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Senator Debbie Barrett, President of the Senate
Representative Austin Knudsen, Speaker of the House
All Legislators

Ladies and gentlemen:

In the my letter to you of January 8, 2015, I stated initially that "[i]n reaching agreement on the terms of the proposed Compact, the Tribes and the Montana Reserved Water Rights Compact Commission have agreed to transform federal reserved water rights under *Winters v. United States*, 207 U.S. 564 (1908), into Indian reserved water rights, greatly expanding the nature and scope of the permissible claims that Indian tribes can make under the Winters Doctrine." In a response to my letter prepared by counsel for the Reserved Water Rights Compact Commission dated February 2, 2015, it is asserted that the agreement does not "reflect a position agreed to by the parties in the Compact, nor [is it an accurate] represent[ation of] the underlying premise of the Compact. Counsel also asserted that my statement that the Compact Commission has adopted the "legal proposition that the Tribes reserved their own Reservation with a 'time immemorial water rights priority' . . . is also incorrect." The first statement in Article I of the Compact, however, reads: "WHEREAS, pursuant to the Hellgate Treaty of 1855, 12 Stat. 975, the Confederated Salish and Kootenai Tribes reserved the Flathead Indian Reservation." The very first predicate of the Compact, like all of the provisions of the Compact, is recited by the Tribes, the State of Montana, and the United States, in concert.[1]

The innocent thesis of the Compact Commission's response to my initial letter is that the provisions of the Compact, including all of the instream flows, were designed "to protect existing uses." To the contrary, the basic mechanism in the Compact for generating reserved rights is the use of an inappropriate computer model to hypothetically idealize the management, operation, and efficiency of the

[1] The Compact Commission, attached to the Governor's Office, negotiated the Compact on behalf of the State of Montana.

Flathead Irrigation Project in order to convert the "water saved" into 102 instream flows that portray the Reservation in its uncorrupted state. The core provisions designed to effectuate the ongoing conversion of irrigation water into instream flows run through the length of the Compact. Some of these provisions deprive the State of Montana of its constitutional and statutory authority to administer water within the Reservation. Others eliminate certain legislative and judicial prerogatives within the Reservation. And others, contained in the Abstracts, which are buried in the Appendices to the Compact and form a substantive part of the Compact, give such an enormous amount of the State of Montana's water to the Tribes that, instead of being based on a *Winters* doctrine analysis, the gift can only derive from the proposition that the Tribes own all of the water on, under, or near the Reservation.

The core provisions designed to effectuate the ongoing conversion of irrigation water to instream flows include:

- Article I, First and Eighteenth Recitals; Article II, Subsections 2, 5, 20, 23, 28, 30, 31, 32, 38, 44, 45, 50, 51, 52, 56, 57, 58, 67, 71;
- Article III, Subsections A, C (pp.14-21), E; Article IV, Subsections D, F; Article V, Subsections B, C; and Article VI, Subsections A, B.

The provisions that deprive the State of Montana of its constitutional and statutory obligations to administer water within the Reservation include:

- Article II, Subsection 45, "Law of Administration," Appendix 4, Article IV (Implementation of Compact) (the creation of a unitary management ordinance governing the administration, development, and enforcement of a new and distinct body of water law over all water rights within the Reservation, whether based on Tribal, federal, or state law);
- Article VI, I (1, 2, 4, 5, 6) (the creation of a politically appointed water management board dominated by Tribal interests to implement the unitary management ordinance).

The provisions that eliminate certain legislative and judicial prerogatives include:

- Article III C (1) (a-l), D (1-8) (preventing the state district court and the Water Court from adjudicating valid state-based water rights within the Reservation);

- Article III C (k), D (4, 5, 6), (co-ownership of state-based instream flow rights off-Reservation which could previously be transferred to other uses if required by judicial and legislative prerogative);
- Article IV B (5,6), Article IV, generally (exempting the Tribes from compliance with MCA 85-2-402 regarding changes of use, large volume water transfers, and out-of-state transfers);
- Article III D 5 (c) (requiring consultation with "stakeholders" in off-Reservation watersheds regarding the reductions in state-based water uses to accommodate Tribal off-Reservation instream flows).

And the provisions giving such an enormous amount of the State of Montana's water to the Tribes that the gift can only derive from the proposition that the Tribes own all of the water on, under, or near the Reservation include:

- Appendix 9, Appendix 10 (awarding 100% of the water in Flathead Lake (prior to the construction of Kerr Dam), both on and off the Reservation, with a time immemorial priority);
- Article V (1), (retaining the right of the Tribes to secure all the state-based water rights currently impounded by Kerr Dam);
- Article III C 1 (a, c, e), Appendices 5, 9, 11, 12-13 (awarding 100% of the water in the Flathead Irrigation Project with a time immemorial priority, while 90% of the water delivered to the farms and ranches is appurtenant to lands owned by non-Indians);
- Article II, Subsections 2, 5, 20, 23, 28, 30, 31, 32, 38, 44, 45, 50, 51, 52, 56, 57, 58, 67, 71 (definitions that effectuate the allocation of irrigation water to instream flows);
- Appendices 18, 25-27, Article III C (7, 8) (awarding 40%-65% of available river flow in eight off-Reservation rivers dedicated to instream flows); and
- Appendix 17 (awarding all of the off-Reservation lakes in the adjacent mountain ranges).[2]

[2] The Compact Commission's counsel also responded to the 70% reduction in historic use detailed in my letter. Review of historical data made available to the Montana Land and Water Alliance, Inc. subsequent to my letter, confirms that the reduction in historic use is still a valid and reasonable estimate. The additional water supplied at the river diversion, which was not contemplated even after the Technical Work Group's findings during the summer of 2014 that the Tribes' model was inappropriate to determine farm turn out allowances, results in a maximum delivery of 1.4 acre feet per acre at the farm turnouts, which still represents a 70% reduction in historic use in a *wet year*. Moreover, the Compact proposes to expand irrigated acreage by some 5,000 acres, but still proposes to supply the same amount of water for irrigation, resulting in even less on-farm water delivery.

Finally, I want to explain a major legal problem with the argument that the Supreme Court held that the Indians involved in *Winters v. United States*, 207 U.S. 564 (1908), reserved their Reservation as opposed to the United States.

The specific, bedrock issue in *Winters* was whether the United States had impliedly reserved water from appropriation under Montana's Territorial law of prior appropriation when, through the Agreement of May 1, 1888, the United States explicitly withdrew from the public domain the land that became the Ft. Belknap Reservation.[3] Generally, the *Winters* doctrine has been repeatedly articulated by the Supreme Court this way: "When the federal government withdraws its land from the public domain, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 141 (1976). Another way to appreciate the basic issue in *Winters* is to ask whether there would be any legal consequences if the Indians reserved the Fort Belknap Reservation instead of the United States. One consequence would have been that the Supreme Court could not have made federal reserved water rights equally applicable to non-Indian reservations of land from the public domain, as the Court did in *Arizona v. California*, 373 U.S. 546 (1963).

In *Arizona v. California*, the Supreme Court itself answered the question of who did the reserving in *Winters*:

> The Court in *Winters*, concluded that the Government, when it created the [Fort Belknap] Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by the Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Reservation was created.

Ibid. at 600. The Court also agreed with the Special Master's recommendation that the *Winters* doctrine should be extended to reservations of land from the public domain for non-Indian reservations:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal

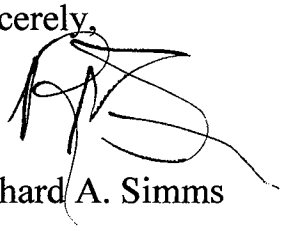
[3] Note the Court's statement at the beginning of the decision on the merits that "[t]his case, as we view it, turns on the agreement of May [1], 1888, resulting in the creation of the Fort Belknap Reservation," an Agreement set forth in the Act of May 1, 1988, 25 Stat. 113." Id., at 575.

establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Gila National Forest.[4]

Id. at 601.

The "principle underlying the reservation of water rights for Indian Reservations" in both *Winters* and *Arizona v. California* was when the United States reserved land from the public domain to create the Fort Belknap Indian Reservation, it impliedly withdrew sufficient water to satisfy the purposes for which the land was withdrawn. If, on the other hand, the Indians reserved their own Reservation, whatever the other underlying principle might have been, the *Winters* doctrine could not have been extended by the Court in *Arizona v. California* to non-Indian reservations of land from the public domain for special purposes, and the Compact Commission, along with all of the western states, would have to reopen countless adjudication cases and negotiated settlements to accommodate this new and expansive view of the *Winters* Doctrine.

Sincerely,



Richard A. Simms

Cc: Attorney General Tim Fox

[4] The Gila National Forest was the forest involved in *United States v. New Mexico*, 438 U.S. 696 (1978) (the "careful examination" of the purposes for which a reservation was made "is required because the reservation is implied, rather than expressed" and each time the Court has reviewed federal reserved water rights, it has "repeatedly emphasized that Congress reserved "only the amount necessary to fulfill the purpose of the reservation, no more").