MEMORANDUM

To: Regional Offices
Water Allocation Bureau

Application Processing Memo # 71
Transfer Processing Memo # 27

From: Jeff Peppersack

Re: **Describing Mitigation in Water Right Records**

Date: November 4, 2015

This memorandum supersedes Application Processing Memorandum #71 and Transfer Processing Memorandum #27 issued May 3, 2010.

Idaho Code § 42-223(10), as amended in 2004, protects water rights from forfeiture if they are not used because they are serving as mitigation for some other water use. The statute 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.**

This statute supports IDWR's recognition of mitigation as a beneficial use. Dedication of a water right for mitigation by not using it is dissimilar to other beneficial uses of water, however, because the beneficial use is a non-use. This dichotomy is reflected in the statute above where a water right is protected for "non-use" when it is "being used for mitigation purposes."

The statutory recognition of mitigation as a defense to forfeiture raises the issue of what processes are necessary to document a mitigation plan in water right records. Mitigation activity takes two possible forms:

- Type I -- Diversion and delivery of replacement water to offset injury or depletion
- Type II -- Non-use of water to offset injury or depletion

Because there are two ways to use water rights for mitigation, it is necessary to distinguish between the two in water right records and processes. "Mitigation by non-use" means that water is not diverted. Rather, the water is left in its naturally occurring location. This contrasts with water that is diverted and delivered as replacement water for depletion caused by some other water use.

The process for obtaining authorization for the mitigation activity depends on which of the mitigation forms is being employed. This memo is intended to help staff identify and distinguish between the processing requirements for mitigation by non-use and the processing requirements for other forms of mitigation. This memorandum does not address mitigation plans for replacement water associated with delivery calls under rules of the Department for Conjunctive Management of Surface and Ground Water Resources, unless addressed through an application for permit, transfer, or exchange.

If water can be diverted pursuant to a valid water right, leaving it in the source stream or in the ground for mitigation purposes is mitigation by non-use. Because of the protection from forfeiture given by Idaho Code § 42-223 and the provision that the director may approve the mitigation plan as a condition of

approval when it accompanies a new application to appropriate water (or application for transfer or exchange), an additional application for transfer or placement of the water right in the Water Supply Bank is not necessary to change the beneficial use of water right to mitigation by non-use.

In contrast, mitigating by releasing water from storage to the stream does not constitute non-use. Likewise, diversion of surface water to a recharge facility and percolating it into the ground as mitigation for a ground water withdrawal is not non-use. These and other forms of Type I mitigation (replacement water) are additional beneficial uses of water that must be authorized by the Department through applications for transfer or exchange, or rentals of water from the Water Supply Bank. The steps for changing a water right so that it serves as Type I mitigation are established by the necessary application process – transfer, exchange, or Water Supply Bank rental.

Because an application process is not necessary for Type II mitigation (non-use), the following steps should be taken for mitigation plans proposing **non-use** of water:

(1) A Type II mitigation plan typically accompanies an application for a new beneficial use of water. The water right or portion of a water right offered for mitigation by non-use must be identified within 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 must verify that the mitigation rights are valid and that the applicant has the authority to commit them to use as mitigation. If necessary, IDWR staff 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 application must generally describe the mitigation plan.

(3) Even though "mitigating rights" will not be lost due to non-use, effective water right administration requires IDWR to identify and track the rights and portions of rights that will not be used. The department record of the water right or portion of a water right dedicated to mitigation by non-use will be modified to show "mitigation by non-use" as the purpose of use. 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 non-use of the water for mitigation purposes. If the consent or agreement states that the delivery entity retains authority to revoke the agreement to allow the non-use of its 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.

Additional Processing Guidelines for Common Scenarios

The following examples may be useful for determining whether a particular mitigation proposal is Type I (replacement water) or Type II (non-use).

Type I - Replacement Water Scenarios

Scenario #1: Mitigation by Change in Nature of Use of an Existing Right

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 other offsetting direct use. For

example, an application for permit for municipal use of ground water in a moratorium area is offset by the transfer of surface water irrigation rights to ground water recharge via an infiltration basin. Another example would be the diversion and use of water under an existing water right to provide make-up water for the evaporative losses from a pond proposed under a new appropriation. The nature of use of the mitigating right is changed through a transfer to the ultimate purpose of the pond such as aesthetics, wildlife or recreation. A variant of this scenario could be the transfer of storage water to the new use, such as ground water recharge from storage, to accomplish mitigation.

Examples: City of Gooding (Transfer 78927 mitigates for 37-22850)
Dry Lot LLC (Transfer 74449 mitigates for 37-22252)

Scenario #2: Mitigation by Storage Release

The second scenario is where the injury or depletion caused by uses under 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 required to change the nature of use of the storage right to "mitigation by delivery storage" and "mitigation by delivery from storage" because the storage water is released and made available at a specific location in the stream as mitigation for any depletion caused by the new permit, exchange or transfer.

Note that in some cases approval may be granted pursuant to existing rental pool procedures in lieu of a transfer. 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 mitigating right(s) is not necessary.

Example: RMH Company (Storage releases mitigate for 63-12521)

Scenario #3: Continued Diversion to Maintain Shared Conveyance Losses

The third 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) non-use of an existing right from the canal for mitigation purposes (Scenario 5). 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 for their respective beneficial uses. Under this scenario, injury could occur to other water users if the flow in the canal is reduced due to a transfer or "mitigation by non-use" of one of the rights from the canal because the beneficial use under the remaining rights would be reduced. 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 or committed to mitigation by non-use, the flow left behind to cover conveyance loss for the beneficial uses of the remaining rights will remain an unchanged part of the original right (i.e. do not change to mitigation use, and the right should not be reduced in volume or acres). The point of diversion for the canal will continue to be described as one of the authorized points of diversion of the right. The order authorizing the transfer out of

the canal or designating a portion of the right to mitigation by non-use will impose a condition describing 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.

Example: The Cross Creek Trust 37-4F (The source of 37-4F is ground water, but 0.02 cfs of surface water from the Big Wood River shall continue to be diverted into the Hiawatha Canal for conveyance losses, and 0.07 cfs of surface water remains in the river to mitigate the use of ground water.)

Scenario #4: Mitigation by Delivery (Delivery Call)

The fourth scenario is where a junior water right holder provides water directly to a senior water right holder who is being injured. For example, fish propagation facility #1 makes a delivery call on right 00-0000 (priority date 1962) to IDWR, which claims that its right is not being fulfilled. The call will cause IDWR to determine if injury is occurring and, if so, order curtailment of ground water right holders junior to 1962. A coalition of ground water appropriators who hold rights junior to right 00-0000 proposes a transfer to mitigate injury to the fish propagation facility, and ultimately prevent curtailment.

The coalition enters into an agreement with a nearby fish hatchery (fish propagation facility #2) to utilize a portion of its water right, and files a transfer proposing to pump and deliver water from springs (near fish propagation facility #2) to the head of an upstream creek near fish propagation facility #1, in order to mitigate material injury to the facility. The transfer requests to change 10 cfs of "fish propagation" use and a portion of the existing "fish propagation" place of use from fish propagation facility #2 to the fish propagation facility #1 site.

In this scenario, the coalition uses spring water to augment creek water, which is fish propagation facility #1's source. Therefore, this is an example of "mitigation by delivery." For the 10 cfs involved in the transfer, the point of diversion should be listed as the springs near fish propagation facility #2, but the place of use should be at the point where water is delivered to benefit fish propagation facility #1. The nature of use should be "mitigation by delivery." The use is described as "mitigation by delivery" instead of "fish propagation" because the junior right holder's obligation is to provide replacement water, regardless of the ultimate beneficial use which the junior right holder does not control. A variant of this scenario could be the release and delivery of storage water to fish propagation facility #1 to accomplish mitigation. If storage water is used, the nature of use should be "mitigation by delivery storage" and "mitigation by delivery from storage."

Example: SeaPac of Idaho Inc. (Transfer 79560 modifies Right 36-7072)

Type II – Mitigation by Non-use Scenarios

Scenario #5: Mitigation by Non-use (New Permit or Exchange)

The fifth scenario is where a new permit or exchange will be mitigated by the non-use of water under other water rights. An application for transfer is not necessary for such a change because non-use is not a change in use. In situations where the new use is mitigated by the non-use 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 mitigating 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 by Non-use	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 <XX ¼ XX ¼, Section 00, Township 00 North, Range 00 East, B.M.>

If a specified mitigating 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 mitigating right.

When dealing with scenario #5, Department staff will complete data entry for the mitigating 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 update and the number of the file where the approval order can be found. Data entry shall also include an update to the nature of use for the mitigating right(s) (or portion thereof) to show "mitigation by non-use" as the purpose of use and an update to the place of use to reflect the non-use at the original location. The place of use update should include 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 mitigating 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.

Example: City of Boise (A condition of approval for 63-33341 changes a portion of 63-243G to mitigation by non-use)

Scenario #6: Mitigation by Non-use (Transfer)

A related scenario is where a transfer is mitigated by the non-use 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 non-use of another irrigation right would provide mitigation for an increase in depletion to a reach of the Snake River. In this situation, the "mitigation by non-use" 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 mitigating rights will be updated to show "mitigation by non-use" as the purpose of use and the corresponding place of use will be updated as necessary. The mitigating 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.

Example: Foster Land & Cattle (Reduction of 25-14398 and other rights mitigates for the changes authorized by Transfer 78938)

Scenario #7: Mitigation by Abandonment

The seventh scenario is where a new permit, exchange, or transfer is mitigated by the abandonment of one or more existing water rights. Abandonment of a water right may provide adequate mitigation if non-use of the right offsets the depletion associated with the proposed use at the appropriate time and location; however, abandonment would not be the most desirable method because, if the permit were approved, the permit holder would not have the ability to rely on the abandoned right to divert out of priority under the permit. Furthermore, abandonment is permanent. Even if the permit is not developed, the abandoned right remains abandoned.

Example: Daniel G. Ward and/or Karla Ward (45-14424 abandoned to mitigate for Transfer 78100)

Undoing a Mitigation Plan

Occasionally a water use approved on the basis of a mitigation plan is not developed at all. Either the permit lapses or the transfer is not accomplished. In those cases, the mitigation plans must be undone so the mitigating rights can revert to their original beneficial uses. For a mitigation plan authorized in a transfer approval, the Department should undo the mitigation by issuing an order rescinding the transfer approval and returning the mitigating rights to their pre-mitigation beneficial use(s). For a mitigation plan approved without a separate transfer, usually a Type II plan, the Department should undo the mitigation by issuing an order reverting the "mitigation by non-use" designation on the mitigating right to its original beneficial use.

Sometimes a permitted water use is only partly developed, and the approved mitigation is not needed in its entirety. For Type I mitigation approved in a transfer, a new transfer application is required to return the unneeded mitigation to its original beneficial use. For Type II mitigation, the water right license for the mitigated use can be used as the order diminishing the mitigation requirement and reverting some of the "mitigation by non-use" on the mitigating right to its original beneficial use. For this purpose, the Department can modify the approval condition described in Scenario #5, above.