“Written laws are like tracks in the snow. They are evidence of tribal activity.”

Will Mayo
Past President of Tanana Chiefs Conference

Tribal Water Codes –
Their Administration and Enforcement

Part 1

Historical And Legal Context As Well As Some Relevant Case Law Affecting Tribal Water Codes

Part 2

Issues, Strategy And Recommendations For Writing And Maintaining Successful Tribal Water Codes

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Introduction

Codification of a Tribal Water Code, like the drafting of all laws, is the act of anticipation, not the act of prediction. Codification of a Tribal Water Code should be distinguished from quantification of water rights. Codification of reserved water rights is an essential act of sovereignty. Because each tribe will have to individualize the reasoning for regulation of water quality and water management and because jurisdictional issues on a tribe's reserved water rights will never be the same twice, existing case law *will not* clearly or fully answer the question of a Tribal Water Code's enforceability. Each tribe should undertake the process of laying the groundwork and establishing the need and purpose of its existing or new water code. A discussion of some relevant case law on the matter of Tribal Water Codes follows.

1. Winters v. United States, 207 U.S. 564 (1908).

The doctrine of federal reserved water rights is derived from *Winters v. United States*, 207 U.S. 564 (1908). The United States Supreme Court ruled that when the United States creates an Indian reservation, it impliedly reserves sufficient water to fulfill the purposes of the reservation, *with the water claim priority date* established as of the date of the reservation. The Supreme Court held that the right to use waters flowing through or adjacent to the Fort Berthold Indian Reservation was reserved by the treaty establishing the reservation. Although the treaty did not mention water rights, the Court ruled that the federal government, when it created the reservation, intended to deal fairly with American Indians by preserving for them waters without which their lands would have been useless. Later decisions, citing Winters, established that courts can find federal rights to reserve water for particular purposes if (1) the land in question lies within an enclave under exclusive federal jurisdiction, (2) the land has been formally withdrawn from federal public lands — i.e., withdrawn from "inventory" lands available for private use under federal land use laws — and set aside or reserved, and (3) the circumstances reveal the government intended to reserve water as well as land when establishing the reservation. The Supreme Court in *Winters* stated Indians "had command of the lands and the waters — command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock, or turned to agriculture and the arts of civilization."

2. Arizona v. California, 373 U.S. 546 (1966)

This important case explains that **non-use** of a *Winters* water right reserved **does not lead to a loss of that right**. Congress did not create an Indian Reservation "without intending to reserve waters necessary to make the reservation livable." The Court held that the United States did in fact "reserve the water rights for the Indians effective as of the time the Indian Reservations were created." The court ruled that water rights are "present perfected rights" and as such are entitled to priority and may not be ceded or taken away.

3. Montana v. United States, 450 U.S. 544 (1981)

In *Montana*, the Court in an important declaration of "water" jurisdiction held that a tribe may, "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." This is the so-called Montana "**second exception**".

4. Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 US 408 (1989)

The Court ruled that the Tribe in *Brendale* did not have the power to apply its zoning laws to property owned by non-Indians in areas of the reservation that had lost their Indian character--the population in the disputed areas was largely white. The Yakima Nation could, however, apply its zoning laws to those areas of the reservation that retained their essentially Indian character. Although there was no majority opinion in *Brendale*, the result of the Court's several opinions was to eliminate the power of tribes to exercise civil jurisdiction over the activities of non-Indians on the reservation, even where those activities implicate an important tribal interest. But see the water code decisions in paragraphs 5, 6, 7, 9, 10, and 11 of these comments. Importantly, the North Dakota Supreme Court in discussing *Brendale* stated, "Although there was no majority consensus on the rationale to support the result reached in *Brendale,* **the decision underscores**

the importance of particular facts in determining whether a state may regulate non-Indian activities within an Indian reservation." Application of Otter Tail Power, 451 N.W.2d 95

5. ***Strate v. A-1 Contractors*, 520 U.S. 438 (1997)**

Tribal jurisdiction over a highway accident case on a highway running through the reservation was not upheld. But the Court in *Strate* also stated, "Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them. *Williams,* 358 U. S., at 220." The general *Montana* ruling, therefore, and not the important second Montana exception, applied to the *Strate v. A-1* case.

6. ***South Dakota v. Yankton Sioux Tribe*, 522 US 329 (1998)**

In *Yankton* because the Tribe did not establish on the record at the trial that the challenged landfill on a non-Tribal members fee land would compromise the "political integrity, the economic security, or the health or welfare of the tribe," the Supreme Court concluded that the Tribe could not invoke its inherent sovereignty under the exceptions in *Montana*.

7. ***In re GENERAL ADJUDICATION OF ALL RIGHTS*, 195 Ariz. 411, 989 P.2d 739 (1999)**

This case was a series of several cases and opinions decided by the Arizona Supreme Court on reserved water rights. The Arizona Court held, among other matters, that implied rights to water include sufficient waters to satisfy the future as well as the present needs of the Reservations and also **extends to groundwater** to the extent that the groundwater is necessary to satisfy the needs or purpose of the activity on a reservation and established that a **homelands principal** of water quantification should be used. The court stated that federal water law supersedes state law if state law frustrates the purpose or goal of protecting or securing reserved water rights. The Arizona Court held that holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights to the extent necessary to accomplish purpose of water related activities on the reservation.

The Arizona Supreme Court in the first *Gila River* opinion held that the federal reserved water rights doctrine applies to groundwater. Previously, in 1989, the Wyoming Supreme Court had refused to recognize a reserved water right to groundwater. *In re: Gen. Adjudication All Rights to Use Water in the Big Horn River Sys. (BigHorn II), 753 P.2d 76, 99–100 (Wyo. 1988), aff'd without opinion sub nom. Wyoming v. United States*. Two other courts have also followed the Arizona Supreme Court's lead and have held that tribes may claim reserved rights to **groundwater** that underlies their reservation lands. *Confederated Tribes of the Salish and Kootenai Tribes of the Flathead Reservation v. Stulz,* 59 P.3d 1093 (Mont. 2002); and *United States v. Washington Department of Ecology,* No. C01-0047Z (W.D. Wash. Feb. 24, 2003). In the *Salish and Kootenai* case, the Montana Supreme Court ruled that the Montana Department of Natural Resources and Conservation may not grant new permits for the appropriation of water within the Flathead Reservation until the reserved rights of the Flathead Tribes are quantified. The Arizona Supreme Court concluded in the second *Gila River* opinion that the **practicably irrigable acreage standard** is **not** assumed to be the appropriate criterion for the quantification of tribal water rights on all reservations. Several years later a U.S. District Court addressed the Arizona water cases. In *United States v. Washington Department of Ecology,* 375 F. Supp. 2d 1050 (W.D. Wash. 2005), the Court held that the Treaty at issue applies both to surface and groundwater within the Reservation. Although the irrigable land within the

Reservation in the Washington Department case was not large, the Judge concluded that agriculture nevertheless was the primary purpose of the 1855 Treaty. The Judge rejected however the United States' and the Tribe's request that he adopt the homelands theory of reserved rights articulated by the Arizona Supreme Court in the *Gila River* cases. The Judge stated in his opinion, "The appropriate inquiry under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established. *Winters,* 207 U.S. at 577. These implied *Winters* rights are necessarily limited in nature."

On the issue of **groundwater as a reserved water rig**ht, both Montana and Washington followed suit. The Montana Supreme Court held in 2002 that that there was no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights. It also recognized the appropriate role of the state in quantifying and negotiating Indian reserved water rights, noting that quantifying the amount of groundwater available to the Tribes is simply another component of that inquiry. In 2005, a federal district court in Washington State affirmed an earlier decision that held that reserved *Winters* rights extend to groundwater, and that the Reservation holds rights to the groundwater on the reservation. Groundwater in hydrology is connected to surface water, it is only logical to have both treated the same.

8. Confederated Salish and Kootenai Tribes v. Clinch, 336 Mont. 302, 158 P.2d 377 (2007).

The majority in this Montana Supreme Court case authorized the state's Department of Natural Resources and Conservation to process applications for changes of water uses by non-Indians on the Reservation, even though **the Tribe's water rights have not yet been quantified**. The Montana Supreme Court remanded the case directing the trial judge to determine whether the state had authority to process applications, given the Supreme Court's line of cases dealing with state regulatory and taxing jurisdiction over non-Indians on reservations. The court's stated concern was whether the proposed changes in water use would adversely affect the Tribes' reserved water rights and have an impact on the Tribe's political integrity, economic security, health, or welfare. The Montana Supreme Court stated that even if the trial judge finds in favor of state jurisdiction, under Montana law the non-Indian applicants will still have to prove that the "proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons," including the Tribes' rights. The Montana Court is suggesting that the unquantified nature of a Tribe's water rights does not preclude a decision by a Montana court when a 'change of use' is at issue.

9. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008)

In *Plains* the Supreme Court discussed the limits on the Tribal Court's adjudicatory powers over non-Indians. Justice Roberts held that the tribal court lacked jurisdiction to hear the tribal member's discrimination claim because the court lacked the civil authority to regulate the non-member creditor Bank's sale of its fee land. Roberts stated that tribal tort law "operates as a restraint on alienation" because it sets limits on how nonmembers may engage in commercial transactions, and therefore it is a form of regulation. Roberts centered the case on whether the Cheyenne River Tribe can regulate the sale of fee land. But the limitations on tribal jurisdiction discussed in the case **do not apply** to the Tribe's legislative and administrative act in creating and enforcing a Tribal Water Code. Justice Roberts for the majority (perhaps unknowingly) stated "The tribe is able fully to vindicate its sovereign interests in protecting its members and

preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases of reserved water rights." (italics in original)

10. ***Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (2001)**

The Ninth Circuit held in the *Bugenig* case that it would be "difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."

The issue in *Bugenig* was whether the Hoopa Valley Indian Tribe has authority to regulate logging by a non-Indian on fee land that the non-Indian owns, located wholly within the borders of the Tribe's Reservation, in order to protect tribal lands of cultural and historic significance. The district court held that Congress expressly delegated such authority to the Tribe. The Ninth Circuit Court of Appeals in a full en banc decision agreed.

"This case involves the regulation of a non-Indian's conduct on land owned by a non-Indian wholly within the boundaries of a reservation. As in *Mazurie*, the ordinance at issue affects "the internal and social relations of tribal life," a subject as to which the Tribe retains at least some independent authority. 419 U.S. at 557; see also *Brendale*, 492 U.S. at 441 (holding that an Indian tribe retained inherent authority to zone land held in fee by a non-member in a closed area of a reservation); *Montana*, 450 U.S. at 566 (noting that Indian tribes retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation "when that conduct threatens or has some direct effect on the . . . health or welfare of the tribe")."

***11. Montana v. EPA*, 137 F.3d 1135 (9th Cir.), cert. denied, 119 S. Ct. 275 (1998)**

This case **upheld** the determination of **tribal inherent authority over water quality** under the Clean Water Act. In *Montana v. EPA*, the Ninth Circuit upheld water quality regulations by the Tribe as validly reflecting the Supreme Court's delineation of the scope of inherent tribal authority. The court cited three reasons for its determination that EPA had properly found the authority to promulgate water quality standards as falling within the scope of the Salish and Kootenai Tribes' inherent sovereign authority.

First, the court noted that in requiring the impacts on tribal health and welfare to rise to a level of "serious and substantial," the EPA properly accounted for the Supreme Court's comments on inherent authority in Brendale. The State of Montana argued that Brendale in fact has repudiated the *Montana v. U.S.* standard of inherent authority. The Ninth Circuit rejected that argument, noting instead that *Montana v. U.S.* was recently "reaffirmed" by the Supreme Court in *Strate v. A□1 Contractors*. **Second**, the Ninth Circuit noted that EPA's finding of serious and substantial threats to tribal health and welfare is supported by Ninth Circuit precedent holding that threats to water rights may invoke inherent authority. **Third**, the court stated that its decision was "fully consistent" with the Tenth Circuit's recent decision in *City of Albuquerque v. Browner*. In the *Browner* case, the Tenth Circuit recognized the authority of the Pueblo Tribe to establish water quality standards more stringent than federal standards, finding such authority to be "in accord with powers inherent in Indian tribal sovereignty." The *Montana v. EPA* the court distinguished the impact to a Tribe from water pollution emanating from nonmember-owned fee lands in the *Strate v. A-1* highway case by stating, "the conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any

way approaching the threat inherent in impairment of the quality of the principal water source." *Montana v. EPA*, 137 F.3d at 1141.

12. **Moratorium on Tribal Water Codes. See attached letter dated July 7, 2014.**

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July 7th, 2014

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Re: Tribal Water Code moratorium under the Memorandum of Rogers C.B. Morton, Secretary of the Interior (Interior), to the Commissioner of Indian Affairs, (Jan. 15, 1975)

Gentlemen:

I have been invited to speak on the topic of Tribal Water Codes at the upcoming Tribal Water Alliance water rights conference sponsored by the Great Plains Tribal Water Alliance. This program is to be held in Rapid City SD on the 23rd and 24th of July. In preparation for my presentation I would appreciate your providing me with the information requested in this letter.

I write concerning the longstanding moratorium (moratorium) which has been in place for several decades now establishing an official policy by Interior and the Bureau of refusing to approve applications by Indian tribes when submitting tribal water codes and ordinances for

agency approval. This moratorium is based upon the memorandum of Rogers C.B. Morton, Secretary of the Interior, to the Commissioner of Indian Affairs, (Jan. 15, 1975). The moratorium to my knowledge is not in effect by promulgated regulation or by submitted and passed legislation. Final rules supporting the moratorium have not been issued. I am unaware of any current or recent rulemaking to establish the moratorium as a rule. If such has occurred would you please provide this information?

My additional questions are found in two general topics as follows:

1. What is the current BIA and Interior position and policy relative to this 1970s informal moratorium? What is the legal basis under which the BIA and Interior continues the moratorium? Do the BIA and Interior take the position that the moratorium is still in place? I have been unable to locate any current policy statements or findings. Information regarding the preceding matters, if it exists, is relevant to my presentation considering the length of time that the moratorium has allegedly been in effect. I would appreciate your providing this information and supporting authority so that I might use it in the upcoming presentation.
2. How has the BIA and Interior addressed the moratorium under the mandate of Executive Order (EO) 13175? The moratorium is a 'policy statement' or 'agency action' subject to EO 13175 which Executive Order was issued and dated November 6th 2000. Did the *designated tribal consultation official* formulate a policy under Section 2 and 3 of EO 13175 to support the moratorium? Did the BIA and Interior designated tribal consultation official consult with the affected tribes regarding the moratorium pursuant to EO 13175? If the preceding were undertaken, did the agency also provide certification of compliance to OMB pursuant to the Executive directive under the subsequent Memorandum of the Executive Office of the President, Office of Management and Budget, issued and dated July 30th 2010 (Memorandum)? The Memorandum, published at 74 Fed Reg. 57879, is applicable in that the moratorium under Section 2 of the Memorandum has a direct effect on one or more Indian tribes as well as on the distribution of power and responsibilities between the Federal Government and Indian tribes. The Memorandum requires all agencies to create a detailed plan of action that documents agency steps taken to implement the directives of EO 13175. On and after August 2nd 2010, and annually thereafter, agencies are also required to submit to the Director of OMB a progress report on the status of each matter that is subject to EO 13175 and the Memorandum. Would you please provide the last most recent progress report?

I would therefore appreciate your sharing with me answers to the foregoing questions as well as the requested information and reports for the purpose of my presentation at the upcoming Water Alliance Workshop. If you have any questions concerning my requests please do not hesitate to contact me. I look forward to your anticipated cooperation and response, and again thank you for your immediate attention to these requests.

Sincerely,

/s/

David L Ganje

Part II

Issues, Strategy And Recommendations For Writing And Maintaining Successful Tribal Water Codes

Writing And Enforcing The Tribal Water Code – Some Considerations:

A. **Tribal Needs**. Which system and water code language better serves community needs and matches existing Tribal law and customary uses of water? Which system and water code language better anticipates all future water uses and is best for long term Tribal interests?

B. **Enforcement**. Which system and water code language would be more successful in its enforcement? Does the code fully describe actual as well as possible uses of water? Agricultural, municipal, industrial, mixed, other?

C. **Defense**. Which system and water code language can be defended against challenges by a state or others? How does a Tribe, through their code, maximize their ability to maintain jurisdiction over water?

D. **Neighboring Systems**. Does the system and water code match or differ from a state's system? What are the advantages and disadvantages in adopting procedures similar to a state's?

WRITING A TRIBAL WATER CODE ---
SOME ADDITIONAL CONSIDERATIONS -- MAKING THE RECORD

Constitution of the United States

- Would the Code violate any provisions of the Constitution (e.g., encroach on the enumerated powers of the federal government, contract clause, etc.)? If yes, which provisions?

Constitution of the Tribe

- Would the Code violate any provisions of the Constitution? If yes, what provisions?

- Does the tribal constitution require any special action be taken on the Code? If yes, please specify the action.

General Laws

- Would the Code create an amended or new General Law? If yes:
  - What is the proposed new chapter number?
  - Has the proposed number/version of the General Law ever been previously repealed?

- Would the Code amend any existing tribal laws? If so, please list and answer the following:
  - What is the history of the section of the law being amended (when was it enacted, last amended, etc.)?
  - Have there been any court decisions based on the section of the law which would be impacted?

- Does the Code include references to other statutes (treaty, federal, state, special acts)? If yes, are the references correct?
- Does the Code include an effective date or an emergency preamble and, if not, does it need to include an effective date or an emergency preamble?

Case Law

- Is the Code the result of a federal, tribal or state court action (e.g., was it filed in response to coverage of a perceived statutory deficiency, filed in response to a specific court reference of a statutory deficiency, etc.)?

General

1. How widely should the Code apply? For instance, should it cover both individuals and corporations?
2. How are the terms to be defined?

3. Who will administer the Code? Will any changes to the law, such as the creation of positions or an appropriation, follow from that decision?
4. Are penalties or other enforcement mechanisms appropriate, see for example the Holly case.