

Keen, Shelley

From: Keen, Shelley
Sent: Friday, August 01, 2014 1:17 PM
To: Weaver, Mathew
Subject: RE: Boise Refill Analysis

Mat,

I looked through the files for Permits 63-12399 (Simplot) and 63-12420 (Micron) to see if anything in the record prior to issuance of the permits clearly and overtly indicates that water would be diverted only during flood control operations. I found the following list of statements:

- The cover letter for the Simplot application states, "The application proposes to divert river water when seasonally high flows are available to make beneficial use of the water that would otherwise be lost."
- The cover letter for the Micron applications states, "The application contemplates appropriation of flood control releases from the Boise River system."
- The legal notice for both applications states, "Right will be used when water is available (high runoff etc.)"
- Both applicants subsequently stipulated that they would not divert when flows are below 240 cfs from June 16 to February 29 and when flows are below 1100 cfs from March 1 to May 31. The parties did not reach agreement on the period from June 1 to June 15, and it was not addressed in the approval conditions of either permit.
- For the Simplot permit, proof of beneficial use was received in March of 2014, but the field examination has not been done yet. For the Micron permit, however, Terry Scanlan submitted a beneficial use field report in 2009. In his report, he states, "Water delivered under this water right permit is available only during flood control releases on the Boise River." In subsequent correspondence, Terry states that "any flows over approximately 1,500 cfs at Glenwood can be considered flood control releases that are available for diversion under this water right." **[Is this statement consistent with the Water Control Manual for Boise River Reservoirs?]**

I didn't see anything in either file addressing whether water could be called to make flows in the Boise River come up to the 240 cfs or 1100 cfs flow rate. However, at the time the permits were issued, I don't think the "second fill" question had come up. Everyone probably assumed that the storage rights were senior and that these new rights could make calls only against future juniors. If the Refill2 right is subordinated to rights with priority dates prior to May 1, 2014, it will be subordinate to these two rights, which have 1997 priority dates, unless it can be made absolutely clear that these two rights can be exercised only during flood control operations. This seems to be the reason for Al's question about adding conditions to the licenses to make it clear that diversions can occur only during flood control mode.

IDWR has instructed our staff to issue **permits** for new appropriations of surface water and ground water upstream from Star with the following conditions:

- 907 -- 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.
- 908 -- 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. 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 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.

We've not instructed staff to add any of these conditions to licenses if the conditions were not already on the permits because IDWR's authority to impose new restrictions at licensing is questionable. (I double checked with Craig and John, and we all agree on this point.) Because it's much clearer in the record for the Micron right that it's for flood flows only, I think IDWR could make a fairly strong argument for adding condition 908 to the license. However, the record for the Simplot right is less clear, and adding condition 908 might be viewed by the right holder as imposing a new restriction. This probably goes for all the other post 94 filings as well.

Let me know if you need me to dig deeper on any of this.

Shelley

From: Weaver, Mathew
Sent: Wednesday, July 30, 2014 9:53 AM
To: Keen, Shelley
Subject: FW: Boise Refill Analysis

Shelley,

Can you take a look at Al's question(s) and the two Micron WRs and let me know what you think?

Thanks,

Mathew Weaver, PE
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From: Albert Barker [<mailto:apb@idahowaters.com>]
Sent: Wednesday, July 30, 2014 9:07 AM
To: Cresto, Liz
Cc: Weaver, Mathew
Subject: RE: Boise Refill Analysis

Liz-

Thanks for the explanation. I did not scroll up far enough on the first sheet to get all the rights and did not realize how the grey boxes worked on the second sheet.

I do have a question about the Micron rights -63-12399 and 63-12420. They both contain the following language.

If measured or calculated Boise River flows at the point of diversion are less than 240.00 cfs during the period beginning June 16 and ending February 29, water shall not be diverted pursuant

to this water right. If measured or calculated Boise River flows at the point of diversion are less than 1,100.00 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 to the New York Canal.

This is not the same language in the later United Water right stating that water can be diverted only when water is being released for flood control, but it seems to suggest that water can be taken only in certain flow conditions and that water cannot be called to make the flow come up to that flow rate. Is that correct and is there something that makes that clear in the back files?

Also these two rights are still permits and a license condition can be added at the time of licensing to provide that water cannot be called from storage to fill these rights. If I understood our discussions from last year on administration that language will be added to all new permits and licenses anyway as a matter of course. Is that right?

It would also seem to me that all the outstanding permits on this list would have that flood release condition added, too, thereby reducing further the impact of the post 1994 rights.