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S. 2796, S. 2959, AND S. 3013

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

JUNE 29, 2016

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S. 2796, S. 2959, AND S. 3013

WEDNESDAY, JUNE 29, 2016

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. John Barrasso, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

The CHAIRMAN. Good afternoon. I call this legislative hearing to order. Today the Committee will examine three bills: S. 2796, a bill to repeal certain obsolete laws relating to Indians; S. 2959, a bill to amend the White Mountain Apache Tribe Water Rights Qualification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund; and S. 3013, the Salish and Kootenai Water Rights Settlement Act of 2016.

The first bill was introduced by Senator Rounds on April 13th of this year. Senator Lankford is a co-sponsor. At this time there is no House companion bill. This bill will repeal obsolete laws relating to Indians.

So I want to thank Senator Rounds for his work on this today.

On May 19th of this year Senator McCain introduced S. 2959, a bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010. Senator Flake is the original co-sponsor. This bill would allow funding authorized for water-related economic development projects in Title III of the Claims Resettlement Act of 2010 to include the White Mountain Apache Tribe's rural water system. This would allow the Secretary of Interior to use all or a portion of the appropriated $78 million of White Mountain Apache Tribe Settlement Fund for the completion, operation, and maintenance of the Miner Flat Dam along the North Fork of the White River.

Then on May 26th Vice Chairman Tester introduced S. 3013, the Salish and Kootenai Water Rights Settlement Act of 2016. This bill would settle claims to water rights in the State of Montana. The bill also ratifies a compact passed by the Montana State Legislature that took a decade of negotiations to resolve the Tribe's claims to reserve water rights within the State. The bill authorizes over $2.3 billion of irrigation, water, and education purposes. The bill also provides an allocation of 90,000 acre feet per year from the Hungry Horse Reservoir.

I would like to now invite Vice Chairman Tester for any opening comments he might like to make.

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. Well, thank you, Mr. Chairman, and thank you for holding this hearing today to discuss a few bills before the Committee. As you have already pointed out, one of these bills, the CSKT Water Rights Settlement Act, which I introduced last month, this bill would affirm the water rights compact between the Tribes and the State of Montana. This compact was passed by the Montana State Legislature last year. This bill would also settle the Tribe's claims against the United States for failure to protect the Tribe's water rights for over a century.

The CSKT Pact is the seventh and last water rights compact passed by the Montana Legislature. As we all knows, once the Tribe and the State have finalized their agreement, it has to come here to be affirmed by Congress, a process which often takes too long. While the State of Montana has done a good job finalizing water compacts with the Tribes and the State, we in Washington need to do a better job. Congress still needs to pass three of these water rights settlements, this one for the CSKT, as well as settlements for Blackfeet and Fort Belknap communities.

I understand from the testimony of the Department of Interior that the CSKT settlement still has a ways to go before it is ready for Congress to enact, but introducing this bill is a first step to getting the Tribes and the Federal Government to sit down and hammer out a final agreement. This is the process that most water rights settlements have taken, including the Blackfeet settlement.

Three years ago, the Department testified on an early version of the Blackfeet bill and stated then that they could not support that bill as introduced. Since then, the parties have negotiated, made compromises, and just last week the Administration affirmed that the current version of the bill conforms with the Criteria and Procedures that apply to Indian water rights settlements. I expect to work with my colleagues here in the Senate, and I hope the House does what they said they were going to do and get this bill passed if the Administration supported it, which they do, and get this Blackfeet settlement across the finish line.

For CSKT, this hearing is just the next step in the process and should spur the Tribes and the DOI to work out their issues so that we in Congress can do our job in seeing that these settlements get implemented.

Everyone on this Committee knows that pursuing water rights settlements is the best policy. Settling tribal water rights provides certainty to all stakeholders in the watershed and saves everybody time and money by not forcing folks into the courtroom. So encouraging water settlements is just common sense and benefits Tribes and surrounding communities alike.

I appreciate Senator Daines working with me on the Blackfeet bill. I am sure we will be working together on this bill as time moves forward, and I hope the same thing can happen with Representative Zinke. The State of Montana has been a model for the

Country in settling water rights throughout the State, and we need to do the same.

Now, while I understand that the Department may not now support the CSKT settlement, I look forward to hearing from Ms. Belin on what the next steps are and how we can get this bill to the finish line. I know it is a lot of work, but I have seen it happen already this Congress on one settlement and I know we can make progress on other settlements as well. The Salish and Kootenai Tribes are certainly ready to move forward.

I would like to welcome you, Chairman Finley, and thank you for joining us today. We appreciate your leadership. And also the leadership of your counsel. And speaking of counsel, we appreciate the counsel of Ryan Rusche, your lawyer.

Back in Montana, you have worked diligently to get the people behind this settlement, and I appreciate your efforts in building that coalition. It certainly makes our job easier when we receive letters in support from so many stakeholders outside the Reservation. The letters have come from the Montana Farm Bureau, Stock Growers, Water Resource Association, Gillette AG Irrigators, AG Business Association, Farmers Union, and Trout Unlimited, a very broad-based constituency. They all recognize the importance of this settlement and now final passage will bring certainty to all stakeholders throughout the Flathead Valley of Western Montana. So I appreciate their support.

And I would ask, Mr. Chairman, unanimous consent for these letters to be entered into the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Tester follows:]

PREPARED STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Thank you, Mr. Chairman, for holding this hearing today to discuss a few bills before the Committee. One of these bills is the C-S-K-T Water Rights Settlement Act, which I introduced last month. That bill would affirm the water rights compact between the Tribes and the State of Montana, which passed the State legislature last year with bipartisan support. The bill would also settle the Tribes' claims against the United States for failure to protect the Tribes' water rights for over a century.

The CSKT compact is the seventh and last water rights compact passed by the Montana legislature. As we all know, once a Tribe and state finalize their agreement, it has to come here to be affirmed by Congress, which often takes too long. While the State of Montana has done a good job finalizing water compacts with the Tribes in the state, we here in Washington need to do a better job. Congress still needs to pass three of these water rights settlements: this one for the CSKT, as well as settlements for the Blackfeet and Ft. Belknap communities.

I understand from the testimony of the Department of the Interior that the C-S-K-T settlement still has a ways to go before its ready for Congress to enact. But introducing the bill is the first step to getting the tribes and the federal government to sit down and hammer out the final agreement. This is the process that most water rights settlements have taken, including Blackfeet.

Three years ago, the Department testified on an early version of the Blackfeet bill, and stated then, that they could not support the bill as introduced. Since then, the parties have negotiated, made compromises, and just last week the Administration affirmed that the current version of the bill conforms with the Criteria and Procedures that apply to Indian Water Rights Settlements. I expect to work with my colleagues in both the House and Senate to see Blackfeet successfully get across the finish line.

For C-S-K-T, this hearing is just the next step in the process, and should spur the Tribes and DOI to work out their issues so we in Congress can then do our job in seeing these settlements get implemented.

Everyone on this Committee knows that pursuing water rights settlements is the best policy. Settling tribal water rights provides certainty to all stakeholders in a watershed, and saves everybody time and money by not forcing folks into a courtroom. So encouraging water settlements is just common sense and benefits tribes and non-Indians alike.

I appreciate Senator Daines working with me on the Blackfeet bill and encourage him to work with me on this bill, and Ft. Belknap as well. The State of Montana has been a model for the country on settling water rights throughout the state, and its Congressional delegation should follow that example.

While I understand that the Department may not now support the C-S-K-T settlement, I look forward to hearing from Ms. Belin on what the next steps are, and how we can get this bill to the finish line. I know it's a lot of work, but I've seen the progress we've made on one settlement this Congress, and know we can make progress on other settlements as well.

I want to reiterate this fact. The CSKT Water Compact was negotiated and constructed over years of on-the-ground collaboration between the tribe, local land owners, and the state. This bill has been a collaborative process that has been decades in the making—despite frivolous efforts to derail the process with fear and misinformation. And this hearing is just the beginning of the process here in Washington. I welcome members of Congress, the tribe, local stakeholders, and Interior to provide input so we can continue to grow support for this bill.

The Salish and Kootenai Tribes are certainly ready to move forward. I'd like to welcome you, Chairman Finley and thank you for joining us today. Your leadership, and that of your council, has really gotten us to this point. Back in Montana you've worked diligently to get people behind this settlement, and I appreciate your efforts in building that coalition. It certainly makes our job easier when we receive letters of support from so many stakeholders outside the Reservation. The letters come from the Montana Farm Bureau, Stockgrowers, Water Resources Association, Gallatin Ag Irrigators, Ag Business Association, Farmers Union,Trout Unlimited, and local elected officials. They all recognize the importance of this settlement and how final passage will bring certainty to all stakeholders throughout the Flathead valley and western Montana. So I appreciate their support and ask unanimous consent for these letters to be entered into the record.

Thank you, Senator Tester.

Senator Daines.

STATEMENT OF HON. STEVE DAINES, U.S. SENATOR FROM MONTANA

Senator DAINES. Thank you, Mr. Chairman.

And thank you, Senator Barrasso, as well as Vice Chairman Tester, for this hearing today.

I first want to welcome CSKT Chairman Vernon Finley, who will be testifying shortly. It is always an honor to see the chairman who hails from truly one of the most beautiful places in our Country, the Flathead Indian Reservation.

I would like to start by noting that I fully understand the value of Indian water rights settlements. They are, no doubt, a productive way to, number one, resolve conflict amongst Indian and non-Indian water users; two, to clear the burden of potential liability at the State and Federal levels; and, three, allowing Tribes to access and develop their water resources.

Most importantly, these settlements are a key component of the Federal Government's tribal trust responsibility to create tangible benefits for Indian Country, providing a Federal stream of support for water infrastructure and much needed maintenance.

For these reasons, I have made passage and enactment of Senate Bill 1125, the Blackfeet Water Rights Settlement Act, one of my highest priorities this Congress.

I want to commend Letty Belin, who is also testifying today, for her, her team's diligence and commitment to that settlement. I

know it has been a long journey. It has been seven years since the Montana Legislature passed the Blackfeet Compact.

Letty, again, thanks so much. I am proud of the progress we are making on that legislation and, as Senator Tester said, I look forward to that being completed and passed here before the end of the calendar year.

The CSKT Compact is one of the most complex water settlements in history. It is the most expensive introduced, as Senator Tester noted, at $2.3 billion. It has meaningful implications for the Tribes, for our State, and other water users on and off the Reservation.

Now, there is a lot of passion on this settlement back home regarding the Compact, and that was demonstrated by its narrow passage in our State Legislature. But it passed, and that is why we are up here today having these discussions. So I am glad we are having the conversation, we are examining the costs and the benefits of this legislation.

I look forward to hearing from Chairman Finley, as well as Ms. Belin, on their perspectives, as well as from my colleagues here on the dais.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Heitkamp.

STATEMENT OF HON. HEIDI HEITKAMP,
U.S. SENATOR FROM NORTH DAKOTA

Senator HEITKAMP. Thank you, Chairman Barrasso and Vice Chairman Tester, for holding this hearing to discuss legislation before us, and my particular interest is legislation that would repeal obsolete laws and address water rights in Indian Country.

I want to congratulate Senator Rounds and Senator Lankford for bringing this issue to the forefront.

Chairman Flute, it is always a pleasure to see you and have you represent your Tribe today. A lot of people don't realize this, but there is a portion of the Sisseton Wahpeton Oyate that is in fact in my home county of Richland County, and you are a particular treasured neighbor for all of us, so we are grateful for your presence and for the work that you have been doing on these obsolete laws. I know that this is a particular passion of yours.

I want to point out that I read earlier this month that you were successful in a high school in Watertown, a town that you and I both know, which lies south of the border on your Reservation, in replacing disparaging activities in their homecoming festivals, so that certainly is a step forward for our region in becoming more culturally sensitive. I know the Tribe has worked long and hard to protect those cultural traditions, and that experiencing disparaging imagery is still an issue for many of your people, particularly your children, who at this point in time need a sense of pride in who they are.

Similarly, to the outdated and often disparaging activities that take place in schools, I am glad you are here today to provide your thoughts regarding outdated Federal laws and policies that should be repealed to ensure your Tribe and the great Tribal Nations across this Country are properly respected. It is long overdue. Just

like assimilation and reorganization eras, it is time that they be officially repealed.

We all know that during the assimilation era there was tremendous loss of Indian cultures, resources, and land, which later further impoverished our Tribes. During this period, the Federal Government broke down traditional family structures and relocated Indian children to religious- or Government-run boarding schools so that they could be assimilated into the dominant culture. This has created generational and, I believe, historic trauma that affects tribal members today and is reflected in the high rates of poverty, substance abuse, post-traumatic stress, and even suicide.

It is critical that we acknowledge this trauma and the role that we all played in it with these outdates policies, and that we take the steps that we hope we can take in this Committee to rectify this wrong and to offer hope and opportunity. And I want to thank you so much for coming, Chairman. You are doing a great job and I know always lead with the interest of your people.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Heitkamp.

Senator McCain.

STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

Senator MCCAIN. Thank you, Mr. Chairman and Mr. Vice Chairman. Thank you for holding today's hearing on S. 2959. I understand that Chairman Ronnie Lupe was invited to testify, but had to cancel. I have had the pleasure of knowing Chairman Lupe for many years and can attest that he is a tireless advocate for the White Mountain Apache people. I am grateful that the Tribe's Vice Chairman, Kasey Velasquez, will be testifying today on behalf of the Tribe.

The bill would amend provisions of the Tribe's Indian water settlement, the White Mountain Apache Tribe Water Rights Quantification Act of 2010, to enable a Tribe and the U.S. Department of the Interior to move forward with the construction of Miner Flat Dam on the North Fork of the White River. In 2010, Congress enacted legislation sponsored by Senator Kyl and myself that resolves a Tribe's claims to the Salt River in Arizona.

The linchpin in the settlement was congressional authorization to construct a water delivery system for the Fort Apache Indian Reservation through the construction of the Miner Flat Dam. Unfortunately, tribal engineers have identified seepage and stability concerns at the proposed dam site, which is delaying construction. Resulting cost overruns exceed the initial $126 million authorization for the construction of the Miner Flat Dam.

The Interior Department has informed the Tribe that a clarifying amendment to the water settlement legislation may be necessary to allow other authorized funds in the settlement act can be applied to the construction project.

The bill I have introduced with Senator Flake would clarify that the Interior Department may access a separate fund in the Tribe's settlement legislation, called the WMAT fund, which covers water-related economic development projects, including dam operations and maintenance.

Mr. Chairman, the Federal Government made a deal with the White Mountain Apache six years ago that we would build the Miner Flat Dam. That was a commitment, part of the deal. The Tribe is currently facing a drinking water crisis. Groundwater wells on the Reservation have dropped by 50 percent and the North Fork of the White River is expected to run dry by 2020 without the Miner Flat Dam reservoir project.

I believe it is pretty obvious that we have an obligation to meet the terms of the water settlement. I urge my colleagues to support this legislation.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator McCain.

We welcome our four witnesses. You will each have about five minutes to give your testimony. Your complete written testimony will be made part of the permanent record of this Committee. I will ask each of you to identify yourself and who you represent, and we will start with Ms. Belin.

STATEMENT OF ALLETTA BELIN, SENIOR COUNSELOR TO THE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Ms. BELIN. Thank you, Chairman Barrasso, Vice Chairman Tester, and members of the Committee. I am Letty Belin, Senior Counselor to the Deputy Secretary of the Interior. I am here today to provide the Department's position on three bills, S. 3013, the Salish and Kootenai Water Rights Settlement Act of 2016, which would approve and authorize a settlement of the water rights claims of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana; second, S. 2959, a bill to amend the White Mountain Apache Tribe Water Settlement Authorization to clarify the use of amounts in the WMAT Settlement Fund; and, finally, S. 2796, an act to repeal existing substandard provisions and encourage conciliation with tribes, also known as the RESPECT Act.

I will start with the two Indian water rights settlements.

As this Committee knows, this Administration strongly supports the resolution of Indian water rights claims through negotiated settlement. Our policy of support for negotiations is premised on a set of general principles set forth in the 1990 criteria and procedures for the participation of the Federal Government in negotiations for settlement of Indian water rights claims. These include, first, that the United States participate in water settlements consistent with its responsibilities as trustee to Indiana; second, that Indian Tribes receive equivalent benefits for rights which they and the United States, as trustee, may release as part of the settlement; third, that Indian Tribes should realize value from confirmed water rights resulting from a settlement; and, fourth, that settlements contain appropriate cost-sharing proportionate to the benefits received by all parties benefitting from the settlement.

So turning to S. 3013, we recognize that it and the underlying compact are the product of a great deal of effort by many parties and reflect desire by the people of Montana, Indian and non-Indian, to settle their differences through negotiation rather than litigation. We also recognize that the Confederated Salish and Kootenai Tribes have long been leaders in sound water and natural

resource management, and we commend the Tribes and the State of Montana for the excellent work they have done in furtherance of the compact and an overall settlement of the Tribes' water rights claims.

However, the Department cannot support S. 3013 as introduced. The Department has significant concerns about the Federal costs of the settlement, which total approximately $2.3 billion, and we have not yet completed a full and robust analysis and discussion of all aspects and ramifications of this substantial settlement.

Next I will discuss S. 2959, the White Mountain Apache Tribe Water Rights Quantification Settlement. One of four Indian water settlements included in the 2010 Claims Resolution Act, this settles the water rights among the Tribe and non-Federal parties, including the State of Arizona. Since the enactment of the Claims Resolution Act, the Department has been working diligently on implementing all four of those settlements, including this one, which resolve well over a century of litigation and bitter disputes.

S. 2959 would authorize funding from the WMAT Settlement Fund to be used for the completion of a rural water system. The Department is aware that the Tribe has identified potential cost overruns associated with the design of the rural water delivery system, specifically Miner Flat Dam. In order to evaluate whether discretionary funding beyond what is available in the cost overrun subaccount is needed to complete the rural water system, the Bureau of Reclamation needs to be provided with the necessary design and estimated cost of the rural water system.

Therefore, the Department cannot support S. 2959 at this time. However, we are hopeful that this hearing will advance the implementation of this settlement and we look forward to working with the Tribe to ensure that Reclamation receives the relevant information.

S. 2796 seeks to repeal laws that were passed by Congress during periods in U.S. history that were directly related to the Federal Government's policy with Indian Tribes. The laws to be repealed by S. 2796 range in dates of enactment from 1862 through 1913, and were passed in eras of Federal Indian policy identified with removal, reservations, allotment, and assimilation.

The language to be repealed by S. 2796 uses antiquated and obsolete terms and contexts such as reference to Indian Tribes in actual hostility to the United States and withholding monies or goods from Indian Tribes on account of intoxicating liquors. The Department agrees that such language should be repealed.

Thank you for the opportunity to express the Department's views on these bills. I am available to answer any questions the Committee may have.

[The prepared statement of Ms. Belin follows:]

PREPARED STATEMENT OF ALLETTA BELIN, SENIOR COUNSELOR TO THE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

S. 2959, TO AMEND THE WHITE MOUNTAIN APACHE TRIBE WATER RIGHTS QUANTIFICATION ACT OF 2010 TO CLARIFY THE USE OF AMOUNTS IN THE WMAT SETTLEMENT FUND

Chairman Barrasso, Vice Chairman Tester and members of the Committee, I am Letty Belin, Counselor to the Deputy Secretary at the Department of the Interior

(Department). I am pleased to provide the views of the Department on S. 2959, a bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund. The Department supports the ongoing ef*forts to implement the White Mountain Apache Tribe settlement; however, we do not have sufficient information to develop a position on S. 2959 at this time.

Background

Over six years ago, this Administration supported and Congress enacted, four Indian water rights settlements for seven tribes that resolved well over a century of litigation and bitter disputes in the Claims Resolution Act of 2010 (PL 111–291). Our support for these four settlements demonstrated that settling Indian water rights disputes was and remains a high priority for this Administration.

Since the enactment of the Claims Resolution Act, the Department has diligently been working on implementing the four settlements to support the maintenance of permanent water supplies and enhance economic security for five Pueblos in New Mexico, the Crow Tribe of Montana, the Taos Pueblo, and the White Mountain Apache Tribe (WMAT) of Arizona. We are here today to discuss the WMAT settlement.

The WMAT settlement, as authorized by Title III of the Claims Resolution Act, settles the water rights among the Tribe and non-federal parties, including the State of Arizona, local water and power districts, local towns, and conservation districts. The Act authorizes design and construction of the WMAT rural water system that consists of a dam and storage reservoir, pumping plant, distribution system and water treatment facilities.

Appropriated funds made available under the White Mountain Apache Tribe Rural Water System Loan Authorization Act (PL 110–390), are currently being used to implement the WMAT settlement. On September 30, 2011, the Bureau of Reclamation awarded a PL 93–638 contract to the Tribe in the amount of $11.8 million (indexed), which allowed the Tribe to move forward with the initial planning, engineering, and design of the WMAT rural water system, as well as to complete the requisite environmental impact statement (EIS). Through this contract, the Tribe has awarded three major engineering contracts, for 30 percent designs of each project component, including Miner Flat Dam, treatment plant, and distribution system. A fourth contract was awarded for preparation of an EIS. Thirty percent designs for the treatment plant and distribution system, including pumping plants are complete. Thirty percent design of the dam and reservoir continues along with preparation of the EIS. Final design on all components will commence subsequent to completion of the EIS and issuance of a Record of Decision.

S. 2959

S. 2959 would amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to authorize funding from the WMAT Settlement Fund for the completion of the WMAT rural water system, including carrying out activities relating to the operation, maintenance, or replacement of the WMAT rural water system. The core of the settlement is the WMAT rural water system and the Act authorized approximately $126 million in mandatory spending for the Secretary of the Interior to carry out its planning, engineering, design, environmental compliance, and construction. The mandatory funding for construction is separate and apart from the WMAT Settlement Fund at issue in S. 2959. For this reason, I will now discuss briefly the history of the WMAT Settlement Fund authorization.

In the 113th Congress, legislation approving the WMAT Settlement (S. 313) was amended in Committee to authorize $113.5 million for a WMAT Settlement Fund. The Administration subsequently submitted—through then-Commissioner of the Bureau of Reclamation Michael L. Connor—a views letter regarding S. 313 as reported by the Committee expressing concerns about the WMAT Settlement Fund. In response to the concerns of the Administration, the Claims Resolution Act ultimately reduced the WMAT Settlement Fund by $35 million in order to create a "Cost Overrun Subaccount," to be administered by the Secretary in order to ensure that the WMAT rural water system would be completed with the funds specifically authorized and capped for its construction. The remaining $78.5 million originally included in the WMAT Settlement Fund remained available as discretionary appropriations. This $78.5 million in discretionary funding, plus any potential unobligated amounts of the Cost Overrun Subaccount, may be used for fish production, including hatcheries; rehabilitation of recreational lakes and existing irrigation systems; water-related economic development project; and protection, restoration, and economic development of forest and watershed health.

The Department is aware that the Tribe has identified challenges and potential cost-overruns associated with the design of the rural water delivery system, specifically Miner Flat Dam. However, the Bureau of Reclamation (Reclamation) has not been provided with the necessary design and cost estimate data to make a determination on the final project design of the WMAT rural water system. Under the Act, Reclamation is required, in consultation with the Tribe, to make changes to the design to ensure that the final design meets Reclamation standards; is cost effective; and may be constructed within the mandatory appropriations provided in the Act. Without necessary information from the Tribe on current design and cost estimate data, Reclamation is unable to make any determinations related to the feasibility of the design or cost of the system, or any potential cost overruns. Because of the history of the Cost Overrun Subaccount's establishment and because Reclamation has not yet received the necessary design and cost estimate data, the Department cannot evaluate whether S. 2959 is needed to complete the WMAT rural water system. However, we are hopeful that this hearing will advance the implementation of this important settlement, and we look forward to working with the Tribe to ensure Reclamation receives the relevant information to advance the WMAT rural water system.

Also, while we recognize the intent of S. 2959, we have identified some technical concerns with the language that we look forward to working with the bill sponsor and the Committee to resolve. Specifically, we would like to clarify how the use of the phrase "in accordance with subsection (e)(4)" would interact with the Cost Overrun Subaccount in in Section 312(e) if S. 2959 were to be enacted.

S. 2796, A BILL TO REPEAL CERTAIN OBSOLETE LAWS RELATING TO INDIANS

Chairman Barrasso, Vice-Chairman Tester, and members of the Committee, thank you for inviting me to express the views of the Department of the Interior (Department) on S. 2796, a bill to repeal certain obsolete laws relating to Indians. The Department understands the need to repeal certain laws relating to Indian that were passed by Congress in the late 1800s. The Department supports S. 2796.

S. 2796

S. 2796 would repeal various laws that were passed by Congress during periods in United States Federal Government history that were directly related to the Federal Government's policy with Indian tribes. The laws to be repealed by S. 2796 range in dates of enactment from 1862 through 1913, and were passed in the eras of Federal Indian policy identified as "removal and reservations (1829–86), and allotment and assimilation (1887–1932)" eras. The language in many of these laws uses historical and antiquated terms and contexts such as "Indian tribe is in actual hostility to the United States," or "while at war with the United States," or "Moneys or annuities of hostile Indians" and "withholding of moneys or goods on account of intoxicating liquors." These various laws were passed with the sole purpose of prescribing the appropriation of moneys or annuities on the condition of "non-hostility" with the United States, or not to be "under the influence of intoxicating liquors," or withholding such appropriations to Indian tribes for Indian children not attending schools. The Department agrees that these laws should be repealed.

S. 3013, SALISH AND KOOTENAI WATER RIGHTS SETTLEMENT ACT OF 2016

Chairman Barrasso, Vice Chairman Tester and members of the Committee, I am Letty Belin, Counselor to the Deputy Secretary at the Department of the Interior (Department). I am here today to provide the Department's position on S. 3013, the Salish and Kootenai Water Rights Settlement Act of 2016, which would approve and provide authorizations to carry out, a settlement of the water right claims of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana (Tribes). We have not completed the necessary review of the legislation, and we have significant concerns about the Federal costs of the settlement, which total approximately $2.3 billion. Therefore, the Department cannot support S. 3013 as introduced.

I. Introduction

The Administration supports the resolution of Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to con-

tain appropriate cost-sharing proportionate to the benefits received by all parties benefitting from the settlement. I want to affirm the Administration's support for settling Indian water rights where possible.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are tangible barriers to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency. For these reasons and more, for nearly 30 years, federally recognized Indian tribes, states, local parties, and the Federal government have acknowledged that negotiated Indian water rights settlements are preferable to the protracted litigation over Indian water rights claims.

The Confederated Salish and Kootenai Tribes have long been leaders in water and natural resources management. They have restored the ecosystem function of miles of streams and, with the State of Montana, co-manage the fishery on Flathead Lake, the largest freshwater body west of the Continental Divide. Most recently, the Tribes acquired ownership of Kerr Dam (now known as the Selis Ksanka Qlispe Dam) near the outlet of Flathead Lake, becoming the first tribe to hold exclusively a federal license for and operate a major hydroelectric dam. The State of Montana should also be commended for its efforts to resolve Tribal and Federal reserved water rights through the State's unique and highly successful Reserved Water Rights Compact Commission. The Tribes and the State brought these leadership qualities to this tribal water negotiation, and the Department recognizes the substantial effort that they have made in negotiating a resolution of the Tribes' water right claims; the issues surrounding these claims have been among the most contentious to be addressed to date in a tribal water settlement.

II. Historical Context

A. 1855 Hellgate Treaty

The aboriginal homeland of the Salish, Kootenai and Pend d' Oreille Tribes is located in present-day western Montana, northern Idaho and north into Canada. In 1855, these Tribes negotiated with the United States and entered into what is known as the Hellgate Treaty. Under the treaty, the Tribes ceded to the United States a significant portion of their aboriginal territory and reserved to themselves the Flathead Indian Reservation (Reservation) in northwestern Montana.

The Hellgate Treaty is one of a series of similar Indian treaties entered into between the United States, represented by Washington Territory Governor Isaac Stevens, and numerous tribes in the Pacific Northwest. A common attribute of these "Stevens treaties" is the express reservation of tribal aboriginal hunting, fishing and gathering rights on- and off-reservations. In the Hellgate Treaty, the Tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to fish at usual and accustomed fishing sites off the Reservation "in common" with non-Indian settlers. These and similar terms found in Indian treaties, discussed more below, have been found by state and federal courts to support reserved instream flow water rights for Tribal fisheries.

In addition, there are extensive Tribal lands within the Reservation that are economically viable agricultural lands when irrigated. Articles four and five of the Hellgate Treaty address the commitment of the United States to provide the necessary materials, equipment, and other support to convert the Tribes to an agrarian society. Under the Winters Indian reserved water rights doctrine, these lands would be entitled to substantial reserved water rights for irrigation as part of the homeland purpose of the Reservation.

B. Water Resource Development and Conflict on the Flathead Reservation

There have been extensive and bitter disputes over the Tribes' water rights and resources dating back a century. These longstanding conflicts can be traced directly to Congressional actions in the early 20th Century. From 1855 to 1904 the Tribes enjoyed the exclusive use of the Flathead Reservation. This included the initiation of irrigated farming by Tribal members. Pressures for non-tribal settlement of lands within the Reservation began to mount, however, and in the 1904 Flathead Allot-

ment Act, Congress, over the objections of the Tribes, directed the allotment of Tribal land to individual Indians and authorized the disposal of additional "surplus" unalloted Tribal land for non-Indian homestead entry.

The 1904 Flathead Allotment Act authorized limited irrigation facilities for Indian use as part of allotting lands to individual Indians. In 1908, Congress amended the 1904 Act and authorized the construction of a greatly-expanded irrigation system to serve extensive irrigable lands on the Reservation, both Indian and non-Indian. This irrigation system became known as the Flathead Indian Irrigation Project (Project). Over the next few decades, the Project was constructed to irrigate approximately 130,000 acres. By the 1930s, most of the lands allotted to individual Tribal members within the Project were no longer in Indian ownership, and currently nearly 90 percent of the lands irrigated by the Project are owned by non-Indians.

C. Court Confirmation of Tribal Reserved Water Rights for Instream Flows

Much of the irrigation water supply for the Project is diverted directly from several streams which also support the Tribes' reserved fisheries. By the 1980s, these diversions had significantly impacted the natural flows and the fisheries on the Reservation. In a series of interrelated lawsuits filed in the 1980s by the Tribes and others, federal courts conclusively confirmed that the Tribes, by the terms of the 1855 Hellgate Treaty, are entitled to on-Reservation instream flows water rights sufficient to support fishery resources. The courts further found that these reserved instream flow rights have a priority date of time immemorial and thus are senior to the irrigation water rights for the Project.

After these rulings, the Tribes agreed to accept lower "interim" flows until the instream flow rights could be fully quantified in the Montana water court or through negotiations. Since the 1980s, the situation on the Flathead Reservation between flows and irrigation demands essentially has been at an impasse. The Bureau of Indian Affairs (BIA) continues to operate the Project, but is on record stating that the existing minimum flow protections are not adequate. Population growth on and near the Reservation over the past few decades has increased the demand for water resources.

Montana is in the process of adjudicating water rights throughout the state. It was clear to Montana representatives and most water users on the Reservation that at the end of a long and expensive process, the non-Indian rights would be junior to the Tribes and and their water supplies could be shut off to meet the Tribes' instream flow rights. The Tribes also had a number of senior water rights claims throughout Montana that created uncertainty about future water uses.

III. Salish and Kootenai Water Rights Compact and Proposed Legislation

A. Negotiations

Seeking to avoid costly litigation, provide certainty for all water users, and meet the Tribes' needs, the State of Montana, the Tribes and the United States have made a number of attempts since the early 1990s to negotiate the Tribes' instream flow and other water right claims. These negotiations became more active and focused in 2007, when the Tribes submitted a set of key negotiation principles. First, the Tribes committed to negotiate toward a settlement in which all verified existing water uses on the Reservation—Tribal and non-Tribal—would be protected. This included a commitment that the water supply for the Project would be protected to the full amount needed to meet existing net irrigation requirements. Second, rather than exercise the full extent of the Tribes' instream flow rights (which are senior in priority to and would reduce water available for irrigation water rights), the Tribes agreed instead that flow protections for fish would be met by dedicating water saved through conservation practices and Project improvements. Third, all waters on the Reservation would be jointly administered by the Tribes and the State to reflect the principle that water on the Reservation is a unitary resource.

B. Compact

The Salish and Kootenai Tribal water compact as negotiated and as approved by the Montana legislature in 2015 represents a comprehensive resolution of all of the Tribes' water right claims in concert with the negotiating principles discussed above. Among other things, the Compact includes a set of Tribal irrigation, domestic, instream flow and other water rights to meet the Tribes' current and future water needs on the Reservation. The Compact entitles the Tribes to additional water sources from the Flathead River and from the federal Hungry Horse Project (a large dam and reservoir on the South Fork of the Flathead River under the jurisdiction of the U.S. Bureau of Reclamation). Off-reservation water right claims are also resolved under the Compact, which provides for Tribal water rights and other flow

protections in key streams throughout the Clarks Fork and Kootenai River basins in western Montana.

Finally, once it is fully executed, the Compact provides a unique and carefully crafted framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or Law of Administration). It describes the process to (1) register existing uses of water; (2) change water rights; and (3) provide for new water development. The Compact also establishes a Water Management Board to administer the Compact and Ordinance on the Reservation.

The Department's federal negotiating team participated in water related compromises contained in the Compact as required by the Department's many federal responsibilities with respect to the disputed water rights and resources on the Flathead Indian Reservation, its ownership and operation of the Project, and its ownership and operation of Hungry Horse Reservoir located above Flathead Lake. Finally, the Department has worked with the U.S. Department of Justice to develop and file extensive claims for water on and off the Reservation in the Montana water court as part of the Montana general stream adjudication. These claims have been stayed by the Montana water court until February 2017 while the parties seek federal and other approvals of the Compact.

C. S. 3013

Among other things, S. 3013 would "authorize, ratify, confirm, and provide funding" for the Salish and Kootenai Tribal water compact; would ratify the tribal water right set forth in the Compact and make "any use of the tribal water right. . .subject to the terms and conditions of the Compact and [S. 3013]"; and, in conformance with the Compact, would direct the Secretary to "allocate to the Tribes 90,000 acre-feet" of storage water in the federal Hungry Horse Reservoir "for use by the Tribes for any beneficial purpose on or off the Reservation." Section 7 addresses future hydropower development on the Reservation by (a) directing that the Commissioner of the Bureau of Reclamation would have exclusive jurisdiction to authorize the development of any hydroelectric power generation project within the Reservation and (b) providing that the Tribes "shall have the exclusive right to develop and market hydropower on water bodies within the Reservation." Section 8 would provide several authorities to rehabilitate, modernize and mitigate the impacts of the federal Project.

S. 3013 would authorize approximately $2.3 billion of federal funds and provide for the waiver of CSKT water and damages claims. The following accounts would be established:

- Selis-QLispe Ksanka (Tribal) Settlement Trust Fund (Section 9)
  - —Agriculture Development Account—$365,207,225
  - —Economic Development Account—$93,633,566
  - —Community Development Account—$233,361,200
- Salish and Kootenai Compact Fund (Section 10)
  - —Compact Implementation Account—$116,209,294
  - —Flathead Indian Irrigation Project Account—$1,519,408,000

With the Project-related fund, CSKT is seeking funding through S. 3013 to rehabilitate and modernize the Project so that the water savings can be used to meet instream flow requirements.

IV. Department of the Interior Positions on S. 3013

While the Department has a record of strong support for Indian water rights settlements and the Compact is similar to many other water rights settlements that Congress has approved, the Department is unable to support S. 3013 as introduced. Additional time is needed for the Department to complete its review of the legislation. The Department has serious concerns about and cannot support the approximately $2.3 billion in federal appropriations that S. 3013 calls for. The proposed amounts and the legislative language contain little information regarding the purposes for which the proposed funds and accounts would be put to use. The Department has made clear to the Tribes that a more realistic level of funding is required before the Department will be able to support S. 3013.

We are also concerned about the magnitude of the increased cost of this settlement compared to enacted Indian water rights settlements. While we recognize that this proposed settlement would seek to resolve longstanding and intense conflicts, we would also note that the size of the proposed Federal funding obligation created under S. 3013 in relation to the Department's budget presents significant challenges. As an example, the Bureau of Reclamation currently has a backlog of more than $1 billion in authorized, but unfunded, Indian Water Rights Settlements.

V. Conclusion

S. 3013 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana—Indian and non-Indian—to settle their differences through negotiation rather than litigation. This Administration shares that goal, and hopes to be able to support ratifying legislation for the Confederated Salish and Kootenai Tribes after a full and robust analysis and discussion of all aspects and ramifications of this substantial settlement.

The Administration is committed to working with the Tribes and other settlement parties to reach a final and fair settlement of the Tribe's water rights claims. The Administration is committed to working with Congress and all parties concerned in developing settlement legislation that the Administration can fully support.

Mr. Chairman, this concludes my written statement. I would be pleased to answer any questions the Committee may have.

The CHAIRMAN. Thank you so much for your testimony.

Next we will hear from the Honorable David Flute. And I will just tell you Senator Rounds, earlier today, told me the story of your incredible military service, your bravery, your courage, and it is a privilege to have you here with us today testifying. Thank you very much. If you could introduce yourself and who you represent.

STATEMENT OF HON. DAVID FLUTE, CHAIRMAN, SISSETON–WAHPETON OYATE SIOUX TRIBE

Mr. FLUTE. Mr. Chairman, Vice Chairman, I respectfully ask to be able to introduce myself in my native tongue according to my Dakota protocol.

The CHAIRMAN. Please.

Mr. FLUTE. [Greeting in native tongue.] I shake each and every one of your hands from my heart today.

[Speaking native language.] I thank you for allowing me to stand before you.

[Speaking native language.] The testimony I am about to give I ask that it strengthens your understanding and your knowledge of what I am about to say today.

With that [speaking native language], I thank you very much.

Good afternoon, Mr. Chairman, Mr. Vice Chairman, members of the Committee. My name is David Flute. I am the Chairman of the Sisseton-Wahpeton Sioux Tribe. I am pleased to testify in support of Senate Bill 2796, the RESPECT Act, which would repeal certain obsolete laws concerning Indians. As Native Americans, respect for our somber Nations' treaty rights and Indian lands is imperative because our right to self-governance on our Reservation is freedom and liberty for us. It is the essence of Tribal self-governance.

Senator Rounds provides leadership and reconciliation with Native Americans in the Senate, as he did as governor of the State of South Dakota, and for that I thank him.

The Sisseton-Wahpeton Sioux Tribe is a signatory of two treaties, the 1851 Treaty and the 1867 Lake Traverse Treaty, which established a permanent homeland for my people in northeast South Dakota and, as Senator Heitkamp had mentioned, southeast North Dakota.

We are proud of our service to the United States through the military. Woodrow Wilson Keeble, one of our most respected tribal veteran members, served in World War II and in Korea and was posthumously awarded the Congressional Medal of Honor by President George W. Bush.

And today, Mr. Chairman, the reason I bring that up is there are laws in our legal code that talk about withholding the annuities of Tribes that are hostile towards the United States Government. As Senator Rounds had mentioned, and I appreciate, Mr. Chairman, acknowledging my service to this Country, that many of us have volunteered to serve this Country. Many of us were not drafted. Many of us did not have to go. We volunteered to serve this Country, and when we created treaty and when we established those relationships with the United States Government, we created a partnership and an alliance. And on behalf of those older veterans that served in World War I, World War II, as my grandfather did, and as he had heard from his grandfather, those treaty obligations we felt, on our part, were an obligation for us to serve the United States of America. So we are very proud of our service to the Country, thus why these laws are obsolete and are concerning to us in that it questions the position of the United States Government towards us that have volunteered our patriotism to the United States of America.

Senator Rounds introduced the RESPECT Act to strike antiquated laws which have historically disadvantaged our Indian Nations and our people. For example, there are still laws on the books for the removal of Indian children from the homes to be sent to compulsory boarding schools run by military officers where the mantra was "Kill the Indian and save the Man."

My grandfather was a World War II veteran. He served with the 101st Airborne Division, the Battle of the Bulge, Bastards of the Stone. He was taken, at five years old, from his mother's arms and he didn't see his grandparents, he did not see his parents for 11 years. When he came back to the Reservation to look for his home, there was no home. And the boarding school laws in Title 25 that spell out where a BIA agent can go into a home and take that child without consent of the parents is appalling, and we ask that those laws like that be removed from our code.

In closing, Mr. Chairman, I would just like to say I have never met Senator McCain before, but I would like to say, sir, I am very honored, I am very humbled to be in your presence knowing what you did for our Country in Vietnam. I am very honored to be in your presence, sir.

Senator MCCAIN. Thank you very much, sir. I am very honored by your service, and I am sure that Senator Tester and Senator Heitkamp are paying close attention to your words.

That was a joke.

I thank you.

[Laughter.]

Senator MCCAIN. I thank you very much for your service. Thank you.

[The prepared statement of Mr. Flute follows:]

PREPARED STATEMENT OF HON. DAVID FLUTE, CHAIRMAN, SISSETON-WAHPETON OYATE SIOUX TRIBE

Good morning, Mr. Chairman, Mr. Vice Chairman, Members of the Committee and Honored Guests. My name is David Flute, and I am the Chairman of the Sisseton-Wahpeton Oyate. I want to give a special greeting to our Senators from South Dakota and North Dakota, Mike Rounds and Heidi Heitkamp. I am pleased to testify in support of S. 2796, the Repealing Existing Substandard Provisions En-

couraging Conciliation with Tribes Act or RESPECT Act, which would repeal certain obsolete laws with concerning Indians. Thank you for the opportunity to testify today.

As Native Americans, it is important for us to have respect for our Native Nations, treaty rights, and Indian lands because our right to self-governance and self-determination on our Reservations is the essence of Freedom and Liberty for us. Senator Rounds is providing important leadership on Respect and Reconciliation for Native Americans in the Senate, as he did as Governor of the State of South Dakota. We thank him.

I would note that the Federal Government has just undertaken an effort to update the United States Code by striking the term "Oriental," which is offensive to some Asians. It is important for the United States to put an end to historical racism against all Americans.

The Oceti Sakowin, or Seven Council Fires, of the Dakota-Nakota-Lakota Oyate or Sioux Nation are the original people of the forests, woodlands, prairies and plains of Southern Minnesota, Iowa, North and South Dakota, Nebraska, Wyoming and Montana. The Sisseton-Wahpeton Oyate (meaning Sisseton-Wahpeton Dakota Nation and we also have been known historically as the Sisseton-Wahpeton Sioux Tribe) had our original homelands in Minnesota, North and South Dakota.

The Sisseton-Wahpeton Sioux Tribe is signatory to the 1851 Treaty with the Sisseton-Wahpeton Bands of Dakota Sioux (Traverse des Sioux) and the 1867 Lake Traverse Treaty, which set aside the Lake Traverse Reservation as our "permanent reservation" homeland:

> Beginning at the head of Lake Travers[e], and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

The Lake Traverse Reservation is located in the Northeastern part of South Dakota and a small portion of southeastern corner of North Dakota. The reservation boundaries extend across seven counties, two in North Dakota and five in South Dakota.

During the Dakota Conflict of 1862, the Sisseton-Wahpeton Sioux Tribe assisted the United States by rescuing white residents of our 1851 reservation and rescuing hostages and captives. Our 1867 Treaty continues our "friendly relations with the Government and people of the United States." Our Treaty also recognizes our people's right to self-government and to adopt "laws for the security of life and property," to promote the "advancement of civilization" and promote "prosperity" among our people.

Today, we have a total of 13,177 tribal members on our Reservation, throughout the United States and others serving overseas in the Armed Forces. We are rightfully proud of our service to the United States through the military. Woodrow Wilson Keeble, one of our most respected tribal members, served in World War II and in Korea and was posthumously awarded the Congressional Medal of Honor by President George W. Bush.

Senator Rounds introduced the Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes Act or RESPECT Act, S. 2796, to strike some of the substandard laws which have historically disadvantaged Indian nations and our people. For example, there are still laws on the books concerning the removal of our children from our homes to be sent to compulsory boarding schools run by military officers, where the mantra was "Kill the Indian, save the Man." National Public Radio reported on Indian Boarding Schools, which cited the example of Floyd Red Crow Westerman, the famed Sisseton-Wahpeton singer and actor:

> Floyd Red Crow Westerman was haunted by his memories of boarding school. As a child, he left his reservation in South Dakota for the Wahpeton Indian Boarding School in North Dakota. Sixty years later, he still remembers watching his mother through the window as he left. At first, he thought he was on the bus because his mother didn't want him anymore. But then he noticed she was crying. "It was hurting her, too. It was hurting me to see that," Westerman says. "I'll never forget. All the mothers were crying." Westerman spent the rest of his childhood in boarding schools far from his family and his Dakota tribe. . .
>
> The Federal Government began sending American Indians to off-reservation boarding schools in the 1870s, when the United States was still at war with Indians. An Army officer, Richard Pratt, founded the first of these schools. He based it on an education program he had developed in an Indian prison. He described his philosophy in a speech he gave in 1892. "A great general has said

> that the only good Indian is a dead one," Pratt said. "In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."

Title 25 U.S.C. sec. 283, Regulations for Withholding Rations for Nonattendance at Schools, and 25 U.S.C. section 285, Withholding Annuities from Osage Indians for Nonattendance at Schools should be struck from the United States Code because these statutory provisions reflect a racist outlook that we, as American Indians, cannot manage our own affairs and our own children.

As Senator Rounds said upon his introduction of the bill, "These statutes are a sad reminder of the hostile aggression and overt racism displayed by the early federal government toward Native Americans as the government attempted to 'assimilate' them into what was considered 'modern society.'"

Title 25 U.S.C. sec. 302 entitled Indian Reform School perhaps should be modernized and amended as follows:

> Strike the existing title and paragraph and insert a new title and a new paragraph: Education, Counseling Services and Other Assistance to Indian Children and Youth: The Secretary of the Interior, in consultation with and with the support of the Attorney General, the Secretary of Health and Human Services, the Secretary of Education, and Secretary of Labor, is authorized to provide education, counseling, training, family and community rehabilitation for Indian children and youth in need of services in BIA or tribal government custody, supervision or in court ordered foster placement. The Secretary of the Interior, in cooperation, coordination and with the support of the appropriate Attorney General, Secretary of Health and Human Services, and Secretary of Education, upon receipt of an appropriate plan acceptable to the Secretary of the Interior, authorize the tribal government to coordinate, in accordance with such plan, to consolidate its federally funded education, counseling, training, and community rehabilitation services for Indian children and youth in need of services in BIA or tribal government custody, supervision or court ordered foster care consistently and waive non-mandatory regulations as needed to integrate programs and services into a single coordinated, comprehensive program that improves performance and results and reduces administrative costs and burdens by consolidating functions.

This provision would provide modernized services for Children and Youth in need of services in BIA or tribal custody, supervision or court ordered foster care in accordance with the principles of Public Law 102–477 (Indian Employment, Training and Related Services Demonstration Act of 1992).

We agree that there is no place in our legal code for many of these laws today. For example, 25 U.S.C. sec. 72 provides for the Abrogation of treaties by the President, when an Indian tribe is in actual hostility with the United States. In the earlier post-Civil War era, the Constitution's 14th Amendment Citizenship Clause and amended Apportionment Clause acknowledged that the citizens of Indian nations were "Indians not taxed," with allegiance to our own Indian nations and subject primarily to tribal jurisdiction, not directly "subject to the jurisdiction" of the United States. Today, we are United States citizens and citizens of our own Indian nations, and our treaties provide for perpetual peace, which we have sustained and protected through our active participation in the Armed Services of the United States for 140 years or more. Accordingly, this provision should be struck from the United States Legal Code.

Title 25 U.S.C. sec. 127 provides for the withholding of annuities and appropriations under treaties to "hostile Indians." As President Washington acknowledged in his Third Annual Address to Congress (which we call the State of the Union Address today) "the main source of discontent and war" was the alienation of Indian lands and the encroachment of non-Indians on reserved Indian lands. President Washington recommended "provision should be made for inflicting adequate penalties upon all those who, by violating [Indian] rights, shall infringe the treaties, and endanger the peace of the Union." Address From George Washington to the U.S. Senate and House of Representatives, 25 October 1791 (National Archives—Founders Online). In 1934, President Franklin Roosevelt acknowledged that too much land had been taken from our Indian nations, and provided an avenue for the restoration of Indian lands in 25 U.S.C. sec. 465, the land into trust process. Today, the United States and Indian nations are working to redress the loss of Indian lands through the Indian Land Consolidation Act, and the Cobell Buy-Back Program. Title 25 U.S.C. sections 127, 128, 129, 130, 137, and 138 should be struck from the United States Code because these sections are antiquated and racist.

Title 25 U.S.C. Section 273 and title 25 U.S.C. sec. 276 should be amended and consolidated. Strike the existing language and insert: Excess Federal Buildings and Real Property; Staffing. The Secretary of Defense, GSA and other Federal agencies are authorized to provide excess Federal Buildings, Land and Property with priority to Indian tribes that demonstrate educational or economic need for, or treaty, historical or geographical nexus to such properties; and the Secretary of Defense or other appropriate official may lend staff to said Indian tribe to assist in the transfer and rededication of such facility. By modernizing these provisions, Indian tribes can receive the benefit that Congress originally intended without the antiquated language that sends the wrong message about modern Federal—Tribal Relations to the public.

Finally, in the spirit of Respect and Reconciliation, perhaps Congress can add a provision to call upon the President of the United States to issue a proclamation to announce the United States' Apology to Native Americans. On December 19, 2009, President Barack Obama signed the Native American Apology Resolution into law. Senator Sam Brownback (R–KS), sponsor of the bill, had it successfully added to the 2010 Defense Appropriations Act, H.R. 3326, after five years of effort. The Section 8113 of the Defense Act, Public Law No. 111–118 is as an apology "on behalf of the people of the United States to all Native peoples for the many instances of violence, maltreatment, and neglect inflicted on Native peoples by citizens of the United States." President Obama has never formally issued or proclaimed the Apology although the Act: "urges the President to acknowledge the wrongs of the United States against Indian tribes in the history of the United States in order to bring healing to this land." Such an Act deserves appropriate public recognition.

In conclusion, the Sisseton-Wahpeton Oyate supports the passage of the RESPECT Act as amended. As Senator Rounds said, the RESPECT Act is "one small step Congress can take to heal some of the wrongs imparted upon Native Americans by the Federal Government." Black Elk, our Lakota Holy Man said:

> You have noticed that everything an Indian does is in a circle, and that is because the Power of the World always works in circles, and everything tries to be round.. . . The Sky is round, and I have heard that the earth is round like a ball, and so are all the stars. The wind, in its greatest power, whirls. Birds make their nest in circles, for theirs is the same religion as ours.. . . Even the seasons form a great circle in their changing, and always come back again to where they were. The life of a man is a circle from childhood to childhood, and so it is in everything where power moves.

President George Washington intended to respect Indian nations and Indian treaties when he entered into the first Indian treaties after the ratification of the U.S. Constitution in 1790. Today, with the leadership of the Senate Committee on Indian Affairs, Congress is returning full circle to the original respect for our Native Nations as America's original sovereigns.

Again, thank you for the opportunity to testify on behalf of the Sisseton-Wahpeton Oyate.

The CHAIRMAN. Thank you. I appreciate your testimony.

We will next hear from Mr. Kasey Velasquez. I know you are substituting, but we appreciate you making it here and to be willing to give this testimony today.

STATEMENT OF HON. KASEY VELASQUEZ, VICE CHAIRMAN, WHITE MOUNTAIN APACHE TRIBE

Mr. VELASQUEZ. Good afternoon, Chairman Barrasso, Vice Chairman Tester, Senator McCain, and members of the Committee. Likewise, as my colleague, I would like to introduce myself in my Apache language.

[Greeting in native tongue.]

My name is Kasey Velasquez. I am Tribal Vice Chairman of the White Mountain Apache Tribe. I come to Washington, D.C. with prayers and culture, heritage adherence in our Apache language, acknowledgment for the White Mountain Apache Tribe.

Chairman Lupe is recovering from being ill. As you guys all know, Chairman Lupe is a Korean War veteran, United States Ma-

rine Corps. He asked me to testify in his place and he sends his regrets.

Thank you for this opportunity for the White Mountain Apache Tribe to testify in support of Senate Bill 2959, and thank you, Senator McCain, for introducing and moving this vital legislation.

We also thank Senator Jeff Flake for his support of this amendment.

Our people, the Apache people of the White Mountain Apache Tribe, have lived on our homeland in eastern Arizona since time immemorial. The headwaters of the Salt River system arises on our Reservation and merged to become the Salt River, which flows south to the Phoenix Valley. Water flowing from our land built the skyscrapers there.

Ironically, despite hundreds of miles of streams on our land, our own economic development has been stifled by the lack of safe, clean, and reliable drinking water for our people, housing, schools, hospital, and Reservation residents. The reason is Mother Nature.

We have very little groundwater on our Reservation; yet, 14,000 people, almost our entire population, are dependent upon a declining well field that was built in 1999. The decline is not reversible. Production is down to half of what it was in 1999. There is no recharge.

There is also natural arsenic in our groundwater. We have to blend it to meet EPA standards. Drinking water must be hauled by hand in one community and piped into another.

Congress, recognizing the White Mountain Apache Tribe Water Rights Act that our current and future drinking water needs could only be met by surface water and then by building a rural water system, including a dam, a small reservoir with 6,000 acres feet of active storage, a treatment plant, and a 55-mile pipeline to deliver the treated water to our tribal communities.

Section 312 of the White Mountain Water Rights Act authorizes up to $78.5 million in the settlement fund for water-related economic development projects. Among other listed purposes, Congress gave us broad discretion on how to use the $78.5 million.

Last year our engineer consultants discovered previously unknown potential seepage and stability conditions to the foundation material at the dam site. They advise that there will be a construction cost overrun to build the dam and reservoir. We are certain, however, that any cost overrun will not exceed the total amount authorized in the Water Rights Act for the rural water system, the settlement fund, and for cost overruns.

We have always understood that the funding authorized by Congress for water-related economic development projects would naturally include using money from settlement funds, if necessary, to pay for any cost overrun to complete the rural water system, a water-related economic development project on its own. We therefore became concerned that the Department of Interior indicated that it was not absolutely clear from its perspective whether the settlement fund could be used for a cost overrun to build the rural water system. Enacting bill 2959 will ensure the Interior that the settlement fund, as needed, can be used to complete the rural water system.

As I testify before you today, I am mindful of an image and a hope that I have held for years that I would be fortunate, and our tribal members to be fortunate to live long enough to see a child or adult in the community of Carrizo casually open a faucet on a kitchen sink to fill a glass of water, something they cannot do today.

Thank you. I am ready to answer any questions you may have.

[The prepared statement of Mr. Lupe follows:]

PREPARED STATEMENT OF HON. RONNIE LUPE, CHAIRMAN, WHITE MOUNTAIN APACHE TRIBE

Chairman Barrasso, Vice Chairman Tester, Senator McCain and members of the Committee: Thank you for the opportunity to testify in support of S. 2959—A Bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to clarify the use of amounts in the WMAT Settlement Fund.

My name is Ronnie Lupe, and I am the Tribal Chairman of the White Mountain Apache Tribe. We live on the Fort Apache Indian Reservation upon aboriginal lands which we have occupied since time immemorial. Our Reservation is located about 200 miles Northeast of Phoenix in the White Mountain Region of East Central Arizona.

The Tribe's current water sources and infrastructure have been and continue to be grossly inadequate to meet the current demands and needs of our reservation communities. Fortunately, subsequent to our agreeing to a quantification of our aboriginal and federally reserved water rights in 2009 with various state parties following decades of litigation, Congress enacted the White Mountain Apache Tribe Water Rights Quantification Act[1] ("Quantification Act")(P.L. 111–291). The cornerstone of that Act, which confirmed the 2009 Water Rights Quantification Agreement and Settlement, is the authorization for the design and construction of the White Mountain Apache Tribe Rural Water System (the "Rural Water System")(P.L. 111–291), which will bring desperately needed safe and reliable drinking water to our Tribe and its members.

S. 2959 will clarify the intent of a provision in the Act concerning the Rural Water System and enable us to shift some amounts of already authorized spending among authorized activities. Specifically, the legislation would clarify Congress's intent to allow the Tribe to use the existing authority under Section 312(b)(2) of the Act for "water-related economic development" projects to complete the construction of the Rural Water System.

If this issue is not resolved, the completion of the Rural Water System project will be threatened, thereby increasing the ultimate cost to the United States and delaying the delivery of life-sustaining drinking water to our reservation communities.

Fort Apache Indian Reservation and the Tribe's Reserved Water Rights

The Tribe holds full beneficial title to 1.66 million acres of trust land in the east central highlands of the State of Arizona. The Tribe's Fort Apache Indian Reservation was established by Executive Order in 1871. We have retained actual, exclusive, use and occupancy of our aboriginal lands within the boundaries we agreed to and later designated by the Executive Orders dated November 9, 1871 and December 14, 1872, without exception, reservation, or limitation since time immemorial. The Tribe's vested property rights, including its aboriginal and other federal reserved rights to the use of water, often referred to as Winters Doctrine Water Rights, that underlie, border and traverse our lands, have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Gila River drainage, of which the Salt River is a major source.

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually our entire Reservation drains to the Salt River. The headwaters and tributaries of the Salt River arise on our Reservation and are the principal sources of water for the Tribe, and the greater metropolitan Phoenix area. Specifically, 78 percent of the water in Theodore Roosevelt Reservoir located north of the Phoenix Valley is contributed from our reservation; at Saguaro Lake reservoir, further South, 60 percent of the water is contributed from our reservation; and below the confluence of the Verde River and Salt River, near Granite Reef Dam, Scottsdale, 42 percent of the water comes from our reservation. The importance of

[1] The White Mountain Apache Tribe Water Rights Quantification Act became Title III of the Claims Resolution Act of 2010 (the "Act"). P.L. 111–291.

achieving implementation of our 2009 Water Rights Quantification Agreement is essential to the well-being of the White Mountain Apache Tribe and the downstream water users in the Phoenix Valley.

White Mountain Apache Tribe Water Rights Quantification Act of 2010

In 2010, this Congress approved the historic White Mountain Apache Tribe Water Rights Quantification Act as part of the Claims Resolution Act of 2010 (P.L. 111–291). The legislation was sponsored in by Senator McCain, now-retired Senator Jon Kyl, and the entire Arizona delegation in the House. Importantly, the Act was budget neutral.

The Quantification Act resolved the Tribe's water related damage and reserved water rights claims against the United States, the State of Arizona, and a number of state parties in regards to rights in the Little Colorado River and the Gila River (Salt River and Tributaries thereto). In consideration for the Tribe waiving its water related claims and prior reserved rights, the Act authorized funding for the construction of the Rural Water System comprised of a dam and reservoir, treatment plant, and a 55 miles of pipeline to serve virtually every reservation community. In addition, the Act also authorized funding for, among other things: (1) cost-overruns for the Rural Water System (Sec. 312(e)) and (2) "water-related economic development projects" as part of the WMAT Settlement Fund (Sec. 312(b)).

The White Mountain Apache Tribe Water Rights Quantification Agreement, which was respectfully negotiated amongst all parties, was formally approved by the White Mountain Apache Tribe and all parties, including the Secretary of the Interior, and subsequently approved by the Superior Courts (Apache County and Maricopa County Superior Court) of the State of Arizona on December 18, 2014. The White Mountain Apache Tribe Water Rights Quantification Settlement Judgment and Decree was filed in Maricopa County and Apache County on March 15, 2015. The Judgments and Decrees become enforceable on the date that the White Mountain Apache Tribe Water Rights Quantification Act becomes enforceable with the publication by the Secretary of the Record of Decision allowing the construction of the Rural Water System project to go forward.

The Tribe's Drinking Water Crisis

The driving force behind the 2009 water rights settlement and the 2010 Quantification Act was the long-standing need to provide a reliable and safe water supply and delivery system to the members of the White Mountain Apache Tribe. The Tribe and Reservation residents are in urgent need of a long-term solution for their drinking water needs. Currently, the Tribe is served by the Miner Flat Well Field. Well production has fallen sharply and is in irreversible decline. Over the last decade, well production has fallen by 50 percent. A small diversion Project on the North Fork of the White River was constructed several years ago to compensate for the precipitous loss of well production, but was only a temporary fix and drinking water shortages remain a chronic problem. The Tribe experiences annual summer drinking water shortages, and there is no prospect for groundwater recovery as there is little or no groundwater on the reservation. The quality of the existing water sources threatens the health of our membership and other Reservation residents, including the Indian Health Service Regional Hospital and State and Bureau of Indian Affairs schools. The only viable solution is the replacement of failing groundwater resources with surface water from the North Fork of the White River.

Without reservoir storage behind Miner Flat Dam, a feature authorized by the Act, the stream flows of the North Fork of the White River, supplemented by short-term capacity of the Miner Flat Well Field, are together inadequate to meet current, much less future, community demands of the White Mountain Apache Tribe in the Greater Whiteriver Area, Cedar Creek, Carrizo, and Cibecue and to maintain a minimum flow in the North Fork of the White River. The demands of the Tribe for its Rural Water System will literally dry up the North Fork of the White River before 2020, even in combination with a supplemental supply from the Miner Flat Well Field. Therefore, Miner Flat Dam is necessary to store 6,000 acre feet of water during runoff periods for release and enhancement of the North Fork of the White River to not only meet demands of the Reservation Rural Water System but to maintain a minimum flow required for aquatic and riparian habitat preservation and enhancement.

In sum, the Rural Water System will replace the failing and terminal groundwater well system and enable the Tribe to construct a secure, safe and reliable drinking water supply for the current 15,000 White Mountain Apache Tribal members and residents living on our Reservation and to meet the increasing drinking water needs of the Reservation for a future population of nearly 40,000 persons in the decades to come.

Need for Technical Clarification

After passage of the Act, the Tribe continued, with a loan from Reclamation, with work on the design and geotechnical work for the proposed dam site of the Rural Water System. In the course of this work, the Tribe's consulting engineers discovered potential seepage and stability conditions in the foundation material at the dam site than had not been previously known. The cost-overrun funding necessary to address these design and construction issues will in no event be greater than the total amounts authorized in Sections 312(a), (b), and (e), of the Act which respectively authorized the Rural Water System, the WMAT Settlement Fund, and cost-overruns for the System.

The WMAT Settlement Fund authorized in Section 312(b)(2) of the legislation was written sufficiently broad to authorize the use of the fund for cost-overruns. Consistent with the goals of self-determination and self-sufficiency, Congress intended the Tribe to have wide discretion on how to use and prioritize any of the authorized uses in Section 312(b)(2)(C), which, as noted, includes the very broad category of "water-related economic development projects." This intent that we would have wide discretion on the use of these funds has always been our understanding and we have relied on that belief. Since the Rural Water System will serve a number of water-related activities from housing to hydropower, it fits squarely within the Settlement Fund's authorized purposes. For example, the System will provide: (1) water for new and existing housing on the reservation; (2) water for existing irrigation; (3) the ability to expand irrigation (approximately 2,000 acres); (4) improvements to the Alchesay fish hatchery; (5) lake-based recreation for fishing and non-motorized boats; and (6) the potential for small-scale hydro-electric (approximately two megawatts). Given the importance of the Rural Water System and its economic development purposes, the Tribe is willing to use this existing authorization to complete the Rural Water System in lieu of other development alternatives listed in Section 312(b).

Recognizing that the Rural Water System was the cornerstone of the Act, Congress provided sufficient flexibility in its funding authorization to ensure that funding for the Rural Water System could be accessed from various authorizations, including Sections 312(a), (b), and (e). The Secretary is only authorized to require changes to the design of the Rural Water System if it cannot be constructed "for the amounts made available under Section 312." Sec. 307(c)(2)(B)(iii). Section 307 does not limit how funds within Section 312 can be used, nor was it intended to.

Notwithstanding the language of the Act, the Department of the Interior has indicated that it is not absolutely clear (from its perspective) whether the Settlement Fund can be used for the System's cost overruns. Consequently, a technical amendment is necessary to clarify that authorization authority exists in Section 312(b) for any necessary cost-overruns associated with the WMAT Rural Water System.

The importance of our water rights settlement and the WMAT Rural Water System to the health and welfare of our people cannot be overstated. We must ensure its timely design and completion by resolving the cost issue within the Act's existing authorization now, not later. This legislation would clarify that we have the necessary authorization to complete the project. If it is not resolved, the completion of the project will be threatened, thereby increasing the ultimate cost to the United States and delaying the delivery of life-sustaining drinking water to our reservation communities.

The CHAIRMAN. Thank you so much for your testimony today.

Now, Mr. Vernon Finley.

STATEMENT OF HON. VERNON FINLEY, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Mr. FINLEY. [Greeting in native tongue.]

Chairman Barrasso, Vice Chairman Tester, members of the Committee, I thank you for providing me the opportunity to provide some testimony to you today. I would like to begin by thanking Senator Tester for the introduction of S. 3013. Not only this bill, but for all of the things that you have done for Indian Country throughout the State of Montana.

I have to admit that I had my doubts when you were elected and here was this rancher from over the mountains in Flattop. I had

my doubts whether the Nations within the State of Montana would be well represented, and I am very honored to testify today that I was proven very wrong. So thank you very much, not only for us, but for all of the folks in Montana. You represent the entire State very well, and thank you very much.

Senator TESTER. Thank you.

And I am sure Senator McCain was paying close attention.

[Laughter.]

Senator MCCAIN. It was wonderful testimony, Mr. Finley.

[Laughter.]

Mr. FINLEY. Would you start my five minutes?

[Laughter.]

Mr. FINLEY. This bill represents exactly what I was just talking about. There was a lot of time put into this bill to get it here, to what it is today.

Since time immemorial, our Nations have traveled throughout western Montana, throughout most of Montana and Wyoming and Idaho and British Columbia, and have utilized the waterways. The waterways were actually our highways before any of the current highways or any of the travel currently existed. Utilizing the waterways meant that we depended upon the fish, and so when these negotiations started about 12 years ago, there was one important part that the elders brought forward to the people, brought forward to the negotiating team, and they stressed that the elders said protect the water, protect the water, and with that they were meaning all of the things and how much we depend upon it.

The United States Government, by signing a treaty with us in 1855, promised us that throughout our aboriginal territory that we would be able to utilize and practice all of our traditional practices throughout our homeland and all of our custom territory. We would also be able to, within the Reservation, have the exclusive right within the boundaries of the Reservation, we would have the exclusive right for fishing.

Immediately upon afterwards, by opening up the reservation to homesteading and the construction of the Flathead irrigation project, what happened was they created an irrigation system that went entirely along the mountain front and dissected every single stream, every single stream that comes throughout our valley from the south to the north. They went to the west side of the Reservation and did the same thing.

And with the construction of that project, it had severe effect, severe effect on our treaty right. When we signed the treaty, the United States Government accepted the responsibility of being our trustee, and with that action, with those actions since then has violated that trust responsibility.

Throughout the history of time since that time, there have been numerous actions that have infringed upon those rights. Now, this bill and the past 12 years of negotiations was a culmination of the State of Montana, the people in Montana, the Tribes to sit down and to negotiate and to come to an agreement about what is the best use and what is the best way forward in order to resolve all of our water responsibilities, so I strongly urge the Committee and the Senate to approve this legislation.

Thank you again, Mr. Tester.

[The prepared statement of Mr. Finley follows:]

PREPARED STATEMENT OF HON. VERNON FINLEY, CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Chairman Barrasso, Vice Chairman Tester and members of the Committee, the Confederated Salish and Kootenai Tribes of the Flathead Reservation are very pleased to appear before you in strong support of this legislation which begins a process to heal the wounds to our people caused directly by over a century of destructive federal policies and failures by the United States to protect our federally reserved water rights, fishing rights and natural resources on our Reservation. This bill resolves existing and potential litigation involving thousands of litigants, settles costly claims by the Tribes against the federal government and water users across roughly two-thirds of Montana, and provides future certainty for all Montanans and, indeed, all Americans. It also makes federal investments that will rehabilitate and modernize decaying infrastructure in order to provide water to our Tribal members as promised by Congress over a century ago, will restore natural resources and fisheries within our Reservation, and will provide an overall savings to the taxpayers. The value of the Tribes' waived claims under this bill is over 14 times higher than the total cost of the proposed settlement, according to nationally-recognized engineers, hydrologists, scientists and economists.

No natural resource is more vital to our *Séliš, Ksanka* and *Qlispé*, people than water—the importance of water to our people is woven into all aspects of our lives. We are a fishing people. For thousands of years, the Bitterroot Salish, Kootenai and Upper Pend d'Oreille, thrived in our aboriginal homeland situated in what is now Montana, Idaho, British Columbia and Wyoming, subsisting off of healthy native fisheries, plants, and wildlife. But over the course of the last one hundred fifty years, federal policy endeavored to sever our relationship with water and failed utterly to protect our federally reserved water rights—instead diverting that water and seizing our resources for the benefit of non-Indians.

Our Reservation is located in northwestern Montana, west of the continental divide. Under the Treaty of Hellgate of July 16, 1855, the Confederated Salish and Kootenai Tribes ("Tribes"), which includes the Upper Pend d'Oreille, ceded over 20 million acres of land in return for a permanent homeland on the 1.3 million-acre Flathead Reservation. And, in the Hellgate Treaty, the United States guaranteed the Tribes that the Flathead Reservation would be set-aside for our "exclusive use and benefit." "[T]he Reservation was a natural paradise for hunting and fishing." *Conf. Salish and Kootenai Tribes v. United States*, 437 F.2d 458, 478 (Ct. Cl. 1971).

In that Treaty, the Tribes also reserved "the exclusive right of taking fish in all the streams running through or bordering said reservation," and "the right of taking fish at all usual and accustomed places. . . ." Ours is the only treaty in Montana reserving off-reservation fishing rights—a more common practice in treaties with tribes in Washington and Oregon—rights that have been repeatedly upheld by the United States Supreme Court.

However, in the century after the promises made in the Hellgate Treaty, the United States broke its word and diminished the tribal land holdings to less than one-fifth of the 1.3 million-acre Reservation that had been reserved under the Treaty. In 1904, over the Tribes' strenuous objection, Congress enacted a statute that opened much of the Reservation to non-Indian settlement, and promised to use the proceeds from the sale of reservation lands to develop an irrigation project "for the benefit of said Indians." But, in fact, in a blatantly transparent breach of its trust responsibility to the Tribes, the United States constructed the Flathead Indian Irrigation Project to provide water to, almost exclusively, the non-Indian homesteaders. The measure of damages sustained by the Tribes and its resources caused by this breach of trust is approximately $4 billion.

For over 100 years the operation of the Project created—and still creates—an environmental catastrophe on our Reservation. It diverts water from most mountain streams on our Reservation—like Mill and Sullivan Creek that flow into the Little Bitterroot River—dewatering them and destroying the native fisheries and fish habitat. For example, the diversion of streams and creeks for the Project has led to complete dewatering of streams in some places, erosion and elimination of natural wetlands throughout the Reservation well beyond the actual footprint of the Project. The Project's inefficiencies and polluted return flows have created severe water quality issues that threaten endangered species. Fish native to the Reservation like westslope cutthroat trout have been evaluated for listing under the Endangered Species Act, and others, like bull trout, have been listed as threatened.

These federal actions had and continue to have disastrous impacts on our Tribal people that this legislation will finally begin to correct. The Tribes decided to negotiate the Water Compact—that this legislation will approve—rather than litigate our federally reserved water rights because we think no good can come from decades-long litigation, with millions of dollars in legal costs for the Tribes, non-Indians and the federal government. Protracted litigation would only serve to cloud title to and likely place significant limitations on water availability and usage throughout two-thirds of Montana. So for the last two decades, the Tribes negotiated this settlement with the Montana Reserved Water Rights Compact Commission, an entity created by the State Legislature in 1979 to negotiate federally reserved water rights claims throughout the state.

In 2015, the Montana Legislature enacted Senate Bill 262, ratifying the Water Rights Compact between the Tribes, the State of Montana and the United States. The Compact has strong bipartisan support and Governor Steve Bullock signed it into law on April 24, 2015. Recognizing the benefits, and the time-sensitive nature of the Compact, the State of Montana has already begun appropriating its share of the funding. Once fully appropriated, Montana's $55 million contribution to the Tribes' settlement will be the largest of state contribution to any Indian water settlement in the Nation. Approval of the Compact through this bill will secure the Tribes' water right while protecting existing non-Indian water uses, and allow parties to develop and implement water using homegrown creative solutions based on local knowledge and values.

This bill will also have a positive impact on Tribal members, the Reservation, and indeed all of Western Montana, addressing the many needs of the decrepit, century-old BIA irrigation project. This includes upgrading the federal facility to comply with the Endangered Species Act. If the Tribes could rewrite history, this Project would have never been constructed. However, we cannot rewrite history. We can only go forward. And the only way that we can undo the damage that this Project has caused to our lands and resources, is to repair this federal facility in order to halt and reverse the destruction that it has caused. This will also result in benefits to the agricultural economy within the Reservation by improving water use efficiency, and will ultimately restore our natural resources by improving instream flows for fisheries—helping farmers, ranchers, and both recreational and subsistence fishermen. The alternative is to leave this federal facility as it is and let it continue to degrade our lands and our resources leading to eventual and complete destruction of our fisheries and way of life. This is entirely unacceptable to us.

By ratifying the Compact, which quantifies the Tribes' reserved and aboriginal water rights, this legislation will bring certainty to stakeholders in the region regarding their water rights. Further, in recognizing the federal government's neglect and mismanagement of the Tribes' resources, this legislation is an effort to move forward in a constructive way and bring a positive change to the Reservation to protect our Treaty rights and resources. The positive change that will be realized by our Tribes through approval of S. 3013, falls into five categories. First, the legislation will provide necessary funding to implement the Compact. For example, funding will be provided to register, monitor and enforce the Tribes' water rights, support fisheries programs, and carry out water measurement activities for the Flathead Indian Irrigation Project.

Second, the legislation will rehabilitate and modernize the dilapidated Flathead Indian Irrigation Project and remediate Tribal natural resources within the Reservation that have been devastated by the Project. These activities will ensure future responsible management of federal infrastructure by applying modern technology to improve efficiency for the advancement of agriculture and industry. At the same time this work will restore severe damages sustained to the Reservation's ecosystem and habitat by restoring wetlands, addressing noxious weeds and erosion issues across the Reservation, and revitalize and restore important in-stream flows for the restoration of a healthy native fishery.

Third, the bill will sustain the Tribal agricultural economy into the future by investing in Tribal agricultural resources and infrastructure commensurate with past investments to non-Indian agriculture in order to promote the advancement of the region's economy. The primary focus will be on strengthening the sustainability of tribal agricultural projects, which is key to contributing to Tribal economic development and the creation of jobs, while ensuring protection of the Reservation's ecosystem.

Fourth, the legislation will ensure safe, reliable drinking water and wastewater systems on the Reservation, thereby promoting economic development throughout the Reservation. Through the implementation of the Tribal water right, drinking water and wastewater systems will be improved and brought to modern standards ensuring the protection of the quality of Reservation surface and ground water.

Finally, a critical component of the bill invests in the Tribes' endeavor to repair and rebuild Tribal culture and language decimated by misguided federal water policies of the past. Because we are fishing people, the destruction of our waters and fishery has had an enormous impact on our language and culture. As we start to rehabilitate and restore our waterways and natural resources we must also have the resources to teach traditional ways and language to our members, adults and children alike. This will ensure true Tribal self-determination and self-sufficiency for generations.

The Compact also contains new and creative concepts such as the Unitary Management Ordinance for the practical administration of non-Indian and Indian water rights within the Reservation, which includes the establishment of the independent Flathead Reservation Water Management Board. Meandering streams know no political boundaries, so instead of having water rights disputes dispersed to various courts based on land status, approval of the Compact will allow for unitary management by the management board with a cross section of non-Indian and Indian stakeholders serving on it. The Compact includes provisions assuring that irrigators remain entitled to the right to the verified use of water that they have historically put to beneficial use.

During the nearly ten years of negotiations at the state level, many compromises were made in order to reach consensus. This resulted in a compact that ultimately reflects a win-win situation for the Tribes, the State of Montana and the United States, as trustee for the Tribes, regarding the ownership, use and management of much of the water in Northwest Montana. The Compact reflects what can happen when stakeholders work in earnest to seek resolution that can bring a true measure of justice and satisfaction to the parties involved.

The federal settlement presented in S. 3013 provides an opportunity for the federal government to authorize a contribution to this settlement, both in its capacity as trustee and as the entity most responsible for causing the damages that have resulted from the past and current federal policies. In addition, S. 3013 allows the United States to finally honor its obligations to the Tribes and our members.

While non-Indians, and the larger non-Indian society, benefitted from the taking of Confederated Salish and Kootenai Tribal lands and waters, Tribal members bore—and continue to bear—the brunt of the costs and damages. Approval of S. 3013 will bring peace in a part of Montana, where there has been controversy for over 100 years, and will be a win-win for all parties.

We are grateful to this Committee and its leadership for working so hard to find mechanisms to fund Indian water settlements and operational, maintenance, and modernization costs of both existing and new water and irrigation projects. We thank Chairman Barrasso for his leadership on these matters and are grateful to our Senator, Vice Chairman Tester, for introducing this historic legislation. I will be happy to answer any questions you may have and hope the Committee will report this legislation favorably to the Senate.

The CHAIRMAN. Well, thank you so much for your testimony.

We are now going to have a round of questions and we will start with Senator Daines.

Senator DAINES. Thank you, Mr. Chairman.

Chairman Finley, in your testimony you note that CSKT decided to negotiate the water compact versus litigate reserved water rights, and you discuss a number of benefits that the ratified compact will bring to the Tribes. As you think about the benefits, which are most important to you?

Mr. FINLEY. Could you repeat that last part, please?

Senator DAINES. Yes. As you look at the benefits that the ratified compact will provide versus litigation, so forth, was the other path to go down, when you think about the benefits, which do you think are most important to you and your people?

Mr. FINLEY. I think the most important part of it is not only the protection of the water, but there are multiple things, the important part being the protection of the water, but also the Salish and Kootenai Nation has always proven to be a good neighbor, a good neighbor to all of our friends. Even though our Reservation was opened up to homesteading, opposites are married to one another.

My grandmother used to always tell me that. Opposites are married. And with all of the things, from one perspective you could look at that opening of the Reservation as an extreme negative, but there were also positives that came along with it. We also respect the economic benefits that have come with the integration.

But there are always a lot of problems with it, a lot of issues. Being a good neighbor, you know, there is a saying out there that strong fences make good neighbors. Well, in our respect, the process of negotiating this compact has really built some strong fences. So we have been able to sit along with our neighbors, and the benefit for everybody is that it provides certainty. It provides certainty, as opposed to decades and decades of litigation. That is really the primary advantage to it.

Thank you for the question, Mr. Daines.

Senator DAINES. Thank you, Mr. Chairman.

I want to bring the question over to Ms. Belin. And, again, thanks for your commitments working with the Blackfeet water settlement. And I hope we can get that across the finish line this Congress. I know you were challenged to justify the $420 million price tag authorizing the Blackfeet settlement and, in fact, had to cut authorized spending from the Blackfeet Tribe's original request, which was nearly $600 million in authorizations.

Ms. Belin, what were the Department's thoughts when you saw the price tag of the CSKT water compact?

Ms. BELIN. Well, it is a significantly higher price tag than any enacted water settlement to date. It is obviously a substantial Federal price tag, and to date we have not negotiated Federal contributions at all; and we intend to do that with the Tribe and the other parties just as soon as we can get to it.

Senator DAINES. How will the Federal Government cover those costs?

Ms. BELIN. Well, in the past the Federal Government has been covering the cost through a combination, I guess in the 2010 Claims Resolution Act there was a combination of mandatory funding and funding out of our budgets. Now I am blanking on the name of the fund that got set up in 2009 that will provide $120 million of Federal funding for each of 10 years in a row that will be used, and some of that will likely be available for the CSKT.

Senator DAINES. I want to move to page 2 of your written testimony. I noted it says here, "The issues surrounding these claims have been among the most contentious to be addressed to date in a tribal water settlement." Could you expand on that statement and what, in the Department's view, about this tribal water settlement is more contentious than the others?

Ms. BELIN. Well, I think the Chairman addressed one set of issues that I have not seen in another settlement, which is the whole issue of the Tribes' water rights to instream flows on the Reservation, and the fact that the water projects got constructed largely for non-Indian use. Removing the instream flows on the Reservation is a major, major issue. I am not aware of any precedent for that, so that creates a whole set of issues of trying to balance the need to protect existing uses of the water project water, at the same time to restore health of instream flows. That is quite

complex and that will be the major difference that I would point to.

Senator DAINES. Okay. Thank you. I am out of time.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Daines.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

Ms. Belin, I want to thank you for attending the summit in Phoenix, Arizona this March to work with Governor Ducey, Senator Flake, Navajo President Russell Begaye, and Hopi Chairman Herman Honanie, in the Little Colorado River Settlement negotiations. You were good enough to come to Arizona, and we appreciate all the help that you have given us.

I understand in your opening statement that you need additional data from the Tribe, and I understand that and I appreciate it. But can I confirm that you support the goal of the Administration, which is clearly in the original legislation, which is to complete the Miner Flat Dam?

Ms. BELIN. Senator McCain, we strongly and absolutely are committed to the settlement. We strongly believe in it. We will get it implemented. Just this morning we met with the Vice Chairman and his team, and I understand that as soon as next week the information that the Bureau of Reclamation has been requesting will be made available. We have already set up a meeting, or at least a phone call, for the following week. We are firmly committed to implementing the settlement; we think it is an excellent settlement.

Senator MCCAIN. Well, I appreciate that testimony very much. Not to repeat the obvious, but the dam was part of the settlement that we need to honor.

Mr. Velasquez, these are facts. The wells on the Reservation have declined by 50 percent. True? The groundwater wells on the Reservation have declined by 50 percent.

Mr. VELASQUEZ. Yes.

Senator MCCAIN. Parts of the North Fork of the White River will be reduced to a trickle by 2020.

Mr. VELASQUEZ. Yes.

Senator MCCAIN. The Tribe's population is around 15,000 today and is expected to grow to 40,000 in the coming decades.

Mr. VELASQUEZ. Yes, sir.

Senator MCCAIN. Under the present circumstances, there is no way you are going to have an adequate water supply without the construction of that dam.

Mr. VELASQUEZ. Most definitely.

Senator MCCAIN. It seems to me that gives it some time sensitivity associated with this legislation.

Mr. VELASQUEZ. Yes, very important.

Senator MCCAIN. Well, I just want to assure you that a lot of treaties have been broken, a lot of agreements have been broken, as we all know, throughout our history of our relations with Native Americans. But it is very clear here that we need to get this dam built if your Tribe is going to have the lifestyle which is dictated by an adequate supply of water. So you have mine and Senator

Flake's commitment, and I am sure the other members of the Committee share your concern and our priority.

Mr. VELASQUEZ. Thank you, Senator McCain. Most importantly, as I sit here addressing information for the people of the White Mountain Apache Tribe, I know for a fact the White Mountain Apache Tribe and the tribal members have the utmost respect for you, sir.

Senator MCCAIN. Well, thank you. And I want to invite Senator Barrasso and Senator Tester out to visit the White Mountain Apache Tribe, which is one of the most beautiful parts of our State, far more beautiful than anything in their States.

[Laughter.]

Senator MCCAIN. Mr. Flute, again, I want to thank you, sir, for your kind remarks and thank you for your service. I might mention that Chairman Ronnie Lupe also had a distinguished Marine Corps career, as well.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator McCain.

Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

I am going to start out with you, Ms. Belin. Your testimony stated you can't support the CSKT legislation as introduced, and that we are just getting started, just getting started for sure. I guess the real question is does the Administration support the goal of coming to a final resolution and getting to a final settlement of the CSKT water rights.

Ms. BELIN. That would be most definitely yes. We believe that we support the compact, we support all the aspects that have already been negotiated in relation to that, and our negotiation team has worked very hard with the Tribe and the State over several years on all those aspects of the settlement, and we are ready to jump in and work on the Federal contribution aspect.

Senator TESTER. Okay.

The Chairman talked about it in his opening statement and I just kind of want to go over it with you, Chairman Finley. Your statement says that there was an irrigation project developed about 100 years ago that basically bisected all the streams and stopped that water from flowing onto your Reservation. Is that an accurate representation?

Mr. FINLEY. Most of the streams were completely de-watered at one point, but at least minimizes the flow of most of them, yes.

Senator TESTER. And that happened 100 years ago, right? That project was put in 100 years ago.

Mr. FINLEY. Correct.

Senator TESTER. Okay.

Now I want to go back to you, Ms. Belin. We can call it anything we want, but it is part of the water project, it is part of the water compact. And I am not putting you on the spot, but I kind of am, have you ever dealt with a water compact that basically dealt with an issue like this, where the water was diverted away from the Reservation?

Ms. BELIN. As I said to Senator Daines, no. I think this is a unique complication that we have to actually protect the diversions

out of the streams and we also have to protect the flows in the streams. That is very challenging.

Senator TESTER. So let's get right to it. Do you think a water compact is the appropriate place to place, this is probably the wrong word, but I am not a lawyer, damages as it applied to 100 years of wrongdoing?

Ms. BELIN. I am sorry, do I think that a water compact is?

Senator TESTER. The right place to place a monetary sum of money to take care of 100 years of what, quite frankly, if it were done today, the outfit that built that canal would probably be out of business the minute they put a shovel in the ground. Because you just don't divert water like that in this day and age; you don't stop fisheries from happening; you don't do a lot of stuff. So I guess my question is you have never dealt with it before in another compact. Obviously complicates it a little bit.

But I will just tell you my thought. It would seem to me that this compact is a much better place to deal with this and get it taken care of than in the courts. So for the same reason that this water compact system was set up, to keep people out of court, to bring people together, to build the kind of groups that can make this happen. So I am just trying to get an idea if the Department is open to really talking about this being a part of this bill or if you guys have a problem with it.

Ms. BELIN. First of all, yes, this is a far better structure for solving this problem. Litigation does not solve these kinds of problems.

Senator TESTER. Right.

Ms. BELIN. Litigation goes on. In fact, having to do with CSKT and the water rights, I can't even count how many lawsuits there have been over decades, and the problems are not solved. So we know that doesn't work.

We also know, at least the Department strongly believes the compact that has already been negotiated sets an excellent framework for an overall solution.

Senator TESTER. Okay. So that leads me to almost my last question before I make a comment, actually, and that is we talked about Blackfeet introduced three years ago. This one today a little more complex, but nothing that smart people can't figure out. What kind of timeframe do you think we should reasonably expect you coming to an agreement with CSKT and CSKT coming to an agreement with you so that Congress can deal with it? Do you think we can do it in three years, two years, one year?

Ms. BELIN. If I say yes, I will probably get something thrown at me from behind, because those are the people who are doing the work.

Senator TESTER. Walk on this side of the table; they can't reach you here.

[Laughter.]

Ms. BELIN. I think, given the fact that we have come so far, barring unforeseen developments, I don't see why we couldn't do it in that timeframe.

Senator TESTER. So one last question. There is going to be an Administration change before this settlement gets done. My guess would be that is fairly clear. So the people who are working on this settlement now, are they career folks that stay in the Department?

Ms. BELIN. Yes.

Senator TESTER. Okay, good.

One other thing, Mr. Chairman, if I might, and I know I am over time.

Ms. Belin, there has been some new guidance from the Administration from OMB that would add even more layers to these negotiations. I have been on this Committee for 10 years now, almost, and we have seen a number of settlements come through Congress. I think that as this bill gets to this level, there are tons of people involved.

I am not sure we need more people involved looking at this, because it has been looked at and it will be looked at by over and above you and over and above all the folks on the Tribe that have looked at it, over and above all the people that looked at it as it went through the process, all the different groups, all the different farmers, ranchers, city people; the works.

Now we are going to add another layer and, quite frankly, I think the water rights process has worked reasonably well. I think if we could get those reclamation dollars so we had a sum of money to fund this stuff with, it could even work a little quicker.

But slower is really not a direction that I am real crazy about heading. So I am going to ask your counsel, do you think we ought to send a letter, the Committee, to OMB and say, you know, we really appreciate you, but I am not sure you are going to help us?

Ms. BELIN. Maybe I can answer the rest of your question and not that last one there, and just say that we work very closely with OMB. Yes, we have a memo. We will continue to work closely with them. We brief them on all these settlements as we are working on them.

Senator TESTER. So do you think this is going to add time, this new directive, this new guidance is going to add time to the process?

Ms. BELIN. I have no reason to believe it will add time.

Senator TESTER. Okay. Music to my ears. My fears have been allayed.

Thank you all very, very much. I appreciate all of your service and look forward to working with Rounds to get this done and Senator McCain to get yours done. So thank you all very much.

Senator BARRASSO. Thank you, Senator Tester.

Ms. Belin, according to the White Mountain Apache Tribe's written testimony, the Tribe believes Congress intended that they have wide discretion on "how to use and prioritize" the uses of the money in the water settlement. So the term "water-related economic development projects" in the Claims Resolution Act of 2010, to me at least, seems to very clearly cover funding of the White Mountain Apache Tribe's rural water system. The fact that Interior claims that the White Mountain Apache Tribe needs specific new authorization from Congress is troubling.

The Administration just seems to be discovering new authorities from existing statutes on almost a daily basis here; not just in this Committee, kind of everything that we interact with in Congress. I guess I am trying to figure out why you feel, suddenly, in this case new legislation is needed to clarify such language, which to me is pretty clear language.

Ms. BELIN. Well, Senator, I guess this is something that our legal team has done, their analysis, and I think the main reason for it is that, in addition to the WMAT account, there is a separate account specifically allocated for cost overruns. So I believe that is the main reason they felt that since Congress had seen fit to establish a specific fund to address cost overruns, which is different from this fund that is being tapped into now, that was the basis for their determination.

Let me just add that we are happy to sit down and work on technical amendments or whatever we need to do to address this problem.

Senator BARRASSO. Because even if there is ambiguity, as the Department claims, is there not a doctrine of law regarding statutory construction in favor of Indian Tribes when there is ambiguity?

Ms. BELIN. Yes, there is.

Senator BARRASSO. So I would think that that doctrine out to be applying.

Ms. BELIN. We do. Yes, we always apply that doctrine.

Senator BARRASSO. Another question. In your written testimony you state the Department of Interior supports S. 2796. Based on the Department's legal analysis of the bill, what legal effect would the repeal of the laws listed in S. 2796 have on Tribes and the Department of Interior, and would Tribal sovereignty or treaty rights be impacted that you see?

Ms. BELIN. Mr. Chairman, our legal teams would be the ones to get into a detailed analysis. I would just say that they carefully reviewed, both in the Department and in the White House, carefully reviewed this language and they do not feel it will create any problems of any sort.

Senator BARRASSO. So, Mr. Flute, along those lines, S. 2796 would repeal certain obsolete rules and laws ranging from 1862, as you pointed out, all the way to 1913 that relate to Indians. How would the repeal of these laws help your Tribe and tribal members?

Mr. FLUTE. Mr. Chairman, if you have had a chance to read the written testimony, I would like to recognize one of our many spiritual leaders of the Oceti Sakowin, more commonly known as the Great Sioux Nation, and that was Black Elk, and he talks about mending that sacred hoop that in our culture and our way of life that we live by and we believe in. As Dakota people, we are very hospitable people and we love to be great hosts, and we come from a very socialistic society. But we also have the warrior societies and the soldiers lodges. When our encampments and our people are in danger, in trouble, they feel other types of challenges, we tend to feel that our ways are being disrespected. So the RESPECT Act would help mend those hoops.

As I mentioned, not just my family, but I know Tribes across the Nation have experienced probably similar challenges and experienced with their grandfathers, some worse. So it would help to mend those hoops and it would also help to acknowledge and strengthen our alliances through the treaties that we have with the United States Government. We also cherish this flag that we serve under, and it will help just strengthen those alliances we have.

Senator BARRASSO. Chairman Finley, in the mitigation fund in S. 3013 there is about $670 million. Could you explain what this

money is going to go towards in a little more detail and how these funds will benefit the Tribe?

Mr. FINLEY. Yes, Mr. Chairman, thank you for the question. That particular part of the funding would go for restoring the wetlands, stream restoration. There was a lot of diversion that happened, a lot of the diversions that I had spoken about, but also others throughout the Reservation that there was meandering, for example, meandering streams were straightened in order to create other farmlands. So a lot of the restoration is exactly where that funding would go.

Senator BARRASSO. Thank you very much.

I want to thank all the witnesses for being here today.

Members may also submit follow-up written questions for the record, so if you get a question, please get back to us quickly.

The hearing record will be open for two more weeks.

So I want to thank you all for your time and your testimony.

Finally, I want to acknowledge the hard work of Caleb Carroll, staff assistant for the Committee, who is from Evanston, Wyoming. He came here as an intern to the Committee. Today is his last day with the Committee, and I wish you every success with your future endeavors and education. So thanks so much.

With that, this hearing is adjourned.

[Whereupon, at 3:36 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. MIKE ROUNDS, U.S. SENATOR FROM SOUTH DAKOTA

Chairman Barrasso, Ranking Member Tester, Members of the Committee, I am pleased that the Committee on Indian Affairs is marking up S.2796, the RESPECT Act, or the "Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes" Act. Senator Lankford has agreed to join me in this effort to begin the process of reversing a list of historic wrongs laid out in U.S. law against Native American citizens. I also want to thank Chairman David Flute, of Sisseton Wahpeton Oyate in South Dakota, who will testify today to the history behind the laws the RESPECT Act seeks to repeal.

The idea that these laws were ever considered is disturbing, but the fact that these laws remain on our books is—at best—an oversight. Currently, Native Americans, who are U.S. citizens just like you and me, are still legally subject to a series of obsolete, historically-wrong statutes. These statutes are a sad reminder of the hostile aggression and overt racism that the federal government exhibited toward Native Americans—as the government attempted to "assimilate" them into what was considered modern society.

In 2016, laws still exist that would allow for the forced removal of their children, who can be sent to boarding schools and denied rations if they refuse. Because these laws still remain, they could still be subject to forced labor on their reservations, as a condition of their receipt of "supplies."

Moreover, they can be denied funding if found drunk on a reservation. These statutes actually remain the law of the land and in many cases are more than a century old and continue the stigma of subjugation and paternalism from that time period. It is without question that they must be stricken. We cannot adequately repair history, but we can move forward.

Let me list some of the laws that RESPECT will repeal:

In Chapter 25 of the U.S. Code, Section 302, entitled "Education of Indians, Indian Reform School; rules and regulations; consent of parents to placing youth in reform school," the Commissioner of Indian Affairs was directed to place Indian youth in Indian Reform Schools, without the consent of their parents.

The issue of off reservation Indian Boarding Schools in particular is a rightfully sensitive one for Native Americans.

Between 1879 and into the 20th Century, at least 830,000 Indian children were taken to boarding schools to allegedly "civilize them." Many parents were threatened with surrendering their children or their food rations. This law in fact, is also still on the books.

A requirement exists in Section 283, entitled, "Regulations for withholding rations for nonattendance at schools," the Secretary of the Interior could "prevent the issuing of rations or the furnishing of subsistence to the head of any Indian family for or on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations. . ."

Yet there still exist, other outdated laws relating to war-time status between Indians and the United States such as those found in Section 72 of the Code, entitled, "Abrogation of treaties."

Here, the president was authorized to declare all treaties with such tribes "abrogated if in his opinion any Indian tribe is in actual hostility to the United States."

In Section 127, entitled "Moneys of annuities of hostile Indians," moneys or annuities stipulated by any treaty with an Indian tribe could be stopped if that tribe "has engaged in hostilities against the United States, or against its citizens peacefully or lawfully sojourning or traveling within its jurisdiction at the time of such hostilities. . ."

Likewise, in Section 128, entitled, "Appropriations not paid to Indians at war with United States," none of the appropriations made for the Indian Service could "be paid to any band of Indians or any portion of any band while at war with the United States or with the white citizens of any of the States or Territories."

Moreover, in Section 138, entitled, "Goods withheld from chiefs violating treaty stipulations," delivery of goods or merchandise could be denied to the chiefs of any tribe, by authority of any treaty, "if such chiefs" had "violated the stipulations contained in such treaty. . ."

Finally, in Section 129, entitled, "Moneys due Indians holding captives other than Indians withheld," the Secretary of the Interior was "authorized to withhold, from any tribe of Indians who may hold any captives other than Indians, any moneys due them from the United States until said captives shall be surrendered to the lawful authorities of the United States."

In Section 130, racist identifications tying drunkenness by Indians to receipt of funds, entitled, "Withholding of moneys of goods on account of intoxicating liquors," still exist stipulating that no "annuities, or moneys, or goods," could "be paid or distributed to Indians while they" were "under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach."

Mandatory work on reservations still exist in Section 137, entitled, "Supplies distributed to able-bodied males on condition," for the purpose of inducing Indians to labor and become self-supporting, "it is provided that, in distributing the supplies and annuities to the Indians for whom the same are appropriated, the agent distributing the same could require all able-bodied male Indians between the ages of eighteen and forty-five to perform service upon the reservation, for the benefit of themselves or of the tribe. . ." in return for supplies.

Let me summarize what I said in the beginning. In the year 2016 in the United States, Native Americans, citizens like you and me, are still legally subject to outrageous, racist and outdated laws that were wrong at their inception. There is no place in our legal code for such laws.

In my state of South Dakota, which is home to nine tribes and roughly 75,000 enrolled members, we strive to work together, to constantly improve relationships and to mend our history through reconciliation and mutual respect. It's not always easy, but with our futures tied together—with our children in mind—"reconciliation" is something we're committed to.

History also proves that since the onset of the government's relationship with the tribes, which has been complicated and challenging over the years—sometimes downright dark and disrespectful—and to this day, often has led to mistreatment by the federal government. As governor, I proclaimed 2010 the "Year of Unity" in South Dakota.

This was done in recognition of the need to continue building upon the legacy and work of those who came before us.

The year 2010 also marked the 20th anniversary of the "Year of Reconciliation" in South Dakota, which was an effort by the late Governor George Mickelson as a way to bring all races together. The "Year of Unity" and the "Year of Reconciliation" were efforts to build upon a common purpose—acknowledge our differences—and yet find ways to work together. We need more of that in Washington, D.C.

While legislative bodies before us have taken steps to rectify our previous failures relative to Native Americans, sadly these laws remain and out of a sense of justice, we should repeal them. Imagine a scenario, where descendants of those from Norway, Britain, Italy, or any other group for that matter were treated with the same patronizing superiority. Only Native Americans face this discrimination and it is long overdue to repeal these noxious laws. We can't change our history, but we can start to change the paternalistic mentality of the federal government towards Native people.

Chairman Barrasso, I want to thank you and the Committee for considering this legislation.

PREPARED STATEMENT OF BRUCE FARLING, EXECUTIVE DIRECTOR, MONTANA COUNCIL OF TROUT UNLIMITED

Chairman Barrasso and Vice Chairman Tester, thank you for this opportunity to submit written testimony on behalf of the Montana Council of Trout Unlimited in support of S. 3013, which provides for Congressional ratification and implementation of the water rights compact negotiated among the Confederated Salish and Kootenai Tribes of Montana (CSKT), the State of Montana and the U.S. Department of the Interior.

The Montana Council of Trout Unlimited represents 4,200 conservation-minded anglers dedicated to conserving, protecting and restoring our state's coldwater fisheries and their watersheds. Most of our members reside within the recognized ab-

original territory of the tribes. Many are residents of the Flathead Indian Reservation, or they live in neighboring communities. In the 52-year history of our council we have often found common ground or partnered with the tribes on natural resource matters, including federal licensing of a large hydroelectric dam, creation of tribal water quality standards, fishery management in Flathead Lake, and restoration of populations of native fish species. Because of our knowledge of fisheries around the state, the tribes and State asked us to provide advice on potential inclusion in the Compact of important fisheries within the off-reservation aboriginal homeland of the tribes. We have found the tribes to be dependable and forthright partners. The CSKT are served well by a talented cadre of natural resource and legal professionals who enjoy strong support from the tribal council and tribal members.

The Compact greatly benefits the tribes because it permanently resolves uncertainty as to what constitutes the tribes' reserved water rights under The 1855 Treaty of Hellgate, as well as aboriginal rights claimed within those portions of Montana constituting traditional hunting and fishing territory. Further, the Compact advances systematic and consistent water-use administration on the reservation, while also accommodating conservation and orderly development of water resources. The Compact will also eliminate the cloud of uncertainty surrounding much of the existing and all future groundwater development on the reservation. Once Congress and the tribal council ratify the Compact, a final decree for general adjudication of water rights in more than half of Montana can be completed, benefitting the CSKT, State of Montana and the federal government. Also furthering the interests of the tribes are the 90,000 acre-feet of Hungry Horse Reservoir water that the Compact makes available for mitigation and development on and off the reservation in Montana.

The CSKT will benefit from implementation of the Compact's investments in conservation measures for irrigation, as well as instream flow protections that will benefit native fish species important to tribal members. Finally, the Compact does much to bring people together in Montana under common purpose. By allowing for co-ownership and management with the State of Montana of existing instream flow water rights for fish currently held by the State's fish and wildlife agency, the Compact ensures the tribes have a formal role in protecting fisheries that served them for millennia. For instance, the water rights associated with instream flows from Painted Rocks Reservoir in the Bitterroot River basin ensures the Salish people will have a role in cooperatively managing for healthier fisheries in the core of their traditional homeland. The Compact's conveyance of an instream flow water right for fisheries on the Kootenai River and lower Clark Fork Rivers recognizes the historical interests of the Pend Oreille and Kootenai peoples in waters that were among their usual and accustomed fishing sites.

Montana Trout Unlimited is pleased to be able to support S. 3013 and look forward to final congressional approval of this important water compact.

PREPARED STATEMENT OF ELAINE D. WILLMAN, MPA, FLATHEAD INDIAN RESERVATION

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 percent 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 percent 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 percent of Montana's land and 30 percent (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 percent) 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.

OFFICE OF THE GOVERNOR—STATE OF MONTANA

July 7, 2016

Honorable John Barrasso,
Honorable Jon Tester,
Chairman, Vice Chairman,
Committee on Indian Affairs,
Washington, DC.

RE: S.3013

Dear Chairman Barrasso and Vice Chairman Tester:

I write on behalf of the State of Montana to express my strong support for S. 3013, the Salish and Kootenai Water Rights Settlement Act of2016. This legislation is the product of decades of work and hard negotiation between the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (Tribes), the State of Montana, and the United States, to resolve the significant water rights claims of the Tribes.

S. 3010 includes a Compact, ratified by the 2015 Montana Legislature, which affirms and quantifies the water rights of the Tribes on and off the Flathead Indian Reservation and provides for the administration of water on the Reservation. It will make new water available for commercial and irrigation use, end the water administration void on the Reservation, allow for economic development under conditions of legal certainty on and off the Reservation, and facilitate the completion of the statewide general stream adjudication. In addition, the Compact establishes a process to plan and implement irrigation project upgrades to protect historic irrigation use and meet Tribal in-stream flow targets. The Compact is the seventh and final negotiated water compact that the State has entered into with the tribal governments located within Montana.

Further, the Compact represents the largest monetary commitment that the State has made in any state-tribal water agreement. Within five years of federal ratification of the compact legislation, the State has committed to funding:

- $4 million for water measurement activities;
- $4 million for improving on-farm efficiency on lands served by the Flathead Indian Irrigation Project (FIIP);
- $4 million for stockwater mitigation to replace FIIP stockwater deliveries outside irrigation season;
- $30 million to provide an annual payment to offset pumping costs and related projects; and
- $13 million to provide for aquatic and terrestrial habitat enhancement.

Passage of a settlement bill is critically important to Montana. The Compact was born of compromise. In it, the Tribes agreed to less water than they believe they could legally claim, including significant claims for water both on and off reservation in the Tribes' aboriginal territory. The Tribes' water rights claims number in the thousands and cover a significant portion of Montana. If the legislation does not pass, the Tribes and claimants to water rights arising under state law will be forced into contentious litigation that could last decades. Because the Tribes' claims have senior priority dates, including claims with time immemorial priority, litigation would be arduous, expensive, and carry great risk for the State and individual water right owners. It is essential for Montana that the protections provided in the Compact be ratified by federal legislation.

I thank you for this opportunity to provide Montana's views and look forward to working with the Committee on this important matter.

Sincerely,

STEVE BULLOCK,
Governor.

SANDERS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF MONTANA, SUBMITS THESE INITIAL COMMENTS ON S. 3013, THE "SALISH AND KOOTENAI WATER RIGHTS SETTLEMENT ACT OF 2016" These issues are significant and more detail can be provided subsequent hereto.

Initially, Section 2, paragraph (1), on page 2, please add Section (C) the benefit of the residents of the State of Montana and the Flathead Reservation and vicinity that are Tribal and non-Tribal members.

Second, Section 3, paragraph 5, part B Inclusions, should be corrected to clarify if or what amendment or amendments to the compact or attachments would be included and what "executed in accordance with this Act" means or involves.

Third, Section 3 paragraph 10, paragraph (B), 1 includes "any other facility of the Flathead Irrigation Project," without a definition of what is included in a "facility", and without an indication of ownership or control of any such "facility". Clarification would help this paragraph, as this county owns some facilities like bridges and culverts.

Further, Section 3, 10, B ii includes "any other physical tangible object used in the management and operation of the Flathead Irrigation Project". No discussion of who owns, maintains, or operates those "objects" is made, and "object" may or not be part of the Project. Examples may include bridges or culverts owned and/or installed by private persons, the railroad, and operated by the Project but not owned by or repaired or maintained historically by the Project.

Fourth, Section 3, paragraph 2 defines "Allottee" to limit the definition to be only owners with trust lands. This definition when utilized in the act, section 5 paragraph (a) limits the benefit to only trust land acreage and excludes persons who own historic allotment parcels that are Tribal or non-Tribal members with lands not in trust. This limits the benefit of Section 5, (a) to only trust lands parties and therefore the definition and intent paragraph deny all other persons equal protection or benefits from the act. A revised or functional definition providing benefits for all allotment or historic allotment holders would perhaps mitigate this problem.

Fifth, Section 4, (a) Ratification, (1) provides that the compact is authorized, ratified and confirmed "Except as modified by this Act." We are unclear how or if the Act can modify the compact, but not ratify the same modifications, and also not ratify portions of the compact in conflict with the Act. Clarification of what modifications occur with the Act and what conflicts exist would help the county and citizens better evaluate the Act itself.

Sixth, Section 5 page 9 could be amended to reflect that the Act seeks similar benefits for all persons affected by the Compact, not only allottees.

Seventh, Section 5 part (b), (3) provides that the Act and not the compact prevails. This does not reflect the nature of the Compact as it was a negotiated contract between the Tribes and State of Montana, not a Federal statute. In the spirit of compromise and working cooperatively it would seem that reversing this language would be appropriate.

Eighth, Section 5, part d 1, 2, and 3, should be amended to reflect the terms of the compact and should provide access to the Tribal Water Right for all allotment parcels, regardless of ownership or trust status of this time. Further, the 3 section could reflect that "all reservation irrigators, not only allottees, should be entitled to a just and equitable allocation of irrigation water".

Ninth, Section 5 part (d) provides authority to protect only allottees. Broader authority to protect other users, with valid claims, or other amenities would seem more appropriate, as it provides the benefit and a remedy to all citizens affected.

Tenth, Section 6, paragraph (a) provides the water as measured at the Hungry Horse Dam. Our question is simply is that going into or coming out of the structure? Clarification would help with this long term question.

Eleventh, Section 6, paragraph (c) (2) D is unclear as to if the storage rights are pro-rata or absolute or adjusted otherwise. As this may impact the levels of Flathead Lake and irrigation water availability, clarity would be helpful as to the amounts.

Twelfth, Section 7 paragraph (a) provides the commission with authority to regulate hydroelectric power within the reservation. Paragraph (b) is unclear as it notes the Tribes' right is exclusive to develop and market any hydro project on bodies of water within the reservation. If off body of water hydro-generation is acceptable for other entities or persons that should be made clear. This would be consistent with national energy policy to encourage alternate energy production without limit as to Tribal only.

Thirteenth, Section 7, paragraph "d" limits the ability of other users to profit from a project. For example, if per paragraph "d" 1B a generator is in a Bureau Rec Irrigation facility that is funded and maintained by irrigators, it seems fair that the irrigators should be entitled to a portion of the revenue generated. This is based upon the fact that they pay repair, operation and maintenance on the facility. Amending parts d, e, and f of that part of paragraph (d) of Section (7) would seem much more equitable to all involved.

Fourteenth, Section 8,"a" 1 identifies in general rehabilitation work to be carried out by the Secretary through the Commission. The Bureau of Reclamation is identified as the "Lead

Agency" in Section 8 (a) 5, but no language regarding cooperating agencies or local governments like Sanders County is made. This is significant as parts of the system are owned by individuals and by this county or local entities like cities or towns, who should be consulted and who should be provided meaningful rights to participate. This participation is important in Section 8(b) 3 and 4 as local participation matters and "local" including this county owns parts of these facilities.

Fifteenth, Section 8(d) should provide that local government entities that already provide repair, and maintenance, and construction of parts of the project should be party to the agreement, and also funded to provide these services to the project. We as a county own the road right-of-ways used by the projects and the crossing structures and should be funded to provide those services.

Sixteenth, Section 8(e) 2 provides for acquisition of easements from landowners without compensation for land value taken or reduced by the work. This seems a taking without compensation and no assurance of restoration of the land is included in the paragraph. We believe both should be. Further, Section (f) requires that the land, i.e. right-of-way is held in trust for the Tribes benefit. This seems lopsided and is a forced sale to an entity that is only for benefit of the "Tribes". It is not a preferred alternative to many.

Seventeenth, Section 8(e) and (f) harms all local government units here and our schools and fire districts, etc. as trust lands do not pay taxes, placing an unfair and oppressive burden on our other taxpayers.

Eighteenth, Section 9 (1) uses mandates that the Ag Development account is used for "Indian Land" in parts A, B, C, D, and F, with no acknowledgment of system improvements that benefit non-Indian land or lands that are impacted. No discussion of cost allocation is included and we believe it should be as collateral costs to non-Indian land may be non-economic for the long term, and unfair to other owners.

Nineteenth. Section 10 includes funding for Flathead Irrigation Project maintenance with no mechanism to allocate costs related to non-allotted beneficiaries.

Twentieth, paragraph Section 12 a (3) does not obtain a release from allottees and 12 (c) allows the Tribes to make claim against any water rights recognized under any Final Decree. That seems contrary to the compact and statements that the Tribe gave up certain claims, which this paragraph does not give up.

Twenty First, Section 13 a and b could release this state and this county from liability as we understood that was the benefit of a compact.

ROCKY MOUNTAIN LAW
PARTNERS, PLLP

Mark W. Buckwalter*
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(Retired)

U.S. Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510
testimony@indian.senate.gov

July 12, 2016

Re: S.3013--Authorization and Implementation of the Water Rights Compact with the Confederated Salish and Kootenai Tribes, Montana.

Dear Committee Members:

Thank you for giving us the opportunity to submit written comment on behalf of the Flathead Joint Board of Control, a joint operation entity formed pursuant to Mont. Code Ann., § 85-7-1601, et seq., its membership comprised of the Flathead, Jocko Valley and Mission Irrigation Districts ("FJBC") in opposition to S.3013. The FJBC represents approximately 90% of the fee land located within the Flathead Indian Reservation ("FIR") which translates into approximately 2,500 irrigators who derive their livelihoods from the area. Authorization and implementation of S.3013 will result in the devastation and destruction of those family farms and ranches. More particularly, our concerns are related to S.3013 along with its companion legislation commonly referred to as the Montana 2015 Confederated Salish and Kootenai Tribes of the Flathead Reservation Water Compact (Montana Senate Bill 262) (hereafter the "Compact"):

1. S. 3013 A bill to authorize and implement the water rights compact among the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, the State of Montana and the United States as introduced by Montana Senator Tester on May 26, 2016, expressly overturns congressional acts dating back to the early 1900's.

   Significant areas of concern exist including but not limited to:

   - Supersedes (SB 262) if a conflict exists between the legislations.
   - Improperly expands the scope of the (SB 262).
   - Eliminates prior congressional acts including but not limited to granting the right to all revenues from the sale of hydroelectric power to the CSKT.
   - Eliminates any obligation on the part of the United States to account for, monitor, or administer any revenue received by the CSKT or any expenditure thereof.
   - Expends approximately $2.3 billion dollars.
   - Eliminates prior congressional acts which mandated that operation and management of the Flathead Irrigation Project ("FIP") be turned over to the owners of the irrigated lands. Instead, S. 3013 anticipates entering into an operation and maintenance agreement with the CSKT.
   - Improper utilization of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.)
   - Improperly provides that failure for the Secretary to approve or disapprove an expenditure plan within 90 days of receipt of a request is automatically deemed as approved.
   - Violates due process and procedural rights.

2. Montana Senate Bill 262 (SB 262): SB 262 consists of over 140 pages along with a stack of appendices, (which excludes the appendices which were NOT included in the vote on SB 262). Significantly, SB 262 contains a new law of administration which will eliminate the Montana Water Use Act and the Montana Water Court from the equation. Significant points of concern include but are not limited to:

    - Grants control over all waters whether "federal, state or tribally" derived to the CSKT.
    - Implements a new law of administration which is, for all intents and purposes, controlled by the CSKT.
    - Contains an illogical and potentially unavailable appeal process to a "court of competent jurisdiction" which may be state or tribal court if all parties agree or federal court if the parties do not agree despite the fact the federal court, as a court of limited jurisdiction, may not legally possess jurisdiction.
    - Eliminates all claims for money damages against the State of Montana (*i.e.* property destruction, tort claims, condemnation and takings claims) as it grants the State of Montana immunity for such causes of action.
    - Replaces property owners' water rights with a "water rights delivery certificate" which the State of Montana admits is not a property right.
    - Despite the fact historical water delivery data has been kept on the FIP, it fails to account for or assure irrigators historical delivery of irrigation water. Instead it incorporates the concept of "adaptive management" which is a trial and error method of water allocation.
    - Fails to give irrigators extra duty and non-quota water which has historically been relied upon by irrigators to grow crops under varying soil conditions.

    The State of Montana has already begun implementing the Compact despite the fact that neither the United States Congress nor the CSKT have approved it, all in violation of Art. I, Sec. 10, cl. 3 of the United States Constitution which prohibits states from entering into a Compact with a foreign power absent Congressional consent. Various boards and technical teams were formed and in place by October 24, 2015. Despite the fact the Montana Legislature failed to appropriate funds for implementation of the 2015 CSKT Compact, the Governor of Montana has, in his discretion, designated $3,000,000.00 towards that end.

3. From an engineering standpoint SB 262, as drafted, cannot be successfully implemented. More particularly it is scientifically unsound:

    - The 2015 CSKT Compact does not contain any FIP irrigation water supply or delivery quantification information. Without that critical information it cannot be determined how much irrigation water will be provided to FIP water users.
    - The 2015 CSKT Compact contains two different River Diversion Allowances (RDA). However, the Compact reports several different values for the total FIP RDAs by FIP area. The Compact can only have ONE accurate RDA enforceable for each FIP area.
    - The Historical Farm Deliveries (HFD) at the farm turnout are presented as actual historical measure and recorded FIP data, but that is not the case.
    - The 2015 CSKT Compact contains inconsistent values, fails to account for extra duty and non-quota water which has been historically provided to irrigators based primarily upon soil conditions. Further, it places stock water at risk.

4. Flathead Joint Board of Control v. State of Montana, Lake County, Montana, Cause No. DV-15-73. The case is presently pending in Lake County, Montana and challenges the sufficiency of the Senate and House votes which allegedly passed SB 262 into law as being a constitutional violation. More particularly, Mont. Const. Art. II, § 18 requires a 2/3 vote of each legislative branch in order to grant sovereign immunity to the State of Montana. SB 262 did not receive a 2/3 vote of approval in either the Senate or House. The FJBC believes the vote on SB 262 was not sufficient, thereby rendering the bill void as a matter of law in its entirety. The issue has been fully briefed and argued on summary judgment and we await the court's decision.

5. 1908 Flathead Allotment Act ("FAA") expressly mandating that once the construction costs have been paid for the FIP's operation and management will be turned over to the owners of the irrigated lands. **Exhibit 1.** Copy of sample lien attached to irrigator' lands which encumbered the lands and assured the payment for construction costs of the FIP by individual land owners. **Exhibit 2.** Copy of Federal Land Patent issued by U.S.A. to individual land owner. **Exhibit 3.** Federal Register demonstrating the FIP construction costs were paid for in full as of January 2004. *71 Fed. Reg. No. 196, 59809 (Oct. 11, 2006).* To date, those liens have not been released. S. 3013 expressly eliminates turnover of the FIP to the owners of the irrigated lands; rather, it places all control in the CSKT. Presently pending before the Ninth Circuit Court of Appeals a Cause No. 15-35701 is Flathead Irrigation District et al. v. Jewell, et al., which is litigation that seeks enforcement of the FAA and turnover of the FIP to the owners of the irrigated lands.

6. Both SB 262 and S. 3013 significantly decrease the low cost block of power which has been guaranteed and provided to irrigators for years and negatively affects the net power revenues generated to reduce O&M charges, per Congressional mandate. On June 8, 2016, the Federal Energy Regulatory Commission concluded a hearing on the FJBC's request to maintain the low cost block of power. The parties await the Judge's decision in that matter as well.

We appreciate your willingness to consider our comments. Thank you for your time and attention to this matter.

Sincerely,

Kristin L. Omvig

Daniel Boone Cole

Montana Land and Water Alliance July 13, 2016

Senator John Barrasso
Chairman, Senate Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C.

Subject: Comments on S. 3013 Hearing June 29, 2016

Dear Senator Barrasso:

Please accept the following comments regarding the June 29, 2016 hearing on Senator Tester's S. 3013 before the Senate Select Committee on Indian Affairs (SCIA).

As a first matter, Senator Tester's bill erroneously refers to a proposed water settlement between the Confederated Salish and Kootenai Tribes (CSKT), the state of Montana, and the United States. The proposed CSKT Compact is actually still in Montana and not ready for any congressional review or any alleged rewrite because *its very existence is in litigation*. The constitutionality of the Montana legislature's vote on the CSKT Compact was challenged immediately in April 2015 and the case is still in court. As of this moment, there is no water settlement to propose to Congress. We are surprised that Senator Tester and the Montana delegation failed to disclose this to the SCIA before it scheduled a hearing.

Furthermore, on two occasions in the last several months, your office, the Montana delegation, Congressman Rob Bishop's committee on Natural Resources, and the Department of the Interior received extensive letters advising you not only of the legal limbo of the CSKT Compact but of the major legal, technical, and policy issues plaguing the compact. These issues will have to be litigated before the compact is ready for any congressional review. The letters are attached for your reference. The "controversial issues" mentioned in the hearing didn't even come close to addressing the breadth and scope of this very destructive water settlement.

Given the facts of the legal status of the real CSKT Compact, its deleterious effects on communities, the numerous violations of federal law contained therein, and the precedent-setting policy changes contemplated by this compact, Senator Tester's "rewrite" of the original Montana-based compact bill not only exacerbates these issues, but attempts to add "other purposes" which have nothing to do with a federal reserved rights settlement. Indeed, S. 3013 is unworthy of any consideration given the

Senator's unilateral glossing over legal facts and issues important to Montana and those which involve serious policy discussions in Congress and the obvious avoidance of citizen due process.

Finally, we note that the SCIA hearing on S. 3013 was not noticed properly and the citizens of Montana affected by this compact were not invited to provide testimony. Such testimony would have clarified this issue for the SCIA but instead, the SCIA got a one-sided, "rosy" picture of one of worst Indian water settlements to emerge out of Montana and all the western states.

We urge the SCIA to take no further action on S. 3013 and object to any attempt to get this to the Senate floor for a vote, or to pass it on to the House of Representatives. It is simply inappropriate, untimely, and unconscionable.

Sincerely,

Catherine Vandemoer

Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance

STEIN & BROCKMANN, P.A.
ATTORNEYS AT LAW

JAY F. STEIN*
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Of Counsel
KATHERINE W. HALL

* New Mexico Board Certified Specialists in Water Law

February 1, 2016

Senator John Barrasso
Chairman, Senate Select Committee on Indian Affairs
United States Senate
Hart Office Building
Washington, D.C.

Dear Senator Barrasso:

Our firm represents the Montana Land and Water Alliance. I am writing regarding the recent water settlement compact reached between the state of Montana, the Confederated Salish and Kootenai Tribes (CSKT)[1], and the United States known as the "CSKT Compact". As you may be aware, the CSKT Compact attempts to settle the federal reserved water rights claims by the Confederated Salish and Kootenai Tribes of the Flathead Reservation. We have learned that the CSKT, and perhaps others, are pressing for the introduction and ratification of the CSKT Compact in this session.[2] We write to express our concern about and complete opposition to its introduction in Congress this session.

The CSKT Compact contains several provisions which negatively affect the water rights of Indian and non-Indian irrigators within the federal Flathead Irrigation Project, located within the exterior boundaries of the Flathead Indian Reservation, and comprising some 127,000 acres of irrigated land. These provisions include a delegation of administrative authority under the "Unitary Management Ordinance" from the State of Montana to a politically appointed, Tribally-controlled "Water Management Board" which will govern all aspects of water use. The amount of water historically used by irrigators in the Flathead Irrigation Project would be reduced to make water

[1] The Flathead Indian Reservation was established by the 1855 Treaty of Hellgate which was ratified by the Senate in 1859. The reservation was opened to settlement in 1909 by Presidential Proclamation. The 1.2 million acre reservation demographics establish that 45 % of the total land area and 90% of the irrigation project lands are owned in fee, and 55% of the total land area and 10% of the irrigation project land is owned by the Tribe.
[2] Proceedings of the Montana legislature's Water Policy Interim Committee meeting January 11 and 12, 2016, Helena, Montana.

available for tribal instream flows. New appropriations and changes of use of existing water rights would be restricted.

The Montana Land and Water Alliance is a coalition of farmers, ranchers, business owners, and many others, some with irrigation rights within the Flathead Irrigation Project whose members are adversely affected by the CSKT Compact and its implementation. We are extremely concerned about any premature Congressional review while many issues remain unresolved.

Initially, the CSKT Compact is in litigation and therefore not yet ready for any Congressional review. The litigation involves the constitutionality of the Montana Legislature's 2015 vote approving the CSKT Compact. This means that there is no CSKT Compact that is available for Congressional review at this time.[3]

There is also significant concern that the technical studies underlying key provisions of the compact---such as the transfer of agricultural water in a federal irrigation project to instream flows -- are insufficient to meet the *Criteria and Procedures*[4], the federal Data Quality Act, and the standards guiding the quantification of a federal reserved water right. These are described in the attached letter sent to Interior Secretary Jewell.

More importantly, for the Senate Select Committee on Indian Affairs, the CSKT Compact provisions expand the *Winters* Doctrine, allowing the CSKT to claim more water on the reservation than they are legally entitled to.[5] Moreover, it allows the CSKT to claim "aboriginal water rights" with a time immemorial priority date, *off the reservation* both in and outside of their judicially-determined ceded territory. This effort attempts to merge a Treaty right of access to fish to a water right to sustain fisheries.

Another key component of the Compact is the expansion of Tribal jurisdiction over non-Indians and state law-based water rights within the exterior boundaries of the Flathead Indian Reservation. This is both inappropriate given state jurisdiction, the reservation demographics and land ownership patterns, and highly significant to other Indian reservations and states.

The expansion of the *Winters* doctrine and Tribal jurisdiction over non-Indians are important legal and policy issues for the federal agencies, Congress and the states. These issues must be fully identified, analyzed, the consequences determined, and hearings held before the CSKT Compact can be considered in or passed by Congress. We request that be done.

Thank you for your consideration in this matter.

Sincerely,

Jay F. Stein

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[3] The constitutionality of the legislature's vote on the compact is currently in litigation in Montana's 20th Judicial District (*FJBC v. Montana DV-15-73*), Lake County, Polson, MT. Whatever decision is made in this court will be appealed to the Montana Supreme Court.

[4] *Criteria and Procedures for the Participation of the Federal Government in the Settlement of Indian Water Rights Claims*, Federal register Vol. 55 No. 48, March 12, 1990. Also see *Letter from Chairman Rob Bishop to Attorney General Holder and Interior Secretary Jewell*, February 26, 2015

[5] *See Winters v. United States*, 207 U.S. 564 (1908).

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February 1, 2016

Honorable Sally Jewel
Office of the Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
Secretary_jewell@ios.doi.gov

Dear Madame Secretary:

Our firm represents the Montana Land and Water Alliance, Inc. (Alliance), regarding the recent water settlement reached between the state of Montana, the Confederated Salish and Kootenai Tribes (CSKT)[1], and the United States, known as the "CSKT Compact".[2] As you may be aware, the Compact attempts to settle water rights claims by the Confederated Salish and Kootnai Tribes of the Flathead Reservation. We have learned that the CSKT and perhaps others are pressing decision-makers to introduce and pass the CSKT Compact in this session. We write to express our concern about and complete opposition to its introduction to Congress this session.

The Compact contains several provisions which negatively affect the water rights of all irrigators within the Flathead Irrigation Project ("FIP"). These include a delegation of administrative authority under the Unitary Management Ordinance from the State of Montana to a "Water Management Board" which will govern all aspects of water use. Under the CSKT Compact, the amount of water historically used by irrigators in the FIP would be reduced to make water available for tribal instream flows. New appropriations and changes of use of existing water rights would be determined by the Water Management Board.

[1] The Flathead Indian Reservation was established by the 1855 Treaty of Hellgate which was ratified by the Senate in 1859. The 1.2 million acre reservation demographics establish that 45% of the total land area and 90% of the irrigation project lands are owned in fee, and 55% of the total land area and 10% of the irrigation project land is owned by the Tribe.

[2] The Montana legislature established the Montana Reserved Water Rights Compact Commission in 1979 to negotiate the federal reserved rights of federal Indian and non-Indian reservations as part of the MT General Stream Adjudication statute. Seventeen compacts have been completed including with six of the seven Tribes in Montana.

The Montana Land and Water Alliance ("Alliance") is a coalition of irrigators, ranchers, business owners, and others, some of whom have irrigation rights within the FIP and whose members are adversely affected by the CSKT Compact in its implementation.

While the CSKT Compact is not yet final because the state's legislative approval of the Compact is currently in litigation[3], we were surprised to learn that the Tribes have initiated an intensive effort to accelerate the CSKT Compact approval by federal agencies and seek administration support and concurrent Congressional approval of the CSKT Compact before or during the 2016 session of Congress.[4] This letter asserts that the hasty approval of this Compact is premature given its substantive legal and technical flaws as well as its broad implications for state law-based and federal reserved water rights in western states.

In the last several years, the Alliance has been actively involved in the analysis of the Compact and the public, legislative, and local decision-maker levels. The purpose of this effort was to both educate the public about the substantive impacts of the Compact and to participate in providing vital expertise and information to the Montana legislature for their deliberations. Many of the issues identified in the CSKT Compact require resolution at the federal level. In that regard, it has been my client's expectation that before the CSKT compact was submitted to and discussed in Congress , it would undergo at least the substantive interdepartmental and interagency review required by the federal *Criteria and Procedures*[5] and the certification and analysis required by the House Committee on Natural Resources.[6] Accordingly we submit the following analysis in support of our assertion and request your attention to this matter.

1. The CSKT Compact is not Final in Montana due to On-going Litigation

As a first principle, the CSKT Compact is not yet ready for federal review. Although the Compact passed in the 2015 legislative session in Montana, its status is uncertain as a result of current litigation challenging the constitutionality of the legislature's vote.[7] At issue is whether the legislature needed a 2/3 or super majority vote to pass the Compact as a result of an immunity provision in the CSKT Compact. [8]

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[3] The constitutionality of the legislature's 2015 vote passing the compact is currently in litigation in Montana's 20th Judicial District (*FJBC v. Montana DV-15-73*) with final arguments scheduled for mid-March 2016.
[4] Proceedings of the Montana legislature Water Policy Interim Committee meeting of January 11 and 12, 2016, Helena, MT.
[5] *Criteria and Procedures for the Participation of the Federal Government In the Settlement of Indian Water Rights Claims*, Federal Register Vol. 55, No. 48, March 13, 1990.
[6] Letter from Chairman Rob Bishop to Attorney General Holder and Interior Secretary Jewell, February 26, 2015.
[7] *Flathead Joint Board of Control v. State of Montana*, DV-15-73.
[8] Article II Section 18 of the Montana Constitution states: *State Subject to Suit. The state, counties, cities, towns, an all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.* A provision of the compact provides the state an exemption from the immunity waiver for "costs, damages, and attorneys fees" and neither house of the legislature achieved a 2/3 vote. Although the lawsuit is not about the Compact itself, the litigation

"All land within the limits of an Indian reservation under the jurisdiction of the United States government."[13]

While we are aware that the CSKT Compact's definition of the Flathead Indian Reservation uses criminal jurisdiction (18 U.S.C.A 1151 (2013)), this definition not only contrasts with Montana's, but when used in the context of the first two recitals, clearly lays the foundation for Tribal jurisdiction over non-Indians and state law-based water rights.

The first two recitals, plus the definition of the reservation, form the foundation for the assertion of ownership and control over the federal irrigation project water rights,[14] the failure to quantify the amount of water necessary to fulfill the purposes of the reservation and instead claim all the surface and ground water on the reservation including state law-based water rights, and the off-reservation claims for water rights to support a treaty right of access to take fish.[15] None of these compact elements are anywhere near the concept of settling the federal reserved rights of an Indian Tribe in a McCarran Amendment proceeding.

4. The Federal Data Quality Act (P.L. 106-554 §515) is Applicable to the CSKT Compact

The provisions of the Data Quality Act (P.L. 106-554 §515) apply to the data used to support major agency actions that involve substantive changes to federal projects or actions that rely on the collection and use of scientific information to support those actions. In the CSKT Compact, the Bureau of Reclamation, Bureau of Indian Affairs (BIA), and the U.S. Fish and Wildlife Service have the burden of assuring that the scientific information backs up the policy decisions regarding the support for components of this compact. This is especially important when a federal action, such as the approval of the CSKT Compact, is likely to have local impacts to the local economy equal to or greater than $100 million dollars.

Of the many issues in the CSKT Compact related to the requirements of the Data Quality Act, one particular concern is the Compact's effect on the federal FIP. The federal government reserved or appropriated water to serve the Project's Indian allotees and non-Indian settlers, and recognized its need for and obligation to ensure the successful development of the reservation's irrigable

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[13] *The Tribal Nations of Montana, a Handbook for Legislators*, Committee on Indian Affairs, March 1995, revised 2015.

[14] Article III C. 1 (a) "Flathead Indian Irrigation Project. The Tribes have the right to water that is supplied to the Flathead Indian Irrigation Project to be used for such purposes in such volumes and flow rates and from such sources of supply as identified in the abstracts of water right attached hereto as Appendix A5. The FIIP will serve up to but not more than 135,000 acres."

[15] Bilodeau, 2012. *The Elusive Implied Water Right for Fish: Do Off-reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?* 48 IDAHO L. REVIEW 515 (2012).

acreage.[16] In 1924 non-Indian settlers owned 80% of the Project land; in 2016 non-Indian ownership of 90% of Project land.

Although the Project water right is held by the federal government in trust for all users in the FIP, and the individual water users hold a beneficial interest, the CSKT Compact transfers the bare legal title of all of the project water to the United States to be held in trust for the CSKT alone. Then the Compact permits the CSKT to transfer significant amounts of irrigation water to instream flow.

Our review of the data and models used to reduce irrigation water use and convert the remainder to instream flow reveals the complete inadequacy of the modeling effort and of the Bureau of Indian Affairs in both supervising and correcting these errors.[17] The U.S. Fish and Wildlife Service did not contribute any analysis to or review of these instream flow determinations in the CSKT Compact.

Thus, the BIA has not met any requirements of its own guidelines under the Data Quality Act for the thorough vetting of the CSKT Compact.[18] We suggest that the BIA's data for this component of the compact is deficient. Instead, the CSKT Compact permits these data and modeling inadequacies to be "built into" the "final" compact in the form of an "Adaptive Management Plan." This is unheard of in the context of a final water settlement.

5. The Federal Government Cannot Require a State to Violate its Own Constitution to Meet a Federal Obligation in an Indian Water Settlement

Certain provisions of the CSKT Compact require the state to violate its own constitution with respect to water administration, the due process rights of its citizens, and unconstitutional takings without compensation. We assert that these violations were and are unnecessary for a settlement of the reserved water rights of the Tribes, and must be remedied before the CSKT Compact is ready for Congressional consideration.

For example, the Compact requires that the state give up its constitutionally-derived administrative authority over its citizens and state-based water rights[19], requiring the creation of a local law which treats citizens living on the reservation differently than every other citizen in Montana. The Montana constitution prohibits the legislature from creating such a law[20]. The creation of this local law simultaneously expands Tribal jurisdiction over non-Indians which is inconsistent with

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[16] 1930, Scattergood Report.
[17] Proceedings of the Water Policy Interim Committee, CSKT Compact Technical Review Team, May-August, 2014.
[18] Bureau of Indian Affairs 10 IAM 1-6, Indian Affairs Manual implementing directives of the Data Quality Act and the associated OMB Guidelines (67 FR 8454-8460) and Peer Review Bulletin (70 FR 2664).
[19] See *Letter to Attorney General Fox*, November 5, 2014, regarding the Compact water administration plan and Article IX of the Montana Constitution.
[20] *Memorandum to Montana Senate President and Speaker of the House on Constitutional Violations by Compact Ratification*, April 6, 2015, by MLWA Attorney Richard A. Simms.

federal and state law. Finally, the aforementioned transfer of the bare legal title of the irrigation water right to the Tribes, and other Tribal claims on and off reservation, deprive citizens of their rights to receive a *fair* adjudication of their historic water rights in the Montana General Stream Adjudication.

We assert that these and the many remaining constitutional violations of the CSKT Compact could have been avoided had the *Criteria and Procedures* been used to resolve a federal reserved rights issues. It would be an unfortunate error to put the CSKT Compact forward before Congress at this time.

This letter review of the CSKT Compact, while lengthy, touches only on a few of the most important issues that identifiably need considerable federal agency review before the Compact can even be considered for introduction to Congress.

Given that the CSKT Compact is not yet final because it is in litigation, the extraordinary scope of this unique Indian water settlement, and the considerable problems that are outstanding, we respectfully reiterate our request to halt any rushed review and approval or introduction of the CSKT Compact into Congress during 2016.

Thank you for your consideration in this matter.

Sincerely,

Jay F. Stein

Montana Land and Water Alliance
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

FACT SHEET ON THE CSKT WATER COMPACT – JUNE 2016[1]

CSKT Compact Violations	Description
The CSKT Compact Violates Montana and U.S. Constitutions	❖ *Constitutionality of Montana Legislature's 2015 vote on CSKT Compact is currently in litigation* and will be for the foreseeable future. • Article II §18- *State Subject to Suit*. Compact grants state immunity and constitution requires a 2/3 vote in each House of legislature, which was not achieved in either house ❖ *CSKT Compact violates other articles of the Montana Constitution.* • Article II § 17-*Due process of law*, and § 4 *Equal protection.* The Compact deprives individuals within the exterior boundaries of the reservation of both • Article V § 12 *The Legislature*. Referring to the "Unitary Management Ordinance", the legislature ratified the creation of a new local law and dispensed with State law. • Article VII § 4(2), (2) & § 2 (4) *The Judiciary*. The Compact removes the Mt District and Supreme Court avenues for resolving disputes • Article VIII §-*Revenue and Finance*. Compact enables taxation without representation • Article IX § (3)4 *Environment and Natural Resources*, and Article III §1 *General Government*. 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. ❖ *CSKT Compact violates U.S. Constitution:* Article IV §4 *Republican form of Government;* Article V *takings without compensation;* and Fourteenth Amendment *equal protection*
The Compact Violates Federal Law	❖ *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*
The CSKT Compact Destroys Irrigation	❖ *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.*
The Compact Sets Negative Precedent for Western States through the expansion of federal reserved water rights	❖ *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.* ❖ *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.*

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

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
Flathead Indian Reservation, Ronan, MT

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.

July 13, 2016

Testimony from Montana State Representative Dan Salomon
U.S. Senate Committee on Indian Affairs
Washington D.C.

Regarding S. 3013

Chairman Barrasso and Vice Chairman Tester, thank you for this opportunity to submit written testimony. I represent House District #93 which encompasses the Flathead Indian Reservation. I served on the Montana Reserved Water Rights Compact Commission as the Republican member from the Montana House of Representatives. I am also a farmer with 550 irrigated acres served by the Flathead Indian Irrigation Project.

The CSKT water compact has many significant benefits for the people of Montana.

It will permanently resolve the Federal Reserve Water Rights that the CSKT tribes were granted with the signing of the Hellgate Treaty. The negotiation process was extensive and brought many ideas which will help all the parties involved move forward, provide certainty for everyone with water rights without the very lengthy and expensive litigation that is certain to follow without an agreement.

The Compact allows for the FIIP to have historic water supply with an opportunity to utilize more water as efficiencies within the project are realized. The economic driver of the Mission Valley and the Flathead Indian Reservation is agriculture. The shared shortage and adaptive management agreements in the compact allow for the ability to serve the irrigation community while meeting the instream flow demands needed for healthy fisheries.

The 90,000 acre feet of new Compact water will allow for continued growth, both population wise and economically, for the state of Montana for many decades.

The negotiation of the tribes off reservation Reserved Water Rights will allow the adjudication of many of the water basins in Montana to continue to be processed without delay. If the Tribes claims are activated due to failure of the compact, a significant number of these water basins will have to be re-adjudicated. This will be a significant expense to the state of Montana for continuation of its Water Court and the individual water right holders if they wish to object to the Tribes claims.

A primary goal of the Reserved Water Rights Compact Commission was to protect the existing water rights of Montana water rights holders. The negotiation process allowed for this to happen.

Thank you for the opportunity to comment. I would be happy to answer any questions that arise.

Sincerely,

Representative Dan Salomon
District #93
42470 Salomon Road
Ronan, Montana 59864

Pamela J. Holmquist
Gary D. Krueger
Phillip B. Mitchell

Flathead County
Board of Commissioners

The Honorable John Barrasso
The Honorable Jon Tester
Senate Committee on Indian Affairs
U. S. Senate
838 Hart Office Building
Washington, D.C. 20510

July 11, 2016

RE: S.3013

Dear Senator Barrasso and Senator Tester:

Thank you for the opportunity to comment on S. 3013, which provides for Congressional ratification and implementation of the CSKT water rights compact. This Compact was the last one to be negotiated in Montana. Significantly, the other six compacts do not grant off-reservation water rights. The proposed CSKT Compact for the first time ever grants off-reservation water rights to a tribe, which is a new type of water right that would set a precedent for other tribes throughout the nation. Therefore, we strongly object to granting off-reservation water rights to the CSKT.

The CSKT tribe claims to have water rights that cover nearly half of the State of Montana and that they are willing to give up many of those claims with the passage of the compact. Of course they would be willing to give up claims in other areas of the State, because the water is not easily deliverable to them in most of those areas. But because the water that flows through Flathead County is deliverable without them doing anything, then they have put the majority of the burden on Flathead County to satisfy the water rights claimed elsewhere in the State.

This compact is an agreement that has no expiration or renegotiating date. We don't believe that anyone should enter into any agreement that is forever.

A water bottling plant is going through the permitting process with the State of Montana on the east side of Flathead County. I'm enclosing the Objection to the Application filed by the CSKT. Their objection was based on legal availability and adverse effect. I'm also attaching Exhibit A and B which they provided as documentation with their objection. The Compact has not been ratified yet. We are also enclosing Appendix 18 dated January 28, 2015, General Abstract, for reference.

Our hope is that the Compact can be revised to identify and protect the CSKT's reserved water rights on the reservation and also protect the water rights of the citizens of Flathead County off the reservation. If the CSKT Compact is not revised, we urge you to vote "no" on S. 3013.

Sincerely,
BOARD OF COMMISSIONERS
FLATHEAD COUNTY, MONTANA

Pamela J. Holmquist, Chairman

Philip B. Mitchell, Member

opposed
Gary D. Krueger, Member

June 27, 2018

David C. Roberts
Associate General Manager
Water Resources

The Honorable John Barrasso Chairman
The Honorable Jon Tester Vice Chairman
Senate Committee on Indian Affairs
Washington, DC 20510

Dear Chairman Barrasso and Vice Chairman Tester:

I am writing to you on behalf of the Salt River Project ("SRP"), in support of S. 2959, a bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010, (Pub.L. 111-291; Title III, 124 Stat. 3064, 3073 (2010)) to clarify the use of amounts in the White Mountain Apache Tribe Settlement Fund. SRP was one of the first five federal reclamation projects authorized by the Secretary of Interior in 1903. Today, SRP is a multi-purpose federal reclamation project operated by the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District under a 1917 contract with the United States. SRP is the largest water supplier for the Phoenix metropolitan area and power to more than a million electric customers in Central Arizona.

Much of the surface water supply delivered by SRP to its water users in the Phoenix metropolitan area originates in the White Mountains in eastern Arizona, which is also the aboriginal homeland of the White Mountain Apache Tribe ("WMAT"). In 2010, after decades of litigation and several years of negotiations, the WMAT, SRP and other interested parties, including the United States, resolved the WMAT's competing claims to water from the Salt River and its tributaries for its reservation. The center piece of the WMAT Quantification Agreement and settlement legislation involved the construction of Miner Flat Dam on the WMAT reservation, together with a water treatment plant and pipeline to deliver potable water to several communities across the reservation. Without this project, those communities will continue to suffer water shortages in the summer, requiring the hauling of water for community distribution, as well as poor quality water from nearby streams, when they do flow, contaminated by a variety of naturally occurring constituents.

During the technical work in designing the dam, the Tribe's consulting engineers discovered potential seepage and stability issues associated with the dam site that had not been previously known. The Act's authorizations for this project are sufficient to address any additional construction costs that may be necessary to address these geologic issues, but the Interior Department has indicated that it is not absolutely clear from its perspective that the WMAT Settlement Fund authorized by Section 312(b)(2) of the Act is worded broadly enough to permit its usage for these expenditures. It was the belief of all of the settlement parties, perhaps other than by the United States, at the time the settlement legislation was enacted into law that this Fund could be used in case there were any unforeseen construction cost overruns. However, in order to resolve this uncertainty with the Interior Department over the usage of the already authorized Fund for this purpose, it is necessary to clarify the language to ensure that the Fund can be used for these construction cost overrun purposes.

The importance of completing this important water rights settlement to water users in Central Arizona and to the WMAT and its people cannot be overstated. This clarifying legislation would resolve this interpretive difference of the Fund's purposes and would permit this project to move forward to timely completion. We urge the Committee to act favorably on this bill.

Sincerely,

David C. Roberts

LAKE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF MONTANA, SUBMITS THESE INITIAL COMMENTS ON S. 3013, THE "SALISH AND KOOTENAI WATER RIGHTS SETTLEMENT ACT OF 2016" These issues are significant and more detail can be provided subsequent hereto.

Initially, Section 2, paragraph (1), on page 2, please add Section (C) the benefit of the residents of the State of Montana and the Flathead Reservation and vicinity that are Tribal and non-Tribal members.

Second, Section 3, paragraph 5, part B Inclusions, should be corrected to clarify if or what amendment or amendments to the compact or attachments would be included and what "executed in accordance with this Act" means or involves.

Third, Section 3 paragraph 10, paragraph (B), 1 includes "any other facility of the Flathead Irrigation Project," without a definition of what is included in a "facility", and without an indication of ownership or control of any such "facility". Clarification would help this paragraph, as this county owns some facilities like bridges and culverts.

Further, Section 3, 10, B ii includes "any other physical tangible object used in the management and operation of the Flathead Irrigation Project". No discussion of who owns, maintains, or operates those "objects" is made, and "object" may or not be part of the Project. Examples may include bridges or culverts owned and/or installed by private persons, the railroad, and operated by the Project but not owned by or repaired or maintained historically by the Project.

Fourth, Section 3, paragraph 2 defines "Allottee" to limit the definition to be only owners with trust lands. This definition when utilized in the act, section 5 paragraph (a) limits the benefit to only trust land acreage and excludes persons who own historic allotment parcels that are Tribal or non-Tribal members with lands not in trust. This limits the benefit of Section 5, (a) to only trust lands parties and therefore the definition and intent paragraph deny all other persons equal protection or benefits from the act. A revised or functional definition providing benefits for all allotment or historic allotment holders would perhaps mitigate this problem.

Fifth, Section 4, (a) Ratification, (1) provides that the compact is authorized, ratified and confirmed "Except as modified by this Act." We are unclear how or if the Act can modify the compact, but not ratify the same modifications, and also not ratify portions of the compact in conflict with the Act. Clarification of what modifications occur with the Act and what conflicts exist would help the county and citizens better evaluate the Act itself.

Sixth, Section 5 page 9 could be amended to reflect that the Act seeks similar benefits for all persons affected by the Compact, not only allottee's.

Seventh, Section 5 part (b), (3) provides that the Act and not the compact prevails. This does not reflect the nature of the Compact as it was a negotiated contract between the Tribes and State of Montana, not a Federal statute. In the spirit of compromise and working cooperatively it would seem that reversing this language would be appropriate.

Eighth, Section 5, part d 1, 2, and 3, should be amended to reflect the terms of the compact and should provide access to the Tribal Water Right for all allotment parcels, regardless of ownership or trust status of this time. Further, the 3 section could reflect that "all reservation irrigators, not only allottees, should be entitled to a just and equitable allocation of irrigation water".

Ninth, Section 5 part (d) provides authority to protect only allottees. Broader authority to protect other users, with valid claims, or other amenities would seem more appropriate, as it provides the benefit and a remedy to all citizens affected.

Tenth, Section 6, paragraph (a) provides the water as measured at the Hungry Horse Dam. Our question is simply is that going into or coming out of the structure? Clarification would help with this long term question.

Eleventh, Section 6, paragraph (c) (2)D is unclear as to if the storage rights are pro-rata or absolute or adjusted otherwise. As this may impact the levels of Flathead Lake and irrigation water availability, clarity would be helpful as to the amounts.

Twelfth, Section 7 paragraph (a) provides the commission with authority to regulate hydroelectric power within the reservation. Paragraph (b) is unclear as it notes the Tribes' right is exclusive to develop and market any hydro project on bodies of water within the reservation. If off body of water hydro-generation is acceptable for other entities or persons, that should be made clear. This would be consistent with national energy policy to encourage alternate energy production without limit as to Tribal only.

Thirteenth, Section 7, paragraph "d" limits the ability of other users to profit from a project. For example, if per paragraph "d" 1B a generator is in a Bureau Rec Irrigation facility that is funded and maintained by irrigators, it seems fair that the irrigators should be entitled to a portion of the revenue generated. This is based upon the fact that they pay repair, operation and maintenance on the facility. Amending parts d, e, and f of that part of paragraph (d) of Section (7) would seem much more equitable to all involved.

Fourteenth, Section 8,"a" 1 identifies in general rehabilitation work to be carried out by the Secretary through the Commission. The Bureau of Reclamation is identified as the "Lead

Agency" in Section 8 (a) 5, but no language regarding cooperating agencies or local governments like Lake County is made. This is significant as parts of the system are owned by individuals and by this county or local entities like cities or towns, who should be consulted and who should be provided meaningful rights to participate. This participation is important in Section 8(b) 3 and 4 as local participation matters and "local" including this county owns parts of these facilities.

Fifteenth, Section 8(d) should provide that local government entities that already provide repair, and maintenance, and construction of parts of the project should be party to the agreement, and also funded to provide these services to the project. We as a county own the road right-of-ways used by the projects and the crossing structures and should be funded to provide those services.

Sixteenth, Section 8(e) 2 provides for acquisition of easements from landowners without compensation for land value taken or reduced by the work. This seems a taking without compensation and no assurance of restoration of the land is included in the paragraph. We believe both should be. Further, Section (f) requires that the land, i.e. right-of-way is held in trust for the Tribes benefit. This seems lopsided and is a forced sale to an entity that is only for benefit of the "Tribes". It is not a preferred alternative to many.

Seventeenth, Section 8(e) and (f) harms all local government units here and our schools and fire districts, etc. as trust lands do not pay taxes, placing an unfair and oppressive burden on our other taxpayers.

Eighteenth, Section 9 (1) uses mandates that the Ag Development account is used for "Indian Land" in parts A, B, C, D, and F, with no acknowledgment of system improvements that benefit non-Indian land or lands that are impacted. No discussion of cost allocation is included and we believe it should be as collateral costs to non-Indian land may be non-economic for the long term, and unfair to other owners.

Nineteenth, Section 10 includes funding for Flathead Irrigation Project maintenance with no mechanism to allocate costs related to non-allottee beneficiaries.

Twentieth, paragraph Section 12 a (3) does not obtain a release from allottees and 12 (c) allows the Tribes to make claim against any water rights recognized under any Final Decree. That seems contrary to the compact and statements that the Tribe gave up certain claims, which this paragraph does not give up.

Twenty First, Section 13 a and b could release this state and this county from liability as we understood that was the benefit of a compact.

Twenty Second, Section 3 (15) defines "Indian Land," the compact does not. The definition seems to overturn the "Clairmont" case and raises significant questions about jurisdiction, use, and authority of Federal, State, Tribal, and local government. A clarified definition would be helpful limiting these questions.

Twenty Third, we also have a concern regarding the other accounts that are being established, including economic development account, community development account, and agriculture development account. Those funds are limited to Tribal Government only, no funding for local government, and no funding for non-Tribal member projects. At a minimum clarification of the programs and provision of funds for all residents would be helpful. This issue is important because more than 70% of the population of this reservation and county is non-Tribal.

Twenty Fourth, as a county our concern about allottees having lands in trust to qualify and all acquired lands being put in trust are largely based on worsening our unfunded mandate. Trust lands pay no taxes to the county, fire districts or schools, but receive the benefits. Our Public Law 280 law enforcement problem will be made even worse by this act as it increases the unfunded mandate burden on our other taxpayers.

These comments are not complete due to time deadlines but are a start for the record of significant issues that need to be addressed.

GREAT PLAINS TRIBAL CHAIRMEN'S ASSOCIATION, INC.
Rapid City, SD, June 27, 2016

Senator John Barasso, Chairman,
Senator Jon Tester, Vice Chairman,
Senate Indian Affairs Committee,
Washington, DC.

RE: S. 2796, THE RESPECT ACT

Dear Chairman Barasso and Vice Chairman Tester:

We write on behalf of the 16 Member Tribes of the Great Plains Tribal Chairmen's Association, Inc., to support S. 2796. We appreciate the leadership of Senator Rounds in bringing forward the RESPECT Act to eliminate substandard, frankly—anti-Indian measures from the era of Indian wars and cultural oppression. And, thank you for your assistance in securing its enactment.

Senator Rounds introduced the RESPECT Act, S. 2796, to strike some of the laws which have historically disadvantaged our Indian nations and our people. For example, there are still laws on the books for the removal of our children from our homes to be sent to compulsory boarding schools run by military officers, where the mantra was "Kill the Indian, save the Man." These laws should be struck from the books.

Perhaps the provision on Indian Reform Schools can be updated to provide for Education, Counseling, and Other Assistance to Indian youth in custody. Perhaps the Army provision on facilities and staff can be consolidated and updated to provide for the transfer of unneeded facilities to Indian tribes.

Finally, perhaps a request can be added to President Obama and Congress to hold a public ceremony to announce America's Apology to Native Americans, enacted under the leadership of Senator Brownback and Senator Inouye as Section 8113 of the 2010 Defense Appropriations Act. The President signed the Act, yet never held a ceremony with our Indian nations and tribes to proclaim it.

Thank for your leadership for Indian country.

Sincerely,

JOHN YELLOW BIRD-STEEL,
President, Oglala Sioux Tribe, Chairman, Great Plains Tribal Chairman's Association

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MONTANA FARMERS UNION
Great Falls, MT, June 22, 2016

Senator John Barasso, Chairman,
Senator Jon Tester, Vice Chairman,
Senate Indian Affairs Committee,
Washington, DC.

RE: S. 2796, THE RESPECT ACT

Dear Chairman Barasso and Vice Chairman Tester:

Montana Farmers Union wishes to go on record in support of S. 3013, introduced by Senator Tester, and which will authorize and implement the water rights compact negotiated by the Montana Compact Commission and members of the Consolidated Salish and Kootenai Tribe. The policy of our organization has long supported State Water Court adjudication of all state water disputes, including all federal, state and private permits and/or reservations.

Action on this bill is critical for our rural producers to be ensured that irrigators on farms and ranches in Montana have all the water resources they need to maintain production of their crops and livestock. Montana is a semi-arid climate with an average of less than 15 inches of moisture per year and depends on irrigation water to sustain and firm up commodities for harvest in the fall. The passage of this Compact will benefit all members of the agriculture community and sustain the number one industry in our state.

Passage of the compact assures Montanan's certainty of adequate water, while protecting existing water rights from tribal call and assuring individual water uses will not have to pay for litigation through the water courts.

The CSKT Water Compact improves the irrigation infrastructure on Montana as it will assure funds for the improvement of water delivery systems, ditches, turnouts, storage and assures efficient use of our scarce water resources.

The exciting piece of this legislation is, that of assuring water certainty for our producer members. We pledge to continue working with you as this legislation moves forward. Feel free to call, should you have concerns.

Sincerely,

ALAN MERRILL, PRESIDENT

E-MAIL SUBMITTED BY MARY MATHEIDAS

I am a rancher and irrigator on the Flathead Indian Reservation. I am non-tribal. I have lived here for 20 years.

As a result of CSKT Water Compact approval by federal, state and tribal officials, a water compact passed illegally by the Mt. state legislature without the mandated ⅔ majority, Mt. residents, both tribal and non-tribal, have NO government to advocate for their constitutional rights, civil, property or water rights. The small CSKT tribal government now has 100 percent control over all water and power emanating from the former Kerr Dam, rivers, streams and 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 had no responsibility to the bulk 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 or S.3013 is ratified.

In addition to total control of water and power, the CSKT refuses to amend the compact to allow for a cap on rate-setting; or review by federal entities or the state public services commission. This was a commitment agreed to many years ago and is now being ignored. Jon Tester's bill makes us basically wards of the tribe.

This constitutes a request that any action of Jon Tester's bill S. 3013 be stayed until proper study has been done. This study need to include the following:

1. DUE PROCESS AND PROCEDURE The CSKT compact passed by the Mt. legislature has been inordinately and dramatically expanded by S. 3013 beyond what the state legislature actually approved on April 11, 2015 all without the approval or review of the Mt. legislature. I am appalled that any federal senator can bypass, expand and override decisions made by a state legislature even if if legality of the

original passage of the water compact is in question. This bill now in consideration pre-empts the Mt. legislature's proposed CSKT water settlement agreement.

2. Both the state approved compact and S. 3013 entirely violate the U.S. Constitution and Montana State Constitution. The compact violates the first, fifth and 10 amendments of the U.S. Constitution. The compact violates numerous individual rights of Mt. citizens as identified in Article II of Mt.'s Constitution and Section 3 of Article IX of the Montana Constitution.

3. There are several JUDICIAL RULINGS being ignores and need to the addressed. Among them are TARRANT v. HERRMANN AND MONTANA v. U.S. The first governs use of water and the second provides that non-tribal people will not be governed by tribal governments without their consent. The executive and legislative branch of the State of Montana have entirely abdicated their responsibilities to protect and serve Mt. citizens, tribal and non-tribal, within the Flathead Indian Reservation.

4. VIOLATIONS OF THE GENERAL ALLOTMENT (DAWES) ACT AND HOMESTEAD ACT When settling the west and opening un indian reservations, Congress provided in perpetuity that each land patent issued under the above leading Acts. Whether to tribal or non-tribal persons was guaranteed a water right permanently attached to the patent. Settling the west and opening the reservation could not happen unless water was guaranteed by Congress to each patent issued. Now 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. Land owners subject to the CSKT water compact had significant liens placed against their properties for the purpose of constructing the Kerr Dam and a federal irrigation system in the early 1900s. Liens were paid off but many properties lack the endorsement of a water deed attached to the particular properties. Nor have all liens been cleared.. Private property water right have been literally stolen while the liens permanently exist on the allotted parcels. The CSKT water compact would render this condition permanent.

5. FEDERAL AND TRIBAL SOVEREIGN IMMUNITY The CSKT water compact as passed by the Mt. Legislature on April 11, 2015, contained a waiver of tribal sovereign immunity. S. 3013 is silent as to tribal sovereign immunity but S3013 provides that where there is inconsistency between the Mt. legislature's compact and Tester's inflated version of the 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 eliminating the CSKT tribal waiver of sovereign immunity approved by the Mt. legislature. By locking out due process of affected land owners, there is no recourse when further harm occurs to land owners and residents other than a small appointed compact management organization probably heavily seated and controlled by tribal members.

6. NATIONAL ENVIRONMENTAL POLICY ACT AND STATE ENVIRONMENTAL POLICY ACT Prior to the passage of the water compact in April 2015, no environmental impact analysis was conducted by federal, state or tribal governments for a project that will physically disturb and impact thousands of acres of land on the Flathead Indian Reservation. S. 3013 affirms compliance with the NEA and in the next sentence, excepts S.3013 for NEPA compliance. Read carefully.

7. HELLGATE TREATY OF 1855 AND THE CSKT CONSTITUTION UNDER THE INDIAN REORGANIZATION ACT OF 1934 The foundational framework asserting tribal water rights is based on the Hellgate Treaty of 1855. The treaty provided for beneficial use and occupancy only of a bounded reservation. Treaty reservation land was owned and governed the the United States and Bureau of Indian Affairs. Neither tribal leaders nor tribal members had any jurisdictional authority or ownership of the land or the water within the reservation under the Treaty. 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 quite a remarkable change in theory.

There are many immoral and constitutional flaws in both the original compact and Jon Tester's current version. I sincerely hope there a people of vision and moral character who will closely scrutinize this bill and reject it outright for what it is: to subjugate all irrigators and peoples of the Flathead Indian Reservation to the will of the tribe, *i.e.* the government.

Senator Daines

I wish to add my name to the growing list of Montana legislators that are against the Salish Kootenay water compact. I feel the non-native American farmers on the reservation are not well enough protected by the Company as it passed the legislature in 2015.

Thank you for your time,

KEN HOLMLUND,
House District 38, Miles City.

I am concerned that this Compact is being addressed at this time. We have court proceedings that need to be processed, the notion that the CSKT Compact may supersede Compacts that are a head is disturbing to me and some people that are involved in these other Compacts. Those of us who live off the reservation have a reel problem with the verbiage off reservation water rights being considered . I feel this needs to be put on hold till it is resolved through litigation. So if it comes to be voted on vote against it.

REP MARK NOLAND.

Please consider a no vote on the Compact. This compact give control of the off reservation water rights to a tribal council and, more importantly, to a small group of old water rights farms, making water a commodity worth far more than the land being farmed. This negatively impacts over one hundred thousand residents. Again, please don't let this out of Committee.

RANDY BRODEHL,
Representative, Montana House District 9.

Esteemed public servants,

My name is Nick Schwaderer, I am the State Representative for House District 14 in Montana, which covers the greatest area of the CSKT Reservation of any House District. I have lived in this area my entire life.

Following years of meeting the community door-to-door and serving them as their representative, I fully oppose this water compact. I can say with full honesty that my community, who lives here, back me in this opposition.

Overall, this water compact goes far beyond the intent of original caselaw and convention with the allocation and administration of native water rights, and acts as a threat to those who live, work and own property in our community.

Sincerely,

REPRESENTATIVE NICK SCHWADERER,
House District 14, Superior, MT.

Not only is the CSKT a violation of the MT Constitution, it is an overreach and power grab by the U.S. government.

Please defeat this egregious affront to state sovereignty in Montana.

REP. BRAD TSCHIDA,
MT House Dist. 97.

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