

**DRAFT  
MEMORANDUM**

To: Regions, Water Right Permits, Water Distribution  
From: Gary Spackman  
Date: Draft

Application Processing Memo # \_\_\_  
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 that 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 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 represented by an application for transfer or placing the water in 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 are not to 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 three 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 the 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 show 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 use of water. 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 irrigation right to dairy use at a new location within the ESPA 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.

## Scenario #3

The third situation is where a new permit or exchange will be mitigated by the nonuse of water under other water rights. In the recent past IDWR has 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. From this point forward, in situations where the new use is mitigated by the nonuse of water under other rights, IDWR will use the approval order for the new permit or exchange as the 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 right(s) 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.**

<b>Right No.</b>	<b>Use Changed to Mitigation</b>	<b>Mitigation Rate</b>	<b>Mitigation Volume</b>	<b>Mitigation Acres</b>
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 the specified mitigation rights, or portions thereof, are sold, transferred, leased, used on any place of use, or are 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 rights.**

When dealing with scenario #3, WR Permits Section staff will complete data entry for the mitigation right(s) when IDWR has issued 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 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 file for the mitigation right(s) shall be documented by inserting into the left side of the file a proof report depicting the changes to the water right. The proof report should show the comment described above and the appropriate changes reflecting the mitigation use.

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