

Law and Strategies for Mitigation of Injury to Water Rights in Idaho

National Judicial College



Dividing the Waters Board of Advisors

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1. DIFFERENT MEANINGS OF MITIGATION

Before launching into a discussion of mitigation, it is worth pondering that mitigation means different things in different contexts. In the dictionary sense, it means to reduce the extent or intensity of a harm, not to avoid or eliminate it altogether. It is used in that sense in the law of contracts, which calls on the non-breaching party to mitigate (i.e., minimize) the damages caused by the breaching party. In this context, the injured party is called upon to mitigate the damages.

In contrast, in environmental and water law it is the party causing the harm who undertakes the mitigation. For example, federal environmental laws might require a party to mitigate adverse impacts to wetlands or endangered species by taking offsetting actions to restore habitat. Though not usually termed mitigation, the same concept applies in the context of air and water pollution credit trading programs.

In water law, mitigation describes an action by one water user to offset injury that his or her diversion causes to another water user. A water right holder may divert under a water right only to the extent that doing so does not cause material injury to senior water right holders. That duty to avoid injury expands to include juniors as well as seniors when a water right is changed (aka transferred) in some way. In other words, the change cannot be approved if there will be injury to any other water right (junior or senior). In order to avoid injury, the right holder may seek to “mitigate” that injury. This allows an existing use to continue or a new or changed use to be made. Where water rights are concerned, the idea is not just to reduce the harm, but to avoid or eliminate material injury altogether, thus making the other water user whole.

In the water rights context, mitigation may come in various forms. On occasion, notably in the context of settlement of tribal reserved rights claims, mitigation may consist of an array of government funded or facilitated measures addressing environmental and instream flow concerns that may or may not be directly related to the alleged injury to the reserved rights. In other contexts, state or other governmental entities may undertake aquifer recharge or other water replacement programs on a regional scale in response to or in anticipation of delivery calls that could cause economic dislocation.

These are examples of large-scale government-sponsored approaches to mitigation. More often, water right mitigation is undertaken by private parties for the benefit of specifically identified water users as a means of preventing injury to other specifically identified water rights.

Elsewhere in the West, water right mitigation is often undertaken in response to extraordinary strains on water supplies that are complicated by federal environmental laws (*e.g.*, the Endangered Species Act), tribal reserved water rights, and/or federal decrees or compacts apportioning water supplies between states. Idaho, in contrast, enjoys a comparatively abundant water supply. Moreover, most water right mitigation in Idaho is

undertaken without the complication of a federal law overlay.¹ Accordingly, Idahoans enjoy ample opportunities for win-win solutions that allow the State's water to be put to optimum use while protecting environmental values.

2. CALIFORNIA'S "PHYSICAL SOLUTIONS DOCTRINE"

It is not necessary that the injured water right holder agree to the mitigation proposed by the party causing the injury. If the Idaho Department of Water Resources ("IDWR" or "Department") or a court finds that a mitigation plan proposed by the party causing the injury is sufficient to avoid material injury, that plan may be approved over the objection of the injured parties.

California has taken this a step further, allowing mitigation to be designed and imposed by the court. Thus, under what is known in California as the "physical solutions doctrine," California has gone much further than Idaho in imposing mitigation solutions. Although this doctrine has no applicability in Idaho, we discuss it here because, by way of contrast, it sheds light on how mitigation is viewed in Idaho.

Under California's doctrine, a court may craft its own mitigation solution and impose it on both parties. The seminal case dates to 1936: "[I]t is not only within the power, but it is also the duty, of the trial court to admit evidence relating to possible physical solutions, and, if none is satisfactory to it, to suggest on its own motion such physical solution. The court possesses the power to enforce such solution regardless of whether the parties agree." *City of Lodi v. East Bay Municipal Utility Dist.*, 60 P.2d 439, 341 (Cal. 1936) (citation omitted).

More recently, the California Court of Appeals summarized the physical solution doctrine this way: "As noted, a physical solution is an equitable decree designed to implement the constitutional mandate and to maximize the beneficial use of water. The court has power to enforce a physical solution regardless of whether the parties agree to it." *Central Basin Municipal Water Dist. v. Water Replenishment Dist. of S. California*, 150 Cal. Rptr. 3d 354, 360, Cal. App. 4th 943, 950 (2012).

The breadth of the doctrine is captured in this commentary:

In working out a physical solution to water shortages where more efficient means of diversion and conveyance may be desirable, a court of equity is not limited by physical properties as they stand at the time of trial, or by suggestions and offers made by

¹ Even when no federal environmental laws are applicable, the environmental effects of a mitigation plan are appropriately considered under Idaho law. This is called out in the Conjunctive Management Rules themselves (IDAPA 37.03.11.043.03.j). It is reflected in the Idaho Water Code's local public interest provisions (Idaho Code §§ 42-202B(3), 42-203A(5)(e), 42-222(1), 42-1763). Finally, the mitigation plan must work within the constraint of any existing instream flow water rights (Idaho Code §§ 42-1501 to 42-1507). On the other hand, it is not the obligation of the mitigating party to enhance environmental conditions. See discussion of instream flows in section 7.G at page 13.

the parties. If it feels that substantial savings can be effected at reasonable cost by changing some of the works, it has the power, by injunctive order, to cause the change to be accomplished and to apportion the cost as justice may require. The court must, however, keep in mind that prior appropriators have prior rights and cannot be required lawfully to incur any material expense in order to accommodate a later appropriator. In working out a physical solution and determining whether an injunction should be granted, the fact that there is no immediate danger to a water right is an element to be considered. If the trial court needs or desires expert assistance or evidence to determine a physical solution in the problem of putting water resources to beneficial use to the fullest extent possible, it possesses the statutory power either to refer the matter to the division of water rights, or to appoint it as an expert.

Romualdo P. Eclavea, et al., *Physical Solutions as Equitable Remedy in Allocating Water Interests*, 62 Cal. Jur. 3d Water § 456 (2015) (footnotes omitted).

Indeed, commentators have gone so far as to describe as mitigation what amounts to condemnation of the senior water right that is suffering the injury:

A physical solution is not incompatible with a finding that it will not provide full compensation, and if the facts justify it, an award of damages may be made in addition to the physical solution. Further, a physical solution need not be applied when the remedy in damages is adequate.

Romualdo P. Eclavea, *et al.*, *Physical Solutions as Equitable Remedy in Allocating Water Interests*, 62 Cal. Jur. 3d Water § 456 (2015) (footnotes omitted).

If this commentary is correct, it means that California's physical solutions doctrine embraces not only the imposition of physical solutions, but financial ones, on the parties to a water conflict. It would allow a court to say, in essence: "I am not impressed with the mitigation strategy urged by the juniors. It is costly and likely to be ineffective in the long run. But it is not in the public interest simply to curtail the juniors. Given the enormous economic benefits of allowing the juniors to continue to divert (in comparison to the economic benefits generated by the senior), the sensible thing is for the senior to stop diverting and the junior to fully compensate the senior for its resulting losses."

3. THREE TYPES OF AQUIFER RECHARGE IN IDAHO

Water right mitigation strategies run the gamut—drying up farms, piping water to new places, building dams, you name it. An increasingly common and important mitigation strategy involves aquifer recharge. Indeed, aquifer recharge may be used either as a basis to

mitigate other water rights or for storage of water to create new water rights (which is not mitigation at all).

Because aquifer recharge is so important (and complicated), I include here a background discussion that draws distinctions among three very different approaches to aquifer recharge:

- Aquifer Storage and Recovery (“ASR”)
- Public Betterment Aquifer Recharge (“PBAR”)
- Aquifer Recharge for Mitigation (“ARM”)

They have different goals and operate in different ways. Each has value, but sets out a distinct approach that should not be confused with the others.

ASR, PBAR, and ARM are all commonly accepted approaches to mitigation in Idaho (though these labels are not routinely employed).

A. Aquifer Storage and Recovery (“ASR”)

The first category of aquifer recharge is known in Idaho as aquifer storage and recovery (“ASR”). In an ASR project, water is stored underground so that it may later be recovered (*i.e.*, diverted) for the project owner’s own use.

ASR is not a mitigation strategy, but rather is a water supply strategy in support of new water rights. It is conceptually no different than storing water in an above-ground reservoir. Obviously, water put in the ground does not stay put quite as well as water held behind a dam. Accordingly, a major part of any ASR project is the technical challenge of quantifying how much will remain for subsequent diversion over time.

ASR is typically undertaken by private parties to create a stored underground supply for later diversion to beneficial use by the entity undertaking the recharge. For example, Micron Technologies diverts water from the Boise River, stores in it an aquifer, and later pumps and uses a calculated volume based on the amount recharged. In this sense, ASR works conceptually like a surface reservoir (while also providing water purification benefits).²

In theory, an ASR project could be undertaken by a governmental agency, just as the Bureau of Reclamation built irrigation dams across the West for the ultimate benefit of individual irrigators. But there is no precedent for this in Idaho.

² Obviously, aquifers are not tightly confined storage vessels like surface reservoirs. Accordingly, it is typically necessary for the proponent of an ASR project to develop a computer model that predicts how much of the water placed in the aquifer will still be there, over time, for subsequent diversion.

B. Public Betterment Aquifer Recharge (“PBAR”)

Aquifer recharge may be undertaken by the State or other entities for the general benefit of all water users. I call this “Public Betterment Aquifer Recharge” (or “PBAR”).³ This typically involves large scale, regional efforts to recharge aquifers through infiltration ponds and/or by water in running leaky irrigation canals during the non-irrigation season.

The practice often is undertaken with minimal hydrologic analysis. None is required, because the water put in the ground does not result in any specific new or enhanced water right to divert that water. Nor does it serve as a basis for releasing particular water uses from a delivery call.

Thus, a PBAR plan may be quite seat of the pants: “Let’s put some water in the aquifer. It will probably do some good. Anyway, it can’t hurt.” There is no need to monitor or quantify how much good a PBAR project does, because it is not undertaken as a basis for subsequent diversion under right or as mitigation for particular water right users. Rather, PBAR is simply an effort to create a better supply for all. This “firms up” the rights of all water users connected to the aquifer and reduces the likelihood of conflict among users. It is as if Mother Nature added the water for everyone’s benefit.

PBAR may be undertaken as a precautionary measure before delivery calls are made, or it may be undertaken in direct response to a call by holders of senior water rights. The thing that distinguishes “public betterment” aquifer recharge from other aquifer recharge is that PBAR is not undertaken for the specific benefit of particular water users. Thus, in a call situation, a PBAR project might be of sufficient size to completely eliminate the call, or it might only partially satisfy the call thereby reducing the number of juniors called out. In either case, water continues to be allocated in order of priority just as before. No one has a special claim to the water recharged through PBAR.

C. Aquifer Recharge for Mitigation (“ARM”)

A third form of aquifer recharge involves recharging an aquifer for the purpose of providing a replacement supply to senior users who, but for the recharge, would call out juniors. I call this “Aquifer Recharge for Mitigation” or “ARM.” This may occur, for instance, where steps are taken to add water to an aquifer which then discharges the additional water to a stream serving senior surface users.

By providing this mitigation, other users may secure new appropriations or avoid having existing rights called out. This sort of mitigation may be undertaken by individual

³ There are several statutory references to “public betterment” in the context of aquifer recharge. For example: “In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use” 1982 Idaho Sess Laws ch. 204 (previously codified at Idaho Code § 42-4202(2)) (repealed in 2009).`

water users for their own benefit, by quasi-governmental ground water districts for the benefit of their members, or by a mitigation project developer who, in turn, sells mitigation plans or credits to junior water users.

Unlike PBAR, ARM is undertaken for the specific benefit of specific junior water users (or a class of them, such as members of a ground water district). An ARM recharge plan is calculated to provide a replacement supply sufficient only to compensate for the impact of the specific diversions providing the mitigation. Thus, other diverters who have not provided mitigation may continue to be called out.

In contrast to PBAR, an ARM plan invariably requires strict attention to hydrogeology, pumping effects, ground water movement, and similar variables; often, a ground water model is involved.

Implementing an ARM allows its sponsor to take credit for providing the replacement supply, thereby allowing it or its members to continue diverting. Meanwhile, other juniors who fail to offer mitigation may face curtailment. In PBAR, by contrast, curtailments continue to occur in strict order of priority, but, one hopes, there will be fewer of them because of the increased water supply.

D. Should ARM be undertaken for profit?

No one seems to struggle with the idea of ARM undertaken by the junior water users to avoid a call or by governmental entities to help resolve a call. Indeed, one of the stated legislative purposes of ground water districts is to develop and implement ARM.⁴ In contrast, ARM undertaken for profit by third-party mitigation project developers is a new concept in Idaho, and it has encountered some resistance.

This discomfort with the idea of for-profit aquifer recharge is reflected, for instance, in unsuccessful legislative efforts over the last few years. Specifically, there have been efforts to modify Idaho Code § 42-234 (authorizing water rights for aquifer recharge). Some of the legislative proposals appear to reflect a measure of uncertainty or mixed feelings with respect to efforts by private parties to undertake for-profit aquifer recharge programs (particularly those involving new appropriations) in support of mitigation plans that will be sold to other water users. Also involved may be concerns that successful ARM projects, using stream flood flows, will reduce amounts flowing through hydropower projects on the Snake River that cannot demand, but benefit from, these flows.

⁴ In response to growing attention and concern among water users about conjunctive management issues, particularly within the Eastern Snake River Plain, the Idaho legislature enacted legislation authorizing the creation of ground water districts. 1995 Idaho Sess. Laws ch. 290; Idaho Code § 42-5200 *et seq.* The primary purposes of these special districts were to provide a mechanism for ground water users within a given area to organize and assess themselves for the costs of measuring and reporting annual ground water withdrawals from wells, and as necessary, responding collectively to delivery calls, curtailment orders, or other forms of administration. Thus, ground water districts, unlike water districts, are not water delivery entities.

Some people sense something wrong in someone profiting by selling an interest in a mitigation plan that utilizes a public resource like water. This concern may derive from the prior appropriation doctrine's hostility to speculation and the insistence that only those putting water to beneficial use may obtain rights therein. Others dismiss this concern, pointing out that there is no incompatibility between individual profit and maximum use of the resource. After all, the biggest canal in the Treasure Valley—the New York Canal—is so named because it was conceived and funded by entrepreneurs two thousand miles away in New York City. Likewise, no one doubts the right of a farmer to sell his or her water rights at great profit. Similarly, no one doubts that for-profit water brokers may lawfully make a living matching buyers and sellers of water rights, thereby ensuring that this public resource finds its way to its highest and best use. The fact is, water rights mitigation is increasingly complicated and challenging. Not every water user has the wherewithal to undertake a successful mitigation project. The author sees nothing in the prior appropriation doctrine that should prevent people from putting together such projects and selling credits in them to others. I don't know how to build a car, either. Nor do I care to rely on my government to build all the cars. I am glad that someone does build them, and is willing to sell one to me. For this analogy to work, however, it is essential that the developer of the mitigation project add something of value, rather than just appropriate water and sell it to others. That value may come in the form of engineering, infrastructure (diversion, storage, or delivery), computer modeling, administrative services, and the like.

The concern centering on the for-profit aspect of these efforts is particularly acute in the Big Wood River Valley where plans are being explored by private mitigation project developers to use otherwise unclaimed spring flood flows to recharge the aquifer in the Sun Valley area to support mitigation plans that may be sold to holders of junior surface and ground water rights (or those diverting without any water right) who face all but certain curtailment in the coming years. It conceivably could support some new appropriations as well, a fact that seems hard to swallow for people who have been confronted with the typical seasonal water scarcity in the area.

4. STATUTES ADDRESSING MITIGATION

At its core, mitigation is a common law principle growing out of a water right owner's entitlement to provide a substitute supply to a senior, thereby allowing both parties to enjoy their constitutional right to divert. Idaho statutes provide scant guidance on water rights mitigation.

One of the few statutes speaking to the subject is the aquifer recharge statute mentioned above, Idaho Code § 42-234, which dates to 1978.⁵ It is a sweeping statement of public policy extolling the virtues and value of aquifer recharge coupled with maddeningly ambiguous

⁵ 1978 Idaho Sess. Laws ch. 366 (codified as amended at Idaho Code §§ 42-232, 42-233a, 42-234; *see also* 1978 Idaho Sess. Laws ch. 293 (codified as amended at Idaho Code §§ 42-4201 to 42-4231)).

regulatory authority over recharge projects. The statute may have been written with PBAR in mind, but its language is certainly not so limited. For instance, it includes the broad and unambiguous declaration that “the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water.” Idaho Code § 42-234(2).

Another statute touching on the subject is a recent amendment to Idaho Code § 42-223(10) which expressly protects from forfeiture a water right that is not being diverted because of its use as part of a mitigation plan.

See also Idaho Code § 42-1416B dealing with expanded (*i.e.*, enlarged) ground water rights within a critical ground water area. It provides: “Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer.”

Idaho Code § 42-1779 provides for a statewide “a statewide comprehensive aquifer planning and management effort over a ten (10) year period of time beginning in fiscal year 2009.”

Since 1978, the Idaho Legislature has provided for the establishment of aquifer recharge districts, which have taxing authority to raise money for and undertake ground water recharge project. Idaho Code §§42-4202 to 42-4231.

5. THREE TYPES OF MITIGATION

In Idaho, private water rights mitigation comes in various forms. One may place them into three broad categories, as follows:

- “Capital-M mitigation” (undertaken pursuant to Idaho’s Conjunctive Management Rules in response to an active delivery call)
- “small-m mitigation” (developed outside of the Conjunctive Management Rules (a) in support of an appropriation, transfer, or exchange, (b) in anticipation of a delivery call, or (c) in response to an active delivery call against a surface right (which is not covered by the Conjunctive Management Rules))
- “ESPA mitigation” (a sub-species of “small-m mitigation”) involving changes in points of diversion of ground water rights hydrologically connected to surface rights

Each of these is discussed below.

6. MITIGATION PURSUANT TO THE CONJUNCTIVE MANAGEMENT RULES: “CAPITAL-M MITIGATION”

The only formal administrative rules dealing with mitigation are contained within the Conjunctive Management Rules, IDAPA 37.03.11.000 to 37.03.11.050.⁶ The Conjunctive Management Rules were promulgated in 1994 (and approved by the Legislature in 1995) in response to calls for the administration (*i.e.*, curtailment) of ground water rights by a trout farm. *See, Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). They set out a carefully crafted set of legal principles governing the difficult subject of delivery calls directed to junior ground water rights. However, the applicability of these rules is limited.

The conjunctive management rules come into play only in response to “a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply.” IDAPA 37.03.11.001.⁷ Notably, they do not come into play until a delivery call is made. Even then,

⁶ The formal title of the rules is “Rules for Conjunctive Management of Surface and Ground Water Resources,” IDAPA 37.03.11.001, but they are commonly referred to as the Conjunctive Management Rules. A note on terminology: “Administration” refers to the Department’s statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term “conjunctive administration” refers to the administration of ground and surface water rights. The term “conjunctive management” is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the brute-force “policing” of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of replacement water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

⁷ The rules also require that the Department to establish an “area having common ground water supply.” *See* IDAPA 37.03.11.010.01 (definition of area having a common ground water supply); IDAPA 37.01.11.031 (determination of areas of common ground water supply); IDAPA 37.01.11.050 (“Rule 50”) (areas determined to have a common ground water supply). The Department has included only one area of common ground water supply in Rule 50—the Eastern Snake Plain Aquifer. In a 2014 rulemaking, Docket No. 37-0377-1101, the Department sought to repeal Rule 50 altogether, explaining that the formality of declaring these areas by rulemaking is unnecessary and that “the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water right should be subject to administration under a delivery call.” The Idaho Legislature (which has the power to veto rules, Idaho Code § 67-5291) rejected the rule in 2015. 2015 House Concurrent Resolution No. 10. The effect of this is somewhat unclear, but there is an argument that areas of common ground water supply must be added by formal rulemaking to Rule 50 before the Department has authority to administer rights in such area under a conjunctive management delivery call.

they do not apply to calls against surface water users,⁸ and they apply only if an area of common ground water supply has been established.

The Conjunctive Management Rules address a host of issues. One of them is mitigation plans developed in response to a delivery call against ground water users. This is known as “Rule 43” of the Conjunctive Management Rules. IDAPA 37.03.11.043 (“Rule 43”) (copy attached.)⁹

Rule 43 borrows heavily from the Colorado concept of “plans for augmentation.” This was the first time the concept of private mitigation for the benefit of specific water rights was codified in Idaho.

Here are some of the key points about Rule 43:

As noted, the Conjunctive Management Rules operate in the context of an active (as opposed to anticipated) delivery call. Accordingly, a water user may not obtain advance approval of a Capital-M mitigation plan under Rule 43 in anticipation of a call. A water user may develop a mitigation plan and keep it on the shelf, but the Department will not determine the plan’s adequacy until the delivery call is made and everyone’s hair is on fire. This may seem odd, but the Department takes the position it does not know what the delivery call will look like until it sees it and cannot approve a plan in the abstract. Likewise, the Department

Arguably, another prerequisite of conjunctive administration is the development of a reliable computer model to evaluate the effect of ground water diversions and recharge on surface rights and other ground water rights. This is not stated in so many words in the Conjunctive Management Rules, but it is difficult to imagine how the Department would fulfill its obligation to evaluate material injury and the futile call defense in the absence of such a model. The whole premise of the Conjunctive Management Rules is that rights should not be curtailed by rote application of the priority system (as is done, more or less, for surface water calls); instead curtailment should be limited to the extent necessary to effectively prevent material injury. *See*, IDAPA 37.03.11.020.04 (application of futile call principle), IDAPA 37.03.11.010.08 (definition of futile call); IDAPA 37.03.11.042 (determining material injury).

⁸ The Conjunctive Management Rules do not apply to delivery calls against junior surface rights. The thought was that surface water is easy enough to administer. (When surface rights are involved, a diversion upstream has a clearly quantifiable impact on downstream rights. There is no need to develop a computer model to figure out who is causing the injury, and how and when it radiates from the point of diversion.) This means, however, that junior surface users—who do not fall within the Conjunctive Management Rules—may not develop Capital-M mitigation plans in response to a delivery call. However, they may still craft small-m mitigation plans outside the rules, which may be just as effective.

⁹ In addition, “Rule 42” expressly provides: “The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.” IDAPA 37.03.11.042.02 (copy attached).

says that senior users should not be required to review and object to every mitigation plan (or forever hold their peace) in advance of an actual delivery call. Furthermore, until the delivery call is made, it is not clear which seniors have an interest in, and must be entitled to respond to, the Capital-M mitigation plan.

Rule 43 recognizes that no two mitigation plans are alike. The rule encourages creative solutions tailor-made to the specific circumstances of the call. Specifically, it notes that mitigation may come in the form of “other appropriate compensation.” IDAPA 37.03.11.043.c. For instance, a water user might pay for efficiency improvements in the senior’s use of water, thereby enabling the junior to provide less wet water as a replacement supply. Likewise, it is conceivable that a junior user depleting an instream flow might provide offsetting habitat improvements to compensate for the flow reduction. This is known as out-of-kind mitigation (as opposed to in-kind mitigation, which is replacement water). Tradeoffs like these are common in negotiated settlements, but compelling the senior water user to accept out-of-kind mitigation is new territory in Idaho.¹⁰

Rule 43 established a detailed list of “factors” the IDWR Director must consider in determining whether to approve a plan. The factors control the Director’s otherwise broad discretion.

One of the factors is agreement between the junior and senior users. But this is only a factor. In other words, even a stipulation of the parties that the mitigation is adequate may be rejected by the Director. In the absence of a stipulation, a mitigation plan proposed by the junior user may be imposed on the senior making the call. On the other hand, the rules do not appear to go so far as California has under its physical solutions doctrine, which would allow the Department to devise its own mitigation solution and impose it on both parties (see discussion in Section 2 at page 4).

The plan must address only “material injury,” not insignificant or fanciful injury. Rule 42 of the Conjunctive Management Rules sets out various factors (including the efficiency of the senior’s use and the reasonableness of the senior’s means of diversion) to consider in determining whether an allegation of injury constitutes “material injury.” IDAPA 37.03.11.042.

¹⁰ California—which faces much more severe water challenges than does Idaho—has embraced out-of-kind mitigation under its “physical solutions” doctrine. See discussion in Section 2 at page 4. Although out-of-kind mitigation is embraced to some extent in Rule 43 of the Conjunctive Management Rules, it does not appear that Idaho has not gone quite so far in that direction as has California, particularly with respect to allowing the Department or a court to fashion and impose a mitigation plan not embraced at least by the junior water right holders. Likewise, there is no suggestion, to date, in Idaho that damages would be a sufficient remedy for injury to a water right.

7. MITIGATION WHEN THERE IS NO CONJUNCTIVE MANAGEMENT DELIVERY CALL: “SMALL-M MITIGATION”

A. Mitigation plans in support of applications for appropriation, transfer, or exchange

As noted above, Capital-M mitigation plans are available only in the context of responding to an active conjunctive management delivery call against a ground water right. However, the Department will evaluate and recognize on a case-by-case basis what I call “small-m mitigation” plans that fall outside the Conjunctive Management Rules. For instance, the Department will consider a plan to mitigate the impact of new appropriations, transfers, or exchanges.

Suppose a homeowner or real estate development requires a new water right, but water in the area is either fully appropriated or new appropriations are subject to frequent curtailment due to their junior priority. (Alternatively, suppose that a domestic well has been illegally diverting water for irrigation or aesthetic purposes in excess of the authorized amount, and the owner wishes to obtain a lawful appropriation.) In such a case, the applicant will need a plan to mitigate the effects of new appropriation by providing a replacement supply for senior water users. The result is to allow water under the new appropriation to be diverted “out-of-priority” so long as the mitigation plan is in effect.¹¹ For all practical purposes, the junior priority of the new right becomes irrelevant, and the new right takes on the priority date of whatever water right is offered as mitigation. Or, if the mitigation plan is premised on storage (including aquifer recharge), then its ability to divert out-of-priority is effective so long as stored water is physically available to offset any material injury that would otherwise be caused by the diversion.

B. Mitigation of existing water rights

The owner of a junior water right may be concerned that his or her right will be called out in the future. This is a real threat in the Big Wood River Valley today, where trophy homes and hobby ranches in the Sun Valley area face imminent curtailment of ground water rights in conjunctive administration.¹² Even today, surface water rights as senior as the early

¹¹ Diversion “out-of-priority” is a commonly employed shorthand reflecting that the right is not subject to curtailment despite its junior priority. Meanwhile, other junior rights that have not provided mitigation are subject to curtailment in order of priority.

¹² On February 23, 2015, two delivery calls were placed by groups of senior surface water users on the Big and Little Wood Rivers south of Sun Valley. Arguably, these calls are premature, given that the Department has not yet designated the valley’s aquifer as a “common source of supply,” as is required under the Conjunctive Management Rules. IDAPA 37.03.11.050 (“Rule 50”). In 2014, the Department repealed Rule 50, which would have allowed it to informally declare or adjust the boundaries of common sources of supply (including the Big Wood River Valley aquifer) without formal rulemaking. In 2015, however, the Idaho Legislature overruled the repeal. House Concurrent Resolution 10 (signed Mar. 16, 2015). Thus, arguably, the Department is required to go through

1880s are subject to late-season curtailment in the Big Wood because they are junior to even more senior downstream surface rights.

The difficulty is that a Capital-M mitigation plan under the Conjunctive Management Rules cannot be approved in advance of the delivery call. And, under current policy, the Department will not evaluate a small-m mitigation plan outside the context of an application for appropriation, transfer, or exchange.

A water user wishing to secure approval of a mitigation plan for an existing right prior to a delivery call may get the plan before the Department by subjecting the existing right to some sort of water right application, such as a transfer application to add an alternative point of diversion. Kluges like this are not always available, however.

Even if they cannot obtain advance review and approval of the plan, junior water users are nonetheless well advised to put together a mitigation plan and have it available in the event of a delivery call. At that point, it may be offered as a Capital-M plan, and the user will find out if the Department deems it good enough. However, if it is developed by competent engineers, hydrogeologists, and water attorneys, the likelihood of it being effective is maximized.

C. Small-m mitigation must be “like kind.”

As noted above, Rule 43 of the Conjunctive Management Rules contemplates the possibility of out-of-kind mitigation (*i.e.*, something other than a replacement supply of water). In contrast, small-m mitigation plans, which operate outside of Rule 43, ordinarily provide like-kind mitigation. In other words, a water user relying on a small-m mitigation plan will probably be required to provide a water supply to the senior of sufficient quantity, quality, and timing to meet the senior’s needs to the same extent as those needs would have been met by curtailing the junior.

D. Small-m mitigation is subject to re-evaluation at time of delivery call

As noted above, Capital-M mitigation plans, once approved, cannot be re-opened during the course of the call. Small-m mitigation plans that are approved in the context of an application for appropriation, transfer, or exchange do not enjoy that certainty. The Department may approve the mitigation plan for purposes of the pending application, thus allowing the permit, transfer, or exchange to be approved.

However, if and when a delivery call is made in the future, the effectiveness of the previously approved mitigation plan may be reevaluated in light of new circumstances and information, including impacts on parties not anticipated at the time the original plan was approved. In other words, approval of a small-m mitigation plan in anticipation of future

formal rulemaking (subject to further legislative veto) before it can conjunctively administer ground and surface water in the Big Wood River Valley. This issue is now being litigated.

conjunctive management provides no guarantee that the mitigation plan will be found adequate when the delivery call comes.

Obviously, this uncertainty is a drag on marketplace and financial transactions involving property that requires reliable water rights.

E. It is no longer required to change the nature of use to mitigation

Until recently, the Department required that if the acquired right is left idle for mitigation purposes, its nature of use element must be changed to “mitigation,” “aquifer recharge,” or the like in order to protect the undiverted right from forfeiture.

This requirement to change the nature of use was of no great consequence, so long as the right was fully under the control of the person creating the mitigation plan. In other words, it was just another “t” that needed to be crossed. However, it presented a problem if, for instance, the plan relied on deliveries by a separate irrigation entity whose right cannot easily be changed to some other nature of use. In other words, even if the irrigation district wanted to cooperate, it could not if it perceived that its water rights could not lawfully be changed to a use other than irrigation.

In response, the Legislature amended the forfeiture statute, Idaho Code § 42-223(10), to exempt from forfeiture a water right that is not diverted because of its use in a mitigation plan. Consequently, a mitigation plan may now safely rely on an undiverted water right, without putting that right through its own transfer proceeding to change its nature of use to mitigation.

F. Example involving mitigation of ponds

In Idaho, a water right is required for every artificial pond (to cover the evaporative loss), even if the pond fills naturally with ground water. The Department has determined that the consumptive use associated with irrigation is virtually identical to the annualized evaporative loss of ponds on an acre-for-acre basis. In other words, if you dry up an acre of irrigated land to create a one-acre pond, there is no gain or loss of water to the system. Thus, it would seem to be a trivial exercise to convert previously irrigated land to aesthetic ponds. Alas, it can be tricky, and a mitigation plan may be required.

In one example, a developer sought to convert farm land irrigated with surface water to a commercial development with ponds that would fill naturally from ground water with a high water table.

If the farm land had been irrigated with ground water, a portion of those rights readily could have been changed from irrigation use to aesthetic pond use. This would be a straight transfer with no mitigation required. Of course, the aesthetic right would have the same priority date as the ground water right and would thus be vulnerable to being called out in a future conjunctive administration call. The problem is that this is not a risk the pond-owner is allowed to take. If a ground-water-fed pond is found to be not in priority, the water cannot simply be shut off. Water will continue to fill that pond no matter what (unless the pond is

filled in). Thus, the owner would be obligated to scramble to develop a new mitigation plan under crisis conditions.

Here, the problem was different. The farm was irrigated with surface water, while the pond is fed by ground water. Surface and ground water are considered to be different “sources” of water, and transfers from one source to another are not allowed. Nor could the developer obtain a new appropriation of shallow ground water to feed the pond, because the shallow ground water is hydrologically related to the fully appropriated Boise River.

Consequently, it was necessary to develop a mitigation plan. The surface water right previously used for irrigation of the land where the ponds were located was left undiverted and dedicated to mitigation of the evaporative loss of the ponds. The additional water left in the Boise River thus would offset any claim of injury by downstream seniors. (No one raised an issue about impacts to other ground water users; the “pressure point” was the over-appropriated Boise River.)

G. Mitigation and instream flows

Where a junior water right is subject to curtailment (or where there is no unappropriated water available to cover an illegal or new use), one approach is for the user to acquire a senior right and transfer it his or her use. This, of course, is not mitigation; it is a simple transfer. This can be tricky, however, where a point of diversion of a surface right must be moved upstream—which must be done in a manner that protects all other water rights on the river, even juniors. It is all the more challenging where the other water right is an instream flow right.

Such is the case in the Big Wood River Valley where two instream flow waters rights (Nos. 37-7919 and 37-8307) have been imposed on the Big Wood River from Ketchum to Bellevue. As a practical matter, this makes it impossible to move a senior water right upstream within or above the protected reach. Water diverted at a farm below the protected reach has no impact on the protected reach. But if the point of diversion is moved upstream, the depletion will diminish flows in the protected instream flow reach.

This is a big problem on the Big Wood because most of the properties in need of water are within or above the protected reach and nearly all of the senior rights available for purchase are downstream.

The Department has adopted the practice of imposing a condition on such upstream transfers subordinating them to the minimum stream flow rights. The effect is that the transferred right cannot be exercised any time the minimum stream flow right is not being met. Because the minimum stream flow rights on the Big Wood River are quite junior (1981 and 1987), they are often out of priority. As a practical matter, such a condition defeats the entire purpose of the transfer, because the right may only be used in the wettest years despite its early priority.

The good news is that there is a work-around for the minimum stream flow problem—at least for some users. You guessed it, it involves a mitigation plan. The idea is to acquire a senior surface right capable of providing a replacement supply to the seniors downstream. (To be effective, the replacement water right must be upstream of every downstream senior who could place a call on the junior. It would be pointless to eliminate one call and still be subject to another.)

Instead of transferring the acquired right up the river, it is used to provide mitigation to downstream seniors (thereby allowing the out-of-priority upstream diversion to continue). Conceptually, it works like this. One does not change any of the elements of the acquired right. Instead, it is simply not diverted (drying up whatever land it was used to irrigate). In the event of a call (or as part of another water application), the user seeks approval of a mitigation plan under which the un-diverted replacement water compensates for any injury caused to the senior user(s).

One might ask why calling it “mitigation” works when simply transferring the same right up river is not viewed as injury to the instream flow. The impact on the minimum stream flow is identical under either scenario. In either case, the continued diversion by the junior will diminish flows that would otherwise be available to the instream right.

The answer is this works if and only if the upstream junior holds a water right that is senior to the instream flow right. Like all water rights, the instream flow right “took the river as it found it,” which included the upstream user’s right to divert. Thus, the upstream user is entitled to continue to divert to the detriment of the even more junior instream flow right. Moreover, the upstream user is entitled to respond to a call by a downstream senior in any way that satisfies the senior.¹³ The instream flow right may “hope” that the upstream right is called out. But, if that happens, it would be only an incidental result of the call. The purpose of the call was to satisfy the downstream senior, not to incidentally benefit the instream flow. The holder of the instream flow right may not complain if the upstream diverter manages somehow to satisfy the call and continue its diversion. Thus, the upstream user may continue to divert, under the mitigation plan, even when the minimum stream flow is not being met.

In contrast, if he or she had sought simply to transfer the replacement right upstream to serve his or her use, the transfer would have been denied. This is because transfers must avoid injury to all other water rights, even the junior minimum stream flow right. In contrast, the mitigation plan essentially amounts to a transfer of the acquired right downstream to the senior, which has no injury effect on the instream flow.

¹³ For example, the junior could go to the senior and offer enough money to simply buy the senior out. Doing so would allow the junior to divert more (in priority with other rights), and the instream flow right would have no basis to complain. A mitigation plan based on a substitute supply closer to the senior is no different. Yes, every user (including the instream flow) “takes the river as he or she finds it.” But one of the things they “take” is the potential that a downstream senior will no longer need or desire to call for as much water.

Again, however, this mitigation approach will not be effective if the upstream user does not hold a water right that is at least senior to the instream flow. In other words, it is a shallow accomplishment for the mitigation plan to resolve the call by the downstream diverter if the junior upstream right is still subject to curtailment by a more senior instream flow right.¹⁴ The upshot is that a seemingly worthless upstream junior water right is quite valuable indeed so long as it is senior to the instream flow rights and is coupled with a mitigation plan that addresses injury to senior diverters further downstream.

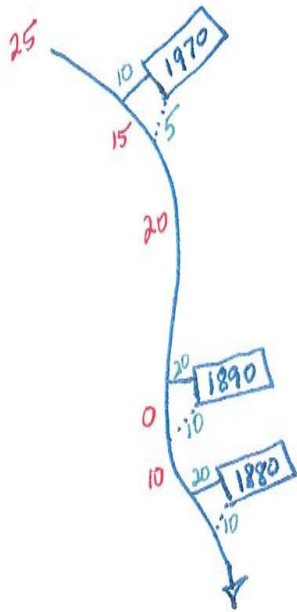
There is one possible glitch. Because the mitigation cannot be approved as a Capital-M mitigation plan until there is a delivery call (nor as a small-m mitigation plan outside of water right application), the non-diverted replacement water is subject to forfeiture. (Idaho Code § 42-223(1) protects from forfeiture Capital-M and small-m mitigation plans, but only if they have been approved by the Department.) Accordingly, steps should be taken to either keep the replacement water in use until needed for mitigation or to get it into the water supply bank.

This concept of mitigating a downstream senior to benefit a diversion upstream of (or within) a reach protected by an instream flow right is conceptually tricky. The simplified schematics on the pages that follow may assist the reader in seeing how this works. Scenarios A1, A2, and A3 show how much easier it is to move water rights around in the absence of an instream flow right. These scenarios illustrate how an upstream junior may respond to a delivery call by a downstream senior by buying another right and moving it upstream. Scenarios B1, B2, and B3 show how this does not work if there is an intervening instream flow. Scenario B4 illustrates how a mitigation plan may work where moving the right upstream does not.

¹⁴ If the mitigation plan involved idling a senior right upstream of both the instream flow right and the senior downstream diverter, then it could effectively respond to both calls. The problem in the Big Wood River Valley is that nearly all of the senior rights available for purchase are located within or downstream of the instream flow reach. To be effective in a call by the instream flow right, the mitigation would need to benefit the entire reach.

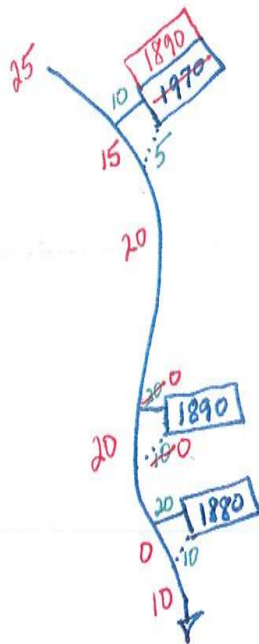
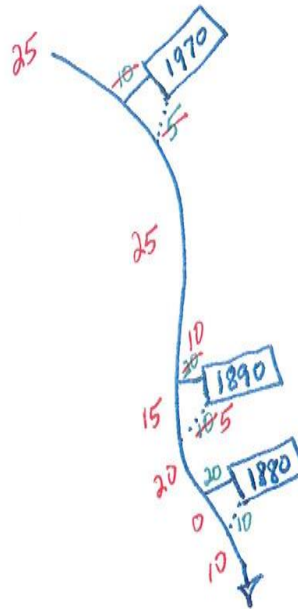
Scenario A1: Shortage before call.

In this scenario, 25 units of water is insufficient water to satisfy all three users. The downstream 1880 right is short 10 units and is entitled to call for water.



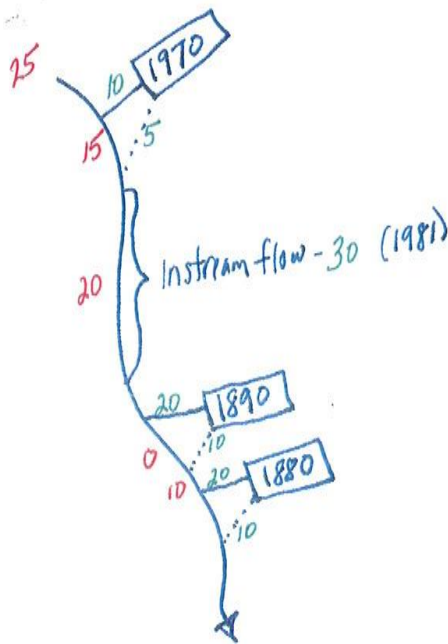
Scenario A2: Result after call.

The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole.



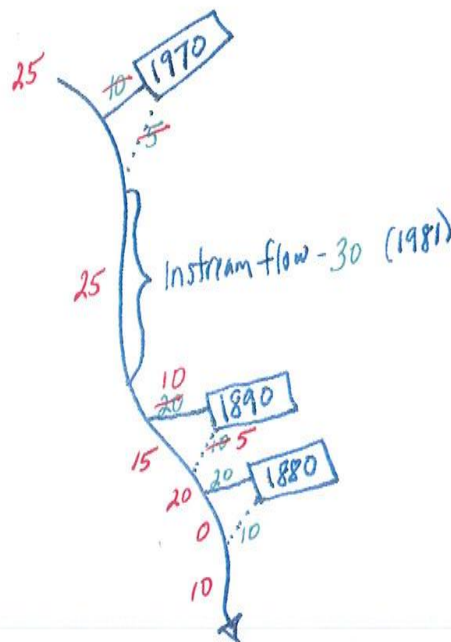
Scenario A3: Result after transfer of 1890 right.

Faced with being called out, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and move its point of diversion up to her property.



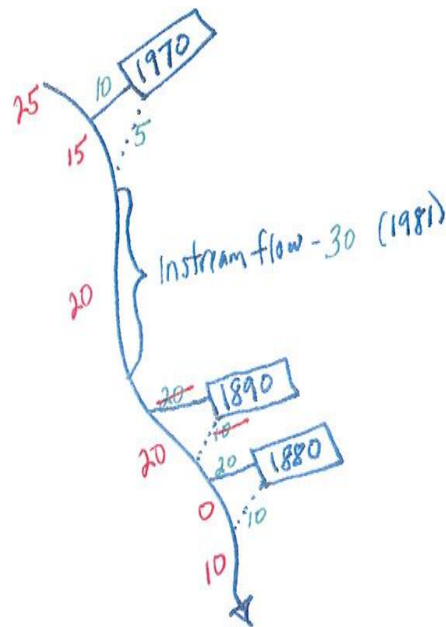
Scenario B1: Shortage before call.

This is same as Scenario A1, except for the addition of an instream flow right of 30 units with an 1981 priority date. Again, 25 units of water are insufficient to satisfy all water rights. The downstream 1880 right and the instream right are each short 10 units. The 1880 right is entitled to call for water. In contrast, the 1981 instream flow right may not, because it is junior to the upstream user. It must suffer the 10 unit shortage.



Scenario B2: Result after call.

The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole. The 1880 right will not call out the junior instream flow, because doing so would not add any new water. This result is identical to Scenario A2 (without the instream flow).



Alternatively, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and use it in a mitigation plan that dries up the farm. The additional 10 units now flows to the 1880 right, making it whole and allowing the 1970 right to continue to divert. The other 10 units under the 1890 right would continue to be called out by the 1880 right, but that is of no concern to the holder of the 1970 right, whose only duty is to mitigate for the injury her diversion causes. Meanwhile the instream flow continues to suffer a 10-unit shortage, but, it can do nothing about it. The instream flow cannot call out the 1970 right, because it is junior to that right. Nor can it complain of the mitigation plan, which involves no change in point of diversion and, in any event, does not affect water rights above it on the stream.

H. If a senior water right is acquired as a replacement supply, why not simply transfer it to the acquiring junior user?

The basic premise of many mitigation plans is to acquire a senior right and make it available to the senior to offset the adverse effects of the junior's diversion. One might ask, having gone to the trouble of acquiring the senior right, why not simply transfer it to serve the junior's use? The effect is identical. Either way, the junior user gets to operate under the priority of the newly acquired water right.

That is a good question—one that sometimes people skip over. The answer is that, if the acquired right can be transferred to the acquiring party's place of use and point of diversion, that is probably the way to go. In short, one should keep the solution as simple as possible. There are times, however, when a direct transfer of the replacement supply to the junior will not work.

For example, there may be times (particularly where the replacement supply results from aquifer recharge or other storage) when it is not physically possible to get the new water to the place where the junior needs it. In other words, the only option may be to deliver the water to the senior under a mitigation plan. This might entail, for example, dry up of land irrigated by ground water where the land is located down-gradient from the junior but above-gradient from the senior, thus allowing the undiverted water to flow downward to satisfy the call.

The mitigation water right may be owned by a water district or other entity that is unwilling or unable to allow a portion of its water right to be split off and transferred to a new use. But the district may be willing to let a portion of its water right go "idle" to serve as mitigation.

In some cases, the senior surface right acquired as a replacement supply cannot be moved upstream without injury to other rights—notably where the stream is subject to an instream flow right. (See discussion below in section 7.G at page 17.)

8. MITIGATION OF GROUND WATER TRANSFERS WITHIN THE ESPA

A special type of mitigation can arise in the context of transfers of ground water rights that are hydrologically connected to senior surface rights. This is a special sub-category of small-m mitigation. It arises due to the special hydraulic connections between ground and surface water in the Magic Valley of Idaho.

Ordinarily it is fairly simple to move ground water points of diversion from one place to another within the same aquifer. There may be individual well interference issues (cone of depression issues). But, other than that, one may "move a straw from one end of the bathtub to the other" without any greater impact on the water resource or other users.

A different situation presents, however, where there is a hydraulic connection with surface water. In Idaho, this occurs most notably in the interaction of the Snake River and the Eastern Snake River Plain Aquifer (typically shortened to “ESPA”). The Snake River runs for hundreds of miles along or near the southern boundary of the ESPA, a massive aquifer covering 10,800 square miles and holding as much water as Lake Erie.

Water within the ESPA flows underground toward to the Snake River. Thus, every consumptive diversion of ground water from the ESPA results in a corresponding reduction in flows somewhere in the Snake River. Each well affects the river in a different way, however. To put it simply, wells in the upper (eastern) part of the aquifer reduce flows most significantly in the upper part of the Snake and have gradually less impact on each succeeding lower reach of the river. And vice versa.

As a result, moving a point of ground water diversion from “point A” to “point B” will increase flows in one part of the Snake while reducing flows in another. The net depletion effect (once steady state is achieved) will be zero, but the effect on specific reaches of the river may be substantial as the impact is redistributed up and down the river. This change benefits some users and injures others.

Because the ESPA is administered as being fully appropriated, new users (notably dairies, industries, and cities) must buy water rights from farms, dry them up, and transfer the water right to the new location.

For a while during the 1990s, the Department refused to approve any ground water transfers due to the then-unquantifiable injury to surface users. Ultimately a computer program (known as the Eastern Snake Plain Aquifer Model or “ESPAM”) was developed to model the effect of every possible change location on every reach of the river.

This methodology, and the Department’s implementation of it to date, is focused solely on mitigating the adverse effects of a transfer on the affected reaches of the Snake (and tributaries thereto). The same methodology also quantifies the corresponding and offsetting positive impacts on other reaches of the river. A major piece of unfinished business is the establishment of a “credit” system to reflect these positive benefits. So far, the Department has approved water right transfers recognizing those benefits and securing the right of water right holders to claim them in the future once a system is put in place to quantify and trade those credits.

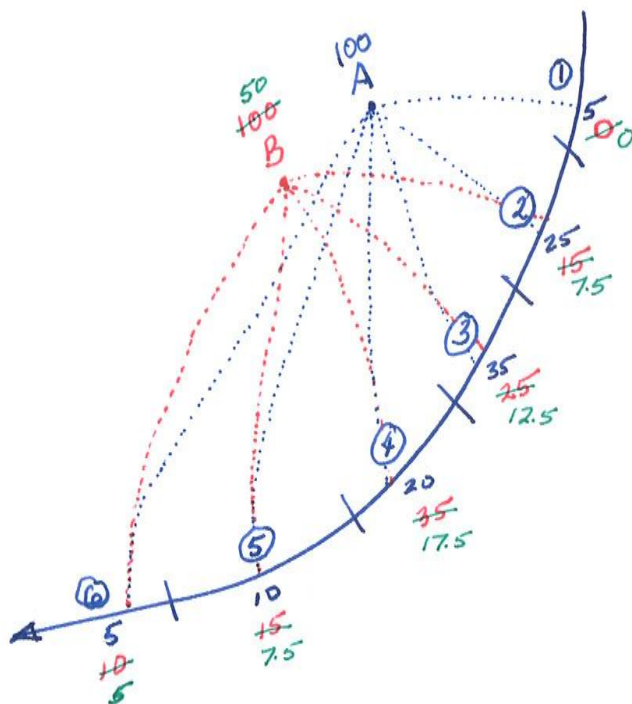
The result is that a person seeking to transfer a point of diversion to a new location in the ESPA may be required to leave some of the water behind. For instance, if the right authorized diversion of 5 cfs at the original location, the Department might approve a transfer of only 4 cfs, if the computer model showed that pumping that amount in the new location would leave no surface user of the Snake River worse off. The greater the distance the water is moved up and down the aquifer, the more water must be left behind to prevent injury.

Of course, in such a transfer, some water users will be made better off. There are two ways in which the transferring party may capture this benefit. First, the Department has

recognized a “credit” for the improvement to other reaches of the Snake River. That credit (in theory at least) may be used to offset some future transfer in the other direction. Alternatively, the water user (or water broker) may arrange various simultaneous transfers in opposing directions whose impacts on various reaches of the river cancel each other out, thus allowing the rights to be transferred at full face value (or close to it).

The reduction in transferred quantity based on the ESPAM is different from other mitigation plans in several ways. First, it is not undertaken in response to or anticipation of a conjunctive administration delivery call. Second, no new, alternate supply of water provided to the other potentially injured rights. Instead, injury is avoided by cutting back the quantity of an existing right (the transferred right) or by using credits or offsets from other transfers. (That quantity may be defined to change over time, reflecting the gradual impact of the transfer until steady state is achieved.) Third, once the transfer is approved, there is no ongoing mitigation plan to implement. Fourth, the effect of the mitigation is only to allow approval of the transfer. It has no effect in protecting the ground water user from a future delivery call. However, when that delivery call comes, it will be evaluated on the basis of the impacts of new quantity being diverted from the new place of diversion.

An illustrative example of a ground water transfer within the Eastern Snake Plain is set out in the illustration on the following page. This is, of course, grossly simplified. It communicates, however, the idea that a change in the point of diversion may be accomplished without injury to any of the river reaches if the diversion quantity is reduced at the new point of diversion. This amounts to “leaving money on the table,” because other reaches are benefited and the overall impact of the diversion is reduced. To some extent, this “money on the table” effect may be avoided by combining two or more transfers that to some extent cancel out each other’s impact. This may be done simultaneously, or at different times through retention of credits after the first transfer.



Eastern Snake Plain Aquifer Ground Water Transfer Scenario.

In this scenario, 100 units of water are initially pumped from location A and consumptively used. The computer model calculates that this will diminish flows in each of six reaches of the Snake River as shown in blue.

If the point of diversion is moved to location B, the computer model predicts that the steady-state impact on each river reach will be as shown in red. The effect of the move from A to B is to improve flows in reaches #1, #2 and #3, but to reduce flows in reaches #4, #5, and #6. This equates to injury, and the transfer will not be approved for the full 100 units.

By restricting the diversion at point B to 50 units, the steady-state impact on each reach is reduced by half (as shown in green). The result is that reaches #1, #2, #3, #4, and #5 all experience a decline in impact compared to pumping 100 units at point A (meaning more flow and no injury), while reach #6 is neutral.

ATTACHMENT A: RULE 42, IDAPA 37.03.11.042

042. DETERMINING MATERIAL INJURY AND..., ID ADC 37.03.11.042

Idaho Administrative Code	Currentness
Agency 37. Department of Water Resources	
Title 03.	
Chapter 11. Rules for Conjunctive Management of Surface and Ground Water Resources	

IDAPA 37.03.11.042

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (Rule 42)

01. Factors. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following: (10-7-94)

- a. The amount of water available in the source from which the water right is diverted. (10-7-94)
- b. The effort or expense of the holder of the water right to divert water from the source. (10-7-94)
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply. (10-7-94)
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. (10-7-94)
- e. The amount of water being diverted and used compared to the water rights. (10-7-94)
- f. The existence of water measuring and recording devices. (10-7-94)
- g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system. (10-7-94)

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h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority. (10-7-94)

02. Delivery Call For Curtailment Of Pumping. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan. (10-7-94)

Current through March 4, 2015

IDAPA 37.03.11.042, ID ADC 37.03.11.042

End of Document

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ATTACHMENT B: RULE 43, IDAPA 37.03.11.043

043. MITIGATION PLANS (Rule 43)., ID ADC 37.03.11.043

Idaho Administrative Code <small>Currentness</small>
Agency 37. Department of Water Resources
Title 03.
Chapter 11. Rules for Conjunctive Management of Surface and Ground Water Resources

IDAPA 37.03.11.043

043. MITIGATION PLANS (Rule 43).

01. Submission Of Mitigation Plans. A proposed mitigation plan shall be submitted to the Director in writing and shall contain the following information: (10-7-94)

- a. The name and mailing address of the person or persons submitting the plan. (10-7-94)
- b. Identification of the water rights for which benefit the mitigation plan is proposed. (10-7-94)
- c. A description of the plan setting forth the water supplies proposed to be used for mitigation and any circumstances or limitations on the availability of such supplies. (10-7-94)
- d. Such information as shall allow the Director to evaluate the factors set forth in Rule Subsection 043.03. (10-7-94)

02. Notice And Hearing. Upon receipt of a proposed mitigation plan the Director will provide notice, hold a hearing as determined necessary, and consider the plan under the procedural provisions of Section 42-222, Idaho Code, in the same manner as applications to transfer water rights. (10-7-94)

03. Factors To Be Considered. Factors that may be considered by the Director in determining whether a proposed mitigation plan will prevent injury to senior rights include, but are not limited to, the following: (10-7-94)

- a. Whether delivery, storage and use of water pursuant to the mitigation plan is in compliance with Idaho law. (10-7-94)
- b. Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source at such time and place as necessary to satisfy the rights of diversion from the surface or ground water source. Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods. (10-7-94)
- c. Whether the mitigation plan provides replacement water supplies or other appropriate compensation to the senior-priority water right when needed during a time of shortage even if the effect of pumping is spread over many years and will continue for years after pumping is curtailed. A mitigation plan may allow for multiseason accounting of ground water withdrawals and provide for replacement water to take advantage of variability in seasonal water supply. The mitigation plan must include contingency provisions to assure protection of the senior-priority right in the event the mitigation water source becomes unavailable. (10-7-94)
- d. Whether the mitigation plan proposes artificial recharge of an area of common ground water supply as a means of protecting ground water pumping levels, compensating senior-priority water rights, or providing aquifer storage for exchange or other purposes related to the mitigation plan. (10-7-94)
- e. Where a mitigation plan is based upon computer simulations and calculations, whether such plan uses generally accepted and appropriate engineering and hydrogeologic formulae for calculating the depletive effect of the ground water withdrawal. (10-7-94)

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- f.** Whether the mitigation plan uses generally accepted and appropriate values for aquifer characteristics such as transmissivity, specific yield, and other relevant factors. (10-7-94)
- g.** Whether the mitigation plan reasonably calculates the consumptive use component of ground water diversion and use. (10-7-94)
- h.** The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan. (10-7-94)
- i.** Whether the mitigation plan proposes enlargement of the rate of diversion, seasonal quantity or time of diversion under any water right being proposed for use in the mitigation plan. (10-7-94)
- j.** Whether the mitigation plan is consistent with the conservation of water resources, the public interest or injures other water rights, or would result in the diversion and use of ground water at a rate beyond the reasonably anticipated average rate of future natural recharge. (10-7-94)
- k.** Whether the mitigation plan provides for monitoring and adjustment as necessary to protect senior-priority water rights from material injury. (10-7-94)
- l.** Whether the plan provides for mitigation of the effects of pumping of existing wells and the effects of pumping of any new wells which may be proposed to take water from the areas of common ground water supply. (10-7-94)
- m.** Whether the mitigation plan provides for future participation on an equitable basis by ground water pumpers who divert water under junior-priority rights but who do not initially participate in such mitigation plan. (10-7-94)
- n.** A mitigation plan may propose division of the area of common ground water supply into zones or segments for the purpose of consideration of local impacts, timing of depletions, and replacement supplies. (10-7-94)
- o.** Whether the petitioners and respondents have entered into an agreement on an acceptable mitigation plan even though such plan may not otherwise be fully in compliance with these provisions. (10-7-94)

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ATTACHMENT C: ABOUT THE AUTHOR

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For more than three decades, Chris has practiced water law, planning and zoning law, constitutional law, natural resources law, road and public access law, constitutional law, and legislative matters. *Best Lawyers in America* has named him “Lawyer of the Year” four times. He is described in the Idaho Yearbook Directory as “centrally located in the world of Idaho public affairs” and “a key figure in Idaho water law.” He serves on the Board of Advisors to the National Judicial College’s “Dividing the Waters” water law program for judges. His clients include Fortune Ten companies, municipal water providers, cities, counties, highway districts, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris taught water law and negotiation at the University of Colorado Law School. Prior to that, he practiced environmental law as counsel to National Wildlife Federation in Washington, D.C.