

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

<b>IN THE MATTER OF</b>	)	
<b>APPLICATION FOR PERMIT</b>	)	
<b>NO. 63-34614 IN THE NAME OF</b>	)	<b>ORDER DENYING IDFG'S</b>
<b>MICRON TECHNOLOGY, INC.</b>	)	<b>MOTION FOR PARTIAL</b>
	)	<b>SUMMARY JUDGEMENT</b>
	)	

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**PROCEDURAL HISTORY**

On September 18, 2018, Micron Technology, Inc ("Micron") filed Application for Permit No. 63-34614 ("Application") with the Idaho Department of Water Resources ("IDWR"). Micron seeks to divert up to 12 cfs from the Boise River for industrial and ground water recharge purposes. The Application was protested by Idaho Foundation for Parks and Lands, SUEZ Water Idaho Inc. ("SUEZ"), the Boise Project Board of Control ("Boise Project"), the Idaho Department of Fish and Game ("IDFG"), and fourteen water delivery entities<sup>1</sup> (collectively, "Irrigation Entities") that divert water from the Boise River.

On July 17, 2020, IDFG served all parties to this contested matter its *Motion for Partial Summary Judgement Re: Condition to Protect "Streamflow Maintenance" Storage Releases* ("Motion"). The Motion was accompanied by *Declaration of Michael C. Orr* ("Orr's Declaration").

On July 31, 2020, IDWR received a response to the Motion from SUEZ in support of the Motion. On August 3, 2020, IDWR received a response to the Motion from Micron also in support of the Motion. IDWR did not receive responses to the Motion from the other parties.

**LEGAL STANDARD**

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions for summary judgment. The rules do, however, authorize the filing of prehearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.260 and 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56.

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<sup>1</sup> The fourteen water delivery entities are: Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

## **IDFG's MOTION**

The Motion asks the Hearing Officer to determine that, as a matter of law, the following condition ("Proposed Condition") will be imposed on any permit issued pursuant to the Application, either in place of or in addition to IDWR's Standard Condition 907:

This right does not authorize the diversion or use of water released from Lucky Peak Reservoir for streamflow maintenance purposes pursuant to water right 63-3618. Pursuant to water right 63-3618, the quantity, duration, and timing of streamflow maintenance releases from Lucky Peak Reservoir are determined according to joint written instructions from the United States Bureau of Reclamation and the Idaho Department of Fish and Game to the Idaho Department of Water Resources.

For Reference, IDWR's Standard Condition 907 reads as follows:

If measured or calculated Boise River flows at the point of diversion are less than 240 cfs during the period beginning June 16 and ending February 29, water shall not be diverted pursuant to this right. If measured or calculated Boise River flows at the point of diversion are less than 1,100 cfs during the period beginning March 1 and ending May 31, water shall not be diverted pursuant to this water right. Measured or calculated Boise River flows at the point of diversion shall be based on gauged Lucky Peak Dam discharge minus the gauged diversion of the New York Canal. If the benchmark stream maintenance flows of 240 cfs (from June 16 to February 29) and 1,100 cfs (From March 1 to May 31) subsequently change, then the diversion of Boise River flows under this right will be limited to provide for the new benchmark flows.

In its Motion, IDFG asserts as undisputed facts that rights 63-3618 and others<sup>2</sup> have been decreed by the Snake River Basin Adjudication Court and that these rights authorize, in pertinent part, diversion of 152,300 AFY of Boise River water into and from storage for streamflow maintenance purposes. And that the decree for 63-3618 defines the place of use for the water released from storage for this purpose as "[Within] the Channel of the Boise River from Lucky Peak Dam downstream to the confluence with the Snake River." Further, that the partial decrees for these rights also specify that IDFG and the United States Bureau of Reclamation shall provide written instruction to IDWR to convey to the watermaster regarding release of the streamflow maintenance storage water. Finally, IDFG asserts as a fact that the basis of its protest to the Application is to ensure that any permit that results is conditioned to protect water released from storage for the streamflow maintenance beneficial use authorized by 63-3618 (hereafter referred to as "Streamflow Maintenance Releases", or "SMR"). These facts are supported by evidence in the record and are not in dispute.

IDFG also asserts facts in its Motion related to development, purpose, and use of the condition of approval referred to in IDWR's database as "Condition 907", which was recited above. IDFG asserts that the condition was developed and revised for the purpose of resolving protested applications for permit beginning in 1998, and that IDWR did not formulate the language or otherwise play a role in developing the condition, yet IDWR designated the

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<sup>2</sup> Associated rights 63-33734A and 63-33734B (the "Refill Rights") in part provide supplemental storage for uses authorized 63-3618.

condition as a “standard approval condition” in 2013 to be used on new, unmitigated appropriations of water from the Boise River above Star Bridge. These facts are supported by evidence in the record and are also not in dispute.

IDFG asserts that Condition 907 was “apparently derived from the ‘streamflow maintenance’ release rate that has generally prevailed since the early 1990s”, but that the “basis for the 1,100 cfs release rate referenced in Condition 907 is ‘not documented.’”

IDFG, SUEZ, and Micron assert that Condition 907 is ill-suited to protect the SMR and should not be included for that purpose on any permit issued pursuant to the Application. IDFG considers the possibility that Condition 907 may have been adopted by IDWR for some purpose beyond protecting SMR<sup>3</sup> and, if so, the Proposed Condition should be used in addition to Condition 907. SUEZ goes further and asserts that Condition 907 “has no independent utility” and “retaining Condition 907 would serve only to confuse and complicate.” Similarly, Micron asserts the Proposed Condition “makes Standard Condition 907 obsolete.”

### ANALYSIS/DISCUSSION

The question of law at hand is whether the Proposed Condition must be included on any permit issued pursuant to the Application for the purpose of protecting SMRs<sup>4</sup>.

IDFG is not arguing that the Proposed Condition is necessary to protect the right to divert and store natural flow water for streamflow maintenance under 63-3618 and the Refill Rights, or that natural flow or storage releases for other purposes must be protected, but rather it is concerned with ensuring that diversion of water pursuant to the Application does not interfere with the use of water that is released from storage for streamflow maintenance pursuant to 63-3618.

It is the watermaster’s duty to ensure that water released from storage is conveyed down the river to its place of use. *See* Idaho Code § 42-801. In this case, the place of use is the entire reach of the Boise River below Lucky Peak Dam to the Snake River, rather than a specific canal for redirection as contemplated by § 42-801, but this difference is not material to the watermaster’s duty. Instead of conveying the water to one or more canals, the duty of the watermaster is to convey the water to the entire reach and to “adjust the headgates of all ditches not entitled to the stored water, and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled.” *Id.*

Because it is the watermaster’s duty to deliver and protect the SMR flow throughout the reach, and because no water user is entitled to divert the SMR flow, a condition on a new water right restating that the water right does not authorize the right holder to divert the SMR water is unnecessary. The Hearing Officer does not agree that, as a matter of law, the Proposed Condition must be included on any permit issued pursuant to the Application. IDFG

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<sup>3</sup> *See* Motion at 14.

<sup>4</sup> Related questions surrounding the use and appropriateness of Condition 907 are suggested in the Motion and the responses. The Hearing Officer will not address those peripheral questions or opine on the utility of Condition 907, except to note that much is being made of Condition 907 as a “standard” condition, yet the Hearing Officer is not bound by IDWR’s 2013 instructions to its staff to use the condition and any decision to apply it will be based on the record developed in this proceeding.

fails to point to any legal authority that would cause the Hearing Officer to conclude the Hearing Officer is required by law to adopt the Proposed Condition.

The Hearing Officer concludes the Hearing Officer should not issue an order in this contested matter that, as a matter of law, the Proposed Condition will be included on any permit that may be issued.

**ORDER**

IT IS HEREBY ORDERED that IDFG's *Motion for Partial Summary Judgement Re: Condition to Protect "Streamflow Maintenance" Storage Releases* is **DENIED**.

Dated this 25<sup>th</sup> day of August 2020

A handwritten signature in blue ink, appearing to read 'Nick Miller', is written over a horizontal line.

Nick Miller  
Hearing Officer

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25 day of August, 2020, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Denying IDFG's Motion for Partial Summary Judgement

MICRON TECHNOLOGY INC  
ATTN: ANN DICKEY  
PO BOX 6  
BOISE, ID 83706

KEVIN J BEATON  
STOEL RIVES LLP  
101 S CAPITOL BLVD STE 1900  
BOISE, ID 83702-7705

IDAHO FOUNDATION OF PARKS AND LANDS  
ADVOCATES OF THE WEST  
C/O LAURENCE J LUCAS  
C/O BRYAN HURLBUTT  
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BOISE, ID 83701

SPF WATER ENGINEERING LLC  
ATTN: TERRY SCANLAN  
300 E MALLARD DR STE 350  
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BOISE PROJECT BOARD OF CONTROL  
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Kensle Thorneycroft  
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State of Idaho

DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

August 25, 2020

MICRON TECHNOLOGY INC  
KEVIN J BEATON  
STOEL RIVES LLP  
101 S CAPITOL BLVD STE 1900  
BOISE, ID 83702-7705

**RE: Application for Permit No. 63-34614**

Dear Interested Parties,

Enclosed is an *Order Denying IDFG's Motion for Partial Summary Judgement* for Permit No. 63-34614 in the name of Micron Technology Inc.

If you have questions regarding the enclosed documents, would like additional information, or need to further discuss the process, please feel free to contact the Western Regional Office at 208-334-2190.

Sincerely,

Kensie Thorneycroft  
Administrative Assistant  
Western Regional Office

Enclosures

CC:  
SPF WATER ENGINEERING  
STOEL RIVES LLP  
IDAHO DEPT OF FISH AND GAME  
SAWTOOTH LAW OFFICE  
GIVENS PURSLEY LLP  
BARKER ROSHOLT & SIMPSON LLP  
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