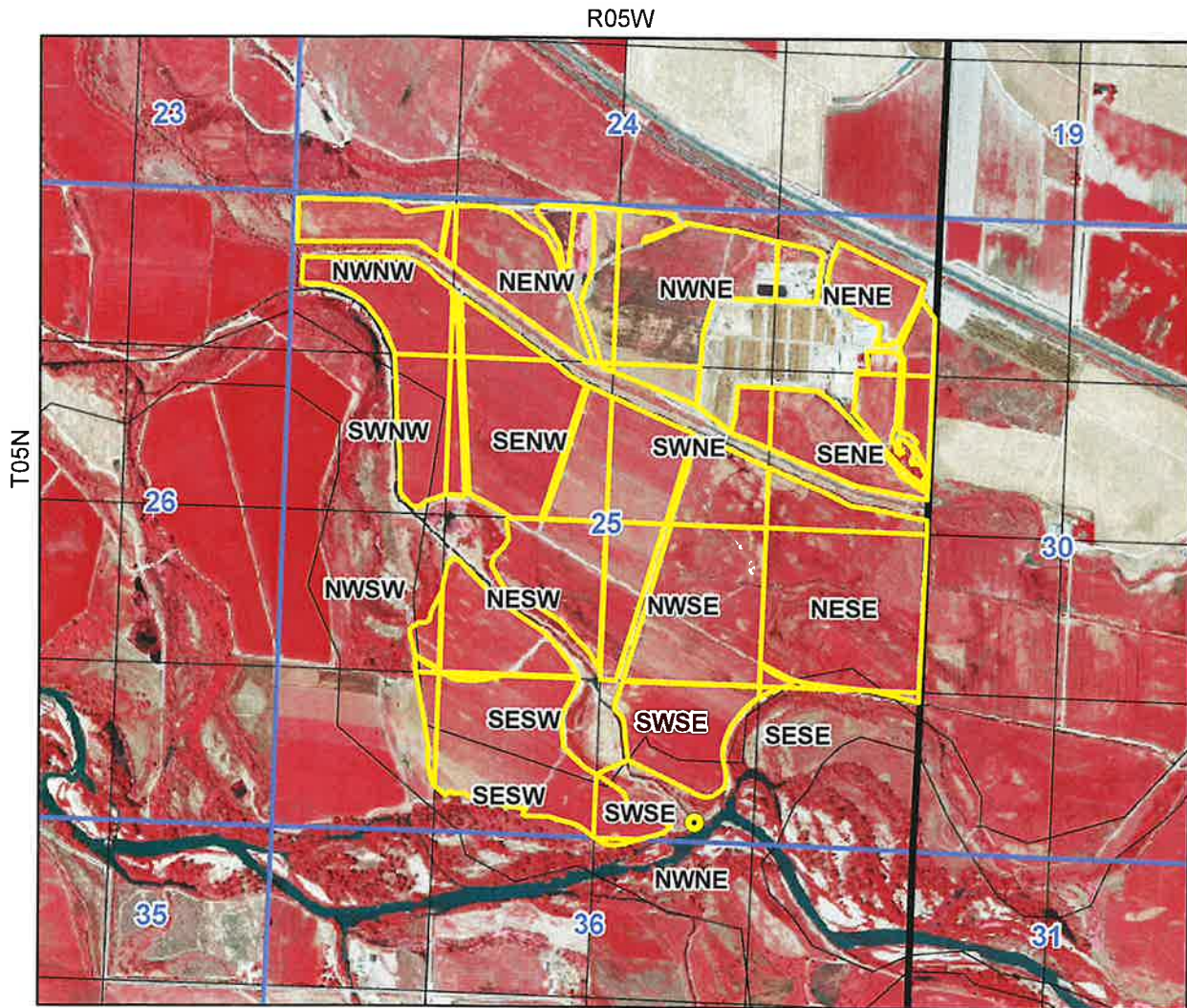


State of Idaho
Department of Water Resources
Adjudication Recommendation

63-180

Water Service Area Boundary for E G Johnson Farms Inc



Legend

-  Point of Diversion
-  Place Of Use Boundary
-  Townships
-  PLS Sections
-  Quarter Quarters

0 0.15 0.3 0.6 Miles



IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 63-180 V1

WATER RIGHT NUMBER: 63-180 V1

<u>Owner Type</u>	<u>Name and Address</u>
Original Owner	T W BOONE
	, ID
Current Owner	E G JOHNSON FARMS INC 24007 HWY 20-26 PARMA, ID 83660 (208)722-5829
Attorney	JOHN M MARSHALL JOHN MARSHALL LAW PLLC 575 W BANNOCK ST BOISE, ID 83702 (208)841-3017

Priority Date: 06/01/1869

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
BOISE RIVER	SNAKE RIVER

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
MITIGATION	03/01 to 11/15	3.500 CFS	
	<u>Total Diversion:</u>	3.500 CFS	

Location of Point(s) of Diversion

BOISE RIVER	L2 (SW1/4SE1/4)	Sec. 25, Twp 05N, Rge 05W, B.M.
CANYON County		

Place of UseMITIGATION Within CANYON County

T05N R05W S25	NENE	T05N R05W S25	NWNE
T05N R05W S25	SWNE	T05N R05W S25	SENE
T05N R05W S25	NENW	T05N R05W S25 Lot 6	NWNW
T05N R05W S25 Lot 5	SWNW	T05N R05W S25 Lot 5	SENW
T05N R05W S25 Lot 4	NESW	T05N R05W S25 Lot 4	NWSW
T05N R05W S25 Lot 3	SWSW	T05N R05W S25 Lot 3	SESW
T05N R05W S25 Lot 1	NESE	T05N R05W S25	NWSE
T05N R05W S25 Lot 2	SWSE	T05N R05W S25 Lot 1	SESE
T05N R05W S36 Lot 3	NWNE		

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommendation Report 63-180 V1

Conditions of Approval:

1. 193 This right mitigates for the depletion of water resulting from the diversion and use of water under Right Nos. 63-4036A, 63-4036B, 63-28751 and 63-32394. To prevent injury to other water right holders, the right holder shall cease diverting 3.5 cfs of this right from the Boise River. If the mitigation portion of this right is used for any other purpose, then water shall not be diverted under Right Nos. 63-4036A, 63-4036B, 63-28751 and 63-32394. If the mitigation portion of this right is not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under the uses of Right Nos. 63-4036A, 63-4036B, 63-28751 and 63-32394 that are being mitigated shall be reduced by the same proportion as the reduction to this right.
2. This right is also designated as Right No. 47 in the Boise River Stewart Decree and Boise River Water Distribution Report.
3. C05 Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
4. S49 Diversion for any water use under this water right prior to April 1 and after October 31 shall occur only when the natural flow in the Boise River below the Star Bridge in Township 04 North, Range 01 West, Section 18, NE¼ of the SE¼ of the SE¼, Boise Meridian (approximate river mile 33.9) is sufficient for water to be available for diversion at the point of diversion described above, provided that any such use of this water right prior to April 1 and after October 31 shall be subordinated to water rights for storage in Lucky Peak Reservoir, Lake Lowell, Arrowrock Reservoir, and/or Anderson Ranch Reservoir, as decreed in SRBA Case No. 39576.
5. 183 Whenever it becomes necessary for the watermaster to deliver this right the following condition shall apply. This right shall receive 100 percent of its decreed quantity until the natural flow of the waters of the Boise River shall decrease so that all rights containing this condition cannot receive 100 percent of their decreed quantities, at which time this right and the other rights containing this condition shall first be cut to 75 percent of their decreed quantities, as the natural flow of the river decreases, beginning with the latest rights containing this condition and proceeding to the earliest rights containing this condition in the order of their priority dates, and after all of the rights containing this condition shall have been reduced to 75 percent of their decreed quantities, should the natural flow of the waters of the river decrease below the amount necessary to supply 75 percent of those decreed quantities, then this right and the other rights containing this condition, beginning with the latest and proceeding to the earliest, shall be reduced to 60 percent of their decreed quantities.
6. C04 Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.
7. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

Remarks:

Comments:

1. jshurte 2/9/2011 Mitigation

Comment: See information in the file concerning the mitigation of this right for the right numbers listed in the conditions. It is explained in the proposal letters and documentation from the claimants which are in the file also. Spoke with allocations and it was approved to go ahead with this right for mitigation (Jeff Peppersac).

PLACE OF USE:

MITIGATION in CANYON County

T05N R05W S25	NENE	T05N R05W S25	NWNE
T05N R05W S25	SWNE	T05N R05W S25	SENE
T05N R05W S25	NENW	T05N R05W S25 Lot 6	NWNW
T05N R05W S25 Lot 5	SWNW	T05N R05W S25 Lot 5	SENW
T05N R05W S25 Lot 4	NESW	T05N R05W S25 Lot 4	NWSW
T05N R05W S25 Lot 3	SWSW	T05N R05W S25 Lot 3	SESW
T05N R05W S25 Lot 1	NESE	T05N R05W S25	NWSE
T05N R05W S25 Lot 2	SWSE	T05N R05W S25 Lot 1	SESE
T05N R05W S36 Lot 3	NWNE		

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

This right is also designated as Right No. 47 in the Boise River Stewart Decree and Boise River Water Distribution Report.

Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.

MEMORANDUM

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

Application Processing Memo # 71
Transfer Processing Memo # 27

Re: Water Rights Dedicated for Mitigation Protected from Forfeiture

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

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

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

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

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

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

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

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

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

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

Processing Guidelines - Examples of Common Scenarios

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

Scenario #1

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

Scenario #2

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

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

Scenario #3

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

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

<u>Right No.</u>	<u>Use Changed to Mitigation</u>	<u>Mitigation Rate</u>	<u>Mitigation Volume</u>	<u>Mitigation Acres</u>
00-00000	Use	00.00	00.0	00
00-00000	Use	00.00	00.0	00

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

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

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

Scenario #4

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

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

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

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

Scenario #5

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

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

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

MEMORANDUM

To: Regional Offices
Water Allocation Bureau

Application Processing Memo # 72

From: Jeff Peppersack 

Re: **EVALUATION OF MITIGATION PLANS FOR WATER RIGHT PERMITS**

Date: 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.

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 herein 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 requiring mitigation is generally designated by an order of the Department 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 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 Lindsay Creek Management Area is an example of a GWMA and includes a management policy that provides for mitigation. The Director has issued orders creating GWMA's to protect a fully appropriated surface water source 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 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. The Boise River and tributaries upstream of Lucky Peak Reservoir 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 the reduction of water quantity available under an existing water right, forcing an existing right holder to unreasonable effort or expense to divert, and 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 during a portion of the proposed period of use and existing right holders rely on the limited source.

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, 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 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.

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 compensation is adequate. 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.

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) with the application for new appropriation and mitigation plan.

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.

The following are examples of mitigation that may be acceptable or practical depending on the circumstances.

Type I – Replacement Water

Diversion and Use for Make-Up Water – Ground water or surface water is diverted and used to provide make-up water for the consumptive portion of a new appropriation. A specific example would be a new appropriation for a recreation pond from a ground water source with

make-up water for evaporation provided through transfer of an existing surface water right by diversion directly to the pond (the make-up water use would also be described as recreation). See Permit 29-13648 mitigated by Transfer 70720 (water right 29-2137A) for an example.

Ground Water Recharge – Surface water source is injected or allowed to seep into the aquifer for recharge purposes allowing diversion from the ground water source under a new permit. Usually requires an application for transfer (or rental of natural flow or storage water from the Water Supply Bank or Rental Pool) to change the nature of use of the surface water source to ground water recharge. Ground water recharge may also require separate permits or approvals for protection of water quality in the aquifer. See Permit 63-12598 mitigated by Transfer 70262 (water right 63-31808) for an example.

Type II - Non-use of Water

Non-use of Natural Flow Surface or Ground Water Right – Non-use of an existing right where the historic consumptive use under the right would offset the depletion associated with the new appropriation (at the appropriate time and location). The mitigation right(s) would not be diverted or used (no transfer required), but would be protected from forfeiture pursuant to Section 42-223, *Idaho Code*.¹ 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. See Permit 74-15608 for an example of mitigation by non-use of a water right.

Storage Release – Purchase of storage water from a rental pool or other storage acquisition and release at the appropriate time to allow diversion and use of water from the same or connected surface water source under a new permit. In this situation, a transfer is not required to change the nature of use of the storage right because the storage water is released (not used) and becomes available in the stream to other users as mitigation for any depletion caused by the new appropriation. Note that even though a transfer approval is not required, approval may be required pursuant to any existing rental pool procedures to authorize and record rental or release of water from storage. 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 and if the mitigation water can be delivered at the time and to the location where depletion occurs. 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.

Abandonment of Natural Flow Surface Water or Ground Water Right – 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

¹ In the past, the Department has approved use of the Water Supply Bank to recognize mitigation through non-use of a water right; the primary purpose for use of the Bank was to ensure protection of the right from forfeiture. Legislation in 2004 provided that no water right shall be forfeited for non-use if the non-use results from the water right being used for mitigation purposes. Therefore, the Department will no longer accept an application to lease a water right to the Bank for non-use of the water right to mitigate for an application for permit to appropriate water.

holder would not have the ability to rely on the abandoned right to divert out of priority under the permit.

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 ground-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 environmental concerns.

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, 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
- 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
- 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 Department's Hydrology Section within Planning and Technical Services Division
- 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 used to compensate other water users

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 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 being 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.

MEMORANDUM

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

Application Processing Memo # 71
Transfer Processing Memo # 27

Re: Water Rights Dedicated for Mitigation Protected from Forfeiture

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

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

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

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

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

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

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

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

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

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

Processing Guidelines - Examples of Common Scenarios

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

Scenario #1

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

Scenario #2

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

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

Scenario #3

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

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

<u>Right No.</u>	<u>Use Changed to Mitigation</u>	<u>Mitigation Rate</u>	<u>Mitigation Volume</u>	<u>Mitigation Acres</u>
00-00000	Use	00.00	00.0	00
00-00000	Use	00.00	00.0	00

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

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

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

Scenario #4

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

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

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

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

Scenario #5

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

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

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

Mitigation Plan Evaluation Checklist

When the Department of Water Resources determines that the source of water is not sufficient to supply a proposed appropriation of water (Rule 45.01.b) or water right transfer, and approval would result in injury to other water rights, the applicant may mitigate to avoid denial of the proposed appropriation or transfer. A mitigation plan must offset the depletion of water associated with a new appropriation or transfer in quantity, time, location¹, and/or quality to protect senior water right holders. Use the following checklist to evaluate the mitigation plan. Attach additional pages if necessary.

- 1 ____ Why is mitigation required? Moratorium area? GWMA? CGWA? Fully appropriated source? Administrative hold? Other? (See the controlling order, policy memo, or management plan for guidance.)
- 2 ____ What water source is being protected by the mitigation requirement? _____
- 3 ____ What water source is proposed to be depleted by the applicant? _____
- 4 ____ How are the two water sources connected? _____
- 5 ____ Did the applicant provide an analysis estimating timing, quantity, and location, of the proposed depletion of the protected source? _____
- 6 ____ Is the source of mitigation water, including WR #s, identified? _____
- 7 ____ Does the applicant have authority or proper permission to use the mitigation rights? _____
- 8 ____ Are the mitigation rights valid, and are they sufficient for the required mitigation?
____ historic use and availability of water: _____
____ forfeiture has not occurred: _____
____ overlapping rights: _____
____ water quality: _____
____ watermaster input: _____
- 9 ____ Does the mitigation plan call for replacement water or for non-use of water? Replacement water normally requires a separate filing, such as a transfer or Water Supply Bank rental, whereas non-use of water is normally addressed in the conditions of the new application or transfer approval. _____
- 10 ____ How will the new water diversion and the mitigation water both be measured and monitored for compliance to ensure that the enough mitigation water is provided at the correct location? _____
- 11 ____ Is the mitigation plan supported by a detailed hydrologic analysis, analytical model, or numerical model? (May need technical analysis or modeling from the Hydrology Section or reference to a prior similar plan.) _____

¹ The word "location" for ground water means both the ground-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 environmental concerns.

MITIGATION PLAN & CONDITIONS OF APPROVAL

Mitigation Plan

Leave water undiverted in source -- or --

Divert water but return unused to source, showing how it remains unused in the system.

References

Application Memo #71 (aka Transfer Memo #27)

Application Memo #72

Mitigation Checklist (Wenet or IDWR website)

I.C. § 42-223(10), defenses to forfeiture

Key Points

Do not need a transfer if use a mitigation plan to cover consumptive use for another right ("new right").

Mitigation plan submitted by owner of a valid old right where some irrigation being retired.

If new right approved, old right is changed without a transfer: reduce irrigation use & replace with mitigation use in database, reduce total acres that can be irrigated in old right. This protects old right from forfeiture, 42-223(10).¹ If other rights irrigate the same land being retired, total acres under those rights must also be reduced, although they do not need to be changed to mitigation under nature of use.

Requires identification of specific acres that will no longer be irrigated.

Use Condition #170 for "new right" requiring mitigation.

*WAS FOR SAND HOLLOW RTS
PUT IN COMMENT*

Text

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 right for the purposes and amounts specified below. Moreover, the official record for the following water right will be changed to show that diversion and use of water is not authorized because the right, or portion thereof, is being dedicated to mitigation purposes.

Right No.	Use Changed to Mitigation	Mitigation Rate (cfs)	Mitigation Volume (AF)	Mitigation Acres
<74-0466	Irrigation	0.08	8.8	2.5>

¹ Does statute apply to SRBA where "new right" is actually another old right being mitigated instead of a permit or transfer being approved? A judge might conclude the intent of the statute applies to SRBA situation even though not specified in 42-223(10).

The land that will no longer be irrigated under this right is located within the <SENW, Section 09, Township 21N, Range 22E, B.M.>

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

Usage Description

Condition 170 is being added on 10/6/2005 for use on permits being mitigated by the non-use and non-diversion of all or part of another right. The purpose of this condition is to provide a mechanism for changing the record of the mitigating (unused) right without having to resort to a transfer. A transfer is not necessary because non-use is not a change in nature of use.

Forfeiture is not a concern for the mitigation right or portion of a right because Idaho Code Section 42-223(10) provides a defense to forfeiture for rights if their non-use results from the right being employed as mitigation.

Early examples of this condition can be found on the following permits: 74-15608, 45-13969, 63-32052, 35-13521, 72-16624, 37-21352, and 37-21177.

Use Condition #193 for old right providing mitigation for the "new right."

Text – If leave water undiverted in the source (37-20400 is new right needing mitigation)

This right mitigates for the depletion of water resulting from the diversion and use of water under Right <37-20400>. To prevent injury to other water right holders, the right holder shall cease diverting <0.22> cfs of this right from the <Big Wood River>.

If the mitigation portion of this right is used for any purpose other than conveyance loss, then water shall not be diverted under Right <37-20400>. If the mitigation portion of this right is not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under the use(s) of Right <37-20400> that is being mitigated shall be reduced by the same proportion as the reduction to this right.

Text – If divert but return water without it being used (63-32811 is new right needing mitigation)

This right mitigates for the depletion of water resulting from the diversion and use of water under Right <63-32811>. To prevent injury to other water right holders, the right holder shall divert <0.02> cfs of this right but shall return that amount of water unused to the <Boise River>.

If the mitigation portion of this right is used for any purpose other than conveyance loss, then water shall not be diverted under Right <63-32811>. If the mitigation portion of this right is not deliverable due to a shortage of water or a priority call, then the amount of water authorized for diversion under the use(s) of Right <63-32811> that is being mitigated shall be reduced by the same proportion as the reduction to this right.

Usage Description

Added 12/22/2006 for use on rights being left in the river as mitigation for the diversion and use of water under another right.

Database Comment for old right used for mitigation – very helpful!

<0.10 cfs and 5 acres> have been removed from irrigation under this right and recorded as mitigation use for recently approved permit <XX-XXXX>.

MITIGATION REFERENCES ON IDWR WEBSITE

Click “Water Right Transfers” then “Policy Memorandums.”

Mitigation Plan Evaluation Checklist etc.

The screenshot displays the Idaho Department of Water Resources (IDWR) website. The browser window shows the URL 'idaho.gov'. The page title is 'Transferring a Water Right'. The main content area is titled 'IDWR Transfer Policy Memorandums' and lists several documents:

- Transfer Processing Memo No. 24 (1/5/01) (8)**: This memorandum provides policy guidance for processing applications for transfers of water rights pursuant to Idaho Code § 42-222 and other applicable law. These policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision, to ensure that applications are processed efficiently and with consistency.
- Table of Contents (36 KB)**
- Index (16 KB)**
- Application Processing Memo No. 72 – Evaluation of Mitigation Plans for Water Right Permits (255 KB)**: Water right transfers are necessary to implement mitigation plans for some new appropriations of water. This memorandum provides guidance to Department staff regarding the evaluation of mitigation plans submitted with applications to appropriate water.
- Application Processing Memo No. 71 & Transfer Processing Memo No. 27 – Water Rights Dedicated for Mitigation Protected from Forfeiture (239 KB)**: This memorandum provides policy guidance for accounting for the non-use of existing water rights to mitigate for new appropriations of water and water right transfers.
- Transfer Processing Memo No. 26 – Consumptive Use for Ponds (242 KB)**: The memorandum provides policy guidance for transfer applications proposing to change the nature of use of an existing irrigation water right to a pond.
- Mitigation Plan Evaluation Checklist (45 KB)**: Use this checklist to ensure that a mitigation plan will be complete and effective.

The right sidebar contains sections for 'Maps: Standard Irrigation Seasons', 'Standard Field Headgate Requirements', and 'Statutes: 42-222 - Change in Point of Diversion, Place of Use, Period of Use or Nature of Use of Water Under Established Rights'. The bottom of the page includes a footer with links to PDF files, a legend, IDWR Dictionary, NWRE, Contact Us, and Idaho.gov.

Shurte, Jan

From: John Marshall [john@jmarshalllaw.com]
Sent: Monday, January 03, 2011 9:56 AM
To: Shurte, Jan
Cc: Courtney, Andrea
Subject: EG Johnson Claims 63-33406, 63-180 and 63-181

Jan,

Per our phone call this morning, I am providing an explanation for how we came up with our claimed 3.8 cfs for the diversion rate for claim 63-33406 (which is the number assigned to our portion of Stewart Decree right 63-160). We simply took the 7 cfs decreed diversion rate under right 63-160, assumed 1-inch to the acre to calculate a total place of use of 350 acres, subtracted out 160 acres assumed for Obendorff's land in Section 24, leaving 190 acres, which at 1-inch per acre is 3.8 cfs. Of this, we claimed 0.56 cfs and 27.9 acres as an overlap with irrigation right 63-3385, leaving the rest, which totals 3.24 cfs, for mitigation. I believe the assumed allocation of 160 acres to Obendorff is generous, but that still leaves EG Johnson with sufficient water to cover the mitigation for the rights on its property.

As we discussed, I believe the decreed priority dates for 63-4036A and B and 63-28751 and 63-32394 (all 03/01/1938) are the best evidence of when the accomplished transfer to mitigation occurred for rights 63-33406, 63-180 and 63-181. My letter dated May 13, 2010 explains, to the best of our knowledge, how this happened. In the 1930s, the development of the Black Canyon and Farmers Cooperative projects significantly increased the amount of water running in Sand Hollow Creek and the drain areas as return flows from Boise River diversions from the two large projects began to flow through the Johnson's property. Feel free to call with other questions as you continue your review of these and the related claims.

Finally, I note that the Court's order granting our motion for late claims has several hard dates for the submission of the director's report, objections and hearing in the event there are no objections. Do we need to approach the Court to amend these dates?

Thank you,

John

John Marshall Law PLLC

575 W Bannock, Suite B
Boise, ID 83702

phone 208-991-2701
fax 208-906-8043
john@jmarshalllaw.com

May 13, 2010

Via US Mail:

Jan Shurte
Adjudication Supervisor
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705-5082

Re: EG Johnson Farms water rights

Dear Jan,

Thank you for meeting with Terry Scanlan and me yesterday to discuss the water right situation for EG Johnson Farms. The following is the written summary of our proposal you asked us to provide so you could further analyze the situation. I include a map of the place of use at issue for reference. I'll refer to the area enclosed in the black line on the map as the EG Johnson Farm.

Background

The SRBA Court has decreed five irrigation water rights with places of use appurtenant to the EG Johnson Farm. One right, 63-3585, authorizes the irrigation of an isolated parcel in the southwest corner of the property using water from the Boise River and is not relevant to our proposal. The other four rights, 63-4036A, 63-4036B, 63-32394, and 63-28751, authorize the irrigation of the remainder of the EG Johnson Farm using water diverted from Sand Hollow Creek and drains. I'll refer to these rights collectively as the Sand Hollow Creek Rights. The Sand Hollow Creek Rights all share the same March 1, 1938 priority date. The attached map shows the locations of the particular places of use for all these rights. The map also shows the places of use for water rights 63-160, 63-180 and 63-181, all of which were decreed in the Stewart Decree, referred to as the Johnson Stewart Decree Rights. These rights have priority dates of 1865, 1869 and 1874 respectively. Rights 63-180 and 63-181 currently are not claimed in the SRBA. The Obendorfs have claimed right 63-160, but have stated they do not intend to pursue that portion of the right that is appurtenant to the EG Johnson Farm.

Our client purchased EG Johnson Farm in the 1970s. By that time the direct diversions from the Boise River had ceased and the farm was being irrigated with water diverted from Sand Hollow Creek and drains that cross the property. Although we will not

present a detailed historical analysis here, we understand our client's predecessor gradually shifted the irrigation of the EG Johnson Farm away from the Boise and over to Sand Hollow Creek and drains as these sources became reliable water sources as the surrounding area developed in the 1930s using water supplied through the Black Canyon Irrigation District and the Farmers Cooperative Project. At that time, this reach of the Boise River was prone to flooding and course alteration, making it difficult to obtain a reliable diversion. It also appears that it was difficult to irrigate the property with the relatively low head generated by the ditches bringing water to the property. As water began to flow reliably in the drains and Sand Hollow Creek, it would have made sense to make use of these sources.

Proposal

Our client seeks to preserve the Stewart Decree water rights appurtenant to the EG Johnson Farm. Our client has two primary motivations. One is simply to preserve senior priority rights from the Boise River. It would be unfortunate for Idaho to lose senior, prior decreed rights if there is a legitimate way to preserve them. The second motivation is to insure against the uncertainty and potential future unreliability of Sand Hollow Creek and the drains as sources of irrigation water. There is no certainty that irrigation and land use patterns in the area surrounding the EG Johnson Farm won't change in the future in a way that could adversely affect the availability of water in the drains and Sand Hollow Creek. If that were to happen, our client would like to have the flexibility of returning to Boise River diversions.

We believe that under the circumstances, where the EG Johnson Farm has been continuously irrigated since the 1800s, there has been no forfeiture of the Stewart Decree Rights. We also believe that the current source of the irrigation water for the EG Johnson Farm, authorized by the four Sand Hollow Creek Rights, actually originates from the Boise River, albeit through other rights, that eventually finds its way into Sand Hollow Creek and the drains that cross the EG Johnson Farm. In other words, we believe that our client's predecessors in effect accomplished a change of point of diversion from the Boise River to Sand Hollow Creek and the drains.

We recognize the Sand Hollow Creek Rights are decreed with sources different from the Boise River, and that as a technical matter recognizing an accomplished change in point of diversion to an alternate source carries significant issues, particularly concerning injury to existing rights on the alternate source. However, if appropriately conditioned to avoid inserting priority dates into the new sources that predate the beneficial use made from the source, we believe this could be a viable option.

The other option we have explored, and one we think is worth pursuing, is to recognize an accomplished transfer of the purpose of use of the three Stewart Decree Rights to mitigation for the Sand Hollow Creek Rights. Under this proposal, the Johnson Stewart Decree rights remain in the river as downstream mitigation for the beneficial use associated with the Sand Hollow Creek Rights. We of course recognize that this proposal would also require appropriate conditioning to avoid injury to existing rights. We have

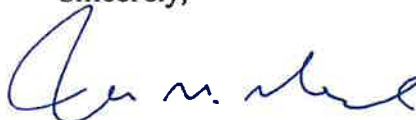
identified two general areas of mitigation. The first is on Sand Hollow Creek and the drains. It would be inappropriate to use the priorities of the Johnson Stewart Decree Rights against the rights in Sand Hollow Creek, and we would expect a condition that would clarify that relative to the rights in Sand Hollow Creek and the drains, the priorities of the Sand Hollow Creek Rights control. The second area of potential injury is to existing rights in the Boise River upstream of the confluence of Sand Hollow Creek and the Snake River and downstream of the historic points of diversion for the Johnson Stewart Decree Rights. We believe it would likely cause injury, at least in the legal sense, to allow enforcement of the Stewart Decree priorities in this reach where junior rights have been used for a long period of time without call from senior upstream rights. However, for any future call from a right downstream of the confluence of Sand Hollow Creek and the Snake, the priorities of the Johnson Stewart Decree Rights would control.

NO
PRIORITY
CONTROLS

In summary, we propose viewing the water situation on the EG Johnson Farm from a regional perspective, recognizing that the current sources of water used to irrigate the property are the result of Boise River diversions that are not consumptively used on surrounding land. Viewing the situation from this regional perspective, it is no matter to the hydraulic system whether the diversions for the EG Johnson Farm come from Sand Hollow Creek, the drains, or the Boise River. The net effect to the system is the same either way. Potential injuries to the existing rights diverting from Sand Hollow Creek and the Boise River need to be identified and eliminated, but we believe this is achievable without much difficulty. We propose preserving the Johnson Stewart Decree Rights in one of two ways: 1) recognizing an accomplished transfer of the point of diversion from the Boise River to Sand Hollow Creek and drains, appropriately conditioned to avoid injury to existing rights in these sources; or 2) recognizing an accomplished transfer of the nature of use from irrigation to mitigation. Under this first proposal, the Johnson Stewart Decree rights would be subordinated to water rights diverting from Sand Hollow Creek with priority dates senior to March 1, 1938. Under this second proposal, the Johnson Stewart Decree Rights would be conditioned to avoid injury and specify they are being left in the Boise River to mitigate the downstream impacts of the Sand Hollow Creek Rights. Under both proposals, the Johnson Stewart Decrees would have a combined use limit with the Sand Hollow Creek water rights that would limit the rights to irrigation of (or mitigation for irrigation of) the same 365.1 acres.

Please review this proposal and then get back to me with thoughts and comments.

Sincerely,



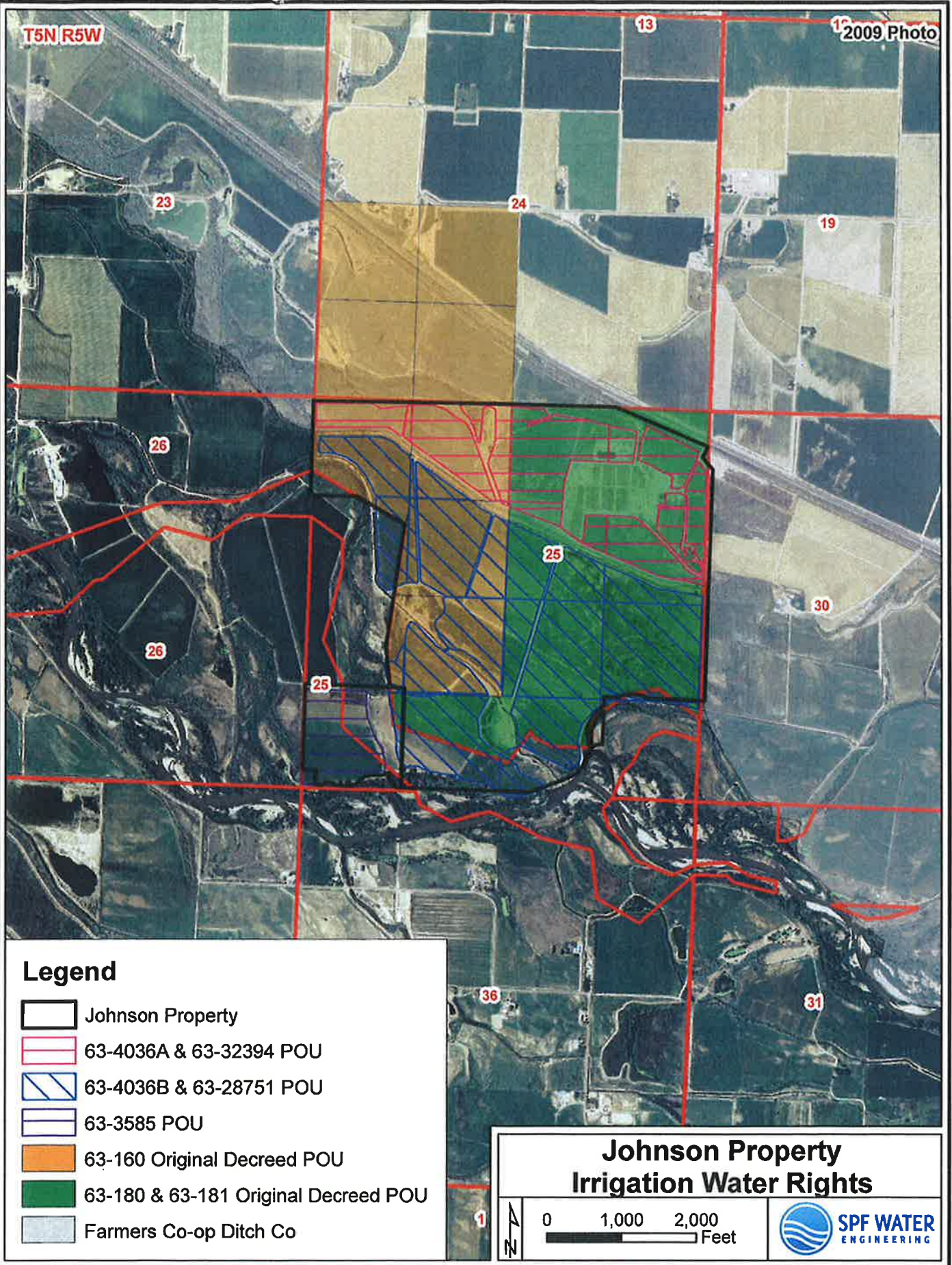
John M. Marshall

cc: Jeff Johnson
Terry Scanlan

Enclosure

T5N R5W

2009 Photo



(12)

Sec. 26, all in T. 5 N. R. 5 W. B.M., in the following amount from the following date;

63 0178 425 inches, from June 1, 1869; and hereby designated as Right No. 44.

And be adjudged to pay \$29.75 costs, in addition to the costs incurred by him.

XLIII.

That the defendant the MASON CREEK DITCH COMPANY, a corporation, be and it is hereby awarded the use of the waters of Boise River, diverted at a point on the south bank thereof near the center of the east line of Sec. 13, T. 4 N. R. 2 W. B.M., for use upon the lands lying under its canal system, in the following amount from the following date:

63 0179 1360 inches, from June 1, 1869; and hereby designated as Right No. 45.

7-A.D. 29
And be adjudged to pay \$130.20 costs in addition to the costs incurred by it.

XLIV.

That the defendant T. W. Boone be, and he is hereby awarded the use of the waters of Boise River, diverted at a point on the SE $\frac{1}{4}$ of Sec. 25, and SW $\frac{1}{4}$ of Sec. 30, T. 5 N. R. 5 W. B.M., for use upon the NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, and lots 1, 2 and 3, Sec. 25, T. 5 N. R. 5 W. B.M., in the following amounts and from the following dates;

63 0180 175 inches, from June 1, 1869; and hereby designated as Right No. 47.

63 0181 110 inches, from June 1, 1874; and hereby designated as Right No. 59.

And be adjudged to pay \$19.95 costs in addition to the costs incurred by him.

XLV.

That the defendant W. J. HAMMING be, and he is hereby awarded the use of the waters of Boise River, diverted at a point near the middle of the east line of Sec. 17, T. 4 N. R. 5 W. B.M.,



Idaho Statutes

TITLE 42

IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 2

APPROPRIATION OF WATER -- PERMITS, CERTIFICATES, AND LICENSES -- SURVEY

42-223. EXCEPTIONS OR DEFENSES TO FORFEITURE. A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other

provision of law authorizing the rental or lease of water rights.

(6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

(7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

(8) No portion of a water right held by an irrigation district shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to chapter 11, title 43, Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

(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.

(11) No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I.C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

*STATUTE DOES NOT COVER SRBA
Claims. May come up as an issue
not in SRBA? Court decision.*

Mitigation Plan Evaluation Checklist

When the Department of Water Resources determines that the source of water is not sufficient to supply a proposed appropriation of water (Rule 45.01.b) or water right transfer, and approval would result in injury to other water rights, the applicant may mitigate to avoid denial of the proposed appropriation or transfer. A mitigation plan must offset the depletion of water associated with a new appropriation or transfer in quantity, time, location¹, and/or quality to protect senior water right holders. Use the following checklist to evaluate the mitigation plan. Attach additional pages if necessary.

- 1____ Why is mitigation required? Moratorium area? GWMA? CGWA? Fully appropriated source? Administrative hold? Other? (See the controlling order, policy memo, or management plan for guidance.)
- 2____ What water source is being protected by the mitigation requirement? _____
- 3____ What water source is proposed to be depleted by the applicant? _____
- 4____ How are the two water sources connected? _____
- 5____ Did the applicant provide an analysis estimating timing, quantity, and location, of the proposed depletion of the protected source? _____
- 6____ Is the source of mitigation water, including WR #s, identified? _____
- 7____ Does the applicant have authority or proper permission to use the mitigation rights? _____
- 8____ Are the mitigation rights valid, and are they sufficient for the required mitigation?
____ historic use and availability of water: _____
____ forfeiture has not occurred: _____
____ overlapping rights: _____
____ water quality: _____
____ watermaster input: _____
- 9____ Does the mitigation plan call for replacement water or for non-use of water? Replacement water normally requires a separate filing, such as a transfer or Water Supply Bank rental, whereas non-use of water is normally addressed in the conditions of the new application or transfer approval. _____
- 10____ How will the new water diversion and the mitigation water both be measured and monitored for compliance to ensure that the enough mitigation water is provided at the correct location? _____
- 11____ Is the mitigation plan supported by a detailed hydrologic analysis, analytical model, or numerical model? (May need technical analysis or modeling from the Hydrology Section or reference to a prior similar plan.) _____

¹ The word "location" for ground water means both the ground-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

(19)

Sec. 26, all in T. 5 N. R. 5 W. B.M., in the following amount from the following date;

63 0178 425 inches, from June 1, 1882; and hereby designated as Right No. 4.

And be adjudged to pay \$22.75 costs, in addition to the costs incurred by him.

XLIII.

That the defendant the MASON CREEK DITCH COMPANY, a corporation, be and it is hereby awarded the use of the waters of Boise River, diverted at a point on the south bank thereof near the center of the east line of Sec. 13, T. 4 N. R. 2 W. B.M., for use upon the lands lying under its canal system, in the following amount from the following date:

63 0179 1860 inches, from June 1, 1882; and hereby designated as Right No. 7-A, B, 29

And be adjudged to pay \$130.20 costs in addition to the costs incurred by it.

XLIV.

That the defendant T. W. Boone be, and he is hereby awarded the use of the waters of Boise River, diverted at a point on the SE $\frac{1}{4}$ of Sec. 25, and SW $\frac{1}{4}$ of Sec. 30, T. 5 N. R. 5 W. B.M., for use upon the NE $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$, and lots 1, 2 and 3, Sec. 25, T. 5 N. R. 5 W. B.M., in the following amounts and from the following dates;

63 0180 175 inches, from June 1, 1882; and hereby designated as Right No. 47

63 0181 110 inches, from June 1, 1874; and hereby designated as Right No. 59

And be adjudged to pay \$19.95 costs in addition to the costs incurred by him.

XLV.

That the defendant W. J. HAMMING be, and he is hereby awarded the use of the waters of Boise River, diverted at a point near the middle of the east line of Sec. 17

RECEIVED

OCT 26 2010

DEPARTMENT OF
WATER RESOURCES

phone 208-841-3017
fax 208-906-8043
john@jmarshalllaw.com

John Marshall Law PLLC

575 W Bannock, Suite B
Boise, ID 83702

October 25, 2010

Via US Mail:

Diana Delaney
253 3rd Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Re: Amended Notices of Claim — Subcases 63-00180 and 63-00181

Dear Ms. Delaney:

Pursuant to the Court's *Order Conditionally Granting Late Notice of Claim for Water Right Claims 63-00180 and 63-00181*, please find the enclosed Amended Notices of Claim for claims 63-180 and 63-181.

Sincerely,



Shannon Marshall

Enclosures

cc: Parties on Docket Sheet service list

SCANNED

OCT 27 2010