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DEPARTMENT OF
WATER RESOURCES

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September 1, 2016

Gary Spackman, Director
Idaho Department of Water Resources
322 Front Street
Boise, ID 83720-0098

Re: McCain Foods USA, Inc. Comments Regarding Proposed Ground Water Management Area

Dear Director Spackman:

These comments are being provided on behalf of McCain Foods USA, Inc. ("McCain") regarding the proposed Ground Water Management Area ("GWMA") for the Eastern Snake River Plain Aquifer ("ESPA"). McCain owns and operates a facility located near Burley, Idaho, and owns groundwater rights that it uses in its processing. McCain has been monitoring the events on the ESPA for the past several years and it came as a surprise that IDWR is now proposing a GWMA for the entire ESPA and tributaries rather than continuing with administration under the Conjunctive Management Rules ("CM Rules"). McCain opposes the creation of a GWMA for the ESPA and would urge IDWR to reconsider.

By way of some background, in the spring of 2015, McCain proposed a CM Rule 43 mitigation plan in order to address pending and future surface water and spring water delivery calls. It should be clearly understood that it is vitally important for McCain to protect its water supply for current and future use in order to continue its operations in Idaho. Without waiving any privileged information, McCain withdrew its CM Rule 43 mitigation plan after assessing the risk to its senior groundwater rights based on factual information on likely priority date cuts under pending delivery calls. Yet, individual protection of McCain's real property rights within a GWMA is entirely unknown. The ground water management plan that may come out of the proposed GWMA may not allow individual users, like McCain, to mitigate for themselves. Indeed, mitigation plans have not been applied in GWMAs and the statutes governing GWMAs only appear to contemplate "plans" that are adopted for the entire GWMA.

IDWR has previously found that a GWMA is not necessary in areas in organized water districts and represented that to the District Court in *A&B Irrigation Dist. v. Idaho Dep't of Water Resources*, Memorandum Decision and Order on Petition for Judicial Review, at 43, Case No. 2009-000647 (5th Jud. Dist. May 4, 2010). "The Director reasoned that the designation of a GWMA would not confer any additional management function that is not already available in an organized water district. This Court agrees." *Id.* In fact, in the administrative proceeding before former Chief Justice Schroeder, IDWR's administrator testified that there is actually more flexibility under the CM Rules. *Id.* If IDWR has factually determined that other areas outside the current area of common groundwater supply defined within CM Rule 50 should be included in such administration, then revision of that definition in accordance with the CM Rules is the method to accomplish that goal.

McCain is not a party to the IGWA-SWC Settlement Agreement; yet, the creation of the GWMA will force non-parties, who have senior water rights, such as McCain, to relegate their private property interests to the protection of quasi-governmental or governmental bodies who may not be able to fulfill their obligations. Based on comments made at the public meetings where the Department indicated that

the Settlement Agreement could be the "template" for the Ground Water Management Plan for the ESPA, it seems IDWR has decided all water users, regardless of their individual circumstances, should now be held to returning the ESPA to the 1991-2001 levels, as set forth in the IGWA-SWC Settlement Agreement, without having had any input into whether or not those levels are reasonably attainable or regardless of whether they were part of the process to negotiate any of the terms.

McCain also has concerns that the facts upon which the Director is making the decision to create a GWMA have not been fully vetted by outside engineers or experts and that the water levels throughout the proposed boundary vary widely for a variety of reasons some of which are unrelated to groundwater pumping.

As far as potential economic impacts to McCain and other industry in the proposed GWMA area in general, this proposed GWMA designation in the ESPA adds uncertainty to potential expansion plans as a protectable water supply is essential in the decision making process. If McCain cannot understand how to protect its current water supply and is subject to a Ground Water Management Plan that promotes goals that McCain cannot itself impact or McCain cannot itself mitigate for, McCain's potential expansion plans may be in jeopardy based on the reliability of water supply.

In summary, McCain has great apprehension that creation of an ESPA GWMA will take away McCain's individual ability to protect its own water supply. As evidenced by the CM Rule 43 mitigation plan it previously filed, McCain takes the security of its water supply very seriously, critically assesses risk, and takes proactive steps to insure water reliability. If a GWMA is designated, McCain will be forced to take the unknowns into consideration in making future business decisions.

McCain requests that any further action or notices regarding the GWMA be sent to me: Candice McHugh, McHugh Bromley, PLLC, 380 S. 4th St., Ste. 103, Boise, ID 83702.

Thank you for your consideration of the above remarks.

Sincerely,

Candice McHugh

Candice McHugh
Attorney for McCain Foods USA, Inc.