438, Exhibits A and B.

The well was drilled by Mack Gray Well Drilling. Drilling commenced on August 25, 1961 and was completed on October 14, 1961. The well is located in Township 10 South, Range

² Beginning in 1963, a permit for ground water was required to use more than 13,000 gpd (domestic use) or 2500 gpd (other uses, including commercial). Sections 42-229, 42-227, and 42-111, Idaho Code.

17 East, Section 17, NESESE (Lot 5 of Chamber of Commerce Industrial Site Subdivision of the City of Twin Falls). *See* Affidavit of David Kubosumi in Support of SRBA Claim 47-17438, Exhibits C and D.

The claim to priority date and the rate of diversion were determined from the Driller's Report and Well Test Report attached to Late Claim 47-17438 and the Affidavit of David Kubosumi. The well supplied water for the processing operations and maintenance of the plant. The well also supplied water year round at the plant for sanitation and fire protection. This was the only water right for the plant. Municipal water was available as an alternative since 1975. The well remained connected to the system. The plant operation has continued throughout ownership changes in 1966, 1984, and 1994.

During and following the completion of this investigation, ConAgra conducted an internal review and decision process to determine how to proceed to obtain and/or confirm a ground water right for the Twin Falls plant. The fact that the well was drilled before the 1963 mandatory ground water permit requirement provided ConAgra with an option to pursue an SRBA claim based on beneficial use. Idaho Code Section 42-229 provides for perfection of this right commenced by diversion and beneficial use prior to a permit being mandatory.

ConAgra completed its internal review and decision-making process in April 2007, at which time it decided to file an SRBA claim. The Director's Report for Basin 47 was filed with the SRBA Court on February 2, 2007. The SRBA deadline for filing objections to the Director's Report for Basin 47 is September 19, 2007; the response deadline is November 21, 2007.

LEGAL STANDARD

Pursuant to this Court's Administrative Order 1, Rule 4, a motion to file late notice of claim will be reviewed under the criteria set forth in Idaho Rules of Civil Procedure 55(c). *Snake River Basin Adjudication Administrative Order 1 § 4(d)(2)(d),(k)*. Rule 55(c) provides that for good cause shown a court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). *Order Granting Motions*

to File Late Notices of Claims, Water Right Claim: 71-10886 et al. (Idaho Water Resource Board) at 1 (SRBA Dist. Court) (July 27, 2005).

When applying the standard set forth in Rule 55(c) this Court took into account three factors: whether the default was willful; whether setting aside the judgment would prejudice the opponent; and as with Rule 60(b) motion, whether a meritorious position has been presented. *Id.* This Court, however, did note the good cause standard is a more lenient threshold than the Rule 60(b) standard. See *Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcase Nos. 65-07267 et al (A.L. Cattle) at 7 (SRBA Dist. Court) (Jan. 31, 2001)*. See also *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 275, 279 (May 25, 1993). To establish a meritorious defense, the moving party must allege facts, which if established, would constitute a defense to the action, and the facts supporting the defense must be detailed. *A.L. Cattle at 6*.

Under Rule 55(c) the setting aside of an entry of default or of a default judgment are both within the sound discretion of the trial court. *Clear Springs Trout Company v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992). “When exercising its discretion, the court must examine whether the litigant engaged in conduct which, although constituting neglect was nevertheless excusable because a reasonably prudent person might have done the same thing under the circumstances.” *Washington Federal Savings and Loan, Ass’n v. Transamerica Premier Insurance Co.*, 124 Idaho 913, 916, 865 P.2d 1004, 1007 (1993), citing *Schraufnagel v. Quinowski*, 113 Idaho 753, 754, 747 P.2d 775, 776 (Ct. App. 1987). Judgments by default are not favored and there is a preference for setting them aside so that cases can be decided on the merits. *Baldwin v. Baldwin*, 114 Idaho 525, 528, 757 P.2d 1244, 1247 (Ct. App. 1988). In determining whether to set aside a default judgment, the court “must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt.” *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469, 471 (1952).

**GOOD CAUSE EXISTS TO GRANT THE
MOTION TO FILE A LATE NOTICE CLAIM**

ConAgra, for the reasons set forth herein, can demonstrate the good cause required to allow the filing of a late claim. The first element of the standard is whether the default was willful. ConAgra failed to timely file an SRBA claim for the prior beneficial use of ground water at its plant because the only information available in the late 1990s indicated the plant well was drilled after 1963, and thus an SRBA claim based on prior beneficial use could not be filed. Then, as the SRBA investigation was proceeding to Basin 47 where the Twin Falls plant is located, ConAgra initiated a final extensive and complicated investigation to obtain historical information about the plant well. Due particularly to electronic retrieval research now available at IDWR (but not available in 1997), the 1961 Well Driller's Report and 1961 Well Test Report were located.

The failure to file a claim before the Director's Report was issued was not willful as ConAgra had not completed its internal review and decision making until after the Director's Report was filed. However, ConAgra is filing its Motion for Late Claim 47-17438 in advance of the September 19, 2007 deadline for filing objections to the Director's Report for Basin 47.

**ANY POSSIBLE PREJUDICE TO OPPONENTS IS OUTWEIGHED
BY THE MANIFEST INJUSTICE TO CONAGRA
IF IT IS NOT ALLOWED TO PROCEED WITH ITS CLAIM**

Allowing ConAgra to proceed with late claim 47-17438 far outweighs any possible prejudice to other claimants. IDWR submitted its director's report for Basin 47 on February 02, 2007. The objection period is still open and does not close until September 19, 2007. The response deadline is November 21, 2007. The Motion to File Late Notice of Claim 47-17438 is in advance of the deadline for filing an objection and thus provides notice and opportunity for response by other SRBA claimants.

ConAgra conducted a diligent and thorough research of historical documents, plant records, and IDWR records to verify that the well was drilled and began operation in 1961. This investigation was initiated even though the only information available in 1997 indicated the well was drilled in 1964. This additional investigation, as the claim sets forth, showed that the well was drilled in 1961 prior to the March 25, 1963 mandatory date for ground water permits. This information confirmed that ConAgra had the option to file a beneficial use SRBA claim for the plant well. During and after obtaining this information (which took several years), ConAgra initiated an internal review of the matter and conducted a process to determine the most appropriate method of claiming the water right.

This internal review and decision process was finalized in April 2007, after the Director's Report for Basin 47 was issued in February 2007. However, ConAgra is filing its late claim within the objection period for Basin 47. ConAgra's late claim 47-17438 would not present any prejudice to other claimants because they would have appropriate notice of the claim while the objection period for Basin 47 is still open, but it would be manifestly unjust to ConAgra not to have the benefit of a beneficial use priority date for its ground water use.

The loss of this beneficial water right and its 1961 priority date would be detrimental to the Twin Falls plant. The beneficial use claim would preserve the 1961 priority date for water use at the plant. Without the beneficial use water right ConAgra would forego the 1961 priority date and be vulnerable to curtailment.

THE FACTS ALLEGED STATE A MERITORIOUS DEFENSE

The facts set forth in SRBA Claim 47-17438 are supported by the affidavit of David Kubosumi, the October 21, 1961 Well Log and Report by Mack Gray Well Drilling, the October 16, 1961 Layne and Bowler Pump Company Well Test Report, *The Idaho Frozen Foods Story* article published in Quick Frozen Foods in June of 1968, and the Idaho Frozen Foods Corp. Employee Handbook. These facts, if proved, would entitle ConAgra to establish the basis for water right 47-17438. ConAgra undertook an evaluation of historical records and data to

establish and confirm the appropriate elements for the claimed water right. The above detailed facts support the issuance of a water right decree for 47-17438.

For the forgoing reasons, ConAgra has demonstrated good cause to allow it to file a late claim, and requests that this Court grant it leave to file a late claim for 47-17438 based on beneficial use.

CONCLUSION

Based on the foregoing, ConAgra respectfully requests that its Motion to File Late Notice Claim 47-17438 be granted.

RESPECTFULLY SUBMITTED this 29th day of June 2007.

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By Josephine P. Beeman
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CERTIFICATE OF MAILING

I certify that on June 29, 2007, I caused to be served the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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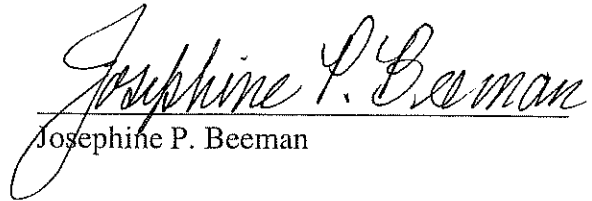
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