

RECOMMENDATION MEMO

DATE: January 14, 2025

TO: Idaho Water Resource Board

THRU: Mat Weaver, Director; Brian Patton, Deputy Director; and Erik Boe, Water Compliance Bureau Chief

FROM: Mary Condon, Water Supply Bank Program Coordinator

RE: ZBR Rulemaking analysis of Shoshone-Bannock Tribal Water Supply Bank Rules, IDAPA 37.02.04 and Staff Recommendations

In January 2020, the Governor passed Executive Order 2020-10 (“Order”), requiring agencies to review all of their administrative rules. In adherence to the Order, the IWRB must review its Shoshone-Bannock Tribal Water Supply Bank Rules (“Tribes Bank Rules”) to determine if they should be repealed or re-promulgated through negotiated rulemaking. This memorandum summarizes rulemaking recommendations from the staff responsible for operating the Water Supply Bank Program. Ultimately, staff recommends that the IWRB engage in negotiated rulemaking to re-promulgate the existing Tribes Bank Rules.

Analysis of the Rules

In adherence with the Governor’s Order, in reviewing the Tribes Bank Rules, staff must analyze and determine (1) “Whether the benefits the Tribes Bank Rules are intended to achieve are being realized, (2) whether those benefits justify the costs of the Tribes Bank Rule, and (3) whether there are less-restrictive alternatives to accomplish the same benefits.” Order at 2. This memo addresses each review criteria individually.

1. Is the Rule Achieving its Intended Benefits

Idaho Code § 42-1762 requires the IWRB to adopt rules that govern the operation of the Water Supply Bank (“WSB”). The purposes of the WSB, as defined by Idaho Code §§ 42-1761-1766, are to (1) encourage the highest beneficial use of water, (2) provide a source of adequate water supplies to benefit new and supplemental water uses, and (3) provide a source of funding for improving water user facilities and efficiencies. The WSB encompasses three distinct types of water markets: The Board’s bank, Rental Pools, and the Tribes Bank, of which the first two types are operated according to the Water Supply Bank Rules, IDAPA 37.02.03, and the third is operated according to the Shoshone-Bannock Tribal Water Supply Bank Rule, IDAPA 37.02.04, as well as Rule 40 of the WSB Rules, IDAPA 37.02.03.040. The Tribes Bank was established in 1990 through the adoption of the Fort Hall Indian Water Rights Agreement by the parties of the settlement and in accordance with the WSB statutes. The Tribes Bank provides a mechanism through which the Tribes can realize the full benefit of their storage rights through the lease and rental of the Tribes storage in Palisades and American Falls Reservoirs outside the reservation boundaries as well as fulfill the three purposes of the Water Supply Bank as outlined above.

Benefits of the current Tribes Bank Rules include establishing review criteria for lease or rental of storage held by the Tribes through the Tribes Bank, the incorporation of articles specific to the Tribes Bank from the 1990 Fort Hall Agreement, and defining the duties and responsibilities of

the committee and chairman to manage the Tribes Bank and of the council for their management of rental income.

Staff has determined that negotiated rulemaking could, at a minimum, improve the rule by standardizing terms used in the rule to describe the Tribes Bank, updating current lease assignment and rental application criteria and processes, updating outdated titles for members of the appointed committee to the bank, and removing unnecessary terms and definitions that complicate rather than benefit the rules.

Idaho Code, § 42-1761 identifies three primary purposes for the WSB as outlined above. The Tribes Bank is a widely used market in Idaho specific to the Snake River Basin to temporarily provide storage water to renters. Wide use of the WSB is evidenced by the annual volume of storage water rented from the Tribes Bank, providing an average of 40,000 acre-feet annually over the last five years for rental purposes including agriculture and ground water recharge. Because water users within the Snake River Basin are able to and regularly use the Tribes Bank each year, staff concludes the current WSB program and Tribes Bank Rules fulfill the first two statutory purposes of the WSB.

The third purpose of the WSB is to “provide a source of funding for improving water user facilities and efficiencies.” Under the current Tribes Bank fee structure, the Tribes realize a net gain each year which provides revenue necessary for improving facilities and efficiencies for the Tribes.

2. Costs of the Rules

There is not an operating cost to the IWRB or the IDWR for the Tribes Bank Rules, besides the annual publishing cost of \$56 per page, since the Tribes and their council are solely responsible for the costs of operating the Tribes Bank and any rental revenue through the Tribes Bank. The benefit to the Tribes through the marketing of their storage water and the renting of storage water by users outside the boundaries of the reservation benefits the Idaho economy and stability of water resources from recharge and mitigation.

3. Alternatives to the Rules

The Tribes Bank Rules are adopted under Idaho Code § 42-1762 and provide interpretation of the application of Idaho Codes §§ 42-1761 through 1765, as well as Water Supply Bank Rule 40, IDAPA 37.02.03.040. The Tribes Bank is specific to water marketing the Tribes storage water for users outside the boundaries of the reservation, and similar programs are only recently emerging in other states within the last decade. Further, other states use Idaho’s current statutes and rules specific to water banking as references and guidelines when creating their water markets and adopting laws and promulgating rules to govern those markets.

4. Recommendation for the Rules

Based on our analysis, IDWR staff recommends repealing the Tribes Bank Rules and replacing them through the zero-based regulation negotiated rulemaking process. According to the negotiated rule process, IDWR staff in coordination with WestWater Market Regional Director, Brett Bovee and the Tribes Water Resource Department paralegal, Gail Martin, will seek comment from the public on whether the IWRB can implement any non-regulatory measures in place of or in support of the Tribes Bank Rules. The rulemaking team will propose some minor rule changes and clarifications.