

**CHAPTER 3-3**  
**WATER RESOURCES**  
**NEZ PERCE TRIBAL WATER RIGHTS ADMINISTRATION**

*Adopted by NPTEC Resolution NP 20-117 (December 24, 2019);  
Approved by United States Department of the Interior by letter of December 16, 2020).*

**INTRODUCTORY PROVISIONS**

**§3-3-1 Short Title**

This chapter may be referenced as the Nez Perce Tribal Water Rights Administration Code.

**§3-3-2 Purposes**

The purposes of the Nez Perce Tribal Water Rights Administration Code are as follows:

- (a) To provide an orderly system for the protection, allocation, regulation, dispute-resolution, and use of Tribal water rights consistent with the needs of ecosystems, natural resources, and cultural resources.
- (b) To carry out the SRBA Agreement and the Snake River Water Rights Act of 2004.
- (c) To ensure that the rights of Allottees to the use of water in quantities necessary to carry out the purposes of a trust allotment are secured as provided under the General Allotment Act, 25 U.S.C. Section 381.

**§3-3-3 Definitions**

- (a) "Allottee" means an individual who holds a trust allotment created pursuant to the General Allotment Act, 25 U.S.C. Section 381, for agricultural purposes, inside or outside the boundaries of the Nez Perce Reservation.
- (b) "Beneficial Use" means any use of water for instream flow, domestic, commercial, municipal, industrial, irrigation, hydropower generation, recreation, stock watering, fish propagation, as well as any other uses that are determined to have a beneficial purpose pursuant to this chapter.
- (c) "Commission" means the Nez Perce Tribal Water Rights Administration Commission.
- (d) "Diversion" means the removal of water from its natural course or location by means of a ditch, canal, flume, bypass, pipeline, conduit, well, pump, or other action, or the impoundment of water in a reservoir or other storage facility for re-diversion.
- (e) "Domestic Use" means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of property, or related accessory uses.

- (f) "Instream Flow Water Use" means water use authorized and permitted for the purposes of protecting a tribal interest in a natural stream, lake, or spring, such as recreation, fish or wildlife.
- (g) "Nez Perce Tribal Code" or "NPTC" means the Code of the Nez Perce Tribe, as amended.
- (h) "NPTEC" means the Nez Perce Tribal Executive Committee, the duly elected governing body of the Nez Perce Tribe pursuant to the Revised Constitution and Bylaws of the Nez Perce Tribe.
- (i) "Permit" means a written, conditioned authorization granted pursuant to this chapter, in the form of either a Water Use Permit or a Temporary Water Use Permit, for a Person to use a portion of the Tribal water rights.
- (j) "Person" means any individual or group or organization of any kind, whether organized for profit or not, and regardless of the manner of form in which it does business, whether as a sole proprietorship, receiver, partnership, joint venture, trust, estate, firm, unincorporated association, corporation, or government.
- (k) "Place of Use" means the location where the water is used.
- (l) "Point of Diversion" or "POD" means any location at which water is diverted from a water source.
- (m) "Priority date" means the priority date assigned to a water right by tribal, federal or state law.
- (n) "Purpose of Use" means the permitted category of use of water under a Permit.
- (o) "Reservation" means all lands within the boundaries of the Nez Perce Reservation as established by the Nez Perce Treaty of 1863.
- (p) "Snake River Basin Adjudication Agreement" or "SRBA Agreement" means the "Mediator's Term Sheet" dated April 20, 2004; together with, and as approved by, the Snake River Water Rights Act of 2004; NPTEC Resolution 05-210; and the Idaho SRBA Court's January 30, 2007 entry in Case No. 39576 of the "Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board."
- (q) "Snake River Water Rights Act" means the Snake River Water Rights Act of 2004, Public Law 108-447, Division J, Title X, 118 Stat. 3431.
- (r) "Source" means the named or described water source within the Reservation.
- (s) "Transfer" means any change in a point of diversion, place of use, period of use, or purpose of use for a water right.
- (t) "Tribal water rights" means those water rights confirmed in the Snake River Water Rights Act of 2004 as rights held in trust for the Tribe by the United States, including

those rights held for the benefit of individual Indians on Indian lands, and any other water rights acquired by the Tribe at any other time.

(u) “Tribe” means the Nez Perce Tribe.

(v) "Water Resources Division" or “Division” means the Tribe’s Water Resources Division, the lead agency responsible for Tribal water rights administration on the Nez Perce Reservation.

### **§3-3-4 Scope**

This chapter applies to the Nez Perce Tribe, all of its governmental subdivisions, all other entities owned by the Tribe, all Allottees, and any Person desiring to use, or using, Tribal water rights.

### **§3-3-5 Construction**

The provisions of this chapter shall be interpreted to give effect to this chapter’s purposes. This chapter shall be construed in a manner that is not inconsistent with provisions of the SRBA Agreement or the Snake River Water Rights Act of 2004.

### **§3-3-6 Allottee Water Rights and Duties**

Allottees are entitled to the use of water in quantities necessary to carry out the purposes of the allotment. In administering and managing this chapter, the Nez Perce Tribe shall ensure that an Allottee’s rights are secured as provided under the General Allotment Act, 25 U.S.C. Section 381.

## **TRIBAL WATER RIGHTS ADMINISTRATION**

### **§3-3-7 Water Resources Division**

The Tribe’s Water Resources Division, a division of the Tribe’s Natural Resources Department, is directed to administer Tribal water rights in the best interests of the Tribe, its members, and Allottees, and is authorized to:

(a) Allocate surface and groundwater for beneficial uses established in this chapter, consistent with the provisions and purposes of this chapter.

(b) Consult and coordinate with the other appropriate departments or divisions of the Tribe to reserve and allocate surface water for non-consumptive, instream flow water uses that are conducive to fish habitat, wildlife habitat, cultural, and recreational purposes.

(c) Develop and adopt water conservation plans necessary to preserve the availability of water resources for the beneficial uses established by this chapter.

(d) Issue, condition, deny, revise, and revoke any Permits established under this chapter, monitor compliance with the requirement to obtain Permits, and monitor compliance with the terms of all Permits.

(e) Take any enforcement action necessary to address violations of this chapter, as further described in §3-3-12.

(f) Coordinate and interact as necessary with the Idaho Department of Water Resources (IDWR) in the administration of this chapter and the Tribal water rights, including but not limited to: sharing and exchanging water use information; acquiring a database from IDWR of all state-administered water rights and permits within the Reservation; filing objections to any proposed new or modified IDWR water right or permit applications within the Reservation, on any basis consistent with the purposes of this chapter.

### **§3-3-8 Tribal Water Rights Administration Commission**

(a) There is established the Tribal Water Rights Administration Commission, which shall be the administrative body charged with conducting hearings and issuing orders appropriate to the enforcement of this chapter.

(b) The Commission shall consist of three members of the NPTEC Natural Resources Subcommittee. The three members shall serve annually after being selected and appointed to the Commission by the new annual membership of the NPTEC Natural Resources Subcommittee.

## **WATER RIGHTS ADMINISTRATION PRINCIPLES**

### **§3-3-9 Beneficial Uses**

The beneficial uses to which Tribal water rights may be put include the following, which are not listed in order of preference:

- (a) Instream Flow
- (b) Domestic
- (c) Cultural
- (d) Religious/spiritual
- (e) Agricultural
- (f) Stock Watering
- (g) Hatchery Use
- (h) Commercial
- (i) Industrial
- (j) Water Storage
- (k) Groundwater Recharge
- (l) Recreational

- (m) Municipal
- (n) Power Generation
- (o) Leasing to the Idaho Water Supply Bank, solely by the Tribe
- (p) Other uses consistent with the purposes of this chapter.

### **§3-3-10 Water Management**

(a) Existing Uses: Existing water uses of the Tribal water rights as of the date of enactment of this chapter, and initial use dates of those existing uses, will be inventoried by the Water Resources Division.

(b) Initial Use: The Water Resources Division shall assign a date of initial use for new-use Permits established pursuant to this chapter.

(c) The Water Resources Division will establish and maintain a geodatabase of: 1) all existing Tribal water rights; 2) all existing uses of the Tribal water rights that are issued a Permit under this chapter; 3) all new-use Permits issued under this chapter; and 4) all future acquired Tribal water rights.

(d) Drought: In drought conditions water shall be strictly allocated according to Permit initial use date, unless special agreements between the Nez Perce Tribe and other entities provide for a temporary change of water allocation priority. If a drought condition prevails such that not enough water exists to satisfy even senior users, all senior water uses will have partial water uses met, but at a lesser diversion rate than that specified in a Permit. The diversion rate shall be set according to the specific demands in relation to overall supply. The Water Resources Division may set temporary use priorities, restrictions, and, in extreme cases, moratoriums on the use of water under drought conditions. In doing so, the Water Resources Division will coordinate with IDWR, or take any other necessary actions, to ensure that such restrictions only occur after any restrictions that are required to occur first, based on priority date or other legal condition, of any state-administered water rights or permits within the Reservation.

## **WATER PERMIT SYSTEM**

### **§3-3-11 Permits**

- (a) General Principles.
  - (1) No Person shall divert water or undertake any activity affecting or involving the Tribal water rights without first obtaining a Permit from the Water Resources Division.
  - (2) Existing uses of the Tribal water rights that are inventoried and documented in a registry by the Division shall not require an application for Permit, but shall be issued a Permit, subject to any Permit conditions of use, including new conditions, imposed by the Water Resources Division at that time in furtherance of the purposes and provisions of this chapter.

- (3) No right to any use of the Tribal water rights may be acquired by adverse possession, prescription, estoppel, or laches.
- (4) No person may create a security interest or authorize the creation of a security interest in a Permit.
- (5) No conditions of use in a Permit, and none of the processes for renewal or revocation of a Permit, may alter an Allottee's entitlement to the use of water in quantities necessary to carry out the agricultural purposes of the allotment as provided under the General Allotment Act, 25 U.S.C. Section 381.
- (6) No Permit is required for emergency fire-fighting uses.
- (7) No Permit is required for sweat house/lodge uses (in an amount not to exceed 15 gallons/day).

(b) Categories of Permits: Permits under this chapter are limited to the following categories:

- (1) Water Use Permits for the purpose of appropriating the Tribal water rights for beneficial uses.
- (2) Temporary Water Use Permits for the purpose of appropriating Tribal water rights for a specified time of less than one (1) year, in a limited amount.

(c) The Water Resources Division shall establish forms for applications and Permits. Forms shall be made available to applicants at no cost, but shall charge a filing fee for submitted applications. Applications must be approved by the Water Resources Division and a Permit issued before the applicant may take any proposed water use action.

(d) Application forms will at a minimum require the following information: name and contact information; proposed water source; proposed point of diversion; proposed diversion rate, annual volume cap, or other quantity limitation; any proposed diversion works; proposed place of water use; proposed beneficial purpose of water use; and proposed calendar period of water use.

(e) All issued Permits shall include at least the following conditions:

- (1) Permittee's name and contact information.
- (2) Restrictions or limitations as to: water source; point of diversion; diversion rate; annual volume cap; place of water use; any authorized diversion works; beneficial purpose(s) of use; calendar period of use.
- (3) The Permittee's required compliance with the provisions of this chapter.
- (4) Notice that the Permit constitutes a right of entry for Water Resources Division personnel to the entire location of permitted water use, for purposes of inspection, monitoring, and Permit enforcement.

- (5) A maximum initial term of five (5) years, or such shorter term as stated in the Permit.
- (6) Notice that a Permit to pump or divert more than twenty-five gallons per minute shall require the installation and maintenance of a flow rate and total use metering system, at the permittee's expense.
- (7) Notice that no construction of diversion works or diversion of water or other alteration of any water source, is allowed under the Permit until the expiration of the later date of either: (1) 20 days after the expiration of the Notice of Permit Issuance described in Subsection (f) below, if no objection to the Permit has been filed; or (2) final resolution of any objection to the Permit pursuant to a hearing pursuant to §3-3-13 below, including any subsequent appellate process on such objection.

(f) Notice of Permit Issuance: Any Permit issued by the Water Resources Division, whether based on an existing use, or any new use, shall then be publicly noticed. The Division shall publish an abstract of the Permit in a newspaper of general circulation within the Reservation for three (3) weeks, and the Permit itself shall also be posted for three (3) weeks in the Tribal and BIA offices and other such areas as may be deemed appropriate by the Division.

(g) Permit Renewals: All Permits expire on the stated expiration date. A permittee may petition the Water Resources Division for renewal within thirty calendar days prior to the expiration date, and the Water Resources Division shall review the petition and provide a renewal decision prior to the expiration of the Permit. Based on the permittee's compliance history and subject to review of the petition and any amendment of conditions, a Permit may be renewed. Nothing in the permit renewal process shall alter an Allottee's entitlement to use of water in quantities necessary to carry out the agricultural purposes of the allotment as provided under the General Allotment Act, 25 U.S.C. Section 381.

(h) Transfer of Permits: No Permit may be transferred, exchanged, sold, or otherwise conveyed except as follows:

- (1) Any Person with an ownership interest in an allotment on the Reservation may transfer a Permit to another person with an ownership interest in the same Allotment; or
- (2) Any Person with an ownership interest in an allotment on the Nez Perce Reservation may transfer a Permit to successors to that ownership interest.
- (3) A Permit held by an Allottee may be transferred to the initial purchaser in fee of an Allotment, provided the quantity of water transferred under the Permit does not exceed the amount of water being validly used by the Allottee at the time of transfer, and does not exceed an equitable share of Tribal water rights pursuant to 25 U.S.C. Section 381.

(i) Transfer of a Permit shall not change any of the terms and conditions of the Permit.

(j) Revocation of Permits: The Water Resources Division may revoke a Permit for any of the following reasons:

- (1) Failure to comply with the any term or condition of the Permit.
- (2) Failure to comply with any provision of this chapter.
- (3) Failure to comply with any order or decision of the Water Resources Division, the Commission, or the Tribal Courts.
- (4) Nonuse of water for a period of two years.
- (5) Expiration of the Permit without renewal.
- (6) Any misrepresentation in the Permit application, or in any other statement made as part of the Permit application or modification process.
- (7) Ecosystem conditions or protections of a Permit's water source.

(k) No later than seven calendar days prior to the revocation of a Permit, the Water Resources Division shall notify the permittee of the impending revocation. Notification is deemed to have occurred if the notification is sent to the last known address of the permittee via certified mail, regardless of whether the permittee picks up the notification. An Allottee whose Permit has been revoked may reapply to obtain a Permit to use water in quantities necessary to carry out the agricultural purposes of the allotment as provided under the General Allotment Act, 25 U.S.C. Section 381.

## **ENFORCEMENT, HEARINGS, AND APPEALS**

### **§3-3-12 Enforcement**

(a) The Water Resources Division is authorized to take appropriate action, including the following:

- (1) Inspect, monitor, and investigate water use, Permit compliance, and any other activities affecting the Tribal water rights in conformity with the purposes or provisions of this chapter;
- (2) Issue warnings, stop work orders, abatement orders, compliance orders, stop use orders, Permit revocations, and take any other action necessary to carry out the purposes or provisions of this chapter; and
- (3) Remove, render inoperative, shut down, close, seal, cap, or otherwise control methods of water diversion, withdrawal, or use, in order to carry out the purposes or provisions of this chapter.

(b) The Nez Perce Tribal Police and the Tribal Prosecutor shall provide assistance as requested by the Water Resources Division in the enforcement of this chapter.



### §3-3-13 Hearings on Permit Decisions

(a) An applicant, or any objector, including the Tribe or any tribal department or agency, who is not satisfied with the issuance or non-issuance of a Permit by the Water Resources Division shall request a hearing within twenty (20) calendar days of the closing period of public notice of issuance of the Permit, and shall receive a hearing before the Commission within twenty (20) calendar days of filing the request. The applicant and any objector shall be provided an opportunity for a full factual presentation and for public comment and testimony on the proposed use or activity.

(b) Notice of such hearing will be published at the Commission's expense in a newspaper of general circulation within the Reservation at least one (1) week prior to the date of hearing. Notice shall also be posted in the Tribal and BIA offices and other such areas as may be deemed appropriate by the Commission.

(c) All members of the Commission shall be present and preside over the hearing. The applicant and any objector shall have the right to present oral and written testimony under oath. The Commission shall have the authority to administer oaths to witnesses, to take evidence under oath, and to compel attendance of witnesses or production of documents and other evidence.

(d) After the hearing, the Commission shall render a written decision based solely on the application and record within ten (10) calendar days:

- (1) Approving the Permit with or without conditions;
- (2) Denying the Permit;
- (3) Tabling action pending receipt of additional data or information.

(e) The decision shall be adopted by a majority vote of the Commission, and shall be delivered to all parties by certified mail.

(f) All proceedings of the hearing shall be recorded, and, if an appeal is sought, the applicant or any other affected party at their sole cost and expense may request a transcript of the hearing.

(g) An appeal shall be filed by a petition, which has the decision of the Commission attached.

(h) All appeals shall go exclusively to the Nez Perce Tribal Court of Appeals as set forth in §3-3-15.

(i) Any Permit that is the subject of a hearing under this Section shall not take effect or authorize any action to be taken pursuant to it, until a final decision is rendered by the Commission, or by the Nez Perce Tribal Court of Appeals if there is an appeal under §3-3-15.

### **§3-3-14 Review of Enforcement Decisions and Actions**

(a) Request for Hearing. Any affected person may file a written petition for a hearing before the Commission not later than fifteen (15) calendar days after issuance of an enforcement decision by the Water Resources Division.

(b) Hearing before Commission. Upon the proper and timely filing of a petition for a hearing, the Commission will conduct a recorded hearing to receive evidence from the petitioner. The Water Resources Division shall provide to the Commission, on its request, copies of all documents and other information which formed the basis for the decision or action. The Commission may modify or reverse such decision or action of the Water Resources Division only where such decision or action is not supported by hydrologic fact, Tribal policy or law, or is clearly arbitrary and capricious. The Commission will issue a written final decision. Appeals of final decisions of the Commission shall be made exclusively to the Nez Perce Tribal Court of Appeals as described in §3-3-15.

(c) Finality of Decisions. If no request for hearing before the Tribal Court of Appeals is filed within twenty (20) calendar days, the decisions or rulings of the Commission shall be binding and enforceable and not subject to further appeal.

(d) Proceedings on Exercise of Water Resources Division's Emergency Enforcement Powers. When in the exercise of the Water Resources Division's authority under §3-3-12, the Water Resources Division removes, renders inoperative, shuts down, closes, seals, caps or otherwise controls any method of water diversion or withdrawal, any obstruction to the flow of water, or any activities adversely affecting the quality or quantity of any Tribal water rights, the affected person shall have the following appeal deadlines:

- (1) A written petition must be filed with the Commission not later than seven (7) calendar days from the date of the Water Resources Division's action;
- (2) The Commission will conduct a hearing to receive evidence from the person challenging the Water Resources Division's action within three (3) working days of filing such petition after having, in good faith, attempted to notify any affected Permit holders; and
- (3) The Commission shall within forty-eight (48) hours issue a written decision stating the grounds therefor.

(e) All decisions and actions of the Water Resources Division shall remain in effect and be enforced unless modified or set aside by a final decision of the Commission.

### **§3-3-15 Tribal Court of Appeals – Review of Commission Decisions**

(a) Tribal Court of Appeals Review. The Nez Perce Tribal Court of Appeals shall have exclusive jurisdiction to hear appeals from any final decisions or ruling of the Commission, if filed within the time period prescribed in subsection (b).

(b) Filing of Appeal. Appeals of Commission decisions or rulings shall be filed with the Nez Perce Tribal Court of Appeals no later than twenty (20) calendar days from issuance of

such decision or ruling of the Commission. Notice of such appeal shall be sent to the Commission.

(c) Exhaustion. No person may seek review by the Nez Perce Tribal Court of Appeals of a decision of the Commission unless such person has first exhausted the administrative appeal rights provided in this chapter.

(d) Standard of Review. Appeals to the Nez Perce Tribal Court of Appeals shall be limited to review of the record of the Commission's administrative decisions or rulings and shall not be a trial de novo. The Tribal Court of Appeals may modify, reverse, or remand a decision or ruling of the Commission only where such decision or ruling is: without substantial basis in fact, in view of the whole record; or is contrary to tribal law or other applicable law; or is clearly arbitrary or capricious, or a clear abuse of discretion.

(e) Administrative Record. Upon receipt by the Commission of notice that an appeal has been filed with the Tribal Court of Appeals, the Commission shall certify and transmit to the clerk of Tribal Court of Appeals the administrative record within fourteen (14) calendar days, including all documents, transcripts and other information which formed the basis for the decision or ruling being appealed.

(f) All decisions of the Commission shall remain in effect and be enforced unless modified or set aside by a final decision of Nez Perce Tribal Court of Appeals.

### **§3-3-16 Tribal Court Jurisdiction**

The Nez Perce Tribal Court shall have jurisdiction to enforce decisions of the Water Resources Division or the Commission, including through orders granting injunctive relief, in the same manner that the Court enforces its own decisions.

## **GENERAL PROVISIONS**

### **§3-3-17 Sovereign Immunity**

This chapter waives the Tribe's sovereign immunity from suit solely and exclusively with respect to actions described in §3-3-15 above, exclusively in the forum described there. This waiver in no other respect waives the sovereign immunity of the Tribe or any of its departments, divisions, officials, employees, or any other entities or persons protected by the sovereign immunity of the Tribe.

### **§3-3-18 Notice to Allottees of Exhaustion Requirement**

As required by the Snake River Water Rights Act, before asserting any claim against the United States under 25 U.S.C. Section 381, or 28 U.S.C. Section 1491(a), or petitioning the Secretary of Interior for relief of claims relating to 25 U.S.C. Section 381, an Allottee shall first exhaust the remedies available pursuant to §3-3-14 and §3-3-15 above.

### **§3-3-19 Severability**

This chapter is severable. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to other persons or circumstances, will remain unaffected.

### **§3-3-20 Computation of Time**

Unless otherwise provided, the time for performing any action under this chapter shall be computed by eliminating the first day and including the last day. If the last day of any time period in this chapter falls on a Saturday, Sunday, or Tribal holiday, then the duration of the time period is extended to end on the next day that is not a Saturday, Sunday, or Tribal holiday. “Day” denotes a calendar day.