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February 3, 2016

Senator Steve Daines
320 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Daines:

Our firm represents the Montana Land and Water Alliance, which is headquartered in Polson, MT. I am writing regarding the Confederated Salish and Kootenai Tribes (CSKT)[1] Compact ("CSKT Compact"). As you may be aware, the Compact attempts to settle the federal reserved water rights claims by the Confederated Salish and Kootenai Tribes of the Flathead Reservation in a pending water rights adjudication. We have learned that the CSKT, and perhaps others, are pressing the Congress to enact the CSKT Compact in this session.[2] We write to express our concern and opposition to the consideration of the CSKT Compact in this session.

The CSKT Compact contains several provisions which negatively affect the water rights of all irrigators within the Flathead Irrigation Project, both Indian and non-Indian alike. The Flathead Irrigation Project contains some 127,000 irrigated acres. These provisions include a delegation of administrative authority from the State under the Unitary Management Ordinance to a politically appointed, Tribally-dominated "Water Management Board" which will govern all aspects of water use in the basin. The amount of water historically used by irrigators of the Flathead Irrigation Project would be reduced to make water available for tribal instream flows. New appropriations and changes of use of existing water rights would be restricted.

The Montana Land and Water Alliance is a coalition of ranchers, farmers, business owners, and many others, some of whom have irrigation rights within the Flathead Irrigation Project whose members are adversely affected by the CSKT Compact and its implementation. The premature

[1] The Flathead Indian Reservation was established by the 1855 Treaty of Hellgate which was ratified by the Senate in 1859. The reservation was opened to settlement in 1909 by Presidential Proclamation. The 1.2 million acre reservation demographics establish that 45 % of the total land area and 90% of the irrigation project lands are owned in fee, and 55% of the total land area and 10% of the irrigation project land is owned by the Tribe.

[2] Proceedings of the Montana Legislature's Water Policy Interim Committee meeting January 11 and 12, 2016, Helena, Montana.

consideration of the CSKT Compact in 2016 will negatively impact our clients in the Flathead Irrigation Project and across western Montana.

Initially, the CSKT Compact should not be considered by Congress at this time because it is currently in litigation.[3] The litigation concerns the constitutionality of the Montana legislature's vote on the Compact. Until this litigation is resolved there is no CSKT Compact to introduce to the Congress. The CSKT have recently intervened in this case which will delay proceedings well into 2016. We are certain that whatever decision is made will be appealed to the Montana Supreme Court.

Further, there are significant legal, constitutional, and environmental issues that remain with the CSKT Compact. We believe that its proponents did not follow the federal agencies' *Criteria and Procedures*[4]. Nor can it be "certified" as suggested by Congressman Rob Bishop, Chairman of the House Natural Resources Committee.[5]

A more detailed description of our concerns and why the CSKT Compact is not ready for Congressional review is contained in the attached letter to the Secretary of Interior. In brief, these concerns also include:

1. The CSKT Compact Expands the Scope and Application of Federal Reserved Water Rights and Their Administration at the Expense of the State Water Administration and State Water Rights.
2. CSKT Compact is Based on Faulty Assumptions Contrary to Federal and State Law: where were the *Criteria and Procedures*?
3. The Federal Data Quality Act (P.L. 106-554 §515) is Applicable to the CSKT Compact.
4. The Federal Government Cannot Require a State to Violate its Own Constitution to Meet a Federal Obligation in an Indian Water Settlement.

Please refer to the attached letter to Interior Secretary Jewell for a more detailed description of these concerns.

Our clients are Montana citizens who will be directly and negatively affected by the CSKT Compact if it is allowed to pass in its present form. We assert that the CSKT Compact, in its present form, must undergo federal agency review, certification, and deliberative hearings conducted by Congress.

We thus respectfully request that you commit to ensuring that the CSKT Compact will not be rushed through Congress in 2016 prior to federal agency review and the Congressional hearing process. To do otherwise will work against the interests of Montanans negatively impacted by the CSKT Compact.

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[3] The litigation is in Montana's 20th Judicial District (*FJBC v. Montana DV-15-73*), Polson, MT.

[4] *Criteria and Procedures for the Participation of the Federal Government in the Settlement of Indian Water Rights Claims*, Federal register Vol. 55 No. 48, March 12, 1990.

[5] Letter from Chairman Rob Bishop to Attorney General Holder and Interior Secretary Jewell, February 26, 2015, regarding the certification required by the Departments that the CSKT Compact meets all of the criteria for a settlement before it comes to Congress.

We are happy to provide additional information as needed.

Thank you for your consideration in this matter.

Sincerely,

Jay F. Stein

CC: Catherine Vandemoer, Ph.D., Chair, MLWA, Polson, MT

Enclosure as stated.

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February 1, 2016

Honorable Sally Jewel
Office of the Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
Secretary_jewell@ios.doi.gov

Dear Madame Secretary:

Our firm represents the Montana Land and Water Alliance, Inc. (Alliance), regarding the recent water settlement reached between the state of Montana, the Confederated Salish and Kootenai Tribes (CSKT)[1], and the United States, known as the "CSKT Compact".[2] As you may be aware, the Compact attempts to settle water rights claims by the Confederated Salish and Kootnai Tribes of the Flathead Reservation. We have learned that the CSKT and perhaps others are pressing decision-makers to introduce and pass the CSKT Compact in this session. We write to express our concern about and complete opposition to its introduction to Congress this session.

The Compact contains several provisions which negatively affect the water rights of all irrigators within the Flathead Irrigation Project ("FIP"). These include a delegation of administrative authority under the Unitary Management Ordinance from the State of Montana to a "Water Management Board" which will govern all aspects of water use. Under the CSKT Compact, the amount of water historically used by irrigators in the FIP would be reduced to make water available for tribal instream flows. New appropriations and changes of use of existing water rights would be determined by the Water Management Board.

[1] The Flathead Indian Reservation was established by the 1855 Treaty of Hellgate which was ratified by the Senate in 1859. The 1.2 million acre reservation demographics establish that 45% of the total land area and 90% of the Irrigation project lands are owned in fee, and 55% of the total land area and 10% of the irrigation project land is owned by the Tribe.

[2] The Montana legislature established the Montana Reserved Water Rights Compact Commission in 1979 to negotiate the federal reserved rights of federal Indian and non-Indian reservations as part of the MT General Stream Adjudication statute. Seventeen compacts have been completed including with six of the seven Tribes in Montana.

The Montana Land and Water Alliance ("Alliance") is a coalition of irrigators, ranchers, business owners, and others, some of whom have irrigation rights within the FIP and whose members are adversely affected by the CSKT Compact in its implementation.

While the CSKT Compact is not yet final because the state's legislative approval of the Compact is currently in litigation[3], we were surprised to learn that the Tribes have initiated an intensive effort to accelerate the CSKT Compact approval by federal agencies and seek administration support and concurrent Congressional approval of the CSKT Compact before or during the 2016 session of Congress.[4] This letter asserts that the hasty approval of this Compact is premature given its substantive legal and technical flaws as well as its broad implications for state law-based and federal reserved water rights in western states.

In the last several years, the Alliance has been actively involved in the analysis of the Compact and the public, legislative, and local decision-maker levels. The purpose of this effort was to both educate the public about the substantive impacts of the Compact and to participate in providing vital expertise and information to the Montana legislature for their deliberations. Many of the issues identified in the CSKT Compact require resolution at the federal level. In that regard, it has been my client's expectation that before the CSKT compact was submitted to and discussed in Congress , it would undergo at least the substantive interdepartmental and interagency review required by the federal *Criteria and Procedures*[5] and the certification and analysis required by the House Committee on Natural Resources.[6] Accordingly we submit the following analysis in support of our assertion and request your attention to this matter.

1. The CSKT Compact is not Final in Montana due to On-going Litigation

As a first principle, the CSKT Compact is not yet ready for federal review. Although the Compact passed in the 2015 legislative session in Montana, its status is uncertain as a result of current litigation challenging the constitutionality of the legislature's vote.[7] At issue is whether the legislature needed a 2/3 or super majority vote to pass the Compact as a result of an immunity provision in the CSKT Compact.[8]

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[3] The constitutionality of the legislature's 2015 vote passing the compact is currently in litigation in Montana's 20th Judicial District (*FJBC v. Montana DV-15-73*) with final arguments scheduled for mid-March 2016.
[4] Proceedings of the Montana legislature Water Policy Interim Committee meeting of January 11 and 12, 2016, Helena, MT.
[5] *Criteria and Procedures for the Participation of the Federal Government in the Settlement of Indian Water Rights Claims*, Federal Register Vol. 55, No. 48, March 12, 1990.
[6] Letter from Chairman Rob Bishop to Attorney General Holder and Interior Secretary Jewell, February 26, 2015.
[7] *Flathead Joint Board of Control v. State of Montana*, DV-15-73.
[8] Article II Section 18 of the Montana Constitution states: *State Subject to Suit. The state, counties, cities, towns, an all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.* A provision of the compact provides the state an exemption from the immunity waiver for "costs, damages, and attorneys fees" and neither house of the legislature achieved a 2/3 vote. Although the lawsuit is not about the Compact itself, the litigation

Whatever decision is made by the Judge in this case will be appealed to the Montana Supreme Court. Thus, the federal agencies and Congress will not know for quite some time whether there is a CSKT Compact to review in 2016 or not.

2. The CSKT Compact Expands the Scope and Application of Federal Reserved Water Rights and Their Administration at the Expense of the State Water Administration and State Water Rights

In its present form, the CSKT Compact expands the federal reserved rights doctrine and as such could not be introduced into Congress without evaluating the basic assumptions of the CSKT Compact that lead to this expansion. The CSKT Compact in essence expands long-standing Departmental practice regarding the quantification of federal reserved water rights for Indian reservations.

The federal reserved water rights doctrine, created by the decision in *U.S. v. Winters* and now inclusive of all federal reservations of land through the *Arizona v. California* proceedings, prescribes that federal reserved water rights on an Indian reservation are restricted to the reservation and limited to the amount of water necessary to fulfill the primary purposes of the reservation.[9] The quantification of federal reserved water rights for Indian reservations is largely prescribed by case law and practice for negotiated and litigated water settlements, as with all the tribal compacts reached in Montana. The CSKT Compact is not a routine Indian federal reserved water rights settlement. It allows the Tribes to make legally unfounded assertions and claims for all surface and groundwater within the reservation[10], not just that amount of water necessary to fulfill the purposes of the reservation.

The CSKT Compact also permits the expansion of federal reserved rights claims off the reservation on lands ceded to the United States by creating a new type of federal water right, *i.e.*, an aboriginal, time immemorial "*tribal reserved right*" based upon a *Tribal* reservation of land to support an off-reservation *access right* to take fish in common with the citizens of the territory.[11] The practical effect of this provision of the compact is to transfer a large amount of state-owned water off the reservation to the United States on behalf of the CSKT, and to preclude future state water development.

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points to portions of the compact where its implementation will in fact cause damage to the property rights, for which the state seeks an exception to its waiver of immunity.

[9] Unlike *United States v. New Mexico*, 438 U.S. 696 (1978).

[10] See Simms, Richard A., 2014, *Memorandum to MT. Senate President Barrett and House Speaker Knudsen, No Ratification of CSKT Compact*, December 2014, prepared for the Montana Land and Water Alliance, Inc.

[11] Treaty of Hellgate, Article III. For an analysis of the Hellgate Treaty, the fallacy of a Tribal reservation of land, and Tribal water claims off the reservation, see "*Threat of 10,000 Off-Reservation Instream Flow Claims*", by Richard A. Simms, MLWA Attorney, and Memorandum to MT Senate President Debby Barrett and Speaker of the House Austin Knudsen, pp 20-24, March 18, 2015.

Our analysis of the CSKT Compact shows that the expansion of the *Winters* Doctrine and federal reserved water rights claims occurs at the expense of private property rights and inherent state sovereignty over water ownership, control, and administration.[12]

3. CSKT Compact Based on Faulty Assumptions Contrary to Federal and State Law: where were the Criteria and Procedures?

In addition to the Compact's uncertain status as a result of on-going litigation, certain substantive portions of the CSKT Compact apparently have not been reviewed and thus absolutely require federal scrutiny as they involve potentially unlawful expansion of the federal reserved rights doctrine, changes in federal law and policy, and the replacement of state water administration for state water users.

The basis for this expansion of *Waters* lies in the assumptions of the Compact. The first recital of the compact states:

> *"Whereas, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation...."*

This is an obvious error as only the United States had the power to reserve the Indian reservations in the United States. If this is indeed a policy change by the federal government, it needs Congressional discussion and concurrence. However, this assertion is the basis for the expansive claims in the CSKT Compact, contained conceptually in the second recital of the Compact:

> *"Whereas, the Confederated Salish and Kootenai Tribes claim aboriginal water rights and, pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation...."*

Taken together, these recitals could be read to mean that the CSKT actually never relinquished any land to the United States but instead reserved it—and all attendant water resources-- for themselves both on and off reservation. These recitals then lead to a definition of the reservation in the compact to represent "Indian Country" and include fee lands:

> *"Flathead Indian Reservation" or "Reservation" means any and all land within the exterior boundaries of the Indian Reservation established under the July 1, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding issuance of any patent, and including rights-of-way running through the Reservation.*

In contrast, the State of Montana's definition of an Indian Reservation is:

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[12] An example of the expense to private property rights includes the CSKT assuming jurisdiction and control over state water rights holders within the exterior boundaries of the reservation and subjecting them to a Tribal water code with new priorities. An example of usurping state sovereignty is the Compacts award to the CSKT of "co-ownership" of a state-based instream-flow right which was formerly and subject only to legislative authority.

"All land within the limits of an Indian reservation under the jurisdiction of the United States government"[13]

While we are aware that the CSKT Compact's definition of the Flathead Indian Reservation uses criminal jurisdiction (18 U.S.C.A 1151 (2013)), this definition not only contrasts with Montana's, but when used in the context of the first two recitals, clearly lays the foundation for Tribal jurisdiction over non-Indians and state law-based water rights.

The first two recitals, plus the definition of the reservation, form the foundation for the assertion of ownership and control over the federal irrigation project water rights,[14] the failure to quantify the amount of water necessary to fulfill the purposes of the reservation and instead claim all the surface and ground water on the reservation including state law-based water rights, and the off-reservation claims for water rights to support a treaty right of access to take fish.[15] None of these compact elements are anywhere near the concept of settling the federal reserved rights of an Indian Tribe in a McCarran Amendment proceeding.

4. The Federal Data Quality Act (P.L. 106-554 §515) is Applicable to the CSKT Compact

The provisions of the Data Quality Act (P.L. 106-554 §515) apply to the data used to support major agency actions that involve substantive changes to federal projects or actions that rely on the collection and use of scientific information to support those actions. In the CSKT Compact, the Bureau of Reclamation, Bureau of Indian Affairs (BIA), and the U.S. Fish and Wildlife Service have the burden of assuring that the scientific information backs up the policy decisions regarding the support for components of this compact. This is especially important when a federal action, such as the approval of the CSKT Compact, is likely to have local impacts to the local economy equal to or greater than $100 million dollars.

Of the many issues in the CSKT Compact related to the requirements of the Data Quality Act, one particular concern is the Compact's effect on the federal FIP. The federal government reserved or appropriated water to serve the Project's Indian allotees and non-Indian settlers, and recognized its need for and obligation to ensure the successful development of the reservation's irrigable

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[13] *The Tribal Nations of Montana, a Handbook for Legislators*, Committee on Indian Affairs, March 1995, revised 2015.

[14] Article III C. 1 (a) "Flathead Indian Irrigation Project. The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in the abstracts of water right attached hereto as Appendix A5. The FIIP will serve up to but not more than 135,000 acres."

[15] Bilodeau, 2012. *The Elusive Implied Water Right for Fish: Do Off-reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?* 48 IDAHO L. REVIEW 515 (2012).

acreage.[16] In 1924 non-Indian settlers owned 80% of the Project land; in 2016 non-Indian ownership of 90% of Project land.

Although the Project water right is held by the federal government in trust for all users in the FIP, and the individual water users hold a beneficial interest, the CSKT Compact transfers the bare legal title of all of the project water to the United States to be held in trust for the CSKT alone. Then the Compact permits the CSKT to transfer significant amounts of irrigation water to instream flow.

Our review of the data and models used to reduce irrigation water use and convert the remainder to instream flow reveals the complete inadequacy of the modeling effort and of the Bureau of Indian Affairs in both supervising and correcting these errors.[17] The U.S. Fish and Wildlife Service did not contribute any analysis to or review of these instream flow determinations in the CSKT Compact.

Thus, the BIA has not met any requirements of its own guidelines under the Data Quality Act for the thorough vetting of the CSKT Compact.[18] We suggest that the BIA's data for this component of the compact is deficient. Instead, the CSKT Compact permits these data and modeling inadequacies to be "built into" the "final" compact in the form of an "Adaptive Management Plan." This is unheard of in the context of a final water settlement.

5. The Federal Government Cannot Require a State to Violate its Own Constitution to Meet a Federal Obligation in an Indian Water Settlement

Certain provisions of the CSKT Compact require the state to violate its own constitution with respect to water administration, the due process rights of its citizens, and unconstitutional takings without compensation. We assert that these violations were and are unnecessary for a settlement of the reserved water rights of the Tribes, and must be remedied before the CSKT Compact is ready for Congressional consideration.

For example, the Compact requires that the state give up its constitutionally-derived administrative authority over its citizens and state-based water rights[19], requiring the creation of a local law which treats citizens living on the reservation differently than every other citizen in Montana. The Montana constitution prohibits the legislature from creating such a law[20]. The creation of this local law simultaneously expands Tribal jurisdiction over non-Indians which is inconsistent with

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[16] 1930, Scattergood Report.
[17] Proceedings of the Water Policy Interim Committee, CSKT Compact Technical Review Team, May-August, 2014.
[18] Bureau of Indian Affairs 10 IAM 1-6, Indian Affairs Manual implementing directives of the Data Quality Act and the associated OMB Guidelines (67 FR 8454-8460) and Peer Review Bulletin (70 FR 2664).
[19] See *Letter to Attorney General Fox*, November 5, 2014, regarding the Compact water administration plan and Article IX of the Montana Constitution.
[20] *Memorandum to Montana Senate President and Speaker of the House on Constitutional Violations by Compact Ratification*, April 6, 2015, by MLWA Attorney Richard A. Simms.

federal and state law. Finally, the aforementioned transfer of the bare legal title of the irrigation water right to the Tribes, and other Tribal claims on and off reservation, deprive citizens of their rights to receive a *fair* adjudication of their historic water rights in the Montana General Stream Adjudication.

We assert that these and the many remaining constitutional violations of the CSKT Compact could have been avoided had the *Criteria and Procedures* been used to resolve a federal reserved rights issues. It would be an unfortunate error to put the CSKT Compact forward before Congress at this time.

This letter review of the CSKT Compact, while lengthy, touches only on a few of the most important issues that identifiably need considerable federal agency review before the Compact can even be considered for introduction to Congress.

Given that the CSKT Compact is not yet final because it is in litigation, the extraordinary scope of this unique Indian water settlement, and the considerable problems that are outstanding, we respectfully reiterate our request to halt any rushed review and approval or introduction of the CSKT Compact into Congress during 2016.

Thank you for your consideration in this matter.

Sincerely,

Jay F. Stein

CC: Catherine Vandemoer, Ph.D.
Kristin Omvig, Esq.
Bruce Fredrickson, Esq.