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BEFORE THE COMMISSIONER OF POLITICAL PRACTICES

JAYSON PETERS, Complainant, vs. CONFEDERATED SALISH AND KOOTENAI TRIBES, Respondent.	Cause No. COPP 2015-LOB-001 **RESPONSE TO COMPLAINT**

Comes now, the Confederated Salish and Kootenai Tribes ("CSKT"), through counsel, and submit the following response to Jayson Peters' ("Peters") complaint against CSKT as follows:

I. INTRODUCTION

1. Mr. Peters alleges that the CSKT violated Montana's lobbying reporting requirements found in Title 5, Chapter 7, in two ways: (1) by failing "in the promotion of high standards of ethics in the practice of lobbying and preventing unfair and unethical lobbying practices" and (2) by failing to disclose any amounts paid to Mercury Public Affairs, LLC ("Mercury").

2. Mr. Peters' allegations arise from the CSKT's relationship with Mercury, and Farmers and Ranchers for Montana ("FARM"). He claims that CKST helped create FARM "for the purposes of direct lobbying of the 2015 legislature and grassroots influencing of public opinion with a call to action of the public to contact their Legislators to vote for SB 262." Although Mr. Peters mentions "direct lobbying" here, with the exception of the three emails attached to the complaint, Mr. Peters' criticism is primarily directed at the grassroots lobbying efforts. Mr. Peters is concerned that the CSKT did not report any expenditures related to the grassroots lobbying efforts to support SB 262, the act ratifying the Flathead Reservations' water compact ("Water Compact").

3. Mr. Peters' complaint must fail. The Commissioner of Political Practices ("COPP") has affirmatively stated in both the administrative rules and a "frequently asked questions" sheet published on his website, that grassroots lobbying is not reportable. Accordingly, changing that course and enforcing any purported violation of § 5-7-208, MCA, could potentially violate the Tribes' due process rights. *See FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012) (lack of proper notice violates due process clause of the U.S. Constitution).

II. PARTIES

4. CSKT is registered as a principal with the COPP, and duly reported expenditures in 2015 for its two registered lobbyists: Mark Baker and Shane Morigeau.

5. Mark Baker is employed by various entities, one of which is Mercury Public Affairs, LLC ("Mercury"). The Complaint does not allege that Mr. Baker coordinated any grassroots or direct lobbying efforts, but instead only claims he was engaged both by Mercury (but not as a lobbyist) and CSKT (as a lobbyist). Mr. Baker's engagement by CSKT

was through his law firm, ABS Legal. There is no prohibition on a lobbyist having other, non-lobbying, income.

6. FARM is an independent grassroots organization that engages Shelby DeMars in a non-lobbyist capacity.

7. Jayson Peters is the Complainant. Mr. Peters is the Chair of the Flathead County Republican Central Committee in Lakeside, Montana.

III. FACTS

8. In June 2014, CSKT engaged Mercury Public Affairs, LLC ("Mercury"), to advise in the creation of a plan to develop support for the Water Rights Compact.

9. In 2014 FARM was formed as a grassroots organization of farmers and ranchers, together with local leaders, tribes, businesses and other Montanans to support the Water Compact.

10. Mercury assisted with the creation of FARM to generate support for the Water Compact through a grassroots campaign. CSKT, along with several other individuals, local leaders, and businesses became members of FARM and made contributions to FARM to support its grassroots activities.

11. Part of FARM's work included sending mailers around the state to generate support for the Water Compact. The mailers (copies of which were attached to the Complaint as Exhibits K, L and M) and other ads suggested that individuals contact their legislators. The mailers, though, did not advise the recipient of the name of the individual's legislator, the individual's senate or house district, or advise the individual what she or he should say. The

mailers also did not include any preaddressed postcard or other communication that the recipient could sign and mail to his or her legislator.

12. Instead they simply stated some variation of "Your representative needs to hear your voice: Call (406) 444-4800." *See* Exhibit M-1 (attached to Complaint). The phone number is that of the Legislative Information Desk. *See* The Montana Legislature, *Contacting Legislators* (http://leg.mt.gov/ css/About-the-Legislature/Lawmaking-Process/contact-legislators.asp) (last accessed May 9, 2015). In fact, many of the mailers did not even include the Legislative Information Desk's phone number. *See* Exhibits L, K (attached to Complaint).

13. Further, the mailers are not unique to FARM's grassroots efforts. In fact, other groups interested in the compact decision also sent similar mailers. Attached is a mailer sent by the Flathead Joint Board of Control opposing the compact. *See* Exhibit 1.

14. The only emails directly to Legislators cited by Mr. Peters and attached to his complaint were three emails sent by FARM's Shelby DeMars. However, those emails on their face did not encourage the Legislators to promote or oppose the Water Compact legislation, but only provided information and press releases regarding the compact. *See* Exhibits F, G, H (attached to Complaint).

15. Because CSKT's engagement with Mercury did not involve direct lobbying, it did not report any amounts spent on its contract with Mercury.

IV. ARGUMENT

16. "A principal subject to this chapter shall file with the commissioner a report of payments made for the purpose of lobbying. A principal is subject to the reporting requirements of this section only if the principal makes total payments for the purpose of

lobbying that exceed the amount specified under 5-7-112 [currently $2,500] during a calendar year." *See* § 5-7-208, MCA.

17. "Lobbying" means: (i) the practice of promoting or opposing the introduction or enactment of legislation **before the legislature or legislators**; and (ii) the practice of promoting or opposing official action of any public official or the legislature. *See* § 5-7-102, MCA, emphasis added.

18. Under the administrative rules, Admin. R. M. 44.12.102(3), "Lobbying" includes

> a) any **direct communication by a lobbyist** or an individual engaged in lobbying activities **with a public official** to promote or oppose official action;
> b) all time spent by a lobbyist or an individual engaged in lobbying activities **to present oral or written testimony to one or more public officials** promoting or opposing official action by any public official or group of public officials, including the legislature or a committee of the legislature; or
> c) signing a sign-in sheet as an opponent or proponent of official action at a legislative hearing.

(Emphasis added)

19. "Lobbying activity" or "lobbying activities" mean actions or efforts by a lobbyist or an individual to lobby or to support or assist lobbying, including preparation and planning activities after a decision has been made to support or oppose official action, and research and other background work that is intended, at the time it is performed, for use in lobbying or to support or assist lobbying activities. Admin. R. M. 44.12.102(4). This Montana definition is consistent with how the matter is characterized by the United States Supreme Court. *See United States v. Rumely*, 345 U.S. 41, 47 (1952) ("As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, 'lobbying in its commonly accepted sense,' that is, '**representations made directly to the Congress, its members, or its committees**,' and does not reach what was in Chairman

Buchanan's mind, attempts 'to saturate the thinking of the community.' " (Citations omitted and emphasis added.))

20. Grassroots lobbying "generally describes efforts by a business, political committee or other organization to encourage others, including the general public, to engage in direct communication with a public official to influence official action. Grassroots lobbying often involves letter writing or e-mail campaigns, mailings, phone banks, or other mass communication." *See COPP-Lobbying FAQ* at 3, http://politicalpractices.mt.gov/content/4lobbying/FAQupdated2015 (January 2011).

A. THE CSKT WAS NOT REQUIRED TO REPORT ANY FUNDS SPENT ON GRASSROOTS LOBBYING.

21. Mr. Peters' main allegation is that the CSKT did not report any of the funds it provided to Mercury in support of grassroots lobbying. However, Mr. Peters provides no legal authority that the CSKT had to report such expenditures. Instead, he cites an outdated COPP ruling that was superseded by the 2002 amendments to the Lobbyist Disclosure Act and was further limited by the COPP's "frequently asked questions" fact sheet created in 2011. He also relies on the federal tax code to define grassroots lobbying, even though the COPP has already defined it as noted above. Mr. Peters has not established that the CSKT non-reporting of its payments to Mercury violated § 5-7-208, MCA.

22. Initially, and as the Commissioner has noted, Montana's lobbying rules are not particularly clear concerning what constitutes reportable lobbying expenses. (*In re Complaint against Blue Cross Blue Shield of Montana* (COPP Apr. 27, 2001) ("*BCBS*") p. 13: "Unfortunately, the Act's rules are sometimes inconsistent with the Act or ambiguous.") In fact, the rules were so unclear that in 2002, when the Lobbyist Disclosure Act was amended

for the first time in twenty years, the Commissioner adopted a preamble to the administrative rules, explaining that "the 2002 rule changes only would be applied to legislative lobbying promoting or opposing the introduction or enactment of legislation before the legislature or legislators." *See* Admin. R. M. 44.12.101A(1). The preamble further notes, "Although rule language may appear to apply to non-legislative lobbying and legislative lobbying involving official action other than the introduction or enactment of legislation, the commissioner of political practices has determined that it is not possible to apply existing and new lobbying rules to these lobbying activities. . . ." *Id.*

23. Although the *Blue Cross* case was cited favorably by Peters, it predates the 2002 rule changes, and in the ruling, the Commissioner nevertheless concluded, "there are significant ambiguities and inconsistencies in existing rules that make it unlikely that a civil or criminal enforcement action would be successful." (BCBS, p. 34)

24. Recognizing the lack of clarity, in January 2011, the COPP explained that it would not enforce rules regarding grassroots lobbying. It published a "frequently asked questions" ("FAQ") page for the general public on its website to provide guidance to principals on what constitutes lobbying. As with the preamble, the FAQ advises that non-legislative lobbying, such as grassroots lobbying, is not generally reportable:

> **Q. Must grassroots lobbying be reported on lobby spending reports.**
>
> **Generally not.** Consider the following three examples – they describe what's typically understood to be grassroots lobbying, and no reporting is required under current law for all but the fourth example below:
>
> Corporation X sends postcards to people urging them to contact state officials/legislators to either support or oppose proposed or pending legislation.

> Corporation X hires a consultant to go door-to-door and call individuals and retailers of Corporation X's product to urge them to contact state officials/legislators to support or oppose proposed or pending legislation.
>
> Organization Y-X contracts with a vendor of phone-banking services to call potential supporters or the public to urge them to contact state officials/legislators to support or oppose proposed or pending legislation.
>
> The next example illustrates a more direct form of lobbying and **would therefore likely be a reportable expense** subject to public disclosure under Montana law:
>
> Organization Y-X sends pre-printed postcards to people, ready for mailing to specified state officials or legislators, urging them to merely sign their names and forward the postcards to the designated recipient.

See CPP-Lobbying FAQ at 3, http://politicalpractices.mt.gov/content/4lobbying/FAQupdated2015 (January 2011)(Emphasis added)

25. The facts as alleged here are similar to the non-reportable examples offered by COPP. Specifically, Mr. Peters alleges that CSKT hired Mercury to engage in a grassroots lobbying campaign, including sending mailers. Such action is akin to the above example wherein "Organization Y-X contracts with a vendor of a phone-banking services to call potential supporters or the public to urge them to contact state officials/legislators to support or oppose proposed or pending legislation."

26. It is also much like the second example, where "Corporation X hires a consultant to go door-to-door and call individuals to urge them to contact state officials/ legislators to support or oppose proposed or pending legislation." Here, CSKT engaged Mercury, a consultant, to advise on public relations strategies related to the Water Compact.

27. The CSKT's support of grassroots efforts are much different than the reportable example, number four, above. Significantly, Peters has not alleged that FARM sent, and

FARM did not send, any pre-printed postcards directed at legislators did not give legislators contact information, and did not supply any pre-printed scripts.

28. Accordingly, because the COPP has advised the CSKT that it expenditures on grassroots lobbying are not reportable, the CSKT cannot have acted unethically or failed to report any required lobbying expenditures as alleged by Peters.

29. This interpretation finds support in *United States v. Rumely*, 345 U.S. 41, as well as the two cases cited by Peters, *United States v. Harriss*, 347 U.S. 612 (1953) and *Montana Auto Ass'n v. Greely*, 193 Mont. 378, 632 P.2d 300 (1981).

30. First, in *Rumely*, an organization named the "Committee for Constitutional Government," whose secretary was Rumely, sold books with a "particular tendentiousness." Rumely refused to give the House Select Committee on Lobbying Activities the names of the person who made bulk purchases of the books. As a result, he was convicted for failing to give testimony. His conviction was reversed by the Circuit Court and appealed to the U.S. Supreme Court. The Court was then tasked with determining whether book distribution constituted "lobbying activities." In analyzing the phrase lobbying activities, the Court concluded,

> As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, "lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees,' and does not reach what was in Chairman Buchanan's mind, attempts 'to saturate the thinking of the community.' If 'lobbying' was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between 'lobbying activities' and other 'activities . . . intended to influence'? Had Congress wished to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies? Certainly it does no violence to the

> phrase 'lobbying activities' to give it a more restricted scope. To give such meaning is not barred by intellectual honesty.

Rumely, 345 U.S at 47.

31. Following *Rumely*, the U.S. Supreme Court heard the *Harriss* case, and further refined the definition of lobbying. There, the Supreme Court considered the definition of principal, which included attempts "[t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." To uphold the legislation against a constitutional vagueness challenge, the Court narrowed the definition to " 'refer only to lobbying in its commonly accepted sense' – to direct communication with members of Congress on pending or proposed legislation." *Harriss*, 347 U.S. at 620.

32. Relying on *Harriss,* in *Montana Auto Ass'n*, the Montana Supreme Court struck from the definition of "principal" a subsection defining a principal to include, "in the case of a person other than an individual, to solicit, directly, indirectly or by an advertising campaign, the lobbying efforts of an individual." Had this section remained, it would have required the registration for any non-individual entity as a principal for any grassroots lobbying efforts. The Supreme Court, though, found the definition unconstitutional under *Harriss* because it "specifically covers solicitation by a person seeking lobbying efforts by others."

33. The *Rumely*, *Harriss*, and *Montana Auto Assn.* decisions all support the interpretation currently given by the COPP, that grassroots lobbying is not considered "lobbying" for reporting purposes. Accordingly, the CSKT did not violate any reporting requirements within Title 5, Chapter 7 by not reporting any payments to Mercury.

B. THE CSKT'S ACTIONS WERE NOT "UNFAIR OR UNETHICAL"

34. Mr. Peters also alleges that the CSKT "failed to comply with the high standards of ethics in the practice of lobbying and preventing unfair and unethical lobbying practices" citing the general language in the "Purposes' section of the Lobbyist disclosure act, § 5-7-101, MCA. Mr. Peters' argument, though, is based on the alleged failure to report grassroots lobbying expenses. Because the CSKT were not required to report any of their grassroots lobbying expenditures, as discussed above, they then cannot have acted unfairly or unethically.

35. But even if the CSKT should have reported the grassroots lobbying expenditures it did not act unfairly or unethically. As noted above, Title 5, Chapter 7, MCA, and its implementing regulations are ambiguous and have even been found by the Commissioner to be unenforceable. Therefore, if there was any failure on the part of the CSKT it certainly was not unfair or unethical, especially in light of the prevalence of other such mailers coming from other organizations like the Flathead Joint Board of Control. *See* Exhibit 1.[1]

C. PUNISHING THE CSKT FOR ANY FAILURE TO REPORT COULD VIOLATE THE DUE PROCESS CLAUSES OF THE U.S. AND MONTANA CONSTITUTIONS.

36. Even if the COPP finds that the CSKT should have reported any amounts spent on grassroots activities, penalizing the CSKT for any failure to report, in light of the authority and action to the contrary cited above, could violate its right to Due Process under both the Montana and U.S. Constitutions.

[1] Significantly, the FJBC, like the CSKT is registered as a principal with the COPP, and has not reported any expenditure for mailers such as the one attached as Exhibit 1.

37. Article II, Section 17, of the Montana Constitution and the 5th and 14th amendments of the U.S. Constitution provide that no person shall be deprived of life, liberty, or property without due process of law. One aspect of these due process clauses is that no person shall be denied procedural due process. *Montanans v. State*, 2006 MT 277, ¶ 30, 334 Mont. 237, 247-48, 146 P.3d 759, 767.

> "Under both federal and state jurisprudence the requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case. As such, 'the process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision.' Otherwise stated, due process requirements of notice and a meaningful hearing are 'flexible' and are adapted by the courts to meet the procedural protections demanded by the specific situation."

Id. (citations omitted). (*See also FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012) (lack of proper notice violates due process clause of the U.S. Constitution).

38. As stated above, the COPP has advised principals in the 2002 preamble and its 2011 FAQ that it would *not* require principals to report any funds spent on grassroots lobbying.

39. Similarly in the *BCBS* decision in 2001, the Commissioner noted that there are "significant ambiguities and inconsistencies in existing rules" that make enforcement difficult.[2]

40. And while in *BCBS* the Commissioner did articulate a rule requiring grassroots lobbying reporting, that limited decision has now been superseded by subsequent actions by the COPP, the 2002 rule amendment and the FAQ.

[2] Due to these ambiguities, it also renders the statute unconstitutionally vague if it is applied to the CSKT's failure to report any grassroots lobbying expenditures.

41. In summary, and as a practical and legal mater, the CSKT were given no notice that their engaging of Mercury to provide public relations advice would be considered a reportable expense. Instead, they were advised by the Commissioner's office, through the FAQ, that no reporting would be necessary. Accordingly, punishing the CSKT for any purported violations of § 5-7-208, MCA, would violate their rights to procedural due process.

V. CONCLUSION

42. In summary, the CSKT was not required to report any expenditures related to its grassroots lobbying efforts, and it did not violate Title 5, Chapter 7, MCA, or any administrative rules by acting unethically or unfairly, or otherwise. Additionally, even in the event that the Commissioner finds a violation, it should not be enforced against the CSKT because the language of the statute is vague, and the CSKT had no notice that their actions would be in violation of § 5-7-208, MCA.

Dated this 14 day of May, 2015

MORRISON, SHERWOOD, WILSON & DEOLA

By: _____
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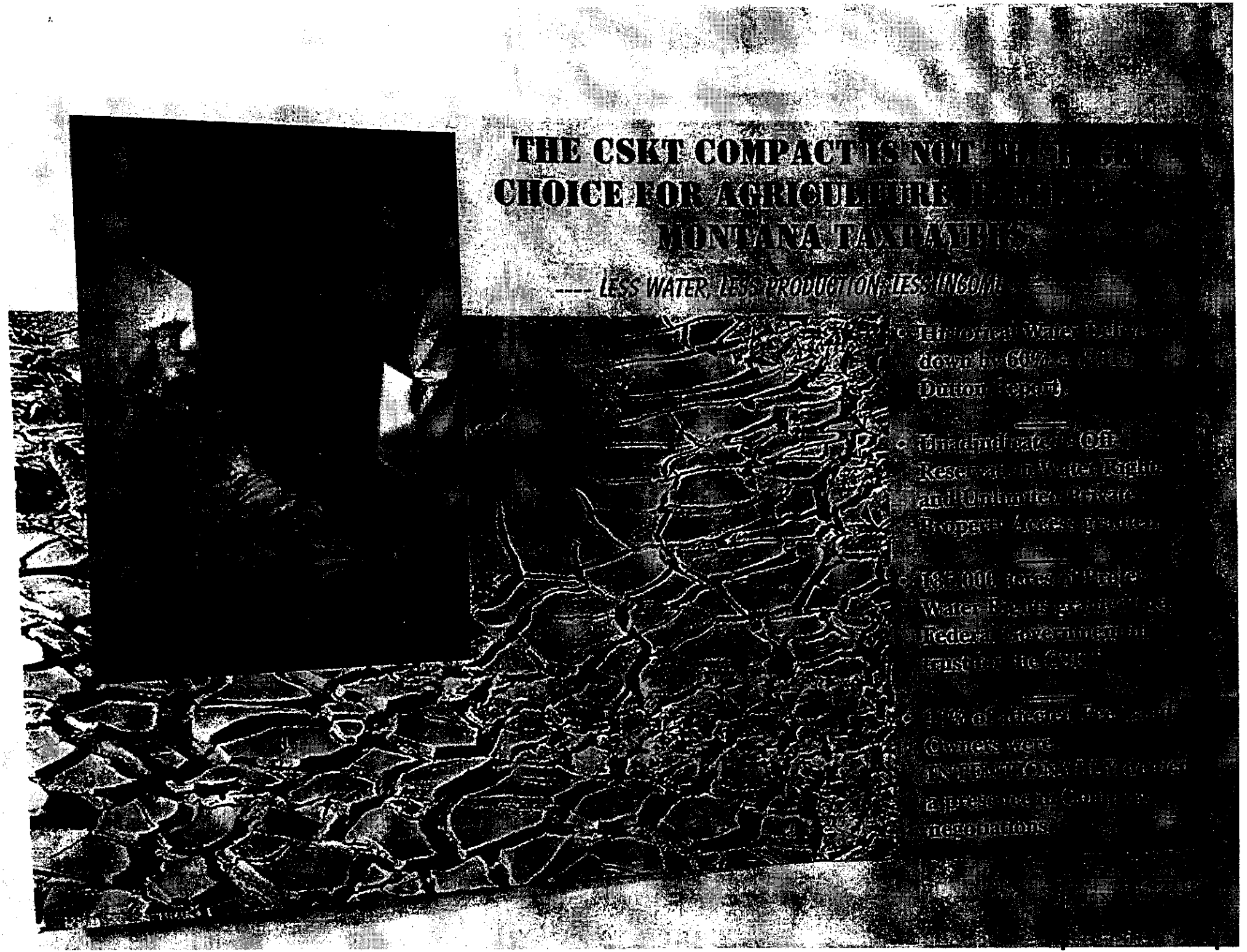
Attorneys for Respondent

EXHIBIT 1


THE CSKT COMPACT IS NOT
CHOICE FOR AGRICULTURE
MONTANA TAXPAYERS
---- LESS WATER, LESS PRODUCTION, LESS INCOME
Buffalo

- Compared to the 2013 CSKT Compact, the 2015 CSKT Compact results in a significant reduction in FIP area annual irrigation water supplies at the farm turnout. Jocko Area:**18% less** in wet years, **19% *less*** in normal years, and **16% *less*** in dry years; Mission Area: **32% *less*** in wet years, **29% *less*** in normal years and **25%*less*** in dry years; and Little Bitterroot Area: **31% *less*** in wet years, ***31% less*** in normal years, and ***28% less*** in dry years.

---- E. Everaert - WWC Engineering ----

- No provisions are made in the proposed 2015 Compact for many waters local irrigators relied on in the past including tail-water, spring flows, large runoff or rainfall events and water unused by other irrigators. These waters were the reason many irrigators could apply 15-25 inches or more in the past.
- The proposed compact has serious implications for the future of irrigated agriculture at the FIIP. If irrigators do not receive historic amounts of water their production levels and crop choices will be reduced. Some irrigators could see water and production levels fall by half and their most valuable crops eliminated. Most farms cannot survive such a reduction in income.

. ---- Barry Dutton - Land and Water Consulting ----

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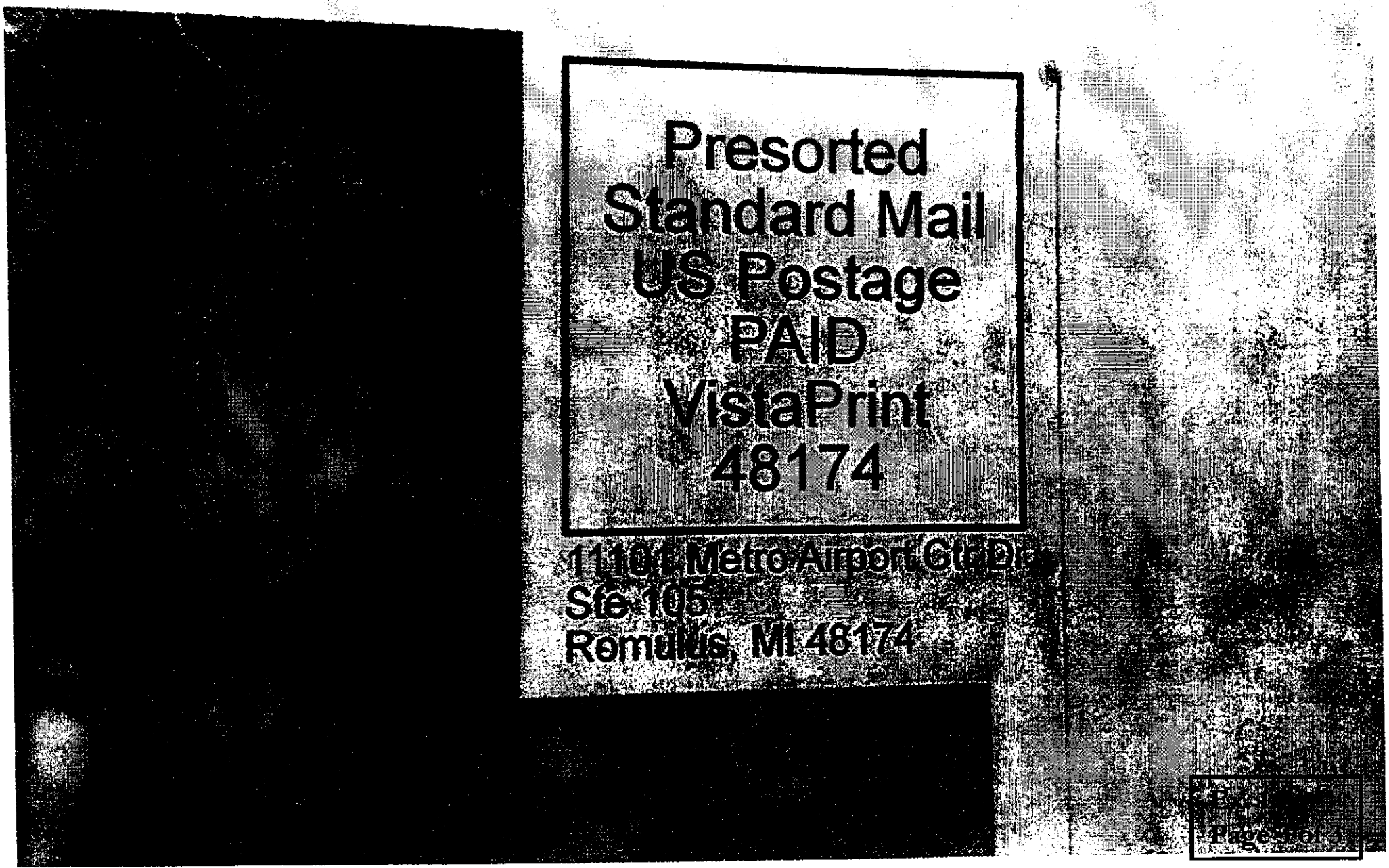
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