

September 6, 2016

Hon. Jon Tester
United State Senator, Montana
311 Hart Senate Office Building
Washington, DC 20510-2604

Re: The Salish and Kootenai Water Right Settlement Act of 2016 (s.3013) and the Tribal Forestry Management Provisions Within S.3085, S.3014 and H.R.2647 Collectively Violate Montanans' U.S. Constitutional Rights

Dear Senator Tester:

I write to you as the legal representative of Western States Constitutional Rights, LLC, a Montana-based nonprofit entity the mission of which is to promote the protection of private property rights held by western United States property owners against reckless federal, state and local government laws, regulations and policies. Its members are irrigators, landowners and business owners located on or near the Flathead Irrigation Project situated within the Flathead Indian Reservation, and from other areas in northwestern Montana, but their concerns are widely shared by many citizens throughout the western United States.

My clients are deeply distressed and angered by the nontransparent activities in which the U.S. Department of Interior, the State of Montana and the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT" or "Tribes") had previously engaged that, despite widespread public opposition, led to the signing and enactment of the CSKT Water Compact into Montana State law. As you are likely aware, the state constitutionality of the CSKT Water Compact (SB262) is currently being litigated in Montana courts.

On May 26, 2016, United States Senator Jon Tester proposed federal legislation intended to ratify and implement the CSKT Water Compact which he introduced and referred to the U.S. Senate Committee on Indian Affairs. The stated purpose of "*The Salish and Kootenai Water Settlement Act of 2016*" (S.3013) is to "achieve a fair and equitable water rights settlement for the Tribes and allottees," without ANY regard for non-tribal irrigators, business owners or landowners. My clients and their colleagues are absolutely and unequivocally opposed to this legislation.

It is quite apparent that the CSKT Water Compact is a political document that is intended to resolve the disputed federal and state-based water claims of the Tribes and the non-tribal community residing on, near and beyond the Flathead Reservation. These claims, but for the Compact, would otherwise be adjudicated by the Montana Water Court under 85-2-701(1), MCA, consistent with the McCarren Amendment (43 U.S.C. § 666). The Compact replaces the Montana Water Court with a newly created politically unaccountable bureaucratic body known as the Flathead Reservation Water Management Board composed of Tribal and State appointed representatives who do not adequately represent the interests of Reservation-based irrigators, business owners and landowners. As drafted, S.3013 would deny my clients and these Montanans their federal and state constitutional due process right to a "day in court."

Clearly, S.3013 does NOT treat non-tribal Montana citizens, including my clients, fairly or equitably. A careful review of S.3013 reveals that it proposes to substantially expand, broaden and extend the scope of the Tribes' off-reservation federal reserved water rights, comprising most of the "Tribal Water Right." S.3013 accords such rights at the expense of all other Montanans' federally-recognized non-consumptive water rights and state-recognized appropriative water rights, *and* consequently, their related land rights, to include approximately one-fifth of Montana's rivers, streams and other tributaries. S.3013's lack of balance and proportion is rather striking, considering that the Tribal population comprises approximately only 4.9% of the statewide population and approximately only 3% of the Flathead Reservation population!

It is especially troublesome that the Tribal off-reservation instream flow rights S.3013 recognizes would bear a pre-European Settlement aboriginal time-immemorial priority date that, when exercised, would effectively extinguish MOST, IF NOT ALL State water rights held by my clients and others operating or residing in northwestern Montana! The enactment of S.3013 into federal law, in other words, would create new federal legal precedent with negative *local, state and regional* implications for all irrigators, landowners and business owners in the northwestern United States.

For example, Tribal on-reservation instream flow rights would apply to and cover all lakes, streams and tributaries, wetlands, high mountain lakes and all man-made reservoirs serving the Flathead Irrigation Project, including Flathead Lake. Tribal off-reservation instream flow rights, meanwhile, would apply to and cover the Kootenai, Swan, and Lower Clark Fork Rivers, which areas are designated as including Basins 76D, 76K, 76M and 76N, as well as, to the North Fork of Placid Creek and other Kootenai River Tributaries, which areas are designated as including Basins 76D and 76F.

S.3013 does more than simply confirm the CSKT Water Compact as enacted into Montana State law. Of particular concern, is S.3013's grant of *additional* Tribal instream flow rights in waters flowing in and through the Bitterroot, Flathead, Kootenai and Lolo National Forests, and in the National Bison Range (a National Park), that the CSKT Water Compact (SB262), itself, does not appear to grant. These four National Forests include and/or surround the Flathead Irrigation Project and Reservation, and extend to a substantial amount of non-reservation Public Lands throughout northwestern Montana. Contrary to S.3013's actual language, its grant and recognition of such rights to the CSKT serves in many ways as a stepping stone to ceding greater control over national lands, waters and natural and wildlife resources (i.e., our national natural treasures) over to Indian Tribes throughout the United States of America.

While S.3013 states that this grant of additional Tribal instream flow rights in waters flowing in or through these National Forests does not confer upon the CSKT and other tribes the authority to manage them, three other bills currently proceeding through Congress do, in fact, provide such authority and control. They include Senator Steve Daines' "*Tribal Forestry Participation and Protection Act of 2016*" (S.3014), Congressman Bruce Westerman's "*Resilient Federal Forests Act of 2015*" (H.R.2647), and Senator Pat Roberts' "*Emergency Wildfire and Forest Management Act of 2016*" (S.3085).

Each of these three bills, if passed by Congress and enacted into law by the President, would enable the CSKT (and other of the 567 federally recognized tribes) to enter into U.S. taxpayer funded "638" contracts with the U.S. Department of Agriculture to manage these National Forests, which are currently sanctioned by the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. 93- 638. The enabling of the Agriculture Department to enter into "638" contracts with the CSKT to manage the four National Forests noted above would pose a genuine risk to northwestern Montana irrigators, landowners and business owners, especially if such contracts enable the CSKT to exercise regulatory control over such forest lands and waters.

The Interior Department Fish & Wildlife Service ("DOI-FWS")'s "638" contract program provides a case on point. DOI-FWS has entered into "638" contracts with federally recognized tribes, including the CSKT, "for the administration of fish and wildlife conservation programs" consistent with agency regulations implementing the Endangered Species Act. These contracts, however, have not always brought positive results. For example, the Interior Department Bureau of Indian Affairs ("BIA")'s prior unsuccessful "638" contract granting the CSKT authority to manage the National Bison Range indisputably showed that the CSKT lacked the requisite skills to properly manage that National Park. Subsequent media reports about the advance funding agreements subsidizing the Tribes' future proposed management of the National Bison Range also revealed how those arrangements had suffered from ongoing transparency flaws that *inter alia* denied the public access under the Freedom of Information Act to financial and other records the Tribes and their subcontractors had maintained. In light of the CSKT's failure to properly manage Americans' national wildlife and the overall non-transparency of the BIA's underlying financial and contractual arrangements, it is unbelievable to think that Congress would now permit the BIA to go a step further and place the National Bison Range into federal trust for the benefit of the Tribes!

The U.S. Environmental Protection Agency's "Treatment as States" Program which, in many ways, serves as a complement to the ISDEAA's "638" funded-contract program, vests the CSKT and other federally recognized tribes with zones of regulatory authority over recently expanded federal waterways and adjacent land areas for purposes of implementing the federal Clean Water Act and Clean Air Act. Such regulatory authority has enabled the CSKT to curtail both private and economic activities on the Flathead Reservation and in and around Flathead Lake that do not pose any credible threat to the environment or wildlife.

S.3013, moreover, would authorize the Interior Secretary to spend approximately \$2.328 billion dollars of U.S. taxpayer funds to implement the CSKT Water Compact and Settlement, of which approximately \$1.519 billion

dollars would be allocated toward Flathead Irrigation Project rehabilitation, modernization, and mitigation, reclamation and restoration activities. It is difficult to believe that Congress would entrust the CSKT to properly use and account for such an extraordinarily large sum of monies where the Bureau of Reclamation ("Reclamation") as Project Manager, would lack the ability under the bill to impose conditions and controls on, and engage in oversight of, the Tribes' use of such monies.

For example, although S.3013 provides for such monies to be deposited into the proposed "Flathead Indian Irrigation Project Non-Trust Compact Fund sub-account," how would Reclamation ever know if the CSKT Tribal Council or its members absconded with the monies and unjustly enriched themselves at the expense of tribal and non-tribal members and U.S. taxpayers? Have Congressional Committee members already forgotten about the Babbitt Interior Department's prior gross mismanagement of Indian Trust Fund Accounts and consequent breach of the "sacred" federal trust obligation that led to the class action lawsuit that resulted in the infamous, but still unresolved Cobell Settlement? Are congressional representatives not aware of how CSKT *Tribal members continue to live in poverty and squalor* and that they have received little to none of the \$billions of dollars Congress continues to place into the CSKT Tribal Indian Trust Account?

Congressional committee members should recall that Montana's former Senator, Conrad Burns, had requested the 2006 U.S. Government Accountability Office report calling for much needed improvements in the BIA's management and financial sustainability of Federal Indian Irrigation Projects. Does Congress not remember the report's findings, including that BIA's accounting of operation and maintenance ("O&M") expenditures for the Flathead Irrigation Project on the Flathead Reservation was virtually nonexistent, and that Project operations had suffered as the result of the BIA's deferral of at least \$82 million in necessary O&M expenses? In light of the BIA's reported Federal Indian Irrigation Project mismanagement which has led, in part, to the Flathead Irrigation Project's current extreme state of disrepair, how could Congress responsibly ratify S.3013? How could Congress permit further BIA involvement in the bill's proposed Flathead Irrigation Project-rehabilitation/modernization activities? Should not Congress be more cautious about ensuring that U.S. taxpayer monies will be well spent?

Even the high-level Interior Department representative testifying at recent House Natural Resource Committee subcommittee hearings expressed concern about the lack of adequate controls over the spending of such exorbitant sums. He also indicated that the proposed cost of implementing S.3013 was unreasonable and would establish bad national agency precedent. Indeed, how could Congress conscientiously justify authorizing the payout of more than \$2.328 billion of U.S. taxpayer funds to a single federally recognized Indian tribe when there are 566 *other* federally recognized tribes clamoring for federal support, because they, like the CSKT, are each "dependent foreign sovereigns" previously "wronged" by the U.S. government? How could Congress authorize a payout of this magnitude for only 7,753 enrolled tribal members, which comes to approximately \$300,270.86 *per capita*, when it is not certain that all CSKT Tribal members will receive their fair share?

The case against this \$2.328 billion payout becomes even stronger when one considers the approximately \$26.793 million the CSKT had previously secured from the Indian Claims Commission in 1966 and the U.S. Court of Claims in 1971 for prior uncompensated federal government "takings" of the Tribes' aboriginal and reservation lands. The CSKT Water Compact, in lieu of seeking monetary reparations based on a Fifth Amendment "takings" legal theory, instead reflects the Tribes' bold new effort to collect federal monies on account of the U.S. government's alleged breach of its "sacred" federal trust obligation to protect the Tribes' Hellgate Treaty of 1855-based pre-European Settlement, aboriginal off-reservation fishing/water rights. What is more, the CSKT, thus far, have not even evidenced that they would be satisfied with the outsized sums they would receive if S.3013 became federal law! Will this ongoing call for reparations ever end?

In sum, if Congress ratifies this Compact, it would signal that it is politically willing to go along with this legal fiction to thereby create new federal law precedent that ignores twenty years' worth of federal cases limiting the scope and extent of such right to far less than what the Tribes and the Interior Department have claimed should be recognized.

If Congress ratifies this Compact, it also would signal that it is politically willing to sanction the Interior Department's and Montana's "taking" of irrigator, business owner, and landowner common law-based private water and land rights to ensure the protection of (in deference to) the "sacred" federal government trust obligation for the benefit of the Tribes (i.e., for a "public use"), without paying these private property owners fair and just compensation, as the Fifth and Tenth Amendments require.

If Congress ratifies this Compact, it would, furthermore, signal that it is politically willing to sanction "benign" racial discrimination (not subject to strict constitutional judicial scrutiny) in favor of the CSKT and against non-CSKT tribal members. In particular, congressional ratification would reflect acceptance of the legal fiction that the Interior Department is protecting the Tribes' and tribal members' right to assemble as a "political entity" when, in reality, the agency is actually protecting the Tribes' and tribal members' religious, spiritual and cultural rights to preserve natural resources and the environment, in violation of the Fifth, Tenth and Fourteenth Amendments. If Congress ratifies this Compact, it would signal, moreover, that it supports the Obama administration's embrace and implementation of the United Nations Declaration on the Rights of Indigenous People. This otherwise legally nonbinding document calls for recognizing the right of all indigenous peoples (in this case, the CSKT) "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" – namely, pre-European Settlement aboriginal land and water rights which currently comprise Montana State and Federal Forests and Park lands and waterways.

The United States Congress should be very attentive to the concerns outlined in this correspondence considering that this year is a critically important presidential and congressional election year in which the role and performance of government is being closely evaluated by *We the People* of Montana and the West.

To ensure your prompt attention to this matter, we have provided for your and your committee's review a well annotated legal memorandum explaining the important points raised in this correspondence (which may be further supplemented at a later time) so that you may carefully reconsider each of the pieces of legislation mentioned above. My clients also plan to very publicly share their concerns with the media to ensure that Congress remains politically accountable to those from whom this legislative body has received its revocable license to govern.

I will soon be contacting you to schedule an appointment to discuss my clients' concerns in further detail. Should you have any questions until then, please do not hesitate to contact me.

Very truly yours,
Lawrence A. Kogan
Managing Principal The Kogan Law Group, P.C.

Cc: Sen. Steve Daines, MT
Rep. Ryan Zinke, MT
Rep. Rob Bishop, UT & Chair, House Natural Resources Committee
Rep. Don Young, AL & Chair, House Subcommittee on Indian and Alaska Native Affairs
Rep. John Fleming, LA & Chair, House Subcommittee on Water, Power and Oceans
Rep. Mike Conaway, TX, & Chair, House Committee on Agriculture
Rep. Glenn Thompson, PA & Chair, House Subcommittee on Conservation and Forestry
Sen. Lisa Murkowski, AL & Chair, Senate Committee on Energy & Natural Resources
Sen. John Barrasso, WY & Chair, Senate Subcommittee on Public Lands, Forests, and Mining
Sen. Mike Lee, UT & Chair, Senate Subcommittee on Water and Power
Sen. Pat Roberts, KS & Chair, Senate Committee on Agriculture, Nutrition & Forestry
Sen. David Perdue, GA & Chair, Senate Subcommittee on Conservation, Forestry and Natural Resources

¹ See Lawrence A. Kogan, Memorandum of Law, *Legal Analysis of S.3013 – The Salish and Kootenai Water Rights Settlement Act of 2016 and Related Congressional Tribal Forest Management Legislation*, prepared for Western States Constitutional Rights, LLC (Aug. 29, 2016), available at: http://www.koganlawgroup.com/uploads/FINAL3_Memo_-KLG_Legal_analysis_of_S.3013_The_Salish_and_Kootenai_Water_Rights_Settlement_Act_of_2016_8-29-1.pdf