

AMENDEDSTATE OF IDAHO
DEPARTMENT OF WATER RESOURCESTransfer No. 78885**RECEIVED**

Amended

**APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1****AUG 25 2016**Name of Applicant(s) Gardner Mace Ranch LCPhone 208-246-8909 **WATER RESOURCES
WESTERN REGION**Mailing address 101 S. Capitol Blvd, Suite 1201, Boise, ID 83702

Email _____

- ☐ If applicant is not an individual and not registered to do business in the State of Idaho, attach documentation identifying officers authorized to sign or act on behalf of the applicant. Label it **Attachment #1**.
- ☐ Attach water right ownership documentation if Department records do not show the transfer applicant as the current water right owner. Label it **Attachment #2a**.
- ☐ If the ownership of the water right will change as a result of the proposed transfer to a new place of use, attach documentation showing land and water right ownership at the new place of use. Include documentation for all affected land and owner(s). Label it **Attachment #2b**.
- ☐ Attach documentation of authority to make the proposed change if the applicant is not the water right owner. Label it **Attachment #3**.

Provide contact information below if a consultant, attorney, or any other person is representing the applicant in this transfer process.

☐ No RepresentativeName of Representative Scott King, SPF Water EngineeringPhone 208-383-4140Mailing address 300 E. Mallard Dr., Ste. 350, Boise, ID 83706Email sking@spfwater.com

- ☐ Send all correspondence for this application to the representative and not to the applicant.
- OR
- ☒ Send original correspondence to the applicant and copies to the representative.
- ☒ The representative may submit information for the applicant but is not authorized to sign for the applicant.
- OR
- ☐ The representative is authorized to sign for the applicant. Attach a Power of Attorney or other documentation providing authority to sign for the applicant and label it **Attachment #4**.

I hereby assert that no one will be injured by the proposed changes and that the proposed changes do not constitute an enlargement in use of the original right(s). The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval.

Signature of Applicant or Authorized Representative

Print Name and Title if applicable

Date

Signature of Applicant or Authorized Representative

Print Name and Title if applicable

Date

A. PURPOSE OF TRANSFER

- ☒ Change point of diversion ☒ Add diversion point(s) ☒ Change place of use
☒ Change nature of use ☒ Change period of use ☐ Other _____
- Describe your proposal in narrative form, including a detailed description of non-irrigation uses to justify amounts transferred (i.e. number of stock, etc.), and provide additional explanation of any other items on the application. Attach additional pages if necessary and label it **Part 1A.2. 1) change place of use to allow irrigation flexibility within Mace Ranch Subdivision. 2) change nature of use on a portion of water right 63-216A to mitigate consumptive uses resulting from ponds proposed on an accompanying application for permit 3) add diversion points so both ditches can be used for both rights.**

78885

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESAPPLICATION FOR TRANSFER OF WATER RIGHT
PART 1 Continued

B. DESCRIPTION OF RIGHTS AFTER THE REQUESTED CHANGES. IF THE RIGHTS ARE BEING SPLIT, DESCRIBE PORTIONS TO BE CHANGED AS THEY WOULD APPEAR AFTER THE REQUESTED CHANGES.

1.	Right Number	Amount (cfs/ac-ft)	Nature of Use	Period of Use	Source & Tributary
All or Part					
☒	63-182	2.12 cfs	Irrigation	3/1 to 11/15	Boise River / Snake River
☒	63-216A	0.32 cfs	Irrigation	3/1 to 11/15	Boise River / Snake River
☒	63-216A 63-182	56.5 ac-ft	Rec/Aesthetic Storage	1/1 to 12/31	Boise River / Snake River
☒	63-216A 63-182	0.48 cfs	Diversion to Storage	3/1 to 11/15	Boise River / Snake River
☐				to	
☐				to	
☐				to	
☐				to	
☐				to	

Total authorized under rights 3.4 cfs and/or 56.5 ac-ft (storage)2. Total amount of water proposed to be transferred or changed 3.4 cubic feet per second and/or 56.5 acre-feet per annum.

3. Point(s) of Diversion:

- ☐ No changes to point(s) of diversion are proposed-the following chart is therefore not completed. (Proceed to #4.)
- ☐ Attach Eastern Snake Plain Aquifer analysis if this transfer proposes to change a point of diversion affecting the ESPA. Label it Attachment #5.

New ?	Lot	¼	¼	¼	Sec	Twp	Rge	County	Source	Local name or tag #
N	2		NW	NE	21	4N	1E	Ada	Boise River	Conway-Hamming
N	5		NW	SW	16	4N	1E	Ada	Boise River	Mace-Mace

4. Place of use: (If irrigation, identify with number of acres irrigated per ¼ ¼ tract.)

- ☐ No changes to place of use are proposed-the following chart is therefore not completed. (Proceed to #5.)

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Acre Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
4N	1E	17	6	17	26	11	24	30	36	30									180
					J/R	J/R													
			L1	L2	L2	L1			L4	L3									
		18	1			2													3
			L1			L1													

J/R = Aesthetic and Recreation Storage Ponds

Total Acres (for irrigation use) * 183

146 acres irrigation within a 183-acre permissible place of use

78885



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 8, 2016

GARDNER MACE RANCH LC
101 S CAPITOL BLVD STE 1700
BOISE, ID 83702

RE: Transfer No. 78885
Water Right No(s). 63-182, 63-216A

Dear Applicant(s):

The Department of Water Resources has received your water right transfer application. Please refer to the transfer number referenced above in all future correspondence regarding this transfer.

A legal notice of the application has been prepared and is scheduled for publication in the IDAHO STATESMAN on 9/15/2016 and 9/22/2016. Protests to this application may be submitted for a period ending ten (10) days after the second publication.

If the application is protested, you will be sent a copy of each protest. All protests must be resolved before the application can be considered for approval. If the protest(s) cannot be resolved voluntarily, the Department will conduct a conference and/or hearing on the matter.

If the application is not protested, the Department will process your application and notify you of any action taken on the application. If your application is approved, the Department will send you a copy of the approval document.

Please contact this office if you have any questions regarding the application.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Rachel Neely', is written over a horizontal line.

Rachel Neely
Administrative Assistant

CC:
SPF WATER ENGINEERING LLC
C/O SCOTT KING
300 E MALLARD DR STE 350
BOISE, ID 83706

Neely, Rachel

From: Neely, Rachel
Sent: Thursday, September 08, 2016 11:56 AM
To: 'BOI Legals'
Subject: Ada Legal Ads
Attachments: Ada Cover Letter.docx; Ada Legal Ad.docx

Good Afternoon Legal Clerk,

Please see the attached ads for publication on 9/15/2016 & 9/22/2016.

Please confirm these are okay to publish as shown.

Thank you,

Rachel Neely

Administrative Assistant I
IDWR-Western Region
2735 Airport Way Boise, ID 83705
Rachel.Neely@idwr.idaho.gov

September 8, 2016

LEGAL NOTICE DEPARTMENT
IDAHO STATESMAN
PO BOX 40
BOISE, ID 83707

RE: Application for Permit No. 63-34248
Application for Transfer No. 78885,
Water Right No(s): 63-182, 63-216A

Dear Legal Notice Department:

Please publish the enclosed legal notice on the dates indicated (once a week for two consecutive weekly issues). If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. Please send the affidavit and bill to this office before 10/3/2016. Your cooperation is appreciated.

Sincerely,

Rachel Neely
Administrative Assistant

Enclosure(s)

The following applications have been filed to appropriate the public waters of the State of Idaho:

63-34248

GARY W HEIKES

LINDA HEIKES

4305 N WILLOW CREEK RD

EAGLE, ID 83616

Point of Diversion NWNE S32 T05N R01E ADA County Source GROUND WATER

Use: DOMESTIC 01/01 to 12/31 0.04 CFS

Use: IRRIGATION 03/01 to 11/15 0.1 CFS

Use: STOCKWATER 01/01 to 12/31 0.02 CFS

Total Diversion: 0.16 CFS

Date Filed: 7/15/2016

Places of Use: IRRIGATION, STOCKWATER, DOMESTIC

T05N R01E S32 NWNE

Total Acres: 5

Water bearing zone to be appropriated is from 200 to 400 feet.

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

TRANSFER NO. 78885

GARDNER MACE RANCH LC, 101 S CAPITOL BLVD STE 1700, BOISE, ID 83702; has filed Application No. 78885 for changes to the following water rights within ADA County(s): Right No(s). 63-182, 63-216A; to see a full description of these rights and the proposed transfer, please see www.idwr.idaho.gov/apps/wr/QueryNewTransfers/QueryNewTransfers.aspx. The purpose of the transfer is to change a portion of the above rights as follows: The place of use for both rights will be changed to allow 146 acres of irrigation within the 183 acre boundary of the Mace River Ranch subdivision in Eagle, ID, near the intersection of Eagle Rd and Hwy 44. Also proposed is for both rights to utilize either of the same two points of diversion, known locally as the Conway-Hamming and Mace-Mace ditches, from the Boise River. Additionally, a 24 acre portion of right no. 63-182 will be changed from irrigation use to storage purposes to mitigate for evaporative losses from twelve new ponds proposed by application for permit no. 63-33864.

Permits will be subject to all prior water rights. For additional information concerning the property location, contact Western Region office at 208-334-2190; or for a full description of the right(s) or proposed transfer (s) please see www.idwr.idaho.gov/WaterManagement/WaterRights. Protests may be submitted based on the criteria of Idaho Code §§ 42-203A and 42-222. Any protest against the approval of the application(s) must be filed with the Director, Dept. of Water Resources, Western Region, 2735 Airport Way, Boise, ID 83705 together with a protest fee of \$25.00 for each application on or before 10/3/2016. The protestant must also send a copy of the protest to the applicant

GARY SPACKMAN, Director

Published on 9/15/2016 and 9/22/2016

Neely, Rachel

From: Neely, Rachel
Sent: Thursday, September 08, 2016 12:32 PM
To: 'Rex Barrie'
Subject: Application for Transfer No. 78885
Attachments: Watermaster Recommendation For1.docx; Application for Transfer No. 78885.pdf

September 8, 2016

REX BARRIE
WATER DISTRICT #63
PO BOX 767
10769 W STATE ST
STAR ID 83669-0767

RE: Application for Transfer No. 78885

Dear Watermaster:

The Idaho Department of Water Resources (IDWR) is seeking written comment and/or recommendations from you regarding the above referenced water right application. A copy of the application is enclosed with this email for your reference. Please review the application, complete a recommendation form, and submit your reply, if any, to this office by October 3, 2016.

IDWR will assume you do not object to this application if a timely response is not received. Please contact me if you have any questions in this matter. Thank you for your help.

Sincerely,

Rachel Neely

Administrative Assistant I
IDWR-Western Region
2735 Airport Way Boise, ID 83705
Rachel.Neely@idwr.idaho.gov



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region • 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

September 1, 2016

GARDNER MACE RANCH LC
101 S CAPITOL BLVD SUITE 1201
BOISE ID 83702

RE: Amended Transfer No. 78885 - Readvertising Fee Request

Dear Applicant(s):

The Idaho Department of Water Resources (IDWR) received your Amended Application Transfer Application No. 78885 seeking to change existing water rights 63-182 and 63-216A in response to the IDWR's information request letter dated 8/16/16. IDWR is processing the application, but the amendment of the application is considered a significant change from the original proposal as previously published. IDWR will readvertise the application, but Idaho Code § 42-221F requires a \$50 readvertising fee. In the interest of time, IDWR will prepare the amended application for publication as soon as possible, which is the last two weeks in September. However, IDWR will not finalize approval of the application until the \$50 readvertising fee is received.

Please submit the \$50 readvertising fee to allow for finalization of the application. You may seek additional time to provide the fee by making a written request to interrupt processing for up to six months. **Transfer Application No. 78885 will be rejected without a timely reply within the next thirty (30) days.** Refunds are not issued for rejected applications.

IDWR forms and other information are available on the Internet at www.idwr.idaho.gov. Please contact me at 208-334-2190 if you need more information. Thank you for your attention to this matter.

Regards,

Angela M. Grimm, P.G.
Water Rights Supervisor

Cc. Scott King SPF Water Engineering LLC (via email and USPS)

Grimm, Angie

From: Grimm, Angie
Sent: Tuesday, August 16, 2016 4:57 PM
To: Scott King
Subject: Gardner Mace Ranch LC Filings - Additional Information Request
Attachments: GardnerMaceRanchLCAddInfoRequest.pdf

Scott,

Good afternoon! As you are likely aware, Nick Van Dyke (the agent assigned to process the Gardner Mace Ranch filings - Permit Application 63-33864 and Transfer Application 78885), is out of the office through the end of August. In the interest of time, Nick Miller and I discussed the applications and I agreed to send a letter outlining additional information necessary before further processing takes place. Attached is a copy of the letter going out USPS to the applicant and yourself. I thought it might be beneficial to email a copy to you as well. Nick Van Dyke is still the agent assigned to process the filings, but if you have any questions regarding this information request between now and the beginning of September, please feel free to contact me.

Regards,
Angie

Angela M. Grimm, P.G.
Water Rights Supervisor
IDWR - Western Region
2735 Airport Way
Boise, ID 83705-5082
(208) 334-2190 phone
(208) 334-2348 fax



State of Idaho

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

August 16, 2016

GARDNER MACE RANCH LC
101 S CAPITOL BLVD SUITE 1201
BOISE ID 83702

RE: Application for Permit No. 63-33864 and Transfer No. 78885 - Mitigation Proposal Additional Information Request

Dear Applicant(s):

The Idaho Department of Water Resources (IDWR) received your Permit Application seeking a new water right 63-33864 and Transfer Application 78885 seeking to change existing water rights 63-182 and 63-216A. IDWR is processing the applications, but additional information regarding the proposed mitigation of consumptive use under Permit Application 63-33864 is necessary before further processing can occur.

Permit Application 63-33864 proposes diversion within an area where new appropriations of water from the Boise River system (including ground water less than 200 ft below ground surface considered tributary to the river) are not approvable since the Boise River system is considered fully appropriated above Star Bridge. IDWR policy states that applications for consumptive use that propose diversion of water in this portion of the Boise River system should be held without further processing unless the applicant can show that the new appropriation will not injure existing users or that injury will be avoided through some mitigating practice that completely offsets the impacts (in time, location, and quantity) of the proposed use on the water supply of other users.

Transfer Application 78885 was filed to change the nature of use for a portion of right 63-216A to recreation/aesthetic storage to offset the consumptive use associated with the proposed ponds, under Permit Application 63-33864, to avoid injury to senior Boise River rights. Right 63-216A is a Stewart Decree Boise River water right with an 1889 priority that is curtailed to 60% of the appropriated diversion most years and fully curtailed some years. Boise River water rights generally not subject to full curtailment carry priority dates no later than 1877. Permit Application 63-33864 proposes diversion of shallow ground water in an excavated pond, which is a use that cannot be reduced and/or ceased should the mitigating right (63-216A) be fully curtailed. Therefore, a mitigation proposal using an 1889 priority is not sufficient. However, based on Department policy at the time the applications were filed, use of right 63-182 with an 1870 priority for mitigation purposes would provide adequate mitigation to allow for further processing of Permit Application 63-33864.

Based on the information above, there are two options to accommodate recording of a mitigation proposal associated with Permit Application 63-33864:

- Option 1 - Submit an amended mitigation plan, in writing, stating a 22 acre portion of irrigation use authorized under right 63-182 will be left un-diverted in the Boise River for Mitigation By Non-Use (to be recorded on WR 63-182 as such) to offset consumptive use (evaporative losses) associated with Permit Application 63-33864 ponds. Upon receipt of the amended mitigation plan, Transfer Application 78885 could be finalized authorizing the point of diversion and place of use changes to rights 63-182 and 63-216A. The record of right 63-182 would be altered to account for the Mitigation by Non-Use through finalization of Permit Application 63-33864. Mitigation by Non-Use is the preferred method of mitigating under the circumstances, based on IDWR policy and Water District 63 Watermaster comments.
- Option 2 - Amend Transfer Application 78885 to change of the nature of use of right 63-182 rather than right 63-216A to recreation/aesthetic storage under the proposal that Boise River water will be diverted under right 63-182 into the each of the ponds to evaporate offsetting the consumptive use associated

with Permit Application 63-33864 ponds. If this option is chosen, IDWR would likely need to re-publish Transfer Application 78885 and Permit Application 63-33864 after amendments are made.

Alternatively, Transfer No. 78885 may be finalized while Permit Application 63-33864 is:

- a) Held by IDWR without further processing,
- b) Evidence is provided by you the new use will not injure existing water right users, or
- c) You provide an alternative mitigation plan to offset injury to existing water right users.

If you choose option c, please provide a detailed plan to mitigate the depletion expected by the proposed use. The plan should describe the expected depletion to the Boise River from the new appropriation, and should describe how that depletion will be mitigated at the appropriate quantity and time. IDWR Application Processing Memorandum #71 and #72 describe various types of mitigation and the criteria for evaluating mitigation plans (copies enclosed for your reference).

Please provide IDWR with a written response outlining which option you chose with regard to your applications. You may seek additional time to provide the response by making a written request to interrupt processing for up to six months. **Permit Application 63-33864 will be voided and Transfer Application 78884 will be rejected without a timely written reply within the next thirty (30) days.** Refunds are not issued for voided or rejected applications.

IDWR forms and other information are available on the Internet at www.idwr.idaho.gov. Please contact me at 208-334-2190 if you need more information. Thank you for your attention to these matters.

Regards,



Angela M. Grimm, P.G.
Water Rights Supervisor

Enclosure

Cc. Scott King SPF Water Engineering LLC (via email and USPS)

MEMORANDUM

TO: Transfer No. 78885

FROM: Nick Van Dyke

DATE: 6/29/2016

RE: Evaluation of Application

Summary of Information Submitted

Narrative: Transfer No. 80375 filed to (1) change the place of use for rights 63-182 and 63-216A to allow 146 acres of irrigation within the 183 acre boundary of the Mace River Ranch subdivision in Eagle, ID, near the intersection of Eagle Rd and Hwy 44. (2) allow both rights to utilize either of the same two points of diversion, known locally as the Conway-Hamming and Mace-Mace ditches, from the Boise River. (3) change a 24 acre portion of right no. 63-216A from irrigation use to storage purposes to mitigate for evaporative losses from 12 new ponds proposed by application for permit no. 63-33864. Note the application also lists a change in period of use – this deviates from how these types of applications are normally filed. Though the period of use change was not in the legal advertisement, the nature of the transfer filing is clear and re-advertisement is not needed.

Authority to File: J. Thomas Ahlquist, who signed the application, is a registered agent per the 2015 Idaho Secretary of State's website report.

Water Right Validity: Both rights were decreed in February of 2007. Review of aerial imagery shows irrigation within the last five years. No forfeiture found.

Overlap Analysis: Place of Use: Within United Water Idaho's municipal service area. Also overlapped by Eagle Water Co municipal water rights and two other Gardner Mace rights, 63-16273 (stockwater) and 63-161CF (irrigation). Point of Diversion(s): No overlap based on the water measurement accounting spatial points (#13206270, Conway-Hamming) and (#13206295, Mace-Mace).

Injury to Other Water Rights: None anticipated. Rental pool water will be needed when the mitigating right falls out of priority.

Enlargement of Use: None anticipated. The water balance checks out in the nature of use change. Seepage does not apply.

Local Public Interest: No issues identified. The application was advertised, no protests were received. The watermaster for the Boise River was notified. He did not have objections to the filings so long as standard conditions are applied.

Beneficial Use/Conservation of Water Resources: The application proposes beneficial use consistent with conservation of water resources in Idaho.

The application is consistent with criteria of I. C. § 42-222 and should be processed.

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.

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 GWMAs 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.