

RECEIVED

APR 23 2015

DEPARTMENT OF
WATER RESOURCES

CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
MCHUGH BROMLEY, PLLC
Attorneys at Law
380 S. 4th St., Ste. 103
Boise, ID 83702
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cmchugh@mchughbromley.com
cbromley@mchughbromley.com

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

In the Matter of Mitigation Plan for McCain
Foods USA, Inc.

CM-MP-2015- 002

**MCCAIN FOODS USA, INC. RULE 43
MITIGATION PLAN FOR PRE-
APPROVED MITIGATION ACTIVITIES**

COMES NOW McCain Foods USA, Inc. (“McCain”) by and through its counsel and, pursuant to Rule 43 of the Idaho Department of Water Resources’ (“IDWR”) *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (“CM Rules”), hereby submits this *CM Rule 43 Mitigation Plan for Direct Delivery of Water* (“McCain Mitigation Plan”) as a means to legally respond with mitigation upon the Director’s finding of material injury in a conjunctive management delivery call.

I. MITIGATION PLAN

McCain’s Mitigation Plan is being submitted to the Director to secure advanced approval for: (1) the direct delivery of water to senior-priority users who are found to be injured under the CM Rules; (2) conversion of acres irrigated from groundwater to surface water irrigation; (3)

reduced or foregone pumping; and (4) groundwater recharge. These activities are collectively referred to herein as the “Mitigation Activity” or “Mitigation Activities.”

McCain’s Mitigation Plan is intended to be forward looking and is not intended to impose any obligation to continue to deliver water unless injury to a senior-priority user has been found and a curtailment order has been issued that implicates water rights owned by McCain. This Mitigation Plan is intended to provide McCain with authorization to implement the Mitigation Activity on an as needed basis in order to provide mitigation, prevent material injury to senior-priority water rights, and thereby reduce or avoid curtailment of McCain’s junior-priority water rights.

Once the nature, extent and location of material injury to a senior-priority user is known, McCain will implement some or all of the above-listed Mitigation Activities to mitigate for any injury McCain’s water use under junior-priority water rights may be causing. “One of the issues that has overshadowed the application of the CMR with respect to mitigation plans is ensuring a timely meaningful response to a delivery call so as to avoid injury to senior rights, while at the same time allowing holders of junior ground water rights the meaningful opportunity to submit and seek approval of a mitigation plan so as to avoid curtailment. The issue is complicated because the Director must make predictions regarding water supplies; climatic conditions can vary significantly and unpredictably within an irrigation season; and mitigation to remediate for the depletive effects of ground water withdrawals can be provided in a number of different ways and combinations.” *Memorandum Decision and Order on Petition for Judicial Review*, CV-2010-3075, p. 14-15 (Fifth Jud. Dist. Jan 25, 2011). McCain’s Mitigation Plan is intended to address the issue identified by the District Court and to timely and fully mitigate any material injury to senior-priority users.

A. Name and Address of Applicants and Identification of Water Rights to Receive Mitigation Credit Through the Cities' Mitigation Plan

All correspondence regarding this Mitigation Plan can be sent to

Candice McHugh
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83680

The name of the Applicant is

McCain Foods USA, Inc.
218 W Hwy 30
Burley, ID 83318

B. Identification of Water Rights to Receive the Benefit of the Mitigation

The water rights that will be mitigated by McCain's Mitigation Plan include but are not limited to:

| Basin | Sequence | Priority Date | Div. Rate (cfs) | Water Use |
|--------------|-----------------|----------------------|------------------------|-----------------------------|
| 45 | 13970 | 9/1/1957 | 2.66 | INDUSTRIAL |
| 45 | 2747 | 3/15/1960 | 4 | INDUSTRIAL |
| 45 | 2758 | 3/15/1960 | 2.08 | COMMERCIAL |
| 45 | 2748 | 3/6/1961 | 0.6 | INDUSTRIAL |
| 45 | 2749 | 8/13/1965 | 2.85 | INDUSTRIAL |
| 45 | 7137 | 5/24/1973 | 3.43 | INDUSTRIAL |
| 45 | 7241 | 5/27/1975 | 0.25 | COMMERCIAL, FIRE PROTECTION |
| 45 | 12462 | 8/7/1981 | 0.04 | DOMESTIC |

It is McCain's intention to mitigate, through this Mitigation Plan, all of its water rights, including any other water rights it may obtain in the future that are found to be causing injury to senior users.

The rights that will benefit from the Mitigation Plan are any senior-priority water rights found to be materially injured under the CM Rules. Currently, the senior-priority water rights

that could benefit from this plan are held by Rangen, Inc. and the Surface Water Coalition. McCain's Mitigation Plan is not intended, however, to respond only to presently active conjunctive management delivery call.

C. Summary Description of the Mitigation Plan

1. Direct Delivery of Water to Senior-Priority Water Users

a. Direct Delivery of McCain Discharge

In the event of a finding of material injury that results in a determination that McCain's junior-priority groundwater rights are subject to curtailment, McCain may choose to discharge an amount of water directly into the Snake River that can be measured and then rediverted by a senior-priority user, or exchanged by a downstream senior user for mitigation of an upstream senior-priority user. McCain seeks advance approval from the Director to implement this mitigation activity on an as needed basis. The amount of credit to McCain will be determined when this mitigation activity is commenced, and may be supported by measurements, including any reasonable conveyance or carry losses, as well as through contracts with water right users, storage right holders, and others, and may also include modelling results and other technical information that shows the benefit of the direct delivery of storage water to the injured senior.

b. Direct Delivery of Storage Water

In the event of a finding of material injury that results in a determination that McCain's junior-priority groundwater rights are subject to curtailment, McCain may secure a volume of storage water that will replace McCain's depletions to the injured senior-priority user. McCain seeks advance approval from the Director to implement this mitigation activity on an as needed basis. The amount of credit to McCain will be determined when this mitigation activity is commenced, and may be supported by measurements, including any reasonable conveyance or

carry losses, as well as through contracts with water right users, storage right holders, and others, and may also include modelling results and other technical information that shows the benefit of the direct delivery of storage water to the injured senior.

c. Direct Delivery of Pumped Water

In the event of a finding of material injury that results in a determination that McCain's junior-priority groundwater rights are subject to curtailment, McCain may pump water from a ground water well that is not subject to curtailment and deliver that water directly to the senior-priority user or deliver it through an exchange. McCain seeks advance approval from the Director to implement this mitigation activity on an as needed basis. The amount of credit to McCain will be determined when this mitigation activity is commenced, and may be supported by contracts with landowners, water right users and others, modelling results and other technical information that shows the impact of pumping and the benefit of the direct delivery of water to the injured senior.

2. Reduced or Foregone Pumping

Reducing demand from groundwater pumping, which in turn increases flows in the Snake River (and springs tributary thereto), can be accomplished by reducing or foregoing pumping under valid groundwater rights. This can include not pumping a commercial or industrial groundwater right, or drying up groundwater irrigated acres. The Director has long recognized that idling groundwater irrigated acres provides a mitigation benefit to materially injured senior-priority water users.

Through this mitigation activity, McCain seeks advance approval to obtain mitigation credit for reduced or foregone pumping of groundwater rights. By reducing demand from groundwater pumping, McCain will be able to replace its depletions to a materially injured

senior-priority water user. McCain seeks advance approval from the Director to implement this mitigation activity on an as needed basis. The amount of credit to McCain will be determined when this mitigation activity is commenced, and may be supported by contracts with landowners, water right users and others along with measurements, and technical and modelling results that show the benefits of the foregone pumping to the injured senior.

3. Groundwater Recharge

Increasing aquifer levels in the ESPA, which in turn increases flows in the Snake River (and springs tributary thereto), can be accomplished by targeted recharge projects. Groundwater recharge has long been approved by the Director as an acceptable form of mitigation in conjunctive management delivery calls.

Through this mitigation activity, McCain seeks advance approval to obtain a mitigation credit for recharge; either through its own recharge project, or in conjunction with other water users. By recharging the ESPA, McCain will be able to replace its depletions to a materially injured senior-priority water user. McCain seeks advance approval from the Director to implement this mitigation activity on an as needed basis. The amount of credit to McCain will be determined when this mitigation activity is commenced, and may be supported by contracts with landowners, water right users and others, modelling results and other technical information that shows the benefit of recharge to the injured senior.

D. Mitigation Activities and Requirement

The amount of mitigation will vary from year-to-year, depending on the Director's finding of material injury. McCain hereby requests the Director approve the above-mentioned Mitigation Activities, then allow McCain to ask the Director for a determination of the mitigation benefit to which McCain is entitled. The amount of credit to McCain will be

determined when a Mitigation Activity is commenced, and may be supported by contracts with landowners, water right users and others along with measurements, and technical and modelling results that show the benefits of the mitigation activity as well as other information as is reasonably determined by the Director to be required in order to mitigate injury for the injured senior.

E. Monitoring and Reporting

Appropriate measurements and reporting will occur to document the mitigation activity and its effectiveness. The measurements and reporting will be submitted to the Director for review and approval.

F. Other Information

Any proposed Mitigation Activities under this Mitigation Plan will not injure other water rights and fully complies with the State’s policy to conserve and enhance its water resources. Further, the proposed Mitigation Activities have and will continue to promote the optimum development of water resources in the public interest and should be fully supported and encouraged. The benefits from any Mitigation Activity are expected to have positive and lasting effects on the ESPA and reaches of the Snake River. Any one or a combination of the above Mitigation Activities may serve as a contingency to ensure that material injury to the senior is fully and timely mitigated. IDAPA 37.03.11.043.03.c.

II. REQUEST FOR RELIEF

McCain hereby requests that IDWR process this plan as soon as possible.

McCain requests that:

1. IDWR advertise this Mitigation Plan as required under the CM Rules;
2. IDWR hold any hearing as may be required;

3. The Director enter an order approving this Mitigation Plan upon such terms and conditions as may be reasonable and necessary to comply with CM Rules.
4. For such other and further relief as the Director may determine is reasonable and necessary to enable McCain to mitigate for material injury to senior users.

RESPECTFULLY SUBMITTED.

DATED this 23rd day of April, 2015.



Candice M. McHugh

McHugh Bromley, PLLC

Attorneys for McCain Foods USA, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2015, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Director Gary Spackman
IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720

- Via US Mail, Postage Paid
- Via Facsimile
- Hand-Delivered
- Other _____


