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WATER RESOURCES
WESTERN REGION

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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 RESPONSE TO IDFG'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

SUEZ Water Idaho Inc. ("SUEZ"), by and through its counsel of record, Givens Pursley LLP, and pursuant to Rule 270.02 of the Idaho Department of Water Resources' Rules of Procedure (IDAPA 37.01.01.270.02), hereby submits this response to *IDFG's Motion for Partial Summary Judgment re: Condition to Protect "Streamflow Maintenance" Storage Releases* (July 17, 2020) ("*IDFG's Motion*").

In its motion, the Idaho Department of Fish and Game ("IDFG") proposes the following new condition to protect streamflow maintenance releases from Lucky Peak:

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.

IDFG's Motion at 1.

SUEZ endorses this proposal. Indeed, SUEZ urges that IDFG's proposed language become the new standard streamflow maintenance condition on all new Boise River rights (including nonconsumptive rights¹) in lieu of flawed Condition 907.²

The first sentence of IDFG's proposed condition serves a valuable notice function.³ It notifies all that the right holder may not divert water in the Boise River that is released for streamflow maintenance under right no. 63-3618 (the so-called "Base Right" for Lucky Peak).

The second sentence of IDFG's proposed condition is consistent with the partial decree for right no. 63-3618, which contains a remark stating, "The Bureau of Reclamation and Idaho Department of Fish and Game shall provide joint written instructions to the Department, for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance

¹ The need to apply the condition to non-consumptive rights is explained in *IDFG's Motion* at 13.

² IDFG does not go quite this far. First, IDFG leaves open the possibility that Condition 907 may have some yet unknown independent utility and, if so, could be retained in addition to the new streamflow maintenance condition. *IDFG Motion* at 14-15. But there is no independent utility to Condition 907. As IDFG makes abundantly clear in its motion, retaining Condition 907 would serve only to confuse and complicate. Second, IDFG urges the new language only with respect to Micron's permit. But IDFG's reasoning applies equally to any new appropriation from the Boise River. It is at least as appropriate for the Hearing Officer (and ultimately the Department) to establish a new "standard" in a contested case like this as it is for agency staff to designate standard conditions behind closed doors (which is how Conditions 907 and 908 became "standard"). Of course, calling something "standard" outside the context of rulemaking has no effect other than the power of the Department's own precedent to persuade reviewing courts and to chart a non-arbitrary course of agency action. And, unless a court ruling provides otherwise, it lasts only so long as the Department chooses to follow its own precedent. But there is still benefit in saying what is "standard," and doing so here is preferable to less formal administrative action.

³ Similar to the conditions SUEZ has proposed to replace Condition 908, IDFG's proposed language does not change anything. It simply ensures that the constraints imposed by other rights are not overlooked. Specifically, it is not necessary to expressly state that a water user may not divert water released from storage for another user's beneficial use. It is the watermaster's job to shepherd such releases past other water users so it reaches the proper beneficial use. Thus, Micron would not be allowed to divert water released for streamflow maintenance (or any other beneficial use authorized under the Lucky Peak water right) even in the absence of a condition. However, as explained in *IDFG's Motion* at page 7, the proposed condition's language is particularly helpful in the case of streamflow maintenance releases—which, unlike most rights, must be shepherded all the way to the Snake River.

storage water.” While the proposed condition’s language concerning “the quantity, duration, and timing of streamflow maintenance releases” is not included in 63-3618’s partial decree, SUEZ believes this additional language is consistent with the intent of right no. 63-3618’s remark and is helpful by providing notice that the quantity, duration, and timing of streamflow maintenance releases are subject to change in the IDFG’s and the Bureau’s discretion.

The notice function served by IDFG’s language, by the way, is similar to the function served by SUEZ’s proposed Condition No. 3 on page 22 of *SUEZ’s Memorandum in Support of Motion for Partial Summary Judgment Concerning Condition 908* (“*SUEZ’s Memo*”).⁴ The difference is that SUEZ’s Condition No. 3 expressly provides notice concerning the inability to divert so-called salmon flow augmentation water, while also generally picking up “any other purpose of use authorized under the water rights for Lucky Peak Reservoir” (which would include streamflow maintenance releases). While one could argue that SUEZ’s broader Condition No. 3 is all that is necessary, SUEZ sees benefit in also including IDFG’s more specific streamflow maintenance condition.

In short, IDFG’s proposed condition makes sense because it is simple to understand and will assist with the efficient administration of water rights. Indeed, as IDFG suggests, it would make even more sense for the Department to completely replace Condition 907 with the proposed condition because it appears that Condition 907 has no utility other than to (haphazardly) protect streamflow maintenance releases under right no. 63-3618.

⁴ SUEZ’s proposed Condition No. 3 is a verbatim adoption of the last sentence in Condition 908, which states: “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.” *SUEZ’s Memo* at 22.

This lack of utility, as well as the evolution of Condition 907 from a stipulated provision used to resolve protests to a “standard” Department condition, is remarkably similar to the situation involving Condition 908 (which is the subject of *SUEZ’s Motion for Partial Summary Judgment Concerning Condition 908* (July 2, 2020)). Both conditions were developed as an expediency to resolve protests. The conditions may have been useful for the settling parties, but there is no basis for either to be treated as a “standard” Department condition imposed on new Boise River rights.

The morphing of Condition 907 from a stipulated condition to a “standard” Department Condition is perhaps even more convoluted than Condition 908’s,⁵ but the bottom line is the same for both of them: for reasons that are unclear, IDWR adopted as “standard” (without notice to any water users or an opportunity for them to comment) conditions that were developed by private parties to resolve protests. It was inappropriate for IDWR to have done so without some basis in the law, and there is none. IDWR should correct the improper situation it created by abandoning Conditions 907 and 908 and adopting the conditions proposed by IDFG and SUEZ.

⁵ *IDFG’s Motion* at 5-6 describes the evolution of Condition 907, citing the January 31, 2020 *Memorandum by Angie Grimm and Matt Anders Regarding Origins of Water Right Condition 907 and Implementation of Water Rights with Conditions 907 and 908 in the Boise River Water Right Accounting Program (“Staff Memo”)*. A copy of the *Staff Memo* is set out in Appendix B at page 27 of *SUEZ’s Memorandum in Support of Motion for Partial Summary Judgment Concerning Condition 908*. SUEZ largely agrees with the descriptions of Condition 907’s history in the *IDFG Motion* and the *Staff Memo*. However, both documents fail to mention that SUEZ’s application for permit no. 63-31409 (which was approved with an iteration of Condition 907 nearly identical to the one set forth in the *Staff Memo*) from the outset acknowledged the intent to protect benchmark flows “for fish habitat identified by the Idaho Department of Fish and Game.” See IDWR backfile for *Application for Permit No. 63-31409*, which includes October 3, 2001 letters from SUEZ (then United Water Idaho) to various interested parties, including IDFG, included as Exhibit 5 to the application. Also, the *IDFG Motion* and the *Staff Memo* fail to recognize that IDWR may have played a role in the development of the last sentence in Condition 907, which appears to have been added after “[a]dditional negotiations between IDWR and the parties [that] resulted in a Second Stipulation for Withdrawal of Protests executed on December 15, 2003.” *Memorandum from Gary Spackman* at 1 (Dec. 30, 2003), in IDWR backfile for *Application for Permit No. 63-31409*. We offer this only for the sake of a complete and accurate record. None of this changes the bottom line. IDFG’s proposed new condition is a far cry better than Condition 907.

Respectfully submitted this 31st day of July, 2020.

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By


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July 2020, the foregoing, together with any appendices or exhibits, was filed, served, and copied as shown below.

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