

June 11, 2020
Senate Committee on Indians Affairs
Washington D. C.

Dear Senator John Barrasso

Please accept these comments into the record for the June 24 hearing on S. 3019 There is a one page summary on the Confederated Salish and Kootenai Tribes Compact and 4 pages of detail. The 17 people who signed this document participated in producing the final copy.

The purpose of this letter is to share the extreme damage S. 3019 (65 pages) and its companion bill Senate Bill 262 (1500 pages) will do to the surrounding 4 counties (Lake, Sanders, Flathead & Lincoln) of the CSKT Reservation and to Western Montana (S.3019 is a supplement to S. 262). It is difficult to read all of the bills, so a one-page summary and 4 pages of detail are included. With the Compact, farmers on the Reservation will lose their water rights to the Tribe and eventually their property which their family homesteaded on over 100 years ago. Western Montana (330,000 citizens) will lose all of the available water in the head waters of Western Montana for future development and many off reservation water rights received tribal co-ownership which gives the Tribe control of the water.

No public hearings were held on S.3019 and it was promoted to revise S. 262, to make it more acceptable. Instead, it increased the impact on the surrounding counties by transferring ownership of some of the land, roads, bridges, and other public infrastructure from Lake, Sanders, and Flathead Counties to the Tribe. Land swaps (36,800 acres) in the Compact are a major problem for all 3 counties because tribally owned land is not taxed and will likely remain vacant. Additional blows to the local economy of the counties is the loss of the 18,000 acre National Bison Range, control of public parks and free access to private property. These two bills are precedent sitting legislation which violates the Hell Gate Treaty, and Federal and State Constitutions. These bills if passed will dramatically affect Montana and other states.

SUMMARY

10 REASONS TO REJECT S. 3019 & THE CSKT COMPACT

Several water compacts have passed. Each of those followed their treaty and accomplished the stated purpose of their individual water compact. The CSKT water compact, as written, fails to meet this standard.

It is apparent that the CSKT Compact is not about obtaining additional water to make the reservation more productive. The Federal Government made the reservation productive by building the model Flathead Irrigation Project along with Kerr dam and electricity generation. There is already enough irrigation water for all of the 128,000 acres of irrigatable land on this 1.3 million acre reservation. Most of that water comes from the Mission Mountains and a little from the Flathead River. The Federal Government has invested billions of dollars to make the CSKT Reservation productive. There are 5,500 Indians on the reservation (2,500 have left) and 38,000 non-Indians.

Tribal leaders have said that this Water Compact will settle unspecified damages suffered by the tribe through violations of the Hellgate Treaty. Those damages are not listed anywhere in the CSKT Compact, and the Hellgate Treaty makes no mention of water. What this Compact does is give to the CSKT Tribe the following:

1. The Flathead Irrigation Project which the irrigators have already paid for with yearly payments.
2. All the available water for future development comes from the head waters of the Flathead River, Hungry Horse dam, and Flathead Lake.
3. Management of all the water on the Reservation and taking all individual water rights.
4. Control of all the instream flows using a robust flow standard not a fish survival standard.
5. Control of some county roads, bridges, and infrastructure including the Bison Range.
6. Free access to private property in Lake, Flathead & Sanders counties with no civil recourse. Land swaps and loss of Bison Range which damages the economy of Counties.
7. More land inside and outside the Reservation, including Federal Forest land.

8. A Compact that makes it almost impossible to sue for damages if not a tribal member.
9. \$1.9 billion from the Federal Government and \$55 million from the state of Montana based on damages by the Federal Government which are not listed in the Compact. No money goes to Individual Indians or to 2,500 who left the Reservation. The Tribal Council spends the money without accountability.

10. This is a precedent setting piece of legislation. If passed it will alter the policy regarding "off reservation water rights and land" of Indian reservations throughout the United States.

Considering that the Tribe has chosen to ignore the Hellgate Treaty and the Federal and State Constitutions, choosing instead to mount an expensive propaganda campaign designed to frighten and intimidate the citizens of Montana, it is best to reject the CSKT Compact and go through adjudication. Why can't the State use the dedicated \$55 million to provide for legal representation when needed to protect our property and water rights as we go through adjudication and also the property and water rights of Lake, Sanders, Flathead and Lincoln counties?

PAGE 1 S. 3019 CSKT WATER COMPACT SHREDS THE HELLGATE TREATY & CONSTITUTIONS

The Confederated Salish and Kootenai Tribes (CSKT) Reservation was established in 1855 by the Hellgate Treaty. The CSKT and Blackfoot treaties are two of the ten treaties negotiated by Isaac Stevens, Superintendent of Indian Affairs. Stevens' goal was to make reservations productive by developing farming, ranching, manufacturing, and other skills on the reservations while providing the privilege to hunt and fish at places where the Indians traditionally hunted and fished off the Reservation. Stevens' dream was that Indians and non-Indians would assimilate in this 1.3-million-acre paradise and there would be no discrimination.

In 1970, Montana began a state-wide water adjudication to determine each water right, how much water is allocated and the property on which it is used. The water rights are recorded, including tribal water rights. Adjudication is done by the Montana Water Court. The tribes had the choice of going through adjudication or negotiating a water right compact which is an agreement among the Tribe, State of Montana and Federal Government. The procedure is for the tribe to develop a water compact based on their treaty which then goes to the Montana legislature and if approved goes to the U.S. Congress for final approval. These compacts include water related projects such as irrigation canals and infrastructure that make the reservation productive. The cost of making the reservation productive was paid mainly by the Federal Government and sometimes the State of Montana. Six of the seven Montana reservations compacts have been completed.

The CSKT Compact (Senate Bill 262) has passed the Montana Legislature but has not received final approval from the U.S. Congress because there is controversy over whether the Compact follows the Hellgate Treaty and complies with the Montana State and Federal constitutions.

On December 11, 2019 The Flathead Beacon reported that, “Tribal leaders said that in addition to ratifying the compact, the proposed legislation settles damages brought by the Federal Government for mismanaging the Tribes’ water and water rights guaranteed under the 1855 Hellgate Treaty.” The Hellgate Treaty is the 1855 peace agreement between the CSKT and the Federal Government. There is no mention of water in the Hellgate Treaty. Furthermore, there are no such damages listed in the Compact. Water was secured for reservations in 1908 by the Winters Doctrine which provided a process for obtaining water to make the reservations productive.

Article I of the Hellgate treaty makes it very clear that the CSKT can’t be granted off Reservation water rights in their water compact based on the right to hunt and fish on their aboriginal land: **“the CSKT “hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them...”** Note that the words cede, relinquish and convey and the words right, title, and interest were all used to make sure everyone understood that aboriginal rights were given up. Water right claims by the CSKT off their reservation do not have standing. This means that Senate Bill 262 that was passed by the Montana Legislature in 2015 but has not yet been approved by the U. S. Congress, violates the Hellgate Treaty. Additionally, S.3019 which was developed by Senator Steve Daines to solve problems in Senate Bill 262 illegally allows huge off reservation water rights to the Tribe.

As a threatening lever and legal smoke screen to get the Compact passed tribal lawyers have filed about 10,000 water right claims on most of Montana to be adjudicated. The water judge will likely rule that none of these claims have standing.

Article II established the Reservation: **“reserved from the lands above ceded, for the use and occupation of the said confederated tribes...”** The Reservation came from the land that was ceded and paid for. It is an open reservation and not a race based sovereign nation inside of a state or county. It was assumed that the reservations would not be necessary after 20 years because the Indians would be assimilated into the general population.

Article III: **“The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.”** Note that the statement “right to take fish in common with the citizens of the Territory” is not a water right; otherwise Montana citizens could get a water right to protect their favorite place to fish. The Indian right is in common with the citizens of the Territory. These subsistence rights which show up in some treaties are given only to tribes known to be peaceful. A subsistence lifestyle was common among PAGE 2 both Indians and the citizens of the territory 159 years ago, but now government programs and fast food restaurants take the place of self-sufficiency.

Article III also gives Indians the right in common with citizens of the United States to travel upon all public highways and provides the right of public convenience roads being built.

Public infrastructure such as roads, bridges and buildings are owned by the government and are to be used by all citizens. They can’t be given to the Tribe or regulated by them. Signs that say **Tribal members only** must be removed.

Article IV and V pay CSKT for the cession: **“In consideration of the above cession, the United States agrees to pay to the Confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty...”** Cash payments were required and basic infrastructure such as a school, black-smith shop, saw mill, and a flouring mill were to be built and maintained for a period of 20 years.

Article VI: Once the land on the reservation was allotted, the remainder could be sold. The CSKT reservation is the only, open for settlement, reservation in Montana which was implemented in 1909.

Article VIII states: **“The confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.”** Crossing or working on private property outside the reservation without the consent of the owner violates Article VIII. Off Reservation CSKT water rights and (10,000 claims) also violates the article VIII.

In 1908, Congress approved homesteading on the 1.3-million-acre CSKT Reservation anticipating construction of the irrigation project to make it productive and providing distribution of land and water rights free to tribal members and sold land and water rights to non-tribal members. Farmers and ranchers were slow to take advantage of the irrigation because it was hard work transforming arid land into irrigated land. It took many years to develop the massive project into what it is now: 128,242 acres of productive irrigated land, 1,300 miles of canals, laterals, and distribution systems, 3 pumping plants, 15 storage reservoirs, and a power plant on the dam at Flathead Lake. Kerr dam and the generation power plant were started in 1926. CSKT was paid \$180,000 per year for use of the site. The power company also agreed to supply the project with electricity at a significant discount. CSKT has now purchased the dam and is selling electricity in Washington. The Reservation is presently very productive producing cattle, feed crops and vegetables.

Today the project serves as a multi-purpose water resource development. Currently, all existing reservoirs provide irrigation water for the project. Flathead Lake, Tabor, Jocko, Upper Dry Fork, Kicking Horse, Mission and Black Lake Reservoirs also provide a wide array of recreational activities, including fishing, boating, camping, and picnicking. The National Bison Range, at the southern end of the Flathead Reservation draws thousands of visitors each year for wildlife viewing and sightseeing activities. Unfortunately, the CSKT Compact will negatively impact 2000 irrigators on the Reservation and 330,000 people off Reservation in 11 counties.

The CSKT Compact which is based on Montana Senate Bill 262 and Federal bill S.3019 transfers the individual water rights of Indians and non-Indian irrigators to the Tribal Council. The Tribe by controlling water could eventually end up with most of the land in western Montana. Since the Compact transfers the state-based water rights of private landowners and management of the water on the Reservation to the CSKT, the next step could be to start the destruction of the Flathead Irrigation Project by controlling the amount of water allocated to the irrigators. Without adequate water, the land is not productive, and the value drops dramatically. As the financially stressed irrigators are forced to sell their land, CSKT will be able to buy the land for pennies on the dollar and leave it idle which they have already been doing both on and off the Reservation. The option to destroy the Flathead Irrigation Project was in the original appendix of the Compact as revealed by Richard Simms, a water attorney: **“in the event the annual payments described in 39(e), above, are no longer needed, such as in the event the Flathead Irrigation Project is decommissioned, all invested funds shall be**

dispersed for Flathead Irrigation Project removal and landscape rehabilitation.” In other words, the Compact authorizes the CSKT to use the remainder of the money in the Compact to pay for the removal of the multi-billion dollar irrigation Project.

Individual studies by Barry Dutton and Richard Simms revealed that the Compact cuts the amount of water to the project by 50% to 70%. Also, off reservation irrigators in 11 counties can be ordered to stop using PAGE 3 water during droughts when they need water the most. This impacts almost all of the land west of the Continental Divide. The uncertainty of having adequate water will dramatically reduce the value of this land and bankrupt most of the non-Indian landowner farmer irrigators.

The CSKT Compact bill (Senate bill 262) passed by only 3 votes. At least a 67% yes vote is required by the Montana Constitution. Funding is \$55 million from Montana and \$1.9 billion from the Federal Government which goes way beyond securing water and water infrastructure violating the purpose of Water Compacts. Despite the illegal vote and exorbitant cost, Senate Bill 262 is in Committee in Congress.

All 6 of the previous compacts met the vote requirement and no off-reservation water rights were given. The Blackfeet Compact (Steven’s treaty) secured additional water and water related projects including new irrigation systems, improvements to existing systems and infrastructure projects that would give everyone more water. Funding was \$471 million. If the CSKT Compact passes, the Blackfeet Tribe may reopen theirs.

The Montana Water Rights Protection Act (S. 3019) is in Congress in committee and is carried by Senator Steve Daines. It supplements Senate bill 262 which passed the Montana legislature and changes some parts of it. S.3019 includes unrelated issues such as roads, land swaps, state sovereignty, and even the Bison Range. The other water compacts dealt with only water and water related projects as appropriate. S.3019 got rid of 97% of the **off-reservation** water right claims in Senate Bill 262, but critical information about the acre feet of the remaining 3% of the water rights or where they are located is missing. One existing water right in Senate bill 262 for 290,000-acre feet takes all the available water in the Flathead headwaters (source) and another water right in S.3019 for 90,000 acre feet takes water out of Hungry Horse Dam. The Montana legislature passed Senate Bill 376 in 2007 that secured this water for use by the State of Montana for future development in western Montana. It ended up in the compact and establishes a water market for the Tribe: S. 3019 states, “The Tribe may use, lease, contract, exchange, or enter into other agreements for use of this water ...” For example, if the city of Missoula needs more city water out of the Clark Fork River, the Tribe will lease it to them or not. This blatantly violates the Hellgate Treaty and illegally transfers to the Tribe the State’s responsibility to have reserved water (as other states do) to provide for future development in Montana.

The Montana Water Protection Act (S. 3019) transfers ownership of some of the land, roads, bridges, and other public infrastructure from Lake, Sanders and Flathead Counties to the Tribe.

Land swaps (36,800 acres) in the Compact are a major problem for all 3 counties because when school trust land on the reservation is given to the Tribe, the income from the land disappears because tribally owned land is not taxed and will likely remain vacant. Land of equal value off the reservation likely would not contribute to the local economy and unlimited money from the Federal Government for damages may not always be available. Another blow to the economy of the counties is the loss of the 18,000 acre National Bison Range which has been paid for twice.

Free access of the Tribe across private property in the 3 counties with no civil recourse is a blatant violation of state and county property rights. Since all the individual irrigation water rights and some of the infrastructure such as roads and bridges on the reservation are also given to the Tribe in the Compact, that makes property rights null and void. For example, the Tribe can follow a stream that flows out of the Reservation onto to private property and make changes in the stream to their benefit. Also, if the Tribe controls roads and bridges they can control who may use them.

These are just a few of the problems with Senate Bill 262 which passed the Montana legislature with an illegal vote in 2015 and S.3019 which is a supplement to the Compact awaiting a hearing in Congress. The 1500 page Senate bill 262 and 65 page S.3019 were written by lawyers who did not follow requirements in the Hellgate Treaty or Federal and Montana Constitutions. Within these two bills are hidden tools which will destroy our Constitutional Republic. The Montana legislature has not had the required research necessary to properly and responsibly review these proposed Water Compacts and unfortunately the bias Montana Compact Commission ignored the required legal, environmental, regulatory, and economic assessments to reveal the impacts of this water compact on private property rights, future growth, and economic development. Without impact studies, no legislator in good conscience could pass a document of this magnitude. Legislators and county commissions have been completely shut out of the development of the CSKT Water Compact. Legislators were **not** allowed to offer amendments to Senate Bill 262 during the session and were not involved at all with S.3019. It was developed in Congress by lawyers. Legislators and county commissioners are not
PAGE 4 lawyers, but they understand our constitutions and the rule of law. They understand and deal with local problems and solutions daily and were greatly offended when their input to the Water Compact bills was not allowed or ignored. It is very unlikely that a fair agreement can be reached. After 10 years of negotiating no progress has been made because the Tribe and their lawyers want control of all “off reservation available water” in the head waters (source) which would limit future development in western Montana.

Equal protection under the law is guaranteed in our Constitutional Republic by the Montana and U.S. Constitutions. This means that all the laws apply equally to citizens both on and off the Reservations. Montana manages river flows and administers water rights for the benefit of its citizens and is accountable to the rule of law developed by the legislature. Montana should not turn over its constitutional and statutory responsibilities to the Tribe. There are problems on the CSKT Reservation, especially with water issues and the Irrigation Project but they can be solved by shifting the oversight of the irrigation project to the Bureau of Reclamation and the management and operation of the irrigation project to landowners who have paid for it and continuing State of Montana administration of state based water rights. Deferred maintenance of the irrigation project, adequate water at the right time, low-cost block of electric power and racial conflict would cease to be major problems. This would be an extremely wise move for this Indian and non-Indian open Reservation.

Indians and non-Indians are citizens of the United States and are entitled to the freedom and opportunity provided by this country. It doesn't matter where you live. There are problems on the CSKT reservation that need to be solved but throwing \$55 million (State) and \$1.9 billion (Federal) dollars and thousands of acre feet of water at the problems will only make things worse and will not end the lawsuits. The raciest Water Compact and the constant propaganda about adjudication have failed. It is the responsibility of our government to protect all of us. If we

need to lawyer up and adjudicate, the \$55million should be enough to get **a fair settlement for everyone.** . At least a 67% yes vote is required by the Montana Constitution. Funding is \$55 million from Montana and \$1.9 billion from the Federal Government which goes way beyond securing water and water infrastructure violating the purpose of Water Compacts. Despite the illegal vote and exorbitant cost, Senate Bill 262 is in Committee in Congress.

All 6 of the previous compacts met the vote requirement of least a 67% yes vote which is required by the Montana Constitution and no off-reservation water rights were given which is consistent with the Hellgate treaty. **It is likely that the CSKT compact was written by lawyers and shoved through without any negotiation or input from Legislators or members of Congress.**

Verdell Jackson, State Representative and Senator	
Al Olszewski, State Representative & Senator, candidate for Governor	
Gale Decker, Lake County Commissioner, Chair	David Dunn, State Representative
Pam Holmquist, Flathead County Commissioner	Jerry O Neil, State Representative
Glen Magera, Sanders County Commissioner	Keith Regier, State Representative & State Senator
Carl Glimm, State Representative, & Senator	David Dunn, State Representative
Bob Keenan, State Representative and Senator	John Fuller, State Representative
Dee Brown, State Representative and Senator	Joe Read, State Representative
Mark Blasdel, State Representative and Senator	Ray Thompson, Business & Technology, Semitool
Derek Skees, State Representative	Mark Noland, State Representative

Many of you have not had the opportunity to see the CSKT Reservation and the Flathead Irrigation Project from an airplane. The attached video shows this reclamation project which begun in 1908 and was not finished until 1963. The project made the flat interior part of the Reservation extremely productive in producing vegetables, wheat, alfalfa, hay, oats and pasture. Much of the 1.3 million acres as you will see in the video is rugged mountains and valleys, numerous waterways and a large amount of natural lakes. Natural water is abundant on the Reservation and most of the land is irrigated with water from the Mission Mountains and natural water in streams which flow in from the mountains which surround the Reservation. [Chick here video](#)