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Overnight Priority Mail

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Attorney General Tim Fox
Office of the Attorney General
215 N. Sanders, Third Floor
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Dear General Fox:

Representatives of your office, the Compact Commission, the Legislative Services Division, and the Water Policy Interim Committee have been told that the Confederated Salish & Kootenai Compact violates Art. IX of the Montana Constitution. The common response has been to say that Art. IX § (3)4 states that "**[the] legislature shall provide** for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." After emphasizing the phrase "the legislature shall provide," it is my understanding that your position has been that in ratifying the CSKT Compact the legislature would be doing exactly what the Constitution mandates, *i.e.*, providing for the administration of water rights. Your response is the same response that is overweeningly recited by the Compact Commission, the Legal Services Division, and the Water Policy Interim Committee. The purpose of this letter is to explain how illusory the response is.

The provisions of Art. IX of the Montana Constitution apply interactively to the State of Montana. Art. IX, § 3(1) provides that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." The existing rights referred to in Art. IX are all water rights perfected in Montana by diversion and application to beneficial use under the territorial and common law of prior appropriation in Montana prior to 1973, the year the Montana Water Use Act was enacted.

Art. IX § 3(3) states that 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." This provision results from the federal government's initial deference to the emergence of territorial and state water law in the West, which was enacted into federal law through the Act of July 26, 1866, 14 Stat. 253, the Act of July 9, 1870,

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16 Stat. 218, and the Desert Land Act of March 3, 1877, 19 Stat. 377. Finally, Art. IX § (4) of the Montana Constitution provides that "[t]he legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

The mandate to provide for state administration of water rights required: 1) the adjudication of all pre-1973 water rights recognized and confirmed in Art. IX § (3)1 in order to make them subject to administration; 2) the creation of a statutory procedure for perfecting new (post-1973) water rights and changes in place or purpose of use of both pre-1973 rights and newly permitted water rights; 3) the creation of a statewide system of *inter sese* adjudication wherein all water rights are determined as between individual water right owners and the state **and as among one another** in order to make the United States, on its own behalf, and on behalf of its Indian wards, subject to being named a party defendant in Montana's state court water rights adjudication under the McCarran Amendment; and 4) the creation of a system of administration for all interdependent, adjudicated water rights as among one another. As planned at the Constitutional Convention, on the same day the Montana Constitution was adopted, the Montana legislature created statutory schemes for all four of these prerequisites in order to enable the State to provide for the "control and regulation of the water rights" and the establishment of "a system of centralized records, in addition to the present system of local records." All four of these statutory schemes mandated by Art. IX of the Montana Constitution have statewide application for the simple reason that Montana's organic law does not carve out gaping geographical holes in its application.

If the legislature were to ratify the CSKT Compact it would:

1) Preclude the formal recognition of the individual water rights owned by both Tribal and non-Tribal irrigators in the Flathead, Mission, and Jocko irrigation districts on the Flathead Reservation, contrary to state and federal law;

2) Effectuate a taking of: a) the real property rights of some 23,000 non-Indians residing within the boundaries of the Flathead Reservation; b) the real property rights of the irrigators in the Flathead, Mission, and Jocko irrigation districts and c) the water rights appurtenant to their property within the boundaries of the Flathead Reservation, in violation of the Fifth Amendment of the United States Constitution;

3) Violate the equal protection clause of the United States Constitution;

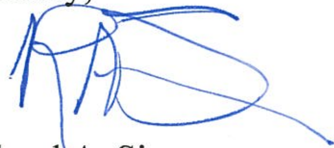
4) Usurp the system of statewide adjudication, administration, and regulation of water rights in Montana currently in place as a result of the mandate of Art. IX;

5) Vitiate the system of centralized records mandated by Art. IX;

6) Give plenary control over the administration of all water rights within the Flathead Reservation, whether "derived from tribal, state or federal law," to a single entity whose water rights are adverse to all other water rights in the relevant water basins in the pending statewide adjudication in the Montana Water Court;
7) Usurp McCarran Amendment jurisdiction over the United States, not only with respect to its own rights, but also for its claims of rights for the CSKT in trust;
8) Totally negate the contemplation of Art. IX with respect to state control over the adjudication and administration of the interrelated and conflicting water rights *inter sese*;
9) Take away the ability to administer the water rights of the United States on its own behalf and the water rights of the United States on behalf of its Indian wards as against the water rights of all non-Indian citizens of Montana residing in the affected water basins; and
10) Completely upend the object of Art. IX of the Montana Constitution and numerous laws enacted by the Montana legislature pursuant to the mandate of Art. IX.

In conclusion, 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. The conveyance of exclusive administrative authority to the Tribes under "The Law of Administration" means that the UMO (or the Law of Administration) "shall govern all water rights, whether derived from tribal, state, or federal law" and "shall control all aspects of water uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation." 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.[1] 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.

Sincerely,



Richard A. Simms

[1] Pursuant to the "Law of Administration," "any provision of Title 85, MCA, that is inconsistent with this Law of Administration is not applicable within the Reservation."

Cc: Members of the Montana Reserved Water Rights Compact Commission
Members of the Water Policy Interim Committee
All Legislators
John Tubbs, Director of the Montana Department of Natural Resources
and Conservation