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WATER RESOURCES
WESTERN REGION

Attorneys for Protestant SUEZ Water Idaho Inc.

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF APPLICATION FOR
PERMIT NO. 63-34614 IN THE NAME OF
MICRON TECHNOLOGY, INC.

**SUEZ'S CONSOLIDATED REPLY IN
SUPPORT OF ITS MOTION FOR PARTIAL
SUMMARY JUDGMENT CONCERNING
CONDITION 908**

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INTRODUCTION

SUEZ Water Idaho Inc. (“SUEZ”), by and through its counsel of record, Givens Pursley LLP, and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, hereby submits this consolidated reply in support of *SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (“*SUEZ’s Motion*”). This consolidated reply addresses the issues raised in *Micron Technology Inc.’s Response to SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (“*Micron’s Response*”), *Boise Project Board of Control’s Response to SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (“*Boise Project’s Response*”), and *Ditch Companies’ Response to SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (“*Ditch Companies’ Response*”).¹ Boise Project and Ditch Companies are referred to collectively as “Irrigators.”

None of the other parties address SUEZ’s arguments that Condition 908 is contrary to Idaho law.² Instead, the Ditch Companies and Boise Project try to defend Condition 908 by mischaracterizing its effect. Moreover, they attempt to defend their proposed modifications to Condition 908 without grappling with the flaw that makes it illegal for IDWR to unilaterally impose it in the first place.

¹ Capitalized terms used in this reply have the same meanings as given them in *SUEZ’s Memorandum in Support of Motion for Partial Summary Judgment Concerning Condition 908* dated July 2, 2020 (“*SUEZ’s Opening Memorandum*”).

² Micron “takes no position” concerning SUEZ’s arguments that Condition 908 is contrary to Idaho law. *Micron’s Response* at 1. Micron also “takes no position” concerning SUEZ’s proposed conditions to replace Condition 908 and implement the refill settlement. *Micron’s Response* at 1-2.

The Hearing Officer should reject the Ditch Companies' and Boise Project's arguments, as well as their proposed modifications to Condition 908, and determine that no version of Condition 908 is appropriate to impose on new water rights.

DISCUSSION

I. THE IRRIGATORS MISCHARACTERIZE THE EFFECT OF CONDITION 908

The Ditch Companies and Boise Project suggest that Condition 908 actually enhances rather than limits the use of a water right containing the condition. Specifically, they contend that Condition 908's function is to allow junior rights to divert flood control releases from Lucky Peak. *Ditch Companies' Response* at 7 ("Without the remark, the Base Rights would continue to command priority and leave open the question of whether use of flood control releases from the Lucky Peak Dam outlet could occur. . . . [A] new applicant such as Micron benefits from a condition like Condition 908 which provides that the new permit/license may be exercised during flood control releases even if out of priority or otherwise subordinated.") The Boise Project similarly argues that "[t]he 908 condition provides greater flexibility to recognize that Micron is able to divert this flood water" *Boise Project's Response* at 8.

This is not true. Condition 908 is not a benevolent condition designed to provide increased opportunities for junior water diversions. Condition 908 is a limitation on the exercise of junior rights that would otherwise be able to divert when they come into priority. Its first sentence could not be clearer that it imposes a limitation: "The right holder shall exercise this right only when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet." (Emphasis added.) This means that, even if a junior right is in priority, it is not entitled to demand water unless an additional condition is met—that

the river is “on flood release.” The phrase “on flood release” may mean one thing or another, but whatever it means, it imposes an additional constraint on the junior user.³ If that were not the case, why would the Irrigators be pushing Condition 908? If, as the Irrigators contend, Condition 908 simply recognizes that juniors are allowed to divert flood water released from Lucky Peak, then its first sentence ought to read: “The right holder ~~shall~~ may exercise this right ~~only~~ when authorized by the District 63 watermaster when the Boise River is on flood release below Lucky Peak dam/outlet.”

In any event, downstream juniors do not need a condition to “allow” them to divert water in the river below Lucky Peak. There is no question that water released for flood control purposes can be diverted and used by downstream juniors. Although it is artificially caused (by the federal government’s decision to release water beyond what is required by downstream seniors), when it is released for purposes other than delivery to spaceholders, it becomes available for any user to take in accordance with their priority.⁴ If that were not the case, water released for flood control would be lost downstream to Oregon and Washington which, of course, does not promote the maximum use of Idaho’s waters. *Poole v Olaveson*, 82 Idaho 496,

³ Boise Project argues that summary judgment is not available because SUEZ has described Condition 908 as “ambiguous.” *Boise Project’s Response* at 6. However, SUEZ is not asking the Hearing Officer to determine the meaning of the ambiguous aspect of Condition 908 (what does “on flood release” mean?). Rather, SUEZ asks the Hearing Officer to determine whether it is legal for IDWR to impose a condition that limits the exercise of a water right based on the actions of the federal government. Condition 908 clearly places such a limit on a water right, a point that Boise Project appears to agree is “clear.” *Boise Project’s Response* at 5 (“The 908 Condition is Clear, Understandable to the Water Master and Provides Notice to the Water Right Holder when the Rights Can Be Exercised.”)

⁴ A downstream junior right may be able to divert even though an upstream senior right is in priority under the “reach gain” concept employed by IDWR’s accounting system. In short, water rights are administered in priority within the reach that their point of diversion is located and, in some circumstances, downstream reaches have more water (and hence can supply more junior priorities) than upstream reaches. See *Anders Memo* at 1-2 (attached as Appendix C to *SUEZ’s Opening Memorandum* at pages 35-36).

502, 356 P.2d 61, 65 (1960) (“The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.”).

Only recently has the Department proposed updates to its water rights accounting program adding a mechanism for administering Condition 908.⁵ The condition has not been administered in any prior water year, and SUEZ is unaware whether the proposed updates have actually been implemented.⁶

In any event, these proposed accounting system updates do not show that the Department has “confirmed the ongoing utility of Condition 908.” *Ditch Companies’ Response* at 4. Rather, IDWR (a signatory to the Refill Settlement) is performing its obligation under the *Stipulation’s* paragraph 18, which states that “the Department will update the Water District 63 water right accounting system to account for the distribution of water pursuant to conditions on water rights authorizing diversions when the Boise River below Lucky Peak Dam is ‘on flood release.’” *Stipulation* at 8 ¶ 18.⁷ Performing this obligation with respect to a condition on then-existing water rights says nothing about Condition 908’s “ongoing utility.”

⁵ On February 27, 2020, IDWR Hydrology Section Supervisor Matt Anders issued a memorandum to Mat Weaver, IDWR’s Deputy Director regarding “Implementation of the Refill Stipulated Agreement in the Boise Water Right Accounting” (“*Anders Memo*”). A copy of the *Anders Memo* is set out in Appendix C to *SUEZ’s Opening Memorandum* at page 34. Pursuant to paragraph 18 of the Refill Settlement’s stipulation, Water District 63 water users were provided notice of the memorandum and an opportunity to comment. SUEZ provided comments to the Department on March 23, 2020 (“*SUEZ’s Comments*”), a copy of which is set out in Appendix D to *SUEZ’s Opening Memorandum* at page 57. *SUEZ’s Comments* requested further explanation and information concerning how the accounting system updates implement Condition 908. To date, no further explanation or information has been provided, and SUEZ is unaware whether the proposed updates have actually been implemented.

⁶ Without actual administration of the condition, it is unclear how Micron “has familiarity with how that condition [908] is administered by the water master in Basin 63.” *Micron’s Response* at 1.

⁷ The *Stipulation* is attached as Exhibit 1 to the State of Idaho’s motion, *In re SRBA Case No. 39576*, Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618 (5th Dist. Idaho Feb. 19, 2019). A copy of the *Stipulation* is set out in Appendix G to *SUEZ’s Opening Memorandum* at page 88.

Nor is the alleged “ongoing utility” of Condition 908 “further solidified” by the *Anders Memo*. *Ditch Companies’ Response* at 4. The *Anders Memo* expressly states that the Department’s obligation in the *Stipulation* is the basis of the Department’s efforts to develop a methodology to administer Condition 908 in the accounting system. *Anders Memo* at 1 (“The purpose of this memo is to document IDWR’s proposed implementation of the stipulations included in the [*Stipulation*] related to water right accounting.”). In sum, the *Anders Memo* relates to a handful of existing water rights that have Condition 908. The memo does not address whether Condition 908 should continue to be imposed.

The Hearing Officer should not be persuaded (or confused by) the Ditch Companies’ circular logic that the Department’s proposed methodology to implement Condition 908 in the accounting system means that a “version of Condition 908 remains necessary to identify or flag such rights and is helpful for the administration and accounting of new permits or licenses on the Boise River.” *Ditch Companies’ Response* at 4-5. The Department promised in the *Stipulation* to update the accounting system to handle existing water rights with Condition 908, but it did not promise to impose Condition 908 on future appropriations.

II. THE IRRIGATORS IGNORE THE DIRECTOR’S DETERMINATIONS IN THE REFILL LITIGATION.

The Irrigators’ insistence that Condition 908 assists with water rights administration is premised on a misunderstanding of Idaho law. Contrary to Micron’s assertion, Condition 908 does not “clearly specify when unappropriated water can be diverted from the Boise River.” *Micron’s Response* at 1. The Ditch Companies are similarly wrong in their assertion that “[i]t is the flood release water exiting the system that is the water available for appropriation in the Boise River system.” *Ditch Companies’ Response* at 5 n.6. See also *Ditch Companies’*

Response at 6 (“while accrual to the Base Rights or Refill 1 may be occurring there may also be flood control releases below Lucky Peak Dam which are available for appropriation and use by junior rights.”)

The Director has firmly rejected the premise that the Boise River’s unappropriated waters are those the federal government decides to release from Lucky Peak for flood control. In his decision in the Refill Litigation, he stated:

[T]estimony that the only unappropriated flows in the Boise River system are those released in flood control operations pursuant to the Water Control Manual is incorrect from a factual standpoint. The existence of unappropriated high flows in flood control years is a product of the snowpack. Flood control operations, in short, are a response to unappropriated high flows, not the cause of them.

In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Amended Final Order at 48 (IDWR Oct. 15, 2015) (Spackman, Director) (“*Amended Final Order*”) (emphasis added).⁸

The Ditch Companies contend:

Accordingly, because accrual in the Department’s accounting program to the Base Rights or Refill 1 does not necessarily mean that the accrued water is physically stored in the reservoirs, and because that water accruing in the accounting program may physically flow through or be released during accrual, conditions are necessary to explain when the junior rights may be exercised.

Ditch Companies’ Response at 6 (footnotes omitted; emphasis added). This is a *non sequitur*.

The fact that water accruing to any of the Bureau of Reclamation’s reservoir water rights is

⁸ The testimony rejected by the Director in the quoted text was provided by a former Water District 63 Watermaster. *Boise Project’s Response* includes a declaration by the current Watermaster. See *Declaration of Rex Barrie* (July 16, 2020) (“*Barrie Declaration*”). The *Barrie Declaration* contains two substantive statements concerning the Watermasters’ view on what constitutes flood releases and whether that water is available to be diverted. The *Barrie Declaration* says nothing contradicting the Director’s statements in his *Amended Final Order*.

released or bypassed does not mean that downstream water users need some sort of special permission or condition to divert that water. All they need is a water right that is administered under the priority system.

In addition, this position ignores the Director's determinations in the Refill litigation concerning the accrual of water to the Base Rights during flood control operations, and how that relates to the exercise of junior rights. In explaining his rationale upholding the current accounting system's "paper fill" methodology (and rejecting a methodology based on "physical fill" or reservoirs), he stated:

161. If the accounting system were modified to keep the reservoir water rights in priority until the reservoir system physically filled or reached maximum contents, the period of priority administration of the reservoir water rights would be extended until the end of reservoir system flood control operations. Because reservoir system flood control operations last longer during years of high runoff, the duration of priority administration of the reservoir water rights under such a system would also last longer during high water years. Junior water rights that have historically been considered in priority and allowed to divert during high flow periods would no longer be in priority under such a system.

162. For the same reasons, such a system would make priority administration of state water rights dependent on federal flood control operations. This would be contrary to historic administration both before and after 1986.

Amended Final Order at 49-50 (emphasis added). He went on to explain:

Under such a system [based on physical reservoir fill], however, the priorities of the BOR's reservoir water rights could be exercised or asserted to block, condition, and/or control future use and development of excess flood water. Similarly, reservoir system flood control operations would be determinative of what flows in the river were "natural flow," "stored water," and/or "unappropriated water."

Amended Final Order at 50 (emphasis added).

In short, the Director already has rejected the Ditch Companies' premise that physical fill of reservoirs has a bearing on the availability of unappropriated waters or the exercise of junior water rights. Conditions in new water rights are not necessary to explain when the junior rights may be exercised under the Department's accounting system—priority administration takes care of that.

III. THE OTHER PARTIES' PROPOSED CONDITIONS CHANGE THE REFILL SETTLEMENT AND DO NOT AID ADMINISTRATION

Micron reports that it has “reached a tentative agreement with the Boise Board and the Ditch Company protestants to include a modified version of Condition 908 that acknowledges the refill settlement and the associated water rights [i.e., Refill 1 and Refill 2].” *Micron's Response* at 1. The “tentative” nature of this agreement is referenced as well in *Ditch Companies' Response* at 8-9.

Micron contends that the “tentative settlement conditions . . . provide the necessary direction on when unappropriated waters can be diverted by Micron from the Boise River.” *Micron's Response* at 1.⁹ The Ditch Companies contend that “Condition 908, or a substantially similar version, continues to have utility in light of the Refill Settlement as a necessary

⁹ Certainly a condition limiting the exercise of new appropriations to times when the federal government releases water from its dams provides a simple method of administration. However, Idaho's Prior Appropriation Doctrine trumps administrative ease, making it inappropriate for IDWR to impose Condition 908 no matter how easy it might be to administer (which is questionable, at best). Administrative convenience does not make an illegal condition appropriate. There is no dispute that the Base Rights and Refill 2 have priority as against Micron's proposed industrial use until those rights are satisfied. But once those rights are satisfied, a junior right (such as Micron's) is entitled to water in priority. A condition that denies that entitlement is contrary to Idaho law and cannot be imposed by IDWR.

explanation/condition on new Boise River permits and licenses for the exercise, administration and accounting of the new permits/licenses.” *Ditch Companies’ Response* at 2.

However, the proposed conditions (including their modified version of Condition 908) are seriously flawed and should be rejected by IDWR in this application and in all future applications.¹⁰

There are three proposed conditions in the “tentative agreement,” each addressed in turn below.

A. Condition No. 1

The first proposed condition states:

Condition No. 1. The direct diversion industrial use portion of this right is subordinate to the capture and retention of water in on-stream Boise River reservoir space that was existing on September 13, 2018, during and following flood control operations until the day of allocation, including the capture and retention of water in such space pursuant to water right numbers 63-33734A and 63-33734B. The recharge use portion of this right is subordinate to the capture and retention of water in on-stream Boise River reservoir space that was existing on September 13, 2018, during and following flood control operations until the day of allocation, including the capture and retention of water in such space pursuant to water right numbers 63-33734A and 63-33734B.

¹⁰ As SUEZ has repeatedly stated, it recognizes the ability of an applicant to agree to conditions that are inadvisable or even contrary to Idaho law. SUEZ’s concern, however, is with the Department’s treatment of stipulated conditions as “standard” conditions for new appropriations. This is a very real concern, given the evolution of Condition 908 from a stipulated condition to resolve a protest in 2004, to a Department standard condition in 2013. This concern is heightened by the Ditch Companies proposal that “the Department should use the modified Condition 908 agreed to by Micron to resolve other future applications seeking appropriations from the Boise River so that future protests can be narrowed and streamlined accordingly.” *Ditch Companies’ Response* at 10. See also *Ditch Companies’ Response* at 3 (“modified Condition 908 . . . should be utilized on future or pending applications from the Boise River . . .”). Thus, the Ditch Companies not only want Micron to agree to modified Condition 908 to resolve a protest, but also ask IDWR to make it a standard condition. SUEZ’s concern about this is not “hollow” because of an agreement it has reached with Boise Project not to seek new appropriations to fill its RAFN “gap.” *Boise Project’s Response* at 4. Eventually that “gap” will be filled and SUEZ may want to seek a new appropriation. In the meantime, SUEZ does not want Condition 908 imposed on the license for SUEZ’s permit no. 63-12055, nor on any surface water rights that SUEZ might acquire.

Micron's Response, Exhibit A-2 (emphasis supplied).

This proposed condition is brand new—developed from whole cloth by the Ditch Companies, Boise Project, and Micron. As a matter of structure, it is unclear why it contains two sentences with identical terms, the first applying to “direct diversion industrial use” and the second applying to “recharge use.”

In any case, proposed Condition No. 1 swallows Condition 908 and Condition No. 3, and eviscerates the Refill Settlement by effectively making the water right on which it is included permanently junior and subordinate to physical reservoir fill and refill without limit. The first clause of each sentence states that the use of water under the Micron right “is subordinate to the capture and retention of water in on-stream Boise River reservoir space that was existing on September 13, 2018,^[11] during and following flood control operations until the day of allocation.” In other words, the right is subordinated to unlimited physical reservoir refill until the day of allocation (which marks the end of flood water season, after which only senior natural flow rights are in priority) so it will never come into priority unless the Bureau decides to release or bypass excess water.

The unlimited physical refill in the first clause has no sideboards at all and, in fact, renders superfluous the second clause: “including the capture and retention of water in such space pursuant to water right numbers 63-33734A and 63-33734B.” This second clause’s reference to the Refill 1 and Refill 2 rights (which have some quantity and priority limitations) is meaningless because the first clause already allows unlimited “capture and retention of water” in

¹¹ September 13, 2018 is the priority date of Micron’s application. Presumably, the Ditch Companies and Boise Project intend that this date reflect the priority date of future applications where this condition would be imposed.

the reservoirs.

B. Condition No. 2

The second proposed condition states:

Condition No. 2. This right is subject to water right holder's full utilization of available rights 63-120F, 63-198Q, 63-199B, and 63-200B.

Micron's Response, Exhibit A-2.

First, water right nos. 63-120F and 63-198Q do not appear to be valid water rights. The Department's online database shows no active records for these rights.

Second, water right nos. 63-199B and 63-200B are held by Nampa & Meridian Irrigation District, which is not a party to this proceeding (although it is part of the Boise Project). The concern of the parties over these rights is not clear.

In any event, while this proposed condition bears a resemblance to a standard supplemental groundwater right condition,¹² this is not the same situation. Micron's application does not propose the diversion of groundwater, and the condition does not appear designed to further a state interest in water rights administration (such as utilizing surface water supplies before using ground water for irrigation). Rather, the condition appears to address simply an agreement between private parties (i.e., the applicant and the protestants) concerning the primary use of privately held water rights. The Department regularly declines to include conditions on

¹² See, e.g., water permit no. 63-34810: "The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert ground water under this right to irrigate land with appurtenant surface water rights when the surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule for canal company deliveries. The right holder shall not divert ground water for irrigation purposes under this right if use of the surface water supply is intentionally discontinued or reduced (for example abandoned, forfeited, sold, disallowed by court

water rights that it does not have authority to administer because they reflect a private agreement between parties. That seems to be the case with this condition.

C. Condition No. 3

The third proposed condition is a modified version of Condition 908. The Ditch Companies contend that Condition 908 “can and should be modified in light of the Refill Settlement.” *Ditch Companies’ Response* at 2. They “submit that Condition 908 should be modified to address Refill 1 and whether the proposed new use is subordinated to Refill 1 or not.” *Ditch Companies’ Response* at 7. But the proposed revisions “tentatively agreed to” by Micron do not actually implement the Refill Settlement or make Condition 908 consistent with Idaho law.

SUEZ has already addressed how Condition 908, in its unmodified version, does not comply with Idaho law and is inconsistent with the Refill Settlement. Here, SUEZ will address why the proposed modification in Condition No. 3 fails to remedy those failings.

The proposed modified version of Condition 908 is the same as the original Condition 908, with new language added. The new language is underlined below:

Condition No. 3. The right holder shall exercise the direct diversion industrial use portion of this right only when authorized by the District 63 Watermaster when the Boise River is on flood release below Lucky Peak dam/outlet or when water right no. 63-33734A is in priority. The right holder shall exercise the recharge use portion of this right only when authorized by the District 63 Watermaster when the Boise River is on flood release below Lucky Peak dam/outlet. Flood releases shall be determined based upon the Memorandum of Agreement between the Department of Army and the Department of Interior for Flood Control Operations of Boise River Reservoirs, dated November 20, 1953, contracts

decree, or leased to the Water Supply Bank), or is not deliverable due to non-payment of annual assessments, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.”

with Reclamation contract holders in the Boise River Reservoirs, the Water Control Manual for Boise River Reservoirs, dated April 1985, and any modifications adopted pursuant to the procedures required in these documents and federal laws. The right holder shall not seek, directly or indirectly, any change to the flood control operations of the 1985 Water Control Manual for Boise River reservoirs. This water right may not be used to divert water released from storage to augment lower Snake River flows during the migration of Snake River salmon as authorized under Idaho law, or for any purpose of use authorized under the water rights for Lucky Peak Reservoir.

Micron's Response, Exhibit A-2 (emphasis added to reflect proposed modifications to Condition 908). (This tracks the redline version of Condition No. 3 set out in the *Ditch Companies' Response* at 8-9.)

First, like proposed Condition No. 1 (addressed above), it begins with two nearly identical sentences, one applicable to “direct diversion industrial use” and the other applicable to “recharge use.” But here the terms applicable to the two categories are different.

Under the proposed modification, the industrial use component could be diverted when the river is “on flood release” or when Refill 1 “is in priority.” When is Refill 1 in priority? Technically, it comes into priority when the Base Rights have been fully satisfied. But, because of its subordination provisions, it cannot store water that is necessary to fulfill other existing or future rights. So, in effect, Refill 1 is “in priority” (meaning water can be stored pursuant to it) only when there is sufficient water to fulfill all other water rights.¹³ So, the proposed

¹³ SUEZ has used the term “free river” as shorthand to describe the situation where there is more water than needed to fulfill existing water rights, thereby making it possible for users to divert more water than the quantity stated on the right without injuring other rights. The historical practice of storing additional water in the Boise River reservoirs after the Base Rights were satisfied and when all other rights were satisfied was confirmed by the Director’s *Amended Final Order* (using the terminology “unaccounted for storage” instead of “free river”). Although there was never an appellate decision on the subject (due to the Refill Settlement), the free river concept is now baked into Refill 1 (with some tweaking, such as the “carve-outs” to subordination). That is, aside from the “carve-outs,” Refill 1 only allows for storage of water when all other water rights (existing or future) are being

modification appears intended to recognize that Micron's right would be entitled to water even if Refill 1 "is in priority," but that is rendered meaningless because Micron still would not be entitled to divert unless the river is "on flood release."

The proposed condition's second sentence provides that the recharge component may be diverted only when the river is "on flood release." As just explained, this is really no different than what applies to the industrial use component.

The Ditch Companies contend that the distinction in these two sentences is intended to address applications such as Micron's "where there are multiple uses such as recharge and direct industrial use." *Ditch Companies' Response* at 8. In their view, this distinction implements the "carve-out" to Refill 1's subordination, which only affects Micron's groundwater recharge use and, thus, "Condition 908 can continue to be used, generally speaking, in its original form" with respect to recharge. *Ditch Companies' Response* at 7.

Boise Project similarly contends that, under the proposed modified condition, "Micron is allowed to divert water for the direct industrial use (5.0 cfs) either when Refill 1 is in priority or when water is being released for flood control, giving Micron greater flexibility." *Boise Project's Response* at 7 (emphasis in original).

satisfied (i.e., "free river" conditions). Boise Project accuses SUEZ of trying to "stamp its 'free river concept' onto Idaho Water law." *Boise Project's Response* at 9. But the free river concept has nothing to do with SUEZ's concerns about Condition 908, which are focused on the limitations it places on the exercise of a junior right based upon the federal government's flood control decisions. SUEZ believes junior water rights should be administered by IDWR according to their priorities, and not by the federal government according to its flood control decisions. In any case, the free river concept already is recognized in Idaho. The Director recognized it in his *Amended Final Order* as water accruing to "unaccounted for storage," and the SRBA Court recognized "based on historical practices . . . the 'use' of high flow water not amounting to a water right." *In re SRBA Case No. 39576, Subcase Nos. 74 15051 et al.*, Memorandum Decision and Order on Challenge, at 25 (Idaho Dist. Ct. for the 5th Judicial Dist., Jan. 3, 2012).

None of this makes any sense. The modified condition is not necessary for Micron to divert its direct industrial use “when Refill 1 is in priority” because Refill 1 is subordinated to that use. In other words, Refill 1 will never be in priority to the disadvantage of Micron’s industrial use component.

Meanwhile, the other limitation on Micron’s use of its water right (when “on flood control”) remains in place as to both industrial and recharge use. Thus, Condition No. 3 does nothing to improve on Condition 908. Both conditions are based on the flawed premise that water is available to junior rights only when water is released for flood control (or otherwise within the ambiguous definition of “on flood control”).

Even if Condition 908 was appropriate (which is isn’t), the proposed modifications do not appropriately implement the Refill Settlement. Micron’s recharge use is junior to the priority dates of the Base Rights, Refill 1, and Refill 2, and, due to the carve-out, is actually treated as junior to all of them because the recharge use does not benefit from any subordinations. As determined by the Director in the Refill Litigation, junior water rights are entitled to water when they are in priority. The recharge use probably will never be in priority because of the significant volume allowed under Refill 1. But that is not the case for Micron’s industrial use.

Micron’s industrial use is (a) junior to the Base Rights (because they are not subordinated to other rights), (b) junior to Refill 2 until its volume limit is satisfied, but (c) treated as senior to Refill 1 because of Refill 1’s subordination provisions. Thus, Micron’s industrial use will be in priority (and entitled to delivery of water) once the Base Rights and Refill 2 are satisfied.¹⁴ But

¹⁴ SUEZ recognizes that it might be uncommon for the Base Rights and Refill 2 to be fully satisfied and go out of priority. However, it is a possibility that was certainly contemplated by the parties to the Refill Settlement, as demonstrated by the fact that Refill 2 has any volume limit at all.

if either Condition 908 or Condition No. 3 is included on the right, Micron will only be able to divert water when “the Boise River is on flood release below Lucky Peak dam/outlet” even when it is in priority. This enables the Bureau to divert to its own storage under Refill 1 water that Micron would be authorized to divert. That turns the Refill Settlement on its head.

In sum, the proposed modifications do nothing to clarify Condition 908, make it consistent with Idaho law, or implement the Refill Settlement. The Department should reject Condition 908 in its original and modified forms.

IV. SUEZ’S MOTION IS NOT MOOT

Contrary to the Ditch Companies’ assertion, SUEZ’s motion is not moot because Micron might voluntarily accept Condition 908 (or some version of it). *Ditch Companies’ Response* at 10.

First, the proposed settlement between Micron, Boise Project, and the Ditch Companies is described as “tentative.” *Ditch Companies’ Response* at 8; *Micron’s Response* at 1. It has not been executed, let alone filed with IDWR. In the absence of its filing, the Hearing Officer will need to decide whether to impose Condition 908 on any approval of Micron’s application.¹⁵

Second, whether voluntary or not, the proposed condition undermines the hard-fought settlement of the Refill Litigation, which vindicated the Director’s paper-fill accounting system and assured that water rights in Idaho are not administered on the basis of decisions made by the federal government.

¹⁵ In 2013 IDWR “instructed staff to issue permits for new appropriations of surface water and ground water upstream from Star with the [908 Condition].” See *Memorandum from Shelley W. Keen to Water Right File 63-12399 Re. Use of Approval Condition 908* (Apr. 9, 2015); *Memorandum from Shelley W. Keen to Water Right File 63-12420 Re. Use of Approval Condition 908* (Apr. 9, 2015) (collectively, “Keen Memoranda”).

Third, even if the “tentative” settlement is filed, IDWR’s treatment of Condition 908 as a standard condition or otherwise is at issue. SUEZ recognizes that the “tentative agreement” states: “The Parties acknowledge that Condition No. 3 [modified Condition 908] does not create a standard condition that would be binding on any future applications filed with the Department.” *Micron’s Response*, Exhibit A-2. But that statement would not bind the Department. The *Keen Memoranda’s* instruction that Condition 908 be included on new Boise River permits makes Micron’s “tentative agreement” to the condition superfluous if IDWR does not rescind its position.

The Ditch Companies contend that it is “questionable” whether IDWR can determine in “this discrete proceeding” whether Condition 908 should be imposed on future appropriations. *Ditch Companies’ Response* at 2. SUEZ certainly would have preferred if IDWR would take the initiative (like it did in the *Keen Memoranda*) and reverse its decision to impose that Condition 908 on new appropriations, but it so far has not done so despite SUEZ’s repeated suggestions.¹⁶ This leaves SUEZ with no choice but to ask IDWR to rule on the issue before this mistaken practice becomes further cemented.

V. SUEZ’S PROPOSED CONDITIONS IMPLEMENT THE REFILL SETTLEMENT

SUEZ has proposed new conditions to replace Condition 908 and implement the Refill Settlement. *SUEZ’s Opening Memorandum* at 20-22. The Ditch Companies contend that

¹⁶ Contrary to Boise Project’s assertions, SUEZ did provide public testimony at the hearing on Elmore County’s application for permit no. 63-34348 in which it argued that IDWR cannot unilaterally impose Condition 908 without a right holder’s consent. Appendix A to this reply contains a copy of the December 7, 2018 written Public Witness Testimony of Marshall Thompson, SUEZ’s Vice President and General Manager, and Appendix B contains a letter from Mr. Thompson to the Hearing Officer in that proceeding which clarifies the oral testimony he provided at the hearing. Both documents contend that “flood release only” conditions such as Condition 908 should not be imposed unilaterally by IDWR or standard for new Boise River appropriations.

SUEZ's proposed conditions "redundantly recite that new permits or licenses are subordinated to water right no. 63-33734B ('Refill 2') and that it may be subordinated to water right no. 66[sic]-33734A ('Refill 1')" *Ditch Companies' Response* at 1-2. They further contend that SUEZ's proposed conditions "do not assist with the explanation or administration of new Boise River water rights and instead simply restate existing law and/or incorporate by reference provisions already contained in Refill 1" *Ditch Companies' Response* at 3.

SUEZ disagrees. Its proposed conditions alert the reader, in very simple terms, as to whether or not the water right benefits from subordinations in Refill 1 or Refill 2 without requiring any knowledge or further review of those rights. This assists administration. It is "redundant" only in the sense that it does nothing to substantively modify what is already in the more convoluted language of Refill 1, Refill 2, and the Refill Settlement.¹⁷

CONCLUSION

For the reasons stated herein and in *SUEZ's Opening Memorandum*, SUEZ requests that the Hearing Officer determine that:

(1) Condition 908 (original or modified) is contrary to Idaho law and no longer will be imposed on new water right permits or licenses sourced from the Boise River or, in the alternative, to rule that the condition will be included on new water right permits or licenses only upon the express consent of the permittee or licensee; and

¹⁷ Table A on page 18 of *SUEZ's Opening Memorandum* shows just how convoluted Refill 1, Refill 2, and the Refill Settlement are.

(2) SUEZ's proposed conditions should be imposed on new Boise River permits and licenses to implement the Refill Settlement.

Respectfully submitted this 23rd day of July, 2020.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
Michael P. Lawrence

Attorneys for Protestant SUEZ Water Idaho Inc.

**Appendix A DECEMBER 7, 2018 WRITTEN PUBLIC WITNESS TESTIMONY OF
MARSHALL THOMPSON, SUEZ's VICE PRESIDENT AND GENERAL
MANAGER**

IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-34348 IN THE NAME OF ELMORE
COUNTY, BOARD OF COUNTY COMMISSIONERS

PUBLIC WITNESS TESTIMONY
DECEMBER 7, 2018

MARSHALL THOMPSON,
VICE PRESIDENT & GENERAL MANAGER,
SUEZ WATER IDAHO INC.

RECEIVED
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DEPT OF WATER RESOURCES

My name is Marshall Thompson. I am the Vice President and General Manager of SUEZ Water Idaho Inc. I have prepared written comments that I request be admitted into the record in this matter. With your permission, I will read them now and stand for any questions.

Before cutting to the chase, let me say a few words about me and my company. I have been employed by SUEZ since January 2012. In July of 2018, Greg Wyatt was promoted to a position at the company's headquarters in New Jersey. When he left, I took his position as Vice President and General Manager. Prior to that, I served as the Director of Operations. And prior to that I was the Assistant Manager in Training. Before joining SUEZ in 2012, I was employed by the City of Spokane, Washington in a variety of utility-focused technical roles.

I am a graduate of Central Washington University with Bachelor of Arts degrees in both Geography and Earth Science. I completed my Master of Engineering and Technology Management degree at Washington State University, where I also received a Graduate Certification in Construction Project Management.

SUEZ Water Idaho is a public utility regulated by the Idaho Public Utilities Commission. SUEZ owns and operates a private water system that currently serves approximately 96,000 customers within the Cities of Boise, Eagle, Meridian, and in unincorporated Ada County. As a private company operating under the strict regulation of the Idaho Public Utilities Commission, our water rights are considered utility assets similar to underground infrastructure and other capital investments.

I am testifying as a public witness because SUEZ opposes Elmore County's plan to divert Boise River water out of the Boise River basin. SUEZ became aware of this plan after the deadline for filing protests had passed. SUEZ attempted to intervene in this matter, but the Hearing Officer denied that request.

In short, this is a trans-basin transfer that requires a higher level of scrutiny by the Department. SUEZ opposes Elmore County's plan to remove water from the Boise River basin that will be needed to supply the Treasure Valley's future growth. That growth has been in the headlines a lot lately. In one of many examples, Forbes magazine this year named Boise the fastest growing city in the nation.

SUEZ is one of many Treasure Valley municipal providers tasked with ensuring that water will be available to allow the sustained economic development of this basin. In sharp

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contrast to the costly battles waged among municipal providers in other parts of the country, municipal providers in the Treasure Valley have approached water planning in a disciplined and cooperative fashion. Thanks to the direction provided by the Local Land Use Planning Act and the Municipal Water Rights Act of 1996, and the good work of this Department, we have been largely spared squabbles over turf and water supply that dominate other areas of the country. In fact, SUEZ is proud to have entered into Mutual Cooperation Agreements with a number of municipal providers, and with several irrigation entities, as well.

Over the last two decades, SUEZ has undertaken a vigorous effort—involving both planning and investment in infrastructure—to ensure that it is able to meet the needs of its growing customer base over the next 50 years. In 2016, SUEZ adopted its *Master Water Plan for the Years 2015 to 2065*, which was submitted in connection with the “IMAP” proceeding now pending before the Department. A copy of the *Master Water Plan* also was submitted in this Elmore County proceeding and is found in the record as Exhibit DC 18.

The *Master Water Plan* quantifies SUEZ’s total projected municipal water demand over 50 years, from 2015 through 2065, within SUEZ’s planning area. That is the area SUEZ anticipates serving by 2065. The *Master Water Plan* also describes and quantifies the company’s current portfolio of municipal water rights and other water entitlements, and compares that portfolio with its projected future needs. This information helps SUEZ determine what changes and additions to its portfolio will be necessary to serve its future customers.

The *Master Water Plan* is distinct from, but complements, SUEZ’s *Master Facilities Plan*, which evaluates and describes the anticipated physical facilities that SUEZ will need to construct over the next 20 years. That shorter time frame provides sufficient lead time to allow SUEZ to address engineering, financial, contracting, and regulatory issues necessary to make decisions and bring these facilities on line in a timely fashion. Simply put, as infrastructure needs change, new infrastructure can be acquired as needed. Water rights are a different matter. SUEZ believes that a planning horizon of less than 50 years for water supply is imprudent in this fast-growing basin.

The *Master Water Plan* projects that SUEZ’s annual production to meet demands will more than double in 50 years, from approximately 16 ^{billion} million gallons per year in 2015 to approximately 33 ^{billion} million gallons per year in 2065. This, of course, includes only the municipal water use within SUEZ’s future service area, and does not include demand that will be served by other municipal providers and irrigation districts elsewhere in Ada and Canyon Counties. News reports and anecdotal evidence reinforce SUEZ’s conviction that its *Master Water Plan* is conservative in its estimate of future demand. In other words, demand could be considerably higher.

SUEZ’s water rights portfolio contains a mixture of ground and surface water rights. At peak demand periods during the summer, when water is needed for irrigation, SUEZ relies increasingly on surface water to supply its customers. Currently, approximately one third of SUEZ’s summer water demand is met with Boise River water diverted at its two surface water treatment plants.

SUEZ anticipates that surface water will be used to supply an increasing percentage of demand in the future for a number of reasons. Notably, water quality regulations increasingly require water to be treated to more stringent potable levels before it can enter SUEZ's system. It is simply more cost-effective to treat large volumes of surface water at treatment plants than to treat smaller volumes of ground water at individual municipal well locations.

Another operational benefit of diverting and treating surface water is that capacity generally is limited mainly by the size of the pump and treatment facility (which readily can be increased as needed). Ground water, on the other hand, is limited by well efficiency factors that cannot be readily modified. Simply put, SUEZ can divert and treat water from the Boise River more efficiently, faster, and in greater quantities than it can through wells.

SUEZ's current water planning—as reflected in its *Master Water Plan*—identifies a gap in its 50-year demand. It is likely that future updates to the *Master Water Plan* will show an increasing gap—to the extent water demand grows more rapidly than our current, conservative projections show. The current gap and any future gap will need to be met in large measure through surface water. To satisfy its increased reliance on surface water, SUEZ is actively seeking surface water rights to add to its portfolio. Some of those additions will occur through acquiring and transferring existing rights to use in SUEZ's system. For example, SUEZ currently is in the process of acquiring and transferring an 1864 priority Boise River right.

But SUEZ also intends to add surface water entitlements based on new appropriations, including new storage. SUEZ already holds relatively junior priority natural flow water rights that are diverted and it may seek more in the future. Although those rights are available frequently enough to be valuable components of SUEZ's portfolio, they are not as reliably available as storage water. For that reason, SUEZ supports efforts to develop new storage in the Boise basin, such as the federal government's proposals to raise Anderson Ranch and Arrowrock dams, and Cat Creek Energy's proposal to build completely new storage facilities.

Developing new storage, however, will require there to be unappropriated water. The Boise River's unappropriated water consists largely (if not completely) of spring flood waters, which are the same waters Elmore County seeks to export out of the basin. That water needs to remain available to meet demand within the rapidly growing Boise River basin.

As shown in its *Master Water Plan*, SUEZ has a good supply of ground water rights to meet long term need, but will need more surface water. SUEZ is not alone. Other municipal providers also rely on the Boise River. These providers are working hard, as envisioned by the Municipal Water Rights Act of 1996, and in undertakings sponsored by the Legislature and the Idaho Water Resource Board, to evaluate the future needs in this basin and take positive steps to ensure that need is met. This high level cooperation and coordination within this basin, coupled with the increasing in-basin demand faced by these providers, is a factor that the Department should weigh heavily in considering this application for trans-basin diversion.

Elmore County says, not to worry. It is only taking a little of the water that will be needed in this basin. But there is little reliable supply left to take. Idaho's Legislature expressly

authorizes the Department, when considering an inter-basin transfer like this one, to protect the needs of the basin of origin. And those needs are substantial.

Elmore County also says don't worry because it will only take water when there is so much that others don't need it. That is an interesting point, and one worth considering. Indeed, there are times of excess water. Under Idaho's Maximum Use Doctrine, the Department must endeavor to allow water users to make full beneficial use of available water consistent with the public interest and other requirements.

For that reason, if Elmore County can pass muster on all other appropriation requirements—and that is a big “if”—SUEZ would not oppose an appropriation of excess water subject to a condition subordinating Elmore County's appropriation to future in-basin uses. The subordination condition would allow Elmore County to augment existing agricultural uses with any water that truly is not needed by Boise Basin users, and to do so in a manner that does not impair future development of storage or future use of natural flow within the basin of origin.

Again, however, Elmore County must first satisfy the basic water appropriation requirements. There has been considerable evidence and testimony questioning the feasibility of this project. SUEZ is not in a position to meaningfully weigh in on those technical feasibility issues. Suffice it to say that those issues are important. Water should not be tied up in speculative claims that have no realistic likelihood of coming to fruition. That said, the risk of discouraging viable in-basin development by tying up water rights in non-viable projects is substantially diminished if a subordination condition is included.

One final point before closing. Some have suggested that if an appropriation is approved, it should be subject to the so-called “flood release only” condition that has been imposed on some, but not all, recent Boise River surface water rights. SUEZ takes issue with that. SUEZ itself agreed, on one occasion, to the imposition of such a condition in order to resolve a protest and expedite approval. But there should be nothing natural or automatic about such a condition. In the event Elmore County voluntarily agrees to such a condition, that is its business. But the Department has no business imposing such a condition on an unwilling applicant. SUEZ believes doing so would be contrary to the Prior Appropriation Doctrine, which does not contemplate second class water rights as a matter of routine.

It is one thing (an entirely appropriate thing) to impose a subordination requirement on an inter-basin transfer. It is another thing (an entirely inappropriate thing) to impose a “flood release only” condition because that is allegedly “standard practice.” It is not standard practice, and making it standard practice would be contrary to law.

In summary, SUEZ opposes Elmore County's proposal to export of water out of the Boise River basin. There is no good justification for unconditionally limiting resources the Treasure Valley needs to satisfy its continued growth. If Elmore County's application is approved, any diversion and use of Boise River water authorized by such approval should be subordinated to future Treasure Valley water rights.

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**Appendix B DECEMBER 10, 2018 LETTER FROM MARSHALL THOMPSON CLARIFYING
ORAL TESTIMONY**



RECEIVED

DEC 10 2018

**DEPARTMENT OF
WATER RESOURCES**

Marshall Thompson
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Via Hand Delivery

December 10, 2018

**Matthew D. Weaver
Hearing Officer
Idaho Department of Water Resources
The Idaho Water Center
322 E. Front Street
Boise, ID 83702**

**Re: IN THE MATTER OF APPLICATION FOR PERMIT NO. 63-34348
 IN THE NAME OF ELMORE COUNTY, BOARD OF COUNTY COMMISSIONERS**

Dear Mr. Hearing Officer Weaver:

At last Friday's hearing, I offered testimony as a public witness on behalf of SUEZ Water Idaho Inc. ("SUEZ"). In that testimony, I urged that if Elmore County's application for an inter-basin transfer of water is approved, it should be subject to a condition subordinating the water right to future uses in the Boise Basin. I also urged that the Department should not impose a flood-release-only condition on the Elmore County application. In other words, a flood-release-only condition should be added only if agreed to by Elmore County.

At the hearing, I was questioned as to whether it was consistent to call for imposing one condition (subordination) but not the other (flood-release-only). I did my best to respond during my testimony on Friday, but I wish to take this opportunity to provide the Hearing Officer with a more comprehensive explanation of SUEZ's position on this question.

Neither subordination nor flood-release-only are standard conditions. Except in special circumstances, a subordination condition should not be forced on an applicant in the context of an ordinary appropriation. Indeed, doing so would be contrary to the prior appropriation doctrine, which calls for even-handed treatment of appropriations and administration on the basis of priority.

As noted in my testimony, however, this is not an ordinary appropriation. Elmore County seeks a trans-basin diversion, which is subject to a different and higher standard of evaluation by the Department. Accordingly, it is appropriate and consistent with the prior appropriation doctrine to impose a subordination condition to protect all users in the basin of origin, even if it is not agreed to by the applicant.

United Water has changed its brand to SUEZ.



However, the flood-release-only condition is different. It is aimed at protecting only a discrete handful of water users in Basin 63—an ambition that is suspect given its imprecise language. Also, the flood release only condition ostensibly gives authority to someone other than the State of Idaho (i.e. the federal government) to determine when other water rights may be exercised, which is wholly inconsistent with Idaho's prior appropriation doctrine. In light of this, there is no justification for IDWR to impose a flood-release-only condition without the consent of the applicant.

However, if the Department sees this differently and determines that a flood-release-only condition is needed to protect the interests of other water users due to special circumstances surrounding this trans-basin diversion, the basis for the flood-release-only condition must be made clear. It should not be imposed on the basis that flood-release-only conditions are standard practice for new surface water appropriations out of the Boise River. In other words, if a flood-release-only condition is imposed on the Elmore County appropriation, it must be made expressly clear that it is added either because (a) the applicant agreed to the condition or (b) special circumstances surrounding the trans-basin diversion make it necessary. Specifically, the condition should not be imposed in a manner that makes it a precedent for new in-basin appropriations.

In order to expedite the filing of this letter, I have authorized SUEZ's counsel to sign for me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Marshall Thompson'.

Marshall Thompson
Vice President and General Manager

cc: Parties (via email)
Givens Pursley LLP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July 2020, the foregoing, together with any appendices or exhibits, was filed, served, and copied as shown below.

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Christopher H. Meyer