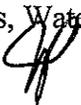


MEMORANDUM

To: Regional Offices, Water Allocation Bureau
From: Jeff Peppersack 
Date: May 3, 2010

Application Processing Memo # 71
Transfer Processing Memo # 27

Re: Water Rights Dedicated for Mitigation Protected from Forfeiture

House Bill 633 (2004) amended Idaho Code § 42-223 by protecting water rights from forfeiture if they are not used because the water right is dedicated as mitigation for some other water use. The amendment states:

(10) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, a water right transfer approved pursuant to section 42-222, Idaho Code, a water exchange approved pursuant to section 42-240, Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code.

The mitigation plan must be approved by the director, and must be associated with a new application to appropriate water, a water right transfer, a water right exchange, or a mitigation plan related to conjunctive management. This memorandum does not address mitigation plans associated with conjunctive management.

The statutory recognition of mitigation as a defense to forfeiture raises the issue of what processes are necessary for the mitigation to be approved by the director. IDWR has previously recognized mitigation as a beneficial use. Dedication of a water right for mitigation is dissimilar to other beneficial uses of water, however, because the beneficial use is, at times, a nonuse. This dichotomy is reflected in the amendment above where a water right is protected for “nonuse” when it is “being used for mitigation purposes.”

Because of the recognition of protection from forfeiture given by Idaho Code § 42-223 and the statement that the director must approve the mitigation plan when it accompanies a new application to appropriate water, an application for transfer, or an application for exchange, an additional application for transfer or placement of the water right in the Water Supply Bank is not necessary if the water right is **not used**. Leaving water in a stream (or in the ground), or releasing water from storage to the stream is non-use. Diverting water through a canal or ditch system and delivering it back to the watercourse is non-use if it can be shown how the water will remain unused within the system. Diversion of surface water to a recharge facility and percolating it into the ground as mitigation for a ground water withdrawal is an additional beneficial use of water that must be authorized by the Department through an application for transfer or rental of water from the Water Supply Bank.

The following steps should be taken for mitigation plans proposing **nonuse** of water for mitigation:

(1) The water right or portion of a water right offered for mitigation must be identified with the application it accompanies. Sufficient information should be submitted with the application for IDWR to determine that the water right or part thereof will not be used. IDWR is responsible for verifying that the mitigation rights are valid and that the applicant has the authority to commit them to use as mitigation. IDWR staff at the regional office should correspond with the applicant to request the documentation needed for verification of the rights in a manner similar to that employed in transfer processing.

(2) The published legal notice for the water right filing must generally describe the mitigation plan.

(3) The department record of the water right or portion of a water right dedicated to mitigation will be modified to show mitigation as a use (even though it is a nonuse). Examples of common scenarios are provided later in this memo. A new water right number will not be issued for a portion of a right dedicated to mitigation unless there is a change of ownership for a portion of the right.

(4) If the water right or portion of a water right offered for mitigation is owned by a canal company, irrigation district, or other water delivery entity, the proponent of the mitigation plan must submit an agreement or consent document, signed by an authorized officer of the delivery entity, stating that the delivery entity agrees (a) to the use of its water right for mitigation and (b) that the water right records(s) of IDWR can be changed to reflect the nonuse of the water as mitigation use. If the consent or agreement states that the delivery entity retains authority to revoke the agreement to allow the use of the water for mitigation, IDWR will condition the water right that it is subject to cancellation or revocation if notified by the delivery entity that the water right can no longer be used for mitigation.

Processing Guidelines - Examples of Common Scenarios

Even though “mitigation rights” will not be lost due to nonuse, effective water right administration requires IDWR to identify and track the rights and portions of rights that will not be used. To determine the kinds of water right filings and procedures necessary to track the unused mitigation rights, it is useful to decide which of the five likely scenarios is applicable.

Scenario #1

The first scenario is where a new permit or exchange is mitigated by changing the nature of use of other pre-existing rights to ground water recharge or some similar use. For example, an application for permit for a pond in a moratorium area requires mitigation for any consumptive use (e.g. consumptive use associated with evaporation from the pond surface). One form of mitigation would be the diversion and use of water under an existing water right to provide make-up water for the evaporative losses. The nature of use is generally changed to ground water recharge or to the ultimate purpose of the pond such as aesthetics, wildlife or recreation. In this situation, in addition to the application for permit or application for exchange, the applicant must also file an application for transfer to alter the “mitigation rights” to authorize the new use. A transfer is required and the rights are not changed to mitigation as a nature of use because the change will involve actual diversion and application of the water to a beneficial use. This is the current practice and will not require a change to our procedures.

Scenario #2

The second scenario is where a transfer is mitigated by the nonuse of water under other pre-existing rights. An example would be the transfer of an existing ground water right authorizing irrigation use to a new location within the ESPA for a dairy, where nonuse of another irrigation right would provide mitigation for an increase in depletion to a reach of the Snake River. In this situation, the “mitigation rights” are treated in the transfer processing similar to other associated rights and are altered in the Workflow process for the transfer and included in the approval of the transfer. The nature of use for the mitigation rights will be changed to show mitigation as the use. This is also very close to our current practice and will require little change to our procedure with the exception that the mitigation rights do not need to be listed on the transfer application under the rights being transferred and will not be considered in calculation of the application fees.

Transfers in the ESPA that result in increased reach depletions in the Snake River can be mitigated by increased reach gains from other proposed ESPA transfers (offsetting transfers). This type of mitigation requires the transfer applications to be submitted together as part of a plan to mitigate or offset the effects of each individual transfer. This type of mitigation requires unique conditions of approval for the offsetting transfers to address future changes and differences in priority dates between rights to prevent injury in the event of delivery calls. See Transfer Memo No. 24 for additional details.

Scenario #3

The third scenario is where a new permit or exchange will be mitigated by the nonuse of water under other water rights. In the past IDWR required applicants to submit an associated application for transfer as a vehicle for changing the nature of use for the “mitigation right(s)” to mitigation. An application for transfer is no longer necessary for such a change. In situations where the new use is mitigated by the nonuse of water under other rights, IDWR uses the approval order for the new permit or exchange to approve the mitigation plan and to provide a vehicle for changing the official record for the mitigation right(s) that will no longer be used. The approval order shall include the following standard condition or a similar condition.

To mitigate for the depletion of water resulting from the use of water under this right and to prevent injury to senior water right holders, the right holder shall cease <diverting and> using water as authorized by the following water rights for the purposes and amounts specified below. Moreover, the official record for the following water rights will be changed to show that <diversion and> use of water is not authorized because the rights, or portion(s) thereof, are being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate	Mitigation Volume	Mitigation Acres
00-00000	Use	00.00	00.0	00
00-00000	Use	00.00	00.0	00

The land that will no longer be irrigated under these rights is located within the <XX¼XX¼, Section 00, Township 00 North, Range 00 East, B.M.>

If a specified mitigation right, or portion thereof, is sold, transferred, leased, used on any place of use, or is not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under this <permit or exchange> approval shall be reduced by the same proportion as the reduction to the mitigation right.

When dealing with scenario #3, Department staff will complete data entry for the mitigation right(s) after issuing the approval document for the new permit or exchange. Data entry shall include a comment referring to the reason for the change and the number of the file where the approval order can be found. Data entry shall also include a change to the nature of use for the mitigation right(s) (or portion thereof) to show mitigation as the use and a change to the place of use including modification of the place of use shape file(s) to designate the portion of the place of use that will no longer be irrigated. The approving office shall document the water right file for the mitigation right(s) by forwarding a proof report depicting the changes to the WR Permits Section for inserting into the left side of the water right file. The proof report should show the comment described above and the appropriate changes reflecting the mitigation use.

Scenario #4

The fourth scenario is where a new permit, exchange or transfer will be mitigated by release of storage water under an existing storage right. An example would be the transfer of an existing ground water right authorizing irrigation use to a new location within the ESPA for an industrial use, where release of storage to a specified reach of the Snake River would provide mitigation for an increase in depletion to the reach due to the industrial use. This method is only approvable if the storage supply is reliable and assured either by pre-purchase or through other accepted operation plans within a rental pool. In this situation, a transfer is not required to change the nature of use of the storage right because the storage water is released (not used) and becomes available in the stream to other users as mitigation for any depletion caused by the new permit, exchange or transfer. Note that even though a transfer approval is not required, approval may be required pursuant to any existing rental pool procedures to authorize and record the rental or release of water from storage.

IDWR will use the approval order for the new permit, exchange or transfer with a condition to describe and approve the mitigation plan and to provide a vehicle for changing the official record for the storage ("mitigation") right(s) that will no longer be used, except as described below for storage releases from an existing rental pool. Department staff will complete data entry for the mitigation right(s) after issuing the approval document for the new permit, exchange or transfer. Data entry shall include a comment referring to the reason for the change and the number of the file where the approval order can be found. Data entry shall also include a change to the nature of use for the mitigation right(s) (or portion thereof) to show mitigation as the use. The place of use, including the shape file(s) for the mitigation use will be the same as the storage place of use. The approving office shall document the water right file for the mitigation right(s) by forwarding a proof report depicting the changes to the WR Permits Section for inserting into the left side of the water right file. The proof report should show the comment described above and the appropriate changes reflecting the mitigation use.

For storage releases through an existing rental pool, authority to use the water for mitigation purposes is addressed through the rental pool procedures. The official record for the storage right will not require changes in the form of data entry for comments, changes in use or modification of the place

of use. Therefore, documentation of the water right file for the mitigation right(s) with a proof report is also not necessary.

Scenario #5

The fifth scenario is where water is proposed to be left in a ditch or canal shared by multiple users to mitigate for injury that would be caused by a) transferring a water right out of the canal or b) nonuse of an existing right from the canal for mitigation purposes (Scenario 3). Multiple water users in a common ditch or canal rely on the combined flow of all the water rights to overcome conveyance losses associated with delivery of the rights through the canal. Under this scenario, injury could occur to other water users if the flow in the canal is reduced due to a transfer or nonuse (for mitigation) of one of the rights from the canal. Injury can be mitigated by continued diversion of a portion of the authorized flow into the canal for conveyance loss.

If a water right is transferred out of the canal, the flow left behind for conveyance loss will continue to be described as part of the flow and beneficial use of the transferred right (i.e. do not change to mitigation use) at the location of the transferred use. The point of diversion for the canal will continue to be described as one of the authorized points of diversion of the right. A condition of approval of the transfer will describe the requirement to continue diversion of a portion of the authorized diversion rate into the canal to offset injury to other users from the canal.

If a water right that historically diverted water from a canal is committed to nonuse for mitigation purposes (Scenario 3), the continued diversion of water into the canal for conveyance loss will be described as part of the mitigation use. The condition of approval associated with Scenario 3 above will be modified or supplemented to describe the requirement to continue diversion of a portion of the authorized diversion rate into the canal to offset injury to other users from the canal.