

**May 22, 2017**

Senator Steve Daines  
Russell Senate Office Building  
Washington, DC 20510

Subject: The CSKT Compact

Dear Senator Daines:

Based on the research presented herein, we believe that the Confederated Salish Kootenai Tribes (CSKT) Compact violates both the Montana and U. S. Constitutions and overturns federal laws and infrastructure put in place almost 100 years ago to make the CSKT Reservation productive. The bare legal title of the irrigation water rights purchased from the federal government by homesteaders on the Flathead reservation were transferred to the CSKT in the Compact. The Compact depreciates the value of property owned by 29,000 citizens within the exterior boundaries of the reservation and new “off reservation water rights” on the streams and rivers depreciate the property values of 350,000 citizens across eleven counties in western Montana because of uncertainty in water supply.

The CSKT compact should remain in Montana until the Legislature is able to correct the Compact’s deficiencies. As legislators, we have an obligation to all Montana citizens to ensure the fair and equitable settlement of the federal reserved water rights in Montana. The present CSKT Compact, and S. 3013, are neither fair nor equitable. We note for the record that every other compact in Montana except the CSKT compact was fair and equitable, and passed by large margins in the legislature.

We are writing to initiate a formal dialogue with you regarding the proposed CSKT water Compact and in particular, its “transformation” into S. 3013 which was introduced in the Senate by Senator Jon Tester in May 2016. Senator Tester’s bill does not reflect the compact that was

unconstitutionally approved by the Montana legislature<sup>1</sup>, and leaves unresolved significant legal, constitutional, and policy issues that plagued its alleged passage in Montana in 2015.<sup>2</sup>

At the time of the introduction of Senator Tester's bill to the Senate in, the CSKT Compact's *existence* was still being litigated in a Montana District Court on the constitutionality of the Montana legislature's 2015 vote on the compact.<sup>3</sup> In July 2016, the Montana District Court ruled that the legislature's vote was indeed unconstitutional.<sup>4</sup> Therefore, there is no CSKT Compact to move forward to Congress, yet Senator Tester proceeded to rewrite the compact and went so far as to have hearings before the Senate Select Committee on Indian Affairs without any notice to local irrigators who are negatively impacted by his bill.<sup>5</sup> Senator Tester also ignored the on-going state court legal proceeding addressing the very validity of a compact.

The main purpose of this letter is to describe, in outline form, the key legal and constitutional issues that are unresolved in the Compact as allegedly passed by the Montana legislature, and which remain unresolved in and are exacerbated by Senator Tester's bill, S. 3013. We do not believe that the Tester bill reflects the will or remaining unresolved concerns of the Montana legislature or its citizens.

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<sup>1</sup> *Flathead Joint Board of Control et al v. Montana*, MT, DV-15-73, Twentieth Judicial District Court, Lake County, Montana, Order 7/18/2016, ruled in part that the MT legislature's vote did not meet the requirements of Article II Section 19 of the MT Constitution, requiring a two-thirds vote of each house.

<sup>2</sup> The Compact bill was S.B. 262 in the 2015 MT legislative session. the legislature was not allowed to make any changes or amendments to address *many known concerns* of the compact, including the auditing of and accountability for the state's financial contribution to the settlement. The bill sponsors, Compact Commission, Governor, Attorney General, and Tribes would not allow any changes to the compact to address these issues and thus prevented the legislature from fixing the real concerns raised by thousands of Montanans. The legislature's 2015 vote in the House and Senate failed to meet the constitutionally-required two-thirds threshold and was the subject of a nearly immediate lawsuit filed by the Flathead Joint Board of Control against the state of MT. The ruling issued by the court in July 2016 found that the legislature's vote was unconstitutional. This ruling is currently on appeal in the MT Supreme Court.

<sup>3</sup> The Compact granted the state of Montana immunity from "costs, damages, and attorneys fees" for its actions in implementing the Compact. Article II Section 19 of the MT Constitution requires that if the state is to grant itself immunity, it must have a 2/3 vote of each house in the legislature. The compact did not receive the required supermajority vote in either house. Instead of a 2/3 vote, the House passed the bill by a simple majority 53-47. The vote is the subject of *FJBC v. Montana DV-15-73* under note 1.

<sup>4</sup> The case is currently on appeal to the Montana Supreme Court

<sup>5</sup> As citizens directly affected by the Compact, the MT Congressional delegation failed to inform anyone other than the CSKT about this hearing on S. 3013. Review of transcripts and video recordings of the hearing demonstrated that no opposing opinions and not even a mention that the constitutional validity of the MT legislature's vote on the compact was being legally challenged. There should have been no bill rewritten or introduced by Senator Tester, and the Montana Congressional delegation should have intervened or at the very least mentioned the legal status of the compact at the hearing.

We believe that the many issues remaining with the original compact should be resolved at the state level first before “a CSKT compact” can be sent to Congress.<sup>6</sup> Furthermore, we expect that before any compact is prematurely rushed through congress it will be thoroughly examined according to the existing agency and Congressional rules prescribed by the Chairman of the House Natural Resources Committee in a February 2015 letter to the then Secretary of the Interior and Attorney General<sup>7</sup>.

We seek your assistance in allowing first the resolution of the primary compact legal issues of the Compact in Montana. Once these issues are resolved at the state level and *properly*<sup>8</sup> submitted to Congress we expect the CSKT Compact to be thoroughly reviewed as prescribed by the House Natural Resources Committee so that the Congress can thoughtfully and thoroughly review and correct any remaining federal issues in the CSKT Compact. To do otherwise would be a great disservice to Montana.

### **Outline of Legal and Constitutional Issues of CSKT Compact and S. 3013**

#### **1. Existing Compact Constitutional and Legal Violations**

- a. Property takings. Compact transfers the bare legal title of water rights in the Flathead Irrigation Project (FIP) from irrigators to the CSKT; reduces the volume of water to historically irrigated lands by 50%-70% and transfers the use of that water to instream flow. No economic, legal, or environmental reviews were conducted of these property takings.
- b. Failure to quantify the volume of water required to meet the purpose of the reservation—irrigated agriculture *and* fisheries<sup>9</sup>-- and instead claiming all surface and ground water on the reservation, including that belonging to others. The volume of water awarded to CSKT is at least 27 times the total amount of water awarded to the other six tribes in Montana, and more than four times the combined water right awarded to thirty tribes across the west.
- c. The CSKT claimed time-immemorial off- reservation water rights based on the improper reinterpretation of the treaty-granted *access right* to take fish, into a *water right* for instream flow for a fishery

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<sup>6</sup> Senator Tester introduced S. 3013 in the Senate with a \$2.9 billion dollar appropriation and included substantive additional provisions expanding the MT legislature’s-passed compact in ways that would further impact Montana citizens.

<sup>7</sup> Letter to Secretary Sally Jewell and Attorney General Eric Holder from Representative Rob Bishop, Chairman, House Natural Resources Committee, February 15, 2015.

<sup>8</sup> Governor Bullock signed into law and transmitted the CSKT Compact to the U.S. House Natural Resources Committee in December 2015 despite on-going litigation on the constitutionality of the legislature’s vote on SB 262.

<sup>9</sup> Since at least 1989, instream flows have been maintained in the Flathead Irrigation Project to provide adequate water for fish. Flows have been maintained consistently to this day.

- d. Montana Constitutional Violations: Article IX regarding state’s ownership, administration and adjudication of water rights; Article II regarding elimination of judicial remedies for Montana citizens; Article III regarding the legislature creating special laws with the compact when existing general laws are applicable
- e. No environmental or economic reviews conducted for massive transfer of agricultural water to different uses; management of all water by CSKT-dominated and unaccountable “agency” replacing state water administration and management for private lands and state-based water resources
- f. Due Process and equal protection violations
- g. Expansion of tribal jurisdiction over non-Indians
- h. Violation of several federal laws: Hellgate Treaty (12. Stat. 975); 1904 Flathead Allotment Act and 1908 Amendment; 1908 Winters Doctrine; 1902 Reclamation Act; 1934 Indian Reorganization Act; 1953 McCarran Amendment

## **2. Senate 3013—The Tester Bill**

- a. Adopts the tenets of the CSKT Compact and retains same problems described above. Additional provisions are included that substantively magnify existing compact effects on water users.
- b. Transfers federal irrigation project water rights and management from landowners to the CSKT and provides funds which may be used for the removal of the Flathead Irrigation and Power Project (FIPP) infrastructure and re-landscaping;<sup>10</sup>
- c. Exempts Tribes from federal and state environmental and economic reviews for all compact activities
- d. Provides the Tribes with the sole right to further develop hydropower on Flathead River, a navigable river whose waters are owned by the State of Montana
- e. Adds billions to the bill with no accounting for use of money

All of the “additions” inserted in the Tester bill are items that would have had to have been approved by the Montana legislature first as they impact the laws, citizens, and economy of the state. The Tester bill is unacceptable to 29,000 citizens on the reservation and the 350,000 citizens in eleven counties in western Montana affected by the off-reservation Tribal water rights claims.

The Montana legislature was prevented from doing its job in amending the original compact – SB 262—and as a result issues critical to Montana’s future remain unresolved. To add insult to

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<sup>10</sup>The Flathead Joint Board of Control, representing irrigation districts, voted 8-2 against compact in 2014. The compact provides for no compensation for lands or water rights taken.

this injury, Senator Tester’s bill inexplicably magnifies the economic costs to Montanans with no judicial remedy—a complete violation of the due process and equal protection protections of citizens guaranteed by the Montana and U.S. Constitutions.

As legislators, we have a legal obligation to ensure that all legal matters are resolved in Montana first before the bill goes to Congress. We would prefer to see no further action on S. 3013 or its resubmission until we have had a chance to bring this compact into compliance with state and federal law. The legislature’s directive in the settlement of federal reserved rights in Montana is to achieve the “fair and equitable settlement of the water rights between Montana citizens and the federal government or Indian Tribes seeking federal reserved water rights.<sup>11</sup>” Neither the existing CSKT Compact (SB 262) nor S. 3013 meets those requirements, nor do they pass constitutional muster.

Of the six compacts successfully negotiated by the federal and state governments with Tribes in Montana, this is the only compact that has resulted in such large scale transfer of water rights, uses, and jurisdiction to a Tribal corporation.<sup>12</sup> Such a departure from existing law and policy, and the property takings enabled by the CSKT Compact, will result in endless litigation if these problems cannot be resolved.

We request your assistance in convincing your colleagues to drop S. 3013 and not reintroduce any CSKT Compact until state-based litigation is complete and the Montana legislature can resolve the legal and constitutionally-based issues in the compact. In the meantime, we ask you to ensure no federal funds are appropriated for any pre-implementation of CSKT Compact.

When a valid CSKT Compact is properly submitted from Montana to Congress, we ask you to support the House Natural Resources Committee February 15, 2015 letter requiring that the compact undergoes multi-agency review before proceeding to its consideration in any Senate or House committees. This review should ensure that any federal legal issues remaining in the Compact will be identified and resolved.

We also urge your vigilance in assuring that federal agencies are not permitted to and have no funding for the pre-implementation of this compact in the federal Flathead Irrigation Project or in any off reservation component of this compact until Congress has ratified a final CSKT Compact.

Finally, we respectfully request that your office keep us apprised of all actions related to any aspect of the CSKT Compact, including hearings, studies, federal register notices, and opportunities for public comment or testimony. This compact in its current form is already

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<sup>11</sup> 85-2-21 cite

<sup>12</sup> The CSKT are organized as a Tribal Corporation under the Indian Reorganization Act of 1934

known to have significant legal, constitutional, economic, and other issues that negatively affect the citizens of Montana.

We hope you will allow us to resolve these issues at the state level prior to any further congressional consideration.

Sincerely,

Keith Regier, State Senator SD

MT Legislators

Cc Zinke, Tester, Sessions, Bishop, House Natural Resources Committee, Barrasso & Senate Committee on Indian Affairs