

MEMORANDUM

DATE: April 9, 2015

TO: Water Right File 63-12420

FROM: Shelley W. Keen *SWK*

RE: Use of Approval Condition 908

In 2013 IDWR instructed our staff to issue permits for new Basin 63 appropriations of surface water and ground water upstream from Star with condition 908, which states:

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.

Because of its age, Permit 63-12420 was not issued with condition 908 or similar language.¹ A condition like 908 seems to have first appeared in IDWR records during the processing of Application 63-31409 in 2003. During the licensing review process for this right, IDWR has evaluated whether it would be appropriate to include condition 908 on the right. Our review process looked to determine whether condition 908 is consistent with the expectations of the permit holder throughout the record.

- The 1997 cover letter for the application states, “The application contemplates appropriation of flood control releases from the Boise River reservoir system.”
- The legal notice for the applications states, “Right will be used when water is available (high runoff etc.)”

¹ Permit 63-12420 has conditions prohibiting diversion if Boise River flows are below 240 cfs from June 16 to February 29 and if they are below 1,100 cfs from March 1 to May 31. However, these conditions have a different purpose than to prevent injury to existing water right holders; they are intended to meet environmental objectives pursued by IDFG and Idaho Rivers United.

- On December 16, 1997, consultant Terry Scanlan wrote letters to Ada County Development Services and the Boise City Public Works Department to explain the development proposed in applications 63-12420 and 63-12399. In the letters, Scanlan states, "We propose to appropriate water that is currently released for flood control purposes."
- Terry Scanlan submitted a beneficial use field report in 2009. In his report, he stated, "Water delivered under this water right permit is available only during flood control releases on the Boise River."

Based on these items in the file, it seemed clear that the limitations in condition 908 apply because Micron Technology Inc. expected to be able to divert water only during flood control operations. The conclusion is further bolstered by the fact that the right is partly for ground water recharge, and the Director has substantial authority under Idaho Code § 42-234 to reduce or modify recharge rights.