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*Attorneys for McCain Foods USA, Inc.*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

IDAHO GROUND WATER  
APPROPRIATORS, INC, BONNEVILLE-  
JEFFERSON GROUND WATER DISTRICT,  
and BINGHAM GROUND WATER  
DISTRICT,

Petitioners,

vs.

THE IDAHO DEPARTMENT OF WATER  
RESOURCES and GARY SPACKMAN in  
his official capacity as Director of the Idaho  
Department of Water Resources,

Respondents.

Case No.: CV01-23-8187

**DECLARATION OF CANDICE MCHUGH  
IN SUPPORT OF MCCAIN FOODS USA,  
INC.'S RESPONSE IN GROUND WATER  
DISTRICTS' MOTION TO STAY,  
MOTION FOR INJUNCTIVE RELIEF,  
MOTION TO COMPEL, MOTION FOR  
EXPEDITED DECISION AND  
APPLICATION FOR ORDER TO SHOW  
CAUSE**

IN THE MATTER OF THE DISTRBUTION  
OF WATER RIGHTS TO VARIOUS  
RIGHTS HELD BY AND FOR THE  
BENEFIT OF A&B IRRIGATION  
DISTRICT, AMERICAN FALLS  
RESERVOIR DISTRICT NO. 2, BURLEY  
IRRIGATION DISTRICT, MILNER  
IRRIGATION DISTRICT, MINIDOKA  
IRRIGATION DISTRICT, NORTH SIDE  
CANAL COMPANY, AND TWIN FALLS  
CANAL COMPANY

I, Candice McHugh hereby declare and state as follows:

1. I am over the age of 18 and state the following based upon my own personal knowledge.
2. I am one of two owners of McHugh Bromley, PLLC, the law firm that represents McCain Foods USA, Inc. in this matter.
3. Our firm's other clients, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell (the "Coalition of Cities") are parties to the underlying administrative action and thus, as their attorney, I received notice of the Director's *Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Fifth Methodology Order"); and *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("As-Applied Order"). The As-Applied Order states:

On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.

4. Attached hereto as Exhibit A is a true and correct copy of a letter dated May 1, 2023 to McCain at its address in Burley, Idaho. The letter was received by McCain in Burley, Idaho on May 12, 2023. Exhibit A does not advise McCain of the May 5, 2023 deadline above. Exhibit A does not specify water right numbers that are subject to curtailment.
5. McCain has no water rights senior to December 30, 1953 for use at its Burley facility.
6. Exhibit A states:

Holders of ground water rights potentially subject to curtailment may also

submit a proposed mitigation plan to the Director in accordance with Conjunctive Management Rule 43.1 See IDAPA 37.03.11.043. However, please be aware the approval process for a mitigation plan is time-consuming **A proposed mitigation plan submitted now may not be approved in time for the 2023 irrigation season.** Upon receipt of a proposed mitigation plan, the Director will publish notice for two successive weeks, after which ten days will be allowed for the filing of protests. The Director may hold a hearing if necessary to determine whether a proposed mitigation plan will mitigate injury to the SWC caused by diversions of ground water authorized by junior priority ground water rights. If the proposed mitigation plan is protested, the Director will hold a hearing. **Please be advised that a curtailment order is not stayed pending evaluation of a mitigation plan.**

(emphasis added)

7. McCain was not a party to the underlying administrative action and thus, did not receive any notice of the May 5, 2023 deadline. It was only because I had other clients that I was made aware of this deadline and its impact to McCain. On behalf of McCain I filed a Request for Hearing and Objection to Fifth Amended Order and the As-Applied Order a true and correct copy is attached hereto as Exhibit B. McCain also filed a Statement of Issues, a true and correct copy of which is attached as Exhibit H.

8. On or about early December of 2022 I was made aware by the Coalition of Cities' expert Greg Sullivan that IDWR was looking at changing its use of the model from a steady-state to transient run which could end up with curtailment dates in the early 1960s late 1950s, which is decades earlier than IDWR has previously predicted with this type of predicted shortfall when using steady-state. Because I also represent McCain, I advised McCain of this development.

9. In early January I contacted Travis Thompson, via telephone, about McCain's interest in developing a stipulated mitigation plan with the Surface Water Coalition. He requested data on McCain's water use.

10. In late January 2023 or early February 2023, I learned that IDWR staff was not recommending that the model be used in a transient mode to determine priority dates and saw the

December 23, 2023 memo that said as much. A true and correct copy of that memo is attached as Exhibit C hereto.

11. However, because McCain had already started to analyze its water use and had engaged technical experts to evaluate possible mitigation options, and because we had already contacted Mr. Thompson, I advised that it would be prudent to continue to evaluate McCain's water use and to develop a stipulated mitigation plan with the Surface Water Coalition if possible as this would protect McCain's water use if the Department ever switched to using the transient method of determining the curtailment date.

12. On or about April 6, 2023, I received a preliminary report regarding McCain's water use and possible mitigation options. I was in the process of evaluating this information and had again reached out to Mr. Thompson on or about April 19, 2023.

13. On April 21, 2023, when the 2023 Orders were issued and I was made aware of the deadlines and specifically that IDWR was not going to allow for private mitigation plans to be processed without curtailment as stated in Exhibits A, F, and G attached hereto it became clear that McCain had no option but to petition to join Southwest Irrigation District in order to protect its water use. It was simply not possible to meet the May 5, 2023 deadline in the As-Applied Order, nor finalize, file and get approval of its own mitigation plan before the Director stated he would curtail water users in the As-Applied Order. Ex. A; see too Exs. F & G.

14. Thus, on behalf of McCain I petitioned Southwest Irrigation District to join its mitigation plan. A true and correct copy of that petition is attached hereto as Exhibit D.

15. I filed a Notice of Mitigation on McCain's behalf before the May 5, 2023 deadline. Exhibit E.

16. A true and correct copy of the relevant portions of the transcript containing Director Spackman's comments regarding mitigation plans is attached hereto as Exhibit F and contains highlights of the pertinent discussion.

17. A true and correct copy of the FAQs is attached hereto as Exhibit G.

18. A true and correct copy of the May 26, 2023 email from Garrick Baxter to Candice McHugh is attached hereto as Exhibit I.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

Dated this 30th, day of May, 2023.

MCHUGH BROMLEY, PLLC



---

Candice M. McHugh  
Attorney for McCain

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May, 2023, I served a true and correct copy of the foregoing document was served through iCourt on the person(s) whose names and addresses appear below and on any other persons who have entered notices of appearance through iCourt:

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/s/ Candice McHugh  
CANDICE MCHUGH



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Governor Brad Little

Director Gary Spackman

May 1, 2023

**RE: Notice of Possible Curtailment of Ground Water Rights with Priority Dates Junior to December 30, 1953 - Surface Water Coalition Delivery Call**

Dear Water Right Holder,

You are receiving this letter because, according to the records of the Idaho Department of Water Resources ("Department"), you are the holder of one or more water rights authorizing diversion of ground water from the Eastern Snake Plain Aquifer Area of Common Ground Water Supply ("ESPA") that are not covered by an approved and effectively operating mitigation plan. Because your water right(s) are not currently covered by an approved and effectively operating mitigation plan, **your water right(s) may be subject to curtailment this 2023 irrigation season.**

On April 21, 2023, the Director of the Department issued the *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("As-Applied Order"). The As-Applied Order predicts a shortfall in the water supply for senior priority Snake River water rights during the 2023 irrigation season, which will result in mitigation requirements or curtailment for ground water rights with priority dates junior to (later than) **December 30, 1953.**

The Department scheduled a hearing for the parties to the As-Applied Order on **June 6–10, 2023.** After the hearing the Director will decide whether to issue a curtailment order. If the Director issues a curtailment order, ground water rights junior to December 30, 1953, could be subject to curtailment unless the holders of junior priority ground water rights mitigate for ground water diverted pursuant to an approved mitigation plan.

Holders of ground water rights affected by a curtailment order may participate in an approved mitigation plan. See Idaho Code § 42-5259. If you are already a member of a ground water district, please contact and work with the district to ensure the district's records are up to date. If you are not a member of a ground water district, you may want to contact the nearest ground water district to inquire if the district will allow you to join.

Holders of ground water rights potentially subject to curtailment may also submit a proposed mitigation plan to the Director in accordance with Conjunctive Management Rule 43.<sup>1</sup> See IDAPA 37.03.11.043. However, please be aware the approval process for a mitigation plan is time-consuming. A proposed mitigation plan submitted now may not be approved in time for the 2023 irrigation season. Upon receipt of a proposed mitigation plan, the Director will publish notice for two successive weeks, after which ten days will be allowed for the filing of protests. The Director may hold a hearing if necessary to determine whether a proposed mitigation plan will mitigate injury to the SWC caused by diversions of ground water authorized by junior priority ground water rights. If the proposed mitigation plan is protested, the Director will hold a hearing. Please be advised that a curtailment order is not stayed pending evaluation of a mitigation plan.

<sup>1</sup> For example, a copy of the proposed mitigation plan submitted by the SWC & IGWA can be found here: <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20160309-SWCs-and-IGWAs-Stipulated-Mitigation-Plan-and-Request-for-Order.pdf>



Information regarding the ongoing status of this matter may be found under the Current Topics section of the Department's website at: <https://idwr.idaho.gov/> If you have questions concerning this notice, please contact the Department's State Office in Boise at 208-287-4800, or the water district watermaster in your area who regulates ground water within the ESPA and copied below. Water district boundaries can be found on the web at <https://idwr.idaho.gov/water-rights/water-districts/map/>, and Watermaster contact information can be found on the web at <https://research.idwr.idaho.gov/files/ExternalReports/wdcontactsrpt.pdf>

Respectfully,

*Gary Spackman*  
GARY SPACKMAN  
Director

- c. Blake Jordan, Watermaster, Water Districts 100, 110 and 120
- Brian Ragan, Watermaster, Water District 130
- Jaxon Higgs, Watermaster, Water District 140
- Greg Shenton, Watermaster, Water District 31
- Preston Marcroft, Watermaster, Water District 34

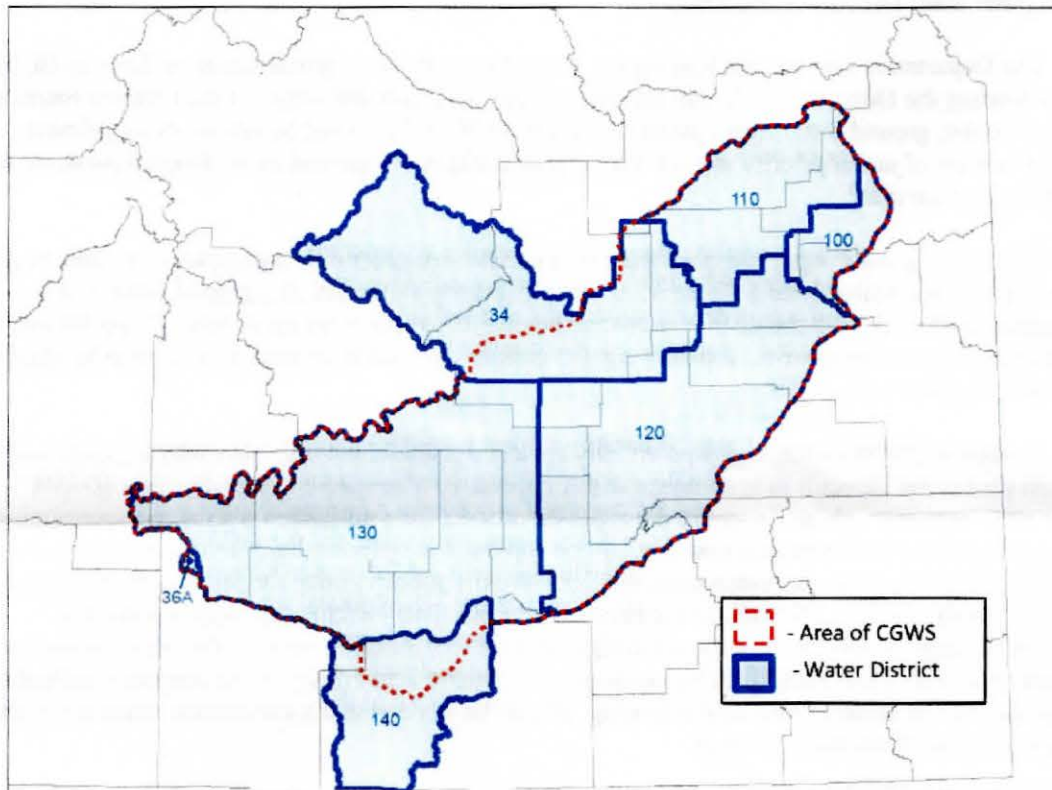


EXHIBIT B  
MCHUGH  
DECLARATION

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*Attorney for McCain Foods USA, Inc.*

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

**IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY, AND TWIN FALLS CANAL  
COMPANY**

**Docket No. CM-DC-2010-001  
MCCAIN FOODS USA, INC.'S  
REQUEST FOR HEARING AND  
OBJECTION**

**REQUEST FOR HEARING**

Pursuant to Idaho Code § 42-1701(A)(3), McCain Foods USA, Inc.'s ("McCain") requests a hearing on the Department's *Fifth Amended Methodology Order Regarding Methodology For Determining Material Injury to Reasonable In-Season Demand And Reasonable Carryover and Final Order Regarding April 2023 Forecast Supply* ("2023 As-Applied Order") both issued April 21, 2023. McCain objects to the *Fifth Amended Order* and the 2023 As-Applied Order's implementation this upcoming season for the reasons set forth below

which it also identifies as issues for hearing. McCain reserves the right to revise the issues as more information becomes available.

Among the issues the McCain has identified for hearing are:

- a) IDWR's new reliance on transient modeling;
- b) IDWR's failure to consider the Twin Falls Canal Company's increase in diversions over the last twenty years;
- d) IDWR's failure to consider changes in the efficiency of the SWC's operations;
- e) IDWR's failure to consider all sources of supply available to the SWC;
- f) IDWR's use of 2018 as the new baseline year; and
- g) IDWR's violation of McCain's due process rights by giving less than 10 business days to provide a mitigation solution after a wholesale change in methodology and in a non-drought year, by setting the hearing without regard to the time required for discovery and without consideration of the existing obligations of the parties, their legal representatives and consultants.

Submitted this 28<sup>th</sup> day of April, 2023

**MCHUGH BROMLEY, PLLC**

/s/ Candice M. McHugh

Candice M. McHugh

*Attorney for McCain*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of April, 2023, the above and foregoing, was served by email to the following:

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/s/ Candice M. McHugh  
Candice M. McHugh



**Summary of Recommended Technical Revisions to the 4<sup>th</sup> Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover for the Surface Water Coalition**

12/23/2022

By: Kara Ferguson, Staff Hydrologist & Matt Anders, Hydrology Section Supervisor

In a status conference on August 5, 2022, the Director of the Idaho Department of Water Resources (IDWR) issued a directive to IDWR staff to convene a committee of experts to review and provide comments on potential technical changes to the "Fourth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover" (Methodology) issued on April 19, 2016. IDWR staff created a technical working group composed of IDWR staff, experts representing the parties to the ongoing Surface Water Coalition (SWC) delivery call, and other interested parties. IDWR identified potential technical changes to the Methodology and presented them to the technical working group for discussion.

IDWR hosted six technical working group meetings between November 16 and December 14, 2022. Before each meeting, IDWR staff circulated PowerPoint presentations and agendas to the working group. The meetings were attended by interested members of the public and consultants and attorneys for parties to the SWC delivery call. Department staff and attorneys also participated. The meetings included presentations by IDWR staff and working group members, as well as open discussion on the topics presented. During the final meeting on December 14, 2022, IDWR staff stated that IDWR would provide a document summarizing staff's preliminary recommendations on potential technical changes to the Methodology.

Based on the information presented at the meetings and distributed to the technical working group, IDWR staff have the following preliminary technical recommendations:

- Update the Baseline Year (BLY) irrigation demand used to determine reasonable in-season demand from the current average of diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the BLY irrigation demand used to determine reasonable carryover for each SWC member from the current average of the diversion demands for the 2006, 2008, and 2012 irrigation seasons to the diversion demand for the 2018 irrigation season.
- Update the project efficiency value used to calculate monthly reasonable in-season demand from a rolling average of the previous eight years to a rolling average of the previous fifteen years.

At this time, staff do not have recommendations on utilizing near real time METRIC for determining crop water need, updating April and July regressions to improve their predictive power for natural flow supply, or using transient model simulation for determining curtailment priority dates. IDWR will continue to evaluate the integration of these and other techniques into the methodology.

IDWR requests written comments from the technical working group on the above recommendations or any other topic covered during the meetings. Please submit any comments no later than January 16, 2023, to [matthew.anders@idwr.idaho.gov](mailto:matthew.anders@idwr.idaho.gov).

# M<sup>C</sup>HUGH BROMLEY

ATTORNEYS AT LAW, PLLC

EXHIBIT D  
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DECLARATION

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May 2, 2023

Southwest Irrigation District  
PO Box 668  
Burley, ID 83318

via email: wparsons@pmt.org

Re: Petition to Join Southwest Irrigation District

Dear Chairman and Board Members:

I am writing on behalf of McCain Foods USA, Inc. (the “Company”) asking that the Company be allowed to join Southwest Irrigation District for mitigation as soon as possible. The water rights owned by the company and for which it is asking to be covered are listed below in Table 1.

As of the date of this letter, I understand via conversations with Mr. Higgs, that the rate for non-irrigation rights is \$900.00 per cfs. He provided me with a spreadsheet of what he understood the costs would be to the Company. This spreadsheet is attached as Exhibit A. The Company is ready to remit payment as required by the Board in order to be covered by Southwest Irrigation District mitigation plan this year and as an ongoing member of the Irrigation District. Mr. Higgs indicated that the Board may consider asking the Company for back assessments. If the Board elects to charge back assessments, please let the Company know what those charges will be so that these additional charges can be considered and proper payment remitted. As you know, and as reflected in Exhibit A, the Company has not been using its most junior water rights for several years but under the Director’s April 21, 2023, *Final Order Regarding April 2023 Forecast Supply* (“2023 As-Applied Order”) its most senior water rights are now subject to curtailment. (See Table 1).

<b>Water Right</b>	<b>PRIORITY DATE</b>	<b>OWNER</b>	<b>CFS</b>	<b>Water Use</b>
45-2747	3/15/1960	MCCAIN FOODS USA INC	4.00	industrial
45-2748	3/6/1961	MCCAIN FOODS USA INC	0.60	industrial
45-2758	3/15/1960	MCCAIN FOODS USA INC	2.08	commercial
45-13970	9/1/1957	MCCAIN FOODS USA INC	2.66	industrial

Table 1.

Time is of the essence as the Company has a May 5, 2023 deadline to respond to IDWR's *Fifth Amended Methodology Order Regarding Methodology For Determining Material Injury to Reasonable In-Season Demand And Reasonable Carryover*, and *Final Order Regarding April 2023 Forecast Supply* ("2023 As-Applied Order"). Thus, the Company requests that a decision be provided as soon as possible and requests the Irrigation Districts' permission to inform the Idaho Department of Water Resources that we will be members of the Southwest Irrigation District and covered under its Mitigation Plan.

If you have any questions or concerns, please contact me at 208-870-3911 or 208-287-0991. Your prompt attention and consideration of this matter is greatly appreciated.

Sincerely,



Candice McHugh

cc:  
McCain Foods USA, Inc.



SOUTH WEST IRRIGATION DISTRICT  
**2022 WATER MEASUREMENT REPORT**  
SUMMARY SHEET

MC CAIN FOODS

EXHIBIT A

WaterRight	PRIORITY DATE	OWNER	CFS	Volume	Combined Limit	WaterUse	Condition	SWID Assessment	WMIS #	POD	DIVERSION NAME	5 yr Avg (AF)
45-2747	3/15/1960	MC CAIN FOODS USA INC	4.00	2062.8	-	industrial	-	\$ 3,600.00	401712	10S 22E 23 SWSE	maintanance well	633.7
45-2748	3/6/1961	MC CAIN FOODS USA INC	0.60	309.4	-	industrial	-	\$ 540.00	401713	10S 22E 23 SESWSE 1	east well	1201.5
45-2749	8/13/1965	MC CAIN FOODS USA INC	2.85	734.7	-	industrial	-	\$ 2,565.00	401870	10S 22E 23 SESESW 2	HCL well	1149.8
45-2758	3/15/1960	MC CAIN FOODS USA INC	2.08	1072.7	-	commercial	-	\$ 1,872.00	401872	10S 22E 23 SWSESW 2	irrigation system	20.4
45-7137	5/24/1973	MC CAIN FOODS USA INC	3.43	884.5	-	industrial	-	\$ 3,087.00	1003844	11S 26E 28 NWNE		0.0
45-7241	5/27/1975	MC CAIN FOODS USA INC	0.25	72	-	commercial/fire	-	\$ 225.00				
45-13970	9/1/1957	MC CAIN FOODS USA INC	2.66	1371.8	-	industrial	-	\$ 2,394.00				
45-12462	8/7/1981	MC CAIN FOODS USA INC	0.04	-	-	domestic	deminimis	\$ -				
<b>Totals:</b>			<b>15.91</b>	<b>6507.9</b>				<b>\$ 14,283.00</b>				<b>Totals: 3005.4</b>

Non-Curtailed Assessment: \$ 8,406.00

Current WD140 Assessment\*: \$ 2,277.43

Red text are rights that are currently curtailed under the Thousand Springs water calls.

\*WD140 assessment is included in SWID assessment. If McCain joined SWID, WD140 would not send a separate assessment.

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Attorneys at Law  
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*Attorney for McCain Foods USA, Inc.*

EXHIBIT E  
MCHUGH  
DECLARATION

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

**IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY, AND TWIN FALLS CANAL  
COMPANY**

**Docket No. CM-DC-2010-001  
MCCAIN FOODS USA, INC.'S  
NOTICE OF MITIGATION**

**REQUEST FOR HEARING**

Pursuant to the *Final Order Regarding April 2023 Forecast Supply* (“2023 As-Applied Order”) issued April 21, 2023 demand that:

On or before May 5, 2023, ground water users holding consumptive water rights bearing priority dates junior to December 30, 1953, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 75,200 acre-feet in accordance with an approved mitigation plan.

McCain Foods USA, Inc., (“McCain”) by and through its attorney of record, submits this *Notice of Mitigation*. McCain owns and uses water rights junior to the December 30, 1953,

date. On Tuesday, May 2, 2023 McCain petitioned Southwest Irrigation District (“SWID”) to become a member of SWID and to be covered by its approved mitigation plan. Counsel for McCain was informed by letter on May 3, 2023, that McCain has been approved to join SWID as a member and that McCain will be covered under its mitigation plan. A copy of the letter is attached hereto as Exhibit A and incorporated herein. SWID also indicated that a letter was sent to IDWR informing IDWR of this fact.

McCain requests an order, or some other applicable document, from IDWR that it has established to the “satisfaction of the Director, that they can mitigation for their proportionate share ... with an approved mitigation plan” by becoming members of SWID.

Submitted this 4<sup>th</sup> day of May, 2023

**MCHUGH BROMLEY, PLLC**

/s/ Candice M. McHugh

Candice M. McHugh  
*Attorney for McCain*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4<sup>th</sup> day of April, 2023, the above and foregoing, was served by email to the following:

Idaho Dept. of Water Res.  
[file@idwr.idaho.gov](mailto:file@idwr.idaho.gov)  
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/s/ Candice M. McHugh  
Candice M. McHugh



# PARSONS, LOVELAND, SHIRLEY & LINDSTROM

—LLP—

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WILLIAM A. PARSONS  
LANCE A. LOVELAND  
DAVID F. SHIRLEY

SCOTT B. LINDSTROM  
RHETT M. MILLER

May 3, 2023

Candice M. McHugh  
380 S. 4<sup>th</sup> Street, Ste 103  
Boise, Idaho 83702  
[cmchugh@mchughbromley.com](mailto:cmchugh@mchughbromley.com)

RE: Petition to Join Southwest Irrigation District for Mitigation

Dear Candice:

Pursuant to your request of May 2, 2023, the Board approved the mitigation for the following water rights:

WaterRight	Priority Date	Owner	CFS	Volume	Combined Limit	WaterUse	Condition
45-2747	3/15/1960	McCain Foods*	4.00	2062.80	-	Industrial	-
45-2748	3/6/1961	McCain Foods	0.60	309.40	-	Industrial	-
45-2758	3/15/1960	McCain Foods	2.08	1072.70	-	Commercial	-
45-13970	9/1/1957	McCain Foods	2.66	1371.80	-	Industrial	-
Totals:			9.34	4816.70			

\* McCain Foods USA Inc.

Southwest charges \$900 per CFS per year billed in arrears.

It is the policy of Southwest Irrigation District to charge new participants in mitigation for the previous three years. In keeping with that procedure, the back fees for McCains would be \$25,218.00. It may be paid over three years if necessary.

The 2023 assessment will be billed in the spring of 2024.

We have forwarded a letter to the Idaho Department of Water Resources indicating the

approval of McCain Foods USA Inc. for mitigation.

I have sent a copy of this letter to you by email and I placed one in regular mail to your office.

Very truly yours,

**PARSONS, LOVELAND, SHIRLEY &  
LINDSTROM, LLP**

A handwritten signature in black ink, appearing to read "William A. Parsons". The signature is written in a cursive, flowing style.

William A. Parsons  
wparsons@pmt.org

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER)	Docket No.
TO VARIOUS WATER RIGHTS HELD BY OR FOR)	CM-DC-2010-001
THE BENEFIT OF A&B IRRIGATION )	
DISTRICT, AMERICAN FALLS RESERVOIR )	
DISTRICT #2, BURLEY IRRIGATION )	
DISTRICT, MILNER IRRIGATION DISTRICT, )	
MINIDOKA IRRIGATION DISTRICT, NORTH )	
SIDE CANAL COMPANY, AND TWIN FALLS )	
CANAL COMPANY )	
_____ )	

TRANSCRIPT OF RECORDED PRE-HEARING CONFERENCE

APRIL 28, 2023

TRANSCRIBED BY:

JEFF LAMAR, C.S.R. No. 640

Notary Public



Page 2

1 APPEARANCES:  
2 GARY SPACKMAN, IDWR DIRECTOR  
3  
4 For Idaho Department of Water Resources:  
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6 IDAHO DEPARTMENT OF WATER RESOURCES  
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20 -and-  
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1 APPEARANCES (Continued):  
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4  
5  
6 For Idaho Ground Water Appropriators:  
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11 Pocatello, Idaho 83204  
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1 APPEARANCES (Continued):  
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4  
5  
6  
7  
8 For Bonneville-Jefferson Groundwater District  
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11 Post Office Box 3005  
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13 sjohns@olsentaggart.com  
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19 cbromley@mchughbromley.com  
20 For City of Pocatello:  
21 SOMACH SIMMONS & DUNN  
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1 APPEARANCES (Continued):  
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7 Burley, Idaho 83318  
8 wkf@pmt.org  
9 For Coalition of Cities and McCain Foods:  
10 MCHUGH BROMLEY, PLLC  
11 BY MS. CANDICE M. MCHUGH  
12 380 South Fourth Street, Suite 103  
13 Boise, Idaho 83702  
14 cmchugh@mchughbromley.com  
15 Also Present:  
16 Sarah Tschohl  
17 Mat Weaver  
18 Kara Ferguson  
19 Matt Anders  
20 Alan Jackson  
21 Don Terry  
22 Jay Barlogi  
23 Paul Arrington  
24 Dave Colvin  
25

Page 6

1 (Beginning of audio file.)  
 2 DIRECTOR SPACKMAN: This is Gary Spackman. I'm  
 3 the Director of the Idaho Department of Water  
 4 Resources.  
 5 This is the time and place scheduled for a  
 6 pre-hearing conference regarding a hearing that has  
 7 been calendared for June 6th through 10th, 2023. And  
 8 the hearing was scheduled on my initiative. And the  
 9 purpose of the hearing is to present and receive  
 10 evidence regarding two orders I issued on April 21st,  
 11 2023.  
 12 And I will just refer to these. Well, let  
 13 me give the titles. One is what we refer to as a  
 14 Methodology Order or maybe in a longer version the  
 15 Fifth Amended Methodology Order, but its full title is  
 16 "Fifth Amended Final Order Regarding Methodology for  
 17 Determining Material Injury to Reasonable In-Season  
 18 Demand and Reasonable Carryover."  
 19 And the other order that was issued was  
 20 what we refer to as an As-Applied Order. And the title  
 21 of that particular document is "Final Order Regarding  
 22 April 2023 Forecast Supply (Methodology Step -- Steps 1  
 23 through 3)."  
 24 And so I think the first thing I need to do  
 25 is probably call roll and determine who's participating

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1 today and who is not.  
 2 And so let's start calling roll here. And  
 3 I'll just -- Garrick, I'll --  
 4 MR. BAXTER: I'm just confirming that we're  
 5 recording.  
 6 DIRECTOR SPACKMAN: Oh, okay. Good. I thought  
 7 when the microphones came on, Sarah, we were good.  
 8 Thank you.  
 9 Okay. So, again, my name is Gary Spackman,  
 10 and we'll go in a clockwise direction around the table  
 11 here at the State offices of the Idaho Department of  
 12 Water Resources. And then there's some folks sitting  
 13 on the perimeter. We'll have them introduce  
 14 themselves.  
 15 And then I -- I assume there's a large  
 16 number of people -- and I'll at least operate off of  
 17 the screen rather than have people speak up  
 18 voluntarily, and then we'll see if we've left anybody  
 19 off.  
 20 So to my left, Garrick.  
 21 MR. BAXTER: Garrick Baxter, attorney for the  
 22 Department.  
 23 MR. SIMPSON: Good afternoon. John Simpson,  
 24 attorney for the Surface Water Coalition.  
 25 MR. THOMPSON: Travis Thompson, Surface Water

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1 Coalition.  
 2 SARAH TSCHOHL: Sarah Tschohl, paralegal for the  
 3 Department.  
 4 DIRECTOR SPACKMAN: And then in -- along the  
 5 perimeter.  
 6 MR. WOOD: Pete Wood, attorney for the  
 7 Department.  
 8 MAT WEAVER: Mat Weaver, Department of Water  
 9 Resources.  
 10 KARA FERGUSON: Kara Ferguson, Department of  
 11 Water Resources.  
 12 MATT ANDERS: Matt Anders, IDWR.  
 13 DIRECTOR SPACKMAN: Okay. And that completes  
 14 the roll call for the folks who are here and present  
 15 physically.  
 16 Now, I'll just look at the screen so I have  
 17 I think starting, Elisheva, are you there?  
 18 MS. PATTERSON: Yes, I am, Director.  
 19 DIRECTOR SPACKMAN: Thank you. And if you'll  
 20 just sound off, and even though we probably know, say  
 21 who you are representing.  
 22 MS. PATTERSON: Yes, of course. This is  
 23 Elisheva Patterson on behalf of IGWA.  
 24 DIRECTOR SPACKMAN: Thank you.  
 25 TJ.

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1 MR. BUDGE: Good afternoon, Director. This is  
 2 TJ Budge on behalf of IGWA.  
 3 DIRECTOR SPACKMAN: Dylan.  
 4 MR. ANDERSON: This is Dylan Anderson on behalf  
 5 of Bingham Groundwater District. Good afternoon.  
 6 DIRECTOR SPACKMAN: Rob.  
 7 MR. HARRIS: Good afternoon, Director. Rob  
 8 Harris on behalf of the City of Idaho Falls.  
 9 DIRECTOR SPACKMAN: Thank you.  
 10 Skyler.  
 11 MR. JOHNS: Good afternoon, Director. Skyler  
 12 Johns. I represent Bonneville-Jefferson Groundwater  
 13 District.  
 14 DIRECTOR SPACKMAN: Thank you.  
 15 Chris Bromley.  
 16 MR. BROMLEY: Good afternoon, Director. Chris  
 17 Bromley on behalf of the Coalition of Cities.  
 18 DIRECTOR SPACKMAN: And then is it possible,  
 19 Sarah, can you advance so I see who else is on? Or is  
 20 that possible?  
 21 SARAH TSCHOHL: I can bring my laptop to you  
 22 because I can't advance that screen.  
 23 DIRECTOR SPACKMAN: Huh. Okay. Thank you.  
 24 All right. Well, let me see if I can first  
 25 pick off the attorneys.

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1 in there it says junior groundwater users -- that's  
 2 me -- who have water rights junior to 1953 must submit  
 3 compliance, if you will, or a way to mitigate by  
 4 May 5th, and then it says that or the Director will  
 5 issue a curtailment order.  
 6 Does that May 5th date still stand, or will  
 7 that date be after the hearing for those that may need  
 8 to file mitigation? Or do we still have to comply with  
 9 the May 5th date?  
 10 DIRECTOR SPACKMAN: No, the May 5th date is  
 11 still an effective date. The As-Applied Order did not  
 12 set a date for issuance of the curtailment order.  
 13 And I'm just clarifying that I won't issue  
 14 the curtailment order until after the hearing and, as  
 15 you clarified, a decision is issued.  
 16 But those folks who are not -- who do not  
 17 have a mitigation plan had better hurry up, because I  
 18 think our processes may prevent them, honestly,  
 19 required processes in the conjunctive management rules  
 20 from putting together a mitigation plan.  
 21 And given what the Department has to do  
 22 under the rules in publishing and then allowing  
 23 opportunity for protest, I don't know whether a  
 24 mitigation plan can be put together. But I don't want  
 25 to start pushing dates back.

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1 Okay. Others?  
 2 Travis.  
 3 MR. THOMPSON: Mr. Director, just a quick  
 4 comment on that '22 breach and process.  
 5 So just to be clear, I think we have  
 6 pursued all avenues with the steering committee as far  
 7 as an impasse between IGWA and the Surface Water  
 8 Coalition, so I recognize any order or any date of  
 9 curtailment would happen after this scheduled hearing.  
 10 But I just want to make clear that I think  
 11 we've exhausted that process. IGWA has indicated that  
 12 they are going to appeal that decision, so that could  
 13 go to District Court. And whether there's a stay or  
 14 not, I guess it's up to them if they seek it.  
 15 But I think from our perspective we've run  
 16 the second addendum process through, and that letter  
 17 identified that.  
 18 DIRECTOR SPACKMAN: But you're talking about the  
 19 2022?  
 20 MR. THOMPSON: Correct, 2022.  
 21 DIRECTOR SPACKMAN: At least the assertion  
 22 there's a breach.  
 23 MR. THOMPSON: Yes.  
 24 DIRECTOR SPACKMAN: And not the 2021 related --  
 25 MR. THOMPSON: Right.

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1 DIRECTOR SPACKMAN: Because it's in front of me,  
 2 but I still have to review the information and make a  
 3 determination of whether there was a breach or not.  
 4 MR. THOMPSON: Yes.  
 5 DIRECTOR SPACKMAN: Yeah. Okay. All right.  
 6 Other matters?  
 7 All right. Let's conclude this -- the  
 8 formal pre-hearing conference.  
 9 (End of audio file.)  
 10 -oOo-

1 REPORTER'S CERTIFICATE

2

3 I, JEFF LaMAR, CSR No. 640, Certified Shorthand

4 Reporter, certify:

5 That the audio recording of the proceedings was

6 transcribed by me or under my direction.

7 That the foregoing is a true and correct

8 transcription of all testimony given, to the best of my

9 ability.

10 I further certify that I am not a relative or

11 employee of any attorney or party, nor am I financially

12 interested in the action.

13 IN WITNESS WHEREOF, I set my hand and seal this

14 3rd day of May, 2023.

15


16

17

18

19

20

21 

22 JEFF LaMAR, CSR NO. 640

23 Notary Public

24 Post Office Box 2636

25 Boise, Idaho 83701-2636

My commission expires December 30, 2023

## Surface Water Coalition Delivery Call, Amended 5<sup>th</sup> Methodology and April 2023 As-Applied Orders

### FAQs

- Why did IDWR change the Methodology?

IDWR is obligated to update the Methodology to incorporate new climate and hydrologic data and to ensure adequate protection for senior water users from injury. The new Methodology revises important elements used to determine in-season injury to water supplies and end-of-season injury to storage reservoir carryover. It also revises the method used to calculate curtailment dates, relying on what is referred to as “transient” model analysis, in a manner that may result in earlier curtailment dates than previously predicted.

- What changes did IDWR make to the Methodology?

IDWR made the following changes to its Methodology: (1) updated climate, hydrologic, and demand data used by the Methodology to determine injury, (2) updated “base line year,” (3) updated “reasonable carryover” volumes for the Surface Water Coalition (SWC), and (4) changed how the Eastern Snake Plain Aquifer Model (ESPAM 2.2) is deployed to calculate a priority curtailment date from “steady state” to transient analysis.

- Why did IDWR change the methodology to a transient model?

The Director has concluded that using the ESPA model in steady-state mode is no longer legally supportable because steady state does not provide water at the time, place, and quantity needed by the senior water user.

- Does this mean that 940,000 acres will be curtailed along the East Snake Plain Aquifer?

No, many irrigated acres are covered by approved mitigation plans and are not subject to curtailment.

- How many acres will be curtailed that IDWR estimates are NOT part of an approved mitigation plan?

IDWR will not have an estimate for this number until it works through curtailment with individual water right holders.

- How can there be curtailment in a year when we have so much snow in the hills?

The As-Applied order is an early season prediction of what the water supply for the SWC will be for the upcoming year. The courts have been clear that the Director’s predictions must favor the senior water users. And while there is a good snowpack in the hills above the ESPA, that is only part of the water supply for the SWC. Additional supply comes from recharge from the aquifer and that is at a record low. Plus, we are coming out of two years of drought and the existing storage supply was low.

- Are water users immediately subject to curtailment with the issuance of the Methodology and As-Applied orders?

No. The Director has scheduled a contested case hearing (June 6 – 10, 2023) to allow parties to submit testimony and evidence regarding the changes to the Methodology implemented by the Director. Because of the pending hearing, the Director will delay issuing a curtailment notice to Snake River junior water users until after the hearing. This means junior ground water pumpers who do not have approved mitigation plans in place will have a reprieve from curtailment until late June. Junior water users should wait for specific notice and direction from IDWR as to how their individual water rights are affected by this decision. However, water right holders who are junior to 1953 should work with IDWR to understand how their water right could be impacted in the case they are not in compliance and a party to an approved mitigation plan.

**The following questions all assume that the Director issues a curtailment order and the water rights at issue are junior to the curtailment date in the order:**

- What happens if I am participating in an approved mitigation plan?

If you are participating in an approved mitigation plan and the mitigation plan is being complied with, you will not be subject to curtailment.

- What happens if I am participating in an approved mitigation plan but the plan is not being complied with?

You will be subject to curtailment.

- What happens if I am NOT part of an approved mitigation plan?

You will be subject to curtailment. However, you do have the option to join an approved mitigation plan. This is based on the parties in the approved mitigation plan agreeing to add additional members.

- What happens if I am a party to, and meet the criteria of IGWA's 2009 Storage Water Delivery Mitigation Plan?

If IGWA delivers storage water to the SWC in a volume equal to the injury determination, participating members are not subject to curtailment. However, this mitigation plan does not provide safe harbor for future injury determination and IGWA must always secure storage water commensurate with the injury determination regardless of the size of injury (e.g., in July of 2021, the injury determination was ~170 KAF). For example, at the mid-season adjustment, if IDWR determines the injury is greater than its April determination, IGWA will have to secure additional storage water or be subject to curtailment during the season after crops are planted.

- What if I am a party to, and meet the criteria of the SWC-IGWA 2015 settlement agreement?

The 2015 settlement agreement was approved as a mitigation plan by IDWR. So long as the ground water districts comply with the mitigation plan, members of the ground water districts are not subject to curtailment.

- What if I am a city participating in a mitigation plan?

If you are a city participating in an approved mitigation plan and the mitigation plan is being complied with, you are not subject to curtailment.

- What if I am a city NOT participating in a mitigation plan?

You will be subject to curtailment. However, you do have the option to join an approved mitigation plan. This is based on the parties in the approved mitigation plan to agree to add additional members.

- What if I am a processor participating in an approved mitigation plan?

If you are a processor participating in an approved mitigation plan and the mitigation plan is being complied with, you are not subject to curtailment.

- What if I am a processor NOT participating in an approved mitigation plan?

You are subject to curtailment. However, you do have the option to join an approved mitigation plan. This is based on the parties in the approved mitigation plan to agree to add additional members.

- Can I submit a mitigation plan now and get it approved in time for this coming irrigation season?

It is unlikely that a mitigation plan can be approved before a potential curtailment order is issued. Once a plan is submitted, the plan must be advertised and is then subject to a protest deadline. The plan is subject to hearing if protested or if the Director determines a hearing is necessary. This process can take many months.

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*Attorney for McCain Foods USA, Inc.*

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

**IN THE MATTER OF DISTRIBUTION  
OF WATER TO VARIOUS WATER RIGHTS  
HELD BY OR FOR THE BENEFIT OF A&B  
IRRIGATION DISTRICT, AMERICAN  
FALLS RESERVOIR DISTRICT #2,  
BURLEY IRRIGATION DISTRICT,  
MILNER IRRIGATION DISTRICT,  
MINIDOKA IRRIGATION  
DISTRICT, NORTH SIDE CANAL  
COMPANY, AND TWIN FALLS CANAL  
COMPANY**

**Docket No. CM-DC-2010-001  
MCCAIN FOODS USA, INC.'S  
STATEMENT OF ISSUES**

Pursuant to the oral order at the Prehearing conference in this matter held on April 28, 2023, by and through the undersigned attorney, McCain Foods USA, Inc. (“McCain”) files this Statement of Issue.

**STATEMENT OF ISSUES FOR HEARING**

McCain identifies the following issues for hearing:

- a) IDWR’s new reliance on transient modeling;

b) IDWR's failure to consider the Twin Falls Canal Company's increase in diversions over the last twenty years;

d) IDWR's failure to consider changes in the efficiency of the SWC's operations;

e) IDWR's failure to consider all sources of supply available to the SWC;

f) IDWR's use of 2018 as the new baseline year; and

g) IDWR's violation of McCain's due process rights by not providing it actual notice of the order and requisite deadlines, and even if it was deemed that it was given "notice" because it shared an attorney with the Coalition of Cities, by giving it less than 10 business days to provide a mitigation solution after a wholesale change in methodology, by depriving it of the ability to develop its own mitigation plan to protect its water rights, by requiring compliance with a deadline to avoid curtailment without actual notice of the deadline and in a non-drought year, by setting the hearing without regard to the time required for discovery and without consideration of the existing obligations of the parties, their legal representatives and consultants.

Submitted this 5<sup>th</sup> day of May, 2023

**MCHUGH BROMLEY, PLLC**

/s/ Candice M. McHugh

Candice M. McHugh

*Attorney for McCain*



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of May, 2023, the above and foregoing, was served by email to the following:

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/s/ Candice M. McHugh  
Candice M. McHugh

**From:** [Baxter, Garrick](#)  
**To:** [Candice McHugh \(cmchugh@mchughbromley.com\)](mailto:cmchugh@mchughbromley.com)  
**Subject:** McCain Foods  
**Date:** Wednesday, May 24, 2023 9:55:52 AM  
**Attachments:** [image001.png](#)

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IDWR was able to confirm with Bill Parsons (attorney for SWID) that four rights in the name of McCain Foods were brought into SWID for mitigation:

- 45-2747
- 45-2748
- 45-2758
- 45-13970

IDWR also confirmed with Bill there are three other rights in the name of McCain foods that were NOT brought into SWID for mitigation.

- 45-2749, 8/13/1965, Industrial, 2.85 cfs, 734.7 acre feet
- 45-7137, 5/24/1973, Industrial, 3.43 cfs, 884.5 acre feet
- 45-7241, 5/27/1975, commercial & fire protection, 0.25 cfs, 72 acre feet

IDWR has updated its records to show that the four mitigated rights are covered by SWID. So long as SWID is in compliance with its approved mitigation plan, the four rights should be protected from curtailment.



**Garrick Baxter | Lead Deputy Attorney General**

Idaho Department of Water Resources | Energy and Natural Resources Division  
Office of the Attorney General | State of Idaho  
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