


MEMORANDUM

**To: Senator Debby Barrett, President of the Senate
Representative Austin Knudsen, Speaker of the House**

**From: Richard A. Simms, on behalf of the
Montana Land and Water Alliance, Inc.** 

Subject: Constitutional Violations by Compact Ratification

CONSTITUTIONAL VIOLATIONS

Ratification of the Compact Would Violate Art. V (The Legislature), § 12 of the Montana Constitution.

Article V (The Legislature), § 12 of the Montana Constitution **mandates** that “[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable.” A local law “is one which operates over a particular locality instead of over the whole territory of the state.” Black’s Law Dictionary. A special law is “[o]ne relating to particular persons or things; one made for individual cases or for particular places or districts; one operating upon a selected class rather than upon the public generally.” *Id.* The Montana Water Use Act is legislatively applicable over the entire territory of the state. Ratification of the Compact would make Unitary Administration and Management Ordinance a law of the State of Montana, thus being a legislative enactment of local law vitiating the applicability of the Montana Water Use Act within the Flathead Indian Reservation.

Article 1-1-101(4) of the Unitary Administration and Management Ordinance states:

Upon the effective Date of the Compact, this Ordinance shall govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian reservation. Any provision of Title 85,

MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation

Ibid. at 2. While the existing Montana Water Use Act comports with Article V, § 12 of the Montana Constitution, ratification of the Compact by the legislature would enact the Unitary Administration and Management Ordinance as a law of the State of Montana limiting its application to the Flathead Indian Reservation.

Ratification of the Compact Would Violate Article VII (The Judiciary), § 4(1) & (2) of the Montana Constitution.

Article VII (The Judiciary), § 4(1) & (2) state:

(1) The district court has original jurisdiction in all criminal cases amounting to felony and all civil matters and cases at law and in equity. It may issue writs appropriate to its jurisdiction. It shall have the power of naturalization and such additional jurisdiction as may be delegated by the laws of the United States or the state of Montana. *Its process shall extend to all parts of the state.* (2) The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law. The legislature may provide for direct review by the district court decisions of administrative agencies.

(Emphasis added). To date, the legislature has complied with the mandate that district court “process shall extend to all parts of the state.” Ratification of the Compact would enact the Unitary Administration and Management Ordinance as a law of the State of Montana which removes the process of the district court from the Flathead Indian Reservation insofar as Title 85, MCA, is concerned. Also, the Compact defines “a court of competent jurisdiction” as “a State or Tribal court that otherwise has jurisdiction over the matter *so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction*, but if no such court exists, a Federal court.” *(Emphasis added).* In other words, upon Montana’s ratification of the Compact, the state district court would be a court of competent jurisdiction within the Flathead Reservation only if the adverse parties in a given proceeding “consent to the exercise of jurisdiction.” The Montana constitution is the organic and fundamental law of the state that describes the extent

and manner of the exercise of sovereign power. The Compact's definition of "a court of competent jurisdiction" is literally unconstitutional, leaving the source of judicial power up to the consent of adverse parties.

Ratification of the Compact Would Violate Article VII (The Judiciary), § 2(4) of the Montana Constitution.

Article VII (The Judiciary), § 2(4) mandates that the Supreme Court's "process shall extend to all parts of the state." With the removal of the process of the district court from the Flathead Indian reservation, appeals from the district court to the Supreme Court are likewise taken away, subverting the statewide process of the Supreme Court.

Ratification of the Compact Would Violate Article IX (Environment and Natural Resources), § (3)4 of the Montana Constitution and Article III (General Government), § 1.

The Constitution of the State of Montana is "the written instrument agreed upon [by the people of the state] as the absolute rule of action and decision for all departments (*i.e.*, branches) and officers of the government in respect to all of the points covered by it, which must control until it shall be changed by the authority which established it (*i.e.*, by amendment), and in opposition to which any act or ordinance of any such department or officer is null and void." Black's Law Dictionary. Article IX, §(3)4 of the Montana Constitution states that "[the] legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." Based on the proposition that "[n]owhere does the Constitution require that water rights administration be restricted to any particular sovereign or administrative entity," the stock response of Montana's governmental agencies to the asserted violation of Article IX, § (3)4 is that by ratifying the Compact the legislature would be doing exactly what Article IX, § (3)4 mandates, *i.e.*, providing for the administration of water rights by taking away the protection of

Montana government from 23,000 people and giving it to the plenary authority of an adverse, dependent sovereign in pending water rights litigation.¹

Article III, § 1 of the Montana Constitution posits that: “The power of the government of this state is divided into three distinct branches of government: legislative, executive, and judicial.” The Constitution speaks of one government, *i.e.*, “the government of this state.” “The power of government” is not some of the power of government discussed in Article III, §1, but rather **all** of the power of government of this state. The next sentence in Article III, § 1 states that [n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.” The integrity of responsible government is thus ensured in Montana, precluding the legislature, for example, from invading the process of the judiciary. If persons charged with the exercise of power properly belonging to one branch are mandated not to exercise the power properly belonging to either of the others, they certainly are not “directed or permitted” to give a considerable chunk of the power of the executive branch to an adverse party in water rights litigation to the detriment of 23,000 people.

cc: MLWA Board
Representatives Regier, Monforton, Wittich
Senators Hinkle, Hansen, Rosendale

¹ Letter of December 16, 2013, from Melissa Hornbein to Senator Chas Vincent at 12.