

MEMORANDUM

To: Regional Offices
Water Allocation Bureau

Application Processing Memo # 72

From: Jeff Peppersack



Re: **Evaluation of Mitigation Plans for Water Right Permits**

Date: November 4, 2015

This memorandum supersedes Application Processing Memorandum #72 issued May 3, 2010.

The purpose of this memorandum is to provide guidance to Department staff regarding the evaluation of mitigation plans submitted with an application for permit to appropriate water. The Department requires mitigation for applications for permit to appropriate water: 1) in areas of the state that are closed to new consumptive appropriations, or 2) where the water supply is not sufficient for the purpose sought and approval of a new appropriation would injure other water rights. 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.

An adequate mitigation plan must replace or offset depletions to a water source at the time, location and quantity that water is depleted due to the new appropriation. Water quality may be another factor for consideration of an adequate mitigation plan. Department staff members have discretion to adapt the requirements set forth in this memorandum according to the nature and complexity of a proposed mitigation plan. A mitigation plan should ultimately ensure protection of other water rights while providing for efficient implementation and administration by the water user and the Department.

SPECIAL ADMINISTRATION AREAS REQUIRING MITIGATION

An area where new appropriations require mitigation is generally designated by a Department order creating a management area or moratorium area to protect existing water rights and/or the local public interest or to foster the conservation of water resources within the state. The order and/or supporting documentation often provides details about the water source and mitigation requirements. The following are examples of areas that may require a mitigation plan to process an application for a new appropriation of water.

Ground Water Management Area (GWMA) or Critical Ground Water Area (CGWA) –

The Director issues an order creating the administrative area because the ground water withdrawals in the area are exceeding (for a CGWA) or near to exceeding (for a GWMA) the average rate of return of annual recharge. The Southeast Boise Groundwater Management Area is an example of a GWMA with a management policy that provides for mitigation. The Director has issued orders creating GWMA's to protect fully appropriated surface water sources where ground water and surface water are considered to be hydraulically connected. The Bear River GWMA is an example; mitigation requirements are specified in the Management Plan associated with the order.

Moratorium Area – The Director normally issues an order to prevent further depletions to the water supply in an area. The purpose of a moratorium is to protect the water supply and/or existing water rights by prohibiting new appropriations seeking consumptive use of water. The Eastern Snake River Plain Moratorium Area is an example; the order allows approval of applications where mitigation is provided to offset depletion and injury to other rights.

Fully Appropriated Source – Some sources within the state are appropriated to the extent that any new consumptive appropriation of the source would injure existing water rights. Consumptive applications can be approved where mitigation is provided to offset injury to other rights. Surface water in the Bear River basin is an example; an Administrator's Memo provides the direction to Department staff.

Temporary Administrative Hold Area – The Director directs staff by memorandum or other informal means to temporarily cease processing new applications to appropriate water due to concerns about further depletions to the water supply and potential injury to existing rights in an area. An "administrative hold" on application processing may result in a significant backlog of applications that have not been processed. An applicant proposing processing ahead of the pending applications must mitigate for the depletion that would result from approval of his out-of-filing-order application. The past administrative hold on processing applications for ground water appropriation in Basin 63 is an example of an administrative hold area.

INSUFFICIENT WATER SUPPLY AND INJURY TO OTHER WATER RIGHTS

Water Appropriation Rule 45.01.a provides criteria for determining whether a proposed use will injure other water rights. The criteria include 1) the reduction of water quantity available under an existing water right, 2) forcing an existing right holder to unreasonable effort or expense to divert, and 3) reduction of water quality available under an existing water right to an unusable extent. Rule 45.01.a.iv provides that "An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the director."

When the Department determines that the source of water is not sufficient to supply the proposed appropriation of water (Rule 45.01.b), and approval would result in injury to other water rights, the applicant may mitigate for the injury to avoid denial of the application by the Department. An example of an insufficient supply where approval may cause injury is where the applicant proposes to appropriate water from a ground water aquifer of limited volume or from a stream with limited flows and a new appropriation would reduce the supply available to existing right holders.

ANALYSIS OF DEPLETION

Development of a mitigation plan requires an analysis of the quantity of water that will be depleted from the source due to the appropriation. It is the applicant's responsibility to ensure that a depletion analysis is completed and submitted with the application. In addition to quantity depleted, the analysis must address the location and timing of the depletion. For complex situations, the services of a qualified professional (engineer, geologist, or hydrologist) may be required for a proper analysis to determine depletion from the source.

The depletion analysis must consider the consumptive nature of the proposed water use. In addition, a proposed use normally considered to be non-consumptive may require mitigation in cases where the water is not returned to the original source or is returned to the original source in a different location. For example, diversion and use of water may be considered consumptive to the source when the water is impounded (e.g. pond fill), when return flow is discharged to a separate source, or when the timing or location of return flow is such that other right holders will be injured.

IDENTIFICATION OF SOURCE OF MITIGATION WATER AND TYPE OF PLAN

Mitigation water may be provided from a variety of water sources, and a mitigation plan may take several forms, but mitigation generally falls into one of two types. Type I is replacement water from an existing water right, and Type II is non-use of water under another water right from the same source or a connected source. See Application Processing Memorandum No. 71 for more discussion of Type I and Type II mitigation and examples of each type.

A mitigation plan must identify the source of water (including water rights) to be used for mitigation and must describe the quantity, method, and location of delivery to ensure that the source is adequately compensated. The plan must include ownership documentation or authority to use the source of water and/or water rights. In addition, the mitigation plan must include information confirming the validity and historic use of any rights to be used for mitigation.

In general, if the applicant proposes to mitigate by diverting and using water differently than authorized under a valid water right, the applicant must file an application for transfer (or rental of natural flow or storage water from the Water Supply Bank or Rental Pool) together with the application for new appropriation and mitigation plan. For more about the filing requirements for particular mitigation scenarios, see Application Processing Memorandum No. 71.

Although rental of water rights from the Water Supply Bank could substitute for a transfer to provide mitigation, rental from the Bank is often a short-term transaction and could provide a source of mitigation water where mitigation is only required on a temporary basis (e.g. filling a pond). For applications seeking to appropriate water for development of subdivisions or other long-term uses with significant investment and reliance on the water supply, a short-term rental may not be used as a source of mitigation water without a long-term source of mitigation water being identified and ready to approve as a condition of a new permit.

A mitigation plan that proposes diversion and use of canal company, irrigation district, or other water delivery entity water rights or non-use of the same would not be acceptable without an application for transfer (for replacement water with changed diversion and use) or written consent (for non-use) from the entity. Non-use of the water right(s) would also require written acknowledgement from the entity that the Department may update their water right record(s) to reflect the mitigation use (see Application Processing Memo No. 71). A mitigation plan which involves use of a conveyance system owned by a canal company, irrigation district or other water delivery entity would also require written consent from the entity for use of the system and a plan for accounting of water deliveries to confirm that mitigation is accomplished.

EVALUATION OF MITIGATION PLAN

A mitigation plan must offset the depletion of water associated with a new appropriation in quantity, time, and location. The word "location" for ground water means both the land surface site and the aquifer from which the water is being withdrawn. The word "location" for surface water means within a reasonable distance of the point of diversion, taking into account other water right diversions and possible environmental¹ concerns. In this case, "time" means that the positive impacts of mitigation must occur at the same time as the depletions.

A mitigation plan must be supported by technical analysis and/or modeling of the effects of the plan unless instruction is otherwise provided within a management plan (for a GWMA) or order of the Department. For complex situations, the services of a qualified professional (engineer, geologist, or hydrologist) may be required for a proper analysis to demonstrate that the mitigation plan will be adequate.

Evaluation of a mitigation plan by Department staff requires confirmation of the following:

Depletion from Source

- Identification of source of water being depleted and Special Administration area
- Analysis estimating quantity, timing and location of depletion

Availability and Adequacy of Mitigation Water

- Source of mitigation water including water right(s)
- Description of plan demonstrating how water is delivered (for Type I - Replacement Water) and how the delivery will be verified or identification of acres or use to be terminated (for Type II - Non-Use of Water) and how mitigation is accomplished. For unregulated surface water sources, one obstacle would be the potential for diversion and use of the mitigation water by junior appropriators, consequently enlarging the use of the junior rights without mitigating for the new appropriation.
- Ownership or authority to use the mitigation source including water right(s) and consent from any water delivery entity for use of water and updates to water right records
- Validity of the water right(s) used for mitigation including analysis of forfeiture, historic use, overlapping rights and availability of water. Historic use must be sufficient to offset the proposed depletion. Mitigation by storage release 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 and if the mitigation water can be delivered at the time and to the location where depletion occurs.² To mitigate using certain Boise River rights or any other water rights that receive a percentage cutback prior to full curtailment, the mitigation plan must include an evaluation of the historic cutbacks and provide sufficient water to mitigate even when the usage has been cut but not curtailed. In other words, these rights cannot be taken at their face value for mitigation purposes because they may be only partially available at times.³ The

¹ For example, allowing a stream segment to be dried up may not be in the local public interest, even though no water rights are injured.

² See memorandum from Tony Olenichak dated August 1, 2008 entitled, "Delivery of Mitigation Storage to Surface Water Diversions" for a discussion of timing and location for delivery of mitigation storage water in Water District #1.

³ See memorandum from Dan Stanaway dated October 30, 2015 entitled "Analysis of the Availability of Water Rights in the Stewart Decree."

proposed changes to the mitigating rights will not cause further depletion or injury. For example, non-use of a right from a community canal may require leaving a portion to offset conveyance losses.

- Transfer or rental agreement or purchase agreement for water/right as necessary
- Technical analysis or modeling of effects to demonstrate adequacy of the plan. Staff may need to seek review of the analysis from the Department's Hydrology Section.
- Adequacy of mitigation to address delayed impacts if the permit holder/successor ceases to divert and/or is no longer in business
- Suitability of the quality of water relative to the source being compensated

Verification of Mitigation

- Plan outlining reasonable method for measurement of water and verification of mitigation
- Consultation with Watermaster within a Water District

PROCESSING, APPROVAL AND VERIFICATION

A permit requiring a mitigation plan cannot be processed until a mitigation plan is submitted. The Department must determine the acceptability of the mitigation plan prior to final processing and approval of a permit. Application Processing Memo No. 71 provides Workflow processing guidance for specific mitigation scenarios. Approval conditions should refer to the mitigation plan, state any measuring, monitoring, and reporting requirements, and explain the consequences for failure to comply with the plan.

Permits and licenses will be conditioned to describe or reference mitigated right(s) and mitigating right(s). Permits and licenses issued in accordance with a mitigation plan will include conditions requiring installation and maintenance of measuring devices on the diversion to assure the mitigation water is being delivered in accordance with the approved mitigation plan. Permits and licenses will be conditioned to require reporting in accordance with Chapter 7, Title 42, Idaho Code, as necessary, to document compliance with conditions of the water right and the associated mitigation plan. In complex situations, the Department may require a condition for measurement, reporting, and monitoring by a qualified professional (engineer, geologist, hydrologist) to ensure that the mitigation plan is accomplished. In addition, approvals will be conditioned to require curtailment of the diversion and use of water anytime the mitigation requirements are not met.

Failure of the holder of the right to implement and continuously comply with the requirements of an approved mitigation plan, while continuing to divert and use water, constitutes a violation subject to enforcement action under Sections 42-311, 350, 351, and/or 1701B, Idaho Code. Any approval must be conditioned that failure to mitigate as described by the plan of mitigation, while still diverting water under the permit, is cause for the director to cancel a water right permit or revoke a subsequently approved water right license.