September 8, 2014

Honorable Chairman, Chas Vincent
And Members of the
Montana Water Policy Interim Committee

Comments Regarding Proposed CSKT Water Compact

Thank you for allowing me to address your Committee. I am here today at the invitation of many of your constituents within 11 counties who have asked me to share my observations. I would note that I am of enrollable Cherokee ancestry but I am not enrolled. My mother and grandmother were enrolled Cherokee, and my spouse is a Shoshoni-Lemhi, a direct descendant of Bazil, Sacajawea's adopted son. My comments are directed to government-decision-making, which is very separate from my lifetime respect and affection for American Indian history and ancestry.

Before I am perceived to be adversarial in my views, let me state that a trend across this country is to discount, dismiss or outright defy the printed words of laws and statutes, and particularly, our founding, governing documents. This trend has settled in upon the federal government as noted almost nightly on the 6 o'clock news, and is unfortunately trending as well among numerous states.

It should be no surprise that great federal desires upon Montana's majestic geography and resources, perhaps the most impressive in the country, can be accomplished through disobedience or disrespect of Montana's Constitution and 10th Amendment rights. Federal and government claims via Indian tribes for 100% of certain waters are occurring in Washington State, Oregon and Northern California as well. Another escalating example is the federal Environmental Protection Agency, frequently chastised in Supreme Court rulings for over-reaching its authority within states and upon private properties, and for creating federal "jurisdiction" where it has no such authority.

My observations are related to two critical documents that are quite seriously at odds with each other. One is the present version of the proposed CSKT Water Compact; the other is this State's Constitution.

The Montana Constitution adopted in 1972 and ratified on June 6th of that year is one of the most comprehensive, clear and concise governing instruments that I have had the privilege to read. Within less than 30 pages Montana's Constitution is nearly as powerful in its simplicity as our federal Constitution, and it squares away the State's duties and authorities by defining well-structured implementation procedures and systems. There is power in simplicity. There is loss of power in complexity.

Contained in the very first paragraph of Article I is acknowledgement of Montana's Compact with the United States regarding the duty to Indian tribes in Montana. That paragraph declares:

> "That 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, continue in full force and effect until revoked by the consent of the United States and the people of Montana."

The federal government is the only government in the United States that has a fiduciary and trust relationship with its Indian tribe dependent wards. The duty to Indian tribes as contained in Montana's Constitution affirms that duty to Indian tribes falls directly and only to the federal government.

The writers of the 1972 Constitution understood that Montana's duty is first and only to its citizens because the very next paragraph of the State Constitution, Article II, Declaration of Rights, Section I is entitled, *Popular Sovereignty*. All Montana citizens including tribal members are vested with the political power of self-government and require and retain their individual and collective Popular Sovereignty.

The only other reference to Indians in the entire Montana Constitution is a commitment in Article X – Education and Public Lands – to the educational goal of preservation of American Indian culture. There is absolutely no written or even implied duty within the four corners of Montana's Constitution to other private governments, domestic or foreign, nor should there be.

It is likely no accident that the fullest section of Montana's Constitution is Article II that contains no less than 35 separate and enumerated sections that identify and assert the declared rights of Montana's citizens as to their inalienable rights, their properties, their right to sue the State, and their freedom from eminent domain, absent just compensation, among the several other rights noted in Article II.

The collision between the proposed CSKT Water Compact and Montana's Constitution exists in Articles I and II, and also importantly in Article IX entitled Environment and Natural Resources. Article IX declares at Section 3:

> "The legislature shall provide adequate remedies for the protection of the **environmental life support system** from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

What is water, if not the beginning and end of **"the environmental life support system,"** protected by Montana's Constitution? And what is depletion and degradation if not the redirection of Montana's waters from the state and its citizens to one or more private domestic governments that have neither duty nor accountability to the State of Montana or its citizens? Water is the environmental and importantly, the **economic** life support system for the entire State.

Article IX – the Environmental section of the State Constitution was implemented as a priority in 1973 within a year after the adoption of the 1972 State Constitution. The **Montana Water Use Act** sets out clear policies and procedures for ongoing State authority, certified recordation and control over its waters, preserves and records water rights that pre-dated the 1973 Act, and provides an

equitable process for negotiating future water needs with the federal government, corporations or other such entities – all without relinquishing Montana's control over its waters.

The Proposed Water Compact removes any significant State control over waters of Western Montana in perpetuity, and as such removes the rights and Popular Sovereignty of nearly one third of Montana's population for the direct benefit of considerably less than one-half of 1% of the State's population. There is no guarantee that even CSKT tribal members would directly benefit either. The Unitary Management and Administration Ordinance (UMO) implementing the Compact guarantees the loss of State authority over its waters, lands and people within at least an 11-country area.

The UMO is an unconscionable thumb in the eye to Montana's people and Constitution as well as the Montana Water Use Act. The combined effect of the Water Compact and UMO elevates the issue to far more than just water. Man cannot live without water; land cannot thrive without water. It is my deep concern that this Water Compact becomes a veritable crowbar that lifts and removes from the guaranteed shelter of the State of Montana's authority, nearly one third of Montana's citizens, and 11 of its 56 counties.

Much like Congresswoman Nancy Pelosi's infamous comment that "We must pass the bill to find out what's in it," when she was discussing the complexities of Obamacare, it would seem that Montanans are now being asked, if not coerced, to do the very same: to approve the Water Compact, alarmingly aware of its forever consequence. This is how and where complexity camouflages severe and surreptitious objectives. The simplicity of the Montana Constitution is the only antidote. The Water Compact cannot be reconciled with the Montana State Constitution. Legislators must choose one or the other because one renders the other null and void. Your constituents that invited me here count on their elected officials to maintain allegiance to their Oath of Office to serve the citizens of Montana and to preserve and protect its Constitution, its water and its land base in 11 counties.

It is understandable that repeated but misguided phrases such as "time immemorial," or aboriginal and indigenous rights, or "treaty rights" when incessantly repeated can become seemingly true or real. But no such references or ideologies that pre-date the United States Constitution find compatibility within the four corners of the Federal or State constitution. As example, the Hellgate Treaty of 1855 mentions the term "water" four times, and only in the first articles defining the boundaries of the Flathead Reservation. The term "fish" is mentioned twice for fishing within the reservation, and in usual, accustomed areas of ceded lands. Nothing within the Hellgate Treaty of 1855 authorizes any delegation of even a drop of water to the tribal government. Absolutely nothing. All of the articles of the Treaty of 1855 were long ago accomplished, and ever since all Native Americans were made full citizens in 1924, even the Article reserving fishing rights is moot since tribal members can fish wherever any other citizens fish.

Furthermore, the CSKT Tribe reorganized as a government under the Indian Reorganization Act (IRA) on October 28, 1935. This tribe is first on a list prepared by John Collier of IRA tribes. An Indian Reorganization Act tribe ceases to be a "Treaty" tribe with its Charter under the Indian Reorganization Act. If the Hellgate Treaty of 1855 had any remaining force an effect when Congress declared all Indians to be citizens in 1924, that effect was ended when the governing authority of the CSKT received its Federal Charter in 1935.

To remove Montana non-tribal citizens and properties from the protections guaranteed by the State of Montana is frighteningly close to legislative anarchy upon Montana citizens, legislated from the top down by elected officials whose duty and Oath is to the citizens of this State and the Montana Constitution.

In closing, I would comfort all in this room by acknowledging that the generous spirit of American citizens, certainly true for Montanans, and the desire to do right by each other and our neighbors often renders us extremely vulnerable to mentalities that are indifferent to all other cultures but their own. This strong and sturdy state has the guiding documents, and must find the leadership to reclaim its 10th Amendment and State Constitutional duties. As States continue to appease and acquiesce to co-located private domestic government demands, by such conduct, 94% of Montana's population loses its water, its natural and environmental resources, its future economic sustainability and muzzles the voice of this State's Popular Sovereignty. It would be heartbreaking if Montana citizens actually tolerated or surrendered to such a condition.

Please consider these observations, and thank you again for the opportunity to share them. I would be happy to answer any questions.

Respectfully submitted:

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