

Montanans Must Seek Independence from CSKT Water Compact in Spirit of 1776

By Lawrence A. Kogan

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July 4th celebrations are a time for recalling the birth and exceptionalism of our great nation. The United States of America has remained a unique global experiment in which Enlightenment-era principles (political, social, economic, scientific, philosophical and legal) have been deployed to successfully promote and defend our natural rights-based individualism and freedoms, especially private property. This 4th of July is particularly noteworthy, because it is both the 239th year since the signing of the Declaration of Independence¹ and the 800th year since the signing of the English Magna Carta.²

The Magna Carta strongly influenced the drafting of the Declaration of Independence and the U.S. Constitution's Bill of Rights.³ Its significance to Americans⁴ lies primarily in its guarantee to "We the People" of certain rights and its binding of an oppressive sovereign (government at all levels) to the rule of law. These documents together memorialize the Founding Fathers' distrust of concentrated political power and confidence that representative government, the idea of a supreme law and independent judicial review can serve as indispensable counterweights to tyranny.

Unfortunately, these core principles and values are now threatened by a presidential administration that rejects⁵ the commonly held notion of American exceptionalism,⁶ steadily usurps its constitutional authority⁷ and violates the rule of law,⁸ all in an effort to unilaterally transform this nation into a Europeanized post-modern regulatory utopia⁹ in which a new political class and elitist bureaucracy control what the people can and cannot do.¹⁰

Apparently, the 'cram-down' approach that many Montana politicians and legislators recently employed to ensure the Confederated Salish & Kootenai Tribes (CSKT) Water Compact's¹¹ hasty enactment into State law, over the expressed protest of Montana's citizens, reveals that they, too, subscribe to such thinking. The Compact is actually a Treaty to be ratified by Congress that was entered into by three distinct sovereigns¹² (the governments of Montana, the United States and the CSKT (a deemed 'dependent'¹³ and 'hostile'¹⁴ nation pursuant to Supreme Court jurisprudence and 43 U.S.C. 1457(10)¹⁵)) that implements at the state and local levels the European and United Nations doctrine of environment-centric sustainable development – i.e., Agenda 21.¹⁶ It is foremost an attack on their private property that diminishes the use and value of land and water rights. However, as discussed in a recent interview in which I participated,¹⁷ it also will surely harm free enterprise and the State's sizeable ranching and agricultural economy and impair Montanans' cherished personal and economic freedoms, including recreational hunting.

As I stated in Billings in a May presentation¹⁸ I delivered before a group convened by Regulatory Lawfare Relief, LLC (a new public interest-focused Montana-based company established by former executive Robert T. Fanning, specifically, to organize, manage and secure legal representation for those whose rights have been harmed by the Compact), “You can’t just focus anymore on what occurs locally, because what is local may be global.” In other words, those who, up to now, have focused narrowly on CSKT federally reserved waters rights must reconsider their provincial approach. Instead, Montana’s citizens must more broadly scrutinize the Compact’s complex provisions as restated in recently enacted SB262.¹⁹

In particular, Montanans must carefully examine the many technical water abstracts that will govern the Compact’s implementation if deemed inconsistent with its textual terms. Their legislators’ inability to review these abstracts amid an unsavory voting process generated considerable confusion and doubt regarding the Compact’s true purpose, objectives and impacts. These abstracts effectively sanction the transformation of common law and statutory water and land rights into aboriginal rights by enabling the CSKT government, as owner and operator (Federal Energy Regulatory Commission licensee) of the Kerr Dam (ownership to be finalized in September 2015) to severely restrict water flows from the Kerr Reservoir and Kerr Dam to the Flathead River and the Jocko and Clark Fork Rivers downstream therefrom, both on and off the Flathead Indian Reservation, on prioritized environmental and cultural rights grounds. In addition, the CSKT, which the Department of Interior’s (DOI’s) Bureau of Indian Affairs recently placed in control of the Flathead Irrigation System in violation of federal statute, has expressed its intention to suspend operations of the pumping stations along the Flathead River that flow to numerous feeder canals and lateral irrigation canals throughout the Reservation, consistent with the tribe’s aboriginal rights. Severely diminished water flows will adversely affect the land and appurtenant water rights held by, and consequently, the economic interests of, farmers and ranchers operating on and downstream from the Reservation, whose crops and grazing lands will perish and whose cattle and beef production will materially suffer.

And, there are a host of other actionable procedural and substantive law irregularities surrounding the CSKT Water Compact’s execution by federal, state and tribal government officials that also warrant closer public inspection.

For example, neither the Federal Environmental Protection Agency nor the DOI’s Bureaus of Reclamation and Indian Affairs, or its Fish and Wildlife Service, performed an environmental assessment to determine whether the Compact’s projected change(s) in water flows required a full-fledged environmental impact assessment to be undertaken, even though much of the Reservation is designated as containing federal wetlands and wildlands replete with sensitive wildlife, and the Flathead and Clark Fork Rivers are part of the Columbia River Basin, among the largest rivers and ecosystem-rich river basins in the United States.²⁰ Such National Environmental Policy Act (NEPA)²¹ violations would not have been tolerated (and indeed would have been publicly protested by nongovernmental environmental organizations (ENGOS)) had changes in water flows been proposed by private parties, and as had previously proposed improvements to highway 93 running through the Reservation²² been subject. Also, the DOI Bureau of Reclamation failed to ensure that the scientific assessment (water basin depletion study)²³ it developed in support of the change(s) in water flows incident to the Compact’s implementation satisfied Federal Information Quality Act²⁴ requirements.²⁵ Similarly, the National Oceanic and Atmospheric Administration’s and DOI Fish & Wildlife Assessment’s biological assessments of water flow changes to the Columbia River Basin, upon which the

Bureau of Reclamation's assessment principally relied, had failed to satisfy IQA certification requirements.

Furthermore, it has been reported that tribal members who have assembled and spoken up in opposition to the CSKT Compact because their individual land and water rights have been and will be adversely affected by the CSKT government's intended changes to water flows, including those who testified during recent Montana Senate Judiciary Committee hearings,²⁶ have been intimidated and threatened, in clear violation of the Indian Civil Rights Act and the U.S. and Montana Constitutions.

Moreover, while the public debates surrounding the CSKT Water Compact were building during the past several years, a group of lawyers (all former partners in one Montana-based law firm, who had worked or are currently working as paid lobbyists on both sides of the CSKT Water Compact legislative vote, as Northwestern Energy inside and/or outside counsel, or as State public officials), were simultaneously choreographing the quiet and discrete purchase by Northwestern Energy of *twelve* major Montana dams owned previously by Montana PPL, one of which includes the highly controversial Kerr Dam. Indeed, the current and former public officials among them failed to abide by Montana's Good Governance/Code of Ethics²⁷ statute by failing to disclose their prior apparent and/or real conflicts of interest.

In their totality, these *and other* aberrations lead those cognizant among us to reasonably conclude that laws have been violated and ethical standards breached. As a result, Montanans now face an array of government and lobbying resources that have been committed to securing the U.S. Congress's ratification of the Compact at their expense.

At the present time, Congress is unfamiliar with the CSKT Water Compact's true details and the actual legal and economic harms its ratification will engender. Congress, therefore, must promptly become educated about the Compact's technical terms, as drafted *and* as they will be implemented. It also must be prepared to devote the time necessary to engage in the type of robust due diligence review that the Montana legislature had been denied the opportunity to undertake. Until this occurs, the rights and interests of tribal and non-tribal residents of the Flathead Reservation and of residents living downstream therefrom, as well as, those of all Montanans, will remain in jeopardy. However, citizens from other States, principally those with abundant "waters of the United States"²⁸ and "federally recognized tribes"²⁹ that EPA has "treated as States"³⁰ for Clean Water Act and Clean Air Act implementation purposes, have little reason to take comfort, for it is they who may be targeted next.

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ENDNOTES

¹ See The Library of Congress, *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 – 1875* (July 4, 1776), pp. 1-3, available at: <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=124>.

² See U.S. National Archives and Records Administration, Featured Documents, *Magna Carta Translation*, available at: http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

³ See Cornell University Law School Legal Information Institute, *Bill of Rights*, available at: <https://www.law.cornell.edu/constitution/billofrights>.

⁴ See U.S. National Archives and Records Administration, Featured Documents, *Magna Carta and its American Legacy*, available at: http://www.archives.gov/exhibits/featured_documents/magna_carta/legacy.html.

⁵ See Joseph Loconte, *Two Cheers for American Exceptionalism*, The American (American Enterprise Institute (March 5, 2010)), available at: <https://www.aei.org/publication/two-cheers-for-american-exceptionalism/>.

⁶ See Wikipedia, *American Exceptionalism*, available at: https://en.wikipedia.org/wiki/American_exceptionalism.

⁷ See Committee for Justice, *25 Violations of Law By President Obama and His Administration*, available at: <https://www.committeeforjustice.org/content/25-violations-law-president-obama-and-his-administration>.

⁸ See Pete Kasperowicz, *Reports: Federal Judge Says Obama Violated the Constitution With Immigration Action*, The Blaze (Dec. 16, 2014), available at: <http://www.theblaze.com/stories/2014/12/16/reports-federal-judge-says-obama-violated-the-constitution-with-immigration-action/>.

⁹ See Lucas Bergkamp and Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process - Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, 4 European Journal of Risk Regulation 493-507 (2014), available at: http://www.koganlawgroup.com/uploads/2013/Trade_Precaution_and_Post-Modern_Regulatory_Process_EJRR-c.pdf.

¹⁰ See Charlemagne, *Brussels Rules OK - How the European Union is Becoming the World's Chief Regulator*, the Economist (Sept. 20, 2007), available at: <http://www.economist.com/node/9832900>.

¹¹ See Montana Department of Natural Resources and Conservation, *Reserved Water Rights Compact Commission, Confederated Salish and Kootenai Tribes*, Montana.gov website, available at: <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes>.

¹² See *Proposed Water Rights Compact Entered into by the Confederated Salish and Kootenai Tribes, the State of Montana and the United States of America* (Jan. 2015, Montana.gov website, available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2015-proposed_compact.pdf).

¹³ See *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014), available at: https://scholar.google.com/scholar_case?case=2991063208286386301&hl=en&as_sdt=6&as_vis=1&oi=scholar (“Indian tribes are ‘domestic dependent nations’ that exercise ‘inherent sovereign authority.’ *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (*Potawatomi*) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (“[T]he Constitution grants Congress’ powers ‘we have consistently described as ‘plenary and exclusive’ to ‘legislate in respect to Indian tribes’.”)”).

¹⁴ See *Motion for Reconsideration of Central New York Fair Business Association and Citizens Equal Rights Alliance*, in *Central New York Business Association v. Jewell*, Central New York Fair Business (ND NY 2015), at p. 2, available at: <https://nebula.wsimg.com/f675d72b8e153c1b3c125da2561ad510?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (challenging as unconstitutional under the equal protection clause, the use by the Secretary of the U.S. Department of Interior of 43 U.S.C. 1457, which serves as “the basis of the Secretary exercising continuing military authority over the Indians” “to promulgate the 25 CFR Part 83 regulations to recognize any group of Indians as a tribe without any statutory authorization from Congress,” and arguing that “the continuing status of the Indians remaining under these territorial war powers is the reason the rights of all other persons are displaced and state jurisdiction is lost over any and all Indian lands placed into trust.”)

¹⁵ See 43 U.S.C. § 1457(10) Duties of Secretary, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title43/pdf/USCODE-2010-title43-chap31-sec1457.pdf>.

¹⁶ See Lawrence A. Kogan, *Local Sustainability Movement Rides Wave of Evolving Federalism to ‘Axe’ Private Property Rights*, 7 Ky. J. Equine, Agric., & Nat. Res. L. 469-491 (2015), available at: <https://nebula.wsimg.com/c2d8337790ff684bd31b029c30b1b6dc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁷ See Rena Wetherelt, *Visiting With Lawrence Kogan, Esq: An Initial Consultation*, Sky Water Journal (June 2015), available at: <https://nebula.wsimg.com/958faac48cefc87a1d87d4d2f5156d68?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁸ See Regulatory Lawfare Relief, *Preventing Congress from Ratifying a Flawed CSKT Water Compact*, Group Presentation, (Billings, MT, May 21, 2015), available at: <https://nebula.wsimg.com/f3bd1b31f6a663ab0824d26ea09715bf?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁹ See “An Act Ratifying a Water Rights Compact Entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the State of Montana, and the United States of America; Creating a Unitary Administration and Management Ordinance to Govern Water Rights on the Flathead Reservation; Providing Exceptions from Certain State Water Laws Related to Department Powers, Judicial Enforcement, and Water Rights Permitting; Amending Sections 3-7-211, 85-2-111, 85-2-114, 85-2-301, 85-2-302, 85-2-306, 85-2-427, 85-2-506, AND 85-5-110, MCA; and Providing an Immediate Effective Date” (“SB0262”), 64th Legislature, State of Montana (passed, April 16, 2014 and signed into law on April 24, 2015), available at: <https://legiscan.com/MT/bill/SB262/2015>.

²⁰ See Wikipedia, *Columbia River*, available at: https://en.wikipedia.org/wiki/Columbia_River; Wikipedia, *Columbia Basin*, available at: https://en.wikipedia.org/wiki/Columbia_Basin.

²¹ See United States Environmental Protection Agency, *National Environmental Policy Act*, available at: <http://www2.epa.gov/nepa>.

²² See Montana Department of Transportation, Confederated Salish and Kootenai Tribes and U.S. Department of Transportation Federal Highway Administration, *US Highway 93 Ninepipe/Ronan Improvement Project Draft Supplemental Environmental Impact Statement and Draft Section 4(f) Evaluation* (Aug. 9, 2006), available at: <http://www.skillings.com/US93/PDF/US93DEIS.pdf>.

²³ See U.S. Department of the Interior, Bureau of Reclamation Pacific Northwest Region, *Reclamation Managing Water in the West: Flathead Basin Tribal Depletion Study* (Sept. 2012), available at: <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2013-appendix7bureauofreclamationmodelingreport.pdf>.

²⁴ See “Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554)” (“Information Quality Act”), available at: <http://www.fws.gov/informationquality/section515.html>.

²⁵ See Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study*, Washington Legal Foundation Working Paper No. 191 (Feb. 2015), available at: <http://www.wlf.org/upload/legalstudies/workingpaper/2015Kogan.pdf>.

²⁶ See Montana Voter, *Bombshell Testimony at Montana Hearing for CSKT Water Compact February 16, 2015*, YouTube (Feb. 17, 2015), available at: <https://www.youtube.com/watch?v=9Kgy2V2Xt1s>.

²⁷ See Title 2. Government Structure and Administration, Chapter 2. Standards of Conduct, Part 1. Code of Ethics, Montana Code Annotated (2014), available at: http://leg.mt.gov/bills/mca_toc/2_2_1.htm (MCA 2-2-101 thru 106; 2-2-111; 2-2-112; 2-2-121; 2-2-131; 2-2-136).

²⁸ See *State of Texas v. United States Environmental Protection Agency*, Case 3:15-cv-00162 (SD TX) (filed 6/29/15), available at: http://www2.bloomberglaw.com/public/desktop/document/State_of_Texas_et_al_v_United_States_Environmental_Protection_Age (challenging the legality of the final rule titled “Clean Water Rule: Definition of ‘Waters of the United States,’” as “an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners.”)

²⁹ See U.S. House of Representatives Committee on Natural Resources, House Subcommittee on Indian, Insular and Alaska Native Affairs Hearing Memo, Oversight hearing on “*The Obama Administration’s Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, not Recognize Them*” (April 20, 2015), available at: <http://docs.house.gov/meetings/II/II24/20150422/103353/HHRG-114-II24-20150422-SD002.pdf>.

³⁰ See United States Environmental Protection Agency, American Indian Environmental Office Tribal Portal, *Treatment in a Similar Manner as a State*, available at: <http://www.epa.gov/tribalportal/laws/tas.htm>.