



Nez Perce

## WATER RESOURCES DIVISION

P.O. BOX 365 • LAPWAI, ID 83540 • (208) 843-7368 • FAX (208) 843-7371

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IDWR Rules Review Officer  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, ID 83720  
[rulesinfo@idwr.idaho.gov](mailto:rulesinfo@idwr.idaho.gov)

### Re: Public Comment for IDAPA 37.03.02 Beneficial Use Exam Rules

To Whom It May Concern,

The Nez Perce Tribe's ("Tribe") Water Resources Division ("WRD") has reviewed the revised draft beneficial use exam rules ("second strawman") provided as part of the Idaho Department of Water Resources ("IDWR")'s requirement to review each rule every five years consistent with the Governor's Zero-Based Regulation Executive Order 2020-01.

The Tribe is a federally-recognized Indian tribe whose aboriginal homeland encompasses millions of acres in what are today the states of Idaho, Oregon, Washington, and Montana. In its 1855 and 1863 treaties with the United States, the Tribe reserved a land base and many of its inherent sovereign rights, held since time immemorial, including its right to co-manage its natural resources throughout its aboriginal territory.<sup>1</sup>

The Tribe's WRD has evaluated the second strawman and provides the following comments:

1. Section 035.01.d. of the clean second strawman states that an "examination report must include information in sufficient detail for the Director to determine the extent of water use developed" for water that is returned directly to a public water source. This proposed rule clarifies that "[i]f water is returned directly to a public water source after use, a description of the conveyance system and the legal description of the point where the water is returned" must be described in sufficient detail. The Tribe's WRD requests that a volume of water

<sup>1</sup> Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957; Treaty with the Nez Percés, June 9, 1863, 14 Stat. 647.

returned to the public water source for each beneficial use be determined. This would help with accounting of water rights junior to minimum stream flow water rights.

2. Section 035.01.j.vii. of the clean second strawman states that “[m]unicipal use by an incorporated city or other entity serving users throughout an incorporated city” is exempt from the volume reporting requirement unless the permit or the amended permit was approved with a volume limitation or the permit was not approved for municipal use but was amended and licensed for a municipal use during the authorized permit development period. The Tribe’s WRD believes that reporting volumes should be required for all water uses, including municipal uses. Municipal uses are often large and provide additional room in the permit for future growth. IDWR’s ability to manage water users and conserve the public water resources of Idaho is dependent on knowing the volume of water being put to beneficial use. Municipal uses should be no different, regardless of whether the permit has an associated volume.
3. Section 035.01.j.viii. of the clean second strawman states that “[i]rrigation using natural stream flow diverted from a stream or spring” is exempt from the volume reporting requirement. As volumes must be reported for irrigation uses from ponds, lakes, and groundwater, the Tribe’s WRD recommends that irrigation from streams and/or springs also be required to report volumes during the beneficial use examination. As irrigation is recognized as a consumptive use by the State of Idaho, not all the surface water diverted for irrigation will return to the stream or spring. As such, it is reasonable to measure the volume associated with irrigation diversions sourced by stream flow and/or springs.
4. Section 035.01.r. of the clean second strawman states that “[u]nless required as a condition of permit approval, an on-site examination and direct measurement of the diversion rate is not required” for irrigation up to five acres, storage of up to 14.6 AF for stockwater, aesthetic, recreation, or wildlife, or any uses other than irrigation or storage if the total combined diversion rate does not exceed 0.24 cubic feet per second (“cfs”) provided documentary means can establish beneficial use, place of use, season of use, and point of diversion. Documentary means includes well driller reports, property tax records, and receipts. The Tribe’s WRD does not believe any uses should be exempt from an on-site examination and direct measurement of the diversion rate.

The Tribe's WRD appreciates the opportunity to comment as part of this Negotiated Rulemaking process. If you have any questions, please do not hesitate to contact me at 208-843-7368 or by email at [allisonl@nezperce.org](mailto:allisonl@nezperce.org).

Sincerely,

A handwritten signature in black ink that reads "Allison Lebeda". The signature is written in a cursive style with a large initial 'A'.

Allison Lebeda  
Water Rights Program Coordinator,  
Nez Perce Tribe Water Resources Division

In concurrence,

A handwritten signature in blue ink that reads "Ken Clark". The signature is written in a cursive style with a large initial 'K'.

Ken Clark  
Water Resources Division Director,  
Nez Perce Tribe Water Resources Division

