

**Montana Land and Water Alliance
P.O. Box 1061
Polson, Montana 59860**

June 10, 2016

**Senator Jon Tester
311 Hart Senate Office Building
Washington, DC 20510-2604**

Subject: Submittal of Confederated Salish and Kootenai (CSKT) Compact to Senate

Dear Senator Tester:

The recent press announcement regarding your introduction of the CSKT Compact to the United States Senate comes as a complete surprise and with great disappointment. Your action is especially troubling since we are still awaiting a response to our February correspondence to you on this subject through our attorneys, Stein and Brockmann P.C.¹ We write to advise you again of our concerns.

It is common knowledge that the constitutionality of the *Montana* legislature's vote on the CSKT Compact is currently in litigation (*FJBC v. Montana, DV-15-73*), and whatever the decision is in this case, the issue will be tied up in the Montana Supreme Court long afterwards. Beyond this instant constitutional issue, there are several other violations of the Montana Constitution in the Compact that will be litigated. In other words, the real CSKT Compact that you prematurely submitted to the Senate has not made it out of Montana yet.

The Montana Land and Water Alliance apprised you of this litigation and other serious problems with the compact through our attorneys on February 1, 2016. Our letter followed another communication that had been sent to you by more than a dozen Montana state legislators in late January. Both letters apprised you of the on-going litigation and the likelihood that any decision would be appealed to the Montana Supreme Court.

Importantly, the constitutional issue at hand in court is a *state issue* that cannot be resolved at the federal level. Thus asking the United States Senate to resolve fundamental issues that already have a venue in state court and which must be resolved there is inappropriate.

¹ Letter from Jay Stein, Esq. to Senator Jon Tester on behalf of the Montana Land and Water Alliance, February 1, 2016.

Your approach to resolving these difficult and important state issues, and to *work around* on-going critical litigation, was to completely rewrite the CSKT Compact which does not address any of the problematic issues at hand in Montana. In doing so you have exacerbated the existing problems with the original CSKT Compact which already rewrites the history of agricultural development in western Montana, federal-state relations, federal-Tribal relations, and the Treaty of Hellgate. The rewrite added a required reinterpretation of the 1887 General Allotment Act.

The Montana-based CSKT Compact and your rewrite both simply dismiss, without explanation, the 1902 Reclamation Act, 1904 Flathead Allotment Act (FAA), and 1908 Amendment to the FAA, 1920 Federal Power Act, 1934 Indian Reorganization Act, the *Winters Doctrine*, and numerous federal contracts with irrigation districts existing since 1926. All of these Congressional acts continue to apply to the lands and waters within the exterior boundaries of the Flathead Reservation.

Both the existing Compact and your rewrite in S. 3013 undermine existing legal processes, including the on-going proceedings with the Federal Energy Regulatory Commission (FERC), the ongoing legal actions, and the Ninth Circuit Court of Appeals negotiations regarding the transfer of the operation and maintenance of the Flathead Irrigation Project to the landowners within the project as stipulated by the 1908 Act.

We urge you to withdraw S. 3013 on grounds that it is not the Compact that was developed by the Montana State legislature. The major state constitutional issues in litigation on the compact at this time cannot be "tweaked", resolved, rewritten, or considered by Congress until resolved in Montana.

We await your timely response.

Sincerely,



Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance
Polson, Montana 406-552-1357

Enclosure

CC: Congressman Ryan Zinke
Senator Steve Daines
Senator John Barrasso
Senator Mitch McConnell
Congressman Rob Bishop

FACT SHEET ON THE CSKT WATER COMPACT – JUNE 2016¹

CSKT Compact Violations	Description
<p>The CSKT Compact Violates Montana and U.S. Constitutions</p>	<ul style="list-style-type: none"> ❖ <i>Constitutionality of Montana Legislature’s 2015 vote on CSKT Compact is currently in litigation and will be for the foreseeable future.</i> <ul style="list-style-type: none"> • Article II §18- <i>State Subject to Suit</i>. Compact grants state immunity and constitution requires a 2/3 vote in each House of legislature, which was not achieved in either house ❖ <i>CSKT Compact violates other articles of the Montana Constitution.</i> <ul style="list-style-type: none"> • Article II § 17-<i>Due process of law, and § 4 Equal protection</i>. The Compact deprives individuals within the exterior boundaries of the reservation of both • Article V § 12 <i>The Legislature</i>. Referring to the “Unitary Management Ordinance”, the legislature ratified the creation of a new local law and dispensed with State law. • Article VII § 4(1), (2) & § 2 (4) <i>The Judiciary</i>. The Compact removes the Mt District and Supreme Court avenues for resolving disputes • Article VIII §-<i>Revenue and Finance</i>. Compact enables taxation without representation • Article IX § (3) <i>Environment and Natural Resources</i>, and Article III §1 <i>General Government</i>. The Compact delegates the state government’s constitutional authority for the administration, control and regulation of state based water resources and rights to another sovereign—the U.S. in trust for the CSKT. ❖ <i>CSKT Compact violates U.S. Constitution: Article IV §4 Republican form of Government; Article V takings without compensation; and Fourteenth Amendment equal protection</i>
<p>The Compact Violates Federal Law</p>	<ul style="list-style-type: none"> ❖ <i>The Compact violates the 1902 Reclamation Act, 1904 Flathead Allotment Act (FAA), and 1908 Amendment to the FAA, 1920 Federal Power Act, 1934 Indian Reorganization Act, the Winters Doctrine, and numerous federal contracts with irrigation districts existing since 1926</i>
<p>The CSKT Compact Destroys Irrigation</p>	<ul style="list-style-type: none"> ❖ <i>The Compact transfers bare legal title of private water rights to the United States in trust for the CSKT instead of project users and landowners, and then converts the use of 50%-70% of historic beneficial use of irrigation water in the Flathead Irrigation Project—the largest in Montana—to instream flow without demonstrated need or biological science.</i>
<p>The Compact Sets Negative Precedent for Western States through the expansion of federal reserved water rights</p>	<ul style="list-style-type: none"> ❖ <i>The effect of this compact is to condemn the historic beneficial use of water for agriculture and other water rights across private lands in the west.</i> ❖ <i>This compact may compel other Tribes to reopen or re-litigate water settlements seeking administrative jurisdiction control over state law-based water rights and uses within the exterior boundaries of their reservations regardless of land ownership.</i>

¹ ©2016 Montana Land and Water Alliance, Polson, MT. www.westernmtwaterrights.wordpress.com