TO: Senator John Barrasso, Chair, and
All Members of the Senate Committee on Indian Affairs

And,

Chairman Don Young, and All Members of:
Indian Insular and Alaska Native Affairs Subcommittee

FROM: Elaine D. Willman, MPA
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DATE: July 14, 2016

RE: **S. 3013 – Confederated Salish-Kootenai Tribes (CSKT) Water Rights Compact**

Introduction. As background for the comments provided below, please know that I have lived on three separate reservations for the past 26 years (Yakama, Oneida of Wisconsin, and Flathead). Further I have been an active researcher of federal Indian policy, and am the author of two books on the aforesaid policies: *Going to Pieces…the dismantling of the United States of America (*May 2005); and *Slumbering Thunder…a primer for confronting the spread of tribalism overwhelming America* (March 2016).

I moved to the Flathead Indian Reservation to assist tribal and non-tribal landowners, farmers and ranchers with the foreboding consequences of a Proposed CSKT Water Settlement Compact, approved by the Montana State Legislature on April 11, 2015.

As a result of CSKT Water Compact approval by federal, state and tribal officials, 30,000 Montana residents, both tribal and non-tribal, have **no** government as advocate for their Constitutional Rights, civil, property or water rights. The small CSKT tribal government now has 100% control over all water and power emanating from the former Kerr Dam, rivers and streams, all land and residential access to water, and all access to electric power. Residents of the Flathead Indian Reservation are now at the mercy of a tribal government that has no duty to 75% of the reservation population, for livelihood on their lands and businesses; this condition will be locked in perpetuity, if the State Legislators' Proposed CSKT Water Settlement Compact, and/or S. 3013 is ratified.

In addition to total control of water and power, the CSKT Compact provides for no cap on rate-setting for water and power, nor review by federal entities or the State Public Services Commission.

Request. This writer requests that the Senate Committee on Indian Affairs and the Indian Insular and Alaska Native Affairs Subcommittee of the House Natural Resources Committee **take no further action on S. 3013 until the following consequences of S. 3013 are investigated and resolved**:

Issue No. 1. Due Process and Procedure. The CSKT Compact passed by the Montana Legislature has been inordinately and dramatically expanded by S. 3013 beyond what the State Legislature actually approved on April 11, 2015, without the review or approval of the Montana Legislature. May a federal senator bypass, expand and override decisions made by a State Legislature without State legislative consent? And if such is legal, is such imbalance of separation of power remotely ethical? S. 3013 controls and pre-empts the Montana Legislature's Proposed CSKT Water Settlement Agreement.

Issue No. 2. U.S. & Montana State Constitutions. Both the State approved Compact and S. 3013 entirely violate the U.S. Constitution and Montana's State Constitution. The Compact violates the 1st, 5th and 10th Amendment of the U.S. Constitution. The Compact violates numerous individual rights of Montana citizens as identified in Article II of Montana's Constitution and Section 3 of Article IX of the Montana Constitution, to wit:

> *"All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (1972)*
>
> *"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 are subject to appropriation for beneficial uses as provided by law." (1972)*

Issue No. 3. Judicial Rulings. In a June 13, 2013 unanimous decision, the U.S. Supreme Court ruled in ***Tarrant v. Herrmann***:

> "The sovereign States possess an absolute right to all their navigable waters and the soils under them for their own common use…So, for example, a court deciding a question of title to a bed of navigable water within a State's boundary must begin with a strong presumption against defeat of a State's title."

The Governor and Attorney General of the State of Montana are fully aware but have declined to acknowledge *Tarrant v. Herrmann* and have sacrificed Montana navigable state waters in 11 counties of Western Montana, affecting 20% of Montana's land and 30% (350,000) of Montana citizens.

Likewise, by signing the Compact, Governor Bullock has confiscated individual Montana citizen's "consent to be governed by a tribal government" as ruled in the U.S. Supreme Court in ***Montana v. U.S.*** (1980) which provides that non-tribal persons will not be governed by tribal

governments absent their individual consent. The Executive and Legislative Branches of the State of Montana have entirely walked away from their responsibilities to protect and serve Montana citizens, tribal and non-tribal, within the Flathead Indian Reservation.

Issue No. 4. Violations of the General Allotment (Dawes) Act and Homestead Act. When settling the West and opening up Indian Reservations, Congress provided in perpetuity that each land patent issued under the above Acts, whether to tribal or non-tribal persons, was guaranteed a water right permanently attached to the patent. Settling the West and opening the reservations could not happen unless water was guaranteed by Congress to each patent issued. **The water rights attached by Congress to individual land patents have been confiscated by the Federal, State and Tribal governments, and incorporated into the CSKT Water Compact.** Landowners subject to the CSKT Water Compact had significant liens placed against their properties for purpose of constructing the Kerr Dam and a federal Irrigation project in the early 1900s. Liens were long-ago paid off, from revenue generated by the dam, and later by tax assessments for irrigation project operations, but landowners have never ever been reimbursed, nor have their properties been cleared of these liens. Private property water rights have attached to the lands have been literally stolen, while liens permanently exist on the allotted and homestead parcels within the Flathead Reservation. The CSKT Water Compact would render this condition permanent.

Issue No. 5. Federal and Tribal Sovereign Immunity. The CSKT Water Compact as passed by Montana Legislature on April 11, 2015 contained a waiver of tribal sovereign immunity. S. 3013 is silent as to tribal sovereign immunity but S. 3013 provides that where there is *inconsistency* between the Legislature's Compact, and Senator Tester's inflated version of the CSKT Water Settlement Compact, that the Act contained in S. 3013 *controls*. The end result is that S. 3013 holds the United States entirely harmless from all administrative accountability, use of funds and project impacts, while also (by intentional omission) *eliminating* the CSKT tribal waiver of sovereign immunity approved by the Montana legislature. By entirely locking out due process of affected landowners, there is no recourse when further harm occurs to landowners and residents other than a small appointed Compact management organization heavily seated and controlled by the tribes.

Issue No. 6. National Environmental Policy Act (NEPA) and State Environmental Policy Act. Prior to passage of the CSKT Water Compact by the Montana State Legislature on April 11, 2015, absolutely no environmental impact analysis was conducted by the federal, state or tribal governments for a project that will physically disturb and impact thousands of acres of land within the Flathead Indian Reservation. Senate Bill 3013 *affirms* compliance with the National Environmental Act, and in the very next sentence, *exempts* S. 3013 from NEPA compliance with the following statement:

> *"The execution of the Compact by the Secretary under this section **shall not constitute a major Federal action** for purposes of the National Environmental Policy Act of 1969."*

To state that the CSKT Water Settlement Compact (S. 3013) does not constitute "a major federal action" is disingenuous at best, and patently false.

Issue No. 7. The Hellgate Treaty of 1855 and the CSKT Constitution under the Indian Reorganization (IRA) Act of 1934. The foundational framework asserting tribal water rights is based upon the Hellgate Treaty of 1855. This treaty executed by Territorial Governor Isaac Stevens provided ***beneficial use and occupancy*** **only** of a bounded reservation. Treaty reservation land was owned and governed by the United States and Bureau of Indian Affairs. Tribal leaders nor tribal members had any jurisdictional authority or ownership of the land, or the water within that reservation under the Treaty of 1855. To claim in 2016 that the Hellgate Treaty provided tribal government "ownership" or jurisdiction of the land or water when the Treaty only affirmed "the right to fish," is remarkable revisionist history.

Additionally, the Confederated Salish-Kootenai Tribe was the very first to be "federally recognized" as a governing entity under the Indian Reorganization Act (IRA) of 1934. The IRA is the instrument that converted "beneficial use and occupancy" to governing and jurisdictional authority over Indian trust lands within reservation boundaries. Tribal governments were required to take a majority vote of adult, enrolled members to either remain a "Treaty" tribe, or become an IRA tribe, but not both. The tribe's IRA constitution granted in 1936 supersedes its Hellgate Treaty of 1855.

The CSKT Water Settlement Compact as passed by the State Legislature and in S. 3013, claim the Hellgate Treaty, rather than the tribe's official governing instrument, its IRA Constitution, as authority for the Water Compact. The tribe's constitution is given almost no mention in either version of the Water Compact. This is a result of two goals: 1) The tribe wants to claim 1855 as its date of superior water rights; and 2) The Tribe's Constitution gives it absolutely no authority to govern non-tribal persons or properties.

Issue No. 8. Pre-Compact Ratification Activities. As a resident on the Flathead Indian Reservation I was made aware shortly after State Legislative approval of the CSKT Water Compact of examples of "pre-implementation" tactics of the CSKT Tribe. The tribe shut off the water to stock ponds for a land owner's large her d of cattle, forcing the landowner to relocate his cattle to someone else's land. Upon relocating the cattle, the tribe turned his stock water back on. In another example, one of my neighbors had two hundred acres of peas coming to peak in a historic heat wave (104+ degrees) at the end of June/first of July last year. His entire crop was scorched. After the crop was lost, the tribe turned the irrigation water back on. There are numerous similar experiences that landowners endured last year, at a significant financial loss. Unauthorized "Pre-Implementation" activities of the proposed CSKT Water Compact (S. 3013) have been ongoing since initial approval by the Montana legislature on April 11, 2015.

Conclusion. The Flathead Indian Reservation includes all or portions of three counties, 11 towns and 30,000 residents. The majority population (75-80%) is non-tribal, and the greater land base within this reservation is equally non-tribal—land paying taxes to a State that no longer serves them.

Citizens either have federal and state constitutional protections, or they do not. Federal, state and tribal governments either follow the rule of law, federal and state regulations, or they do not. Senate Bill 3013 has not followed the rule of law or traditional environmental impact regulations. The end result is that the Executive and Legislative branches of the State of Montana, and its federal Senator, Jon Tester, no longer acknowledge an oath to serve and protect the Montana residents, both tribal and non-tribal, within the Flathead Indian Reservation.

S. 3013 must be rejected outright.