

**Public Notice and Request for Comments on the Proposed Enactment of the MHA Nation  
Water Use and Administration Code of the Three Affiliated Tribes**

Copies may also be obtained from the Three Affiliated Tribes Fort Berthold Rural Water Department, at the 308 Four Bears Complex, New Town, ND 58763

**Opportunity to Comment.**

The purpose of this notice is to invite comments on the proposed Water Use and Administration Code. The Tribe will then consider all comments, and will determine the extent to which changes may be needed before making a final decision on the amendments. Any amendments to the law would then be submitted to the Secretary of the Interior for approval and publication in the Federal Register.

Anyone wishing to comment on the Tribe's proposed Water Use and Administration Code may do so by submitting comments in writing to the following:

Fort Berthold Rural Water  
308 Four Bears Complex  
New Town, ND 58763

Email: fbrwreceptionist@mhanation.com

**Comments must be received by 4:30 PM CST on July 13, 2018.**

**MHA NATION  
WATER USE AND ADMINISTRATION CODE**

**SECTION 1: GENERAL PROVISIONS**

**A. Title**

This Code shall be known as the "Water Use and Administration Code" of the Mandan Hidatsa and Arikara Nation ("Nation" or "Tribes").

**B. Findings**

1. Whereas, the MHA Nation finds that all Reservation natural resources are interconnected; and that water has cultural, spiritual and economic values that guide the appropriate use, management and protection of water and associated land use activities in the watersheds and drainage basins of the Reservation; and
2. Whereas, the MHA Nation finds that surface and ground water are directly interconnected by the hydrologic cycle of the region and the Fort Berthold Reservation, and therefore water is a unitary resource, whether occurring as ground water, springs,

mineral water, soil moisture, precipitation, percolating water, recharge, drainage waters, or surface water; and

3. Whereas, the MHA Nation recognizes that water is vital to the health and welfare of Reservation residents and to the vitality of the Reservation economy; and
4. Whereas, resource uses may contribute to the degradation of water supply, and
5. Whereas, it is necessary to protect the environmental quality and integrity of all surface and ground water; and
6. Whereas, the MHA Nation finds that as an essential attribute of sovereignty, the MHA Nation has the power to determine the proper uses of the Tribal water right and the management of all waters reserved for the MHA Nation, and held in trust for the benefit of the MHA Nation.

### **C. Purposes**

The purposes of the MHA Nation Water Use and Administration Code shall be:

1. To provide an orderly system for the use, management, and protection of the MHA Nation's water resources on behalf of the MHA Nation, its tribal departments, tribal members, and allottees living within the exterior boundaries of the Reservation; and
2. To ensure that Reservation residents have sufficient water for cultural, domestic, agricultural, stock, instream, and other uses, and that the MHA Nation has sufficient water for reservation economic development; and
3. To protect Reservation water from over-appropriation, degradation, exploitation, and any acts injurious to the quantity, quality, or integrity of the water; and
4. To encourage optimal development and multiple use of the Reservation water resources, to promote stability of investment in water use and delivery systems, and to permit all reasonable uses; and
5. To protect the health and welfare of Reservation residents, the political integrity of the MHA Nation, and the economic security of the Reservation through effective management and protection of the Reservation's water resources; and
6. To protect traditional, religious and cultural uses of water resources and other resources dependent upon water.

### **D. General Powers and Authorities**

This Code is enacted pursuant to the inherent sovereign powers expressly delegated to the Tribal Business Council by the Constitution and Bylaws of the MHA Nation, Article VI, Section 5, including the power to manage the economic affairs and enterprises of the MHA Nation, and protect and preserve the property, wildlife, and natural resources of the MHA Nation including water on the Fort Berthold Reservation.

The Code provides for the development of a Tribal Water Management System, as further defined by regulations of the MHA Tribal Water Commission MHA with final approval of the Tribal Business Council.

#### **E. Construction**

This Code shall not be construed in any manner which is inconsistent with the provisions of other applicable Tribal and federal law.

#### **F. Nature of Ownership**

1. The MHA Nation is the owner of the full equitable title to all of the waters of the MHA Nation, and that title resides undiminished in the MHA Nation; to the extent provided by federal law, the United States holds the legal title to those waters solely as trustee for the MHA Nation.
2. All rights to the use of the waters of the MHA Nation are subject to the prior and supreme rights, interests, and governmental authority of the MHA Nation, and the policy and provisions contained in this Code and any regulations promulgated by the Tribal Business Council and/or the Tribal Water Commission with respect to this Code.

#### **G. Scope**

This Code applies to all persons desiring to use or using or undertaking activities on Reservation lands affecting Reservation Water Resources.

#### **H. Allottee Water Rights for Agricultural Purposes**

Any allottee holding an allotment that was allotted for agricultural purposes, pursuant to the General Allotment Act, 25 U.S.C. § 381, is entitled to request and be provided an equitable distribution of a portion of the Tribal Water right to carry out the agricultural purposes of the allotment. In administering and managing this Water Code, the Tribal Water Department and the Tribal Water Commission shall ensure that the allottees' rights are secured as provided under 25 U.S.C. § 381. Section 381 does not apply to allotments established for grazing purposes on the Fort Berthold Reservation.

#### **I. Definitions**

For the purposes of this Code:

1. "Allottee" means an individual who owns a beneficial interest in a trust allotment within the exterior boundaries of the Fort Berthold Reservation, which was allotted in accordance with federal law.
2. "Beneficial Use" means any use of water for domestic, commercial, municipal, industrial, irrigation, hydropower generation, recreation, stockwatering, and instream flow uses as well as any other uses that provide a benefit to the user of the water.
3. "BIA" means the Fort Berthold Agency of the Bureau of Indian Affairs, Department of the Interior, the United States of America, unless otherwise indicated.

4. "Commission" means the Water Commission of the MHA Nation.
5. "Diversion" means the removal of water from its natural source, natural flow, or location by means of a ditch, canal, flume, dike, pipeline, well, pump, or other artificial act and/or manmade action, including the impoundment of water in a reservoir for the purposes of rediversion.
6. "Fort Berthold Reservation" or "Reservation lands" or "Reservation" means lands within the exterior boundaries of the Fort Berthold Reservation as established by federal law and Article I of the Constitution of the MHA Nation.
7. "Fort Berthold Rural Water" means the division of the MHA Nation government that has the responsibility for the development of a tribal water supply and distribution system for the benefit of all residents of the Fort Berthold Reservation.
8. "Indian lands" means all lands within the exterior boundaries of the Reservation that are held in trust for the MHA Nation, or owned by Indians and those lands, if any, outside of the exterior boundaries of the Reservation held in trust by the United States for the MHA Nation or an enrolled member thereof.
9. "Instream Flow" means a quantity of water in a stream required to protect or to preserve the integrity of the ecosystem.
10. "Irrigation use" means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.
11. "Person" means any individual or group or combination thereof acting as a unit, however associated, or any organization of any kind, whether organized for profit or not, and regardless of the manner in which it does business, whether as a sole proprietorship, receiver, partnership, joint venture, trust, estate, firm, unincorporated association, corporation, or government, including, but not limited to, any part, subdivision, or agency of any of the foregoing; any pronoun used herein shall refer to any gender and to any number as the context requires for permits.
12. "Place of Use" means the location where the water is used.
13. "Point of Diversion" or "POD" means any location at which water is diverted from the water system.
14. "Priority date" means the priority date assigned to the water rights as established by tribal, federal or state law.
15. "Purpose of Use" means the nature of use of the water right.
16. "Relinquish" means abandonment of a water claim or water right.
17. "Reservation water resources" means any and all waters underlying, flowing through, or otherwise occurring or contained within the Reservation over which the MHA Nation has jurisdiction.

18. "Source" means the named or described source of water within the water system.
19. "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.
20. "Tribal Business Council" shall mean the governing body of the MHA Nation as established and defined in Article III of the Constitution and Bylaws of the MHA Nation.
21. "Tribal Court" means the Fort Berthold District Court and any courts from which appeals may be taken from a decision of the Fort Berthold District Court.
22. "Tribal lands" means those lands owned by the MHA Nation.
23. "Tribal Water Engineer" or "Engineer" means the MHA Nation Tribal Water Engineer.
24. "Tribal Water Department" or "Department" means the MHA Nation agency with delegated responsibility for Tribal water rights administration on the Fort Berthold Reservation.
25. "MHA Nation" or "Tribal" means or refers to the MHA Nation.
26. "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the Fort Berthold Indian Reservation.

**SECTION 2: ESTABLISHMENT OF THE TRIBAL WATER COMMISSION AND THE TRIBAL WATER DEPARTMENT**

**A. Tribal Water Resources Commission Established**

1. The MHA Nation Water Commission of the Fort Berthold Reservation is hereby established as the primary enforcement and management agency responsible for administering Tribal water rights on the Reservation. The Tribal Business Council shall appoint five (5) members to the Commission from a list of nominees.
2. Nominees shall be selected following application through public notice by the Tribal Business Council and shall be Tribal members of the MHA Nation who are qualified; giving due weight to education, experience, and other qualities judged significant by the Tribal Business Council. The selected Commission members shall not hold any other elected or appointed position with the MHA Nation, nor be otherwise employed by the Tribal Water Department.
  1. The Water Commissioners shall serve three (3) year staggered terms and may be reappointed by the Tribal Business Council upon the expiration of their initial term. Commissioners shall serve the following terms: two (2) Commissioners shall be appointed and serve for three years, two (2) Commissioners shall be appointed and serve for two years; and one (1) Commissioner shall be appointed and serve for one year. It shall be the decision of the Tribal Business Committee to determine which Commissioners shall serve in which term after their appointment. Thereafter, the appointments shall

be advertised and appointments shall be for three-year terms. Commissioners still continue to serve until their successor is duly appointed.

2. A Commissioner may be removed by vote of the Tribal Business Council for failure to carry out duties and responsibilities as assigned by this Code. In addition, the Commission may establish their own regulations regarding the removal of Commissioners, as is appropriate.
3. If a permanent vacancy occurs because of removal, resignation, or death, the Tribal Business Council shall appoint a replacement for the remainder of the term of the person being replaced.
4. A Chairperson of the Water Commission shall be designated from the appointed Commissioners by the Tribal Business Council. The Chairperson shall serve in that capacity until the Chairperson either voluntarily relinquishes the position, is removed from the position, or the Commission term expires. The Chairperson shall continue to serve until his successor is duly appointed.
3. No Commissioner shall vote on a decision that could have a direct personal financial effect or other conflict of interest upon the affected Commissioner. A Commissioner shall disclose to the Commission any such financial effect or conflict of interest at the time of such vote and may participate in the discussion of the matter without voting upon it. The Commission shall adopt regulations that govern conflicts of interest.
4. Three (3) members of the Commission shall constitute a quorum.
5. The Business Council shall fix the compensation of Commissioners. The rates of compensation so established may not be decreased during a member's term of office. Commissioners shall receive compensation only for those days they sit as members of the Commission, including meetings they are required to attend as members of the Commission.

#### **B. Powers and Duties of the Water Commission**

The powers, duties and responsibilities of the Commission shall include:

1. Providing supervision over the execution and enforcement of this Code, its provisions and regulations there under;
2. Approving or denying water use permits in accordance with the Water Code and regulations implemented to enforce this Code;
3. Obtaining and providing a comprehensive knowledge of the use and management of the MHA Nation's water resources. The Commission is responsible for overseeing and assisting related tribal water divisions, including Fort Berthold Rural Water.
4. Conducting hearings and rendering decisions regarding water permit applications and hearing disputes regarding the water management decisions and actions of the Tribal Water Engineer and/or water management staff in accordance with the procedures adopted pursuant to this Code and regulations;

5. Requesting production of documents or other information, and compelling attendance and testimony of witnesses before the Commission, and, if necessary, seeking judicial assistance from the Tribal Court to compel production of documents or to compel witnesses to attend the hearings;
6. Adopting such rules, regulations, permit forms, and other additional materials needed to carry out the Commission's duties effectively and efficiently;
7. Proposing amendments to this Code as necessary to interpret and execute its authority and implementing the objectives and purposes of this Code;
8. Advising the Tribal Business Council on all aspects of this Code and Reservation water resources, including water marketing;
9. Organizing and operating the Office of the Water Commission in a manner intended to discharge Commission responsibilities effectively;
10. Coordinating with the officials from other tribal commissions, agencies, entities, and other applicable tribal, state and federal agencies to ensure comprehensive oversight of the Reservation's inter-related water quantity, water quality, land use, and fish and wildlife resources;
11. Advising the general membership of the MHA Nation on all aspects of this Code, Reservation water resources, and Tribal water rights in coordination with the Tribal Water Engineer and other applicable Tribal departments;
12. Reviewing the proposed budget developed by the Tribal Water Engineer and making recommendations to the budget in coordination with the Tribal Water Engineer. The Tribal Water Engineer and the Chair of the Commission shall be available to discuss such budget with the Tribal Business Council as requested. The Tribal Water Engineer shall be responsible for the day-to-day operation of the budget; and
13. Imposing reasonable charges for water use by regulations promulgated by the Commission. The Commission may grant waivers of charges if the use is shown to be of benefit to the MHA Nation. The Tribal Business Council may delegate any other duties and authorities after amendment of this Code.

**B. Tribal Water Resources Department Established**

1. There is hereby created the Tribal Water Department and the position of Tribal Water Engineer. The Tribal Water Engineer serves as the Chief Executive of the Commission and is responsible directly to the Commission for water administration. The Tribal Water Engineer shall be responsible for the administration of the Tribal Water Department. The Tribal Water Engineer has the authority to administer the water laws of the MHA Nation and enforce regulations established pursuant to this Code, subject to the oversight of the Commission. The Commission may delegate any of its duties and authority to the Tribal Water Engineer except the duty and authority to:

- a. Hear disputes and conduct hearings in accordance with the procedures set forth in this Code;
  - b. Approve or deny water use permits in accordance with this Code and regulations promulgated to enforce this Code; and
  - c. Adopt regulations to implement this Code
2. For water development and all other water issues excluding office administration and personnel matters, the Tribal Water Engineer is responsible directly to the Commission.

**C. Tribal Water Engineer--Minimum Qualifications and Duties**

1. The Tribal Water Engineer shall be a qualified hydrologist and water resource manager with a minimum educational level of a Bachelor's degree in civil or agricultural engineering or a water-resource management field, and not less than four (4) years of experience in water resource management, water rights administration, and water development and engineering.
2. The Tribal Water Engineer shall have the right to delegate responsibilities to staff provided that the ultimate responsibility shall remain with the Tribal Water Engineer.
3. The Tribal Water Engineer shall equitably guard all of the interests involved in carrying out the duties and authorities of the Department. The Tribal Water Engineer shall be issued an official Tribal Water Engineer identification for enforcement purposes.
4. The Tribal Water Engineer shall have the following duties and authorities:
  - a. Enforcement Functions
    - (i) To administer Tribal water rights, and ensure maximum compliance with the Code and with the conditions of all permits, determinations, orders, regulations, plans, policies, guidelines, and other actions taken by the Commission and coordinate such activities with the Bureau of Indian Affairs;
    - (ii) To enter upon Reservation lands with reasonable notice to owner or occupant to investigate and inspect methods of diversion, withdrawal, irrigation, other water uses and other activities affecting water quantity; to install measuring devices on surface and ground water diversions for the purpose of enforcing and administering this Code; and to monitor water use, water quality, and the diversions in conjunction with this Code;
    - (iii) In an emergency, to remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversion and withdrawal, obstructions to the flow of water, and remedy activities adversely affecting Reservation water resources, subject to expedited appeal to the Commission by the affected person, as provided in Section 7.B.4. of this Code;



(iv) To initiate, by citation and other means, enforcement proceedings before the Commission or, when appropriate, in Tribal Court, for violations of this Code, including injunctive relief; provided that before any enforcement actions occur, the Tribal Water Engineer shall ensure such enforcement is consistent with any applicable federal and Tribal law.

(v) Except as otherwise provided, the Tribal Water Engineer shall ensure that water delivery systems on the Reservation shall divert only that quantity of water to which they are legally permitted.

b. Advisory Functions

(i) To advise the Commission on all water resource related development planning issues consistent with the Tribal Water Master Plan;

(ii) To provide the Commission and Tribal Business Council with a semiannual report on water quantity and quality and the status of water use on the Reservation,

(iii) To provide suggestions, alternatives, and recommendations for water management;

(iv) To declare water supply conditions and to prepare alternative water supply scenarios for different climatic trends and conditions for the Commission's use in setting priorities and preferred uses during drought;

(v) To recommend, after coordination with other agencies or departments, designation of certain land areas, waters, and surface and ground water regions on the Reservation for dedication to certain beneficial uses or as "critical management areas" requiring specialized provisions for management;

(vi) To recommend to the Commission proposed changes to this Code and to its regulations;

(vii) To offer testimony on behalf of the MHA Nation to tribal, state, or federal agencies with regard to MHA Nation water management or interests; and

(viii) To assist all applicants for permits in assembling and analyzing hydrologic and environmental data required to be submitted with the application and otherwise to assist in the preparation of the application, and, if appropriate, to seek assistance from other Tribal departments.

c. Information and Research Functions

- (i) To conduct hydrologic investigations to determine water supply and quality characteristics, analyze existing uses, identify water needs and development possibilities, and study means of developing, managing, conserving, and otherwise protecting Reservation water resources;
- (ii) To collect, maintain, and analyze, on a continuing basis, information regarding Reservation and basin-wide water resources, including data on water, land, air quality, rangeland, and other factors actually or potentially affecting Reservation water resources or Tribal water rights;
- (iii) To perform regular research regarding the overall carrying capacity of the Reservation's water system, with emphasis on discovering and reporting the levels of specific water use which impairs or injures overall water availability and use;
- (iv) To identify sources of financial support for water management and development;
- (v) To conduct public educational programs and develop educational material regarding Reservation water resources and Tribal water rights and administration, irrigation management, water quality, environmental issues, water conservation, and any other pertinent issues as may be determined by the Commission or the Tribal Business Council;
- (vi) To determine the extent of potential effects on existing water users, given hydrologic conditions, from proposed uses of Reservation water resources;
- (vii) To identify promising research areas regarding Reservation water resources and to solicit research proposals by government, university, or private sources;
- (viii) Coordinate joint and separate studies with Tribal departments;
- (ix) At least one month before each irrigation season, the Tribal Water Engineer shall prepare a water supply forecast for the coming season. The Tribal Water Engineer will provide periodic updates on hydrologic conditions to the Commission and the Tribal Business Council; and
- (x) Provide appropriate notices to the other entities as needed.

d. Administrative Functions

- (i) To employ, supervise, and terminate Department and technical staff that are employed to enforce and administer this Code, provided that all hiring and firing decisions are subject to the provision contained within the MHA Nation' current Personnel Policies and Procedures Manual. This includes the right to delegate certain duties to staff members provided that the ultimate responsibility for such duties lies with the Tribal Water Engineer;
- (ii) To develop the internal tribal technical and managerial capabilities to promote the direct involvement of tribal staff that are employed to administer this Code, in the development and construction of water resource supply, distribution, and management facilities and devices;
- (iii) To develop and submit an annual budget in coordination with the Commission as set forth in Section 2.A.4.k. of this Code to submit to the Tribal Business Council; and
- (iv) To develop Department policies and procedures as is consistent with tribal policies for the orderly operation of the Department.

5. The Business Council will appropriate from available funds sufficient resources to administer the provisions of this Code.

### **SECTION 3: SYSTEM FOR WATER USE AND RESOURCE MANAGEMENT**

#### **A. General Policies**

The following general policies shall guide the use and management of Reservation water resources:

1. Existing and established uses and relative priorities concerning the use of Reservation water resources may be protected and preserved, subject to the MHA Nation's obligations to protect Tribal water rights and resources.
2. Surface water use may be adjusted for the varying water conditions each year, and overall water use allocation decisions will be guided by the hydrologic conditions, which require different water management strategies. Water development decisions will recognize hydrologic variability and will consider alternative sources of supply, should dry conditions prevail.
3. Ground water use will be guided by the overall condition of each aquifer system, the expected long-term yields, and the cumulative impacts of existing and proposed uses on ground and surface water supply and quality.

4. All land, water or other resource strategies, decisions, regulations shall consider the potential effect on all Reservation natural resources and will safeguard against surface and ground water degradation.
5. Decisions involving land use which significantly affect a stream bank, bed or channel, or water storage facility shall contemplate their effects upon fishery and wildlife resources.
6. Drainage strategies will be developed with due consideration for the conjunctive or integrated use of surface and ground water.

## **B. Beneficial Uses of Water**

The uses to which water on the Reservation may beneficially be applied include, but are not limited, to:

- a. Domestic use;
- b. Commercial use;
- c. Municipal use;
- d. Agricultural use;
- e. Stock water use;
- f. Industrial use;
- g. Instream flow use, including instream flow for fisheries, wildlife, and pollution control, aesthetic and cultural purposes;
- h. Water storage;
- i. Marketing;
- j. Ground water recharge and supply enhancement;
- k. Recreational use;
- l. Cultural use;
- m. Religious use;
- n. Power generation;
- o. Resource development; and
- p. Other beneficial uses.

There shall be no presumption of preference of use in the order in which the beneficial uses listed above.

## **C. Guidelines for Allocation of Tribal Water**

In addition to those policies contained in Section A, the Tribal Water Engineer and the Water Commission shall take appropriate action for:

1. Water allocation. Water is to be allocated in accordance with a date of initial use pursuant to the historic practices of rotation and scheduling or upon other allocations established by the Commission.
2. Surplus. The Commission may allocate surplus water that may be used beneficially and efficiently after a recommendation of the Tribal Water Engineer, ratably among senior users first; later priorities are then allocated a proportionate share of the remainder.
3. Critical Water Areas. The Commission may designate critical water areas in cases where significant surface or ground water declines and/or water quality degradation exist, and may limit the amount of water for permitted uses in such areas pursuant to regulations designed to protect the long term quality and sustainability of the water resource.
4. Water Shortage Periods. In cases where there is a water shortage due to drought or other causes, water will be strictly allocated according to priority date, unless special agreements between the MHA Nation and other entities provide for a temporary change of water allocation formulas. If a water shortage condition prevails such that not enough water exists to satisfy even senior users, all senior water users will have partial water uses met, but at a lesser diversion rate than that specified in the Tribal Water Permit. The diversion rate shall be set according to the specific demands in relation to overall supply. The Commission may set temporary use priorities during periods of drought after notice and hearing. The Tribal Water Engineer is to develop a drought management plan and corresponding regulations by the Commission.

## **SECTION 4: WATER PERMIT SYSTEM**

### **A. Permit Required to Divert Water**

1. A permit is required for all uses of water, except in cases when both the amount of water to be impounded, diverted, or withdrawn is less than 12.5 acre-feet, and the contemplated use is domestic, livestock, or fish, wildlife, and other recreational uses. Although no permit is required for these uses, the Tribal Water Engineer must be notified of the location and the acre-feet capacity for stored or utilized water once the facilities are constructed. A permit may be applied for in order to establish a priority date for these uses.
2. Except as provided in subsection A.1., no person shall divert Tribal water or undertake an activity affecting or involving such water without first obtaining a permit under this section. If such diversion or activity is required by federal law on behalf of the any federally approved irrigation project, an exemption will be granted as set forth in subsection 4 of this section. All persons shall promptly notify the Tribal Water Engineer, regardless of exemption status, in order to give notice to the MHA Nation of all such activities on the Fort Berthold Reservation. A permit or license is required for any of the following activities:

- a. Diversion of water from any surface or ground water source, including but not limited to any lake, pond, stream course, spring or well in excess of 12.5 acre feet, with the contemplated use being domestic, livestock, fish, wildlife, or other recreational use;
  - b. Diversion of water from any surface or ground water source, including but not limited to any lake, pond, stream course, spring or well for irrigation of more than 5 acres, or for municipal, industrial or commercial use;
  - c. Drilling of any new well or modification of any existing well, including irrigation, industrial, municipal, or commercial wells.
  - d. Altering any stream course or stream bank for any purpose, including but not limited to road construction and repair;
  - e. Developing ground water recharge projects;
  - f. Generating hydropower;
  - g. Storing or impounding water;
  - h. Dedicating water to instream flow; and
  - i. Other non-exempt water uses herein not mentioned but for which a permit is determined necessary by the Tribal Water Engineer.
3. The issuance of a permit allows the activity therein described and constitutes an undertaking by the permittee to comply with the conditions therein stated and all Tribal laws and regulations of general application and applicable federal laws covering such activity.
  4. Any person proposing to undertake an activity that may affect Reservation water resources may apply to the Tribal Water Engineer for an exemption. The Tribal Water Engineer may issue such an exemption if the Tribal Water Engineer finds the activity will have a minimal impact on Reservation water resources or if federal law preemptively allows the activity or diversion. The exemption shall be limited to the facts represented by the applicant. No fee shall be required for such application.
  5. If, upon reviewing an action which is presumptively allowed by federal law, the Tribal Water Engineer determines such action will have more than a minimal impact on Reservation water resources or on the Fort Berthold Reservation, the Tribal Water Engineer shall notify the Tribal Council and request formal consultation with the federal government to mitigate or remove any impacts.
  6. All permits issued under this Code are provisional and shall not be construed to create any entitlement in the user beyond the provisional period or to allow reliance thereon by any other person.
  7. No person shall be authorized to use or otherwise take any action affecting the Reservation water resources administered under this Code unless he or she shall

consent to reasonable entry upon his or her land by the Tribal Water Engineer, Tribal Water Resource employees, or Commissioners engaged in the administration of this Code. Every permit issued under this Code shall contain the condition that no use or other action affecting the waters in question may be made unless the applicant consents to such reasonable entry on his or her land.

## **B. The Permit System**

1. The Permit System is established to regulate, inventory, and monitor the use of Reservation water resources, including Tribal water rights. There shall be four (4) categories of permits. Any two or more categories may be combined into a single permit, as appropriate. Any permit may be made subject to such reasonable conditions and stipulations as the Commission may deem necessary in the public interest.
2. Such permitted uses shall include:
  - a. **Tribal Water Use Permit.** A Tribal Water Use Permit grants or confirms a right to use a share of Tribal water, and guides the present and future use and appropriation of the Tribal water set forth in the use permit. The permit applies to surface water and ground water. There shall be one Water Permit for any use of water and shall be permitted, as follows:
    - (i) Members of the MHA Nation shall have preference to the use of Tribal water, the methods and procedures for exercise of such preference to be established by the Commission by regulation.
    - (ii) An existing permit for Tribal or individual lands within the Reservation may be assigned to a lessee when the land included within the permit is leased, subject to the approval of the Commission. Where there is no existing permit, the lessee may apply for a permit. A permit issued to a lessee shall be valid only as long as the lease is valid.
    - (iii) A Tribal water use permit may be granted to a non-Tribal member person or non-Tribal entity to use Tribal water, upon payment to the MHA Nation at rates to be established by the Tribal Business Council as recommended by the Commission, in addition to any applicable operations and maintenance charges.
    - (iv) Permits for industrial use of groundwater from the Fox Hill aquifer shall not be granted when there are other available sources of water; and if granted, shall not exceed \_\_\_\_\_ acre feet per year.
    - (v) The Commission shall place such conditions on permits as are reasonably necessary to protect water quantity and

quality.

- (vi) In addition to the requirements of this code and any regulations of the Commission, applicants must also comply with applicable federal law.
- b. **Transfer Permit for Changing Place of Use, Purpose of Use, Method of Application, Method of Diversion, or Point of Diversion.** A Transfer Permit grants the right to change the location or purpose of water use, method of application, method of diversion, or point of diversion. This may include the right to divert Tribal water outside the watershed of origin or to other water users in accordance with applicable federal law. The Commission shall establish specific regulations regarding such changes or transfers.
  - c. **Instream Flow Permit.** An Instream Flow Permit grants the right only to the MHA Nation to maintain specified instream flows and/or lake levels in portions of or for entire streams or reservoirs on the Reservation.
  - d. **Storage Permit.** A Storage Permit grants the right to impound surface or ground water for a beneficial use.
3. The Commission shall cause an inventory of all current permitted water uses and any existing diversions and uses permitted on the Reservation. An inventory list of current water users and permittees of Tribal Water Rights shall be published as public notice within one hundred twenty (120) days of adoption of this Code. This list shall be published in public places and in a newspaper of general circulation for ninety (90) days. The Commission shall promulgate regulations regarding the public notice process, objections, and hearing. The Commission may issue permits to any and all water users on the inventory list. No application for a permit shall be required for any use listed on the inventory. Once this initial inventory list is completed, water users shall update the Tribal Water Resources Department with any changes, including name and address changes.
  4. Any Tribal member who is applying for a permit for water and whose land is also part of the any federally approved irrigation project must ensure compliance with Tribal regulations, project regulations, and applicable federal law.
  5. Permits shall be granted for no more than five (5) years, but may be considered for automatic additional five (5) year extensions as set forth by the Commission regulations.
  6. The Commission shall establish a process for changing the point of water diversion, whether surface or ground water, changing the use of waters, or the place of use or the method of diversion or application of waters, and transferring Tribal water outside the watershed of origin.
  7. No permit shall be granted unless the applicant and any licensee, lessee, assignee, or agent of applicant agrees to comply with all tribal laws and regulations and taxes



applicable to the use, lease or sale of water. Failure to comply with any applicable tribal law or regulation or tax shall be grounds for immediate revocation of the permit.

### **C. Application Procedure for Permit**

1. Applications for any permit under this Section shall be made on forms developed by the Tribal Water Engineer, including particular information of facts that in the judgment of the Tribal Water Engineer and the Commission is required for the proper processing of such applications. Information that the Water Engineer and Water Commission shall consider in processing a Water Permit may include Priority Date, Period of Use, Place of Use, Method of Diversion, Volume of Water, and Flow Rate requested.
2. Unless exempted by other provisions of this Code, the Commission shall establish, in the regulations promulgated hereunder, a schedule of applications fees for permits, which shall be paid in advance of consideration of application for any water permit governed by this Code. All fees shall be collected by the Office of the Tribal Water Engineer. The Commission may waive the fee in the case of financial hardship or for tribal members. Such fees shall be used in part to defray the cost of reviewing and processing the application and conducting a hearing when necessary.
3. The Tribal Water Engineer, or his or her designee, as consistent with the procedures in the established regulations, shall, upon request, meet with and assist any applicant in the collection of data and the preparation of the application to the extent the applicant, through lack of resources or technical knowledge, requires such assistance. The Tribal Water Engineer will notify an applicant of any errors or omissions to their application.
4. Within sixty (60) days of receipt of the application, the Tribal Water Engineer shall review each permit or license application; perform investigations and determine whether the proposed use or activity is technically feasible; prepare a report on each application; and recommend approval or denial to the Commission.
5. The Commission shall review all applications and reports and recommendations generated by the Water Engineer to determine whether the proposed use or activity adversely affects Tribal resources or other Tribal interests, and whether the proposed use or activity is consistent with the policies, purposes, and procedures described by this Code and with Tribal water laws and any other applicable Tribal or federal law. The Commission shall have the authority to grant or deny a permit within thirty (30) days of receipt of the recommendation by the Tribal Water Engineer. Every decision of the Commission must include factual findings, which justify the decision.
6. If the Commission does not approve the application or approves it with conditions which are not accepted by the applicant, the applicant shall be entitled to a hearing pursuant to Section 7.A.
7. If the Commission approves the application, the Tribal Water Engineer shall issue the appropriate permit in conformity with the Commission's decision.

8. A duly issued water permit by the Tribal Water Engineer shall constitute *prima facie* proof of the water user's right and entitlement to the use of water as defined in the water permit.

**SECTION 5: VOLUNTARY RELINQUISHMENT OF CLAIMS OR RIGHTS  
TRANSFERS, SECURITY INTERESTS, NO LOSS BY ADVERSE  
POSSESSION, PRESCRIPTION, ESTOPPELS OR ACQUIESCENCE,  
LOSS BY NONUSE, AND REVERSION TO MHA NATION**

**A. Voluntary Relinquishment of Clams or Rights**

Any holder or claimant of any right, other than a Tribal water right, in or to the waters of the Reservation may voluntarily relinquish all or a portion of such right to the MHA Nation by any affirmative act indicating an intent to relinquish.

**B. Transfers**

1. No Transfer Except In Accordance with this Section. No permit granted under this Code may be transferred, exchanged, sold, or otherwise conveyed except as provided in this Code.
2. Transfers Between Tribal Members. A Tribal water use permit may be transferred from one Tribal member to another Tribal member only upon the transfer of land on the Reservation from one Tribal member to another Tribal member. An application for transfer of a water permit under this provision must be submitted to the Tribal Water Department promptly after the completing transfer of the land.
3. Transfer of Water Permit Upon Transfer or Sale of Allotment Out of Trust. A Tribal water use permit held by tribal member 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 tribal member at the time of transfer, and does not adversely impact Tribal water rights. A water permit may be transferred from an allottee or his or her successor(s) in interest to any person for agricultural purposes with the transfer of land on the Reservation.
4. Form of Application. Applications for transfer, assignment, exchange shall be made on forms prepared and made available by the Tribal Water Engineer.

**C. Security Interests**

No person may create a security interest or authorize the creation of a security interest in a water permit without the express written consent of the Commission.

**D. No Loss By Adverse Possession, Prescription, Estoppel, or Acquiescence**

No right to use or otherwise affect the quantity, level, flow, pressure, quality, or temperature of water may be acquired by adverse possession, prescription, estoppel, or acquiescence.

**E. Loss By Non-Use**

A permit shall become null and void in whole or part and the water revert to the MHA Nation if the water user fails to use all or a portion of the water for a period of five (5) consecutive years, without sufficient cause. A tribal member may request and be granted reinstatement of all or a portion of his or her permit without reapplication, provided that the water permit of an allottee may be restored upon request by the allottee, or his or her Indian successor.

“Sufficient cause” shall include:

1. Drought or other unavailability of water;
2. Active service in the armed forces of the United States;
3. The operation of legal proceedings;
4. The application of any laws restricting water use;
5. Incarceration in a penal institution;
6. Confinement in a mental institution, whether voluntary or involuntary;
7. Incompetence by reason of age or mental incapacity;
8. Provisions for future use as provided in this Code; or
9. Other causes of nonuse beyond the control of the holder or holders or the Tribal water use permit.

The Commission shall serve notice of loss by nonuse on the permit holder. A hearing to show cause why such permit should not be revoked shall be held before the Commission not less than 30 days or more than 60 days from the date of notice. A decision of the Commission may be appealed in accordance with Section 7.

#### **F. Reversion to the MHA Nation**

If any permitted use is voluntarily relinquished or is lost by nonuse before the term of the permit expires, or is terminated for reasons of permit violation(s) or violations of this Code, the subject water use right shall revert to the MHA Nation.

### **SECTION 6: ENFORCEMENT**

#### **A. Prohibited Acts**

No person shall:

1. Forcibly, or through bribery, attempted bribery, threat, or other corrupt practice, obstruct or impede the due administration of this Code;
2. Commit fraud, or knowingly assist another in the commission of fraud, with the intent to evade or defeat the administration of this Code or costs imposed or assessed;
3. Falsely verify by written declaration any permit, form, or other document, or intentionally withhold data required to be submitted by law;

4. Violate the conditions or stipulations of his or her permit, including but not limited to taking more water than is allowed by permit;
5. Willfully take, waste, alter or damage Reservation water resources or Tribal water rights;
6. Knowingly use, take action, or otherwise affect the use of Tribal waters within the Reservation without the authorization required; or
7. Willfully obstruct or interfere with Tribal employees performing their lawful duties under this Code.

## **B. Penalties**

Any person that commits any of the above prohibited acts, or whose employees or agents in the course of their employment or agency, commit any of the above-prohibited acts, shall be subject to civil proceedings before the Commission or citation by the Tribal Water Engineer. The policy of the Commission is to assess and initiate penalties that are appropriate for the violation committed, and to ensure that penalties are sufficient to deter persons from committing violations and that compliance is achieved. On finding a violation, the Commission may impose any of the following sanctions, or any combination thereof, subject to compliance with applicable tribal and federal law:

1. Monetary damages;
2. Restitution;
3. Recommendation for cancellation of the holder's lease if the lands to which the permit applies are Tribal lands;
4. Injunctive relief;
5. Affirmative remedial action;
6. Additional conditions or limitations upon the holder's permit, including limitation of the amount of water permitted for diversion;
7. Suspension of the permit for a certain term;
8. Recommendation to the Business Council for exclusion from the territory of the Reservation, if the violator is subject to exclusion under the tribal or federal law;
9. Forfeiture of any permit;
10. Temporary or permanent disqualification from eligibility for any permit, subject to limitations set forth by applicable Tribal or federal law; and/or
11. Civil fine.

## **C. Appeals**

Appeals from a decision of the Commission by any affected person shall be in accordance with the provisions of Section 7.C. of this Code. An affected person shall mean any person or entity that can demonstrate actual harm or potential harm because of a decision of the Commission.

#### **D. Exhaustion of Administrative Remedy**

Appeals must be made pursuant to the administrative process set forth in Section 7. The appeal procedure set forth in Section 7 shall be the sole and only appellate process by which an affected person may seek relief from a decision rendered by the Water Commission or Water Engineer. Appeals made directly to the MHA Nation Tribal Court without exhaustion of administrative remedy are prohibited.

### **SECTION 7: HEARINGS AND APPEALS**

#### **A. Hearings on Permits**

1. An affected person or applicant who is not satisfied with the issuance or non-issuance of a permit by the Commission shall request a hearing within twenty (20) days, and shall receive a hearing before the Commission within twenty (20) days of filing the request. The affected person or applicant shall be provided an opportunity for a full factual presentation and for public comment and testimony on the proposed use or activity.
2. Notice of such hearing will be published at the Commission's expense in a newspaper of general circulation on 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.
3. At least 3 members of the Commission shall be present and preside over the hearing. The appellant 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 compel attendance of witnesses or production of documents and other evidence. The Commission shall promulgate regulations for the hearing procedure to ensure that due process requirements are met.
4. After the hearing, the Commission shall render a written decision based solely on the application and record within ten (10) days:
  - a. Approving the permit with or without conditions;
  - b. Denying the permit or license; or
  - c. Tabling action pending receipt of additional data or information.
5. The decision shall be adopted by a majority vote of the Commission, and shall be delivered to all parties by certified mail.
6. All proceedings of the hearing shall be recorded, and, if an appeal to Tribal Court is sought, the applicant or any other affected party, at their sole cost and expense, may request a transcript of the hearing.

7. An appeal of a final decision of the Commission shall be by Petition filed with the Tribal Court within thirty (30) days of receipt of the Commission's decision. The Petition shall set forth the grounds and basis of appeal and attach the decision of the Commission.
8. A decision rendered on a Petition submitted to the Tribal Court pursuant to Section 7.A. of this Code shall be final and nonappealable to any other courts.

**B. Review of Tribal Water Engineer Decisions and Actions**

1. Request for Hearing. Any affected person may file a written petition for a hearing before the Commission not later than thirty (30) working days after issuance of a decision by the Tribal Water Engineer.
2. 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 appellant. The Tribal Water Engineer 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 action of the Tribal Water Engineer 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 only to the Tribal Court within thirty (30) days of receipt of the written final decision.
3. Finality of Decisions. If no request for hearing before the Tribal Court is timely filed, the decisions or rulings of the Commission shall be binding and enforceable and not be subject to further appeal.
4. Proceedings on Exercise of Tribal Water Engineer's Emergency Enforcement Powers. When, in the exercise of the Tribal Water Engineer's authority under Section 2.C.4.a.iii., the Tribal Water Engineer removes, renders inoperative, shuts down, closes, seals, caps or otherwise controls any method of diversion or withdrawal, any obstruction to the flow of water, or any activities adversely affecting the quality or quantity of treaty-based or Tribally-permitted water, the affected person shall have the following appeal deadlines:
  - a. A written petition must be filed with the Commission not later than seven (7) business days from the date of the Tribal Water Engineer's action;
  - b. The Commission will conduct a hearing to receive evidence from the person adversely affected by the Tribal Water Engineer's action within three (3) business days of filing such petition after having, in good faith, attempted to notify any affected permit holders; and
  - c. The Commission shall within forty-eight (48) hours issue a written decision stating the facts and grounds therefor.

**C. Appeal to Tribal Court—Review of Commission Decisions**

1. Tribal Court Review. The Tribal Court is empowered to hear appeals from any final decisions or ruling of the Commission if filed within the time period prescribed in subsection 2.
2. Filing of Appeal. Appeals of Commission decisions or rulings shall be filed with the Tribal Court no later than thirty (30) days from issuance of such decision or ruling of the Commission. Such notice of appeal shall be filed with the Tribal Court. Appellant shall send a copy of the notice of appeal to the Commission, and shall certify to the Tribal Court that the copy was sent to the commission by certified or regular mail.
3. Administrative Record. Upon receipt by the Commission of notice that an appeal has been filed with the Tribal Court, the Secretary for the Commission shall certify and transmit to the Clerk of the Tribal Court the administrative record within fourteen (14) days, including all documents, transcripts and other information, which formed the basis for the decision or ruling being appealed.
4. Standard of Review. Appeals to the Tribal Court shall be limited to review of the record of the Commission's administrative decisions or rulings. The standard of review shall not be a trial de novo. Based upon the record developed during the administrative proceeding and the Commission's decision, the Tribal Court may modify, reverse, or remand a decision or ruling of the Commission only where such decision or ruling is without substantial basis in fact, is contrary to tribal policy or tribal law, or is clearly arbitrary or capricious.

## **SECTION 8: MISCELLANEOUS PROVISIONS**

### **A. Sovereign Immunity**

1. This Code, in no way, limits, restricts, or otherwise waives the MHA Nation's sovereign immunity from suit; and
2. Under this Code, the Tribal Business Council grants a limited waiver of sovereign immunity for its Commission and its Tribal Water Engineer for the sole purpose of providing redress and relief pursuant to Section 7 of this Code. The limited waiver of sovereign immunity for the Commission and for the Tribal Water Engineer shall only be for the sole purpose of addressing actions taken by the Commission, or by the Tribal Water Engineer, acting in their official capacities, and shall only be available for the purpose of declaring, adjudicating, and enforcing the parties' rights and duties as more fully described in this Code and any regulations promulgated hereunder; and
3. The waiver specifically does not waive the sovereign immunity of the Tribal Business Council or the MHA Nation or any other departments; and
4. The waiver specifically does not allow any further action in any other court or jurisdiction or for any other purpose except as forth in Section 8.A.2.

### **B. Rules, Regulations, and Standards**

1. Any rules or regulations promulgated under this Code shall be consistent with this Code and all applicable Tribal and federal law.
2. The Tribal Water Engineer shall review regulations with the Commission and submit the regulations to the Commission for review, consideration, publication, and if appropriate, approval.
3. Pursuant to Section 2.A.4.e., before the formal adoption of proposed regulations, the Commission shall publish such regulations in order to provide interested parties an opportunity to comment. The notice will invite written comments and provide a deadline for their submission of not less than seven (7) days after publication of notice. The Commission will hold a public hearing in order to receive oral testimony to the proposed regulations. The Commission shall also establish procedures for emergency regulations.
  - a. A regulation will become effective twenty-four (24) hours after the closing date for comments or on the date otherwise specified therein.
  - b. A copy of the regulations will be filed and made available for public inspection at the Tribal Water Engineer office.

**C. Records Access**

1. All records maintained by the Tribal Water Engineer or the Commission are considered Tribal records as such these records may not be disclosed unless authorized by the Tribal Business Council in writing.
2. No employee may alter or destroy these records unless authorized by the Tribal Business Council in writing.
3. Nothing in this section shall prohibit other Tribal departments from sharing data or other information necessary for performing their job(s) as long as all confidential information is maintained in conformance with Tribal policies and procedures.

**D. Amendment**

The Tribal Business Council may amend this Code. The Commission shall notify Tribal members and other affected persons of any amendment in the manner considered appropriate by the Commission under Tribal laws.

**E. Severability**

In the event any provision of this Code or the application thereof to any person or circumstances is held invalid by a court of competent jurisdiction, the remainder of this Code shall not be affected thereby and, to this end, the remaining provisions of this Code shall be unaffected and survive the invalid provisions.

**F. Extension of Time Limits**



Except for appeals under section 7, time limits provided by provisions of this Code may be extended, for good cause shown, by the Tribal Water Engineer or the Commission before which the proceeding is pending when the ends of justice so require and when all applicable requirements have been met.

**G. Effective Date**

The provisions of this Code shall be in effect upon the approval and passage by the Tribal Business Council. This Code shall remain in effect until repealed or amended.

**H. Repeal**

Any act, ordinance, resolutions, rules or regulations, or provision of law of the MHA Nation in conflict with the provisions of this Code are hereby repealed to the extent that they are inconsistent with, conflict with, or are contrary to, the purpose of this Code. Those acts, ordinances, resolutions, rules or regulations, or provisions of law that do not conflict shall remain in effect.