Montana's Last Indian Water Compact

How Democrats and wise Republicans saved the CSKT Water Compact by one vote.

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Montana's Last Indian Water Compact:

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Second Edition (First edition published in 2017)

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Preface to Second Edition

February 3, 2023

The 2015 vote on the Confederated Salish and Kootenai Tribes (CSKT) Water Compact was one of the most important and defining events in Montana's history.

This book is the most complete, correct, memorable, unbiased, account of Montana's Last Indian Water Compact.

After months of debates and public hearings, the Montana legislature approved the Compact by 53 to 47. However, prior votes showed the true vote was 51 to 49.

This book is where you can read and evaluate for yourself the proponent and opponent arguments for and against the Compact. I invited three key opponents to make their case in Chapter 10.

Compact opponents did not understand the key question, which is:

Will Montana be better served with or without the Compact?

The key question is not about whether the Compact is perfect, or whether we like it, or whether it is too complicated, or whether we had time to read it, or whether all Republicans should vote against it because Democrats are voting for it.

The question is: What is best for Montana?

My personal political bias would be toward the opponents because I am a conservative Republican. However, my profession as a theoretical climate physicist and my success with winning in court has taught me to be logical and unbiased. So, I call it like I see it.

Proponents showed Montana would be significantly better served with the Compact than without the Compact. They showed Montana should not spend a generation of time and millions of

dollars trying to win water rights lawsuits we cannot win.

No opponent showed any proponent argument was wrong. No opponent presented an argument that could beat the CSKT water rights lawsuits if Montana rejected the Compact.

Opponents who think their personal interpretation of the Hell Gate Treaty would win in court would lose their water rights along with their shirts.

Wise opponents see the Compact as one political issue among many and work with Republicans on other issues. Some opponents never had the opportunity to evaluate the Compact as you will have by reading this book, and they would probably vote YES if they would read this book.

The radical opponents began with conspiracy theories and myths about the Compact and then gave fifteen irrational and six invalid reasons to vote NO (Chapters 7 and 8).

These radical opponents are a groupthink. They cause the split in the Republican Party because they censor, blacklist, and attack Republicans who disagree with them on only one issue.

Radical opponents think they are "patriots." Real patriots collaborate with all Republicans because they realize we are all in one boat and we must all work together to survive and win.

Republican Senator Chas Vincent, sponsor of SB 262, summed it up the Compact in his presentation (Chapter 2),

> At the end of the day, you can disagree with the Compact and you can disagree with the case law that supports it.
>
> But don't condemn the rest of us to millions of dollars and years of litigation when there is the option to prevent it by passing the Compact.

Now read the amazing story about Montana's Last Indian Water Compact.

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Introduction

The Confederated Salish and Kootenai Tribes (CSKT) Water Compact was one of the most critical bills in Montana's history.

It intends to resolve the thousands of legal issues that stem from the Hell Gate Treaty in 1855, before Montana became a state.

Montana's 1979 legislature made Montana the only state with the right to negotiate rather than litigate water-rights disputes with its Indian tribes. This was a significant accomplishment.

Thirty-six years later, Montana's 2015 House ratified the Montana's Last Indian Compact with only one vote to spare.

Why was this vote so close? What changed in Montana in 36 years?

Without the Compact, Montanans would spend the next 20 to 30 years defending themselves from thousands of unwinnable Indian water-rights lawsuits.

These lawsuits would be the most-costly legal battles in Montana's history. They would set back Montana's economy for a whole generation. And when the dust settled, the CSKT would own most of the water in western Montana.

Most Montana farmers and ranchers, city managers, and business leaders supported the Compact.

Democrat and true Republican legislators supported the Compact.

But the radical-right legislators, who occupied almost half of Montana's House, were against the Compact. At the end of a bitter fight, Montana's House ratified the Compact by one vote.

Now, for the first time, you will learn the inside story of how one vote saved the CSKT Water Compact and Montana.

Chapter 1 – Time Immemorial

Should you ask me whence these stories?
Whence these legends and traditions?
I should answer, I should tell you,

From the forests and the prairies,
From the great lakes of the Northland …
I repeat them as I heard them
From the lips of Nawadaha.

- Longfellow (1855a, b): Song of Hiawatha

They came to America before the last ice age ended.

They migrated here near the end of the last 90,000-year long ice age. The ocean level was 200 meters (660 feet) lower than today. The lower ocean level opened a 600-mile-wide Bering land bridge (USGS, 2013). The Earth's climate changed 15,000 years ago.

They came here in one migration from East Asia before human recorded history (Wikipedia, 2016a). Plants and animals joined them in their long, slow, historic migration. They gradually moved south following their food. They may have migrated on the ice-free corridor that formed east of the Rocky Mountain front as glaciers melted. They hunted big game, mammoths, mastodons (Phys Org, 2014).

If we had their detailed history, it would be the greatest story on Earth.

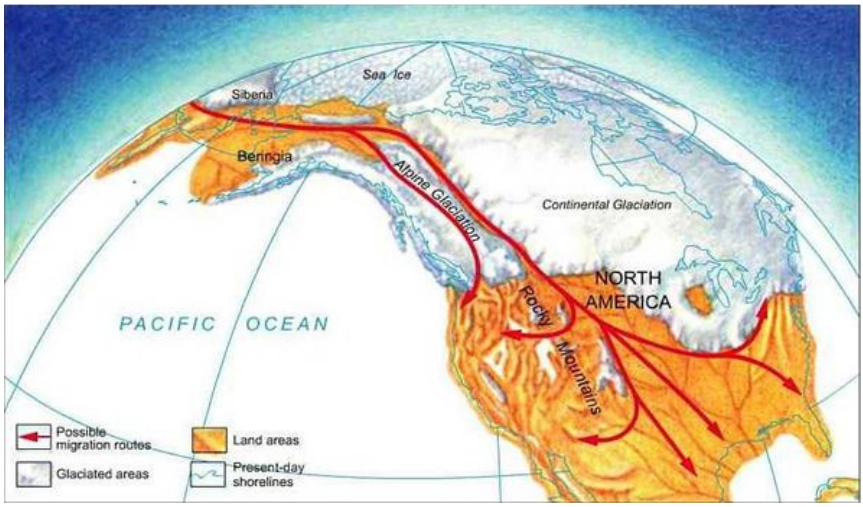

Figure 1. Routes of the Clovis Americans. (White, 2016)

American Indians are the Indians of the Clovis culture, named after their archeological site near Clovis, New Mexico. That site dates 13,390 BP. The Clovis culture Indians are noted for their fluted stone spear points (Wikipedia, 2016b).

They were not the first migration from Siberia to America. Some pre-Clovis migrations came here thousands of years earlier. But the earlier civilizations may not have survived.

A pre-Clovis archeological site in South Carolina dates 22,900 to possibly 50,000 years ago. Brazil has an archeological site with an archeological date of 32,160 BP (before present) and a carbon-14 date of 60,000 years BP. An archeological site in Florida dates 14,550 BP (CBS News, 2016).

They were here when the Earth warmed dramatically over a 200-year span that began about 14,400-years ago. They were here when the Earth cooled again until about 12,800 years ago, now called the Younger Dryas cooling.

They lived here when the Earth began to warm again about 11,700 years ago. The warming caused ocean levels to rise and close the Bering land bridge about 11,000 years ago. The warming began our present 13,000-year long Holocene epoch (Wikipedia, 2016d).

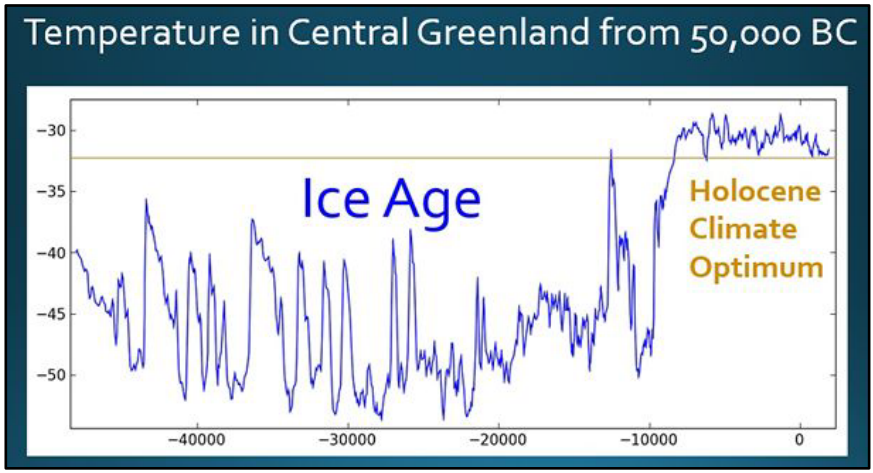

Figure 2. Reconstructed temperature from Greenland ice core shows significant warming from the ice age to our Holocene. Vertical temperature scale is in Degrees C. Horizontal scale is in Years.

Greenland and Antarctica ice cores show 800,000 years of climate history (Davies, 2015). Ice cores have annual rings like tree rings that allow us to count the years. These ice cores trace the Earth's temperature history.

The oldest known burial in North America

In 1968, construction workers in central Montana found the grave of a Clovis baby boy. Named the Anzick Child, he was born 12,600 years ago, and died when he was between 12 and 18 months old. His is the oldest known burial in North America.

The Native Americans who buried the Anzick Child covered his

body with red-ocher pigment. They put in his grave a cache of 125 tools and heirlooms made of rare elk antler. Little did these people know their baby's grave someday would become a time machine (CBS, 2014).

Eske Willerslev is an evolutionary geneticist at the University of Copenhagen. In 2013, he analyzed the baby's DNA (Watson, 2014). The DNA proved the baby's people came from the Eurasians in Siberia. All today's North and South American Indians are related to the Anzick Child's people (CBS News, 2014).

Glacial Lake Missoula

The Clovis Culture Native Americans lived in our Pacific Northwest when Glacial Lake Missoula stretched 200 miles across northwest Montana between 15,000 and 13,000 years ago.

They were here when Glacial Lake Missoula's ice dam gave way and then reformed again, 25 to 40 times (NOVA, 2005). Each time, it dumped its 500 cubic miles of water across the Pacific Northwest in only a few days.

These were the greatest natural floods known to have occurred on the Earth. These unimaginable floods changed the landscape across 16,000 square miles of the Pacific Northwest.

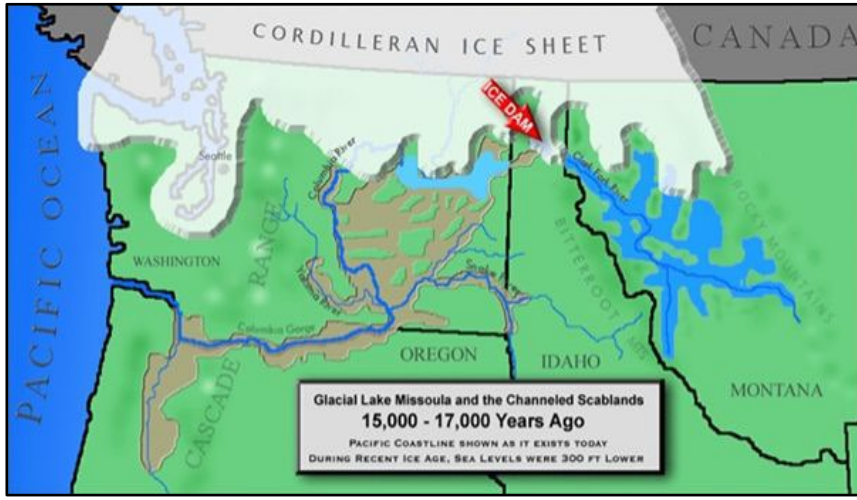

Figure 3. Glacial Lake Missoula in what is now northwest Montana.

They were here when the natural warming Holocene slowly melted the great glaciers in what is now Montana's Glacier National Park, Flathead Valley, Flathead Lake, and Flathead Indian Reservation.

Our present Holocene epoch has had several warm and cool periods. Native Americans were here for all of them.

They lived through the Minoan warm period 3400 years ago. The Roman warm period 2200 years ago. The Medieval Warm Period from about 950 to 1220 AD. All these past warm periods were much warmer than our Earth's average temperature today. They lived here through the Little Ice Age from about 1300 to 1800 AD.

They formed their lives, legends, and religions on the land we call America.

Their lives changed forever.

Native Americans lived healthy lives. They were remarkably free of serious diseases. But they had no immunity to European diseases.

Beginning in the early 1500's, European settlers imported their weapons of mass destruction: smallpox, measles, and influenza.

European diseases killed 90 to 95 percent of the Native American population. Smallpox caused the fall of the Aztec and Inca empires.

If disease had not caused massive loss of the Native American population, the European invasion of the Americas would have a different history.

The Iroquois Federation

Hiawatha was a Native American visionary, statesman, and peacemaker. Born about 1450, he designed, promoted, and co-founded the Iroquois Federation. As a reward for his work, the Mohawk nation made Hiawatha one of their chiefs (Hale, 2016).

Before the Federation, all the tribes suffered deaths and destruction of continuing wars. Hiawatha's Federation brought the tribes of five nations together.

The primary goal of the Federation was to abolish war and to provide for the common defense. The Federation design allowed other Nations to join them.

The Federation allowed each Nation to retain its own council and manage its own affairs. Each Nation elected representatives to attend the Federation.

The Iroquois Constitution assured thorough political debate. If two Nations disagreed, a third Nation could cast the deciding vote.

Hiawatha's Federation held the Iroquois nations together for more than three centuries. The countrymen of Hiawatha pursued alliances and treaties with other nations, and showed a persistent desire for peace (Shepard, 2014).

The Iroquois "Book of Rites" shows them to be a kind and

affectionate people, who have sympathy for their friends in distress, are considerate to their women and tender to their children. They have a profound reverence for their constitution and its authors.

European settlers to America found these Indians to be acute reasoners, eloquent speakers, and very skillful and far-seeing politicians. In negotiations, the Indian leaders proved they could cope with the best diplomats in the world.

While always striving for peace, the Iroquois Federation were efficient warriors. With less than five thousand fighting men, they controlled the balance of power between France and England in America.

In 1744, leaders from Maryland, Pennsylvania, and Virginia met with delegates of the Six Nations of the Iroquois Federation. Iroquois leader Canassatego advised:

> Our wise forefathers established a union and amity between the Five Nations. This has made us formidable. This has given us great weight and authority with our neighboring Nations.
>
> We are a powerful Confederacy and by your observing the same methods our wise forefathers have taken you will acquire much strength and power; therefore, whatever befalls you, do not fall out with one another.

Benjamin Franklin published the official transcript of the proceedings. Seven years later, Franklin suggested the colonies form a union following the example of the Iroquois Federation. At that time, American colonists had developed diplomatic and trading relations with American Indian societies and had friendly relations with the Iroquois.

Today many historians believe the Iroquoian ideas of unity, federalism, and balance of power directly influenced the future of the United States' government.

Franklin carried the Iroquois concept of unity to the Albany Congress in 1754. He proposed a plan for the union like the Iroquois Confederation. Iroquois leaders attended to conclude their alliance against the French and to help devise a plan for a union of the colonies (Feathers, 2007).

Franklin's booklet "Short hints toward a scheme for uniting the northern colonies" proposed that each colony could govern its internal affairs and send representatives to a Grand Council that would provide for mutual defense.

In 1775, the Continental Congress invited Iroquois chiefs to attend. The Congress acknowledged the advice Iroquois chiefs had given them 30 years ago.

In 1787, John Rutledge was a member of the Constitutional Convention and chair of the drafting committee. He used the structure of the Iroquois Federation to support the idea that political power comes from "we, the people."

Franklin's Albany Plan became a basis for the Continental Congresses, the Articles of Confederation, and the Constitution of the United States of America.

The US Constitution

September 17, 1787, concluded three months of debate moderated by convention president George Washington. The 38 of the 41 delegates present at the end of the convention signed the new US Constitution. This Constitution created a strong federal government with a system of checks and balances. Article VII dictated the document would not become binding until ratified by nine of the 13 states.

On June 21, 1788, New Hampshire became the ninth state to ratify the document. The states' delegates agreed that government under the U.S. Constitution would begin on March 4, 1789.

In 1988, the 100th US Congress passed a concurrent resolution that acknowledged the influence and contribution to America by the Six Nations of the Iroquois Confederacy.

Bill Moyers (1991) interviewed Oren Lyons, chief of the Onondaga Nation. Lyons said of America's founding fathers:

> In North America at that time, they took an ember, they took a light from our fire, and they carried that over to light their own fire and that made their own nation. They lighted this great fire, and that was a great light at that time of peace.

Flathead Indians signed the Hell Gate Treaty in 1855

Land was sufficient for the Native American tribes before the settlers' diseases decimated their population. However, when non-Indians brought their industry, agriculture, and growing urban areas to the arid western United States, land conflicts arose.

To resolve conflicts, the US Government made the Tribes offers they could not refuse: Accept our treaties and live on reservations.

Lewis and Clark met with the Flathead Indians on September 5, 1805, to ask the Indians for horses. Their meeting was the first written record of the Flathead Indians (Wikipedia, 2016c).

Today, the Flathead Indians are the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation. "Salish" means "people."

No, the Flathead Indians did not have flat heads. The Columbia River tribes called them "Flatheads" because the Columbia River tribes sloped their foreheads backwards by putting wooden constraints on their baby's heads. The "Flatheads" did not.

The Catholic Church founded the St. Mary's mission in the Bitter Root Valley in the 1840s. They closed it in 1849 and founded the St. Ignatius mission in 1854.

Isaac Stephens was governor of the Washington Territory and the Superintendent of Indian Affairs. In 1855, he encouraged the CSKT to sign the Hell Gate Treaty. A Jesuit treaty observer, Father Adrian Hoecken, reported the translations were so poor that neither side understood "a tenth of what was said."

The Tribes thought the Hell Gate treaty formalized their friendship. The non-Indians thought the treaty gave them rights to Indian land. Time proved the non-Indians correct.

Chief Victor, the head chief of the Flathead, signed the Hell Gate Treaty in 1855 (Center for Columbia River History, 2016). The US government allowed the Flathead Tribe to remain in Bitterroot Valley until the government found a better location.

The same year, 1855, the Flathead Indians signed the Hell Gate Treaty, Henry Wadsworth Longfellow (1855a, b) published his *Song of Hiawatha*. Although more poetic than factual, Longfellow's poem brought national attention to the culture of the North American Indians.

In 1864, nine years after the Hell Gate Treaty, the US Congress and President Abraham Lincoln made these former Indian lands "Montana Territory."

Passage of 25 U.S.C.A. Section 71 on March 3, 1871, ended the Indian "Treaty Era." All treaties ratified before that date are enforceable legal documents. No treaties after that date can be ratified.

Sitting Bull's warriors defeated Custer's army in 1876.

The 1868 Fort Laramie Treaty forced the Lakotas to live on a western South Dakota reservation. The Commissioner of Indian Affairs ordered the Indians to report to the reservation by January 31, 1876. But Lakota leaders Sitting Bull and Crazy Horse had refused to sign the Fort Laramie Treaty. So, their Lakota Sioux refused the order to go to the reservation.

General Philip Sheridan ordered Custer to round up the 8,000 members of Sitting Bull's encampment and take them to the reservation. Sheridan assigned the forces of Colonel John Gibbon, General George Crook, and General Alfred Terry to support Custer's forces.

On about June 10, 1876, the Lakota Sioux, Northern Cheyenne, and Arapaho tribes gathered for their annual sun dance ceremony near Lame Deer, Montana. During the ceremony, Sitting Bull had a vision of soldiers falling upside down into his village. He prophesized his people would soon have a great victory.

Two weeks later, on the morning of June 25, 1876, Lt. Col. George Custer positioned his 7th Cavalry Regiment twelve miles from a Lakota Sioux and Cheyenne encampment on the Little Bighorn River. Custer believed his Regiment would easily defeat the 1,800 warriors of the Lakota Sioux, Northern Cheyenne, and Arapaho in the encampment.

The next day, June 26, 1876, Lt. Col George Custer and 262 of his U.S. Army soldiers lay dead at Little Bighorn, Montana. Southern Cheyenne women stood over Custer's body so warriors would not scalp or mutilate it.

Little Bighorn is now a Place of Reflection

In 1879, the 7th US Cavalry built a temporary memorial on Last Stand Hill. They built a permanent monument of granite in 1881.

On July 1, 1940, the National Park Service made Little Bighorn Battlefield a National Monument (National Park Service, 2016).

On June 25, 2003, the National Park Service and Indian tribes dedicated an Indian Memorial at the Little Bighorn Battlefield National Monument to honor all the tribes who defended their way of life in the Little Bighorn Battle.

The Dedication Memorial reads:

> This area memorializes the U.S. Army's 7th Cavalry and the Sioux and Cheyenne in one of the Indian's last armed efforts to preserve their way of life. Here on June 25 and 26 of 1876, 263 soldiers, including Lt. Col. George A. Custer and attached personnel of the U.S. Army, died fighting several thousand Lakota, and Cheyenne warriors.

Read that as Sitting Bull's warriors killed Custer and 262 of his soldiers.

Enos Poor Bear, Sr., Oglala Lakota Elder spoke for the Tribes at dedication of the Indian Memorial, Little Bighorn Battlefield, June 25, 2003:

> "If this memorial is to serve its total purpose, it must not only be a tribute to the dead; it must contain a message for the living...power through unity…"

Montana became America's 41st state in 1889.

Over time, the CSKT learned they lost their land rights under the Hell Gate Treaty. The Hell Gate treaty gave 20 million acres to the US Government and 1.3 million acres to the CSKT. The US Government forced the CSKT to move from the Bitterroot Valley to the Flathead Reservation in 1891.

The tribes, now living on reservations, needed the water that flowed into their reservations. But non-Indians who diverted upstream water challenged tribal water rights. This conflict led to litigation about tribal water rights.

Montana's solution for water conflicts

Water used to be sufficient for the Indian tribes in the arid western half of the United States. This changed when non-Indians brought in their industry, agriculture, and growing urban areas. The tribes, now living on reservations, needed the water that flowed into their reservations. When non-Indians diverted upstream water, the

tribes faced real challenges to their water rights.

In the 1970's, with support of the US government, the Tribes began water-rights lawsuits to secure their water rights. The water rights litigations proved time-consuming and costly for all parties.

Montana's 1979 legislature, with support of the US Government, created the Reserved Water Rights Compact Commission (DNRC, 2015). The Legislature ordered the Commission to negotiate and "conclude" water compacts with Montana's seven Tribes.

Montana became the only state to negotiate water rights with Indian tribes. All the other states had to use litigation.

Thus, began a 36-year period where the Montana tribes suspended their water rights lawsuits. That 36-year period ended on June 30, 2015.

Most people in Montana believe this suspended period is the natural state and will continue forever. It isn't and it can't. Without the Compact, Montana would return to the litigations of the 1970's.

In late 2014, Montana's Compact Commission concluded its water rights negotiations with the Confederated Salish and Kootenai Tribes (CSKT), and the United States government. The negotiated settlement is known as the CSKT Compact or the Flathead Compact. The negotiation took twelve years.

Chapter 2 – One vote saved the Compact.

> Two roads diverged in a yellow wood,
> And sorry I could not travel both
> And be one traveler, long I stood
> And looked down one as far as I could
> To where it bent in the undergrowth.
>
> - Robert Frost (1916): The Road Not Taken

A Robert Frost Moment

The CSKT Compact was a true Robert Frost moment in Montana's history. Whether Montanans liked it or not, Montana would choose one of two roads. The choice would be permanent no matter which road Montana chose. The road chosen would make all the difference to Montana's future.

Montana's 1979 Legislature opened the door for Montana to resolve all its Indian water rights problems by negotiation rather than by litigation. When negotiations began in 1979, all Indian water rights lawsuits were suspended. The 36-year negotiation period would end on June 30, 2015.

Montana's 1979 legislature could not have predicted how political forces in 2015 would oppose Montana's last Indian water compact.

In the 36 years since Montana's 1979 legislature politics changed in Montana. They did not have a far-right tea party in 1979.

In 2013, the Compact bill died in the legislature. It was not ready to be approved. The deadline was not until June 30, 2015. This allowed time for the Commission to improve the Compact.

In late 2014, Montana's Compact Commission concluded its water rights negotiations with the CSKT. The negotiation and Compact organization took twelve years.

Senator Chas Vincent sponsored SB 262

Republican Senator Chas Vincent served in Montana's House in 2007 and 2009 and in Montana's Senate in 2011, 2013, and 2015. He served on Montana's Water Policy Interim Committee where he was Chairman in 2013-2014.

In 2013, Vincent opposed the Compact. In 2014, he spent many hours studying the Compact. Vincent learned, as do all who honestly study the Compact, that the Compact protects existing water uses, treats reservation irrigators fairly, and prevents long,

expensive lawsuits over tribal water rights.

In January 2015, Senator Vincent sponsored Senate Bill 262 (2015) to ratify Montana's CSKT Water Compact. Ratification of SB 262 would fulfill the vision of Montana's 1979 legislature.

Vincent said,

> This compact represents a settlement that protects existing and future water uses in Montana. Without it, the future is very uncertain.
>
> Water is no doubt the most valuable resource in the Montana. This Compact will ensure that all Montanans continue to have access to reliable water sources, whether they live on reservation or off.
>
> I'm pleased that legislators from both sides of the aisle recognized not only the importance of passing this legislation, but also that this was a fair deal for all Montanans.

Senator Chas Vincent (2015) responded to ten key complaints against the Compact:

1. The CSKT Water Compact is not a taking under the 5th Amendment of the U.S. Constitution because it does not take or impact the title of any property owners, nor does it change the economic value of non-tribal water rights.
2. The Compact specifically states, "Nothing in this compact shall be construed or interpreted ...to transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation."
3. The Compact does not violate Equal Protection by treating off-reservation water users differently than on-reservation users because on-reservation users are not similarly situated and federal law recognizes the uniqueness of tribal water rights. (State v. Shook, 313 Mont. 347, 351 (2002); Morton

v. Manacari, 471 U.S. 535, 555 (1974)).

4. The Compact may treat water users across the state differently only where federally defined tribal reserved water rights require the State of Montana to recognize such differences (Henry v. State Campen. Ins. Fund, 1999 MT 126, 27, 294 Mont. 449, 982 P.2d 456).

5. The Compact does not transfer ownership of water from the State of Montana to the Tribes, or to the federal government. Under Article IX, Section 3 of the Montana Constitution, the State continues to own the water.

6. The Compact quantifies rights to use the water for the Tribes.

7. The Compact is a negotiated settlement between the Tribes, the federal government, and the State of Montana. Its purpose is to manage water use, consumptive rights, and settle the claims of the Tribes. It adheres to Montana's Article IX, Section 3 by preserving the State's role in the administration, control, and regulation water rights and by allowing the legislature to determine the form of that administration.

8. The State is required to follow federal law and recognize the senior Tribal water rights. Unlike the adjudication process, the Compact can balance Tribal interests with those of non-Tribal water users and protect junior water right holders from call.

9. There is nothing in the Compact that prevents individual claimants from going through the adjudication process.

10. At the end of the day, you can disagree with the Compact and you can disagree with the case law that supports it. But don't condemn the rest of us to millions of dollars and years of litigation when there is the option to prevent it by

passing the Compact.

Montana's Water War

SB 262 became the most contentious, high-profile legislative bill in the history of Montana. Montana's 2015 legislature became a battleground of the war over the Compact. It was a war between two different ideologies in the Republican Party. Compact opponents made it an "Alamo war" over who would control the heart and soul of Montana's Republican Party.

The war over the CSKT Compact became as contentious as the war between Sitting Bull's Lakota Sioux warriors and Lt. Col. George Custer's army. Ominously, the Compact SB 262 is the number of Lt. Col George Custer's soldiers (not counting Custer) that Sitting Bull's warriors killed at Little Bighorn, Montana, on June 26, 1876.

At the end of the historic battle over the Compact, only 51 of Montana's 100 House representatives supported the Compact.

In 2015, Democrats supported the Compact, but Republicans dominated Montana's legislature. Republicans controlled the fate of the Compact. If Republicans had split evenly on the Compact, they would have passed the Compact easily. Such was not the case.

The Compact was a bipartisan bill even though its opponents viewed is as a partisan issue. Bipartisan issues are matters of truth. Votes do not decide truth. Votes decide only political opinions. The law decides legal truth and case law set the pattern for the Compact.

There will always be partisan differences between Democrats and Republicans. But both can benefit when they work together to honestly solve bipartisan issues, like the Compact.

Water fight in Montana's legislature

Following its public hearing of SB 262 on April 11, 2015, the House Judiciary Committee voted 11 to 10 to kill the Compact. All 9 Democrats and 1 Republican, Bruce Meyers, voted YES. Eleven Republicans voted NO.

All the days and hours of hearings did not change one vote on the Committee. Those who opposed the Compact closed their minds to any arguments that might show Montana would be better served with the Compact than without the Compact.

Without a miracle, the House Judiciary Committee vote would end Montana's CSKT Compact.

Compact proponents did not give up.

The rules the House agreed upon at the start of its 2015 session, each party, Democrat and Republican, has six "Silver Bullets." Each silver bullet allowed its party to pull a bill from a committee by a simple majority vote of the House. Without a silver bullet, it would take 60 House votes to pull a bill out of a committee.

House Democrats used a "Silver Bullet" to pull SB 262 from the Committee. The House vote was a 52 to 48 to pull SB 262 out of the Committee and onto the House floor.

With SB 262 on the House floor, opponents tried another way to stop the Compact. They introduced 13 successive amendments to the Compact. Since the Compact was a negotiated agreement, it could not be modified by the legislature. An approved amendment would kill the Compact.

Compact proponents shot down all 13 proposed amendments. Attempted amendment number 8 lost by only 51 to 49. Republican Greg Hertz voted for this Amendment. Democrat Gordon Pierson broke ranks with the Democrats and voted YES. This was a clear indication the House had only 51 solid votes for the Compact.

Republican Hertz had voted against pulling the Compact from the Committee. If Democrat Pierson also had voted against pulling SB

262 from the Committee, the final vote would have been 51 to 49. One more NO vote in the House would have killed the Compact.

Now it was time to vote on SB 262. Compact opponents tried another tactic.

Republican House Majority Leader Keith Regier claimed the Compact required 60 votes for House approval. He claimed a silver bullet applied only to pulling a bill from a committee by 51 votes but not to the bill's final approval.

Republican Frank Garner disagreed with Regier. Garner said (to the Daily Inter Lake) when the Legislature approved the silver bullet rules, the agreement was a silver bullet bill would require only 51 votes for House approval, like any other bill.

Although Garner voted against the Compact, he voted for an honest interpretation of the silver bullet rules. Garner is an honest man. We need more honest people in our legislature.

Regier's final tactic lost. Now it would take only 51 votes to approve the Compact.

Another controversial issue in the Compact was the legal immunity it grants to the state and to a new Water Management Board.

Attorney and Speaker of the House Austin Knudsen said,

> "The bill grants immunity to the state, and also to the new board that is being set up... immunity from suit. According to our State Constitution, that requires a two-thirds vote of the legislature, and that did not happen here. I put that on the record on the House floor. I put that on the record in the rules committee. I basically told people, 'this is what's going to happen, you're going to get sued for violating the Constitution."

Republican House Speaker Austin Knudsen ruled that the immunity

clause required a two-thirds vote of each legislative house for approval. The decision went to the House Rules Committee, which agreed with Knudsen.

Knudsen said he wanted the House Rules Committee to rule on the issue because that would make it eligible for a lawsuit.

As Knudsen expected, the House voted 52-48 to overrule Knudsen and the House Rules Committee.

The following day, the House voted 53-47 to pass Senate Bill 262, which approved the water compact after nearly 20 cumulative hours of testimony and debate.

The Compact vote was close. Too close.

In the end, only 10 of 59 House Republicans joined 41 of 42 Democrats to support Compact ratification. That's 51 for and 49 against the Compact.

The official record shows the Compact passed the last House vote by 53 to 47. But the official record does not show that Republican Hertz and Democrat Pierson had voted against the SB 262 and changed their vote to YES on the final vote.

Republican Hertz and Democrat Pierson were ready to kill the Compact if they had just one more vote on their side. Lacking that one extra vote, they voted YES to make the final vote for the Compact by 53 to 47. That way they appear on the record to be for the Compact even though they were not.

Montana's Water Compact vote was an example of chaos. Chaos means a small difference in input can cause a dramatic, sometimes irreversible, shift to a new regime. You experience chaos when you adjust a water faucet. A small difference in setting the faucet handle can shift from smooth water flow to turbulent water flow, and vice-versa.

That's what happened to the CSKT Water Compact. One more NO

vote would have changed the Compact from ratification to rejection and set back Montana … forever.

Montana's Democratic Governor Steve Bullock signed Montana's last Indian water compact on Friday, April 24, 2015.

Governor Bullock's signature was a major milestone for Montana. It made Montana the only state to resolve all tribal water rights by negotiation rather than by lawsuits.

The CSKT Compact was the highest profile issue of the 2014 election. Most candidates who opposed the Compact had decided to oppose it before they were elected.

In the end, the votes in the 2014 elections determined the votes in Montana's House, and the votes in Montana's House determined the fate of the Compact.

Two close elections that saved the Compact.

Jerry O'Neil – HD 3

Jerry O'Neil is a good Libertarian. He's smart. He runs as a Republican because a Libertarian can't win an election. He was a Montana Senator from 2000 to 2008 until termed out. Jerry is my friend.

Jerry O'Neil strongly opposed the Compact.

In 2014, Jerry O'Neil ran for House District 3 against Democrat Zac Perry. Then Libertarian Chris Colvin entered the race. Obviously, Chris could not win. The only thing Chris could do was steal votes from Jerry. If he stole enough votes from Jerry, the Democrat would win the election.

Chris got his 138 Libertarian votes and Jerry lost to Zac by 48 votes out of 3206. The Libertarians, who were against the Compact cost Jerry O'Neil his election. The Libertarians, as usual, shot themselves in the foot in this rare example of poetic justice.

Forty-Nine Libertarian votes in Montana's HD3 saved Montana's CSKT Water Compact. If they had voted for Jerry O'Neil, a true Libertarian, Jerry would have won, and his NO vote would have killed the Compact ... forever.

Gary Marbut – HD 94

Gary Marbut (Montana Shooting Sports Association, 2016) ran as an Independent in HD 94 after the Republican candidate dropped out of the race. Gary would vote NO on the Compact if elected.

Gary lost to Democrat Kimberly Dudik by 48 out of 3448 votes. If 25 voters for Kimberly Dudik had voted for Gary Marbut, Gary would have won, and his NO vote would have killed the Compact.

Two more close elections

Republicans Fred Anderson and Tony O'Donnell may have voted against the Compact. They are also my friends.

Fred Anderson – HD 24

Republican Fred Anderson lost to Democrat Jean Price by 23 out of 3131 votes.

Tony O'Donnell – HD 51

Republican Tony O'Donnell lost to Democrat Margie MacDonald by 13 out of 2635 votes.

Compact rejection would cost Montana severely.

If Montana had rejected the Compact, here is what would have happened, according to the top Water Compact attorneys in Montana.

The CSKT would file thousands of off-reservation water rights lawsuits. Montanans would pay for long, expensive legal battles to defend their water rights. It would be the most costly and time-consuming legal war in the history of Montana.

There are not enough lawyers in Montana to manage the lawsuits. Few lawyers are experts in Montana Water Law. Water Law attorneys would be the most in-demand career for prospective college students.

The litigations would take 20 to 30 years and consume a whole generation of Montanans. They would have been called the "Litigation Generation."

During these 20 to 30 years, Montana's water rights would be in limbo. No one could plan or build when water rights are uncertain. Cities could not plan their growth. Businesses would leave for other states or not come here at all. Montana would have less money to spend on infrastructure. Real estate values would fall.

Montanans would spend $2 billion to defend themselves against Indian water rights litigations. The federal government would pay CSKT's legal costs. Montana taxpayers would pay $73 million to fund for the Montana Water Court.

The overwhelming odds are the CSKT would have won its lawsuits because its water rights are senior to Montana water rights.

Even if Montanans won all the CSKT water-rights lawsuits, they could still not regain the benefits offered in the Compact.

When the dust of those unnecessary lawsuits would have settled, the Tribes and the US government would control Montana's water … the very scenario Compact opponents wanted to avoid.

Montanans would be forced to waste their money and time, on useless water-rights lawsuits. They would have lost their opportunity to build up Montana under the Compact.

Before the lawsuit dust would settle, history books would already reveal how Compact opponents destroyed Montana.

How long is 30 years?

It's called "opportunity cost." It is the value you lose when you lose an opportunity to improve your business or government.

Compact opponents did not see the future. They didn't see the change happening before their very eyes. They didn't realize the cost to Montana of being mired in lawsuits while the rest of the world moves ahead.

Compact rejection would cost Montana not only money but also the opportunity to improve Montana.

If Montana rejected the Compact, then its people would spend the next 20 years or more fighting water rights lawsuits. The time and money Montanans would spend on these lawsuits would delay adapting to the new future.

In the next 10 years alone, we will see a major technological shift that will change America. The shift will transform our lives in ways we can't even imagine today.

One measure of the coming shift is "Moore's Law." It is not really a law. It is an observation that has been consistent for 50 years.

In 1965, Gordon Moore predicted the number of transistors on a computer chip would double every 18 to 24 months. He was right. Compared to 1965, computer chips today are 3500 times faster, 90,000 times more energy efficient, and are only $1/60^{th}$ the cost.

Moore's Law applies to all science, technology, and information. It applies to healthcare, defense, jobs, transportation, communication, food production, agriculture, and more.

Nations will change. The world will change. The change in two decades will be beyond what we can imagine or predict.

The world's knowledge and technological power will double every two years. Our science and technology will be 1,000 times more powerful in 20 years, and 33,000 times more powerful in 30 years.

The last thing smart people want is to be trapped in 20 or more years of unproductive water-rights lawsuits as our world changes.

The opportunity cost of rejecting the Compact would exceed the direct costs of the lawsuits.

Chapter 3 – The Game and the Players

> There are times I almost think Nobody sure of what he absolutely know.
> Everybody find confusion in conclusion he concluded long ago
> And it puzzle me to learn that tho' a man may be in doubt of what he know,
> Very quickly he will fight... He'll fight to prove that what he does not know is so!
>
> - Rogers & Hammerstein, "The King and I: A Puzzlement"

The key question of the Compact

The key question of the Compact before the 2015 legislature was:

> Will Montana be better served with or without the Compact?

To be a reason to reject the Compact, a complaint must relate to the key question. Complaints that do not relate to this key question are irrelevant to the Compact debate.

Proponents presented overwhelming evidence that Montana will be better served with the Compact, and no opponent presented any claim related to the key question.

Compact Summary

The Compact and Ordinance provides:

1. Protect valid existing water uses as those rights are ultimately decreed by the Montana Water Court or permitted by the Department of Natural Resources and Conservation (DNRC).
2. Legal protection for post-1996 domestic wells and permits that are currently not legally permitted on the Reservation.

3. Establish a process to permit new uses such as domestic, stock, wetlands, municipal, hydropower, industrial, commercial, and agricultural uses on the Reservation.
4. A process to change existing water uses.
5. Funding to improve water measurement and water supply forecasting.
6. Funding to improve habitat and Flathead Indian Irrigation Project (FIIP).
7. Quantify the Tribes' water rights for all time.
8. Recognition of Tribal instream flow rights on and off the Reservation in exchange for the Tribes' agreement to relinquish all other claims within the state.
9. Water from the Flathead River and Flathead Lake to meet CSKT instream and consumptive water needs.
10. More water from Hungry Horse Reservoir to help meet CSKT instream and consumptive water needs.
11. A process to lease portions of this added water for new development.
12. Recognition of existing Tribal uses, including traditional Tribal cultural and religious uses.
13. A joint state-tribal board to administer water use on the Reservation under a Reservation-specific law.
14. Flexibility, local control, and certainty.
15. Drought protection for western Montana.

Compact Funding

Within five years of federal ratification of compact legislation, the State has committed to:

- $4 million for water measurement activities.
- $4 million to improve On-Farm efficiency.
- $4 million to mitigate the loss of stockwater deliveries.
- $30 million to help pay pumping costs and related projects.
- $13 million to provide aquatic and terrestrial habitat enhancement.

The Tribes will dedicate part of the settlement funding they receive from the United States to fund portions of the operational improvements and the rehabilitation and betterment projects.

The Settlement

The Confederated Salish and Kootenai Tribes (CSKT), the State of Montana, and the United States negotiated a water rights settlement. This settlement includes a Compact that quantifies the water rights of the CSKT on and off the Flathead Indian Reservation, and a Unitary Administration and Management Ordinance (UMO) that provides for the administration of water rights on the Reservation.

The Reserved Water Rights Compact Commission (DNRC, 2015) published the Compact (2015) and a Compact Summary (2015).

Key Proponents

Senator Chas Vincent

Senator Chas Vincent (R) served in Montana's House in 2007 and 2009 and in Montana's Senate in 2011, 2013, and 2015. He served on Montana's Water Policy Interim Committee where he was Chairman in 2013-2014. In January 2015, Senator Vincent sponsored Senate Bill 262 to ratify Montana's CSKT Water Compact.

Attorney Colleen Coyle

Colleen Coyle is Director of Water Services for Ponderosa

Advisors LLC. She previously served as a Senior Water Master with the Montana Water Court.

Attorney Andrew Huff

Attorney Andrew Huff, legal counsel to Governor Bullock, replied to Commissioners Mitchell and Holmquist of Flathead County on January 19, 2015.

Attorney Melissa Hornbein

Melissa Hornbein, Staff Attorney for Montana Department of Natural Resources and Conservation (DNRC), and Montana Reserved Water Rights Commission from 2010 to 2015.

Attorney Hertha L. Lund

Hertha L. Lund (Lund Law, 2016) has worked on behalf of agriculture on legislative issues for more than 30 years. Lund represented Montana Water Stewards, a private, non-partisan organization comprised of farmers and ranchers on the Flathead Indian Reservation, and its supporters.

Attorney Dale Schowengerdt

Dale Schowengerdt, State Solicitor, presented the official opinion of Attorney General Tim Fox on the CSKT Water Compact on January 30, 2015.

Attorney Helen Thigpen

Helen Thigpen, Staff Attorney for Montana's Legal Services Office, replied to Ballance and Regier (2014) questions on August 22, 2014.

Attorney Jay Weiner

Attorney Jay Weiner, Assistant Attorney General and Staff Attorney, Montana Reserved Water Rights Compact Commission since 2004, rebutted Vandemoer's claims.

Attorney Cory Swanson

Broadwater county attorney

Key Opponents

Dr. Catherine Vandemoer

Dr. Catherine Vandemoer is a hydrologist from Arizona. She moved to Montana in 2012 to lead the fight against the Compact. She is a consultant to Concerned Citizens of Western Montana and a key writer for Western Montana Water Rights (2016).

Concerned Citizens of Western Montana funded Western Montana Water Rights and Montana Land and Water Alliance (2016).

Before moving to Montana, Vandemoer worked for the US Bureau of Indian Affairs under the Clinton Administration. She helped implement endangered species regulations against agriculture in Washington State.

As an environmental activist in Oregon, Vandemoer advocated that more water be left in the river instead of being used by agriculture. Now, as a Compact opponent, Vandemoer claims the Compact will not leave enough water for agriculture.

Vandemoer's personal website (Vandemoer, 2013) shows she is consumed by conspiracy theories, like population control, HAARP, Project Popeye, and geoengineering. She believes normal jet contrails are "chemtrails" the government uses to poison Americans.

Elaine Willman

Elaine Willman is another well-known Compact opponent. Willman (2011) is the author of "Going to Pieces – The Dismantling of the United States of America."

Willman is a longtime Board member of Citizens Equal Rights Alliance (CERA, 2016a). She was Chair of CERA from 2001 to

2007. The CERA/CERF Mission is:

> Federal Indian Policy is unaccountable, destructive, racist, and unconstitutional. It is, therefore, CERF and CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States.

CERA (2016b) believes the federal rules for tribal governments should be modified.

On September 26, 2015, CERA (2015) hosted its Regional Educational Conference in Kalispell, Montana. The Conference title was "This Land is our Land … or is it? Corrupt & Unconstitutional Federal Indian Policy and Rogue Federal Agencies."

Prominent attendees were Willman and attorney Larry Kogan of Kogan Law Group in New York.

Willman has no legal case against the Compact. Willman inserts her Indian policy interests into the Compact debate, but the Compact is not about Indian policy. The compact is about quantifying and resolving tribal water rights.

IRERH (2015a) wrote of Willman:

> On the heels of state approval of the Confederated Salish and Kootenai Tribes (CSKT) and State of Montana water compact, a leading national anti-Indian activist has moved to Ronan, Montana to continue the fight against the agreement.
>
> In July 2015 Elaine Willman – a longtime leader of Citizens Equal Rights Alliance (CERA) – explained that she was relocating because the compact was a United Nations influenced effort to institute socialism in the state, amounting to "The Revolutionary War for citizens of Montana."

IREHR (2015b) wrote of CERA:

> The anti-Indian Citizens Equal Rights Alliance has announced a "Regional Education Conference" to be held September 26, 2015, at the Red Lion Hotel in Kalispell, Montana.
>
> The conference comes as longtime CERA Board Member Elaine Willman has recently moved to Ronan, Montana, an outgrowth of her involvement in a far-right mobilization against the Confederated Salish and Kootenai Tribes (CSKT) and State of Montana water compact approved by the state legislature in April.
>
> The conference will feature CERA regulars, allied elected officials and attorneys, and a well-known California activist who has aligned her cause with the paramilitary Oath Keepers and secessionist State of Jefferson movement.
>
> The Montana conference escalates the anti-Indian activity in that state and falsely positions CERA as the Indian law "expert." Based on the agenda and history of the presenters the CERA conference is will simply promote bigotry towards indigenous people, spin far-right conspiracy theories, and spread inaccuracies about Tribal-State relations.

Lenz (2016) wrote:

> After years of avoiding conspiracy theories, anti-Indian activists now see a global communist plot behind a UN plan.
>
> Violent hostility toward American Indians may be our original hatred, going back to more than 250 years before the American Revolution and even predating the anti-black racism that was long nourished by slavery. Indigenous peoples have been the victims of massacres, exploitation, cultural annihilation and a litany of hate violence that continues to this day. They are weak, marginalized and ignored.

> Still, the organized anti-Indian movement has in recent decades adopted the language of the civil rights movement. Although its claims are clearly disingenuous, they are cloaked in terms of "equality," complaints about government favoritism, and calls for repealing treaties and "special" rights for Indians in favor of treating all American citizens alike. Anti-Indian activists rarely talk about their enemies in the openly contemptuous ways favored by other parts of the radical right.
>
> Until now, that is.
>
> In the last year or two, some of the nation's leading anti-Indian activists and groups have added a completely new twist to their attempts to wrest away water, fishing and other rights legally granted to Indians under an array of treaties: the idea that power-mad globalists are using an entirely voluntary UN sustainability plan to wipe out property rights, local democratic government and freedom itself.

Elaine Willman, the silver-haired matriarch of the movement, claimed in Kalispell, Montana, last fall,

> "The language of Agenda 21, and the language of the United Nations' indigenous people's declaration, signed by President Obama, is now being incorporated into federal regulations. Federal Indian policy is tying in and being coordinated with international and United Nations goals, and the long-term goal of the United Nations and Agenda 21 is that states will go away."

Attorney Richard A. Simms

Opponents hired New Mexico Attorney Richard A. Simms to rebut the Compact. Simms was not licensed to practice law in Montana and made gross errors in interpreting Montana water law.

Senator Debby Barrett was Senate President in 2015.

Rep. Keith Regier was House Majority Leader in 2015.

Senator Debby Barrett and Rep. Keith Regier lead the legislative war against the Compact.

Rep. Nancy Ballance

Senator Janna Taylor was a state senator in 2015.

Pam Holmquist, Flathead County Commissioner

Phil Mitchell, Flathead County Commissioner

Senator Verdell Jackson, State Senator 2007-2014.

Senator Jackson is a farmer who wrote many Letters to the Editor that argued against the Compact.

Chapter 4 – Compact support is overwhelming.

> Through the Compact, irrigators served by the Flathead Indian Irrigation project can have a water delivery entitlement specific to their lands so long as comply with their operation and maintenance obligations.
>
> - Governor Steve Bullock and Attorney General Tim Fox

This chapter includes extracts from public letters and testimonies of Montana leaders.

123 Farmers and Ranchers support the Compact.

Farmers and Ranchers for Montana (2015) is a grassroots coalition of farmers and ranchers, united with local leaders, Indian tribes, businesses, water users and other Montanans who support the approval of a Water Compact.

These farmers, ranchers, and landowners operate more than 45,000 acres of land on the Flathead Indian Irrigation Project.

They say, in their letter below, the Compact secures reliable access for water users on and off the Reservation. The compact ensures that water can be transferred to future generations or upon sale of the land, provides new sources of water for irrigators, businesses, farmers and families, and funding for critical infrastructure repairs and improvements.

They say, without a compact, litigation will clog the Montana Water Court – costing taxpayers, county governments and individual water users. The Compact passed by the MT Legislature provides stability and secure reliable access to water:

1. Protects all existing rights for domestic, commercial, municipal, industrial, stockwater or other non-irrigation use.

2. Creates new sources of water for irrigators, businesses, farmers and families and increases local government's oversight role on allocation.
3. Protects individual property rights by ensuring that water access can be transferred to future generations or upon sale of the land.
4. Prevents a catastrophic logjam of the Montana Water Court that would delay action, cost taxpayers millions and force farmers, families, county governments and business to fund their own court costs.

January 6, 2014

Dear Governor Bullock and Attorney General Fox,

As Flathead Irrigation District farmers and ranchers, as irrigators who make their living from the land, we have some grave concerns about the misinformation that is circulating about the proposed Water Use Agreement and the Flathead Reservation Compact.

Every legal water right has four attributes:

- a point of diversion
- a place of use
- a flow rate
- a priority date, or date of appropriation.

Of these, the last—priority date, is most important, especially in times of drought. Under western water law, 100% of the senior water right must be satisfied before water can be released to a junior right. There is no sharing of water shortages between junior and senior rights. In times of drought, junior rights may not receive any water at all, depending on the available supply.

In the Klamath River Basin in southern Oregon, a negotiated

settlement was reached several years ago that provided for water and sharing in times of shortages between junior and senior water rights involving irrigation districts and the Klamath Tribes. Other irrigators refused to participate in the negotiated settlement, however. This year, the irrigators with the negotiated settlement are receiving water and the irrigators who refused to negotiate are having 'calls' placed on their water, which means they cannot irrigate because the water they are using needs to satisfy the senior Indian water right. According to news articles, this involves at least 58,000 acres of irrigated land.

We do not want that to happen here, on the Flathead Indian Irrigation Project or on the Flathead Indian Reservation. We believe the proposed Water Use Agreement and the Flathead Reservation Compact should be approved and implemented by the State of Montana, the U.S. and the CSKT.

The FJBC spent millions litigating instream flows in the late 1980's and early 1990's. The FJBC lost. We believe the FJBC will lose again, and we do not want to pay for more litigation. We do not want to pay for increased pumping costs which may approach $6.00-$7.00 per acre after 2015. We do not want to lose the benefits of a secure supply of irrigation water guaranteed by the water use agreement. We do not want to lose the benefits of state and federal dollars fixing our irrigation project.

We would like to address and rebut some erroneous claims promoted by Compact opponents:

First, the Compact does not allow CSKT control of all the water in western Montana, or even on the Flathead Indian Reservation. In fact, simply reading the proposed Water Use Agreement and Compact proves that to be a false claim.

The Compact clearly states that Montana will administer all off reservation water, including water rights co-owned between the

CSKT and Montana and water rights held by the CSKT. The Water use agreement clearly states that private and secretarial water rights are not included in the Agreement or Compact and that the Montana Water Court will adjudicate those claims.

Finally, The CSKT also do not have unilateral jurisdiction on the Flathead Reservation, either. The Compact sets up a six-member board, with five voting members to oversee administration of water rights and permits on the Reservation.

Only two of these six members are appointed by the CSKT. Does this sound like the CSKT will have unilateral control of water in western Montana? No.

Second, the Water Use Agreement provides a good, secure water supply for irrigators, including a mechanism for irrigators to continue to receive extra duty water.

This provides Flathead Project irrigators with a reliable supply of water, without any litigation costs and also provides large amounts of state and federal dollars to improve the irrigation project. These are dollars that irrigators will not have to raise themselves to affect much needed repairs.

Third, there is no provision in the Water Use Agreement or Compact that allows the CSKT to monitor or meter wells. The Unitary Management board may require meters on new large wells, as is done in other areas of the state, but that is for the protection of existing small wells, as is done in other areas of the state.

Fourth, the Compact specifically provides a mechanism not only for the protection of existing water uses, such as all the wells that have been drilled since 1996 without any permits, but also provides for the development of future uses, including new wells.

These Compact provisions virtually mirror Montana law. The Compact and Water Use agreement provide certainty and security

that is now lacking, without spending millions of dollars in litigation costs.

Governor Bullock, we respectfully request your support for the Flathead Reservation Compact to be addressed in a special session of the Montana legislature. We cannot afford the alternative.

Signed:

1. Duane Weible, Charlo
2. Paul & Sharon Guenzler, Ronan
3. Chris Hertz, Charlo
4. Jack Horner, Ronan
5. Roger Starkel, Ronan
6. Ken & Gina McAlpin, Ronan
7. Randa McAlpin, Polson
8. Cody and Libby Sherman, Ronan
9. Ken Cornelius, Ronan
10. Ed Starkel, Polson
11. Larry & Dee Coleman, Coleman Angus, Charlo
12. Harley & Sharon Coleman, Charlo
13. Chuck & Doris Stipe, Moiese
14. Larry & Anita Coleman, Charlo
15. Roy & Evelyn Lake, Ronan
16. Jack & Susan Lake, Ronan
17. Harold & Pat Hughes, Valley View
18. Dave Stipe, Charlo

19. Kathy Emerson, Ronan
20. John Bartel, Ronan
21. Russ & Joan Sherman, Ronan
22. Ralph Salomon, Ronan
23. Dan Salomon, Ronan
24. Steve Hughes, Polson
25. David Morigeau, Ronan
26. Haack Family Farms, Polson
27. Susie Aders, Polson
28. Jim Smith Family, Ronan
29. Tomi & Jeff Clairmont, Ronan
30. Jamie & Craig Cornelius, Ronan
31. Zon Lloyd, Ronan
32. Dean Wang, Charlo
33. Danny Krantz, Charlo
34. Paul Wadsworth, St. Ignatius
35. Scott Wadsworth, St. Ignatius
36. Pat Salomon, Polson
37. Mark Jackson, Ronan
38. Robert Sterling Trust B, R.A. Sterling, Trustee, Polson
39. Rory & Jan Schauss, Ronan
40. Karen & Daniel Ryan, Ronan
41. Barry Baker, Ronan
42. Joel Clairmont, Polson & Helena

43. Mac (James) Binger, Polson
44. Greg & Lyn Gardner, Polson
45. Bob & Kathy Smith, Ronan
46. Northwest Holdings, L.L.C., Polson
47. Dennis Duty, Polson
48. Corey & Carrie Guenzler, Hot Springs
49. Jack & Claudia McReady, St. Ignatius
50. Troy & Tonya Truman, Charlo
51. Dianne Lerwick, Albin, WY
52. David Lake, Polson
53. Daniel Lake, Polson
54. Tim Lake, Polson
55. Pat Lake, Polson
56. Leroy Hoversland, Ronan
57. Joseph F. Stiley, Ronan
58. Mandy M. Tupin, Ronan
59. Theresa Wall-McDonald, Ronan (non-district)
60. Thomas R. McDonald, Ronan (non-district)
61. Raymond C. & Mary J. Carl, Ronan (non-district)
62. Ken Matheny & Sandy Moore, Ronan
63. Cory Symington, Ronan
64. George & Nancy Delie, Ronan
65. Trent & Melissa Coleman, Charlo
66. Thompson Smith & Karen Stallard, Charlo

67. Ninepipes L.L.C., Charlo
68. Rick & Kathy Woodruff, Charlo
69. Eileen McMillan, Ronan
70. Florence P. Saloane, Ronan
71. Bill & Lorna Kolstad, Ronan
72. Rodney & Martha Hyvonen, Charlo
73. Wayne & Louise Billings, St. Ignatius
74. Cort Potter, Charlo
75. Vern & Barbie Stipe, Charlo
76. Nick J. & Martin J. Herak, Charlo
77. Lawrence & Lorraine Cornelius, Ronan
78. Marilyn Koester, Ronan
79. Ann L. Fleming, Ronan
80. Esther Bick, Charlo
81. Pat & Neil Fleming, Ronan
82. Doug Hahn, Ronan
83. Marion Hahn, Roy, Washington (Ronan area property)
84. Jimmie & Donna Johnson, Ronan
85. Agnes Wangerin, Ronan
86. Rick & Marsha Giannini, Ronan
87. Edward (Kent) Duckworth, Ronan
88. Dick Vinson, Thompson Falls (non-district)
89. Verlin & Marabeth Mintz, Charlo
90. Judy Rasmussen, Carl Guenzler Retrieverland L.L.C.,

Ronan

91. Sidney & Reba Turnquist, Ronan
92. Doug & Kathy Crockett, Ronan
93. Eugene Bilile, Ronan
94. Janet Franz, Cheney, Washington (Charlo)
95. Glenwood Farms North, Will & Jan Tusick, Polson
96. Sigurd Jensen, Elmo (non-district)
97. Paul Hunsucker, Polson
98. Virgil & Barb Rinke, Ronan
99. Paul Cullen, Ronan
100. Valley View Charlais Scott & Buddy Westphal, Polson
101. Gail & Jean Patton, Hot Springs
102. Ron & Carmel Couture, Ronan
103. Bill Meadows, Trout Creek (non-district)
104. John Salomon, Ronan
105. Bob & Myrna Gauthier, Ronan
106. Donald Olsson Jr., Ronan
107. Curtis & Janette Rosman, Charlo (Mission & Flathead District)
108. Krantz Family Limited Partners, Ronan
109. Cynthia Gabriel, Charlo
110. Oliver & Lois Dupuis, Polson
111. Kendall & Linda Dupuis, Polson
112. Lila Nelson Normandeau, Ronan

113. Paddy Trusler, Polson
114. Scott & Debbie Lund, Ronan
115. Dave Robbins, Triple D Ranch, Ronan
116. Bud & Ramona Lynch, Ronan
117. Moiese Valley Ranch, L.L.C., Charlo
118. Ninepipe Ranch L.L.C., Missoula (Non-District)
119. Post Creek Springs, Ltd., Missoula (Flathead District)
120. Dave & Jeanette Dutter, Flathead District
121. Frances E. & Kay Rollins, St. Ignatius (Flathead District)
122. Ernest & Kristi Foust, Charlo
123. Hector Speckert, Polson

Jack Horner, Rancher with 2,700 acres in the Flathead Reservation

Jack Horner testified:

> The CSKT Compact protects private property rights, private land values, reservation irrigators and off-reservation irrigators and provides a new water source for western Montana—keeping more of our water in Montana.

Governor Steve Bullock (D) and Attorney General Tim Fox (R)

Governor Steve Bullock and Attorney General Tim Fox announced an agreement with the Confederated Salish and Kootenai Tribes on the Flathead Water Rights Compact. Here is their joint news release (Governor Bullock, 2014):

> The Compact protects all existing rights for stock water, municipal, domestic, commercial, industrial and other non-

irrigation uses, while respecting tribal and treaty rights.

The Compact will make new water available for commercial and irrigation use, end the water administration void on the Flathead Reservation, allow economic development under conditions of legal certainty, and facilitate the resolution of the statewide water adjudication process.

The Compact establishes a technical team with irrigator representation that will implement water compact provisions relating to diversions of water into the irrigation project so irrigator historic use is protected and tribal in-stream flow targets are met.

The Compact establishes a $30 million fund that can be tapped to pay for water pumping to ensure that both irrigation and in-stream flow targets are met, and to mitigate impacts of compact implementation on project water use, even in dry years.

In low water years, the Compact provides for shared shortages, and this fund will allow for additional pumping capacity to meet irrigation needs.

After long and difficult negotiations, the state, the Tribes, and the federal government have reached an agreement that is good for Montana.

Attorney General Tim Fox said, if legislators reject the Compact, the CSKT would begin the most-costly series of legal cases in Montana's history.

Lorents Grosfield, former Republican lawmaker

Lorents Grosfield is a third-generation cattle rancher and irrigator from Big Timber who has followed water issues and water policy for over 35 years. He served in the Montana Senate from 1991 through 2003 and was Chairman of Senate Natural Resources and

later Senate Judiciary (where he dealt with several Compacts).

He is a former member of the Montana Reserved Water Rights Commission, a former Chair of the Montana State Water Plan Advisory Council, a former member of the Environmental Quality Council, a former member of the Water Policy Committee, and former President of the Montana Association of Conservation Districts.

Grosfield (2015) testified:

> I strongly support the CSKT Compact because I believe it is fair to both tribal and nontribal members who live on the Flathead Reservation, and because I am very fearful of the consequences of not passing it.
>
> If this Legislature does not pass the CSKT Compact, the Tribes are required under Montana water law to file all their claims by June 30, 2015. The impact of this deadline is exactly the same as the April 30th, 1982, deadline was for the rest of us.
>
> Those who say it's unconstitutional are essentially saying that at least three very supportive Montana Attorneys General (Marc Racicot, Steve Bullock and Tim Fox) don't know the law or the Montana Constitution.
>
> I ask you to think about how things will unfold if this Compact does not pass. The Tribes will obviously file all their claims by the deadline at the end of June, less than 3 months from now. These claims will be larger and more extensive, both on and off the reservation, than the rights granted in the Compact-especially since many tribal members believe the tribe has already given up way too much in the compact process.
>
> Each tribal claim will be accompanied by evidence to support the claim. For off-reservation claims, all of which will be

instream flow claims with a "time immemorial" priority date, each claim will include at least the following two elements:

- expert witness testimony, affidavits or depositions that the claim involves "usual and accustomed places" that the Tribes used historically, and
- expert biological testimony that the amount claimed is necessary to support a viable fishery in the reach claimed.

This puts any objectors in the position of having to find their own expert witnesses to refute the expert witness testimony that is part of the claim. The Tribes' expert evidence from reputable anthropologists and historians will be based largely on research of items like the Lewis and Clark Journals, trapper's and mountain men journals and statements, records from the many old military forts around Montana, etc. Biological testimony will come from fisheries biologists and instream flow scientists.

I submit that none of these will be easy or cheap for Montana water rights holders across much of the state to refute in a court setting.

Anything the Tribes file will have a priority date of 1855, except for instream flow claims which will have a priority date of "time immemorial," both of which predate any other claims in the Montana adjudication process.

Whether these claims are on-reservation or off-reservation, they will, by state law, be presumed to be valid by the Water Court unless and until water users submit valid and pertinent objections that either invalidate specific claims or cut back the amount of water.

That's the same way the adjudication process has worked for me and all other claimants after the 1982 deadline process (which is still going on well over 30 years later).

> For the sake of argument, let's say some of the Tribes' claims are defeated in the Water Court process.
>
> Does anyone here really think the Tribes will just let them go, or will they appeal?
>
> And if they lose again in the Montana Supreme Court, will they go on to the US Supreme Court, which has already stated,
>
> "State courts, as much as federal courts, have a solemn obligation to follow federal law" and "any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." [Arizona v. San Carlos Apache Tribe, 463 US 545, 564 (1983)]
>
> That is an extremely strong statement by the United States Supreme Court.

In a separate interview, Grosfield told Pat Bellinghausen (2015),

> The CSKT compact is “a very good compromise that does protect interests of Montana water users on and off the reservation. One party doesn’t get it all.
>
> The compact says the tribes will forego all off-reservation water rights in Montana, except for eight near the reservation.

Scott Reichner (R), Big Fork business owner and former state legislator

> The compact will achieve several important goals, including protecting families and businesses so that access can be transferred to future generations or upon sale of land. It would also ensure complete protection for stock water, municipal water, domestic, commercial and other non-irrigation uses on and off the reservation. (Reichner, 2015)

Chuck Hunter (D) House Minority Leader

> The CSKT Water Compact "provides very important security and stability to water resources throughout the western part of our state and even over to the eastern part of the divide as well."

Jeffrey K. Krauss, Mayor, City of Bozeman

> The negotiated compact set forth in SB 262 guarantees the certainty of existing water rights owned by the City of Bozeman. The importance of this guarantee cannot be overstated, nor overlooked. Our water rights are the lynchpin and foundation upon which the City of Bozeman is built.
>
> Our water rights provide for the public health, safety, and welfare of our residents and visitors; they bolster the strength of our local economy and provide for the future growth and vitality of the community.
>
> Failure of the 64th Legislature to pass SB 262 will have a potential negative impact upon the present certainty the City of Bozeman enjoys and depends upon with its water use. We wish to eliminate having to defend, yet again, our water rights in a litigation setting which is inevitable should SB 262 not pass into law.

> The costs to our citizens to mount such a defense are unknown and presently unaccounted for. This unfunded liability is an unfortunate reality and one that should be considered by all members of the 64th legislature. These liabilities extend to every existing water rights holder in the Gallatin.
>
> Your support of SB 262 will provide certainty to irrigators on and off the Flathead Reservation. The Compact will protect all current non-irrigation uses on and off the Flathead Reservation and provide a common-sense solution to the difficult problem of tribal reserved water rights. (Krauss, 2015).

Rick Smith, Flathead Reservation resident, Century 21 owner

> Businesses and retirees are holding off moving to Montana because of the uncertainty about the Water Compact. If Montana approves the compact, property values and business income will improve.

Ruby Valley Conservation District Supervisors

The following letter is signed by Gary Giem, Neil Sarnosky, Rick Sandru, Jeremy Miller, John Anderson, and George Trischman.

> The Ruby Valley Conservation District (2015) stands together to publicly support the Confederated Salish and Kootenai Tribal (CSKT) Montana Water Compact.
>
> The proposed CSKT Montana Water Compact is the result of more than a decade of negotiations to resolve the reserved water rights of the Tribes within our State.
>
> We can speculate and debate about what those reserve rights mean, but the truth is that the courts have already made that decision. They have confirmed the reality that the Treaty of Hell Gate grants the CSKT certain rights to claims for water

both on and off the reservation, and these rights were established long before Montana was a state.

The purpose of the Compact is to quantify the Tribe's water claims, to create a mechanism to resolve conflicts over future water needs, to protect existing water rights and ensure that irrigators have access to water at levels of historic consumption.

Existing water users are protected in the Compact. The Compact gives everyone security in their existing water rights and allows the Water Court to conclude much of its work. It is fiscally responsible and has been well thought out.

To not pass this Compact would be a mistake and would subject generations of Montanans to expensive litigation, ruin the years of work of adjudication, and undermine the very foundation of the lifestyle we hold dear.

The Montana Water Policy Interim Committee has spent two years reviewing, revising and making recommendations so that in this 2015 Legislative session action could be taken. The CSKT Water Compact has been negotiated to provide all parties the water re sources that they need.

Marty Lundstrom, President, Montana Agricultural Business Association

Marty Lundstrom testified:

We support the Compact because of the certainty that it provides for water users that buy their seed, fertilizer, and other inputs from our businesses.

The agricultural industry does not need additional challenges that are not necessary. Pass the CSKT Compact so that water users on the Milk River have certainty and agriculture can continue to thrive on the hi-line.

Krista Lee Evans for Senior Water Rights Coalition

The Senior Water Rights Coalition (2015) is made up of farmers, ranchers, irrigators, and hydropower users.

> We wholeheartedly support the 2015 CSKT Compact that is outlined in SB 262.
>
> The people of Montana have two options - settle (through the Compact) or litigate. Our membership feels very strongly that moving forward with a settlement that protects existing users both on and off the reservation is a wise path.
>
> Some people don't like the Federal Government involvement. Unfortunately, when the issue in front of you is a tribal reserved water right, the Federal Government will be involved, either through settlement or through litigation.
>
> The US Government has a responsibility to the tribes. Without a Compact the tribes will file for their off-reservation claims to instream flow. The Feds will be involved, and they have made it clear that their goal will be the protection of bull trout.
>
> One of the biggest benefits of the CSKT Compact is it keeps the Feds out of our rivers, streams, and tributaries.
>
> The Federal Government has agreed that ALL ESA REQUIREMENTS AS THEY RELATE TO BULL TROUT are addressed through the proposed compact. This is significant and it is worth paying attention to.
>
> To put it simply - THIS COMPACT LIMITS FEDERAL INVOLVEMENT in Montana's waters.
>
> As many of you have heard us say - WE DON'T WANT TO GO TO COURT - AGAIN!
>
> Any of my members that have incorporated for any number of reasons don't have the option of not hiring an attorney.

They can't represent themselves. They will be required to hire legal counsel. This will be very expensive and time consuming. We know because we've already gone through it at least once.

That doesn't include the cost to the State - funded by General Fund - will be at least $73 Million for the Water Court and Department of Natural Resources and Conservation (DNRC) portion of the adjudication. And this is a conservative estimate.

None of the off-reservation instream flow rights that will be owned by the Tribe allows for immediate call. They all have "conditions" that must be met prior to the Tribe being able to make a call. Even once these conditions are met there are still significant protections for existing water users.

For those who believe an instream flow right isn't a water right or a hydropower right can't be changed to an instream flow right - take those issues to court. There isn't anything in the Compact that keeps you from doing so. Just don't drag all the rest of us into Court with you.

The CSKT Compact is good for Montana's economy, its citizens, and its water users. This is a reasonable settlement that protects our Montana water resources and our water users.

John Youngberg, Executive VP of Montana Farm Bureau Federation

John Youngberg testified:

The people most impacted if the Compact doesn’t pass are the farmers and ranchers who will have to spend decades and millions of dollars adjudicating their water rights.

Those who depend on the ability to access water to support

their livelihoods, support the Compact.

Those who oppose the Compact don't understand how essential water right certainty is to a strong agriculture industry in Montana and are spreading misinformation about the Compact.

At the end of the day our legislators need to remember that their vote on the Compact is ultimately a vote on whether they support agriculture or whether they support the radicals who are intentionally misleading the people of our state.

Failure to pass the Compact will condemn Montanans to decades of litigation and millions of dollars in court costs.

CSKT is a fair settlement for water users on and off the reservation. Without a compact, the adjudication of Montana's water could be held up for decades, creating uncertainty, economic loss, and costing Montana's farmers, ranchers, and water users millions.

(Montana Farm Bureau Federation, 2015)

Gene Curry, President, Montana Stockgrowers Association

Gene Curry testified:

Montana Stockgrowers Association (2015) supports the CSKT Water Compact (Curry, 2015).

After a thorough discussion and legal analysis, the Stockgrowers Board of Directors voted unanimously at our January meeting to support this negotiated Compact.

The Compact includes numerous protections for historic water users that would not be available through litigation. The Compact prohibits the CSKT from making a call on non-irrigation water rights both off and on the reservation,

including all stock water rights.

Many off-reservation water rights granted to the CSKT are already in existence such as the Milltown Dam water right and Montana Fish, Wildlife and Parks instream flow water rights. These rights are generally junior and do not represent an additional burden on water users.

In those cases, where the Compact grants the CSKT off-reservation rights with a time immemorial priority date, their rights are limited to protect historic water use. In addition, the daily flow rates for this right are exceeded approximately 90% of the time.

If the Compact is not ratified, the water right claims filed by the CSKT will likely be larger, more senior, and will encompass a greater area of the state. And regardless of the outcome of the litigation, it will be expensive, lengthy, and disruptive to the current adjudication process.

As an irrigator, I can attest to the significant costs of litigation in defending your water rights. I personally have been involved in numerous years of litigation over water rights, with a significant cost to our family ranch.

It is important to pass this critical piece of legislation and not force thousands of family ranchers into similar situations of this type of litigation.

Errol Rice, Executive Vice President of Montana Stockgrowers Association

Eric Rice testified:

> We conducted an extensive analysis of the Compact and its contents. There is no question that passing the Compact is in the best interest of Montana's ranching community.

Flathead Reservation voters supported the Compact.

Rep. Dan Salomon's HD 93 includes most of the irrigation project. His election by a wide margin in November 2014 to Montana's HD 93 was a vote by project irrigators for the Compact.

Attorney Hertha L. Lund, Montana Rancher

Montana Attorney Hertha Lund has worked on behalf of agriculture on legislative issues for more than 30 years. She represents the Montana Water Stewards a private, non-partisan organization comprised of farmers and ranchers on the Flathead Indian Reservation, and their supporters.

Lund (2015b) wrote why she supports the Compact. Here is my summary of her testimony:

> I'm a Montana rancher and attorney who works for a group of Montana irrigators. My clients support the Compact and believe its approval is essential to their future on the land.
>
> I spent the last 25 years defending ranchers' and farmers' water and other property rights.
>
> During two of the three years of law school, I lobbied at the Montana Legislature on behalf of the Montana Farm Bureau Federation. I helped draft the Private Property Rights Assessment Act, which passed in 1995. After law school, I clerked for the Chief Judge of the United States Court of

Federal Claims, where all takings cases against the federal government are decided. The Judge I clerked for decided several water rights takings cases.

Since that clerkship, I have continued to work for farmers and ranchers on water and other property rights issues. Due to my deep interest in water rights and takings, I was recruited to work for the Washington Farm Bureau Federation on litigation involving the Endangered Species Act ("ESA"), regarding salmon and bull trout populations.

I have litigated water rights and takings cases involving instream flows for fish and irrigation rights before the United States Court of Federal Claims and the Federal Circuit Court of Appeals. With this in-depth background of 20 plus years of experience working in the courts on behalf of farmers and ranchers and their property rights, I support the CSKT Compact.

Those who freely give their legal advice related to the CSKT Compact, takings and other constitutional claims have never tried a case on these issues. Further, their opinions ignore decades of laws that run completely contrary to their expressed legal opinions.

For example, many of those who opposed the Compact have stated that the Compact gives ownership of the State's water rights to the CSKT Tribes. This is simply not true. Montana owns the water, and those who use the water own the water right, because a water right is a "use right."

The Compact, like all of Montana's Indian reserved water rights compacts, or an irrigator's abstract, quantifies the use right that the United States holds in trust for the Indian Tribes pursuant to the Winters case in 1908. Therefore, the opponents are simply wrong both in fact and in legal analysis.

Other opponents have claimed the Compact gives the CSKT Tribe 110,000 acres of irrigated land owned by individuals. Again, this is simply not the case. There is nothing in the Compact that transfers one iota of land ownership. In fact, the Compact specifically states that it does not "transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation."

The Compact does not take private property from any individual. Instead, the Compact quantifies a senior water right that the United States Supreme Court found belongs to Indians on their reservations.

If the Compact fails, then, by law, the CSKT Tribes have to either file their water rights claims or lose them. See §85-2-702 of the Montana Code. All other water rights holders went through a similar process in the 1980s.

If SB 262 were to fail, we expect the CSKT Tribes to file thousands of claims. The Tribes would have to file their claims by July 1, 2015. Based on my experience of litigating in the Water Court, I estimate that it will cost farmers, ranchers, and other water rights holders more than $1.8 billion of their own money to defend their water rights.

I have seen estimates that it will cost Montana taxpayers at least an additional $73 million and several more decades to complete the adjudication process. While all that legal uncertainty is getting straightened out, land values will be depressed, appraisers will be unsure of real values, and bankers will be even more conservative than usual when assessing operating and property loans.

Some Compact opponents want the federal government to be less involved in how Montana manages our water resources, but the truth is passing the Compact will ensure that decisions about Montana's waters will be left to Montanans. The

> Compact is based on the Tribes' many years of biological science and modeling to meet the needs of fish.
>
> Without the Compact, the federal government can come into the state and arbitrarily make decisions about our water use based on the ESA and the needs of certain species—like the bull trout. Therefore, if you really dislike the federal government, and its ability to influence water rights issues in Montana, there is no other choice but to support the Compact.
>
> The CSKT Compact is the product of many years of negotiation and compromise by all parties. There are no legal boogey men in the document. Based on the facts and legal precedent, passage of the Compact is a no-brainer in order to protect property rights, individual citizens' budgets, and taxpayers' dollars.

Major Irrigators of the Bitterroot

The following letter is signed by 19 groups that represent 37,810 acres in the Bitterroot Valley.

The signers are Teller Wildlife Refuge, Tucker Crossing Ranch, Etna Ditch, Union Ditch, Valley Springs Ranch, Overturf Ditch, Spooner Ditch, Woods-Parkhurst Ditch, McPherson Farms, Painted Rocks Water Users Association, Supply Ditch, Kootenai Springs Ranch, Webfoot Ditch, Bitterroot Springs Ranch, Bitterroot Irrigation District, Hawkinson Ranch, Double Fork Ranch, Popham Ranch, and Woodside Irrigation District. (Major Irrigators of the Bitterroot, 2015)

> Farmers and ranchers depend on our water to irrigate our crops, to water our livestock, to care for our families, and to run our businesses. Water doesn't just play a pivotal role in our everyday lives, it is central to our ability to exist and maintain our livelihoods. The importance of water — and the certainty of having reliable access to water — cannot be

overstated.

Montana agriculture, down through the generations, has worked hard to secure and maintain reliable and defined water rights. And up until now, they have for the most part been just that — reliable, defined and certain.

But, in order for that certainty to continue, for all of Montana agriculture on both sides of the continental divide to have access to reliable water and defined water rights, we need our state legislature to approve the Confederated Salish and Kootenai Tribes water compact.

For those not familiar with the Montana water rights process and history, our state operates under the "Prior Appropriation Doctrine." More commonly it's known as "First in Time, First in Right." Thus, the one who can prove first use of the water has the first or senior right to continue using the water. It's important to remember that the Hell Gate Treaty of 1855, guaranteeing the Salish and Kootenai tribes their aboriginal hunting and fishing rights, on and off the reservation, predates all agricultural water rights in Montana.

The latest and much improved version of the CSKT water compact defines, through a cooperative agreement, the water rights provided to CSKT by the 1855 treaty and protects the water rights and access to water for all other Montana water users, including all those who currently hold agricultural water rights.

Rather than take the long and costly road of litigation, members of the state's compact commission have sought to take the high road and hammer out an agreement that will benefit all Montanans and water users, both on and off the tribal reservation.

Without such an agreement, the Tribes would have to file on

all their water rights across their aboriginal lands in order to seek the definition of those rights … an area including all of Montana, from Lewistown to the Idaho border.

This would result in decades of litigation, upending the years of water rights adjudication work already completed, and millions of additional dollars in court costs paid for by individual irrigators and Montana taxpayers. All of which can be avoided by the compact agreement that has been made between the state of Montana and the Confederated Salish and Kootenai Tribes.

If the compact fails and the tribes file their claims with the Montana Water Court, Bitterroot irrigators will be severely impacted. The Bitterroot Valley is well known as one of the primary, off-reservation areas where the tribes can file such claims, for it is their ancestral home.

For Bitterroot irrigators, the CSKT water compact is without question a good deal. The very fact that under the compact the tribes have agreed to not claim any aboriginal in-stream flow rights on the Bitterroot River is pretty remarkable.

Rather, they have agreed to a co-ownership status with Montana Fish, Wildlife, and Parks to four very junior in-stream flow rights on the main stem of the Bitterroot River that FWP now already holds.

Additionally, they have asked to be listed as co-shareholders with FWP for their shares of the state-owned contract water from the Painted Rocks Reservoir and Como Lake. Under this arrangement, FWP will retain the administrative responsibilities and duties of water delivery for fishery needs on the Bitterroot, as they have done in the past.

We can only imagine the impact to agriculture if mandatory in-stream flow rates were to increase greatly under the tribes'

senior rights — agriculture in the Bitterroot Valley would never be the same. Fortunately, the tribes are comfortable with the past cooperative efforts between FWP and local agricultural interests to protect the river, its fishery and agriculture as well. The tribe's primary concern for habitat protection is being met, and they just want to have a collaborative seat at the table with FWP.

Across the state, the recently negotiated and revised compact ensures that water users can continue to utilize their water rights as they always have and receive the same amount of water as they have historically held. Through the creation of a water market utilizing a rare opportunity — a newly available supply of water out of Hungry Horse Reservoir — and a system of shared shortages for the tribes and irrigators alike, the compact also protects irrigators in low water years.

In summary, as irrigators in the Bitterroot, one of the areas impacted most by the water compact, we can say with certainty that the compact will protect irrigators by providing them certainty in terms of water usage and access. Failing to approve the compact this legislative session, the adjudication process would leave irrigators in the Bitterroot and across the state exposed to not only uncertain water rights, but to costly legal battles for decades to come.

Roger Raynal, Manager, Tucker Crossing Ranch

The following letter is from the Tucker Crossing Ranch (2015). This Ranch is arguably the largest single irrigator on the main stem Bitterroot River. It holds the most comprehensive and diverse water rights portfolio in the area including portions of the oldest decreed rights out of the river. It diverts water to the ranch through major irrigation systems including the Woods-Parkhurst Ditch, Supply Ditch, Corvallis Canal, Humble Drain, and Mitchell Slough, as well as being the largest shareholder in Painted Rocks

Water Users Association.

We have built one of the largest, and to this day maintain the highest functioning wetlands mitigation project for MDOT in the region.

From Tucker Crossing Ranch's standpoint, we strongly support the CSKT Water Compact.

The very fact that the tribes have agreed to only assert a co-ownership with FWP of four very junior in-stream flow rights on the main stem Bitterroot and have asked to be listed as co-owners with FWP for their shares of the contract water from Painted Rocks Reservoir and Como Lake, all the while maintaining that FWP will retain the sole administrative responsibilities of water delivery as they have done in the past, is pretty remarkable.

Considering … their potential senior priority date of 1855, if the tribes went so far as to file their claims and make calls on in-stream flow rates, agriculture in the Bitterroot Valley would never be the same.

For most farmers and ranchers, it's a fact of life that financial resources, uncommitted to anything other than day to day operations, are not available to be put forth for attorneys and water rights consultants.

The resources are just not there to object to and fight serious tribal water right filings in order to protect what water has already been decreed or permitted to these landowners for upwards of almost 145 years.

If the compact isn't ratified this session, our water rights and thousands of other similar filings, adjudicated or not, all across Montana will be in jeopardy. No matter how hard we in agriculture fight, our water rights will be junior to the tribes and that's one fact of life. The other fact is the only winners

will be the attorneys.

Our organization has realized and acknowledges that under the proposed compact, we see no impact to our delivery of irrigation water, or any changes in management of the dam works, or delivery of FWP's in-stream water.

The Montana Farm Bureau Federation (MFBF) is the state's largest agricultural organization and advocate for Montana agriculture with over 13,000 ag producing family members statewide.

MFBF delegates voted to formally support a negotiated settlement of the CSKT Water Compact. The largest voice for Montana agriculture has spoken and as such we support the absolute and imperative necessity of getting this CSKT Water Compact passed and ratified.

Walt Sales, Gallatin Valley irrigator

Walt Sales is a fourth-generation farmer in the Gallatin Valley near Bozeman, Montana. He is a current director and a founding member of the Association of Gallatin Agricultural irrigators (AGAI) and a co-chair of Farmers and Ranchers for Montana (FARM).

Walt Sales and 63 irrigators and water users in the Gallatin Valley signed the following letter.

The Compact protects all existing water rights. It doesn't create new water rights or alter existing ones in the Gallatin but ensures that the existing rights and historical uses of Montana's water users are upheld and protected. Through the Compact the tribes have agreed to co-own a few specific in-stream flow rights with Montana Fish, Wildlife & Parks instead of seeking sole ownership. None of the co-owned instream rights are in the Gallatin.

Additionally, with the Compact the tribes have agreed that they will not litigate instream flows that exist off the reservation-meaning Gallatin irrigators won't have to go back to the Water Court, again.

By releasing more water from Hungry Horse Reservoir to be used on tribal lands and in other water short basins, Montana water users will benefit from the availability of additional water resources that the Compact provides. Without the Compact the use of this water remains at the discretion of the Federal Government.

However, should the Compact fail irrigators will be subject to more uncertainty than perhaps any other stakeholder group impacted by the CSKT Water Compact. If the Compact does not pass, much of the adjudication that has already been settled by the Montana Water Court will have to be revisited and a minimum of 35 basin decrees will have to be reopened - including the Gallatin.

This will unquestionably hurt irrigators, individually forcing us back into the adjudication process - even though we thought we were done. Not only will much of the work done by the Montana Water Court have to be reexamined, but with the filing of an overwhelming number of new claims it will take decades to complete the adjudication process.

The Compact has many benefits that are the product of extensive negotiations and cooperative efforts between all parties involved. With input from irrigators, farmers, ranchers, and water users from every corner of the state, the CSKT Water Compact is the best option for all Montanans.

With such positive impacts on the line and the future of our water hanging in the balance, we have an obligation to pass the CSKT Water Compact-not just for the protections that it will offer to water users across the state today, but for the

opportunities it preserves for the farmers, ranchers, and irrigators of tomorrow.

Summary

The above opinions of people whose lives depend upon water speak for the value of the Compact.

No opponent showed Montana would be better served without the Compact than with the Compact.

All opponent' arguments tried to show the Compact was not perfect. However, imperfection does not mean Montana is better served without the Compact.

Chapter 5 – The Compact will benefit Montana.

> One of the biggest benefits of the CSKT Compact is that it keeps the Feds out of our rivers, streams, and tributaries. This is significant, and it is worth paying attention to.
>
> To put it simply - THIS COMPACT LIMITS FEDERAL INVOLVEMENT in Montana's waters.
>
> - Krista Lee Evans

The key question of the Compact

The key question of the Compact required a comparison. The key question was:

> **Will Montana be better served with or without the Compact?**

The word "better" requires a comparison. Simply claiming there is a problem with the Compact does not mean Montana would be better served without the Compact.

The CSKT Water Compact is a bipartisan issue. All legislators should have voted for the Compact based on evaluation of facts.

Compact opponents did not understand the key question of the Compact. They first decided to oppose the Compact. Then they developed self-serving reasons to oppose the Compact.

Opponents believed any perceived imperfection in the Compact was reason to reject the Compact. They could not have been more wrong. Just because a proposed solution has flaws that does not mean it is better to reject the proposed solution.

> **If your horse is not perfect, do you shoot your horse?**

Wise people compare benefits and costs of each alternative. Biased people look only at the negatives of a proposed solution.

Compact opponents did not understand the Compact required a relative judgment. In all their claims against the Compact, no Compact opponent ever showed, or tried to show, that Montana would benefit more without the Compact than with the Compact.

Compact opponents never produced an alternative "business plan" to show how Montana would benefit more without the Compact.

Therefore, Compact proponents won, and opponents lost the logical argument over the Compact.

The value of a negotiated settlement

Everyone familiar with lawsuits knows all parties win if they negotiate a settlement rather than litigate. In fact, many lawsuits end with a negotiated settlement rather than a court ruling.

Negotiated settlements have a distinct advantage over litigation. The parties can achieve more of their desired goals and save time and money compared to litigation.

Because the Compact is a negotiated settlement, it has no binding legal effect on any other Tribe in any state.

The Compact solves a complex problem.

The CSKT Water Compact solves a very complex problem.

In short, the Compact ensures the future of agriculture in Montana.

1. The Compact resolves legal and economic uncertainty.
2. The Compact saves Montanans time and money.
3. The Compact settles thousands of individual lawsuits and resolves thousands of water rights contentions in one document.
4. The Compact settles all remaining water rights differences between Montanans and the Indian tribes.

5. The Compact settles the scope of the tribes' claims for off-reservation water rights.
6. The Compact-confirmed water rights are "in full and final satisfaction" of "all claims to water or to the use of water by the Tribes, Tribal members, and Allottees and the United States . . ."
7. The Compact provides benefits that would be impossible to accomplish through litigation.
8. The Compact simplifies Montana water law. This simplification will result in future savings.
9. The alternative of thousands of lawsuits would have conflicted with each other and raised more legal problems forever.
10. The Compact protects all existing rights for stockwater, municipal, domestic, commercial, industrial and other non-irrigation uses.
11. The Compact respects tribal and treaty rights under the Hell Gate Treaty. It protects existing junior users.
12. The Compact sets aside $30 million for pumping to ensure water is available for fisheries and irrigation in the event of a drought.
13. The Compact forms a technical team that includes irrigators. It guarantees farmers and ranchers can still get water so long as they continue to pay they operation and maintenance charges. It allows farmers and ranchers to pass their entitlement to families or buyers.

Without the Compact, the irrigators had no delivery entitlement. Their water delivery depended upon the decisions of project managers.

More important to the opponents of the Compact, the Compact

limits the reach of the federal government to interfere with Montana's management of its water. Compact opponents had this issue completely backwards.

Opponents thought the Compact opened the door to federal control of Montana's water. The legal documents prove otherwise. The door for federal control of Montana's water is already open. The federal government can use the Endangered Species Act and the Environmental Protection Agency to control Montana's water in a manner that harms Montana's farmers and ranchers. The Compact closes that door.

How the Compact benefits Montana

1. It is the best solution to Montana's complex Indian water-rights problem.
2. It resolves all water rights issues between CSKT and Montana.
3. It removes all CSKT claims east of the Continental Divide.
4. It stops the federal government from controlling Montana's water.
5. It harms no one and does not remove anyone's proven water rights.
6. It protects all non-irrigation water users on or off the reservation.
7. It protects agriculture from senior Indian reserved water rights.
8. It quantifies off-reservation water rights.
9. It assures irrigators receive their historic amounts of water.
10. It stops CSKT off-reservation calls on Montana's water except from the Flathead River.

11. It protects on-reservation irrigators who did not have senior water rights.
12. It provides 90,000 acre-feet of water for development in Montana only, 11,000 of which is for new development controlled by the state. The CSKT gets all revenue from leasing the 90,000 acre-feet.
13. It protects fish.
14. It will bring Federal funds of about $1.2 billion to help the Irrigation project and Montana's economy.
15. It helps irrigators produce more product with less water.
16. It requires CSKT to share in water deficits during droughts.
17. It stops Idaho, Oregon, and Washington from calling Montana's Hungry Horse water.
18. It brings water certainty and builds Montana's economy.
19. It lets cities plan for water, and farmers and ranchers to focus on their business.
20. People, businesses, and money will move to Montana.
21. Property values will increase.
22. It lets Montana build its economy without the costs, delays, and distractions of water rights lawsuits.

The Compact includes these options:

- The three parties can amend the Compact.
- Opponents can make legal challenges to the Compact.
- Opponents can sue for more water rights.

Lund: Why the Compact is good for Montana.

Lund (2014a) published "From Lies to Truth: Why the CSKT Water Rights Compact Is Good for Montana." Lund gives this

overview of the Compact:

> The Confederated Salish and Kootenai Tribes have been negotiating with the State of Montana and the United States for more than 20 years to reach a settlement, known as a *compact*, to quantify the Tribes' reserved water rights. Reserved water rights are recognized by the courts and have a priority date that the reservation was created (in this case, 1855) or "time immemorial." Either way, tribal reserved rights are senior to almost every other water rights holder.

Lund concludes:

> The CSKT Compact will save millions of dollars in litigations expenses for current water rights owners who live the area bordered by the Yellowstone River, Idaho, Dillon, and Canada. It will save Montana taxpayers millions of dollars needed to fund decades of adjudication if the Compact fails.
>
> The Compact will provide certainty to irrigators on and off the reservation, while protecting all current irrigation uses below 100 gallons per minute. It will also protect all current non-irrigation uses on and off the Flathead Reservation.
>
> The CSKT Compact is a common-sense solution to the difficult problem of tribal reserved water rights. It offers a more certain path into the future for water users and taxpayers throughout Montana.

Lund: Compact will have positive economic impacts.

Lund (2015c) wrote "The Compact Will Have Positive Impacts on the Economy." She wrote:

> The Legislature's passage of the CSKT Compact ("Compact") would have positive impacts on the economy both on and off the Reservation. Water for development is difficult to find in Montana.

There are nearly 60,000 square miles of the state in closed basins, over 8,500 square miles of which includes even more restrictive controlled groundwater areas. The basins that are not closed have very limited availability for new water development.

Further, most of the prime water rights in the state for new development would need to go through a change application with the Department of Natural Resources and Conservation (DNRC) in order to be used for development. Unfortunately, the DNRC change application process is lengthy and typically costs tens of thousands of dollars.

On-Reservation Positive Economic Benefits:

The Compact provides for the lease of up to 11,000 acre-feet of water that can be designated by the DNRC for the purposes of mitigating new or existing domestic, commercial, municipal and industrial water users.

Further, the Compact would provide, at a reduced cost, leased water to the Irrigation Project if needed during water shortages. The ability for agriculture or others to lease water will allow development on the Flathead Reservation that, otherwise, would likely not exist.

Additionally, on the Flathead Reservation, the Compact would provide certainty to the farmers and ranchers who currently depend on water from the Irrigation Project to irrigate their crops.

With the Compact, **on-reservation irrigators have a right to receive irrigation water, which they did not have before.** Further, with the Compact it is far more likely that agriculture will be kept whole instead of losing their water rights to senior Indian reserved water rights for instream flow.

Off-Reservation Positive Economic Impacts:

Off the Flathead Reservation, the Compact will provide certainty, alleviate Montana's taxpayers from having to subsidize millions of dollars more for the state-wide adjudication, and will alleviate farmers, ranchers, cities, and other water rights holders from spending millions of their own resources on legal fees.

According to best estimates, if the Compact fails, Montana taxpayers will be contributing at least another $73 million dollars in order to pay for adjudication. Further, additional costs to water rights holders could be as high as $1.8 billion.

Additionally, while the Water Court is adjudicating the estimated 10,000 claims of the Tribes, every water right that is impacted will have an uncertain status. This uncertainty will impact every appraisal. Appraisal values impact sales, mortgages and operating loan values.

Compact gives Montanans drought insurance

The "drought insurance" part of the Compact is sufficient reason alone to approve the Compact. Droughts happen. Severe droughts have occurred in the past and they will occur again.

Trees 200 feet below the surface of Lake McDonald and Lake Tahoe testify to past severe droughts. Past climate can and will repeat itself.

The Compact includes two provisions that will help Montanans make best use of their water during severe droughts.

First, the CSKT agree to share in water shortages. The Compact assures the CSKT will not call off-reservation water, with minor exceptions.

Second, the Compact does not allow downriver states of Idaho, Oregon, and Washington to call Montana's water, specifically from Hungry Horse reservoir.

Without the Compact, the CSKT can call water from Montana's irrigators, and Idaho, Oregon, and Washington can call water from Hungry Horse reservoir during droughts. That event would require western Montanans to stop use of their water.

Compact opponents object to the Compact's acknowledgement of CSKT off-reservation water rights. However, the Compact's inclusion of CSKT's time-immemorial off-reservation water rights is what prevents downriver states of Idaho, Washington, and Oregon from calling Montana's water during droughts.

Montana's long-term economic survival may depend upon the Compact because it gives Montanans the right to use their own water before it leaves Montana.

This drought-protection benefit alone is reason enough to accept the Compact.

Swanson: The conservative case for the Compact.

Cory Swanson, Broadwater county attorney. (2018)

In 2015, the Montana Legislature ratified the Confederated Salish and Kootenai Tribes' water compact with Montana, which settled all water rights claimed by the tribes under the 1855 Hellgate Treaty. This was the culmination of a multi-year negotiation process between Montana's Reserved Water Rights Compact Commission and the tribes. The final step in the implementation of the Salish and Kootenai compact is ratification by the U.S. Congress.

The federal ratification debate has inevitably turned political, and now many of the familiar arguments over this compact have returned. I was heavily involved in efforts to finalize the compact and to ensure its passage through the Legislature, working as deputy attorney general in the Montana Department of Justice. Many of the inaccurate claims of Compact opponents, which we disproved in 2015, have been exhumed from the grave in an effort

to defeat congressional ratification.

I joined Attorney General Fox's administration in 2013 as an opponent to the compact. In my years in private practice, I had worked as the attorney for the Montana Republican Party, took on radical environmentalists, strongly supported multiple-use recreation on federal lands, and had gone to court against tribal over-reach over non-tribal members. I, therefore, viewed the compact as a water grab that was being foisted upon non-tribal water users in the waning days of the Schweitzer administration.

Facts and reality changed my mind because I realized this compact gave water users on the Flathead Reservation a better deal than they could ever achieve through litigation. It gave irrigators on the Flathead Reservation, whether tribal or non-tribal, better protections against being "called" off to ensure instream flows for fisheries than they could ever obtain in a court battle. It established a better measurement and management system for this massive irrigation network. And it provided a funding framework to complete much-neglected maintenance on a ditch system that was literally leaking like a sieve.

Just as importantly, the compact prevented the tribes from asserting ancient fishing-based water rights secured by the Hellgate Treaty across half of Montana, which would have paralyzed the already-delayed statewide water adjudication. Without a compact, most water basins in the western half of Montana would be currently in the midst of re-opening the objection and claims process, even in the few places where the Montana Water Court has entered a final decree. This would be done to deal with the Salish and Kootenai's treaty claims to instream flow water rights with a priority date of "time immemorial" and therefore senior to all other claims.

The compact is not perfect, as few negotiated agreements are, but it is much better than the decades of court battles that promised to

take its place. For comparison, consider Montana's litigation against the state of Wyoming over the Tongue River water rights. That case began under Attorney General Mike McGrath and is still not complete. I was one of the lead attorneys when we finally took this case to trial for 12 weeks in late 2013. At my last count, Montana had spent over $6 million over the life of that case and has taken two trips to the U.S. Supreme Court to settle interstate legal issues.

The Salish-Kootenai water litigation would be orders of magnitude larger, more complex and more expensive than the Tongue litigation. In the Tongue, we dealt with one simple drainage, whose only complexity was a state boundary intersecting its middle. The hydrology, terrain, water-use systems, fisheries and history in a Salish-Kootenai lawsuit are in every way more complex. It presents unique issues of treaty interpretation, tribal history, congressional action, fish biology, hydrology, interaction with the Endangered Species Act, interests of downstream states, and interests of off-reservation users affected by on-reservation claimants. This would bog down the water court, state district court, and federal court, and would pass through the liberal 9th Circuit Court on its likely multiple trips to the Supreme Court.

Only the lawyers will win a case like that.

For those conservatives who oppose ratification of the compact, you owe the rest of us an answer to two essential questions: First, are you going to foot the bill for re-opening the statewide Water Court adjudication? Are you prepared to tell off-reservation water users across all of Western Montana that they need to pay their water lawyers twice and gamble that they can prove the Salish and Kootenai Tribes did not fish along a certain tributary in 1839?

Second, if you are a conservative and you believe in federalism, as I do, why should a congressman or senator sent to Washington reject a compact that was negotiated by a committee of citizens,

passed by a Republican-majority Legislature and signed by a Democrat governor? I can't think of any other situation where conservatives would say our congressman or senator should override the wisdom of our citizens, the will of the Legislature, and the authority of the governor. In the conservative, federalist world I grew up in, the voice of the state mattered in its own affairs.

The voices crying against this compact are only telling you part of the story. They have omitted the part where they want the entire state to take the risk for no reward. The Legislature did the right thing in 2015 by passing the compact, and Congress should respect the state's decision by ratifying it.

Hydrology claims and rebuttals

Ethan Mace is a Surface Water Hydrologist for the Montana Department of Natural Resources and Conservation (DNRC). In February 2015, Mace published his report, *Analysis of Potential Impacts to Off-Reservation Water Users* (Mace, 2015a).

Mace explained the deal with the tribes. Under the Compact, the tribes give up their option to file lawsuits to claim their senior water rights over the western half of Montana. In return, the Compact allows the tribes the following, limited off-reservation water rights:

1. Three time-immemorial priority date instream flow water rights on the Kootenai, Swan, and Lower Clark Fork Rivers.
2. Four time-immemorial priority date headwater instream flow water rights in the Kootenai Basin that are located on National Forest land upstream of any existing water users.
3. One time-immemorial priority date instream flow water right on the North Fork of Placid Creek.
4. Co-ownership of the former Milltown Dam instream

hydropower water right as bifurcated (split into two water rights) and conditioned by the Compact.

5. Co-ownership of 36 existing Montana Fish, Wildlife and Parks (MT FWP) instream fisheries water rights in the Flathead, Rock Creek, and Blackfoot Drainages that will be decreed as part of the Compact.
6. Co-ownership of 47 existing MT FWP instream fisheries water rights in the Bitterroot, Flathead, and Blackfoot Drainages that will not be decreed as part of the Compact.
7. Co-ownership of existing MT FWP instream fisheries water delivery contracts from Painted Rocks Reservoir and Como Lake.
8. Flathead System Compact Water, a large water right sourced from the mainstem and south fork of the Flathead River and Flathead Lake; includes water stored in Hungry Horse Reservoir.
9. Two Flathead River mainstem "other" instream fishery flow rights; these water rights are located on the reservation but are geographically situated downstream of off-reservation water users.
10. Flathead Lake water right that protects the natural fill level, below and not including the 10 feet of water impounded and stored by Kerr Dam.

The Dutton Report

A minority in the Flathead Joint Board of Control (FJBC) who oppose the Compact hired Barry Dutton without the knowledge of the whole FJBC.

Barry Dutton (1994) is a professional soil scientist. From 1989 to 1992, he measured the "actual amount of irrigation water applied to crop plants on the Flathead Indian Irrigation Project" (FIIP).

Later (Dutton, 2015), he compared his historic irrigation measurements with the amounts of irrigation water proposed in the Compact. He concluded the Compact:

> "does not seem to provide the amounts of water local irrigators used in the past … There is no clear process for irrigators to provide documentation and obtain their historic water amounts similar to that available to off-reservation water users."

Dutton argues that the Compact does not use proper hydrological data and does not deliver historic amounts of irrigation water to project irrigators.

Makepeace and Irion rebutted the Dutton report.

On March 18, 2015, Seth Makepeace, CSKT Hydrologist, and Wade Irion, P.E., DOWL, published their rebuttal to Dutton, (Makepeace and Irion, 2015). Here is a summary of their rebuttal.

Contrary to Dutton's claims, the Compact:

1. Improves instream flow levels while preserving historic irrigation water use.
2. Preserves historic crop consumption use and allows flexibility for water distribution.
3. Benefits the FIIP through new sources of water.
4. Shields irrigators from the Tribes' instream flows by setting minimum instream flows notably below target levels or biologically based levels.
5. Allows irrigators to apply for greater amounts of water to grow higher value crops. Irrigators who can receive water from the Flathead Pumping Plant may seek to increase their water supply.
6. Includes adaptive management provisions that allow

adjustment of irrigation if necessary.

7. Uses the RDA approach to water allocation which allows for flexibility in water delivery within the interior of the FIIP, and emerging crop patterns can be accommodated per Project Operator and irrigator policy.

Ethan Mace rebutted the Dutton report.

On April 4, 2015, hydrologist Ethan Mace, of Montana's Department of Natural Resources and Conservation, published his rebuttal to Dutton, (Mace, 2015b).

Dutton made these errors:

1. Used inaccurate representation of his field measurements.
2. Used maximum rather than average data to represent historical water use.
3. Used 2014 version of Compact rather than 2015 version for water allowances.
4. used "potential crop growth" rather than current or historic water use.
5. Contrary to Dutton, the Compact:
6. Provides more water than Dutton's field measurements.
7. Offers more average water per acre than most generous interpretation of Dutton's data.
8. Lowest average historic farm deliveries provide more water than Dutton's data.
9. Allots more water than historical average to the Project.
10. Allows Project Operator to distribute water to irrigators according to historical use.
11. Allows irrigators flexibility in their use of water.

12. Allows irrigators distribute more water to some parcels if they wish.
13. Places no cap on individual applications.
14. Solves the water distribution problem best way possible, far better than thousands of uncoordinated court decisions.
15. Will help the FIIP install water measurement equipment.
16. Will gather data to help FIIP improve water use efficiency.
17. Will make even more water available than planned.
18. Brings significantly more benefits to irrigators and stockgrowers than no Compact.
19. With no Compact, tribes could file on-reservation water rights claims to get larger instream flow rights.

Attorney Simms plays hydrologist.

Simms (2014) claimed 490,859 acre-feet of water was available for the irrigation of 104,859 project acres. He incorrectly assumed all this water was delivered to the irrigators. His assumption gives a "historic duty" of 4.7 acre-feet per acre, which is incorrect.

Here are the facts:

1. The 490,859 acre-feet is the total water supply theoretically available to irrigators. It assumes diversion and pumping structures yet to be built. It counts at least 48,000 acre-feet from the Jocko Valley Irrigation District twice.
2. The Compact Commission used measured data from the period from 1983 to 2002 to create a water budget for the entire project.
3. The Commission put the measured water budget into the HYDROSS water accounting model. The model created water budgets for individual service areas and determined

water savings that can be achieved through improvements to the project.

4. The Compact uses "River Diversion Allowances" (RDAs) to measure the FIIP Water Use Right. RDAs are the amount of water FIIP draws from Flathead Lake or River.
5. The RDAs in the Compact's Appendix 3.2 add up to a maximum RDA of 302,250 acre-feet. The Compact uses the RDAs in Appendix 3.3 to satisfy the FIIP Water Use Right.
6. The Compact's cumulative RDA properly accounts for project inefficiencies and allows for excess water.
7. The RDAs allow irrigators to verify that modeled numbers will supply historic delivery amounts. During drought years, the project can use pumped water to help supply the desired RDAs.
8. The Compact uses numbers that are consistent with historic use on the FIIP. The Compact provides means to adjust these RDAs if they are not sufficient to meet Historic Farm Deliveries.

Summary

The Compact settles CSKT water rights on and off their reservation. Without the Compact, Montana would have to settle CSKT water rights by litigation.

The Compact brings significant value to Montana. It solves the complicated problem of tribal water rights.

The Compact replaces decades of litigation that would be expensive and uncertain. It avoids legal uncertainty that would set back Montana's economy for decades.

The Compact provides money to upgrade the irrigation project

facilities and additional water from Hungry Horse Reservoir.

The Compact gives Montana drought insurance by stopping downriver states from calling Montana's water.

The Compact saves Montana's money. It allows Montana to prepare for a beneficial economic future.

Chapter 6 –The Legal Basis of the Compact

> Without the Compact, the federal government can come into the state and arbitrarily make decisions about our water use based on the ESA ...
>
> Therefore, if you really dislike the federal government, and its ability to influence water rights issues in Montana, there is no other choice but to support the Compact.
>
> - Attorney Hertha Lund (2015b)

To play a game, we must first know the rules of the game. Compact opponents ignored the rules of the game. Compact opponents should have studied the legal information in this chapter. It was available to them, but they ignored it.

Reserved Water Rights Compact Commission of 1979

Montana's 1972 constitution mandated a general statewide adjudication process for water rights. The 1973 legislature passed legislation to create the adjudication process.

This legislation required the federal government to file tribal water rights lawsuits. These federal lawsuits required Montanans to defend their water rights against these tribal water rights lawsuits.

The US Government initiated litigations for the Northern Cheyenne and Crow tribes in 1975. The US Government followed with litigations for the Fort Peck tribes in 1979. All litigations were in federal courts (Coyle, 2015a, b).

These water rights litigations proved time-consuming and costly for all parties. Non-Indians expressed their concern about the consequences of the litigations. All parties wanted a better way to resolve tribal water rights. They learned that lawsuits don't solve water-rights problems.

Montana decided to resolve Indian water rights issues by negotiation rather than by thousands of individual lawsuits.

Montana's 1979 legislature approved SB 76 to create the Reserved Water Rights Compact Commission (DNRC, 2015).

The 1979 legislature gave the Commission the right and duty to "negotiate" and "conclude" compacts for the equitable division and apportionment of waters between the State of Montana, its people, and the several Indian tribes (Coyle, 2015a).

The Tribes and the US Government supported Montana's Commission. All parties preferred to solve their water rights issues by negotiation rather than by litigation.

Montana became the only state to gain the right to negotiate water rights with Indian tribes. Other states had to solve their tribal water rights issues by costly litigation.

Montana's 1979 action stayed the federal government's litigation for 36 years, until July 1, 2015.

During this period, Montana negotiated and ratified compacts with the Blackfeet, Crow, Northern Cheyenne, Fort Peck, Fort Belknap, and Rocky Boy's tribes. Montana's last Tribal Water Compact is with the Confederated Salish and Kootenai Tribes (CSKT).

In 2015, the Montana legislature ratified the CSKT Water Compact. Now, the federal government, the tribes, and the Montana Water Court must ratify outstanding compacts to make them valid.

The Commission also negotiated and concluded water rights claims for other federal lands in Montana. These included national parks, forests and wildlife refuges, and federally designated wild and scenic rivers.

Prior Appropriation Doctrine of Western States Water Rights

To understand the CSKT Compact, we must understand how water rights issues are resolved in Montana. Here is how the US Fish and Wildlife Service explains Western Water Rights. Good references are Water Rights Law (2016) and Water Encyclopedia (2016).

Appropriation Doctrine

The Appropriation Doctrine applies to water laws developed in the arid Western States. This doctrine awards a water right to a person who uses the water. It has four fundamental principles:

9. There must be a legal description of the point of a diversion.
10. There must be a legal description of the place the water will be used.
11. The description must include that flow rate or volume of water that will be diverted.
12. The description must include a priority date.

The priority date determines the priority of a water right.

Beneficial Use

Beneficial use requires efficient or non-wasteful use of water. States have different definitions of beneficial use and may change the definitions over time.

The US Supreme Court ruled that *reserved* water rights cannot be lost by non-use. Non-reserved water-rights can be lost by non-use.

Consumptive Use

Consumptive use is the amount of water diverted but not returned to the stream or underground basin.

Instream Flow Requirement

Instream flow is the water needed to sustain instream values at an acceptable level.

Instream values include protection of fish and wildlife habitat, outdoor recreation activities, navigation, hydropower generation, waste assimilation, and ecosystem maintenance.

Ecosystem maintenance includes recruitment of fresh water to estuaries, riparian vegetation, floodplain wetlands, and channel geomorphology.

Water requirements sufficient to maintain all these uses at an acceptable level are the "instream flow requirements."

Perfected Right

Perfected Right comes with completion of all required steps to secure a State appropriative water right. A state-issued Water License or Certificate is prima facie evidence of a water right and is considered real property.

Priority

Priority determines the order of rank of the rights to use water in a system. The first person to use water for a beneficial purpose has a right superior to later users. Under the prior appropriation system, shortages are not shared.

The priority date of a Federal reserved water right is when the feds withdrew the land from the public domain. Examples are a National Park or an Indian reservation.

Some western States have different priorities for different water use. For example, domestic use may have first right to water in times of shortage, regardless of priority date.

Call

An owner of a higher priority water right does not have to release

water to a lower priority until the higher priority is satisfied.

An owner of a higher priority water right does not have to share water with owners of lower priority rights during a water shortage.

An owner of a higher priority water right whose water right is not satisfied can “call” water from owners of a lower priority rights. Upon receiving a call, owners of lower priority water rights must restrict their water use until the higher priority right is fully satisfied.

Public Trust Doctrine

The Public Trust Doctrine is the State’s responsibility to hold property rights in trust for the benefit of its citizens. The trust can apply to navigable waters, beaches, parks, and "all natural resources."

California used it to challenge the City of Los Angeles’ diversions from tributaries of Mono Lake that were destroying the Lake's unique habitat.

Montana used it to assure stream access to the public.

Hell Gate Treaty 1855

The CSKT Compact is necessarily different from Montana’s compacts with the other six Montana tribes because the CSKT are the only Montana tribes that signed the Hell Gate Treaty. The Hell Gate Treaty gives the CSKT claims to off-reservation water rights.

No other Montana tribe has a treaty with the United States with language like CSKT’s treaty regarding the right to take fish at usual and accustomed places. Therefore, no other tribe in Montana has a legal basis to assert similar off-reservation claims.

The Hell Gate Treaty is a Stephens’ Treaty. It differs from Fort Laramie Treaties signed by all other tribes in Montana. The Hell Gate Treaty contains this special language:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Central to the 2015 debate over the CSKT Compact, was whether the "right of taking fish" includes a water right. Some Compact opponents claim the right to take fish is not water right. However, many court decisions disagree with opponents' claim.

Court rulings described below show the CSKT have legitimate water rights claims in Montana. These court decisions are now case laws that decide how future courts will rule on the Hell Gate Treaty language.

The US Supreme Court and other courts decided the Hell Gate Treaty gives the CSKT two kinds of off-reservation water rights.

- They have aboriginal water rights to fish off-reservation on land they used before the creation of their reservation. These rights have a priority date of "time immemorial."
- And they have federal reserved water rights to off-reservation water necessary to meet the purposes of their reservation. These rights have a priority date when they signed the Treaty. The CSKT signed their Hell Gate Treaty on July 15, 1855.

The CSKT water rights predate all non-Indian water rights in Montana.

The courts have agreed to use three basic principles when they interpret Indian treaty language. They resolve all uncertainties in a treaty in favor of the Indians. They interpret a treaty as the Indians

who signed them would have understood the treaty. They interpret the treaty in favor of the Indians involved.

The courts interpret treaties in favor of the Indians because the Indians were the weaker parties in treaty negotiations. They were not familiar with the language of the treaties and typically had no choice but to sign the treaties.

Daily Kos on the Hell Gate Treaty

When the United States divided Oregon Territory into Washington Territory and Oregon Territory in 1853, western Montana was included in Washington Territory. President Millard Fillmore appointed Isaac I. Stevens as the territorial governor of Washington.

Stevens began an aggressive plan to deprive the Indian nations within the territory of title to their lands. Western Montana was not high on his priority list and so he did not arrive there to "negotiate" treaties until 1855.

Governor Stevens considered the western Montana tribes – the Flathead (also called the Bitterroot Salish), the Pend d'Oreilles (also called the Upper Kalispel), and the Kootenai – to be unimportant. His goal was to consolidate them, together with other tribes in eastern Washington Territory, on a single reservation.

At the treaty council, held near the present-day city of Missoula, the head chief for the Flathead was Victor, the head chief for the Pend d'Oreilles was Alexander, and the head chief of the Kootenai was Michelle. The Pend d'Oreilles chief Big Canoe also played an important role in the negotiations.

Stevens insisted that all three tribes be treated as a single nation because he assumed they were all Salish. He was unaware that the Kootenai are not a Salish-speaking people.

The Kootenai were included in the treaty council because they had

one band living on the western shore of Flathead Lake. However, the Kootenai speak a language unrelated to the Salish languages of the Flathead, the Pend d'Oreille, and the other tribes in eastern Washington Territory. Not only are they culturally distinct but they did not have a peaceful relationship with the Flathead.

Following the standard practice of American treaty councils, the Americans simply appointed Victor as the head chief over the three tribes. The Americans preferred to deal with a single chief, preferably a puppet dictator whom they could control.

The American plan for a single reservation was not met with enthusiasm. Stevens proposed that the reservation for the three tribes be created in the Jocko Valley, the homeland of the Pend d'Oreilles. However, the Flathead did not want to leave their homeland in the Bitterroot Valley a hundred miles to the south. When Chief Victor refused to sign the treaty until it included provisions for a separate reservation for this people in the Bitterroot Valley, Governor Stevens called him an old woman and a dog. Victor replied:

> I sit quiet and before me you give my land away.

Chief Alexander, a Christian, favored the treaty as it would give his people an opportunity to learn more about Christianity. He did, however, accuse Governor Stevens of "talking like a Blackfoot." This was not a compliment.

Red Wolf (Flathead) questioned the wisdom of combining the three tribes and tried to explain to the Americans that each of the tribes is different. The Americans turned their deaf ears toward his words and continued to act upon their delusion that all Indian cultures were the same.

Big Canoe, a Pend d'Oreilles, pointed out that his people had offered the hand of friendship to the Americans since first contact. He questioned why there was a need for a treaty, saying that

treaties were used to settle differences between enemies. While he still offered friendship, he felt the Americans did not have the right to come into his territory and take away his lands.

While the 1855 Treaty of Hell Gate established what would become the Flathead Reservation in western Montana, it also acknowledged the rights of the Flathead to remain in their homeland in the Bitterroot Valley. According to the treaty, which was theoretically the supreme law under the Constitution, the Bitterroot Valley was to be closed to non-Indian settlement. Article 11 of the treaty states:

> No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be open to settlement until such examination is had and the decision of the President made known.

Victor felt sure that the President would agree with him that the Bitterroot Salish should be allowed to retain their traditional homelands.

As with the other treaties negotiated by Stevens, the Hell Gate Treaty states:

> The exclusive right of taking fish in all the streams running through or bordering the reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places ... together with the privilege of hunting, gathering roots and berries...

The assembled chiefs signed the treaty agreement believing that the United States would protect them from Blackfoot raids and provide them with generous monetary payments and annual appropriations. The chiefs were unfamiliar with American concepts of land ownership and both the treaty and the discussions regarding land ownership were poorly translated.

The Kootenai, whose language and culture was very different from that of the two Salish-speaking groups, claimed a territory that

included part of western Montana, northern Idaho, and southern British Columbia. One of the Kootenai bands in Idaho declined to move to the newly established Flathead Reservation and today maintain their own reservation. The Elders of the Kootenai Nation in Idaho report that Michel did not attend the treaty council but sent some men to hear what Stevens had to say. According to the Elders:

> When they returned and told him about the plan to put us all on a reservation in return for giving up all of our Aboriginal Territory, Chief Michel was horrified. He said that would be impossible.

According to the Elders:

> So, no Kootenai ever signed that Hellgate Treaty. Someone forged the Kootenai marks on it.

Montana 1889

Montana was admitted to statehood in 1889. A prerequisite for North Dakota, South Dakota, Montana, and Washington for admission to the Union was to accept the federal Enabling Act, § 4 Second; 25 Stat. 676 (1889) and declare:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to … all lands … owned or held by any Indian or Indian tribes … and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, … -.

In response to this requirement, Montana adopted Ordinance No. 1, Second (1889), and disclaimed any right or title to Indian lands. This Ordinance was "irrevocable without the consent of the United States and the people of … Montana." Ordinance No. 1, Sixth (1889).

Winans 1905

The US Supreme Court ruled in U.S. v. Winans, 198 U.S. 371 (1905) that the Hell Gate Treaty gives the CSKT aboriginal water rights to fish on land they used before the government created their reservation (Wikipedia, 2016e). The priority date for these rights is “time immemorial.”

Specifically, the Winans Court held the Yakama Tribe’s Stevens’ Treaty reserved for them “the (aboriginal) right of taking fish at all usual and accustomed places.”

The court ruling means “Stevens’ Treaty” Indians have the right to cross over and temporarily occupy lands to exercise their fishing rights.

These off-reservation water rights are treaty-based, aboriginal rights that stem from "tribal uses that existed before the creation of the reservation."

The court confirmed these Stevens’ Treaty rights supersede state laws.

The Winan’s ruling gives the CSKT rights to land and water east of the Continental Divide.

The key to the US Supreme Court’s ruling is the following, known as the “reserved rights doctrine”:

> The US Supreme Court concluded the Hell Gate Treaty was not a grant of rights from the US to the Indians but a grant of rights from the Indians to the US wherein the Indians retained all rights they did not grant to the US under the Treaty.

Winters 1908

The United States Supreme Court first recognized Indian reserved water rights in Winters v. United States.

In 1888, a statute defined the Fort Belknap tribe reservation to

include 1400 square miles with its northern boundary centered on the Milk River. The Fort Belknap Reservation depended upon water from the Milk River.

After Montana achieved statehood in 1889, the federal government began to divert water from the Milk River for the needs of its officers and agents in charge of the reservation.

In 1898, the government began an Indian irrigation project that allowed non-Indians to divert water from the Milk River upstream of the reservation. These water users had obtained water rights under Montana's prior appropriation law.

Then came the drought of 1905. There was not enough water for both the Indian and non-Indian needs. So, the federal government filed and won a lawsuit to protect the Indian reservation water. An appeal court and the U.S. Supreme Court affirmed the suit.

The US Supreme Court concluded in Winters v. United States, 207 U.S. 564, 577 (1908) that when Congress created the Fort Belknap Indian Reservation in northern Montana, it reserved by implication not only the reservation land but also an amount of water from the Milk River necessary for the purposes of the reservation.

The Court ruled, when the US government establishes a reservation, it also creates Indian reserved water rights. The priority date of these water rights is the date the government established the reservation. These Indian reserved water rights supersede water rights obtained under state law. Winters rights are not lost if they are not put to beneficial use.

These water rights became known as "federal reserved water rights" or Winters rights. Winters rights are the implied reserved water rights necessary to satisfy the purposes of the reservation.

The "Winters doctrine" gives these tribal water rights:

- The rights begin the date the federal government created the reservation, making tribal rights senior to most other

current users of Western water.

- The rights cannot be forfeited by non-use.
- Although sometimes quantified as the water necessary to support the "practically irrigable acreage" on a reservation, these rights can be used for non-agricultural purposes.
- The rights involve the future needs on a reservation, not just the present needs.

McCarran Amendment 1952

Congress passed the McCarran Amendment in 1952 (McCarran, 1952). The Amendment waives the United States' sovereign immunity in lawsuits about ownership or management of water rights by those who are affected by the result of the lawsuit. It gives others the right to join in such a lawsuit as a defendant.

Prior to the Amendment, sovereign immunity kept the United States from being joined in any suits. The Amendment enabled suits concerning federal water rights to be tried in state courts.

Today, most stream system adjudications occur in state courts. Many tribes believe state courts are hostile to their rights because many state judges are elected by popular vote.

Off-reservation claims appear to fall within the context of the McCarran Amendment.

Cappaert 1976

United States Supreme Court certified Winters (1908) in its ruling in Cappaert v. United States. The court ruled:

> When the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States

acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. - Cappaert v. United States, 426 U.S. 128 (1976).

Adair 1983

In 1983, the Ninth Circuit Court held in United States v. Adair that a Tribe can prevent other water users from depleting the stream waters below a protected level in any area where a non-consumptive right exists.

Adair court found that even if the government disestablished a reservation the tribe still retained the right to fish in all their usual and accustomed places. Their right to fish means the tribe has the right to the water necessary to support fish in those places. The priority date is time immemorial.

The tribes view these rights as part of the treaty they signed when they gave give up vast lands and resources.

Kittitas 1985

In 1985, the Ninth Circuit Court of Appeals Kittitas Reclamation Dist. V. Sunnyside Valley Irrigation Dist. 763 F.2d 1032 (9th Cir. 1985) decision upheld a federal court decision.

The decision ordered the Bureau of Reclamation to release sufficient water from a Yakima reservoir to preserve salmon eggs threatened by low water flow in an Indian off-reservation fishing area.

The decision showed that Tribes with a Stevens' Treaty can demand enough off-reservation water flow to protect their fish.

Greely 1985

In 1985, the Montana Supreme Court decided the landmark case,

Greely v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation (1985).

Lund (2015a) explains the significance of Greely (1985):

The Montana Supreme Court discussed Indian reserved water rights for tribal hunting and fishing and stated any "ambiguity in a treaty must be resolved in favor of the Indians."

The Montana Supreme Court quoted from the 1983 Ninth Circuit Court of Appeals Adair decision regarding instream flow rights:

> The right to water reserved to preserve tribal hunting and fishing rights is unusual in that it is non-consumptive. A reserved water right for hunting and fishing purposes
>
> "consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies."

The Court explained the difference between State-based water rights and Indian reserved water rights:

> State-created water rights are defined and governed by state law. [Art. IX, § 3(4), Mont. Const. 1972; § 85-2-101, MCA.] Indian reserved water rights are created or recognized by federal treaty, federal statute or executive order, and are governed by federal law.

The Court explained that the Montana Water Use Act:

> …recognizes non-consumptive and instream uses for fish and wildlife. It is sufficiently broad to allow adjudication of water reserved to protect tribal hunting and fishing rights, including protection from the depletion of streams below a protected level.

The Court found that tribal uses that existed before the creation of the reservation have a "time immemorial" priority date.

The Court cited several federal cases and a US Supreme Court case that support its reasoning.

Coyle (2015a) gives the summary of several federal court decisions provided by the Montana Supreme Court:

1. State appropriative water rights and Indian reserved water rights differ in origin and definition.
2. Appropriative rights are based on actual use. Appropriation for beneficial use is governed by state law.
3. Reserved water rights are established by the purposes of the reservation rather than by use of the water.
4. The basis for an Indian reserved water right is the treaty, federal statute, or executive order that established the reservation.
5. Federal Indian law governs treaty interpretation.
6. The priority date of an Indian reserved water right depends upon the nature and purpose of the right.
7. Reserved water rights are difficult to quantify because the purposes of each reservation differ. Federal courts have devised general quantification standards that differ with the purposes of the reservation.
8. For agricultural purposes, the reserved right is a right to sufficient water to "irrigate all the practicably irrigable acreage on the reservation." This means the tribes do not need to currently use the water to maintain their rights to the water.
9. The right to water to preserve tribal hunting and fishing rights is non-consumptive. A reserved right for hunting and fishing purposes "consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right

applies." (Greely)

10. In 1995, the Washington Supreme Court affirmed the Greely 1985 court decision that Indian off-reservation water rights include an instream flow necessary to maintain their fish habitat.

Stevens' Treaty Summary

The professional Compact attorneys conclude the above referenced cases strongly indicate the CSKT would prevail on CSKT off-reservation water rights in the Montana Supreme Court and the Ninth Circuit Court of Appeals.

No court has issued binding legal precedent for courts in Montana on whether the fishing language confers an instream water right sufficient to protect off-reservation fisheries. However, various courts have indicated that such claims may be valid and enforceable.

In the absence of the Compact, the language of existing legal precedent makes it very likely federal and state courts will uphold the Tribes' claims to off-reservation instream flow rights. Therefore, the compact addresses, and must address, off-reservation rights.

Legal precedents support these outcomes in any future litigation:

1. Tribes with Stevens' Treaties, like the Hell Gate Treaty, have off-reservation fishing rights.
2. Their rights are substantive and continue to exist.
3. Beneficial uses in Montana include instream flows for fisheries.
4. A tribal reserved right for fishing includes the right to "prevent other appropriators from depleting the stream waters below a protected level in any area where the non-

consumptive right applies."

Under the Compact, the tribes reserved any rights not "granted, recognized, or relinquished" in the Compact. This includes the "right to the continued exercise by members of the Tribes of Tribal off-Reservation rights to hunt, fish, trap and gather food and other materials, as reserved in Article III of the Hell Gate Treaty."

Montana Water Court

The Montana Water Court has jurisdiction to adjudicate federal reserved water rights as well as Indian reserved water rights, including non-reserved federal water rights that are held by the federal government under state law.

The Montana Water Court likely has jurisdiction under the McCarran Amendment to hear any federal water claim except reserved water rights.

The inclusion of off-reservation water claims complies with the intent and requirements of the McCarran Amendment, the Montana General Stream Adjudication, and the jurisdiction of the Montana Water Court.

The Montana Water Court concluded when it approved the compacts of the Fort Peck and Rocky Boy Reservations in 2001 and 2002 (Coyle, 2015b):

> All negotiations and adjudications quantifying Indian reserved water rights involve extensive and complex disputed issues of fact and law.
>
> They inherently involve competing interests in a scarce resource, the allocation of which must be determined by ambiguous, perhaps anachronistic law, evolving governmental policies, and increasingly sophisticated science--all amidst rapidly changing circumstances, within the confines of a complex adjudication process.

That is precisely the incentive for negotiation and settlement of complex water right adjudications.

Legal Ambiguity

The legal precedents in Montana tribal water rights are ambiguous. This ambiguity will cause these litigations to be less predictable, take more time, and cost more.

Compact opponents have a valid argument that they might win some water rights lawsuits because of legal ambiguity. But that does not mean litigation is a preferred choice. It means litigation is a gamble.

The 1979 Montana legislature recognized the ambiguity in Montana's water law. That was one reason the legislature decided to negotiate tribal water compacts.

Coyle (2015a) wrote about the ambiguity in Tribal water rights laws in Montana:

> Many aspects of these rules and decisions are ambiguous and thus it is difficult to predict the outcome of their application to CSKT water rights in litigation.
>
> For example, the Winters Court held that reserved water on the Fort Belknap Reservation could be beneficially used for "acts of civilization" as well as for agricultural purposes. Winters v. United States, 207 U.S. 564 (1908).
>
> "Acts of civilization" could be found to include a variety of uses, including consumptive uses for industrial purposes. Also, reserved rights may reflect future need as well as present use.
>
> Most reservations have used only a fraction of their reserved water, but the "practically irrigable acreage" standard applies to future irrigation of reservation land, not present irrigation practices and current consumptive uses. Winters rights are not

subject to abandonment.

The Montana Water Court Memorandum Opinion wrote of several Supreme Court decisions (Coyle, 2015a, b):

> [w]hether by adjudication or by negotiation, determining the scope and extent of Indian reserved water rights has proved difficult at best.
>
> As articulated by the United States Supreme Court, the Reserved Water Rights Doctrine is vague and open-ended and has been construed both broadly and narrowly by subsequent federal and state courts.
>
> After nearly one hundred years of legislation, litigation, and policy making, there are still no bright lines clearly and consistently delineating the Doctrine. Most of the legal issues inherent in the Doctrine remain unsettled and hotly debated and are now complicated by decades of distrust and competing policies.
>
> Memorandum Opinion, Case WC 92-1 (2001).

When the Montana Water Court approved the Fort Peck and Rocky Boy Compacts in 2001 and 2002, Judge Loble wrote that Compact negotiations were complicated by "competing interests in a scarce resource" and "ambiguous, perhaps anachronistic law" (Coyle, 2015a).

Prima Facie Proof

Prima facie proof raises the bar in Montana water rights litigations. Montana originated prima facie proof in 1979. It does not apply in other states. Prima facie proof means courts must consider all state, federal government, and Indian reserved water rights claims as proof of the water right.

The claim itself proves the right. Defendants must prove the claim is wrong. Prima facie proof makes it invalid to assume that

defendants in Montana courts will achieve the same success as defendants in other states.

Farmers, ranchers, and other large water users must challenge claims to their water rights or lose them. If they lose, they may be out of business. Their defense to such claims will be long, difficult, and expensive.

Coyle (2015a) wrote about Montana water rights:

> All statements of claim, for state-based claims and federal and Indian reserved rights, are prima facie proof of their content. Section 85-2-227(1), MCA.
>
> Objectors have the burden of producing evidence that contradicts and overcomes elements of the prima facie claim. Memorandum Opinion, Water Court Case 40G-2, p. 13 (March 11, 1997).
>
> This is the burden of proof for every assertion that a claim is incorrect, including for claimants objecting to their own claims. Rule 19, Water Right Adjudication Rules (W.R.Adj.R.)

How do Montana's farmers and ranchers prove their water rights are superior to tribal water rights? The tribes have prior water rights. Their claims are prima facie proof that their claims are valid.

Coyle continued:

> In Montana, this prima facie standard would apply to CSKT claims just like any other claims in the adjudication process, so any objectors would have the burden to attempt to contradict or overcome elements of CSKT claims.
>
> This makes comparisons or predictions based on Indian reserved water rights litigation in other states very difficult.
>
> In Montana, unless Department of Natural Resources and

Conservation (DNRC) places issue remarks on claims, the Court reviews claims pursuant to Rule 8, W.R.Adj.R, or objectors actively oppose claims through the objection process, the prima facie standard can result in claims proceeding through adjudication unchallenged. The final decree can then reflect the claims as they originally appeared on the statements of claim.

Objectors must actively participate in adjudication proceedings in order to maintain an objection. If an objector fails to appear at a scheduled conference or hearing or fails to comply with an order issued by the Water Court, the Water Court may issue orders of sanction including dismissal of the objection. Rule 22, W.R.Adj.R.

Litigation is a very high risk.

Montana legislators who voted against the Compact did not properly evaluate the risk to Montanans. Legislators who voted against the Compact voted to commit Montanans to long, expensive, high-risk defense of their water rights. Native American Rights (2016) and Sacks Tierney (2011) describe the case law that would help the CSKT win their lawsuits.

If the Compact is rejected at any level, the CSKT will claim off-reservation water rights that cover the western half of Montana.

Coyle (2015a) wrote that a normal litigation in one water basin takes over 5 years to be 90 percent complete. The last 10 percent can take years more.

Litigation of a CSKT claim would take much longer than 5 years. Litigation of many claims could take 20 to 30 years.

Litigation cannot produce the benefits of a good negotiation. Litigation is constrained to provide only an answer to who owns the water right. Coyle (2015a) wrote:

> Settlements can address issues such as water administration and funding, but a Water Court decision, issued after the claims are filed and all objections are litigated to finality, would set forth only the findings of fact, conclusions of law, and elements of water rights as dictated by Section 85-2-234, MCA.

Coyle concluded:

1. If Montana fails to approve the CSKT Compact, the Montana Water Court will face the most complex, most contentious litigation in its history.
2. The cost of water rights adjudication over the last thirty years has been $90 million. This does not count the costs to federal agencies, local governments, and water users.
3. If Montana fails to approve the CSKT Compact, Montana water rights will remain unsettled for a very long time.

Coyle (2015b) wrote:

> The U.S. Department of the Interior and Department of Justice will review and evaluate the tribes' damages claims to facilitate Congress in considering the compact and the settlement. New rules suggest that the parties will proceed within the next 12 months.

Montana Supreme Court: Compact is constitutional.

In August 2016, the Flathead Joint Board of Control (FJBC) appealed Judge Manley's decision to the Montana Supreme Court.

On November 8, 2017, the Montana Supreme Court ruled the Compact is constitutional and overturned Judge Manley's decision that a portion of the Compact was unconstitutional.

The Farmers and Ranchers for Montana (FARM) praised the high court's ruling. FARM spokesperson Shelby DeMars said,

> After more than a decade of negotiations, the resulting settlement will protect existing water rights, prevent decades of costly litigation and invest in critical infrastructure in our state.

The result shows that Compact proponents were correct.

If opponents had one more vote, they would have killed the CSKT Water Compact forever and seriously harmed Montanans.

The FJBC paid lawyers $596,691 to file lawsuits to stop the Compact. They wasted irrigators' money and made lawyers happy.

McGirt v. Oklahoma 2022

The US Supreme Court ruled on July 9, 2022, that determined the majority of land in eastern Oklahoma is rightfully Indian Country. The Supreme Court invalidated the State of Oklahoma claim that the Indian treaties of 1866 were no longer valid.

This ruling supports the CSKT water rights lawsuits if the Compact were rejected.

Montana Water Court can kill the Compact 2023

Opponents of the CSKT Water Compact continue to try to kill the Compact. They think the Compact is a government conspiracy. They run newspaper ads that show their ignorance of the Compact.

The Water Court is accepting public objections to the Compact through February 9, 2023.

Brown can kill the Compact, but he could take several years to decide. When he approves the Compact, opponents can appeal to the Montana Supreme Court and the US Supreme Court.

Personally, I predict Brown will approve the Compact because the opponents never had and never will have any valid legal arguments against the Compact. And the Montana and US Supreme Courts

will approve the Compact.

Here is the Water Court document of December 2, 2022:

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

IN THE WATER COURT OF THE STATE OF MONTANA
CONFEDERATED SALISH AND KOOTENAI TRIBES –
MONTANA – UNITED STATES
COMPACT

* * * * * * * * * * * * * * * * * * * *

CASE NO. WC-0001-C-2021

ORDER EXTENDING OBJECTION DEADLINE

The Water Court issued the Confederated Salish and Kootenai Tribes of the Flathead Reservation—State of Montana—United States Compact Preliminary Decree and Notice of Availability ("Preliminary Decree") on June 9, 2022. The preliminary decree objection period closes on December 6, 2022.

Numerous parties filed requests for extension. The requests state a

number of reasons, many of which fall into two general categories: (1) assertions that parties entitled to receive personal notice of the Preliminary Decree did not receive personal notice; and

(2) assertions that the Preliminary Decree is too complicated to file a complete objection within the time allotted. Many extension requests provide little detail, and some are framed more in the form of an objection rather than a request for extension. Most of the requests received do not request a specific amount of time for an objection extension.

The Water Use Act authorizes the Court to extend the deadline for filing objections upon a timely application and for "good cause shown." Section 85-2-233(2), MCA. Absent a showing of good cause, requests for extension will be denied. *See*, Corrected Order Denying Request for Extension of Objection Period, Basin 76E (Jan. 28, 2019) ("Basin 76E Order").

To demonstrate good cause for extension of an objection period, parties seeking an extension are expected to "specifically identify unique obstacles, problems, or circumstances that prevent them from preparing and filing objections." Basin 76E Order at 4. Reasons stated vaguely or tied to the normal or reasonably anticipated press of business fall short of showing good cause to extend a basin objection deadline. *Id*.

On November 28, 2022, the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America (collectively, the "Compacting Parties") filed a joint response ("Joint Response") to some of the extension requests. (Doc. 119.00). The Joint Response provides information about concerns raised in four of the requests.

Ultimately, the Compacting Parties state they do not oppose an extension to the objection deadline within certain parameters. This statement of non-opposition provides the requisite good cause to extend the deadline.

After considering the extension requests, the Joint Response, prior extension requests for other decrees, and the Court's general practice for extension requests, the Court concludes a 60-day extension is appropriate, adjusted slightly for weekends and mailing.

In issuing this extension, the Court cautions that no determination has been made to grant any further extensions, and any further requests for extension must establish good cause in light of this extension.

ORDER

THEREFORE, the pending requests for extension of time to file objections are GRANTED to the extent the objection period is extended for 60 days until and including **February 9, 2023**.

This extension applies to all potential objectors, regardless of whether they requested an extension. The Court will publish a notice of this extension in the same newspapers that published availability of the Preliminary Decree.

The Court will provide notice of this Order to each person who filed a request. If the extension request identified an attorney, notice is provided to the referenced attorney.

This Order also shall be published on the Water Court's website at: https://courts.mt.gov/Courts/Water/Notices-Info/PublicNotices.

The Court also provides notice via its listserve.

–

Stephen R. Brown

Associate Water Judge

Chapter 7 – Fifteen irrational reasons

> The other party is not the enemy. They are the opposition. In our democracy, we are lucky to have an opposition, to have honest debate.
>
> - Jim Webb, 2016 Democratic presidential candidate.

It is unfortunate that the opponents used too many invalid reasons to support their position. If any opponent did propose a valid reason to reject the Compact, then it was lost in the noise created by their invalid reasons.

Claim 1: Compact is an Agenda 21 Conspiracy

Good marketers know the best way to convince people to believe and buy is through fear. They know that once a person believes because of fear, that person will reject information that proves his belief is wrong. So, who is pulling the opponents' strings?

Compact opponents claimed the Compact is an Agenda 21 federal government conspiracy to steal Montana's water and move people out of Montana and into a crowded apartment complex in southern California, or maybe into a FEMA prison.

Opponents begin with their fear that the Compact is a government conspiracy. Then they invented reasons to oppose the Compact. Their reasons look like they threw spaghetti at the wall to see if any reason would stick. None did.

No Compact opponent ever produced evidence to support their claim that the Compact is a government conspiracy or connected to Agenda 21. That's because it's not a government conspiracy and it is not connected to Agenda 21.

Fear of a government conspiracy was the foundation of Compact opposition. All other opponents' claims were made up to support their prior belief that the Compact was bad.

Elaine Willman claims the Compact is a conspiracy.

The John Birch Society's New American magazine published Alex Newman's interview with Elaine Willman on June 26, 2015. Willman (Newman, 2015) wrote:

> Leading federal Indian policy expert Elaine Willman … told The New American … that the Obama administration and federally funded tribal governments are colluding to assault the U.S. Constitution, property rights, and American liberties. She said the American people must wake up to the threat and take action.
>
> Americans on or near Indian reservations, she said, are facing the brunt of the joint federal-tribal government assault on their property rights, water rights, and a broad range of other constitutionally guaranteed rights.

Willman (2015a) posted a letter in February 2015, that cast the CSKT-State water compact in the language of war:

> The Proposed CSKT Water Compact is the Revolutionary War for citizens of Montana. Its consequences are as severe. Where American colonists had lost the ear and trust in their British leaders, so too have Montanans lost the ear and trust in their State elected officials.
>
> And the Compact is only the beginning. There will be more: Kerr Dam, the Columbia River Treaty, threats of the CSKT initializing "repatriation" of their entire reservation, forcing non-tribal members off their properties and off the reservation.
>
> Much like the Revolutionary War started on a bridge in one of the 13 colonies, this 2014 Revolutionary War starting on the CSKT Reservation in Montana will spread quickly to other states.

Willman (2015b) wrote in a letter published on July 22, 2015, by the Western Ag Reporter,

> "I became convinced that the CSKT Compact is a template for federalizing all state waters and implementing communalism and socialism consistent with Agenda 21 and that it is intentionally aligned to spread tribalism as a governing system while eliminating State authority and duty to protect its citizenry.
>
> "It is my belief that Montana is Ground Zero for test-driving this model in a highly prized state of small population. I so seriously believe this peril is a fight worth fighting that I have walked away from an excellent employer and moved my family, household, and consulting business to Ronan, Montana."

Willman's case against the Compact fails.

Willman wrote an open letter against the Compact (Berry, 2015d). Her letter proves Compact opponents are driven by their conspiracy theories, not facts or logic. Willman wrote,

> "The 2015 Montana State Legislature does not remotely resemble the Montana Legislature of the 1970's, when the State was acting like a State and damn proud of it."

Follow Willman's logic.

She approves the work of Montana's 1970's legislatures. Therefore, she must approve the Reserved Water Rights Compact Commission (DNRC, 2015) created by the 1979 legislature. Therefore, she must approve the Indian compacts, the CSKT Compact, negotiated by the Commission.

But Willman is not logical. With no valid argument, she claimed the CSKT Compact, the most notable product of the 1970's legislatures, is evil.

Is Willman all mixed up? Yes, and so are her followers.

Without presenting any evidence, Willman claims the Compact is a conspiracy. But that is the way with conspiracies. You don't have to prove something is a conspiracy. You only need to claim something is a conspiracy. Then all the nutcases come out of their sandboxes to believe you and follow you.

Willman believes the 2015 legislators who voted to approve the Compact were influenced by five evil forces:

1. The federal Executive branch.
2. Tribal governments.
3. Environmental extremists.
4. United Nations.
5. Agenda 21

Willman presented no evidence that the federal Executive branch, environmental extremists, United Nations, or Agenda 21 were involved in the battle for Compact ratification. But, hey, you only have to mention those things to attract radical right followers.

Willman and her followers ignore facts. Here are the facts:

- The Montana House ratified the Compact by one vote. Her five evil forces were nowhere to be found.
- The Montana House would have rejected the Compact if 49 Libertarian voters in HD 3 had voted for Republican Jerry O'Neil.
- It's as simple as that. Those 49 Libertarian voters in HD 3 passed the Compact.

Willman claimed, without evidence, that her 5 evil forces oppressed and intimidated "elected officials at every level of government and academia in Montana."

Tea party Republican legislators adopted Willman's view of the

Compact. They came to the legislature not to objectively review the Compact but to vote against the Compact.

Full of wild imagination, Willman writes the CSKT Water Compact is a "Legislative Beast" and if Montana approves the Compact, then:

1. The US Constitution will be irrelevant.
2. The Montana Constitution will be irrelevant.
3. NEPA and MEPA will be irrelevant.
4. Oaths of Office will be meaningless.
5. The Pledge of Allegiance will be meaningless.
6. Montana's 1973 Constitution will become toilet paper.
7. The 1981 Supreme Court case of Montana v. U.S. will be overturned.
8. 350,000 Montanans in 11 Counties will be subject to tribal government.
9. The State of Montana will be governed by the Tribes.
10. The State's life support will be turned off.

Normally, it would take a successful invasion by an enemy country to cause such devastation to America. But Willman believes ratification of the Compact is sufficient to destroy America.

Ever the hand-waving promoter, Willman continues,

> … a victorious CSKT Compact opens the door for the federal government, tribal governments and globalists to fundamentally transform Montana into something unlike the proud State that existed in the 1970s.
>
> Montana legislators passing this Compact may just as well turn off the lights in the Helena Capitol because the CSKT Compact is a fatal, self-inflicted injury to State sovereignty

and all of Montana's waters.

Willman's poetic words convince right-wing voters who don't care about evidence.

MRHN (2015) provides a good summary of Compact opponents and their belief the Compact is a government conspiracy.

Claim 2: Compact gives Feds control of Montana's water.

Opponents claimed the Compact will give the Feds control of Montana's water.

The reality is just the opposite. The Compact, far from turning loose the federal government, sets bounds on the federal government's claim to Montana's water. Lund (2015b) wrote:

> Some Compact opponents want the federal government to be less involved in how Montana manages our water resources, but the truth is passing the Compact will ensure that decisions about Montana's waters will be left to Montanans. The Compact is based on the Tribes' many years of biological science and modeling to meet the needs of fish.
>
> Without the Compact, the federal government can come into the state and arbitrarily make decisions about our water use based on the Endangered Species Act and the needs of certain species—like the bull trout. Therefore, if you really dislike the federal government, and its ability to influence water rights issues in Montana, there is no other choice but to support the Compact.

Opponents did not read proponents' testimonies and they ignored proponents' arguments.

If Montana legislators, led by Rep. Keith Regier, had been successful in their attempt to reject the Compact, they would have opened the door to the federal government's control of Montana's

water.

Here are extracts of emails sent to me by Compact opponents. They are consumed by their belief the Compact is a conspiracy.

One tea bag emailed me:

> We must keep in mind that tribes and feds are basically the same, since feds financially control the reservations and their lands.
>
> Now the government is "using" the Indians to lay claim to the rest of the natural resources and the lands they are on. The tribes and other financial beneficiaries being used as conduits, are largely unknowingly supporting this new conquest by government. If successful this entire nation and its populations will eventually fall under a totalitarian, fascist form of government.

Another tea bag chastised me for my support of the Compact:

> America is America not because of men like you, Ed, but because of men like my heroes. Men who stood for something and built this country. They did that by not giving it away. Look at the Indians for the example. They surrendered their rights off reservation to the USA and they allowed the BIA to control them. Sad. But now they want us all to do the same. Kinda like jumping off a cliff.
>
> Anyways, I do not agree that in our nation that stands for freedom around the world, that we should allow anyone to trample on our rights, our property and our future. That some things are worth fighting for.
>
> It's a darn fool's errand you are on, Ed. You serve a conscious that just does not get it. You are easily lead. I challenge you to show me proof of your claims once again. Thanks.

Another tea bag email called me a communist:

> The compact puts all authority of water in the hands of the tribe that is CSKT, in trust with the BIA [Bureau of Indian Affairs] and Feds.
>
> CSKT is not a local entity. The CSKT is a confederated group of tribes spread out over Idaho, Washington, Oregon and Montana. This already breeches beyond our borders. Tribes are not democratic governments.
>
> The BIA is a corrupt organization that has systematically subjugated the tribes across the USA by coercion and force like a cruel mafia.
>
> The Feds will look at the big picture and decide what is best for large population centers and make aberrational decisions that do not include much input from Montana and the Flathead County in what they will do with OUR water. They may sacrifice our economy, agriculture, land value, water needs for what they decide is best for Seattle, Portland or L.A., that's a fact!
>
> So, I am not sure if you are either naive, dumb, ignorant or plainly on the wrong side of right, but no matter what you are wrong in your opinion based on an American Value system. If you are using the Communist model, then you got it nailed down right.
>
> So, Ed, Are you a communist?

Here's a tea bag letter to the editor of a Montana newspaper:

> We Cannot Risk a "FOREVER" Document in a "CHANGING WORLD". There is much more to this than "WATER".
>
> This proposed "federal" compact extends far beyond its presumed intent. It claims all water in 11 targeted counties, even potentially extending statewide. Doesn't this exceed the "needs" of some 3,000 natives on the reservation?

> Montanans must be in position to benefit from profitable new business and industry opportunities. We must not lock ourselves into a FOREVER document rendering ourselves vulnerable to unscrupulous opportunists.
>
> Where in this compact are our financial and natural resource protections? We must defeat this compact in the interests of protecting Montana's future.

Compact opponents are driven by delusions and fear that government will control of their lives. That's why all their objections to the Compact were invalid.

Claim 3: Compact is against my principles.

Senator Barrett (2015), who voted against the Compact, wrote:

> As a rancher and a senator who values little ahead of private property rights, I think I know when to call a bluff, and when to stand my ground no matter what. This is such a time. Not all values and principles should be compromised away. I do not believe my fellow ranchers and farmers really want to turn their backs on the thousands of Montanans whose property, including water rights, will be devastated by this proposal.

Senator Barrett (2015) displays her emotions, but she does not understand principles. She claimed,

> "Not all values and principles should be compromised away."

But she is at a loss to describe what these principles might be.

She does not address the key question of the Compact: Would Montana would be better served with or without the Compact?

Claim 4: I don't like lawyers.

Some opponents want to reject the Compact because it involves lawyers. They would throw out the US Constitution because it

involved lawyers. But they claim they are for the Constitution. So, they contradict themselves.

More to the point, if you don't like lawyers then you better support the Compact because without the Compact, you will be deluged with lawyers. There are not enough lawyers in the State of Montana today to process the CSKT lawsuits if we had rejected the Compact.

Without the Compact, we would pay directly, or indirectly through taxes, for more lawyers than we ever want in Montana.

Claim 5: I'd rather reject Compact and let the chips fall.

Some opponents said, "I'd rather reject the Compact and let the chips fall where they may."

These opponents must like lawyers. Or maybe they hate Montana's farmers and ranchers and want to put them out of business.

If these opponents want to litigate their water rights, then they should approve the Compact for the benefit of most Montanans. Then they can file their own lawsuits and "let the chips fall" on them without harming other Montanans.

If you have a legal problem with the Compact then the proper, ethical action is to vote YES on the Compact, so you don't harm Montanan's who need the Compact. Then, after the Compact is ratified, you can file your complaint against the Compact.

Claim 6: Compact threatens me, and no one threatens ME.

Opponents claimed the CSKT "threatens me" with thousands of lawsuits if I don't approve the Compact. They said "No one threatens ME. So, I oppose the Compact."

This claim is like standing in front of a speeding locomotive and calling the locomotive a threat.

Senator Verdell Jackson (2015) wrote:

> In my 16 years in the Legislature, I have never voted for a bill because of a threat or because of the rights it did not take away from us. These two statements have been the main selling points of the proponents of the CSKT Water Compact.

But those were not the selling points, they are reality.

Proponent attorney Lund (2015b) wrote:

> "If the Compact fails, then, by law, the CSKT Tribes have to either file their water rights claims or lose them. See §85-2-702 of the Montana Code."

If Montana rejects the Compact then the CSKT MUST by law file for all their water rights by June 30, 2015 or lose them forever. They cannot afford to lose their water rights forever.

The federal government will help the CSKT win its lawsuits.

Senator Jackson and other Compact opponents think we can defeat any future CSKT water rights lawsuits by hanging tough. The reality is it won't matter in a court of law if you are the toughest dude in the valley when the CSKT has "time immemorial" water rights and the federal government is the CSKT's legal partner.

If you want to fight, it is better to choose a fight that you can win.

Claim 7: Compact is permanent, and I can't stand

permanent.

Senator Janna Taylor opposed the Compact because it is a "permanent" agreement. She does not get it that "rejection" of the Compact is more "permanent" than the Compact.

Senator Taylor would not have voted for the Declaration of Independence or the US Constitution because they were "permanent." Taylor and other legislators need an education in logic.

Senator Barrett (2015) wrote:

> In essence, this proposed compact requires the state to limit its legal authority off the reservation by sharing it with the CSKT – permanently.

Barrett does not understand that under the Compact, Montana retains ownership of the water, or that settlements are permanent. Also, all parties to the agreement can approve future changes to the Compact.

Claim 8: They won't let me edit it.

Senator Janna Taylor, Senator Debbie Barrett, and House Majority Leader Keith Regier made this claim.

Senator Barrett (2015) wrote:

> The legislature's responsibility and authority includes amending proposals if necessary and approving all state costs associated with a compact such as this one.
>
> But at an informational meeting held by proponents, the legislature was warned that it cannot amend the proposal. It's a "take it or leave it" deal.
>
> That insult to the constitutional role of the legislature is enough for me to want to leave it. Other proposed compacts have not been thrust on us, the legislature, with such

arrogance and disrespect for legislators.

Senator Barrett would deprive Montanans of the benefits of the Compact because she feels the Compact Commission insulted her and treated her with "arrogance and disrespect."

Barrett is arrogant and disrespectful of the law. She should respect the Compact Commission and the work the commissioners did to produce the Compact. She puts her personal feelings above her duty to best serve the interests of the people of Montana.

The 1979 Montana legislature created the Reserved Water Rights Compact Commission (DNRC, 2015) to conclude compacts:

- for the equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the state (MCA 85-2-701),
- and between the State and its people and the federal government claiming non-Indian reserved waters within the state (MCA 85-2-703).

Montana's 1979 Legislature specifically delegated its legislative responsibility to negotiate and "conclude" the Compact to the Compact Commission.

This was for good reason. One-hundred fifty legislators, who work only 4 months every 2 years and get reelected every 2 years, cannot negotiate a Compact with the CSKT and the federal government.

Senator Janna Taylor, Senator Debbie Barrett, House Majority Leader Keith Regier think they are above Montana law as set by Montana's 1979 legislature.

They used their lack of right to edit as an excuse to reject the Compact. They put their egos above the interests of the citizens of Montana.

In the legislative floor fight, opponent legislators tried to add

amendments to the Compact to cause the Compact to fail.

House Majority Leader Keith Regier who offered most of the amendments, said (Bauman, 2015):

> "We have an obligation as a Legislature to make the legislation the best we can. The water of Montana is controlled by the state of Montana for all of us, not just one group."

Regier was incorrect. The obligation of the legislature was not to change the Compact. The obligation of the legislature was to determine whether Montana would be better served with or without the negotiated Compact.

Opponents in the legislature proposed 13 amendments, all of which failed. Some proposed amendments to SB 262 included removal of CSKT off-reservation water rights and language that exempts the CSKT from certain water-rights laws and rules.

Clearly, the CSKT would not accept these changes. So, if any proposed amendment had passed, the Compact would have failed.

Regier knew this, which is why he tried to add amendments.

Democrat Rep. Margie MacDonald, who supported the Compact, said (Dennison, 2015),

> For us to take apart this agreement, this compact, so naively, so ignorantly, really shows our ignorance and it really degrades our (legislative) branch.

Rep. MacDonald is correct. The far-right tea party legislators showed they are not as smart as the Democrats.

Claim 9: They didn't give me enough time to read it.

Elected legislators were paid to read and study the Compact. It's their job. They ran for elected office and assumed responsibility to do their job. However, many opponents claimed they did not have

enough time to read the Compact.

The 2015 version of the Compact had only minor changes from the 2013 version. Most 2015 legislators were also there in 2013. So, they only had to read the changes for 2015.

Legislators who claimed they had "no time to read it" cannot also object to the Compact because they "can't edit it." They can't have it both ways. If they did not have time to read the Compact, then they did not have time to understand and edit the Compact.

Regier and others used both the "I can't edit it" excuse and the incompatible "no time to read it" excuse as dual reasons to oppose the Compact. Opponents contradict themselves.

Compact opponents made so many invalid claims against the Compact that they even made claims that conflicted.

Regier wrote in the October 11, 2015, Daily Inter Lake (Regier, 2015):

> "He [Berry] said he spent 200 hours studying the Compact and that I [Regier] didn't review it. I did study the Compact, and it didn't take me 200 hours to realize it is not good for Montana."

On the one hand, Regier claimed the State of Montana did not give him enough time to read the Compact. On the other hand, he brags that he read it and understood it in well under 200 hours.

In the same opinion letter, Regier listed three reasons he opposed the Compact and (the claim that proves him wrong):

- It gives the CSKT off-reservation water rights. (Claim 20 proves him wrong.)
- It will cost the taxpayers millions of dollars. (Claim 10 proves him wrong.)
- It puts non-tribal landowners on the reservation under a new water court that has strong tribal control. (Claim 16

proves him wrong.)

All three of Regier's reasons show he is incorrect. The rebuttal to the claims above show Regier's reasons to oppose the Compact were invalid.

Regier did not consider the benefits of the Compact. He did not consider the testimony of the proponents. He did not consider the key question.

Claim 10: The $55 million settlement fee is outrageous.

The settlement fee is Montana's obligation to the CSKT project under the Compact. Those who objected to the $55 million settlement fee do not understand that it is mostly an investment in Montana infrastructure rather than an expense.

Regier (2015) opposed the Compact because it would "cost the taxpayers tens of millions of dollars."

Montana's $55 million settlement fee stays in Montana just like any other improvement to our infrastructure.

- $30 million is for a revolving pumping fund needed only in drier years.
- $4 million is for stock water management.
- $4 million is for farm improvement.
- $4 million is for hydrologic data collection and measurement.
- $13 million is for habitat conservation.

Montana funded $3 million in 2015 and will fund a maximum of $52 million in the future. Of this, $30 million is an emergency fund to be used only in the event of a drought. The remaining $22 million will add to Montana's economy just like any public works project.

The settlement fee will improve irrigation efficiency and alleviate

negative impacts of changes in irrigation necessary for water use efficiency.

The $55 million settlement fee is 5 percent of the expected $1.2 billion federal contribution and only 3 percent of the estimated $1.8 billion in legal costs without the Compact.

Montana pays $55 for every $3,000 gained in Compact benefits.

Proponent attorney Huff (2015) addressed this issue in his reply to Mitchell and Holmquist (2015).

$42 million of the $55 million funding package directly benefits Flathead Indian Irrigation Project irrigators, who are primarily non-Indian. More funding for Irrigation Project infrastructure improvement will come through the federal ratification of the Compact.

When Commissioners Mitchell and Holmquist objected to funding to support the Compact, they objected to badly needed improvements to the irrigation infrastructure relied upon by irrigators, and to the funding necessary to pump additional water to protect existing users.

State contributions to state-tribal water compacts do not imply state responsibility to "support the tribes." Rather, state contributions are because compacts represent the settlement of litigation that would otherwise result in fewer or no protections for junior water users and ultimately be far costlier to pursue, for both the state and impacted water users.

Claim 11: I don't want Fed's to give $1.2 billion to the tribes.

Those who made this claim are greedy. The tribes will spend their money in Montana. They will use the money to improve the irrigation project infrastructure and efficiency. All Montanans benefit when federal money improves Montana.

If a business moved into Montana and brought $1.2 billion into Montana's economy, Montana's media, Chambers of Commerce, the Governor, and everyone else would rejoice. The same should be true of the Compact.

Claim 12: CSKT money is promoting it.

Both sides spent money and political capital. This is legal and common for hot political issues. This concern does not address the key question.

Claim 13: Democrats support it, so Republicans must oppose it.

This may be the dumbest reason of all to reject the Compact. It says Republicans should not think for themselves but just vote the opposite of the Democrats.

On April 3, 2015, Montana Senator Janna Taylor told the Kalispell Pachyderm audience that real Republicans always vote opposite of the Democrats. Rep. Keith Regier, House Majority Leader also championed this claim. (Berry, 2015a)

This claim is absurd. It means, for example, all Republicans should vote for gravel highways just because Democrats vote for paved highways. It means Republicans should always wait to see how Democrats vote on every issue before they decide how to vote. We could train a monkey to do the work of such mechanized Republicans.

Claim 14: The tribes are too greedy.

Those who made this claim do not understand negotiation. There is always give and take. You never get something without giving something in return. Compact negotiators got the best deal they could for Montana. Montana is far better served with the Compact than without the Compact.

Opponent Senator Barrett (2015) wrote:

> The proposed CSKT compact is the perfect example of overreaching in negotiations, causing their failure. The CSKT and federal government on their behalf demanded too much, and the compact commission negotiators surrendered too much. As a state, we tried for years to negotiate a deal good for all. In this compact alone, that has proven to be impossible.
>
> So, it's time to recognize that this compact is not going to work, and we must prepare to protect the state's rights, interests and sovereignty. This compact is not just poor policy, sacrificing the rights of thousands of Montanans to protect the rest of the state is the worst policy possible.

Senator Barrett did not show there was "overreaching in negotiations" or "failure."

Senator Barrett does not understand the Compact. With all her ranting, she has not made the case that Montanans will be better served by fighting water rights issues in court for 20 or more years than to approve the compact and get on with our lives and business.

Hornbein (2015b) described the legal and emotional challenges of the Compact negotiation:

> In many cases it was productive, but it was also incredibly frustrating and contentious. And that wasn't just between compact opponents and the negotiators, but between the negotiating parties themselves.

> The tribes were incredibly tough negotiators and discussions often got heated and were very difficult. Ultimately, we were able to come to agreement, but I think sometimes there's a perception that the tribes and the state were on board with everything all along, and that certainly wasn't true.

Proponent Montana Attorney Cory Swanson testified,

> Even if you go to court and win, you will not get a better deal than you will under this Compact.

Claim 15: Compact is different from other tribal compacts.

The CSKT Compact is different from Montana's other six tribal compact for a good reason. It's because the CSKT are the only Montana tribes that signed the Hell Gate Treaty. In addition, the ownership pattern on the CSKT reservation differs from other reservations. Different problems require different solutions.

The Hell Gate Treaty is a Stephens treaty. All other Montana tribes signed Fort Laramie type treaties that do not include rights to hunt and fish. Fort Laramie Treaties do not include off-reservation water rights.

Chapter 8 – Six invalid legal claims

> The greatest enemy of knowledge is not ignorance. It is the illusion of knowledge.
>
> - Stehen Hawking

Here are the legal claims the opponents gave to oppose the Compact. Although we will rebut these claims individually, they all suffer from a major logical error:

Legal claims against the Compact were not valid reasons to vote NO on the Compact. They were reasons to vote YES on the Compact so the courts could rule on the legal issues.

The courts, not the legislators, are qualified to rule on matters of law. Making legal rulings is above the pay grade of legislators, even if they are attorneys.

The Attorney General and all the State of Montana's legal counsel advised that the opponents' legal claims about the Compact were wrong. They also advised that only the courts can decide these legal issues.

Legislators who voted NO because they believed they were smarter than the State of Montana's legal team took the law into their own hands. They substituted their egos for common sense.

Ballance and Regier (2014) sent questions about the Compact to the Montana Water Policy Interim Committee. Proponent attorney Helen Thigpen (2014) answered their questions.

Catherine Vandemoer, PhD, (2012) gave her "Five reasons why the proposed CSKT compact should be rejected."

Attorney Jay Weiner (2013) rebutted Vandemoer's (2012) claims. Concerned Citizens of Western Montana (2013) replied to Weiner's (2013) rebuttal. Their reply was merely an expression of disagreement without legal substance.

Claim 16: Unitary Management Ordinance (UMO) is unconstitutional.

- Vandemoer (2012) claimed the UMO is unconstitutional, the UMO is tribally controlled, and requires some users to register under the UMO.
- Ballance and Regier (2014) claimed the UMO is unconstitutional.
- Simms (2014) claimed the UMO gives administrative control to the CSKT.

Weiner (2013) showed the UMO is constitutional.

The Montana Constitution does not tell the State how to accomplish its constitutional objectives. The legislature has broad latitude to enact laws that are "rationally tied to the fulfillment of the unique obligations toward Indians."

When the Montana legislature approves the Compact and the UMO, it fulfills its obligation to "provide for the administration, control, and regulation of water rights."

The UMO requires the Water Management Board (WMB) to enter in the Department of Natural Resources and Conservation (DNRC) water rights database any water rights or change authorizations the Board approves. The DNRC is a "system of centralized records" established by the Montana legislature to fulfill its constitutional obligations.

Thigpen (2014) showed why the UMO is constitutional.

The UMO establishes a joint state-tribal Water Management Board (WMB) for water administration and management on the Flathead Indian Reservation.

The UMO provides for dispute resolution. Aggrieved parties may seek legal redress in a court that has jurisdiction over the parties and the cause of action.

The Montana Constitution requires the Legislature to "provide for the administration, control, and regulation of water rights" but does not limit the state's authority on how to do this.

No law prohibits the formation of a dual state-tribal board to administer or manage water rights on an Indian reservation.

The UMO does not give the CSKT sole jurisdiction over water use on the reservation, nor does it provide the board with any control or administrative authority over land.

The Montana Constitution says all water in Montana is the property of the state for the use of its people:

> "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."

The state broadly asserts authority over the water in the state. However, the U.S. Supreme Court made an exception to state-based laws for federal and Indian reserved water rights.

Both the Montana Supreme Court and the Montana Water Court clarified that the United States does not "own" Indian reserved waters. Rather, the federal government holds the water in trust for the benefit of the Indians. The Water Court wrote:

> The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians. Its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes and allottees, who are the beneficiaries of the land that the United States holds in trust. Indian reserved water rights are "owned" by the Indians.

Article I of the Montana Constitution provides that "all lands owned and held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States" until revoked by the U.S. and the people of Montana.

The Ninth Circuit held that the tribes may regulate the riparian activities of non-tribal fee owners.

The Compact settles water-rights claims for the Flathead Indian Reservation and the CSKT.

Lacking the compact, water rights are very complicated. The Compact solves a very big problem.

Lund (2014b) showed why Simms (2014) is wrong.

> The Compact's Unitary Management Ordinance ("UMO") creates a Water Management Board (WMB). The WMB will be composed of five voting members, with two members selected by the Governor, two members selected by the CSKT Tribal Council, and one member selected by the other four appointed members.
>
> The WMB will have only limited authority to resolve disputes between tribal water rights holders and state-based water rights holders. The WMB must follow Montana statutes and water law when resolving disputes. State and Federal courts can review all WMB legal decisions.

Weiner (2013) showed why Vandemoer (2012) is wrong.

The UMO is composed of two members appointed by the Tribal Council, two members appointed by the Governor, and a fifth member selected by the other four appointees.

No law precludes the State or the Tribes from consenting to such an arrangement in furtherance of the sovereignty each possesses.

The Compact requires only three categories of water use to register under the proposed UMO. Each category is not presently included in the DNRC water rights database. These categories are:

- Pre-1973 water rights that are exempt from the Adjudication's filing requirements by 85-2-222, MCA.
- Existing tribal water rights.

- Small domestic and stock water users who meet the exceptions to the permit requirements of the Montana Water Use Act after August 22, 1996 but are protecting by the Compact.

All other existing uses do not need to register because they are already recorded in the DNRC water rights database. Their water rights will remain as decreed by the Montana Water Court or permitted by the DNRC.

Claim 17: Compact steals water rights.

- Vandemoer (2012) claimed a senior water right holder can "take" a property right from a junior water user.
- Vandemoer (2014) claimed the Compact steals water rights.
- Simms (2014) claimed the Compact lets CSKT control water west of the Continental Divide.

Weiner (2013) showed why Vandemoer (2012) is wrong.

When the Montana legislature ratifies a settlement that includes the FIIP Water Use Agreement it adds the agreement to the constitutional obligation in the Montana Constitution.

The FIIP Water Use Agreement does not "take" water from irrigators and give it to the Tribes.

Preasault v. United States shows that a taking claim must be based upon a compensable property interest. The Montana Supreme Court ruled there is no property interest that can be taken unless an individual filed for a water right by 1981.

The Ninth Circuit Court of Appeals in Joint Board of Control v. United States (1987) settled this issue. The Circuit ruled under the *prior appropriation doctrine* law in Montana, the Tribes would be entitled to the last drop of water to satisfy their instream flow rights before FIIP irrigators could receive the first drop of theirs.

Under the Compact, the FIIP Water Use Agreement protects existing water users by ensuring there is a legally binding allocation of water between tribal instream flows and project users.

The Compact protects junior users by imposing conditions on the Tribes' senior water rights. It is the precise opposite of a taking.

Rather than taking water rights, the Compact protects junior users because it significantly restricts the exercise of the Tribes' senior water rights.

The Montana Supreme Court ruled that Vandemoer (2014) is wrong.

Vandemoer (2014) wrote:

> The proposed CSKT Compact, however, requires irrigators to give up their water rights to the ownership of the Tribes in exchange for a reduced amount of water far lower than historic use. This plan was ruled an unconstitutional taking of property rights without compensation by a District Court Judge [McNeil] in February 2013.

Vandemoer did not tell you the Montana Supreme Court voted unanimously on April 3, 2013, after less than 24 hours of consideration, to vacate in its entirety Judge McNeil's "unconstitutional" ruling of February 15, 2013:

> Before McNeil could argue that the individual irrigators' water rights were being taken without compensation, he would need to determine if they in fact held those water rights. That determination was not made, and the plaintiffs never presented that argument.

The Compact does not require irrigators to give up their water rights. The Compact does not convey any water rights to the Tribes.

Schowengerdt (2015) showed why Vandemoer (2014) is wrong.

The government does not deprive non-Tribal water users of an interest in their property when they subordinate non-Tribal water rights to senior Tribal water rights and to Tribal regulatory authority.

The Compact does not remove any state law-based water rights. The Compact does not "transfer, convert, or otherwise change the ownership or trust/fee status of land on the Reservation."

The Compact quantifies the Tribes' water rights. Tribal water rights are senior to state-based water rights on the reservation. This is consistent with Montana's "prior appropriation" doctrine.

The Compact allocates water between tribal instream flows and project users. The Compact makes water available for all project irrigators even if their water rights are junior to the Tribes' instream flow rights.

Under the Compact, the Tribe agrees to limit its rights to call existing irrigation rights on the reservation. Under the Compact, the Tribe agrees to relinquish its right to call irrigation rights off the reservation.

Without the Compact, the Tribe would keep its right to call water claims over the western half of Montana.

So rather than taking non-Tribal water rights, the Compact secures existing non-Tribal water rights.

Schowengerdt (2015) showed why the Compact does not steal water rights.

The Compact does not violate equal protection by treating off-reservation water users differently than on-reservation water users.

On the Reservation, the Tribes' water rights are superior to the rights of the State.

Equal protection under both the state and federal constitutions follow a similar analysis.

> The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment.

Courts recognize that virtually all laws draw distinctions between classes. That is not what Equal Protection prohibits. When the purpose of a law justifies distinctions, the distinctions do not violate equal protection.

The Montana Supreme Court allowed treatment of non-Tribal members on the reservation to be different from non-Tribal members off the reservation. In some contexts, the Montana Supreme Court has mandated different treatment.

The Compact recognizes the Tribe's superior water rights. The Water Management Board is based on the Tribes' unique water use rights under federal law. The Montana Supreme Court recognized,

> the distinctions between federal reserved water rights, Indian reserved water rights, and state appropriative use rights and the manner in which the Water Use Act permits each different class of water rights to be treated differently. Greely (1985)

In Greely (1985), the Montana Supreme Court reiterated that Indian reserved water rights are broad and much different than typical water rights. For example, beyond the Tribe's superior priority date, Indian reserved water rights may include future uses and are not constrained by beneficial past use.

The Montana Supreme Court and the United States Supreme Court affirmed it does not violate equal protection to treat tribal members differently when doing so is "tied to the fulfillment of the unique obligation" to Indians created by federal law.

The Compact treats water users differently when distinctions are based on federally defined Indian reserved rights. Non-Tribal water users within the boundary of the Reservation are subject to different rules than water users in the rest of the state.

Lund (2014b) showed why the Compact does not steal water rights.

There are No Vested Rights in Montana due to the Montana Water Use Act.

The Montana Supreme Court held several times that unless an individual filed their pre-1973 water rights as provided in the Montana Water Use Act, those rights no longer exist. Based on these cases, there are no such things as "vested water rights" in Montana.

The Individual Irrigators Have No Property Rights Related to the Irrigation Water.

The irrigation project is a Bureau of Indian Affairs ("BIA") Irrigation Project developed following federal law. There is no record that the BIA ever delivered a water right to an individual.

There is No Taking Violation of the Fifth Amendment of the US Constitution.

The Montana Supreme Court has been clear that unless an individual filed for a water right by the deadline set in 1981, there is no property interest that can be taken. It is impossible to take a water right that does not exist.

The Compact does not take away any water rights. Anyone who filed and received a water right can take their claim to the Water Court with or without the Compact.

The Flathead Joint Board of Control (FJBC) of the Flathead, Mission and Jocko Valley Irrigation Districts sued the United States over 20 years ago. The FJBC alleged they were entitled to operate and manage the Flathead Indian Irrigation Project (FIIP). The government refused to let the FJBC operate and manage the FIIP.

So, the FJBC claimed the federal government took their property.

The FJBC based its claim on the contracts it signed with the United States.

The court held that no contract gave the FJBC the right to manage and run the FIIP, and the FJBC did not have a compensable property interest. The court dismissed the FJBC takings claim.

Hornbein (2015a) showed why Simms (2014) is wrong.

Simms based his argument on CSKT's litigation position, not upon the CSKT's negotiated position under the Compact.

Claim 18. Compact does not provide historical water delivery.

- Vandemoer (2012), Appendix C, claimed the Compact would not deliver historical amounts of water.
- Vandemoer (2012) claimed the Compact does not specify the quantity of water that belongs to the Tribes, the Commission has not publicly confirmed the volume of water claimed, and the Compact relinquishes state water rights attached to legally-established private fee patent land to the CSKT/Federal government.
- Mitchell and Holmquist (2015) claimed the Compact will not deliver historical amounts of water.
- Simms (2015) claimed the Compact does not provide historical water delivery.

Mace (2015a), Mace (2015b), and Makepeace and Irion (2015) show why Vandemoer (2012), Appendix A, is wrong.

Vandemoer does not understand the vast improvements in hydrologic modelling since the Walker Report in 1946. In 1946, they did not even have computers and good data. Today, we have good computers, software, and better data.

A competent engineering group developed the hydrologic model for the project. The State of Montana and irrigators reviewed the

model. The model is orders of magnitude better for planning and managing irrigation water on the reservation than the 1946 Walker Report.

The 1946 Walker model assigned a constant amount of water to instream flows regardless of the timing in the water year and whether irrigators needed the assigned amount of water. Irrigators only need irrigation water during their growing season.

The new hydrologic model assigns more water to the farmers than the historical irrigation quota for the last 20 years. This gives the farmers more water than before. That is why most reservation irrigators favor the Compact.

The new hydrologic model shows how to apportion water among irrigators to give them more water during their growing seasons. The model matches the water usage with the expected seasonal precipitation and stream flow.

The Compact's plan simplifies water management because it deals with only one water rights claim rather than with thousands.

Weiner (2013) showed why Vandemoer (2012) is wrong.

The Compact quantifies the Tribes' water rights very well. The Compact Appendices specify, in detail, all the water rights quantified by the Compact. That's why all the water rights abstracts are appended to the proposed Compact.

The Compact quantifies CSKT's water rights in more detail than in prior Indian water rights settlements in Montana. This detail will greatly facilitate the Montana Water Court's review of the Compact.

The Compact does not adjudicate the Tribes' rights. It reaches a negotiated settlement to quantify the Tribes' rights.

Vandemoer references a table that claims to tally up the number of acre-feet of water associated with the rights abstracted in the

proposed settlement. Her straight-sum approach does not account for the fact that the same molecule of water may satisfy several of the Tribes' rights that are quantified.

For example, water that physically satisfies a portion of a Tribes' instream flow right in the Jocko drainage may also later satisfy a portion of the Tribes' instream flow right in the Flathead River, and may also be diverted and then returned after traveling through FIIP infrastructure on its journey from Point A to Point B.

The Commission delineated the conditions on the exercise of the Tribes' water rights and the protections for existing users. This ensures that, no matter how much annual water the Tribes may have a legal right to, the Tribes' effects on existing water users are carefully contained.

It is surprising that Dr. Vandemoer, a hydrologic consultant, would misunderstand this basic principle of water measurement.

Nothing in the Compact "relinquishes" any state law-based water right.

The Compact recognizes CSKT's right to "Flathead System Compact Water," which is water drawn from the mainstem of the Flathead River, backstopped by an allocation from the United States Bureau of Reclamation's Hungry Horse Dam.

The Compact quantifies the CSKT's water rights, which is what the Montana legislature directed the Compact Commission to accomplish. All claims to private water rights filed in the adjudication remain in the adjudication to be resolved by the Montana Water Court.

Huff (2015) showed why Mitchell and Holmquist (2015) are wrong.

The Compact will deliver more water that the historical amounts.

The water resources on the Flathead Indian Reservation are much

greater than on any other reservation in Montana. The Compact must deal with greater volumes of water.

Instream flow rights are different from consumptive water rights.

Instream flow rights require a certain amount of water in streams, rivers and lakes, to maintain fisheries and other purposes. These rights are measured in water flow, typically cubic feet per second.

Consumptive use rights divert water out of streams, rivers and lakes for irrigation and other uses. These rights are measured in acre feet of water diverted over a specific time-period.

Instream flow rights allow the same water to satisfy an instream flow right at more than one point on the stream.

Mitchell and Holmquist's (2015) assertion that the Compact reserves an average of 6,827 acre-feet of water per tribal member counts instream flow water multiple times.

Further, Mitchell and Holmquist's chart does not include how they made their calculations, so it is impossible to check its accuracy.

Lund (2015a) destroyed the imaginary claims of Simms (2015).

Simms made his legal claims on the assumption that Greely does not exist. Simms does not understand how to compute water deliveries. He does not understand Montana Water Law.

Opponents do themselves a disservice when they use an attorney who is not qualified to practice in Montana. There seem to be no practicing Montana attorneys who oppose the Compact.

Claim 19: Compact violates Constitutions.

- Vandemoer (2012) claimed the Commission did not have authority to negotiate aboriginal, treaty-based rights these water rights.
- Mitchell and Holmquist (2015) claimed the Compact violates the Montana Constitution.

- Simms (2014) claimed the Compact violates the Montana Constitution.

Weiner (2013) showed why Vandemoer (2012) is wrong.

Vandemoer's claim conflicts with the Montana Supreme Court's ruling in Greely (1985). The Montana Supreme Court recognized that "reserved water rights" encompasses Indian water rights claims.

The Court ruled the Montana Water Use Act allows Montana courts to adjudicate those federal and Indian reserved water rights.

The Montana Supreme Court recognized the Water Use Act charges the Compact Commission to reach agreements on the extent of the reserved water right of each tribe.

The Compact Commission has the authority to negotiate over all the CSKT's water rights that derive from federal law.

Huff (2015) showed why Mitchell and Holmquist (2015) are wrong.

Article IX, Section 3, Part 4, requires the legislature to provide for the administration, control and regulation of water rights and establish a centralized records system. There has been no such record system since 1996 for water users on the Flathead Indian Reservation.

The Montana Supreme Court decided the Montana Department of Natural Resources and Conservation could no longer process new water use applications on the Flathead Reservation until Montana quantifies the Tribes' water rights.

This void created legal uncertainty in water development and has impeded economic development. The Compact provides a water administration framework to bring the Reservation to comply with Article IX of the Montana Constitution.

The unitary management approach is the most efficient

administrative method for water management on the Reservation. It meets the state's obligation to comply with both Article IX and our federal law obligations to recognize tribal treaty rights.

The Compact requires that water rights be entered in a centralized database managed by the Department of Natural Resources and Conservation (DNRC).

Lund (2014b) showed why Simms (2014) is wrong.

> The Compact does not violate Article IX. The Compact Commission has authority to quantify water rights.
>
> The 1979 Montana Legislature amended the Water Use Act to allow Montana to adjudicate all claims of reserved Indian water rights and all claims of federal reserved water rights.
>
> The Legislature created the Reserved Water Rights Compact Commission to negotiate compacts to apportion waters between Montana and the Indian Tribes that claimed reserved water rights. Montana has the right to do this under the McCarran Amendment. The federal government has approved Montana's right.
>
> The Legislature created the Compact Commission to negotiate Compacts. Nothing in the Compact violates the duty to keep centralized records.
>
> In the 1970s, the State of Montana began adjudicating all water rights within its borders. After four years, the state realized adjudication was much slower than anticipated.
>
> In 1979, the legislature created the Reserved Water Rights Compact Commission to facilitate the quantification of reserved water rights – both Indian and federal – in Montana.

Schowengerdt (2015) showed the compact does not violate the Montana Constitution.

The Constitution does not tell the State how to administer, control,

and regulate the State's water rights. The Compact, including its unitary administration framework, fulfills the State's obligation to administer, control, and regulate water rights.

Article IX, Section 3, states that all water within the State is owned by the State. The Compact does not give ownership of State water to the Tribes.

The State must follow federal law and recognize the superior on-Reservation water rights of the Tribes. The Compact balances the interests with non-Tribal water use and limits the Tribe's ability to call junior water rights.

The Compact conforms to Article IX, section 3's requirement to administer, control, and regulate water rights.

Under Article IX, section 3, the State owns all the water within the State. The Compact does not alter that. Rather, the Compact is a negotiated settlement of water use rights, not water ownership.

Montana water rights are based on prior appropriation, which means water rights have priority dates. Senior water users with an earlier priority date are entitled to use the last drop of their water rights before junior water users are entitled to the first drop of theirs.

A water user with the most senior priority date may call a junior user and may force the junior user to curtail water use until the senior user's right is satisfied.

Courts determined that the Tribes have a priority date of time immemorial for inflow stream rights and an 1855 priority date for on-reservation water rights.

The Montana Supreme Court described in Greely (1985):

> State-created water rights are defined and governed by state law. Indian reserved water rights are created or recognized by federal treaty, federal statutes or executive order, and are

governed by federal law.

> The United States is not the owner of Indian reserved rights. It is a trustee for the benefit of the Indians… Indian reserved water rights are "owned" by the Indians.

The United States Supreme Court recognized:

> The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied and could not be. Winters (1908)

The Tribes and the State, however, do have authority to negotiate and agree:

> upon the extent of the reserved water rights of each tribe. In order to be binding, a negotiated compact between the State and tribe must be ratified by the Montana legislature and the tribe. Greely (1985)

Consistent with Article IX, section 3, the Compact does not cede ownership of State water. Instead, it provides a negotiated settlement of competing water use claims to ensure continued use by non-Tribal water users.

Without the Compact, only litigation would settle those claims. Such litigation would be expensive, and the result of the litigation would likely not favor non-Tribal water users.

Claim 20: Hell Gate Treaty has no off-reservation water rights.

- Vandemoer (2012) claimed the Tribes' off-reservation water rights may cause basin closures, and the Compact will hurt "the family farm."
- Mitchell and Holmquist (2015) claimed the Hell Gate Treaty does not give off-reservation water rights, and the Compact does not protect the citizens and businesses of

Flathead County.

- Simms (2014) claimed the Hell Gate Treaty does not provide off-reservation, instream flow water rights for the Tribes, no legal precedent recognizes off-reservation rights with a "time immemorial" priority date.
- Senator Verdell Jackson (2014) claimed the Hell Gate Treaty does not give the CSKT off-reservation water rights.

Weiner (2013) showed why Vandemoer (2012) is wrong.

The Compact will close no basins to future appropriations in western Montana. The Compact quantifies the Tribes' rights with much more certainty and predictability than is possible with the current unquantified state of senior water rights.

The Compact reverses some basin closures that could not be otherwise reversed. With few negligible exceptions, the Compact does not give the Tribes any new water rights.

The only new off-reservation water rights the Compact quantifies are for the mainstems of the Kootenai, Swan, and Lower Clark Fork Rivers.

This is a significantly smaller number of streams than the Tribes would claim in the absence of the Compact.

The Compact Commission very directly contemplated future development needs. Specifically, the Compact requires the Tribes to make available at least 11,000 acre-feet per year of water for off-reservation mitigation uses.

This added water will allow new development not otherwise possible because large hydropower water rights constrain the Department of Natural Resources and Conservation (DNRC) ability to issue new water rights permits in some western Montana drainages.

The Compact limits the Tribes exercise of water rights. This protects family farms.

The Compact protects irrigators and all other existing water users from the consequences inherent in Montana law of the junior priority dates of their water rights.

Compact rejection would threaten family farms because it would open the door to costly litigations of tribal instream flows. These lawsuits would pose a much more direct threat to Montana's agricultural traditions than anything in the Compact.

Jackson (2014) based his argument on this paragraph of 1855 Hell Gate Treaty, Article III:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.

Senator Jackson claimed the "right to take fish is NOT a water right. Senator Jackson also claimed the statement in Article I of the Treaty that the CSKT:

> hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them…
>
> means
>
> the CSKT cannot be granted off-reservation water rights based on the right to hunt and fish on their aboriginal land.

Huff (2015) showed why Mitchell and Holmquist (2015) are wrong.

The Hell Gate Treaty supports off-reservation water rights. The CSKT is the only tribe in Montana with a Stevens' Treaty. The CSKT is the only Montana tribe that signed a Stevens' Treaty.

The US Supreme Court held that Stevens' treaties preserve meaningful off-reservation fishing rights for tribes (Winans, 1905).

The Compact benefits Montana. Under the Compact, the CSKT agreed to cede almost all its off-reservation water rights claims. These claims cover the western half of Montana.

The Ninth Circuit Court of Appeals, in a decision dealing specifically with CSKT and the Flathead Joint Board of Control, held,

> To the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them. The priority date of time immemorial obviously predates all competing right asserted by the Joint Board for the irrigators in this case.

Greely (1985) established that:

- Stevens' Treaty Tribes, specifically the Hell Gate Treaty of 1855, have off-reservation fishing rights;
- these rights are substantive and continue to exist;
- beneficial uses in Montana include instream flows for fisheries; and
- a tribal reserved right for fishing includes the right to "prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies."

While it is true that a court has not yet adjudicated the precise issue of CSKT's off-reservation water rights as derived from the Hell Gate Treaty, the Compact must address off-reservation rights to make them part of the agreement.

Without the Compact, the CSKT can "call" any non-tribal user of water, including water for homes, businesses, cities and towns, and farms both on and off the Reservation. This includes Flathead

County.

The Compact protects all non-irrigation water users from Tribal calls, including the homes, businesses and towns in Flathead County.

Article III Section G of the Compact states:

> The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation.

The Compact includes significant protections for the irrigators in the Flathead Indian Irrigation Project. Irrigators get a water delivery entitlement and a $30 million fund to offset pumping costs in low water years and to fund water measurement, on-farm efficiency, groundwater mitigation, and other projects.

Without the Compact, Project irrigators would be subject to call by CSKT and would receive no funding to complete much needed project repairs or obtain additional water in times of shortage.

Hornbein (2015a) showed why Simms (2014) is wrong.

The US Supreme Court explicitly rejected Simms' opinion:

> The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights and - more or less explicitly - rejected the State's "equal opportunity" approach.

Simms assumes the CSKT can claim only Winters (1908) rights that the federal government created when it established the CSKT reservation.

State and federal courts have ruled the CSKT have both Winters

(1908) rights that have an 1855 priority date and Winans (1905) aboriginal rights that have a "time-immemorial" priority date.

The off-reservation rights quantified under the Compact reflect the underlying uncertainty in this area of the law. The Compact solves this uncertainty and the associated risks to both parties.

The Commission consistently emphasized the importance this uncertainty to the negotiated provisions in the Compact.

The Washington Supreme Court affirmed a state trial court decision that the Yakima Tribes possess time-immemorial off-reservation rights in the Yakima River and its tributaries to preserve the fishery.

The Commission concluded there is enough uncertainty about the meaning of this Hell Gate Treaty language that settlement of the Tribal claims under the Compact benefits Montana.

The Compact mitigates adverse impacts to state water users and does not create legal precedent. The Compact is far preferable to the time, expense, economic impact, and risk of litigation.

Thigpen (2014) showed why the Hell Gate Treaty includes off-reservation water rights.

Thigpen shows why the Hell Gate Treaty gives the tribes off-reservation water rights. These are aboriginal water rights the tribes held prior to the creation of the reservations. The tribes did not give up their off-reservation water rights in their treaty with the US government.

Winans (1905) first recognized the tribes off-reservation rights. The Compact legally settles the scope of the CSKT's claims for off-reservation water rights. The water rights confirmed by the compact are "in full and final satisfaction" of "all claims to water or to the use of water by the Tribes, Tribal members, and Allottees and the United States..."

The problem with Senator Jackson's (2014) claim.

Numerous courts have interpreted the language of the Hell Gate Treaty differently than Senator Verdell Jackson. Personal opinions do not overturn legal precedents.

All professional water attorneys who defended the Compact concluded sufficient legal precedent confirms the Hell Gate Treaty indeed provides water rights to the CSKT. They predict the CSKT would prevail on this issue if Montanans had to defend themselves against CSKT water lawsuits.

Further, no state or federal law prohibits a negotiated settlement from including Indian off-reservation water rights. The Montana Legislature has the legal authority to approve the Compact.

Nez Perce

Senator Jackson (2015) also claimed the Nez Perce settlement in Idaho supports his claim. He is wrong again.

Grasping for more straws, Senator Jackson noted the Nez Perce filed 6,000 claims and only six were successful. By analogy, he argued only a small number of CSKT claims would survive out of thousands of CSKT lawsuits. Therefore, he concluded Montana should reject the Compact.

However, the lesson of the Nez Perce negotiated settlement is exactly the opposite of what Senator Jackson claims.

Attorney Duane Mecham is familiar with the Idaho Snake River Basin Adjudication. He worked on it as federal attorney for several years on behalf of several federal agencies. He was a chair of the federal negotiation team in the Nez Perce Tribal (NPT) water-rights negotiations and the comprehensive settlement of NPT claims in 2004.

In a recent public email, specifically to counter the claim of Senator Jackson, Attorney Mecham provided the following

information as a lesson to Montana.

In Idaho, unlike in Montana, federal agencies and Tribes had to file claims before they could begin negotiations toward a compact.

The United States, as trustee, filed off-reservation instream water right claims on behalf of only one tribe, the Nez Perce Tribe, because only the Nez Perce Tribe, like Montana's CSKT, has a Stevens' treaty like the Hell Gate treaty that gives off-reservation water rights.

Both the United States and the Nez Perce made extensive off-reservation instream water right claims with a time immemorial priority date as a trump card.

Idaho and its water users strongly objected to the Nez Perce Tribe off-reservation reserved claims. But after they reviewed the law, they realized they had too much at stake to risk a lawsuit. So, they agreed to negotiate a settlement.

The State of Idaho reached comprehensive settlements with the tribes on all three Indian reservations in the Snake River basin in Idaho, Fort Hall, Duck Valley, and Nez Perce. Each settlement achieved robust on-reservation water rights for the tribes.

Idaho offered to give the Nez Perce Tribes extensive instream water rights if the Tribes would give up all but six of their filed claims. The Tribes accepted the offer.

The Idaho settlement gave the Nez Perce Tribe much more off-reservation instream flows than the Montana Compact gives the CSKT.

Idaho also agreed to allow almost 500,000 acre-feet of water from the upper Snake River to be released and delivered downstream (below Hells Canyon Dam) to augment instream flows in the Snake River for fish. This is over five times the amount of water the Montana Compact provides the CSKT from Hungry Horse Reservoir.

Attorney Mecham concludes Idaho recognized its legal exposure and made major accommodations to resolve the Nez Perce Tribe off-reservation instream flow claims. He wrote:

> The Nez Perce settlement represents a treasure trove of lessons-learned that should be considered in the Flathead context.

So, the precedent set was not a loss for the Nez Perce, as Senator Jackson claims, but a big win for Stevens-Treaty Tribal claims of off-reservation water rights. This precedent is a strong warning to those who would reject the CSKT Compact on the belief they will get a better outcome in court trials.

The CSKT has "prima facia" proof of their water rights in Montana that the Nez Perce did not have in Idaho. This gives the CSKT a much stronger legal position than the Nez Perce had in Idaho.

Claim 21: Compact violates MEPA and NEPA.

- Vandemoer (2012) claimed the Compact does not comply with NEPA and MEPA.
- Willman (Newman, 2015) claimed the Compact does not comply with NEPA and MEPA.
- Barrett (2015) claimed the Compact does not comply with NEPA and MEPA.

NEPA is the 1970 National Environmental Policy Act. MEPA is the 1971 Montana Environmental Policy Act.

Weiner (2013) showed MEPA and NEPA apply to actions by government agencies, not to actions by Congress or legislatures.

MEPA and NEPA apply only to works, not to legislation.

Opponents' legal claims require Compact ratification.

Do you notice a difference between the proponents and opponents

in the legal debate over the Compact?

Proponents

Governor Steve Bullock, Attorney General Tim Fox, Colleen Coyle, Andrew Huff, Melissa Hornbein, Hertha L. Lund, Dale Schowengerdt, Helen Thigpen, and Jay Weiner are all attorneys with experience in Montana water law.

Opponents

Vandemoer, Willman, Barrett, Regier, Balance, Taylor, Holmquist, Mitchell, and Jackson are not attorneys. Attorney Simms is not licensed to practice in Montana. No opponent has any experience, education, or credibility in Montana water law.

Legal considerations.

The legislature does not have the authority to make legal decisions on negotiated agreements like the Compact. Only the courts have the authority to make legal decisions.

Legislators do not have the right to play attorney in the legislature even if they are attorneys. All attorneys know that only a court, and not the legislature, can resolve legal issues.

Legislators are supposed to accept the legal advice of state attorneys and the Attorney General. The courts can later overrule the state's legal advice, but the legislature does not have the legal expertise or authority to do so.

The state attorneys advised the legislature that the Compact was constitutional and there were no serious legal defects in the Compact.

Yet, opponent legislators voted against the Compact because they believed their amateur legal opinions were more credible than the professional legal opinions.

The legislature passed the Compact subject to allowing the courts to change any parts found unconstitutional.

A YES vote was failsafe. It threatened no one. It allowed opponents to test their legal claims in court. It allowed the court to reject the Compact.

A NO vote was a dead-end road. Legislators who voted NO, voted to steal the possible benefits of the Compact from Montanans without a valid reason.

Opponents were wrong.

Jerry O'Neil claimed in a Letter to the Editor that those who opposed the Compact for "constitutional" reasons supported the Constitution. The reason was their Oath of Office required them to

> support, protect, and defend the Constitution of the United States, and the Constitution of the State of Montana.

Jerry O'Neil is wrong because the Oath of Office does not require legislators to be attorneys or to make personal interpretations of the law. That is why the state has an Attorney General and staff attorneys to advise legislators on legal issues.

As noted above, professional water compact attorneys, including Montana Attorney General Tim Fox, recommended two things:

> First, only a court can decide whether the Compact is "constitutional" and whether the Hell Gate Treaty conveys off-reservation water rights.
>
> Second, based upon their professional review, they predict the court will rule the Compact is constitutional and the Hell Gate Treaty does convey off-reservation water rights.

The opinions of attorneys Governor Steve Bullock, Attorney General Tim Fox, Colleen Coyle, Andrew Huff, Melissa Hornbein, Hertha L. Lund, Dale Schowengerdt, Helen Thigpen, and Jay Weiner are more likely to be correct than the amateur

opinions of Compact opponents.

If Compact opponents had blocked the Compact, they would have deprived all Montanans of the benefits of the Compact … forever.

Chapter 9 –Votes on the Compact

In Montana's Senate, all 21 Democrats voted YES, eleven Senate Republicans voted YES and 18 voted NO. SB262 passed the Senate 32 to 18.

In Montana's House, all 41 Democrats voted YES, 12 Republicans voted YES and 47 voted NO. SB262 passed the House 53 to 47.

But among the YES vote were one Democrat and one Republican who had previously voted NO, making the true vote 51 to 49.

Here are the final votes on the CSKT Compact SB262.

Democrat Senate 21 YES

1. Barrett, Dick
2. Caferro, Mary M.
3. Cohenour, Jill
4. Driscoll, Robyn
5. Facey, Thomas "Tom"
6. Hamlett, Bradley "Brad"
7. Kaufmann, Christine
8. Keane, Jim
9. Larsen, Clifford "Cliff" G.
10. Malek, Sue
11. McNally, Mary
12. Moe, Mary Sheehy
13. Phillips, Mike K.
14. Pomnichowski, Jennifer "JP"

15. Sands, Diane
16. Sesso, Jon C.
17. Stewart-Peregoy, Sharon
18. Vuckovich, Gene
19. Whitford, Lea
20. Windy Boy, Jonathan
21. Wolken, Cynthia

Republicans Senate 11 YES.

The 22 Republicans legislators who voted YES on CSKT Water Compact:

1. Ankney, Duane
2. Brown, Taylor
3. Buttrey, Edward
4. Connell, Pat
5. Hoven, Brian
6. Jones, Llew
7. Kary, Douglas (Doug)
8. Swandal, Nels
9. Thomas, Fred
10. Tutvedt, Bruce
11. Vincent, Chas

Republican Senate 18 NO

1. Arntzen, Elsie

2. Barrett, Debby
3. Blasdel, Mark
4. Brenden, John
5. Brown, Dee
6. Fielder, Jennifer
7. Hansen, Kris
8. Hinkle, Jedediah
9. Howard, David
10. Keenan, Bob
11. Moore, Frederick (Eric)
12. Ripley, Rick
13. Rosendale, Matthew
14. Sales, Scott
15. Smith, Cary
16. Taylor, Janna
17. Vance, Gordon
18. Webb, Roger

Democrat House 41 YES

1. Bennett, Bryce
2. Brown, Zach
3. Court, Virginia
4. Curdy, Willis
5. Dudik, Kimberly
6. Dunwell, Mary Ann

7. Eck, Jennifer
8. Ellis, Janet
9. Funk, Moffie
10. Hayman, Denise
11. Hill, Ellie Boldman
12. Hunter, Chuck
13. Jacobson, Tom
14. Karjala, Jessica
15. Kelker, Kathy
16. Kipp, George
17. Lieser, Ed
18. Lynch, Ryan
19. MacDonald, Margaret (Margie)
20. McCarthy, Kelly
21. McClafferty, Edith (Edie)
22. McConnell, Nate
23. Mehlhoff, Robert (Bob)
24. Noonan, Pat
25. Olsen, Andrea
26. Pease-Lopez, Carolyn
27. Peppers, Rae
28. Perry, Zac
29. Person, Andrew
30. Pierson, Gordon

31. Pope, Christopher
32. Price, Jean
33. Schreiner, Casey
34. Smith, Bridget
35. Steenberg, Tom
36. Swanson, Kathy
37. Tropila, Mitch
38. Webber, Susan
39. Williams, Kathleen
40. Wilson, Nancy
41. Woods, Tom

Pierson changed his vote to YES on the final vote.

Republican House 12 YES

1. Berry, Tom
2. Clark, Christy
3. Cook, Rob
4. Custer, Geraldine
5. Fitzpatrick, Steve
6. Hertz, Greg
7. Hollandsworth, Roy
8. Meyers, G. Bruce
9. Richmond, Tom
10. Salomon, Daniel
11. Shaw, Ray

12. Welborn, Jeffrey

Greg Hertz previously voted NO but his final vote was YES.

Republican House 47 NO

1. Ballance, Nancy
2. Bennett, Gerald (Jerry)
3. Berglee, Seth
4. Brodehl, Randy
5. Brown, Bob
6. Burnett, Tom
7. Cuffe, Mike
8. Doane, Alan
9. Ehli, Ron
10. Essmann, Jeff
11. Fiscus, Clayton
12. Flynn, Kelly
13. Garner, Frank
14. Glimm, Carl
15. Greef, Edward
16. Hagstrom, Dave
17. Harris, Bill
18. Hess, Stephanie
19. Holmlund, Kenneth
20. Jones, Donald
21. Knudsen, Austin
22. Lamm, Debra
23. Lang, Mike

24. Laszloffy, Sarah
25. Lavin, Steve
26. Mandeville, Forrest
27. Manzella, Theresa
28. McKamey, Wendy
29. Miller, Mike
30. Monforton, Matthew
31. Moore, David (Doc)
32. Mortensen, Dale
33. Noland, Mark
34. Olszewski, Albert
35. Osmundson, Ryan
36. Pinocci, Randall
37. Randall, Lee
38. Redfield, Alan
39. Regier, Keith
40. Ricci, Vince
41. Schwaderer, Nicholas
42. Staffanson, Scott
43. Tschida, Brad
44. Wagoner, Kirk
45. White, Kerry
46. Wittich, Art
47. Zolnikov, Daniel

Frank Garner voted NO, but he also voted against Regier's interpretation of the silver bullet rules and saved the Compact.

Austin Knudsen, Speaker of the House, who was elected Attorney General in 2020, voted NO on the Compact, thereby contradicting case law and proponent attorneys. He did not counter any proponent argument. He did not present any argument to win the CSKT water-rights lawsuits if the legislature defeated the Compact. (See Chapter 2.)

Republicans Testifying 7 NO

1. Curtiss, Aubyn - former Senator
2. Jackson, Verdell - former Senator
3. O'Neil, Jerry - former Senator
4. Skees, Derek - former Rep
5. Happel, Dan - former Commissioner
6. Mitchell, Phil - Commissioner
7. Holmquist, Pam - Commissioner

Chapter 10 – Opponents' Rebuttal

This chapter is open for the opponents to show why the preceding chapters are wrong. All opponents are welcome to respond.

Rick and Nancy Jore - February 9, 2023

IN THE WATER COURT OF THE STATE OF MONTANA

CONFEDERATED SALISH AND KOOTENAI TRIBES – MONTANA – UNITED STATES COMPACT CASE NO. WC-0001-C-2021

ATTACHMENT TO NOTICE OF OBJECTION AND REQUEST FOR HEARING RICK AND NANCY JORE

SUMMARY Of OBJECTION

Objectors Rick and Nancy Jore "have interests that could be materially injured by operation of the compact." As taxpaying residents and citizens of the State of Montana, owning and residing on private fee patented property in Lake County, a political subdivision of the State of Montana, they expect and are to be afforded the benefits and protections of the Montana Constitution.

Those benefits and protections include the right of Equal Protection of the Laws, the Right of Due Process, the Right of Property, and the Right of Representation in the State Government to which they pay taxes, including full representation in the Administration of their water rights, all of which are violated by the Confederated Salish and Kootenai Tribes – Montana – United States Compact.

Considering historical and factual misrepresentations within the Compact, the court cannot possibly "reach a reasoned judgment

that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties."

SPECIFIC GROUNDS AND EVIDENCE OF OBJECTION

Objectors Rick and Nancy Jore provide the following information in support of their Notice of Objection to the settlement of the Confederated Salish and Kootenai Tribes Water Rights Compact, codified at Mont. Code Ann. § 85-20-1901, and Request for Hearing pursuant to Mont. Code Ann. § 85-2- 233(1)(a)(iii).

We reside at 30488 Mount Harding Lane, Ronan MT 59864. Our home is on 160 acres of property we own at that address. The legal description of the property is SE1/4 of Section 27, Township 20 North, Range 19 West of the Montana Meridian, Montana.

First and original owner Joseph C. Meingassner was granted a Land Patent on the property dated January 10, 1920, from the United States of America. The Patent Number is 726673.

Our property is in Basin 76L. The granted patent included,

> "any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights…"

We have DNRC issued water rights #'s 76L 128897 00 (1962 priority date) and 76L 40286 00 (1981 priority date).

While our property is located within the exterior boundaries of what is generally called the Flathead Indian Reservation, it has been legally withdrawn from reservation status. History and legal documents defend that assertion.

HISTORY

The 1855 Hellgate Treaty established the Flathead Indian Reservation. In Art. I of the Treaty, the

> "said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them..."

The United States then created the reservation as expressed in Art. II of the Treaty:

> "There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington..."

This "reservation" of land by the United States established the background for "federal reserved water rights" under the Winters Doctrine for the Flathead reservation. It also disproves the first claimed assumption within the Compact that,

> "...the Confederated Salish and Kootenai tribes reserved the Flathead Indian Reservation..."

Congress passed the 1889 Enabling Act on February 22, 1889, which permitted the entrance of Montana into the United States of America. The Enabling Act contained language addressing the status of Indian lands:

> "...all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States...until revoked by the consent of the United States and the people of Montana."

This Enabling Act language was incorporated into Art. I of the Montana Constitution.

Art. VI of the Hellgate Treaty anticipated and authorized "allotment" of parcels of land to individual Indians and, after allotment, sale of "the residue" of land. (Attached.) The Congress acted on this provision of the treaty with the passage of the Flathead Indian Reservation Allotment Act of 1904:

> "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment."

In 1934, the United States Congress passed the Indian Reorganization Act, sometimes called "The Wheeler/Howard Act." This act changed federal Indian policy when it established,

> "That hereafter no land of any Indian reservation...shall be allotted in severalty to any Indian."

The Act also authorized the Sec. Of Interior

> "...to **restore** to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened..."

(These lands had to be **"restored"** to tribal ownership because, by virtue of such acts of Congress as the Flathead Allotment Act, they had been removed from tribal ownership and subject to allotment or sale.)

However, Sec. 3 of the Act is clear insofar as lands previously withdrawn from reservation status when it states:

> "Provided, however, that valid rights or claims of any persons to any lands so withdrawn...shall not be affected by this Act..."

This history and Congressional Acts indicate a clear intent to extinguish federal and tribal title on lands allotted to Indians and lands sold to non-Indians within the boundaries of the original Flathead reservation. The CKST compact disregards this fact when it defines "Flathead Indian Reservation" as

> "All land within the exterior boundaries of the Indian Reservation established under the July 16, 1855 Treaty of Hellgate (12 Stat. 975), notwithstanding the issuance of any patent, and including rights-of- way running through the

Reservation."

In short, the reservation is legally diminished and title to private land within the boundaries is justified and valid because those lands have been withdrawn from the reservation.

The State of Montana affirms this diminishment by exercise of state jurisdiction over state citizens on private and state-owned land, including rights-of-way, within the exterior boundaries of the reservation; thereby confirming these lands are not "under the absolute jurisdiction and control of the Congress..." and therefore, not "owned or held by any Indian or Indian tribes."

The United States and the CSKT affirm this diminishment by concession of jurisdictional authority of the State of Montana within the boundaries, including authority to levy taxes.

COMPACT VIOLATES MT CONST ART II SEC 1

THE CSKT COMPACT VIOLATES ARTICLE II SEC. 1 AND ART. II SEC. 2 OF THE MONTANA CONSTITUTION

Art. II Sec. 1 of the Montana Constitution states: Popular sovereignty.

> "All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."

Art. II Sec. 2 states: Self-government.

> "The people have the exclusive right of governing themselves as a free, sovereign, and independent state."

The compact is assumed to be implemented by a "Law of Administration" or "Unitary Administration and Management Ordinance" that is dependent upon action by both the State and the CSKT.

The compact defines both terms as

> "the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation..."

A "Flathead Reservation Water Management Board" is established under the Unitary Management Ordinance. The ordinance states:

> "The Board shall be the **exclusive regulatory body** on the Reservation for the issuance of Appropriation Rights and authorizations for Changes of Use of Appropriation Rights and Existing Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses. **The Board shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact** on the Reservation, and any controversy over the right to the use of water as between the Parties or between or among holders of Appropriations Rights and Existing uses on the Reservation..."

By acquiescing to the UAMO and Law of Administration provisions of the compact, the State of Montana is assuming that its constitutional duty and obligation to "provide for the administration of water rights" is dependent upon the will and actions of a separate (assumed) "sovereign," namely the CSKT.

It is denying that "all political power is vested in and derived from the people" of the State, that "all government of right originates with the people," and "is founded upon their will only." It is forfeiting the "exclusive right" of "the people" to "govern[ing] themselves as a free, sovereign, and independent state."

COMPACT VIOLATES MT CONST ART II SEC 4

THE CSKT COMPACT VIOLATES THE "EQUAL PROTECTION OF THE LAW" PROVISIONS IN ARTICLE II SEC. 4 OF THE MONTANA CONSTITUTION AND THE

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; INCLUDING THE RIGHT OF FULL REPRESENTATION FOR ART. IX SEC. 3 MONTANA CONSTITUTION ADMINISTRATION OF WATER RIGHTS

Art. II Sec. 4 of the Montana Constitution establishes a state duty to secure "equal protection" to each citizen:

> "Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."

The Fourteenth Amendment to the Constitution for the United States also secures the right of "equal protection" to these same citizens:

> "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

The Montana Constitution Article IX, Section 3(4), states that

> "[t]he legislature shall provide for the administration, control, and regulation of water rights..."

The Montana legislature created the Reserved Water Rights Compact Commission in 1979 to negotiate Federal Reserved Water Rights stemming from the "Winters Doctrine" emanating from a 1908 Supreme Court decision recognizing the **implied** water rights "necessary to fulfill the purpose of any federal reservation of land."

At a public meeting of the Compact Commission on August 2, 2012, Commission Chairman Chris Tweeten conveyed to the commission members, and the public, what he called "The Grand Bargain." He stated:

> "...the response is to remind the tribes about the Grand Bargain, and the fact that we agreed to do this **extraordinary thing**, frankly, with respect to **agreeing to subject or to remove non-Indian rights on the**

> **reservation from the jurisdiction and control of the state**, and place that somewhere else at the tribe's request…."

Mr. Tweeten's words are unequivocal. He and the Commission should have understood the implications of this "extraordinary thing." The UMO/Law of Administration and the formation of the "Flathead Indian Reservation Water Management Board" are incompatible with the Art. IX Sec. 3 constitutional duty of the State.

Mr. Tweeten clearly expressed what any logical and common-sense person would conclude; **the State was**

> "agreeing to...remove non-Indian rights on the reservation from the jurisdiction and control of the state"

and thereby, by "overreach" and "collusion between the negotiating parties," (if not outright "fraud") violate the constitutionally secured "equal protection" rights of taxpaying Montana citizens within the reservation.

Legislators who supported the Compact likewise should have understood this "extraordinary thing" was not at all consistent with their oath to uphold the Montana and United States Constitutions.

Members of the RWRCC and legislators also should have known this "extraordinary thing" was contrary to the State's earlier stated position regarding water rights administration within the Reservation when it exhibited a more stringent will to follow the requirements of the State Constitution.

In a 1981 case filed in the United States District Court in Missoula, *Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al vs. The State of Montana, et al,* the CSKT made much the same claims on which the Compact is based.

The State rejected the claims of the tribes as applied to non-tribal member property owners and water right holders within the reservation.

In the "Defendants' Brief in Opposition to Application for Preliminary Injunction" in that case, the State conveyed

> "The defendants do not in any way assert jurisdiction over the Tribes, or over the property of individual members of the Tribes owned by them or their Reservation. The defendants do however assert jurisdiction pursuant to the Montana Water Use Act over the SURPLUS WATERS flowing through and touching upon the Reservation."

Additionally, the State declared,

> "All individuals who either claim rights existing as of July 1, 1973, pursuant to the Montana Water Use Act, or claim water rights through permits granted by the Montana Department of Natural Resources and Conservation as provided by Montana law have valuable property rights."

In a letter to then Montana Attorney General Tim Fox, Attorney Richard A. Simms, New Mexico Board Certified Specialist in Water Law, summed up his arguments that the Compact violated Art. IX Sec. (3)4 thusly:

> "The blind assertion that the ratification of the CSKT Compact would "provide for the administration of water rights pursuant to Art. IX of the Montana Constitution" is dead wrong under both federal and state water law.
>
> In sum, the "Law of Administration" obliterates Art. IX of the Montana Constitution and all of the Montana law enacted pursuant thereto by the Montana legislature.
>
> To conclude that the ratification of the CSKT Compact would "provide for the administration, control, and regulation of water rights" in Montana is completely inane."

COMPACT VIOLATES MT CONST ART III SEC 1

THE CSKT COMPACT VIOLATES ART. III SEC. 1 OF THE MONTANA CONSTITUTION

All legitimate State governmental power in Montana is contained in one of the three branches created by Art. III Sec. 1 of the Montana Constitution, which says: **Separation of powers.**

> "The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No 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."

There is contention that the "Flathead Reservation Water Management Board" is "a state created board" that somehow fulfills the requirements of Art. IX Sec. 3.

Legislators and others that supported the compact struggle to define the board when asked and we have yet to receive a cogent answer from any of them. One State Senator, for example, offered an apparent guess: "I would say it is a state authorized board."

However, by the terms of the compact, it is no less a "tribal authorized board," since existence of the board depends on Tribal Council passage of the UMO/Law of Administration and Tribal Council appointments to the board.

One Board member described the Board and its assumed authority in this way:

> "This is neither a state system nor a tribal system. We are really creating a new independent system."

Another Board member deferred to DNRC staff member and Compact Implementation Program Manager Arne Wick when asked to define the board. Mr. Wick then contacted us by phone to

address our questions. He verbally confirmed that he agrees the Board is "independent" of both the State and the Tribes. Mr. Wick also confirmed that Board members were under no obligation of allegiance to the Montana Constitution by oath, as that was not a requirement within the legislation.

The Board itself paid a Montana law firm to "**attempt** to define the classification of the Board" with an answer to this specific question:

> "What is the Flathead Reservation Management Board (the "Board") and how is the Board classified for jurisdiction and authority purposes?"

The law firm issued a Memorandum to the Board and the Office of the Engineer employed by the Board on Nov. 16, 2022. The memorandum states,

> "The Board is neither a state nor tribal governmental entity; rather it is an amalgamate of both" and eventually concluded that the Flathead Reservation Water Management Board was to be called "a government instrumentality."

If the Board is not a "state board" and

> "The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial,"

obviously, it is not exercising Montana Constitution ordained authority.

If it is indeed an independent "government instrumentality" with no Constitutional sanction and no Constitutional allegiance, it is without legitimate authority over Montana citizens.

Additionally, it is apparent that the Board exercises legislative, executive, and judicial authority which, if one makes the claim that this is a "state board"—even if in an "amalgamated" way—the

assumed legislative, executive, and judicial authority is a violation of "separation of powers." Either way, the Compact must be declared repugnant to Art. III Sec. 1 of the Montana Constitution and therefore void.

COMPACT VIOLATES MT CONST ART II SECS 17, 26

THE COMPACT VIOLATES ART. II SEC. 17 AND ART. II SEC. 26 OF THE MONTANA CONSTITUTION

The Montana Constitution secures the right of "Due process of law" and "Trial by jury" to each individual citizen. Art. II Sec. 17:

Due process of law. "No person shall be deprived of life, liberty, or property without due process of law."

Art. II Sec. 26: Trial by jury. The right of trial by jury is secured to all and shall remain inviolate.

Although the Compact states that an individual "dissatisfied with a decision of the Board...may appeal that decision by filing a petition for judicial review with a Court of Competent Jurisdiction," the Compact later clarifies that such a court need not be in the Montana judiciary.

In the Compact, a "Court of Competent Jurisdiction" is defined 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."

Under the Compact, the water rights of non-tribal Montanans within the boundaries of the Reservation are adjudicated by the Board. If parties to a conflict do not consent to Montana district court jurisdiction, a ruling by the Board could be appealed to the Federal judiciary. In such cases, Montana citizens like us would be deprived of the typical "due process" procedures afforded all other Montana citizens, including a right of trial by a jury of their peers within the State of Montana and within the standard Montana

judiciary process.

COMPACT VIOLATES US CONST ART II SEC 28, AND FIFTH

THE COMPACT VIOLATES ART. II SEC. 28 AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The United States assumed to "ratify" the CSKT water compact by passage of a Sen. Daines sponsored bill, S 3019, titled "The Montana Water Rights Protection Act."

To gain passage, the bill was attached to H.R. 133, called the "Consolidated Appropriations Act, 2021." The MWRPA did not have a committee hearing in the House of Representatives, did not have a "stand alone" vote in either the House or the Senate, and was "passed" by attachment to the Omnibus Spending bill during a lame duck session of Congress on Dec. 27, 2020.

Additionally, **MWRPA contains significant provisions that were not included in SB 262, the bill passed by the MT Legislature as "ratification" of the compact.**

One significant provision of MWRPA is the implementation of "land exchange" provisions that **require** both **state and private land** within the exterior boundaries of the Reservation be exchanged for public (federal) land elsewhere within the State of Montana. Once exchanged, those state and private lands will be given to the tribes and, by the terms of MWRPA, "become part of the reservation."

MWRPA requires no less than "**the value of the surface estate of the approximately 36,808 acres of State trust land"** within the boundaries of the reservation be exchanged and then transferred to the tribes. If the totality of the approximately 36,808 acres of State trust land within the boundaries is not exchanged and transferred to the tribes within "the 5-year period beginning on the date of enactment" of MWRPA, a **"private land exchange program"** is

initiated and

> "The Tribes shall assist in obtaining prospective willing parties to exchange private land within the Reservation for public land within the State."

The Montana DNRC has publicly conveyed that up to 29,200 acres of State trust land within the boundaries of the reservation is eligible for exchange. If the entirety of that amount of State trust land is exchanged, which is unlikely in our view, then no less than approx. 7,600 acres of private land would be required to be exchanged and transferred to the Tribes. The "exchange" of private land and its eventual transfer to tribal trust status removes the property from the tax base of local political subdivisions of the State.

The impact of these land exchanges will be significant to both the value and tax liability of remaining private property within the boundaries of the reservation. In addition to land value diminishment caused by uncertainty of State jurisdictional authority (except regarding State taxation, apparently), the already present "tax shift" concerns, especially in Lake County, will be exacerbated.

A legislative interim committee study during the 2019-2021 interim, stemming from passage of HJ 35 in the 2019 legislative session, indicated that 81% of property tax revenue in Lake County was derived from Residential property taxes, the highest percentage of all 56 Montana Counties and approximately double the average of all counties. Lake County had the fourth highest Residential property tax when measured on a per capita basis. These numbers are confirmation of significant "tax shift" caused primarily by non-taxed land in tribal trust status. There is no doubt this "tax shift" will be exacerbated by MWRPA.

The Compact contains jurisdictional transfer provisions from the State to the Tribes. The "land exchange" provisions of MWRPA

are a not-so-subtle repatriation effort that necessarily assumes the Flathead Allotment Act of 1904 was illegitimate and that non-Indian owned private property within the reservation boundaries is, at best, less valid as private property outside the boundaries, at worst, "stolen land."

(It must be noted that this very presupposition has been stated publicly to myself and others, including elected officials, by tribal members and supporters with this contention: "You are living on stolen land." A serious and disconcerting accusation, to say the least.)

The Compact, including the provisions of MWRPA, is public policy that logically and certainly impacts market forces negatively and which devalues private property within the Flathead Indian Reservation and is therefore a "taking of private property for public use without just compensation."

CONCLUSION

Rick and Nancy Jore are Montana citizens, property owners, and taxpayers who have defrauded no one of their rights or property and therefore have a right of claim to full citizenship under the Montana Constitution, the governing document of this State. We do not concede to taxation without representation.

ARTICLE VI, HELLGATE TREATY

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or said portion of such reservation as he may think proper, to be surveyed into lots, and assign the same as such individuals of families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 6. OMAHA TREATY (APPLICABLE)

The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members.

And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon.

And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions.

And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of

industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land.

And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States.

No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

Chapter 11 – Montana's 1979 dream fulfilled.

> *So even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal.*
>
> - Rev. Martin Luther King Jr., 1963

Montana's 1979 legislature had a dream.

The tribes' water rights begin before the State of Montana existed. The tribes' lawsuits would have been legally correct by default (Prima Facia Proof). The federal government would have supported the tribes' lawsuits.

In the 1970's, with support of the US government, the Tribes began water-rights lawsuits to define and secure their water rights. Montanans had to defend themselves against the lawsuits. These water rights litigations proved time-consuming and costly for all parties.

Montana's 1979 legislature dreamed of a future where Montana would solve all its Indian water-rights issues by negotiation rather than litigation.

Montana's 1979 legislature, with support of the US Government and the Tribes, created the Reserved Water Rights Compact Commission (DNRC, 2015). The Legislature ordered the Commission to negotiate and "conclude" water compacts with Montana's seven Tribes.

In late 2014, Montana's Compact Commission concluded its water rights negotiations with the Confederated Salish and Kootenai Tribes (CSKT), and the United States government. The negotiated

settlement is the CSKT Water Compact. The negotiation took twelve years.

But in 2015, Montana had different legislators. Republicans in 2015 had a much larger percent of radical right than in 1979. This made the vote a cliff-hanger but, almost miraculously, they approved the Compact by one vote.

The 2015 CSKT Water Compact fulfilled the 1979 dream, 36 years in the making. The Compact settles all Indian water-rights conflicts and lets Montana and the CSKT work together to improve Montana.

Congress approves CSKT Compact.

Congressman Rob Bishop (R-Utah) chairs the House Natural Resources Committee. On Feb. 26, 2016, he informed the Justice Department and the Interior Department that his committee intends to follow a new process for future Indian water rights settlements.

Now that Montana has ratified the Compact, the parties must form a compact implementation technical team (CITT) and a compact management committee (CMC).

The CITT is helping the operator of the Flathead Indian Irrigation Project on operational improvements, rehabilitation, betterment of Project facilities, and adaptive management. The CMC will oversee the technical team.

Now that Congress has approved the Compact, the Montana Water Court will review the Compact. Water users who believe the Compact will cause them harm have their opportunity to object to the Compact. The court can either approve or reject the Compact. It cannot modify it.

On December 21, 2020, Congress passed a spending bill that included funding for the CSKT Compact.

CSKT Tribal Council Chairwoman Shelly Fyant said,

> This is one of the most significant days in the history of our people, and the one that will have a profound and positive impact on the future of the Flathead Reservation for the next century.
>
> We chose the path of negotiation and now we can avoid decades of acrimonious litigation on streams across much of Montana and protect many streams with sufficient amounts of water to ensure that fish can survive.

Montana Senator Daines said,

> The U.S. Senate just passed our bipartisan bill that permanently resolves the century long CSKT water dispute and will soon become law.
>
> Without our bill, thousands of Montanans would be forced into very expensive litigation and our ag economy would've taken over a one billion dollar hit.

Montana Senator Tester said,

> This victory has been decades in the making, and is a huge win for Montana taxpayers, ranchers, farmers, and the Tribes.
>
> Water is among our most valuable resources. Ratifying this Compact honors our trust responsibilities, creates jobs and invests in infrastructure while providing certainty to water users everywhere.
>
> I'm thankful we were able to work together to get this critical legislation across the finish line."

Governor-elect Greg Gianforte said,

> I am glad we were able to get this done to bring certainty to Montana's farmers, ranchers, the Salish and Kootenai tribes, and all the water users across the state.

Attorney General Tim Fox said,

> I cannot overstate the historic significance of this milestone in the 165 years since the signing of the Hellgate Treaty.

Montana Farmers Union, Montana Wilderness Association, Montana Farm Bureau Federation supported the Compact.

Montana Conservation Voters said,

> It is the product of government-to-government collaboration, resulting in a fair and equitable solution for sovereign tribal governments and their lands, for Montana's shared public lands, for bison and other wildlife, and for the precious resource of water.

President Donald Trump signed the bill. The CSKT Tribal Council unanimously ratified the CSKT Water Compact.

All this happened in late December 2020.

Montana Trout Unlimited lists Compact benefits.

Clayton Elliott, Montana Trout Unlimited (MTU) Conservation and Gov't Affairs Director, wrote (here summarized):

> MTU celebrates the recent passage of the landmark Montana Water Rights Protection Act, S. 3019.
>
> This bill provides Congressional ratification of the negotiated water compact and settlement the CSKT, the State of Montana, and the United States.
>
> The $1.9 billion CSKT water compact is the largest water rights settlement in history between the federal government and a federally recognized tribe.
>
> The legislation settles on and off reservation water rights thereby avoiding decades of costly litigation and uncertainty.
>
> The settlement will provide millions of dollars in renovation

and restoration funds to the Flathead Indian Irrigation Project, delivering benefits to coldwater fisheries in western Montana.

It will inject millions of dollars into collaborative restoration of wild fish and their habitats while upgrading aging irrigation infrastructure critical to the Tribes and agricultural users.

Here are more details:

- The Compact resolves for all time the very legitimate, legal water right claims of the Tribes on and off the reservation. This will save water right owners and the State of Montana millions of dollars in litigation.
- The Compact protects current irrigators on the reservation, including within the Flathead Indian Irrigation Project (FIIP), by ensuring they get the water they have been legally entitled to in the past.
- The Compact protects all non-irrigation water rights from a tribal call on water, and it protects existing rights on and off the reservation by limiting tribal rights.
- The Compact will make available up to 90,000 acre-feet of stored water from Hungry Horse Reservoir for future development in the Flathead Basin.
- This water can be used to supplement irrigation, residential or fishery needs, or to mitigate the effects of new development on existing water rights. This water cannot be used out of state.
- The Compact will trigger state expenditures of $55 million for improving irrigation infrastructure, paying for pumping costs and water measurement, and investing in stream habitat restoration.
- New federal funds will be available for infrastructure that will benefit both tribal and non-tribal water users.
- The Compact benefits fish and wildlife. It includes enhanced protections for instream flows for important trout

populations on the Flathead Indian Reservation and for the upper Clark Fork River. It helps protect current streamflow guarantees off-reservation in the Bitterroot, Blackfoot, Flathead, Swan and Kootenai River basins.

- All off-reservation water rights granted to the Tribes in the Compact are either subordinate to, or parallel to existing water rights or dam license conditions held by the State of Montana and the federal and private utilities.

The CSKT will give up forever future claims to water everywhere in Montana, saving decades of costly litigation and uncertainty for water users and coldwater fisheries.

Farmers and Ranchers for Montana list benefits.

- It secures stable, reliable access to water.
- It repairs critical irrigation infrastructure.
- It creates jobs and strengthens our agricultural economy.
- It improves water management during drought conditions.
- It respects property rights and removes uncertainty.
- It lets Montana control its water.
- It makes the CSKT share water during low-water years.
- It stops water calls by Idaho, Oregon, and Washington.
- It saves billions of dollars by avoiding forever a generation of costly, unrewarding lawsuits.
- It will encourage businesses to move to Montana.
- It will increase real-estate values and business investment.
- It will bring federal money to help Montana's economy.

Conclusions

The Compact was a Robert Frost moment in Montana's history. Montana would choose one of two roads. The road chosen would make all the difference to Montana's future.

The Compact settles all Indian water-rights conflicts and lets

Montana and the CSKT work together to improve Montana. It should encourage Republicans work together to improve Montana.

Normal Republicans realize Republicans do not always agree in every issue. They take that in stride and never hold grudges against those who voted differently that they do. Like in sports, you don't hate your competitor. Sometimes you win and sometimes you lose.

Unfortunately, radical Republicans don't see it that way, and that characteristic best defines the difference between normal and radical Republicans.

The Compact is about working together to improve Montana, but the radical right is not about working together. They believe they are perfect. So, they censor, blacklist, and attack Republicans whom they deem are "imperfect." They even vote Democrat or Libertarian to stop "imperfect" Republicans from taking office.

Radical opponents think they are "patriots." But real patriots work with all Republicans and even with Democrats to achieve a common goal. Real patriots realize we are all in one boat and we must all work together to survive and win.

Opponents Claim #13 says Republicans must oppose the Compact because the Democrats are voting for it. This may be the dumbest reason ever promoted to reject the Compact. This argument all but admits the radical Republicans can't think for themselves. Instead, they must wait to see how the Democrats vote and then vote the opposite.

Proponents' logical and legal arguments show Montana is better served with the Compact than without the Compact.

No opponent ever showed any proponent argument was wrong. No opponent showed a business plan for how Montana would benefit without the Compact. No opponent proposed a legal strategy to win CSKT water rights lawsuits in the absence of the Compact.

We close with Senator Chas Vincent's summary:

At the end of the day, you can disagree with the Compact and you can disagree with the case law that supports it.

But don't condemn the rest of us to millions of dollars and years of litigation when there is the option to prevent it by passing the Compact.

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About the Author

Berry is a graduate of Caltech, Dartmouth, and the University of Nevada. His key PhD mentor was Professor Friedwardt Winterberg – who was the best student of Nobel Laureate physicist Werner Heisenberg – and who said Berry was his best student.

Berry's PhD thesis in theoretical physics was a breakthrough in cloud physics and numerical modeling that shows how fast rain forms in convective clouds with different condensation nuclei. Today's climate models use his parameterized model to calculate rain formation. Berry's work is now described in textbooks.

Berry was chief scientist for Nevada's Desert Research Institute (DRI) airborne research facility. He planned and led DRI's instrumented planes through Sierra Nevada wave clouds, winter storms, Alberta hailstorms, and geysers in Yellowstone National Park. He designed the first airborne, earth-referenced radar that predated modern GPS instruments.

He is a Certified Consulting Meteorologist (CCM) and an experienced expert witness with a 100% win-record. He is a USA certified pilot with single engine land, glider, and instrument ratings.

He took part in weather modification experiments all over the world and was a regular consultant to DOD's weather modification program, including top-secret Project Popeye.

The National Science Foundation choose Berry to be its Program Manager for Weather Modification. He managed the Metropolitan Meteorological Experiment (METROMEX) which was the first major experiment to show how large cities change their local climate.

In his weather and climate business, he showed the FAA how to

stop airline accidents caused by severe downdrafts. There have been no such accidents since.

Working for the defense in a major murder trial, Berry collected relevant data and wrote a computer model that simulated the testimony of the key witness of the prosecution. This was first interactive courtroom model ever used in a major high-profile murder trial. He showed how changes in weather along a 400-mile route affected the environment and human physiology of the claimed murder victim. Berry's testimony and software proved the prosecution's witness lied. He defended his software for five days against two California Attorney General attorneys and convinced the jury that the defendant was innocent. After the trial, Berry's software won the *People's Choice Award* at a Microsoft. *Windows World Open* contest.

The University of Nevada Alumni Association gave Berry its Professional Achievement Award.

In 2011, Berry led an Intervention that stopped the *Our Children's Trust* climate petition in Montana's Supreme Court, making him one of the few scientists who has beaten an alarmist lawsuit, and saving Montana billions of dollars per year thereafter.

He has debated opposing scientists on his website for many years, learning their arguments and how to win climate-change debates.

His unique book, *Climate Miracle*, is about how to win a climate change debate or lawsuit.

His December 2021 peer-reviewed publication checkmates the very foundation of climate alarmism and is a critical argument to winning climate lawsuits. His 2023 publication (in preparation) makes it very simple for a judge to understand that Berry has checkmated the core alarmists' claims about climate change.

His climate physics publications have received over 700 citations.

His athletic performance in Nevada made him a member of the elite *Sigma Delta Psi* national athletic honorary.

Berry and his wife Valerie won sailing Gold Medals in the Canadian Olympic-Training Regatta and US national and North American sailing championships, in an international class 16-ft high performance trapeze centerboard sailboat.

He placed in the top ten in USA age-group run-bike-run and senior track events.

He holds Concept2 rowing world records for the 80-89 age-group in 100m and 1min, breaking his own world records at age 87.

Berry is a theoretical climate physicist and a competitor who you need to help you win your climate lawsuit.

This book on the CSKT Water Compact is a diversion from his work in climate physics.

Go to his website: https://edberry.com where you can comment on this book and sign up for his emails.

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Montana's Last Indian Water Compact:

How Democrats and wise Republicans saved the CSKT Water Compact by one vote.

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To join the conversation on this book, go here:

https://edberry.com/csktcompactbook/

My other book is ***Climate Miracle*** which you can find on Amazon here:

https://www.amazon.com/dp/B08LCD1YC3/

and comment on here:

https://edberry.com/climatemiracle/

How to win your climate lawsuit.

I wrote this book on the CSKT Water Compact because somebody had to do it. Somebody had to document this very important even in Montana's history.

My other book is ***Climate Miracle*** which you can find on Amazon.

My profession is climate physics and winning climate debates and lawsuits. Very few climate physicists are also good at winning.

I and my Climate Team Six can find to prove in court that human CO_2 does not cause dangerous climate change.

So, if you want to win a climate lawsuit, let's talk.

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