

Date: August 29, 2016
From: The Kogan Law Group, P.C.
To: Western States Constitutional Rights, LLC
Re: Memorandum: Legal Analysis of S.3013 – *The Salish and Kootenai Water Rights Settlement Act of 2016* and Related Congressional Tribal Forest Management Legislation (FINAL)

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I. Introduction

The purpose of this memorandum is to identify and analyze the key provisions of the Tester bill (S.3013) introduced into the U.S. Congress to facilitate the ratification of the CSKT Water Compact as federal law. This memorandum will be accompanied by a correspondence addressed to the United States Senate Committee on Indian Affairs and to the Subcommittee on Indian, Insular and Alaska Native Affairs of the U.S. House Committee on Natural Resources that briefly summarizes how the proposed legislation, if enacted into federal law, would arguably violate the U.S. constitutional rights of Montana irrigators.

1. SB 262:

On April 16, 2015, the Montana legislature voted to pass SB 262,¹ otherwise known as the “CSKT Water Compact.” SB 262, Section 1 states that one of its primary purposes is “to settle all existing claims to water of or on behalf of the Confederated Salish and Kootenai Tribes within the State of Montana.”² SB 262, Section 2 states that the other of its primary purposes is to “create a unitary administration and management ordinance to govern water rights on the Flathead Reservation.”³ SB 262 became effective immediately,⁴ upon being enacted into Montana *State law* by the Governor on April 24, 2015⁵ and incorporated within Part 19 of Title 85, Chapter 20 of the Montana Code Annotated.⁶

As Section 1 of SB 262 clearly states, the CSKT Water Compact was “entered into by and among the Confederated Salish Kootenai Tribes of the Flathead Reservation, Montana, the State

¹ See Legiscan, Votes: MT SB262 (2015), Regular Session, *Montana Senate Bill 262 (Adjourned Sine Die)*, available at: <https://legiscan.com/MT/votes/SB262/201>.

² See The State of Montana, *Senate Bill No. 262*, at Section 1, available at: <http://leg.mt.gov/bills/2015/billhtml/SB0262.htm> (“**Section 1. Water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United States ratified.** This Compact is entered into by and among the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the State of Montana, and the United State of America to settle all existing claims to water of or on behalf of the Confederated Salish and Kootenai Tribes within the State of Montana” (boldfaced emphasis in original)). See also *Id.*, at Final Preambular Clause (“NOW THEREFORE, the Parties agree to enter into the Compact for the purpose of settling the water rights claims of the Confederated Salish and Kootenai Tribes, their members, and Allottees of the Flathead Indian Reservation, and of the United States on behalf of the Tribes, their members and Allottees, and to provide the necessary foundation for the establishment of a board composed of Tribal and State appointed representatives to provide for the unified administration of all water resources on the Reservation.”).

³ See The State of Montana, *Senate Bill No. 262*, *supra* at Section 2 (“**Section 2. Unitary administration and management ordinance.** [...] 1-1-101. Authority. 1. This Ordinance parallels legislation adopted by the Confederated Salish and Kootenai Tribes pursuant to Tribal approval of the Confederated Salish and Kootenai Tribes-Montana Compact and the Montana Water Use Act of 1973 to effectuate Unitary Administration and Management on the Flathead Indian Reservation” (boldfaced emphasis in original)).

⁴ See The State of Montana, *Senate Bill No. 262*, *supra* at Section 14 (“**Section 14. Effective date.** [This act] is effective on passage and approval”) (boldfaced emphasis in original).

⁵ See The State of Montana, Montana Legislature Detailed Bill Information, *2015 January Regular Session - SB 262*, available at: [http://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P_BILL_NO1=262&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20151](http://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=262&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20151).

⁶ See The Montana Code Annotated, Sections 85-20-1901 and 85-20-1902, available at: http://leg.mt.gov/bills/mca_toc/85_20_19.htm.

of Montana, *and the United States of America*” (emphasis added). Consequently, Article II, Section 28 of SB 262 provides that it would not become effective as *federal* law until it is ratified by both the CSKT Tribal Council and the United States Government.⁷

The significance of the federal government role in the Compact’s ratification cannot be underestimated. It is initially conveyed in Article VI, Section B of the CSKT Water Compact, which provides that, “The Parties agree that the Federal contribution to settlement shall be negotiated by the Tribes, the State, and the United States as part of the negotiations *on the Federal legislation to ratify and effectuate* the Compact” (emphasis added).⁸ In addition, it is conveyed in Article VII, Section A.1, which provides that “[...] The State and the Tribes will support provisions in the *Federal legislation ratifying the Compact* that delegates to the Secretary the authority to ratify such future amendments on behalf of the United States.”⁹ The significance of the federal role in ratification, furthermore, is conveyed in Article VII, Sections A.2.a and A.4.a.¹⁰ These provisions reserve, respectively, to the Tribes and to the State of Montana, the “unilateral right to withdraw as a Party” from the Compact if, in the case of the Tribes, Congress fails to ratify the Compact and authorize appropriations for its implementation within 4 years of its enactment as Montana State law,¹¹ and in the case of Montana, if Congress fails simply to ratify the Compact within 4 years of its enactment as State law.¹²

2. S.3013:

On May 26, 2016, Montana’s U.S. Senator Jon Tester (MT-D) introduced and referred to the U.S. Senate Committee on Indian Affairs S.3013 – *the Salish and Kootenai Water Rights Settlement Act of 2016*.¹³ He stated that the purpose of the bill is “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, *and for other purposes*”

⁷ See The State of Montana, *Senate Bill No. 262*, *supra* at Article II, Section 28 (“28. ‘Effective Date’ means the date on which the Compact is finally approved by the Tribes, by the State, and by the United States, and on which the Law of Administration has been enacted and taken effect as the law of the State and the Tribes, whichever date is latest.”). *Id.*

⁸ See The State of Montana, *Senate Bill No. 262*, *supra* at Article VI, Section B.

⁹ *Id.*, at Article VII, Section A.1.

¹⁰ *Id.*, at Article VII, Section A.2 (listing 5 separate bases justifying the CSKT’s withdrawal from the Compact). See also Article VII, Section A.4 (listing 5 separate bases justifying the State’s withdrawal from the Compact).

¹¹ *Id.*, at Article VII, Section A.2.a (“2. Notwithstanding any other provision in the Compact, the Tribes reserve the unilateral right to withdraw as a Party if: a. *Congress has not ratified this Compact and authorized appropriations for the Federal contribution to the settlement* within four years from the date on which the ratification of the Compact by the Montana Legislature takes effect under State law. This is a continuing right until Congress ratifies the Compact” (emphasis added)).

¹² *Id.*, at Article VII, Section A.4.a (“Notwithstanding any other provision in the Compact, the State reserves the unilateral right to withdraw as a Party to the Compact if: a. *Congress has not ratified this Compact* within four years from the date on which the ratification of the Compact by the Montana Legislature takes effect under State law. This is a continuing right until Congress ratifies the Compact”(emphasis added)).

¹³ See Congressional Record, Senate (May 26, 2016), at p. S3291, available at: <https://www.congress.gov/crec/2016/05/26/CREC-2016-05-26-pt1-PgS3291.pdf>. See also Vince Devlin, *Congress's Turn: Tester Introduces CSKT Water Compact in D.C.*, Montana Standard (May 26, 2016), available at: http://mtstandard.com/news/local/congress-s-turn-tester-introduces-cskt-water-compact-in-d/article_5714d8dc-e899-5a0b-8b46-0cec31d94008.html.

(emphasis added).¹⁴ Whereas two primary purposes had been identified for the enactment of SB 262, Section 2 of the Tester bill (S.3013) identified four primary purposes: 1) to achieve a fair and equitable water rights settlement for the Tribes and allottees; 2) to ensure adequate funding for the Compact to the extent it is consistent with the Act; 3) to authorize the Interior Secretary to sign, allocate and dispense funds to implement the Compact; and 4) to authorize funds necessary to implement the Compact and the Act.¹⁵

Although the Tester bill was identified as having no cosponsors,¹⁶ and as having only a 32% chance of being enacted,¹⁷ it was hailed by the Montana Group, a private Helena, Montana-based government affairs, public relations and grass roots advocacy and consultancy organization.¹⁸ According to the Montana Group an apparent supporter of the Tester bill,

“By ratifying the CSKT Water Compact more of Montana’s water resources will be controlled locally, rather than by the federal government. The CSKT made many concessions throughout the negotiation process, one of which was agreeing to co-own instream flow rights with Montana Fish, Wildlife, & Parks. They also have agreed to cede many of the off-reservation rights to ensure that those with existing water rights are not forced to defend them before the Montana Water Court.”¹⁹

Lorents Grosfield, a Co-chair of Farmers and Ranchers for Montana (“FARM”), has noted how the Compact must first be ratified by Congress “before it can be fully implemented.”²⁰ In addition, Walt Sales, another FARM co-Chair, has stated that, “[t]he Compact makes sure that those who want to pursue litigation have the ability to do so without committing all Montanans to expensive court proceedings.”²¹ Furthermore, Karen Fagg, a FARM co-Chair and Billings business owner, stated that “[t]he passage of the settlement legislation and ratification of the

¹⁴ *Id.*

¹⁵ See 114th Cong. 2d Session, *S.3013, 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, and for other purposes* (May 26, 2016), available at: <https://www.congress.gov/114/bills/s3013/BILLS-114s3013is.pdf> (“SEC. 2. PURPOSES. The purposes of this Act are— (1) to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for— (A) the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation; and (B) the United States, for the benefit of the Tribes and allottees; (2) to authorize, ratify, confirm, and provide funding for the Compact, to the extent that the Compact is consistent with this Act; (3) to authorize and direct the Secretary of the Interior— (A) to execute the Compact; and (B) to take any other action necessary to carry out the Compact in accordance with this Act; and (4) to authorize funds necessary for the implementation of the Compact and this Act.”) *Id.*

¹⁶ See Congress.gov, *S.3013 - Salish and Kootenai Water Rights Settlement Act of 2016*, available at: <https://www.congress.gov/bill/114th-congress/senate-bill/3013>.

¹⁷ See Gov.track.us, *S. 3013: Salish and Kootenai Water Rights Settlement Act of 2016*, available at: <https://www.govtrack.us/congress/bills/114/s3013>.

¹⁸

¹⁹ See Char-Koosta News, *CSKT Water Compact, federal settlement legislation completes first step in congressional ratification process*, Montana Group (Aug. 4, 2016), available at: http://www.charkoosta.com/2016/2016_08_04/CSKT_Water_Compact-Montana_Group.html.

²⁰ *Id.*

²¹ *Id.*

Compact will create a significant number of jobs in our state [...] that will improve our state for all Montanans.”²²

It is quite interesting that Shelby DeMars of the Montana Group,²³ FARM, and Denny Rehberg Co-Chairman of)²⁴ and Mark Baker (Of Counsel to)²⁵ the Washington, D.C.-based Mercury public affairs and political consultancy firm had each been named within the 68-page complaint Flathead County Republican leader, Jayson Peters had filed against the CSKT with the Montana Commissioner of Political Practices on April 2, 2015.²⁶ As many may recall, that complaint had identified how the Tribes had employed such persons, whose actions allegedly violated Montana’s lobbying disclosure laws, to lobby for passage of the CSKT Water Compact before the Montana legislature.²⁷

II. The Contents of Senator Tester’s Bill – S.3013

According to the Montana Group, “S. 3103 makes *no* changes to the negotiated agreement passed by the Montana State Legislature, it simply includes the language necessary for it to be presented to Congress and ratified.”²⁸ As the following analysis shows, a comparison of SB 262 and S.3013 reveals that the Montana Group statement is only partially true.

1. Section 4 – Confirmation of CSKT Water Compact:

Section 4(a)(1) of the bill authorizes, ratifies and confirms the terms and conditions of the CSKT Water Compact.²⁹ Section 4(b)(1) of S.3013 authorizes the Interior Secretary to execute the Compact, including its appendices and exhibits, provided such execution does not otherwise conflict with the Act.³⁰ Section 4(c)(1) of S.3013 further subjects the Interior Secretary’s execution of the Compact/Act to the National Environmental Policy Act, the Endangered Species Act and all other applicable environmental statutes.³¹

2. Section 5 – Confirmation of ‘Tribal Water Right’:

Section 5(b)(1) of S.3013 ratifies, confirms and declares to be valid the “tribal water right,” which is defined under Section 3(21) of S.3013 as “the water right of the Tribes as set forth in

²² *Id.*

²³ See The Montana Group, *Our Team*, available at: <http://www.montanagroup.net/>.

²⁴ See Mercury, *Experts - Denny Rehberg*, available at: <http://www.mercuryllc.com/experts/hon-denny-rehberg/>.

²⁵ See Mercury, *Experts – Mark Baker*, available at: <http://www.mercuryllc.com/experts/mark-baker/>.

²⁶ See The State of Montana, Commissioner of Political Practices, *Lobbying Complaint Filed by Jayson Peters Against the Confederated and Salish and Kootenai Tribes (CSKT)* (April 2, 2015), available at: <http://politicalpractices.mt.gov/content/4lobbying/PetersvConfederatedSalishKootenaiTribesComplaint>.

²⁷ See Ron Catlett, MediaTrackers, *Montana Water Compact Battle Heats Up as Complaint Filed Against Tribe* (April 9, 2015), available at: <http://mediatrackers.org/montana/2015/04/09/montana-water-compact-battle-heats-complaint-filed-tribe>.

²⁸ See Char-Koosta News, *CSKT Water Compact, federal settlement legislation completes first step in congressional ratification process*, Montana Group (Aug. 4, 2016), *supra*.

²⁹ See S.3013, at Section 4(a)(1).

³⁰ *Id.*, at Section 4(b)(1).

³¹ *Id.*, at Section 4(c)(1).

the Compact.”³² Article II, Section 67 of the SB 262/Compact defines the “tribal water right” quite broadly as encompassing:

“the water rights of the Confederated Salish and Kootenai Tribes, including any Tribal member or Allottee, the basis of which are federal law, as set forth in Article III.A, Article III.C.1.a through j, Article III.C.1.k.i, Article III.C.1.l.i, Article III.D.1 through 3 and Article III.D.7 and 8. The term ‘Tribal Water Right’ also includes those rights identified in Article III.H that are appurtenant to lands taken into trust by the United States on behalf of the Tribes.”³³

a. *Article III.A of SB 262 – Traditional, Religious or Cultural Uses*

Article III.A of SB 262 states that, the Tribal Water Right “includes all traditional, religious, or cultural uses of water by members of the Confederated Salish and Kootenai Tribes within Montana.”³⁴ It should be noted that this provision also exempts “[i]ndividual exercises of traditional, religious, or cultural uses [...] from the Registration process contained in the Law of Administration”³⁵ to which all non-Indian Flathead irrigators are subject.

b. *Article III.C.1.a-j of SB 262 – FIIP, Existing Use, Flathead System Compact Water, Instream On-Reservation Flow, Wetlands, Minimum Reservoir Pool, High Mountain Lake, Flathead Lake, Hydroelectric Power Use Water Rights*

Article III.C.1.a-j identifies the “Tribal Water Right” as consisting of the following:

- “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 [contained in] Appendix 5,” **which will have a priority date of July 16, 1855;**³⁶
- “Existing Uses by the Tribes, their members and Allottees that are **not Water Rights Arising Under State Law** and are not otherwise specifically quantified in other sections of [...] Article III;”³⁷
- “Flathead System Compact Water,” [namely, a] direct flow water right from the Flathead River, **bearing a July 16, 1855 priority date,**³⁸ that:
 - [derives from the] Flathead River, Flathead Lake, and the South Fork of the Flathead River **up to Hungry Horse Reservoir;**
 - [diverts from] Flathead Lake or the Flathead River, either on or off of the Reservation;
 - [used for] Any beneficial use;

³² *Id.*, at Sections 5(b)(1) and 3(21).

³³ See The State of Montana, *Senate Bill No. 262, supra* at Article II, Section 67.

³⁴ *Id.*, at Article III.A.

³⁵ *Id.*

³⁶ *Id.*, at Article III.C.1.a.

³⁷ *Id.*, at Article III.C.1.b.i.

³⁸ *Id.*, at Article III.C.1.c.viii.

- [diverts] 229,383 Acre-feet per year;
- [depletes] 128,158 Acre-feet per year;
- [from] January 1 through December 31;”³⁹ and
- [includes] **“an allocation of 90,000 Acre-feet per year, as measured at the Hungry Horse Dam, of storage water in Hungry Horse Reservoir,”**⁴⁰ as set forth in SB 262, Article 6, subject to:
 - “the ‘Biological Impact Evaluation and Operational Constraints for a proposed 90,000 Acre-foot withdrawal’ (State of Montana, September 14, 2011) attached [...] as Appendix 8;”⁴¹
 - “the minimum instream flow schedules, as measured at the USGS gaging station on the Flathead River at Columbia Falls (12363000) and the USGS gaging station on the Flathead River at Polson (12372000) as identified in Tables 3 through 6 of Appendix 7, as well as the minimum flow requirements set forth in Table 5 that must also be met downstream at the USGS gaging station;”⁴²
 - “the Flathead Lake filling criteria identified on page 12 of Appendix 7;”⁴³ and
 - “subject to the approval of, and any terms and conditions specified by, Congress.”⁴⁴
- **“Instream Flow Rights on Reservation ,” bearing a time immemorial priority date,**⁴⁵ including:
 - “Natural Instream Flow[...] rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 10;”⁴⁶
 - “FIIP Instream Flow [...] rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 11;”⁴⁷
 - “Other Instream Flow [...] rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 12;”⁴⁸
 - “Interim Instream Flow [...] rights [...] contained in Appendix 13 [...] until such time as the Instream Flow water rights set forth in Article III.C.1.d.ii become enforceable pursuant to Article IV.C, [in accordance with] Appendix 13 or existing practice as of December 31, 2014, and as described in the protocols in Appendix 14;”⁴⁹
- “Minimum Reservoir Pool Elevations in Flathead Indian Irrigation Project Reservoirs,” including:

³⁹ *Id.*, at Article III.C.1.c.

⁴⁰ *Id.*, at Article III.C.1.c.i.

⁴¹ *Id.*, at Article III.C.1.c.iii.

⁴² *Id.*, at Article III.C.1.c.iv.

⁴³ *Id.*, at Article III.C.1.c.v.

⁴⁴ *Id.*, at Article III.C.1.d.vii.

⁴⁵ *Id.*, at Article III.C.1.d.v.

⁴⁶ *Id.*, at Article III.C.1.d.i.

⁴⁷ *Id.*, at Article III.C.1.d.ii.

⁴⁸ *Id.*, at Article III.C.1.d.iii.

⁴⁹ *Id.*, at Article III.C.1.d.iv.

- “[T]he right to water necessary to maintain Minimum Reservoir Pool Elevations for FIIP reservoirs in the quantities and locations set forth in the table and abstracts of water right attached [...] as Appendix 15;”⁵⁰ and
- “those interim reservoir pool elevations identified in Appendix 13 [...] until such time as the Minimum Reservoir Pool Elevations set forth in Article III.C.1.e become enforceable pursuant to Article IV.C;”⁵¹
- “[A] Wetland Water Right” [...] to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached [...] as Appendix 16,” **bearing a time immemorial priority date;**⁵²
- “[A] High Mountain Lakes Water Right [...] to all naturally occurring water necessary to maintain the High Mountain Lakes identified in the abstracts of water right attached [...] as Appendix 17,” **bearing a time immemorial priority date;**⁵³
- “[A] Flathead Lake” [...] right to all naturally occurring water necessary to maintain the level of the entirety of Flathead Lake at an elevation of 2,883 feet as described in the abstract of water right attached [...] as Appendix 18,” **bearing a time immemorial priority date;**⁵⁴
- “[A] Boulder Creek Hydroelectric Project [...] right to water necessary to operate the Boulder Creek Hydroelectric Project as identified in the abstracts of water right attached hereto as Appendix 19,” **bearing a July 16, 1855 priority date;**⁵⁵ **AND**
- “[A] Hellroaring Hydroelectric Project [...] right to water necessary to operate the Hellroaring Hydroelectric Project as identified in the abstracts of water right attached [...] as Appendix 20,” **bearing a July 16, 1855 priority date.**⁵⁶

c. *Article III.C.1.k.i of SB 262 – Wetlands Appurtenant to Montana FWP*

Article III.C.1.k.i of SB 262 indicates that the Tribal Water Right also includes “the right to all naturally occurring water necessary to maintain the Wetlands [...] appurtenant to [l]ands [o]wned by Montana Fish Wildlife and Parks [...] identified in the abstracts of water right attached [...] as Appendix 21,” **bearing a time immemorial priority date.**⁵⁷

d. *Article III.C.1.l.i of SB 262 – Wetlands Appurtenant to USFWS*

Article III.C.1.l.i of SB 262 indicates that the Tribal Water Right, furthermore, includes “the right to all naturally occurring water necessary to maintain the Wetlands [...] appurtenant to [l]ands [o]wned by Department of Interior Fish and Wildlife Service [...] identified in the abstracts of water right attached [...] as Appendix 23,” **bearing a time immemorial priority date.**⁵⁸

⁵⁰ *Id.*, at Article III.C.1.e.i.

⁵¹ *Id.*, at Article III.C.1.e.iv.

⁵² *Id.*, at Article III.C.1.f.

⁵³ *Id.*, at Article III.C.1.g.

⁵⁴ *Id.*, at Article III.C.1.h.

⁵⁵ *Id.*, at Article III.C.1.i.

⁵⁶ *Id.*, at Article III.C.1.j.

⁵⁷ *Id.*, at Article III.C.1.k.i.

⁵⁸ *Id.*, at Article III.C.1.l.i.

- e. *Article III.D.1 through 3 of SB 262 – Instream Off-Reservation Flow in Basins 76D, 76K and 76 M & N*

Articles III.D.1 through 3 indicate that the Tribal Water Right, furthermore, includes:

- “[The] **Instream Flow Water Rights Off of the Reservation**,” including:
 - “[The] Mainstem Instream Flow Right in the Kootenai River (**Basin 76D**) [...] set forth in the abstract of water right attached [...] as Appendix 25” and measured at “USGS streamflow gage #12305000 located at Leonia, Idaho,”⁵⁹ **bearing a time immemorial priority date**,⁶⁰ to be exercised at the instream point of diversion⁶¹ from “January 1 to December 31 of each year⁶² [...] for the maintenance and enhancement of fish habitat to benefit the instream fishery;”⁶³
 - However, “[t]he ability to enforce this right shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers’ operations of that dam are conducted consistently with the [2008, updated 2010 and supplemental 2014 Biological Opinions].”⁶⁴
 - “[The] Mainstem Instream Flow Right in the Swan River (**Basin 76K**) [...] set forth in the abstract of water right attached [...] as Appendix 26,” and measured at “USGS streamflow gage #12370000 located immediately below Swan Lake near Big Fork, Montana,”⁶⁵ **bearing a time immemorial priority date**,⁶⁶ to be exercised at the instream point of diversion⁶⁷ from “January 1 to December 31 of each year [...] for the maintenance and enhancement of fish habitat to benefit the instream fishery;”⁶⁸ **AND**
 - “[The] Mainstem Instream Flow Right in the Lower Clark Fork River (**Basins 76M and 76N**) [...] set forth in the abstract of water right attached [...] as Appendix 27,” [...] and measure at “USGS streamflow gage #12391950 located immediately below Cabinet Gorge Dam in Idaho,”⁶⁹ **bearing a time immemorial priority date**,⁷⁰ to be exercised at the point of instream diversion⁷¹ from “January

⁵⁹ *Id.*, at Article III.D.1

⁶⁰ *Id.*, at Article III.D.1.a.

⁶¹ *Id.*, at Article III.D.1.d.

⁶² *Id.*, at Article III.D.1.b.

⁶³ *Id.*, at Article III.D.1.c.

⁶⁴ *Id.*, at Article III.D.1.e (“The ability to enforce this right shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers’ operations of that dam are conducted consistently with 2008 Federal Columbia River Power System Biological Opinion, the 2010 updated Biological Opinion, and the 2014 Supplemental Federal Columbia River Power System Biological Opinion, specifically as described in Reasonable and Prudent Alternative Action (RPA) No. 4 (Storage Project Operations), Table No. 1 (Libby Dam), including the Northwest Power and Conservation Council’s 2003 mainstem amendments to the Columbia River Basin Fish and Wildlife Program, or any subsequent Biological Opinion(s) governing the same RPAs and Operations.”).

⁶⁵ *Id.*, at Article III.D.2.

⁶⁶ *Id.*, at Article III.D.2.a.

⁶⁷ *Id.*, at Article III.D.2.d.

⁶⁸ *Id.*, at Article III.D.2.c.

⁶⁹ *Id.*, at Article III.D.3.

⁷⁰ *Id.*, at Article III.D.3.a.

⁷¹ *Id.*, at Article III.D.3.d.

1 to December 31 of each year [...] for the maintenance and enhancement of fish habitat to benefit the instream fishery.”⁷²

f. *Article III.D.7 and 8 of SB 262 – Instream Off-Reservation Flow in Basins 76F, 76D Tributaries*

Moreover, Articles III.D.7 and 8 of SB 262 indicate that the Tribal Water Right includes:

- “[The] Instream Flow Right on the North Fork of Placid Creek (Basin 76F) [...] set forth in the abstract of water right attached [...] as Appendix 35,”⁷³ [...] **bearing a time immemorial priority date**,⁷⁴ to be exercised at the point of instream diversion from “January 1 to December 31 of each year [...] for the maintenance and enhancement of fish habitat to benefit the instream fishery;” **AND**
- “[The] Instream Flow Rights on Kootenai River Tributaries (Basin 76D) [...] set forth in the abstracts of water right attached hereto as Appendix 36,”⁷⁵ **bearing a time immemorial priority date**,⁷⁶ to be exercised at the point of instream diversion⁷⁷ from “January 1 to December 31 of each year”⁷⁸ [...] for the maintenance and enhancement of fish habitat to benefit the instream fishery.”⁷⁹
 - “The recognition of the Instream Flow water rights in this Article III.D.8 does not confer on the Tribes any authority over the management of National Forest System lands within Basin 76D, or any claim to ownership or other rights in that land.”⁸⁰
 - **However**, the “*Tribal Forestry Participation and Protection Act of 2016*” (S.3014)⁸¹ introduced by U.S. Senator Steve Daines (MT-R) into the Senate Committee on Indian Affairs on May 26, 2016,⁸² if passed, *would* provide the CSKT with managerial authority over such lands;⁸³

⁷² *Id.*, at Article III.C.3.c.

⁷³ *Id.*, at Article III.C.7.

⁷⁴ *Id.*, at Article III.C.7.a.

⁷⁵ *Id.*, at Article III.C.8.

⁷⁶ *Id.*, at Article III.C.8.a.

⁷⁷ *Id.*, at Article III.C.8.d.

⁷⁸ *Id.*, at Article III.C.8.b.

⁷⁹ *Id.*, at Article III.C.8.c.

⁸⁰ *Id.*, at Article III.C.8.f.

⁸¹ See 114th Cong. 2d Session, S.3014, a bill to improve the management of Indian forest land, and for other purposes (May 26, 2016), available at: <https://www.congress.gov/114/bills/s3014/BILLS-114s3014is.pdf> (Section 1 of the Act provides that, “This Act may be cited as the ‘Tribal Forestry Participation and Protection Act of 2016.’”).

⁸² See Congressional Record, Senate (May 26, 2016), at p. S3291, *supra*.

⁸³ See Ripon Advance News Service, *Daines Bill Would Promote Better Forest Management Through Tribal, Federal Cooperation* (June 8, 2016), available at: <https://riponadvance.com/stories/daines-bill-promote-better-forest-management-tribal-federal-cooperation/> (discussing how [u]nder the bill, a 10-year pilot program would authorize the secretaries of interior and agriculture to consult with state and local governments at the request of tribes to treat federal forestland as Indian forestland to expedite restoration projects.”). See also Steve Daines, United States Senator for Montana, *Daines Introduces Tribal Forestry Legislation*, Press Release (May 27, 2016), available at: <https://www.daines.senate.gov/news/press-releases/daines-introduces-tribal-forestry-legislation> (discussing how the Act: “[c]reates a ten-year pilot program that authorizes the Secretaries of the Interior and Agriculture, at the request of an Indian tribe, in consultation with state and local governments, to treat Federal forest land as Indian forest land for the sole purpose of expediting forest health projects on federal lands that have a direct

- **However**, the “*Resilient Federal Forests Act of 2015*” (H.R.2647) introduced by U.S. Congressman Bruce Westerman (AR-R) into the House Committee on Agriculture and House Natural Resources Committee on June 4, 2015,⁸⁴ if passed, would provide the CSKT with managerial authority over such lands; **OR**
- **However**, the “*Emergency Wildfire and Forest Management Act of 2016*” (S.3085) introduced into the Senate and referred to the Senate Committee on Agriculture, Nutrition, and Forestry on June 22, 2016,⁸⁵ if passed, would provide the CSKT with managerial authority over such lands.

g. *Article III.H – Water Rights Arising Under State Law Appurtenant to Lands Acquired by the Tribes*

Lastly, Article III.H of SB 262 grants the Tribes “the right to any Water Right Arising Under State Law acquired as an appurtenance to [any] land[s] [...the Tribes acquired] within the Reservation.”⁸⁶ Once the Compact becomes effective as a matter of *state law*, the Tribes may ensure that such *state-based* appurtenant water rights are transferred to the Tribal Water Right such that they are recognized as a matter of *federal law*.⁸⁷ The Tribes may accomplish this by simply filing with the Flathead Reservation Water Management Board a Trust Transfer Form evidencing the U.S. government’s taking of those lands into trust on behalf of the Tribes.⁸⁸ Article II, Section 34 describes the Flathead Reservation Water Management Board as “the entity established by this Compact and the Law of Administration to administer the use of all water rights on the Reservation upon the Effective Date.”⁸⁹

Once transferred to the Tribal Water Right, the appurtenant water right will bear a **priority date of July 16, 1855**.⁹⁰ However, this Hellgate Treaty of 1855⁹¹ priority date will be lost unless the Tribes “continue to use the acquired water right as it was historically used or [...] change the use of the acquired water right pursuant to the provisions for change of use set forth in Article IV.B.4

connection to the tribe[; and] Keeps the land in federal ownership and maintains public access, revenue-sharing with state and local governments, prohibitions on log exports, recognition of existing of rights of way and county roads, and upholds environmental protections.” The Act also “[g]ives the Secretaries of Agriculture and the Interior authority to enter into 638 contracts with tribes to complete administrative functions under the Tribal Forest Protection Act of 2004, rather than requiring that the federal government do it for them”) (emphasis added).

⁸⁴ See 114th Cong. 1st Session, H.R.2647, *An Act To expedite under the National Environmental Policy Act of 1969 and improve forest management activities on National Forest System lands, on public lands under the jurisdiction of the Bureau of Land Management, and on tribal lands to return resilience to overgrown, fire-prone forested lands, and for other purposes* (July 13, 2015), available at: <https://www.congress.gov/114/bills/hr2647/BILLS-114hr2647rfs.pdf>.

⁸⁵ See 114th Cong. 2d Session, S.3085, *A Bill To improve forest management activities on National Forest System land and public land, and for other purposes* (June 22, 2016), available at: <https://www.congress.gov/114/bills/s3085/BILLS-114s3085is.pdf>.

⁸⁶ See The State of Montana, *Senate Bill No. 262*, *supra* at Article III.H.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*, at Article II, Section 34.

⁹⁰ *Id.*, at Article III.H.

⁹¹ See Hellgate Treaty of July 16, 1855, 12 Stat. 975; (II Kapp. 722), available at: <http://www.koganlawgroup.com/uploads/hellgatetreaty.pdf>; https://www.fws.gov/pacific/ea/tribal/treaties/flatheads_1855.pdf.

and the Law of Administration.”⁹² In addition, the transfer of the appurtenant water right to the Tribal Water Right “does not shield the underlying right from abandonment based on acts or omissions of the holder of that water right prior to its acquisition by the Tribes.”⁹³

h. *Sections 5(c) and (e) of S.3013 – USG to Hold Tribal Water Right in Trust; Tribes’ Right to Lease Tribal Water Right*

Section 5(c) of the Tester bill provides that the Tribal Water Right, as outlined above in Sections 2a.-2f of this memorandum, “(1) shall be held in trust by the United States for the use and benefit of the Tribes and allottees in accordance with this Act; and (2) shall not be subject to loss through nonuse, forfeiture or abandonment, or other operation of law.”⁹⁴

Section 5(e) of the Tester bill authorizes the Tribes to lease the Tribal Water Right for any on-Reservation or off-Reservation use consistent with the Compact, the Law of Administration, the Act and/or applicable federal law.⁹⁵ Section 3(17) of the Tester bill and Section 45 of SB 262 define the “Law of Administration” synonymous with the “Unitary Administration and Management Ordinance” – i.e., as “the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation, that are both materially consistent with the substantive provisions of Appendix 4.”⁹⁶

i. *The CSKT’s July 2015 Filing of the Tribal Water Right With the Montana Water Court*

As the Montana Department of Natural Resources & Conservation website indicates, following enactment of SB 262 on April 24, 2015,

“[...] the United States and the Confederated Salish and Kootenai Tribes have filed separate and independent claims for water rights for the Tribes in Montana’s general stream adjudication. The United States and CSKT filings each claim on-reservation and off-reservation water rights. In addition, both filed claims to water rights for the Flathead Indian Irrigation Project.”⁹⁷

This website also indicates that the Tribes and the USG had “petitioned the Montana Water Court to stay all proceedings on these recently filed claims, including claims examination, while efforts to ratify the CSKT-Montana Compact move forward at the federal and tribal levels.”⁹⁸ Furthermore, the website indicates that these Parties will dismiss their recently filed claims “if

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See S.3013, *supra* at Section 5(c)(1)-(2).

⁹⁵ *Id.*, at Section 5(e)(1)-(2). (The Tribes may lease the Tribal Water Right for use on the Reservation so long as such use is consistent also with “the law of administration, this Act, and applicable Federal law.” *Id.*, at Section 5(e)(1).

⁹⁶ See The State of Montana, *Senate Bill No. 262, supra* at Article II, Section 45.

⁹⁷ See The Montana Department of Natural Resources & Conservation, *CSKT Claim Filing Information*, available at: <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes/cskt-claim-filing-information>.

⁹⁸ *Id.*

the Compact is finally decreed by the Water Court.”⁹⁹ If Congress ultimately ratifies the CSKT Water Compact, the Tribes’ filed water claims which reflect the more limited “Tribal Water Right” described above in Section II.2 of this memorandum will comprise approximately 1/5 of the State of Montana’s instream flows.¹⁰⁰ If Congress does not ultimately ratify the CSKT Water Compact, the Tribes’ more expansive water claims, largely unopposed by irrigators, could potentially comprise nearly 2/3 of the State of Montana’s instream flows.¹⁰¹

j. Montana Water Court Will No Longer Adjudicate Opposed Tribal and Non-Tribal Federal and State On-Reservation Water Rights

Article II, Section 34 and Article IV.I of SB262 provide for the establishment of a Flathead Reservation Water Management Board “to administer the use of all water rights on the Reservation as upon the Compact’s Effective Date.”¹⁰² As the Preamble to SB 262 states, the newly created Water Board will be “composed of Tribal and State appointed representatives”¹⁰³ who do not necessarily represent the interests of Reservation-based irrigators, business owners or landowners.

Article IV.I.1, furthermore, provides that the Board “shall be the exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses.”¹⁰⁴ The Water Board “shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact on the Reservation, and any controversy over the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation, except as explicitly provided otherwise in Article IV.G.5.”¹⁰⁵ However, the Water Board’s jurisdiction “does not extend to any water rights whose place of use is located outside the exterior boundaries of the Reservation.”¹⁰⁶

The CSKT Water Compact’s grant of such broad jurisdiction to the Water Board to adjudicate state and federal water rights on the Flathead Reservation that otherwise would be adjudicated by the Montana Water Court under 85-2-701(1), MCA,¹⁰⁷ consistent with the McCarren Amendment (43 U.S.C. § 666). As the Legal Services Office of the Montana Legislative Services Division of the Montana Legislature has correctly explained,

⁹⁹ *Id.*

¹⁰⁰ See CSKT Legal Department, *Basins in the Confederated Salish and Kootenai Tribes - Montana Compact* (July 1, 2015), available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/basins_in_compact.pdf.

¹⁰¹ See CSKT Legal Department, *Basins in Which the Confederated Salish and Kootenai Tribes Have Filed Water Rights Claims* (June 25, 2015), available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/basins_with_claims.pdf.

¹⁰² See The State of Montana, *Senate Bill No. 262*, *supra* at Articles II, Section 34; IV.I.

¹⁰³ *Id.*, at Preamble, Final Clause.

¹⁰⁴ *Id.*, at Article IV.I.1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See also Montana Code Annotated 2015, *Table of Contents, Title 85, Chapter 2, Part 7 - Indian and Federal Water Rights -- Water Rights Within Indian Reservations*, available at: http://leg.mt.gov/bills/mca_toc/85_2_7.htm.

“The McCarran Amendment provides, in pertinent part, that the United States may be joined as a defendant in any suit: ‘(1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.’”¹⁰⁸

The Montana Legislative Services Division also correctly concluded that, not only has “the United States Supreme Court extended the application of the McCarran Amendment to Indian water rights held in trust by the United States,” but also that “the Montana Supreme Court has recognized the existence of Indian reserved water rights and has confirmed the Montana Water Court’s authority to adjudicate both federal and Indian reserved water rights under the Montana Water Use Act.”¹⁰⁹ The Montana Legislative Services Division, however, has incorrectly summarized the water law in the West since 1998, and has intentionally omitted discussion regarding how western water remains in flux over the federal reserved rights doctrine, a subject matter that goes well beyond the scope of this memorandum.

The effective replacement of Montana Water Court jurisdiction over opposing on-Reservation water right claims is arguably inconsistent with the McCarran Amendment and the Montana Constitution to the extent the “unified proceedings” provided by the Water Board are presided over by politicians¹¹⁰ rather than by water right-competent lawyers, thereby denying non-tribal Reservation irrigators their “day in court,” and consequently, their Fifth Amendment right to due process of law.

3. Section 11 – Confirmation of Added Tribal Instream Flow Water Rights in Federal Forest and National Park Lands:

a. *Tester Bill S.3013 Would Provide Tribes Water Rights in Four National Forests in and Surrounding Flathead Reservation*

Section 11(a) of S.3013 provides for the confirmation of what would seem to be additional CSKT Instream Flow water rights in waters flowing in or through National Forest and National Park Lands identified in Section 11(b)(1)-(5), which apparently are not included within the Tribal instream flow rights described above.

Section 11(b) of S.3013 identifies 4 National Forests in which such Tribal Instream Flow Rights reside: “(1) Bitterroot National Forest”¹¹¹ (falling within Basin 76H for which the Tribes possess

¹⁰⁸ See Montana Legislative Services Division Legal Services Office, *Responses to Legal Questions Submitted by Representatives Ballance and Regier Regarding the Proposed Water Compact with the Confederated Salish & Kootenai Tribes* (Aug. 22, 2014), at p. 20, available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/wpic-cskt-thigpen_review.pdf (referencing and quoting 43 U.S.C. § 666(a)).

¹⁰⁹ *Id.*, at p. 21.

¹¹⁰ See The State of Montana, *Senate Bill No. 262*, *supra* at Article IV.I.2 (setting forth the appointed membership of the Flathead Reservation Water Management Board).

¹¹¹ See S.3013, *supra* at Section 11(b)(1).

only storage rights pursuant to Article III.D.6 of SB 262);¹¹² “(2) Flathead National Forest”¹¹³ (falling within Basin 76J where the Tribes have relinquished their exercise of the Tribal Water Right to make a call against water located in Basin 76J,¹¹⁴ and falling within Basin 76K in which the CSKT otherwise have instream flow rights);¹¹⁵ “(3) Kootenai National Forest”¹¹⁶ (falling within Basin 76D in which the CSKT have instream flow rights);¹¹⁷ and “(4) Lolo National Forest”¹¹⁸ (falling within Basin 76M in which the CSKT have instream flow rights).¹¹⁹

- b. *Daines Senate Bill (S.3014), Westerman House Bill (H.R.2647) and Roberts Bill (S.3085) Would Provide Tribes Management Contract Rights in Four National Forests in and Surrounding Flathead Reservation*

The Bitterroot, Flathead, Kootenai and Lolo National Forests that are part of and/or surrounding the Flathead Indian Reservation would seem to be covered by Senator Daines’ “*Tribal Forestry Participation and Protection Act of 2016*” (S.3014),¹²⁰ Congressman Westerman’s “*Resilient Federal Forests Act of 2015*” (H.R.2647),¹²¹ and Senator Roberts’ “*Emergency Wildfire and Forest Management Act of 2016*.”¹²²

Section 3(a) of S.3014, Section 702 of H.R.2647, and Section 502 of S.3085 would each, if enacted, amend Section 305 the *Indian Forest Resources Management Act* (25 U.S.C. 3104) to treat “Federal forest land” as “Indian forest land for purposes of planning and conducting management activities.”¹²³ Each of these bills defines “Federal forest land” as including both “National Forest System Land” and “Public Lands.”¹²⁴

Granted, S.3014, unlike H.R.2647 and S.3085, states that U.S. federal agencies would retain ownership of national forest lands eligible for tribal management,¹²⁵ all three bills would provide

¹¹² See The State of Montana, *Senate Bill No. 262, supra* at Article III.D.6 (“6. Contract Rights to Stored Water Held by MFWP in Basin 76H (Bitterroot)”).

¹¹³ See S.3013, *supra* at Section 11(b)(2).

¹¹⁴ See The State of Montana, *Senate Bill No. 262, supra* at Article III.D.4.

¹¹⁵ *Id.*, at Article III.D.2.

¹¹⁶ See S.3013, *supra* at Section 11(b)(3).

¹¹⁷ See The State of Montana, *Senate Bill No. 262, supra* at Article III.D.1.

¹¹⁸ See S.3013, *supra* at Section 11(b)(4).

¹¹⁹ See The State of Montana, *Senate Bill No. 262, supra* at Article III.D.3.

¹²⁰ See S.3014, *supra*.

¹²¹ See H.R.2647, *supra*.

¹²² See S.3085, *supra*.

¹²³ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(3)(A)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)). See also S.3085 *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)(A)).

¹²⁴ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(2)(A)(i)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(4)(A)). See also S.3085 *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(1)(A)).

¹²⁵ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(3)(B)(ii)).

Montana's citizens with continued public and recreational access to such Federal forest lands,¹²⁶ and would continue to entitle Montana's State and Local Governments to a continuing share of Forest land revenues.¹²⁷ The treatment of Federal forests as Indian forests would effectively provide the CSKT with *managerial authority and regulatory control* over these forest lands and appurtenant water resources. The Tribes, in turn, would be enabled to curtail irrigation-related water deliveries to the FIIP and surrounding non-FIIP farms and ranches on religious, cultural and environmental and wildlife grounds.

The Daines bill (S.3014), the Westerman bill (H.R.2647) and the Roberts bill (S.3085) each would enable the CSKT to treat Federal forest land as Indian forest land "if the Federal forest land is located within, or mostly within, a geographical area that presents a feature or involves circumstances principally relevant to that Indian tribe."¹²⁸ Such circumstances may include: 1) a treaty or other agreement with the CSKT (e.g., the Hellgate Treaty of 1855¹²⁹) that previously ceded these forest lands to the U.S. Government;¹³⁰ 2) if these forest lands are located within the boundaries of the current or former Flathead Reservation;¹³¹ or 3) a prior adjudication by the Indian Claims Commission or a Federal court that these forest lands comprise part of the CSKT's *tribal homeland*.¹³²

c. *Tester Bill (S.3013) Would Provide Tribes Water Rights in National Bison Range and Adjacent Waterfowl Production Areas*

¹²⁶ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(4)(A)). See also H.R.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new at Section (c)(2)(A)).

¹²⁷ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(4)(B)). See also H.R.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section (c)(2)(B)). See also S.3085, *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new at Section (c)(3)(B)).

¹²⁸ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(3)(A)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(1)). See also S.3085, *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)(B)).

¹²⁹ See Hellgate Treaty of July 16, 1855, 12 Stat. 975 (II Kapp. 722), *supra*.

¹³⁰ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Sections c(3)(A)(i)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(1)). See also S.3085, *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)(B)(i)).

¹³¹ See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(3)(A)(ii)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(1)). See also S.3085, *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)(B)(ii)).

¹³² See S.3014, *supra* at Section 3(a) (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(3)(A)(iii)). See also HR.2647, *supra* at Section 702 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(1)). See also S.3085, *supra* at Section 502 (amending Section 305 of the National Indian Forest Resources Management Act (25 U.S.C. 3104) to add new Section c(2)(B)(iii)).

Moreover, Section 11(b)(5) of S.3013 (Tester bill) confirms the Tribal Instream Flow Right in “the National Bison Range Complex and affiliated Waterfowl Production Areas.”¹³³ The CSKT’s involvement with the management of the National Bison Range (“NBR”) on behalf of the U.S. Fish & Wildlife Service (“FWS”) has been controversial since at least 2006. As reported by the Public Employees for Environmental Responsibility (“PEER”), it resulted in the agency’s issuance and cancellation of a prior 638 NBR management contract and in the Tribes’ unsuccessful subsequent efforts to secure new 638 NBR management contracts from the FWS.¹³⁴

S.3013 Section 11(b)(5)’s confirmation of the Tribal Instream Flow Right in the National Bison Range and associated Waterfowl Production Areas would seem to reaffirm the National Bison Range Compact entered into between the State of Montana and the United States in 2009 for the purpose of settling related federal reserved water rights claims, as reflected in Section 85-20-1601 of the Montana Code Annotated.¹³⁵ Article III of the NBR Compact recognized federal reserved water rights bearing a priority date of May 23, 1908 (the date the NBR was created¹³⁶) for: 1) consumptive and non-consumptive uses for wildlife purposes; 2) current and future consumptive and non-consumptive uses for administrative purposes; and 3) non-consumptive use of water for emergency fire suppression.¹³⁷

Perhaps, it is such *federal reserved water rights* that the CSKT hope to assume once NBR *lands* have been placed into federal trust for the benefit of the Tribes. Indeed, if nothing else, Section 11(b)(5) of S.3013 reaffirms the contents of February 5, 2016 emails dispatched by U.S. Fish & Wildlife Service officials reflecting that the FWS had then “entered the first stage of negotiations to cede control of the National Bison Range to the Confederated Salish and Kootenai Tribes.”¹³⁸ According to the media, “[t]he agency-wide messages, sent by both FWS Refuge Chief Cynthia Martinez and Mountain Prairie Regional Director Noreen Walsh, explain[ed] that talks ha[d] begun about drafting ‘legislation that would transfer *the lands* comprising the National Bison Range in Montana to be held in trust by the United States for the benefit of the CSKT’”

¹³³ See S.3013, *supra* at Section 11(b)(5).

¹³⁴ The CSKT had previously, during 2006, entered into a ‘638 contract’ with DOI/FWS to manage the National Bison Range located mostly within the boundaries of the reservation, which the agency, unfortunately, terminated in 2010 because of alleged mismanagement. Despite this setback, the CSKT Tribal Council, in 2012, again pursued efforts to secure new ‘638 contracts’ with DOI-FWS. However, it was subsequently reported, in 2014, that the provisions of advance funding agreements subsidizing these activities suffered ongoing flaws that inter alia denied the public access under FOIA to financial and other records maintained by the Tribes and their subcontractors. In 2014, the Tribes sought, once again, to negotiate management of the National Bison Range. This renewed effort also has been portrayed by the media as suffering similar flaws. See, e.g., Public Employees for Environmental Responsibility (PEER), *New Bison Range-Tribal Pact Vulnerable to Legal Challenge: Latest Version Does Not Cure Earlier Violations While Creating New Ones*, Press Release (Sept. 17, 2014), available at: <https://www.peer.org/news/news-releases/new-bison-range-tribal-pact-vulnerable-to-legal-challenge.html>.

¹³⁵ See Montana Code Annotated, Section 85-20-1601, available at: <http://leg.mt.gov/bills/mca/85/20/85-20-1601.htm>.

¹³⁶ *Id.*, at Article III.A.

¹³⁷ *Id.*, at Article III.B(1)-(3).

¹³⁸ See Tristan Scott, *FWS Considering Transfer of National Bison Range to Tribes*, Flathead Beacon (Feb. 16, 2016), available at: <http://flatheadbeacon.com/2016/02/16/fws-considering-transfer-of-national-bison-range-to-tribes/>.

(emphasis added).¹³⁹ In May 2016, PEER had filed a lawsuit intended to derail this lands transfer proposal.¹⁴⁰

During early June 2016, the media reported that the CSKT had drafted proposed legislation, not yet introduced in the U.S. Senate, to provide for title transfer of the Bison Range to the federal Indian trust for the benefit of the Tribes.¹⁴¹ Bearing the short title, “*The National Bison Range and Restoration Act of 2016*,” the stated purpose of the bill is “To restore *the lands* of the National Bison Range to federal trust ownership for the benefit of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, and related purposes” (emphasis added).¹⁴²

4. Section 7 – Development of Hydroelectric Power:

As noted above in Section 2 of this memorandum, SB 262 effectively defines the Tribal Water Right as including the exercise of time immemorial water rights necessary to operate hydroelectric dams already existing on the Flathead Reservation, including the Boulder Creek Hydroelectric Project,¹⁴³ the Hellroaring Hydroelectric Project¹⁴⁴ and the Federal Energy Regulatory Commission (“FERC”)-licensed Kerr Hydroelectric Project.¹⁴⁵

Article V.C.1 of SB 262 is more expansive. It enables the Tribes to take any action necessary “to protect any interests in Water Rights Arising Under State Law that the Tribes may acquire or seek to acquire *and which are associated with* [...] *any other hydroelectric facility located on the Reservation subject to FERC jurisdiction*” (emphasis added).¹⁴⁶ Presumably, these actions may include *further development* of such facilities. This would make sense considering that Lake County, Montana’s 2012 Predisaster Mitigation Plan lists 11 dams located on the Reservation that could potentially be further developed to generate hydroelectric power.¹⁴⁷ Flathead County, Montana’s 2008 Predisaster Mitigation Plan lists an additional 13 or 14 dams located on the Reservation that could potentially be further developed to generate hydroelectric power.¹⁴⁸

¹³⁹ See Tristan Scott, *FWS Considering Transfer of National Bison Range to Tribes*, Flathead Beacon (Feb. 16, 2016), available at: <http://flatheadbeacon.com/2016/02/16/fws-considering-transfer-of-national-bison-range-to-tribes/>.

¹⁴⁰ See Vince Devlin, *Tribes Take Issue With PEER, Bison Range Lawsuit*, Missoulian (May 29, 2016), available at: http://missoulian.com/news/local/tribes-take-issue-with-peer-bison-range-lawsuit/article_b2851ae1-93a3-5377-b349-92dc25a489c8.html.

¹⁴¹ See Vince Devlin, *Tribes Draft Proposed Legislation for Transfer of National Bison Range*, Missoulian (June 10, 2016), available at: http://missoulian.com/news/state-and-regional/tribes-draft-proposed-legislation-for-transfer-of-national-bison-range/article_d6b3e294-f4b6-5240-ad23-17cbe0464784.html. See also Tristan Scott, *CSKT Bison Range Transfer Receives Strong Reception*, Flathead Beacon (July 16, 2016), available at: <http://flatheadbeacon.com/2016/07/16/cskt-bison-range-transfer-receives-strong-reception/>.

¹⁴² See *The National Bison Range and Restoration Act of 2016*, available at: http://www.peer.org/assets/docs/6_29_16_CSKT-Draft-NBR-Bill.pdf.

¹⁴³ *Id.*, at Article III.C.1.i.

¹⁴⁴ *Id.*, at Article III.C.1.j.

¹⁴⁵ *Id.*, at Article V.C.1.

¹⁴⁶ *Id.*

¹⁴⁷ See Tetra Tech, *Pre-Disaster Mitigation Plan, Lake County, Montana* (Aug. 2012), at Table 4.11-1, p. 4-68, available at: http://www.lakemt.gov/pdf/Lake_PDM%20Plan_Final.pdf.

¹⁴⁸ See Hydrometrics, Inc., *Flathead County Montana Pre-Disaster Mitigation Plan*, Flathead County Office of Emergency Services (May 2008), at Figure 3-3, p. 3-16, and Table 3-24, p. 3-26, available at: <http://flathead.mt.gov/oes/documents/2008FlatheadPDMPlan.pdf>.

Section 7(b) of S.3013, by comparison, bestows upon the Tribes “the exclusive right to develop and market *any* hydroelectric power generation project on bodies of water within the Reservation” (emphasis added).¹⁴⁹ The Bureau of Reclamation shall assist the Tribes in any such development,¹⁵⁰ provided the Tribes satisfy all Bureau of Reclamation dam design, construction and operation standards and their hydropower development activities do not otherwise interfere with or impair the efficiencies of any Reclamation or Bureau of Indian Affairs project.¹⁵¹ Section 7(f) of S.3013 enables the Tribes to “collect and retain *any revenue from the sale* of hydroelectric power generated by a hydroelectric power generation project under this section” (emphasis added), the receipt and expenditure of which Section 7(g) of the Tester bill absolves the U.S. government from liability.¹⁵²

In sum, since Section 7(a) of the Tester bill does not limit the definition of the term “development, when applied to hydroelectric dams, to only *new* development, it is more than possible that the Tester bill actually focuses on, but also goes beyond, the dams already existing on the Reservation that SB 262 addresses.

5. Section 8 – Irrigation Activities:

Section 8 of S3013 is devoted to explaining how the Bureau of Reclamation will rehabilitate and modernize the Flathead Indian Irrigation Project (“FIIP”) to mitigate its impacts on the Reservation environment. However, nowhere does Section 8 state that such activities must be consistent with the CSKT Water Compact and/or SB 262.

a. *SB 262 & S.3013 – Flathead Indian Irrigation Project Defined*

SB 262 and S.3013 broadly define the scope and extent of the Flathead Indian Irrigation Project in a similar manner.

i. SB 262

Article II, Section 30 of SB 262 defines the term “Flathead Indian Irrigation Project” (“FIIP”) as “the irrigation project developed by the United States to irrigate lands within the Reservation pursuant to the Act of April 23, 1904, Public Law 58-159, 33 Stat. 302 (1904), and the Act of May 29, 1908, Public Law 60-156, 35 Stat. 441 (1908).”¹⁵³ The FIIP “includes, but is not limited to, all lands, reservoirs, easements, rights-of-way, canals, ditches, laterals, or any other FIIP facilities (whether situated on or off the Reservation), headgates, pipelines, pumps, buildings, heavy equipment, vehicles, supplies, records or copies of records and all other physical, tangible objects, whether of real or personal property, used in the management and operation of the FIIP.”¹⁵⁴

¹⁴⁹ See S.3013, *supra* at Section 7(b).

¹⁵⁰ *Id.*, at Section 7(c).

¹⁵¹ *Id.*, at Section 7(d).

¹⁵² *Id.*, at Section 7(g)(1)-(2).

¹⁵³ See The State of Montana, *Senate Bill No. 262*, *supra* at Article II, Section 30.

¹⁵⁴ *Id.*

ii. S.3013

Section 10(A) of S.3013 similarly defines the term “Flathead Indian Irrigation Project” (“FIIP”) as “the irrigation project developed by the United States to irrigate land within the Reservation pursuant to (i) the Act of April 23, 1904 (33 Stat. 302, chapter 1495); and (ii) the Act of May 29, 1908 (35 Stat. 444, chapter 216).”¹⁵⁵ Section 10(B) of S.3013 similarly defines the FIIP as including “(i) all land and any reservoir, easement, right-of-way, canal, ditch, lateral, and any other facility of the Flathead Indian irrigation project (whether located on or off the Reservation), and (ii) any headgate, pipeline, pump, building, heavy equipment, vehicle, supplies, record, copy of a record, and any other physical, tangible object (whether of real or personal property) used in the management and operation of the Flathead Indian irrigation project.”¹⁵⁶

b. *SB262 – FIIP Operational Improvements, Adaptive Management, Rehabilitation & Betterment*

The following discussion highlights the differences in terminology used in SB 262 and S.3013 to describe essentially the same activities. However, while SB 262 focuses on the primary role of the Project Operator to undertake FIIP Operational Improvements, Adaptive Management, Rehabilitation and Betterment activities, S.3013 focuses instead on the primary role of the Bureau of Reclamation to perform such services.

i. The Establishment of the CITT to Advise the Project Operator Re FIIP Operational Improvements, Rehabilitation and Betterment and Adaptive Management

Article II, Section 55 of SB 262 defines the term “Project Operator” as “the entity with the legal authority and responsibility to operate Flathead Indian Irrigation Project.”¹⁵⁷ “The BIA [*Bureau of Indian Affairs*] reassumed Management and Operation of FIIP in April 2014” (emphasis added).¹⁵⁸

Article IV.G of SB 262 directs the Compact Parties to “establish a Compact Implementation Technical Team (CITT) to allow planning for and implementation of Operational Improvements, Rehabilitation and Betterment, and Adaptive Management [...w]ithin six months of the date the ratification of the Compact by the Montana Legislature takes effect under State law.”¹⁵⁹ The CITT shall be established “prior to and following the Effective Date.”¹⁶⁰

Article II, Section 24 of SB 262 defines the term “Compact Implementation Technical Team” or “CITT” as “the entity established by this Compact to plan and advise the Project Operator on the

¹⁵⁵ See S.3013, *supra* at Section 10(A).

¹⁵⁶ *Id.*, at Section 10(B)(i)-(ii).

¹⁵⁷ *Id.*, at Article II, Section 55.

¹⁵⁸ See U.S. Department of Interior Bureau of Indian Affairs, *Notice of Proposed Rate Adjustments for Indian Irrigation Projects* (June 11, 2015), 80 FR 33279, 33285 at Note #1, available at: <http://bia.gov/cs/groups/xraca/documents/text/idc1-030578.pdf>.

¹⁵⁹ See The State of Montana, *Senate Bill No. 262*, *supra* at Article IV.G.

¹⁶⁰ *Id.*

implementation of FIIP Operational Improvements, Rehabilitation and Betterment, and Adaptive Management.”¹⁶¹

ii. Operational Improvements Defined

Article II, Section 52 of SB 262 defines the term “Operational Improvements” as “practices that improve the ability of the Project Operator to plan for and manage water storage and allocation between Instream Flows and FIIP Water Use Rights.”¹⁶² They “address water supply planning, reservoir management, Instream Flow management, water accounting and reporting, Stock Water delivery, irrigation wastewater, measurement at diversion works, water measurement at farm delivery locations, and water measurement at irrigation wasteways.”¹⁶³ They are listed in Appendix 3.4 accompanying the CSKT Water Compact.¹⁶⁴

iii. Rehabilitation and Betterment Defined

Article II, Section 57 of SB 262 defines the terms “Rehabilitation” and “Betterment,” as “irrigation facility upgrades that improve water management and operational control at irrigation diversion works, and irrigation facility upgrades to reduce losses in conveyance of water from irrigation sources of supply to irrigation points of use.”¹⁶⁵ It also defines “Rehabilitation” and “Betterment” as actions that “include, but are not limited to, reconstruction, replacement, and automation at irrigation diversion works; lining of open canals; and placement of open canals in pipe.”¹⁶⁶

iv. Adaptive Management Defined

Article II, Section 2 of SB 262 defines the term “Adaptive Management” as an ongoing process of decision-making, based on water measurement and accounting designed to continuously manage and improve the allocation of water between Instream Flows, Minimum Reservoir Pool Elevations, and FIIP Water Use Rights pursuant to the Adaptive Management Appendix 3.5.”¹⁶⁷

Article IV.G of SB 262 also directs the CITT to “carry out the duties specified by Appendix 3.5.”¹⁶⁸ Section 1.f of Appendix 3.5 of SB 262 defines the term “Adaptive Management” as involving certain activities “which include Operational Improvements to be implemented according to the schedule set forth in Appendix 3.4.”¹⁶⁹ Adaptive Management includes the following Rehabilitation and Betterment-related activities: “vi[)] Prioritization of Operational

¹⁶¹ See The State of Montana, *Senate Bill No. 262*, *supra* at Article II, Section 24.

¹⁶² *Id.*, at Article II, Section 52.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*, at Article II, Section 57.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, at Article II, Section 2.

¹⁶⁸ *Id.*, at Article IV.G.2.

¹⁶⁹ See Appendix 3.5: Adaptive Management & CITT, to The State of Montana, *Senate Bill 262* (Jan. 12, 2015), available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2015-appendix_3-5_am_citt_2015-01-12.pdf. See also Appendix 3.4: Implementation Schedule, to The State of Montana, *Senate Bill 262* (Jan. 12, 2015), available at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/appendix_3-4-implementation-schedule.pdf.

Improvements and Rehabilitation and Betterment Projects; vii[] Quantification and apportionment of Reallocated Water following completion of Rehabilitation and Betterment actions; [...] ix[]) Advising the Project Operator regarding the implementation of Operational Improvements, Rehabilitation and Better, and Adaptive Management.”¹⁷⁰

- v. State Funding of Compact Implementation; Federal Funding of FIIP Operational Improvements, Rehabilitation and Betterment, and Adaptive Management Activities

Article VI.A of SB 262 provides that “the State contribution to settlement shall be \$55 million.”¹⁷¹ Article VI.A.1 allocates the \$55 million State contribution between the following activities: water measurement, on-farm efficiency improvements, stock water delivery loss mitigation, pumping cost offsets, and aquatic and terrestrial habitat enhancement.¹⁷² Article VI.B indicates that the Parties will negotiate the Federal contribution to Compact implementation which will be reflected in Federal legislation.¹⁷³

- c. S.3013 – *FIIP Rehabilitation and Modernization; Mitigation of FIIP Environmental Effects*

To recall, SB 262 places the responsibility for FIIP Rehabilitation and Betterment and Operational Improvements upon the BIA, the Project Operator. By comparison, Sections 8(a)(1)-(3) and 8(a)(5) of S.3013 provide that “*the Bureau of Reclamation* shall serve as the lead agency with respect to [...] rehabilitation[,...] modernization[,...and] mitigation [...] activities [...] related to the Flathead Irrigation Project (emphasis added).”¹⁷⁴

- i. Rehabilitation & Modernization Activities

Section 8(a)(1)(A) of S.3013 describes “rehabilitation activities” as entailing “rehabilitation of structures, canals, and pumping facilities, including dam safety improvements, irrigation facility upgrades that improve water management and operational control at irrigation diversion works, and irrigation facility upgrades to reduce losses in conveyance of water from irrigation sources of supply to irrigation points of use.”¹⁷⁵ Section 8(a)(1)(B) of S.3013 provides that “rehabilitation activities” “include reconstruction, replacement, and automation at irrigation diversion works, lining of open canals, and placement of open canals in pipe.”¹⁷⁶

Section 8(a)(2) of S.3013 describes “modernization activities” as “including the planning, design, and construction of additional pumping facilities and operational improvements to infrastructure within the distribution network of the Flathead Indian irrigation project.”¹⁷⁷ Section 8(a)(3) describes “mitigation activities” as entailing the “[m]itigation, reclamation, and

¹⁷⁰ *Id.*, at Sections 1.f.vi, 1.f.vii and 1.f.ix.

¹⁷¹ See The State of Montana, *Senate Bill No. 262*, *supra* at Article VI.A.

¹⁷² *Id.*, at Article VI.A.1.

¹⁷³ *Id.*, at Article VI.B.

¹⁷⁴ See S.3013, *supra* at Sections 8(a)(1)-(3) and 8(a)(5).

¹⁷⁵ *Id.*, at Section 8(a)(1)(A).

¹⁷⁶ *Id.*, at Section 8(a)(1)(B).

¹⁷⁷ *Id.*, at Section 8(a)(2).

restoration of streams, wetlands, banks, slopes, and wasteways within, appurtenant to, or affected by the Flathead Indian irrigation project.”¹⁷⁸

Section 8(b)(1)(A)(i)-(ii) states that “the scope of rehabilitation activities shall be as generally described in the document entitled ‘*Engineering Evaluation and Condition Assessment: Flathead Indian Irrigation Project*,’ prepared by HKM Engineering for the Bureau of Indian Affairs, Division of Irrigation, Power, and Safety of Dams, and dated March 2008 [...] and the document entitled ‘*Update Engineering Evaluation of Existing Conditions: Flathead Agency Irrigation Division (FAID)*,’ prepared by HKM Engineering for the Confederated Salish and Kootenai Tribes, and dated July 2005.”¹⁷⁹

What is immediately apparent is that these two referenced HKM reports are NOT publicly available. Indeed, the first such report actually released in July 2005, has been referenced in other documents, including a February 2006 GAO report on the state of disrepair at federal irrigation projects,¹⁸⁰ and a November 2008 HKM report on the cooperative management entity’s plan of operations following transfer of FIIP operations & maintenance (“O&M”) responsibilities to non-Indian irrigators.¹⁸¹ The second such report was a 2008 update and revision of the 2005 report. It was referenced within the BIA’s March 2010 Final Finding of No Significant Impact (“FONSI”) for the transfer of FIIP O&M responsibilities to the non-Indian irrigators.¹⁸² As the FONSI described, the purpose of the 2005 HKM engineering evaluation report was

“to evaluate the existing operations and management and physical conditions of the FIIP. The report provides baseline information used to draw conclusions regarding the effectiveness of existing operations and management and to provide recommendations for improvements following transfer of the operation and maintenance of the project. The majority of the field work was completed in two phases [...]. Phase One consisted primarily of an evaluation

¹⁷⁸ *Id.*, at Section 8(a)(3).

¹⁷⁹ *Id.*, at Section 8(b)(1)(A)(i)-(ii).

¹⁸⁰ See United States Government Accountability Office, *Indian Irrigation Projects: Numerous Issues Need to Be Addressed to Improve Project Management and Financial Sustainability* (GAO-06-314) (Feb. 2006) at pp. 19-20, fn #10, available at: <http://www.gao.gov/assets/250/249094.pdf> (describing how the first “condition assessment [...] to identify deferred maintenance needs and costs [...] was completed for the Flathead Irrigation Project in July 2005,” and referencing the “condition assessment, entitled *Final Report: Engineering Evaluation of Existing Conditions, Flathead Agency Irrigation Division (FAID)* [which] was prepared by HKM Engineering for the Confederated Salish and Kootenai Tribes.”).

¹⁸¹ See HKM, *Flathead Indian Irrigation Project Cooperative Management Entity, Plan of Operations* (Nov. 2008), at pp. 30, 35, 38 available at: https://projects.battelle.org/fiipea/CME_Plan_of_Operations.pdf (referencing the HKM 2005) Engineering Evaluation and Condition Assessment entitled, *Engineering Evaluation of Existing Conditions, Flathead Agency Irrigation Division* (July 2005) “completed for the FIIP Project [...] to determine the extent of needed rehabilitation (repair concrete, replace gates, repair erosion, reshape canals, line canals, etc...)).

¹⁸² See U.S. Department of the Interior Bureau of Indian Affairs, *Final Environmental Assessment for Operation and Maintenance of the Flathead Indian Irrigation Project Upon Transfer and Finding of No Significant Impact* (March 2010), at pp. 16, 36, 43, 46 available at: https://projects.battelle.org/fiipea/FIIP_EA_March_2010.pdf (referencing how the “current condition of the [FIIP] project is described in detail in a report prepared by HKM Engineering Inc. for the CSKT titled *Engineering Evaluation of Existing Conditions Flathead Agency Irrigation Division (FAID) Volumes I – V, Final Report* (HKM 2005, revised 2008) [...] briefly summarized [...] and [...] incorporated by reference in this final EA.”). *Id.*, at p. 16.

of the canal system itself and was completed during a period of active water distribution, so that operational deficiencies could more easily be observed. Phase Two of the field work focused on the evaluation of key structures, facilities, and canal linings at the end of the irrigation season, when there was little or no water in the canal system and the majority of the facilities could be visually inspected. A list of deficiencies was compiled for each key structure and lined canal section. Specific deficiencies that were identified include concrete spalling, break-up, cracking, exposed reinforcing bars, corrosion, deterioration, and structural failure. Some structures also had deficiencies associated with erosion, such as undermining, scour, or bank sloughing. Along with identifying and documenting these deficiencies, the report also estimated and documented remediation and/or replacement materials and quantities. These materials and their quantities were subsequently used to develop the remediation and replacement cost estimates for each structure.”¹⁸³

Section 8(b)(2)(A)(i)-(ii) of S.3013 indicates that the scope of “modernization activities” “shall be as generally described in the document entitled ‘*Flathead Indian Irrigation Project Modernization Plan*’ and prepared for the Bureau of Indian Affairs Division of Water; and the document entitled ‘Power by Irrigation Technology Research Center at the Department of Agricultural Engineering at California Polytechnic State University.’”¹⁸⁴ ***The first of these documents IS web-accessible.***¹⁸⁵

According to such study, the purpose of the FIIP Modernization Plan “is to examine [...the] lack of the proper physical infrastructure that is needed for good management, and the [l]ack of proper real-time information and data management that is needed for good management” of the Project.¹⁸⁶ The Modernization Plan priorities include “[m]odernizing aging, malfunctioning, or poorly configured infrastructure rather than simply replacing structures, [s]implifying operations to minimize overly complex management and/or decision-making[, and e]nhancing information management.”¹⁸⁷

ii. Mitigation, Reclamation & Restoration Activities

Section 8(b)(3)(A) of S.3013 indicates that “the scope of mitigation, reclamation and restoration” activities shall be as generally described in the document entitled ‘*Final Biological Assessment for Operation and Maintenance of the Flathead Indian Irrigation Project, Including Transfer*,’ prepared by the United States Department of the Interior, Bureau of Indian Affairs, and dated January 2008.”¹⁸⁸ This document ***IS web-accessible*** and was released in March 10, 2010.¹⁸⁹ As

¹⁸³ *Id.*, at pp. 16, 18.

¹⁸⁴ See S.3013, *supra* at Sections 8(b)(2)(A)(i)-(ii).

¹⁸⁵ See Irrigation Training & Research Center, California Polytechnic State University, *Flathead Indian Irrigation Project Overview*, prepared for the U.S. Department of Interior Bureau of Indian Affairs Division of Water and Power (April 2016), available at: http://cskt-montana-citt.org/wp-content/uploads/2016/06/fiip_modernization_plan.pdf.

¹⁸⁶ *Id.*, at pp. 1-2.

¹⁸⁷ *Id.*, at p. 2.

¹⁸⁸ See S.3013, *supra* at Sections 8(b)(3)(A).

this biological assessment (“BA”) indicates, “the ultimate [short term] objectives [included] improving water conservation and irrigation efficiencies, while continuing to enhance fisheries.”¹⁹⁰

The BA refers to the CME Plan of Operations as setting forth future long term goals and objectives for the FIIP.¹⁹¹ These goals and objectives entail “improvements [...] in: water measurement, water accounting/runoff forecasting, water distribution system management (reservoirs, pumping plants, diversion structures, canals, drains, return flows), water delivery and water use management, control of system losses (evaporation, seepage, waste, and spills), control of pool levels, water quality management and protection, instream flows and fisheries protection, and maintenance programs (for example, canal cleaning, access road construction or upgrades, and brush and tree clearing).”¹⁹² In addition, they engender “more detailed descriptions of water conservation and improved water delivery efficiencies based on possible changes in operations; utilization of an improved, state-of-the-art hydrologic model; continued fisheries protection and enhancement; and possible comprehensive rehabilitation or replacement of project facilities.”¹⁹³

Section 8(e)(2) of S.3013 requires non-Indian landowners to grant free of cost to the USG or the Tribes all easements and right-of-ways over their lands “as are necessary for the construction, rehabilitation, operation and maintenance of the FIIP or the Mission Valley Power Project.”¹⁹⁴ If such landowners refuse to grant such easements and right-of-ways, they may be denied water deliveries from the FIIP and/or electricity deliveries from MVP.¹⁹⁵

iii. S.3013 Federal Funding of FIIP Rehabilitation, Modernization, and Mitigation, Reclamation & Restoration Activities

Section 8(c)(1) of S.3013 provides that the Interior Secretary is authorized to incur up to \$1,519,408,000 (**\$1.519 billion**) in carrying out these objectives,¹⁹⁶ and to apportion that amount as follows for the following purposes: \$471,071,000 (\$471 million) for rehabilitation activities;¹⁹⁷ \$377,901,000 (\$377.9 million) for modernization activities;¹⁹⁸ and \$670,436,000 (\$670.4 million) for mitigation, reclamation and restoration activities.¹⁹⁹ Section 8(c)(2) confirms

¹⁸⁹ See U.S. Department of Interior Bureau of Indian Affairs, *Final Environmental Assessment for Operation and Maintenance of the Flathead Indian Irrigation Project upon Transfer and Finding of No Significant Impact* (March 2010), available at: https://projects.battelle.org/fiipea/FIIP_EA_March_2010.pdf.

¹⁹⁰ *Id.*, at p. 12.

¹⁹¹ See *Id.*, at p. 13. See also HKM, *Flathead Indian Irrigation Project Cooperative Management Entity, Plan of Operations* (Nov. 2008), *supra*.

¹⁹² See U.S. Department of Interior Bureau of Indian Affairs, *Final Environmental Assessment for Operation and Maintenance of the Flathead Indian Irrigation Project upon Transfer and Finding of No Significant Impact* (March 2010), *supra* at p. 13.

¹⁹³ *Id.*

¹⁹⁴ *Id.*, at Section 8(e)(2).

¹⁹⁵ *Id.* (“In partial consideration for construction relating to activities under subsection (a) and as a condition of receiving service from the Flathead Indian irrigation project or the Mission Valley Power Project, a landowner shall grant, at no cost [...]”) (emphasis added).

¹⁹⁶ See S.3013, *supra* at Section 8(c)(1).

¹⁹⁷ *Id.*, at Section 8(c)(1)(A) (referencing Section 8(a)(1)).

¹⁹⁸ *Id.*, at Section 8(c)(1)(B) (referencing Section 8(a)(2)).

¹⁹⁹ *Id.*, at Section 8(c)(1)(C) (referencing Section 8(a)(3)).

that ALL such costs shall be “**nonreimbursable**” to the Interior Secretary (i.e., they are free to the Tribes and the non-Indian irrigators.²⁰⁰ These federal funds will be disbursed only after the State of Montana has first made available (contributes) \$55,000,000 (\$55 million) to carry out such activities.²⁰¹

Section 8(d) of S.3013 directs the Interior Secretary to enter into an agreement with the CSKT for the operation and maintenance of the Flathead Indian Irrigation Project, in accordance with applicable law.²⁰² Section 8(g) of S.3013 directs the Interior Secretary, upon request from the Tribes, “to enter into one or more agreements with the Tribes in accordance with the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.)” for such purposes (i.e., “638 contracts”).²⁰³ Presumably, the funds the Interior Department will use to pay the Tribes for performing such 638 contract services will come from the \$1.519 billion the Tester bill has allocated to those tasks.

6. Sections 9 and 10 – CSKT Trust Fund and Non-Trust Fund Accounts:

a. *Section 9 – The Selis-Qlispe Ksanka (“SQK”) Settlement Trust Fund*

Section 9(a)(1) of S.3013 directs the Interior Secretary to establish, manage, invest and distribute the SQK trust fund account.²⁰⁴ Section 9(c) of S.3013 then directs the Interior Secretary to divide the SQK trust fund account into three separate sub-accounts into which the Secretary would place deposited funds to facilitate implementation of the settlement.²⁰⁵ Section 9(m) of S.3013 authorizes the Interior Secretary to make deposits into the SQK trust fund, allocated among the three sub-accounts in the following amounts: \$365,207,225 (\$365.2 million) into the Agriculture Development Account;²⁰⁶ \$93,633,566 (\$93.63 million) into the Economic Development Account;²⁰⁷ and \$233,361,200 (\$233.36 million) into the Community Development Account.²⁰⁸ The total authorized deposits equal \$692,201,991 (\$692.2 million).

Section 9(h) of S.3013 enables the Tribes to withdraw funds from any portion of the SQK trust fund²⁰⁹ for the purposes described in the Act, provided it is in accordance with the Tribes’ submitted expenditure plan²¹⁰ that the Interior Secretary has approved.²¹¹ Sections 9(i)(1)-(3) of S.3013 specifies the purposes for which CSKT trust fund withdrawals must be put, respectively,

²⁰⁰ *Id.*, at Section 8(c)(2).

²⁰¹ *Id.*, at Section 8(c)(3).

²⁰² *Id.*, at Section 8(d).

²⁰³ *Id.*, at Section 8(g).

²⁰⁴ *Id.*, at Section 9(a)(1).

²⁰⁵ *Id.*, at Section 9(c)(1)-(3).

²⁰⁶ *Id.*, at Section 9(m)(1)(A).

²⁰⁷ *Id.*, at Section 9(m)(1)(B).

²⁰⁸ *Id.*, at Section 9(m)(1)(C).

²⁰⁹ *Id.*, at Section 9(h)(1).

²¹⁰ *Id.*, at Sections 9(h)(1) and (3) (“An expenditure plan [...] shall include a description of the manner and purpose for which the amounts proposed to be withdrawn from the Trust Fund will be used by the Tribes.”) *Id.*, at Section 9(h)(3).

²¹¹ *Id.*, at Section 9(h)(1)-(2) and (4). (The Secretary must determine that the plan is reasonable and consistent with the purposes of the Act.) *Id.*, at Section 9(h)(4)(A).

for Agricultural Development,²¹² Economic Development²¹³ and Community Development²¹⁴ sub-accounts identified above.

Although Section 9(h)(5) of S.3013 authorizes the Secretary to employ judicial and administrative actions to enforce the Tribes' adherence to the approved expenditure plan(s),²¹⁵ the Secretary, nevertheless, possesses the discretion not to employ such remedies to enforce the CSKT's adherence to such plans. In other words, there is nothing to prevent the Tribes from misappropriating these funds for purposes unrelated to these objectives, including for purposes of enriching the private bank accounts of Tribal Council members at the expense of Flathead Irrigation Project farmers and ranchers as well as all other members of the Tribes who rarely, if ever, share in Tribal trust fund revenues.

b. *Section 10 – The Salish and Kootenai Non-Trust Compact Fund (“SKCF”)*

Section 10(a) of S.3013 directs the Interior Secretary to establish, manage and distribute the SKCF as a non-trust fund interest bearing account to carry out the purposes of the Act.²¹⁶ Section 10(b) of S.3013 then directs the Interior Secretary to divide the SKCF into two sub-accounts: the “Compact Implementation Account”²¹⁷ and the “Flathead Indian Irrigation Project Account.”²¹⁸ Section 10(c)(1)-(2) of S.3013 authorizes the Interior Secretary to make deposits into the SKCF non-trust account, allocated among the two sub-accounts in the following amounts:²¹⁹ \$116,209,294 (\$116.21 million) into the Compact Implementation Account;²²⁰ and \$1,519,408,000 (\$1.519.4 billion) into the Flathead Irrigation Project Account.²²¹ As discussed in Section 6.c.iii of this memorandum, the latter amount (\$1.519 billion) is to be used for the purposes described in Section 8(c)(1) of S.3013 – i.e., for FIIP rehabilitation, modernization, and mitigation, reclamation & restoration activities.

²¹² See *Id.*, at Section 9(i)(1) (Trust fund withdrawals from the Agricultural Development sub-account “shall be used: (A) to implement the tribal water right through rehabilitation and improvement of agricultural Indian land within the Reservation; (B) to construct and rehabilitate livestock fencing on Indian within the Reservation; (C) to mitigate and control noxious weeds on Indian land within the Reservation; (D) to plan, design and construct improvements to irrigation systems on Indian land served by the Flathead Indian irrigation project; (E) to plan, design and construct irrigation facilities on Indian land within the Reservation that is not served by the Flathead Indian irrigation project; and (F) to install screens, barriers, passages, or ladders to prevent fish entrainment in irrigation ditches and canals within the Reservation.”).

²¹³ See *Id.*, at Section 9(i)(2) (Trust fund withdrawals from the Economic Development Account “shall be used: (A) to implement the tribal water right; (B) to plan, design, construct, operate, maintain and replace community water distribution and wastewater treatment facilities on the Reservation; and (C) to develop geothermal water resources on Indian land within the Reservation.”).

²¹⁴ See *Id.*, at Section 9(i)(3)(A) (Trust fund withdrawals from the Community Development Account “shall be used to develop and establish community services, including education services and centers for native language and cultural education for children and adults on or near the Reservation.”).

²¹⁵ *Id.*, at Section 9(h)(5).

²¹⁶ *Id.*, at Section 10(a).

²¹⁷ *Id.*, at Section 10(b)(1).

²¹⁸ *Id.*, at Section 10(b)(2).

²¹⁹ *Id.*, at Section 10(f)(1).

²²⁰ *Id.*, at Section 10(f)(1)(A).

²²¹ *Id.*, at Section 10(f)(1)(B).

Based on Sections 9 and 10, the total price tag for S.3013 appears to be at least \$2,327,819,285 (\$2.328 billion).

III. Congressional Action Thus Far Taken on S.3013, S.3014, H.R.2647 and S.3085

1. The Tester Bill – S.3013:

Since its May 26, 2016 introduction in the U.S. Senate Committee on Indian Affairs, S.3013 was discussed in preliminary congressional hearings convened on June 29, 2016.²²² Among the relevant testimonies of “Panel 1” witnesses were those provided by CSKT Chairman, Vernon Finley and by Senior Counselor to the Deputy Secretary, U.S. Department of the Interior, Alleta Belin.²²³

a. *CSKT Tribal Chairman Vernon Finley Testimony*

Mr. Finley’s testimony emphasizes how the Tester bill “resolves existing and potential litigation involving thousands of litigants, [and] settles costly claims by the Tribes against the federal government and water users across roughly two-thirds of Montana...”²²⁴ It may be recalled, as discussed in Section II.2.i of this memorandum, that, on June 25, 2015, the CSKT had filed water claims with the Montana Water Court calling the water on approximately two-thirds (2/3) of Montana’s instream flows in the event the CSKT Water Compact wasn’t ratified by Congress.²²⁵

Finley’s testimony also emphasized how federal policy had “failed utterly to protect [the Tribes’] federally reserved water rights – instead diverting that water and seizing [Tribal] resources for the benefit of non-Indians.”²²⁶ In support of this statement, Finley testified how the Hellgate Treaty had “reserved ‘the exclusive right of taking fish in all the streams running through or bordering [...] the Flathead 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” (emphasis added).²²⁷

Finley also testified how Congress’ enactment of the 1904 Flathead Allotment Act²²⁸ had

²²² See United States Senate Committee on Indian Affairs, *Legislative Hearing to receive testimony on the following bills: S. 2796, S. 2959, & S.3013* (June 29, 2016), available at: <http://www.indian.senate.gov/hearing/legislative-hearing-receive-testimony-following-bills-s-2796-s-2959-s3013>.

²²³ *Id.*

²²⁴ See United States Senate Committee on Indian Affairs Legislative Hearing, *Testimony of Vernon Finley, Chairman, Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation on S.3013 – Salish Kootenai Tribal Water Rights Settlement Act of 2016*, 114th Cong., 2d Session (June 29, 2016) (“Finley Testimony”), at p. 1, available at: <http://www.indian.senate.gov/sites/default/files/upload/6.29.16%20Vernon%20Finley%20Testimony.pdf>.

²²⁵ See CSKT Legal Department, *Basins in Which the Confederated Salish and Kootenai Tribes Have Filed Water Rights Claims* (June 25, 2015), *supra*.

²²⁶ See Finley Testimony, *supra* at p. 2.

²²⁷ *Id.*, at p. 3.

²²⁸ See Flathead Allotment Act of 1904, ch. 1495, 33 Stat. 302 (April 23, 1904), available at: <http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/March-2014/1904->

“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 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.”²²⁹**

The language Finley employs in his recent testimony to describe the U.S. government’s use of the Flathead Irrigation Project “to provide water to, almost exclusively, the non-Indian homesteaders,” harkens back to the language the U.S. Court of Claims employed in its 1971 takings decision in *CSKT v. United States*.²³⁰ In that decision, the Court awarded the CSKT just compensation for the U.S. government’s 5th Amendment “taking” of Reservation lands under the 1904 Flathead Allotment Act. It reasoned that, pursuant to the 1904 Act,

“Congress provided, in authorizing the disposition of the tribal lands to homesteaders, *that the proceeds could be used for the benefit of non-Indians, i.e. through the irrigation project which was beneficial to white settlers as well as Indians. We agree with the trial commissioner that such diversion to others of the proceeds of the Indians’ land* was inconsistent with a good faith effort to give the Indians the full money value of their land, and that under the principles of *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 390 F.2d 686, 182 Ct.Cl. 543 (1968), *an eminent domain taking necessarily resulted*” (emphasis added).²³¹

Due to the Tribes’ persistence, the U.S. Court Claims awarded the CSKT \$6,066,668.78 as compensation for such taking. This amount reflected the difference between the fair market value, as of January 1, 1912, of \$7,410,000 and the \$1,343,331.22 amount realized (the USG paid) therefor under the 1904 Act. In addition, the Court assessed interest “at the rate of 5 percent per annum from January 1, 1912, to January 1, 1934, and at the rate of 4 percent per annum thereafter until paid.”²³² Ultimately, the amount of interest came to \$16,294,880.29, for a total award of \$22,361,549.07.²³³

[Flathead Allotment Act.pdf](#). See *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), at fn#3, available at: https://www.courtlistener.com/opinion/397447/confederated-salish-and-kootenai-tribes-of-the-flathead-reservation/?order_by=dateFiled+desc (“The Act of April 23, 1904, ch. 1495, 33 Stat. 302 [...] authorized allotments in severalty of Flathead Reservation land to members of the Tribes. The land remaining after allotment was to be made available by presidential proclamation to non-Indians. The Act was implemented by the Proclamation of May 22, 1909, 36 Stat. 2494, which—after a delay—became effective May 2, 1910.”)

²²⁹ See Finley Testimony, *supra* at pp 2-3.

²³⁰ See *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (Ct. Cl. 1971), available at: <http://openjurist.org/437/f2d/458/confederated-salish-and-kootenai-tribes-of-flathead-reservation-montana-v-united-states> (referencing the Act of April 23, 1904, 33 Stat. 302, 3 Kapp. 79).

²³¹ *Id.*, at para. 3.

²³² *Id.*, at paras. 6 and 79.

²³³ See Morisset, Schlosser, Jozwiak & Sommerville, Attorney at Law, *Judgment Funds - Indian Claims Cases (Work in Progress)* (May 5, 2009), at p. 68, available at: http://www.msaj.com/~trustfund/JudgmentFunds_CLAIMS_Query.pdf.

Previously, in 1966, the CSKT had been persistent in securing from the Indian Claims Commission final judgment and award as compensation for the 12 million or so acres of *aboriginal lands* that the CSKT's predecessors-in-interest had ceded to the U.S. government pursuant to the Hellgate Treaty of 1855 in exchange for the Flathead Reservation.²³⁴ The ICC final judgment recognized a compromise settlement in which the Tribes agreed to an award of \$4,431,622.18, representing the difference between the \$593,377.82 the USG had previously paid for the lands and the \$5,300,000 actual fair-market value of such lands as of March 8, 1859, less agreed upon offsets of \$275,000.²³⁵

Evidently, the Tribes' litigiousness has paid off handsomely. They secured **\$26,793,171.25 of total compensation** from both of these actions which they now can attribute to the U.S. government's "unconscionable takings of aboriginal lands *and* allotted Reservation lands.

The CSKT now appear to be pursuing a *political* rather than a legal approach to securing a financial award that would compensate for the U.S. government's alleged "taking" of the Tribes' *aboriginal* (pre-European Settlement)- and Reservation-based *water rights*. In effect, the Tribes have argued that their "taken" aboriginal waters rights are tied to the aboriginal lands the Interior Department had initially taken in exchange for the Hellgate Treaty-based Reservation, *and* that their "taken" *federal reserved water rights* are tied to Reservation lands Congress had subsequently taken pursuant to the 1904 Flathead Allotment Act.

"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" (emphasis added).²³⁶

This *political* approach uses "takings" language to express "facts" which the Tribes then plug into an alternative legal theory not employed at the prior ICC and Court of Claims adjudications. The alternative legal theory charges the U.S. government with the breach of its "*federal trust obligation*" to protect the Tribes' on- and off-Reservation fishing rights. The Tribes' focus on the USG's federal fiduciary trust obligation/duty has *equitable, ethical and moral* as well as legal dimensions²³⁷ which the CSKT can harness most effectively on the *political* stage – in Congress²³⁸ and the media.

²³⁴ See *Confederated Salish and Kootenai Tribes v. United States of America*, Docket No. 61, 17 Ind. C1. Comm. 297 (Aug. 1, 1966), at pp. 1-2, available at: <http://digital.library.okstate.edu/icc/v17/icc17p297.pdf>.

²³⁵ *Id.*, at p. 2.

²³⁶ *Id.*, at p. 10.

²³⁷ See Cornell University Law School Legal Information Institute, *Wex-Fiduciary Duty*, available at: https://www.law.cornell.edu/wex/fiduciary_duty ("A fiduciary duty is the highest standard of care. The person who has a fiduciary duty is called the fiduciary, and the person to whom he owes the duty, is typically referred to as the principal or the beneficiary. If an individual breaches the fiduciary duties, he or she would need to account for the ill-gotten profit. His or her beneficiaries are entitled to damages, even if they suffered no harm. Fiduciary duties exist to encourage specialization and induce people to enter into a fiduciary relationship. By imposing these duties, the law reduces the risk of abuse of a beneficiary by the fiduciary. As a result, potential beneficiaries can have

Mr. Finley’s testimony sets forth the following general unsubstantiated “factual” assertions to support this new breach of trust claim:

“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*

greater confidence in seeking out a fiduciary. [...] Certain relationships impose fiduciary duties. For example, attorneys have a fiduciary duty to their client, a principal to his agent, a guardian to his ward, a priest to his parishioner, and a doctor to his patient. Fiduciary duty is imposed whenever confidence is reposed on one side in a contractual relationship, so as to allow that side to exert influence and dominance over the other.”). *See also* Tamar Frankel, *Excerpt from The New Palgrave Dictionary of Economics and the Law, Definition of ‘Fiduciary Duties’*, available at: <https://cyber.law.harvard.edu/trusting/unit5all.html> (“Fiduciary relationships appear in many legal contexts: contracts, wills, trusts and elections (e.g. of corporate directors). *However, fiduciary duties and remedies draw on a common source - equity. Thus, in addition to damages, a remedy in common law, fiduciaries must account for ill-gotten profits even if their entrustors suffered no injury - a remedy in equity.* The similarities and differences among fiduciary relationships explain why law regulates fiduciaries in the first place, and why the regulation varies with different classes of fiduciaries”) (emphasis added); Francis G.X. Pileggi, *The Moral Aspect of a Lawyer’s Fiduciary Duty*, The Bencher Ethics Column (March/April 2012), available at: <http://inns.innsocourt.org/for-members/current-members/the-bencher/ethics-columns/the-moral-aspect-of-a-lawyer-s-fiduciary-duty.aspx> (“*The standard applicable to a fiduciary encompasses a ‘legal or moral recognition of trust, reliance, or dependence,*” Sarah W. Holtman, ‘Fiduciary Relationships,’ *The Encyclopedia of Ethics*, 545-49 (2nd ed. 2001). *See generally*, Stephen Bainbridge, ‘Catholic Social Thought and the Corporation’ (2003) (discussing influence of Catholic theology on corporate governance), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=461100) (emphasis added)).

^{238**} *See* “Final Report of the American Indian Policy Review Commission Submitted to Congress”(May 17, 1977), at pp. 103-104, available at: <https://ia601409.us.archive.org/6/items/finalreport01unit/finalreport01unit.pdf> (Former U.S. Supreme Court Chief Justice John Marshall previously concluded that “[t]he trust relationship between the United States and American Indians [...] ‘resembles that of a ward to his guardian.’ This duty has always been recognized by the courts and has been variously characterized as a ‘fiduciary’ relationship, a ‘trust’ responsibility, and a ‘guardian-ward’ relationship. Marshall’s analysis that our law has no direct parallel to this trust relationship has been often emphasized by the United States Supreme Court, which has described the relationship between Congress and Indians as ‘solemn,’ ‘unique’ or ‘special,’ and ‘moral,’ citing *Morton v. Mancari*, 417 U.S. 535, 540, 552 (1974)) (emphasis added). *See also Id.*, at Chapter Four – Trust Responsibility at pp. 125-138, available at: https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/6-1-AmIndianPolicyComm_FinRpt_Chp-4-Trust-Responsibility_May1977.pdf (“[M]uch like the principles and rights contained in the U.S. Bill of Rights, the United States trust responsibility is a constantly evolving legal concept”) (emphasis added). *Id.*, at p. 133. *See also Id.*, at p. 136 (“**Recommendations – To clarify and improve the administration of the Federal trust responsibility to American Indians, the Commission recommends that: Congress reaffirm and direct all executive agencies to administer the trust responsibility consistent with the following principles and procedures: A. State of Policy – 1. The trust responsibility to American Indians is an established legal obligation which requires the United States to protect and enhance Indian trust resources and tribal self-government and to provide economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. In matters involving trust resources, the United States be held to the highest standards of care and good faith consistent with principles of common law trust. Legal and equitable remedies be available in Federal courts for breach of standards**”) (boldfaced emphasis added)). *See also Id.*, at Transmittal Letter from James Abourezk, Chairman of the American Indian Policy Review Commission to Vice President Walter Mondale (May 17, 1977) (“**The report is responsive to the provisions of P.L. 93-580 which established this Commission and charged it with the responsibility to conduct a comprehensive review of the historical and legal developments underlying the Indians’ relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians.**”)

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*" (emphasis added).²³⁹

Finley's testimony states that the Tester bill (S.3013)'s provisions calling for the "repair [of...] this federal facility" and for "improving water use efficiency,"²⁴⁰ and the Compact's quantification of "the Tribes' reserved and aboriginal water rights"²⁴¹ provide "the only way" to "undo the damage that this Project has caused" to [Tribal] lands and resources."²⁴² To the best of this counsel's knowledge, however, Finley has, thus far, failed to provide any hard evidence to support his claim that the Tribes have suffered **\$4 billion worth of damages** as the result of this alleged federal government breach of its obligation/duty of *fiduciary* trust.

b. *Senior Counselor to DOI Deputy Secretary Alleta Belin Testimony*

i. Belin Confirms CSKT's On and Off-Reservation Instream Flow Rights

In her testimony before the Senate Committee on Indian Affairs, Ms. Belin cites the Hellgate Treaty as the legal foundation for the Tribes claim of on-Reservation as well as off-Reservation instream flow rights. In particular, Article III of the Hellgate Treaty states, in part:

"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 [...]"²⁴³

²³⁹ See Finley Testimony, *supra* at p. 4.

²⁴⁰ See *Id.*, at p. 7 ("Second, 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.")

²⁴¹ *Id.* ("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 Irrigation Project.")

²⁴² *Id.*, at p. 6.

²⁴³ See Hellgate Treaty of July 16, 1855, 12 Stat. 975 (II Kapp. 722), *supra* at Article III.

“In the Hellgate Treaty, the Tribes reserved to themselves the “exclusive right of taking fish in all *streams running through and bordering* the Reservation” (emphasis added).²⁴⁴ Ms. Belin referred to the on-Reservation instream flow rights described in the *first clause* of the first sentence of the second paragraph of Article III of the Hellgate Treaty reproduced above: “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians[.]”²⁴⁵ In addition, Ms. Belin refers to

“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” (emphasis added).²⁴⁶

Furthermore, Ms. Belin described the Hellgate Treaty as possessing “[a] common attribute of [all Pacific Northwest] “Stevens treaties” [namely,...] the express reservation of tribal aboriginal hunting, fishing and gathering rights on- and off-reservations.”²⁴⁷ Hence, she stated that the Tribes “also expressly reserved the right to fish at usual and accustomed fishing sites *off the Reservation ‘in common’ with non-Indian settlers*” (emphasis added).²⁴⁸ Ms. Belin had likely referred to the Tribes’ off-Reservation instream flow rights described in the *second clause* of the first sentence of the second paragraph of Article III of the Hellgate Treaty reproduced above: “as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory [...] is further secured to said Indians.”²⁴⁹ She then moved on to her description of the Compact: “*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*” (emphasis added).

ii. Belin Expresses Concern Over S.3013 Funding

In her testimony, Ms. Belin also conveyed the Interior Department’s “serious concerns about” S.3013.²⁵⁰ She stated that the Department

²⁴⁴ See United States Senate Committee on Indian Affairs Legislative Hearing, *Statement of Letty Belin, Counselor to the Deputy Secretary, U.S. Department of the Interior before the Committee on Indian Affairs U.S. Senate on S.3013, Salish and Kootenai Water Rights Settlement Act of 2016*, 114th Cong., 2d Session (June 20, 2016), at p. 2, available at: <http://www.indian.senate.gov/sites/default/files/upload/6.29.16%20Alletta%20Belin%20S.%203013.pdf>.

²⁴⁵ See Hellgate Treaty of July 16, 1855, 12 Stat. 975 (II Kapp. 722), *supra* at Article III.

²⁴⁶ See United States Senate Committee on Indian Affairs Legislative Hearing, *Statement of Letty Belin, Counselor to the Deputy Secretary, U.S. Department of the Interior before the Committee on Indian Affairs U.S. Senate on S.3013, Salish and Kootenai Water Rights Settlement Act of 2016*, 114th Cong., 2d Session (June 20, 2016), *supra* at p. 3.

²⁴⁷ *Id.*, at p. 2.

²⁴⁸ *Id.*, at p. 2.

²⁴⁹ See Hellgate Treaty of July 16, 1855, 12 Stat. 975 (II Kapp. 722), *supra* at Article III.

²⁵⁰ See United States Senate Committee on Indian Affairs Legislative Hearing, *Statement of Letty Belin, Counselor to the Deputy Secretary, U.S. Department of the Interior before the Committee on Indian Affairs U.S. Senate on S.3013, Salish and Kootenai Water Rights Settlement Act of 2016*, 114th Cong., 2d Session (June 20, 2016), at p. 6,

“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 would also note that the size of the proposed Federal funding obligation created under S.3013 in relation 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” (emphasis added).²⁵¹

Presumably, DOI is currently working with the Tribes to arrive at a more palatable *political* solution (i.e., \$\$ amount), which should provide opponents of the Tester bill with an opportunity to weigh in on a *political* level before the November 2016 elections.

2. The Daines Bill – S.3014:

To recall, Senator Steve Daines introduced the “*Tribal Forestry Participation and Protection Act of 2016*” into the Senate Committee on Indian Affairs on May 26, 2016. On June 8, 2016, the U.S. Senate Committee on Indian Affairs convened an oversight hearing to discuss proposals for improving interagency forest management practices to strengthen tribal capabilities for responding to and preventing wildfires.²⁵² The Daines bill (S.3014) also was discussed during the hearing by all four Panel 1 witnesses.

a. *The CSKT and InterTribal Timber Council Testimonies*

Two of these “Panel 1” witnesses, namely CSKT Tribal Council Member Carole Lankford²⁵³ and Intertribal Timber Council (“ITC”) Board Member, William Nicholson,²⁵⁴ emphasized how the U.S. government has violated its *fiduciary obligation to protect Indian trust assets* by failing to provide adequate resources to Indian forestry programs when other non-Indian private property interests have been at stake. For example, Ms. Lankford testified that,

available at: <http://www.indian.senate.gov/sites/default/files/upload/6.29.16%20Alletta%20Belin%20S.%203013.pdf>.

²⁵¹ *Id.*

²⁵² See United States Senate Committee on Indian Affairs, *Oversight/Legislative Hearing on “Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S. 3014, a bill to improve the management of Indian forest land, and for other purposes”* 114th Cong., 2d Session (June 8, 2016), available at: <http://www.indian.senate.gov/hearing/oversightlegislative-hearing-improving-interagency-forest-management-strengthen-tribal>.

²⁵³ See United States Senate Committee on Indian Affairs, *Oversight/Legislative Hearing on “Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S. 3014, a bill to improve the management of Indian forest land, and for other purposes,”* “Statement of Tribal Council Member Carole Lankford, Confederated Salish and Kootenai Tribes of the Flathead Reservation,” presented before the Senate Committee on Indian Affairs (June 8, 2016), available at: <http://www.indian.senate.gov/sites/default/files/documents/6.8.16%20Carole%20Lankford%20Testimony.pdf>.

²⁵⁴ Timber

“Earlier this year, the Intertribal Timber Council testified before Congress about last summer’s fires that severely impacted a number of western Indian reservations, the majority of which were in Washington State. *In some cases, federal suppression resources were diverted from Indian reservations to fires threatening private property elsewhere.* [...] This is why tribes are very sensitive to discussions about priorities for funding in fuel reduction treatments, in fire suppression resources when wildfires occur, and in funding for rehabilitation of lands after the devastating fires are out. *The federal government has long-affirmed fiduciary obligations to protect Indian trust assets, and cannot simply let them burn while it protects often insured private property at resorts.* After the United States settled the so call Salazar cases for over \$1 billion for the mismanagement of Indian trust lands, *it seems odd to us that those making determinations about allocating fire funds have given such low priority to protecting lands that they hold in trust. We can only assume that there is a fundamental misunderstanding about what the role of a trustee is in this situation.* [...] So my tribe and many others have asked for a re-evaluation of fire suppression priorities. *We believe that the protection of our vital trust forest assets fully warrant fire suppression priority at least on a par with that for private structures,* and we apparently need Congressional direction to the agencies on that point. ***No President in my lifetime has shown a better understanding of this trust relationship than has Barack Obama*** [...]” (emphasis added).²⁵⁵

Similarly, Mr. Nicholson testified that,

“It’s been said that *forests are the most important trust asset for tribes.* They provide food, jobs, clean air and water, and are places of cultural and historical legacy. Indian forests also provide revenue to tribes for health care, education and other critical social services. [...] To summarize my statement, tribes are deeply concerned about the failure to prioritize protection of tribal forests by federal agencies – at both policy and funding levels. [...] For the 2015 fire season last summer, a national total of 539,000 tribal trust forest acres burned. On the five reservations examined in the IFMAT 2015 Fire Report,²⁵⁶ 338,110 forest acres burned, damaging 1.2 billion board feet of tribal trust timber. The timber value alone exceeds \$143 million, with an additional \$377 million in lost wages and services totaling over \$521 million. These losses impact tribes for decades into the future as we work to recover burned forests. [...] *Tribes are therefore deeply concerned that wildfire suppression priorities appear to be shifting away from tribal trust forests and toward other federal lands and interests.* [...] The Interior Department is working on a new way to prioritize

²⁵⁵ See “Statement of Tribal Council Member Carole Lankford, Confederated Salish and Kootenai Tribes of the Flathead Reservation,” presented before the Senate Committee on Indian Affairs (June 8, 2016), *supra* at pp. 2-3.

²⁵⁶ See Vincent Corrao, John Bailey, John Gordon, Adrian Leighton, Larry Mason, Mark Rasmussen and John Sessions, *Wildfire on Indian Forests A Trust Crisis*, InterTribal Timber Council Indian Forest Management Assessment Team (July 12, 2016), available at: http://www.itcnet.org/file_download/ed0c0ac7-079d-4a84-81b3-18a159db64b5.

its wildfire funds. The so-called ‘Risk-Based Wildland Fire Management Model’ is of great concern to tribes. The IFMAT 2015 Fire Report found that *the values prioritized in this model are inherently biased against tribal trust land and the government’s fiduciary responsibility to protect them*” (emphasis added).²⁵⁷

Apparently, the CSKT and ITC witnesses’ interpretation of the federal government fiduciary obligation to protect Indian trust forest assets is shaped largely by former U.S. Supreme Court Justice Thurgood Marshall’s opinion in the 1983 case *Mitchell v. United States*.²⁵⁸ Indeed, a 2013 ITC report reproduces a portion of that decision as support for the proposition that, “the Supreme Court long ago concluded that the trust responsibility for Indian forest management is clear.”²⁵⁹ According to Justice Marshall in *Mitchell*,

“Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people’

Because the statutes and regulations in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust”²⁶⁰

b. *The DOI-BIA and USDA-USFS Testimonies*

The two remaining government witnesses, U.S. Department of Agriculture (“USDA”) U.S. Forest Service Deputy Chief, State and Private Forestry, James Hubbard²⁶¹ and DOI Bureau of

²⁵⁷ See Testimony of William Nicholson, On behalf of the Intertribal Timber Council Before the United States Senate Committee on Indian Affairs Oversight/Legislative Hearing on “*Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S. 3014, a bill to improve the management of Indian forest land, and for other purposes*” (June 8, 2016), at pp. 1, 4, available at: <http://www.indian.senate.gov/sites/default/files/documents/6.8.16%20William%20Nicholson%20Testimony.pdf>.

²⁵⁸ See *Mitchell v. United States*, 463 U.S. 206 (1983).

²⁵⁹ See Indian Forest Management Assessment Team For the Intertribal Timber Council, An assessment of Indian Forests and Forest Management in the United States, Volume II 2013 (2013), at p. 14, available at: file:///C:/Users/L%20Kogan/Downloads/VolII_FINAL092613Revised-Reduced.pdf (reproducing this portion of the *Mitchell* decision).

²⁶⁰ See *Mitchell v. United States*, 463 U.S. 206, 225-226 (1983).

²⁶¹ See Statement of James Hubbard, Deputy Chief, State & Private Forestry, U.S. Forest Service before the United States Senate Committee on Indian Affairs, *Concerning Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires and, S. 3014 To improve the management of Indian forest land, and for other purposes*, 114th Cong., 2d Session (June 8, 2016), available at: <http://www.indian.senate.gov/sites/default/files/documents/6.8.16%20James%20Hubbard%20Testimony.pdf>.

Indian Affairs Director, Michael Black,²⁶² meanwhile, criticized portions of the Daines bill. For example, Black discussed how S.3014 would “*significantly [...] expand the scope of federal lands eligible for tribal management*” (emphasis added) beyond current law.²⁶³ Black and Hubbard also discussed how S.3014 could possibly impact other DOI agency (e.g., Bureau of Land Management) budgets and invite jurisdictional challenges between the USFS and other DOI agencies.²⁶⁴

3. The Westerman Bill – H.R.2647:

Congressman Bruce Westerman (R-AR) introduced the “*Resilient Federal Forests Act of 2015*” (H.R.2647) on June 4, 2015,²⁶⁵ and then referred it to the House Committee on Agriculture, slightly more than one month following the April 29, 2015 public hearing the Agriculture Committee’s Subcommittee on Conservation and Forestry had previously convened. At that hearing, the Subcommittee had heard testimony from other than tribal witnesses²⁶⁶ and had discussed wildfire prevention and suppression funding; timelines for implementing the final

²⁶² See Testimony of Mike Black, Director Bureau of Indian Affairs United States Department of the Interior before the Senate Committee on Indian Affairs Oversight Hearing on *‘Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S.3014, A Bill to Improve the Management of Indian Forest Land,’* 11th Cong., 2d Session (June 8, 2016), available at: <http://www.indian.senate.gov/sites/default/files/documents/6.8.16%20Mike%20Black%20Testimony.pdf>.

²⁶³ *Id.*, at p. 3. See also *Id.*, at pp. 3-4 (“The Department notes one change between the original 2004 Tribal Forest Protection Act and Section 3(a) of S. 3014 that relates to the geographic scope of the project area. Under the original 2004 TFPA, a tribe may request to carry out projects on federal land that ‘borders on or is adjacent to’ land managed by the BLM or the U.S. Forest Service, or where the Forest Service or BLM land presents a ‘feature or circumstances unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances)’. **In contrast, the bill amends the National Indian Forest Resources Management Act to expand the scope of federal lands eligible for tribal management to include federal forest land ceded to the United States, within the boundaries of a current or former reservation, or adjudicated by the Indian Claims Commission or a Federal court to be the tribal homeland of that Indian tribe. The amount of federal land that could be considered available under this new authority could significantly expand beyond those bordering or adjacent to federal lands. The expanded geographic scope may raise issues of conflict with existing uses and may require additional resources for the project area**”) (emphasis added)). See also Statement of James Hubbard, Deputy Chief, State & Private Forestry, U.S. Forest Service before the United States Senate Committee on Indian Affairs, *Concerning Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires and, S. 3014 To improve the management of Indian forest land, and for other purposes*, 114th Cong., 2d Session (June 8, 2016), *supra* at pp. 7-8.

²⁶⁴ See Testimony of Mike Black, Director Bureau of Indian Affairs United States Department of the Interior before the Senate Committee on Indian Affairs Oversight Hearing on *‘Improving Interagency Forest Management to Strengthen Tribal Capabilities for Responding to and Preventing Wildfires, and S.3014, A Bill to Improve the Management of Indian Forest Land,’* 11th Cong., 2d Session (June 8, 2016), *supra*, at p. 4 (“Also, the Department is concerned with Section 5 of S. 3014 which provides that projects under this Act are to be funded from other amounts available to the Secretaries that are not otherwise obligated. It is unclear how Section 5 would impact the BLM’s appropriated funding particularly when part of funding to manage the O&C lands is offset by timber sale receipts as provided in the 1937 O&C Act. Finally, federal forest land management is shared between USDA and Interior and the bill appears to create confusion over roles and responsibilities each agency has under the new authority. The Department recommends clarifying language be provided.”).

²⁶⁵ See U.S. House of Representatives, *Report to Accompany H.R.2647 – The Resilient Federal Forests Act of 2015*, Rept. 114–185, Part 2 (“H.Rpt. 114-185, Part 2”), 114th Cong., 1st Session (June 25, 2015), at p. 15, available at: <https://www.congress.gov/114/crpt/hrpt185/CRPT-114hrpt185-pt2.pdf>.

²⁶⁶ See U.S. House of Representatives, *Report to Accompany H.R.2647 – The Resilient Federal Forests Act of 2015*, Rept. 114–185, Part 1 (“H.Rpt. 114-185, Part 1”), 114th Cong., 1st Session (June 25, 2015), at p. 21, available at: <https://www.congress.gov/114/crpt/hrpt185/CRPT-114hrpt185-pt1.pdf>.

Farm Bill provisions; the Endangered Species Act recent lists and the impacts on forests; and challenges for the U.S. Forest Service.²⁶⁷

H.R.2647 was thereafter referred to the Committee on Agriculture which then considered it on June 17, 2015. At such time, Congressman Thompson submitted an Amendment in the Nature of a Substitute which was considered as original text for purposes of amendment approved by voice vote.²⁶⁸ H.R.2647 also was referred to the House Committee on Natural Resources and two of its subcommittees: the Subcommittee on Federal Lands and the Subcommittee on Indian, Insular and Alaska Native Affairs.²⁶⁹ The House Natural Resources Committee met on June 10, 2015 to consider the bill.²⁷⁰ On June 11, 2015, H.R.2647 “was adopted and ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 22–15.”²⁷¹ On June 25, 2015, H.R.2647 was reported (amended) by the Committee on Agriculture and by the Committee on Natural Resources, respectively, in H. Rept. 114-185, Part I and H. Rept. 114-185, Part II.²⁷² **H.R.2647 passed the House of Representatives pursuant to a recorded vote of 262–167 on July 9, 2015.²⁷³ On July 13, 2015, H.R.2647 was received in the Senate and read twice and referred to the Senate Committee on Agriculture, Nutrition, and Forestry.²⁷⁴**

Only Title VII of H.R.2647 (“the Westerman bill”) addresses tribal forestry issues. Although it contains many of the same provisions as (and is much shorter than) S.3014 (“the Daines bill”), the congressional bill most related to H.R.2647 is the Roberts bill – S.3085.²⁷⁵ On July 8, 2015, the Obama administration issued a Statement of Administration Policy stating its opposition to the Westerman bill.²⁷⁶

4. The Roberts Bill – S.3085:

Senator Pat Roberts (KS-R) introduced the “*Emergency Wildfire and Forest Management Act of 2016*” (S.3085) into the Senate, on June 22, 2016, and the bill was read twice and referred to the

²⁶⁷ See *Id.*, at p. 20 (“During the hearing, the following witnesses testified on matters included in H.R. 2647: • The Honorable Tom Tidwell, Chief, U.S. Forest Service, Washington, DC • Ms. Susan Swanson, Executive Director, Allegheny Hardwood Utilization Group, Kane, PA • Ms. Becky Humphries, Chief Conservation Officer, National Wild Turkey Federation, Edgefield, SC • Ms. Laura Falk McCarthy, Director of Conservation Programs, The Nature Conservancy, Santa Fe, NM.”).

²⁶⁸ See H.Rpt. 114-185, Part 1, *supra* at p. 21.

²⁶⁹ See H.Rpt. 114-185, Part 2, *supra* at p. 15.

²⁷⁰ *Id.*

²⁷¹ *Id.*, at p. 19.

²⁷² See H. Rept. 114-185, Parts 1 and 2, *supra*. See also Congress.gov, *H.R.2647 - Resilient Federal Forests Act of 2015*, 114th Congress (2015-2016), available at: <https://www.congress.gov/bill/114th-congress/house-bill/2647/actions>.

²⁷³ *Id.*

²⁷⁴ See Congress.gov, *S.3085 - Emergency Wildfire and Forest Management Act of 2016*, 114th Congress (2015-2016), available at: <https://www.congress.gov/bill/114th-congress/senate-bill/3085/related-bills>.

²⁷⁵ See Congress.gov, *H.R.2647 - Resilient Federal Forests Act of 2015*, 114th Congress (2015-2016), available at: <https://www.congress.gov/bill/114th-congress/house-bill/2647/text>.

²⁷⁶ See The White House, *Statement of Administration Policy re H.R. 2647 – Resilient Federal Forests Act of 2015* (July 8, 2015), available at: https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2647h_20150708.pdf.

Committee on Agriculture, Nutrition, and Forestry on the same day.²⁷⁷ It is the last of the several bills introduced by Congressional Republicans that address forestry management issues generally, and tribal forestry management issues more specifically.²⁷⁸ Only Title V of the Roberts bill addresses tribal forestry issues.

According to Senator Roberts, “We’re going to try to take action as soon as we come back. [...] The House moves pretty quickly, but the Senate has numerous committees that have jurisdiction. We’ll get to working away in the fall.”²⁷⁹ In a recent article, the Missoulian reported that “Roberts’ Emergency Wildfire and Forest Management Act of 2016 (S. 3085) pairs with a bill by Rep. Bruce Westerman, R-Ark., that passed the House last year. The Resilient Federal Forests Act (HR 2647) was co-sponsored by Rep. Ryan Zinke, R-Mont. Roberts’ bill has no co-sponsors.”²⁸⁰ Although the Missoulian article did not discuss the Daines bill (S.3014), it noted how Senator Daines stated, “[i]n an email, he was pleased to see Agriculture Committee Chairman Roberts offering another solution. ‘I’m encouraged by the growing bipartisan support for meaningful reforms to protect and grow good-paying jobs, enhance forest health, and treat catastrophic wildfires as natural disasters,’ Daines wrote.”²⁸¹

The prognosis for success regarding S.3085, H.R.2647 and S.3014 is uncertain at this juncture. While there is evidence of disagreement concerning these bills’ funding provisions, “[o]ne place where agreement does appear to exist is how the fire spending problem might get resolved – **in a post-Election Day scramble**” (emphasis added). According to the Missoulian,

“During a visit to Missoula earlier this week, [Senator] Tester predicted the forest management bills could end up attached to some public lands omnibus bill in what he called a ‘fairly active lame duck session.’ Sen. Roberts made a similar forecast Friday. ‘We’re looking at any vehicles, and I do literally mean any vehicles, to get this done,’ Roberts said. ‘It could be a stand-alone bill, or part of an energy bill conference. We are also looking at the end of year for some kind of omnibus that deals with appropriations. Those are all options.’”²⁸²

The bottom line: expect a congressional effort to reconcile the provisions of the Westerman bill (H.R.2647) with the provisions of the Roberts bill (S.3085), either alone or as part of some omnibus funding bill before or soon following the November presidential and congressional elections.

No matter which of these forestry management bills Congress ultimately passes and the President signs into law, the ability of Montana farmers and ranchers operating both on and off

²⁷⁷ See Congress.gov, *S.3085 - Emergency Wildfire and Forest Management Act of 2016*, 114th Congress (2015-2016), *supra*.

²⁷⁸ See Rob Chaney, *Congress Members Prepare Alternative Fire Borrowing Bills*, Missoulian (July 15, 2016), available at: http://missoulian.com/news/local/congress-members-prepare-alternative-fire-borrowing-bills/article_a1efa5e4-7f36-50c6-8f05-f5c5e735187a.html.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

the Flathead Reservation to exercise their State-registered private water rights would very likely be curtailed. This scenario would unfold once the CSKT has exercised its acquired 638 contract rights to manage any one or more of the four National Forests on and/or surrounding the Flathead Reservation in combination with the Tribes pre-European Settlement aboriginal time-immemorial instream flow rights within and appurtenant to these forested lands that Congress' ratification of the CSKT Water Compact would recognize.

IV. The Relationship Between S.3013, S.3014, H.R.2647, S.3085 and United Nations Soft Law

1. The United Nations Declaration on the Rights of Indigenous Peoples:

The United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples*²⁸³ on September 13, 2007, pursuant to 143-4 vote in favor.²⁸⁴ The United States was among the 4 countries then voting in opposition to the declaration.²⁸⁵

a. *The Declaration's Problematic Provisions*

The declaration contains a number of troubling provisions which are relevant for purposes of this memorandum's discussion of the CSKT Water Compact and S.3013. They include:

- Article 3 – recognizing the right of all indigenous peoples “to self-determination;”²⁸⁶
- Article 5 – recognizing the right of all indigenous peoples “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (emphasis added);²⁸⁷
- Article 25 – recognizing the right of all indigenous peoples “to maintain and strengthen their distinctive spiritual relationship with their **traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources** and to uphold their responsibilities to future generations in this regard” (emphasis added);²⁸⁸
- Article 26, recognizing the right of all indigenous peoples:
 - Section 1 – “to the **lands, territories and resources** which they have traditionally owned, occupied or otherwise used or acquired (emphasis added);²⁸⁹

²⁸³ See “The United Nations Declaration on the Rights of Indigenous Peoples,” adopted by General Assembly Resolution 61/295 (Sept. 13, 2007), available at: http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

²⁸⁴ See United Nations, Office of the High Commissioner of Human Rights, *Declaration on the Rights of Indigenous Peoples*, available at: <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>

²⁸⁵ See *Id.* (“The UN Declaration was adopted by a majority of 143 states in favour, **4 votes against (Australia, Canada, New Zealand and the United States)** and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).”(emphasis added)). *Id.*

²⁸⁶ See “The United Nations Declaration on the Rights of Indigenous Peoples,” adopted by General Assembly Resolution 61/295 (Sept. 13, 2007), *supra* at Article 3.

²⁸⁷ *Id.*, at Article 5.

²⁸⁸ *Id.*, at Article 25.

²⁸⁹ *Id.*, at Article 26, Section 1.

- Section 2 – “to own, use, develop and control the **lands, territories and resources** that they possess by reason of **traditional ownership** or other traditional occupation or use as well as those which they have otherwise acquired.” (emphasis added);²⁹⁰ and
- Section 3 – to States’ legal recognition and protection to **these lands, territories and resources** [...] with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”²⁹¹
- Article 29, Section 1 – recognizing the right of all indigenous peoples “to the conservation and protection of the environment and the productive capacity **of their lands or territories and resources**” and the obligation of States to “establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”²⁹²

Although Article 46 of the declaration states that no part of the declaration may be interpreted or “construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States,”²⁹³ it is difficult not to see how the implementation of this declaration does not threaten the territorial integrity or political unity of the sub-state units within a sovereign and independent State. It is critical for purposes of understanding the significance of this declaration that the United Nations refers to sovereign nations as “States,” and not to the several states within the United States.

2. The Obama Administration’s Implementation of the Declaration:

- a. *While Declaration Has No Immediate Legal Binding Effect, It Has Considerable Moral, Political Force*

On December 16, 2010, President Obama announced that “the United States w[ould] sign [the] United Nations non-binding declaration on the rights of indigenous peoples,” reversing the prior Bush administration policy,²⁹⁴ and making the United States “the last major country to sign on to the U.N. declaration.”²⁹⁵ Although the declaration, itself, is not binding as a matter of law, the President has emphasized that it “*carries considerable moral and political force* and

²⁹⁰ *Id.*, at Article 26, Section 2.

²⁹¹ *Id.*, at Article 26, Section 3.

²⁹² *Id.*, at Article 29, Section 1.

²⁹³ *Id.*, at Article 46.

²⁹⁴ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, Office of the Spokesman (Dec. 16, 2010), available at: <http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm> (“The decision to support the Declaration represents an important and meaningful change in the U.S. position, and resulted from a comprehensive, interagency policy review, including extensive consultation with tribes” (emphasis added)). See also The White House Office of the Press Secretary, *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010), available at: <https://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

²⁹⁵ See Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, Washington Post (Dec. 16, 2010), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html>.

complements the President's ongoing efforts to address historical inequities faced by indigenous communities in the United States" (emphasis added).²⁹⁶

Much to the contrary, any new international legal norms the declaration establishes could be incorporated into binding international treaties that the United States later signs and ratifies. Alternatively, the Obama administration could implement the declaration as a matter of domestic federal law by referencing it within executive orders and presidential memoranda that federal agencies must follow in performing their daily activities. This would lend credence to the third way in which the declaration's new international norms could ultimately become U.S. federal law: U.S. federal courts could adopt the new legal standards the declaration establishes, as evidenced in U.S. federal agency practices, as part of their decisions once such norms rise to the level of customary international law.²⁹⁷ Indeed, the Native American Rights Fund had emphasized this last point in its 2011 Winter/Spring newsletter.²⁹⁸

The more detailed version of the President's prior announcement²⁹⁹ revealed that the Obama administration foresaw how federal agencies could implement the declaration. In particular, it

²⁹⁶ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, Office of the Spokesman (Dec. 16, 2010), *supra*.

²⁹⁷ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (analyzing whether the requirements of the Alien Tort Claims Act of 1789 (recognizing causes of actions for torts based on violations of customary international law and treaties) (28 U.S.C. §1350 (2002)) has been satisfied, and holding that "any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th – century paradigms we have recognized"). See also Lawrence A. Kogan, *Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers*, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 118 (Sept. 2003), at pp. 29, available at: http://www.wlf.org/publishing/publication_detail.asp?id=1474; <https://nebula.wsimg.com/479dfbf05aafb1b5c4cccca6fc3dc45?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> ("In general customary international law consists of the regular practices and rules among [Nation] States that States follow. These practices and rules become rules of international law when they satisfy two conditions. First, State practice must demonstrate that States engage in acts consistently within their borders and with other States, as reflected by court decisions, legislation, and diplomatic practices. Second, State practice must rise to the level of *opinio juris*. In other words, State practice must demonstrate that such acts are accepted as law. Thus, something more than actual practice is needed to evidence that States are, in fact, doing or not doing something, and State actions must be based on more than morality, habit or convenience. Rather, States must be acting out of obligation; they must be acting because they believe they must follow a rule."); Lawrence A. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise*, Washington Legal Foundation Monograph (2005), at p. 112, fn#s 556-559, available at: <http://www.wlf.org/upload/110405MONOKogan.pdf>; Michael P. Socarras, *International Law and the Constitution*, 4 The Federal Courts Law Review 1 (2011), available at: <http://www.fclr.org/fclr/articles/html/2010/Socarras.pdf>.

²⁹⁸ See Native American Rights Fund Legal Review, *United States Finally Endorses Historic United Nation's Declaration On The Rights Of Indigenous Peoples* (Winter/Spring 2011), at p. 4, available at: <http://www.narf.org/nill/documents/nlr/nlr36-1.pdf> ("The position of the United States that no part of the Declaration is expressive of international law is clearly overstated, and that is likely to be proved out in the course of time. In the meantime, there is nothing to prevent courts from using the Declaration to help reach decisions in matters involving indigenous peoples. The Supreme Court has looked to international standards as 'evolving standards of decency that mark the progress of a maturing society...' and thus relevant to consider in making decisions of great import. *Graham v. Florida*, 130 S. Ct. 2011, 2020 (2010). *It will require careful consideration by attorneys as to when and how to use the Declaration in court proceedings, but important building blocks can be laid if one court relies on it to reach a decision, then another and another.*") (emphasis added).

²⁹⁹ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples ("Detailed Version")* (Dec. 16, 2010), available at:

stated that “[t]he United States aspires to improve relations with indigenous peoples by *looking to the principles embodied in the Declaration* in its dealings with federally recognized tribes...” (emphasis added).³⁰⁰ It also stated that, “[t]he United States underlines its support for the Declaration’s recognition in the preamble that indigenous *individuals* are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain *additional, collective rights*” (emphasis added).³⁰¹ The detailed announcement, furthermore, stated that the U.S. was “pleased to support the Declaration’s call to promote the development of *a new and distinct international concept of self-determination* specific to indigenous peoples [...] that is *different from the existing right of self-determination in international law*” (emphasis added).³⁰²

The more detailed version of the White House announcement, moreover, sought to reassure U.S. citizens that Declaration Article 46 “does not imply any right to take action that would dismember or impair [...] the territorial integrity or political unity of” the United States. It endeavored to do so by emphasizing how “the Declaration’s concept of self-governance is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes³⁰³ *as political entities that have inherent sovereign powers of self-governance*” (emphasis added).³⁰⁴

The Obama administration, however, has apparently interpreted the new collective human right of indigenous peoples to self-determination as sanctioning the ongoing “benign” discrimination in favor of federally recognized tribes as political entities under the U.S. Constitution! As discussed in Section V of this memorandum, federal, state and/or local government preferences in favor of federally recognized tribes, including the CSKT, are said to constitute only a “benign” form of racial discrimination not actionable under the U.S. Constitution! How can this be allowed to stand?

b. *The Obama Administration’s Commitment to Protect Native American Lands and Natural Resources Consistent With the Declaration*

The Obama administration’s detailed announcement also clarified how the United States would support the Declaration’s call for national laws and mechanisms enabling the full legal recognition of the traditional, existing and to-be-acquired ownership, occupation or use of indigenous peoples’ lands, territories, and natural resources.³⁰⁵ In particular, the administration

<http://www.state.gov/documents/organization/184099.pdf>. See also The White House, *Obama Administration Record for American Indians and Alaska Natives* (2011), at pp. 2-3, available at: https://www.whitehouse.gov/sites/default/files/docs/american_indians_and_alaska_natives_community_record_0.pdf.

³⁰⁰ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (“Detailed Version”)* (Dec. 16, 2010), *supra* at p. 2.

³⁰¹ *Id.*

³⁰² *Id.*, at p. 3.

³⁰³ See “Federally Recognized Indian Tribe List Act of 1994,” P.L. 103-454, 108 Stat. 4791 (Nov. 2, 1994), available at: <http://uscode.house.gov/statutes/pl/103/454.pdf>.

³⁰⁴ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (“Detailed Version”)* (Dec. 16, 2010), *supra* at p. 3.

³⁰⁵ *Id.*, at p. 6 (“Consistent with its understanding of the intention of the States that negotiated and adopted the Declaration, the United States understands these provisions to call for the existence of national laws and

hailed its program of “[r]ecovering and protecting the tribes’ land base [as] a hallmark objective of this Administration. After the recent Supreme Court decision in *Carcieri v. Salazar*, Congress introduced, and the Administration has fully supported, legislation to reaffirm the authority of the United States to take land into trust on behalf of all federally recognized Indian tribes.”³⁰⁶

Additionally, the more detailed Obama administration announcement emphasized how the administration had extensively endeavored “to resolve longstanding Native American legal claims against the United States and private entities related to lands, natural resources, and other issues.”³⁰⁷ It cited as prime example congressional passage and the administration’s enactment into law of the Claims Resolution Act of 2010 (P.L. 111-291),³⁰⁸ Title IV of which was entitled the “Crow Tribe *Water Rights Settlement Act of 2010*.”³⁰⁹ The purposes of the Crow Tribe Water Rights Settlement Act were to:

“(1) to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for (A) the Crow Tribe; and (B) the United States for the benefit of the Tribe and allottees; (2) *to authorize, ratify, and confirm the Crow Tribe-Montana Water Rights Compact entered into by the Tribe and the State of Montana on June 22, 1999*; (3) *to authorize and direct the Secretary of the Interior (A) to execute the Crow Tribe-Montana Water Rights Compact and (B) to take any other action necessary to carry out the Compact in accordance with this title; and (4) to ensure the availability of funds necessary for the implementation of the Compact and this title*” (emphasis added).³¹⁰

The Crow Tribe Water Rights Compact covered the tribal right to irrigation project waters and other waters,³¹¹ though not nearly as extensively as S.3013 covers the on-and off-reservation water rights of the CSKT.

Finally, the White House’s more detailed announcement on the declaration emphasized the administration’s “commitment to the environment” and recognition of “indigenous people[s]’ depend[ence] upon a healthy environment *for subsistence fishing, hunting and gathering*.”³¹² In

mechanisms for the full legal recognition of the lands, territories, and natural resources indigenous peoples currently possess by reason of traditional ownership, occupation, or use as well as those that they have otherwise acquired. The Declaration further calls upon States to recognize, as appropriate, additional interests of indigenous peoples in traditional lands, territories, and natural resources. Consistent with that understanding, the United States intends to continue to work so that the laws and mechanisms it has put in place to recognize existing, and accommodate the acquisition of additional, land, territory, and natural resource rights under U.S. law function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest.”).

³⁰⁶ *Id.*

³⁰⁷ *Id.*, at p. 7.

³⁰⁸ *Id.*

³⁰⁹ See Claims Resolution Act of 2010, P.L. 111-291 (Dec. 8, 2010), at *Title IV - Crow Tribe Water Rights Settlement Act of 2010*, Section 402, available at: http://dnrc.mt.gov/divisions/water/adjudication/basin-documents/crow_compact_claims_resolution_act_2010.pdf.

³¹⁰ See *Id.*

³¹¹ See U.S. Department of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (“Detailed Version”)* (Dec. 16, 2010), *supra* at p. 7.

³¹² *Id.*

particular, it highlighted how the administration “acknowledges the importance of the provisions of the Declaration that address environmental issues.”³¹³ Clearly, the Obama administration had in mind both the on-reservation federal reserved water rights and *the off-reservation aboriginal water rights of the CSKT* and other Stevens Treaty tribes when preparing its detailed announcement outlining how it intended to implement the U.N. Declaration on the Rights of Indigenous Peoples.

c. *Obama Administration’s Support for a UN Body to Monitor Nations’ Implementation of the Declaration*

On June 26, 2013, President Obama issued Executive Order 13647, establishing the White House Council on Native American Affairs.³¹⁴ This E.O.’s objective was to promote the “government-to-government” and the “unique legal and political relationship” the United States has with federally recognized tribes, as “set forth in the Constitution of the United States, treaties, statutes, Executive Orders, administrative rules and regulations, and judicial decisions.”³¹⁵ One of the Council’s several functions is to “assist the White House Office of Public Engagement and Intergovernmental Affairs in organizing the White House Tribal Nations Conference each year.”³¹⁶ According to the E.O., such conferences are to be attended by “leaders from all federally recognized Indian tribes and senior officials from the Federal Government,” and are intended “to provide for direct government-to-government discussion of *the Federal Government’s Indian country policy priorities*” (emphasis added).³¹⁷

During the 6th Annual White House Tribal Nations Conference convened in Washington, D.C. in December 2014, “there ha[d] been a breakout session on ‘International Issues.’”³¹⁸ The final section of the Tribal Leader Briefing Book prepared and distributed during the 6th conference³¹⁹ by the National Congress of American Indians (“NCAI”) was entitled, “International Relationships and Participation.” It referenced the September 22-23, 2014, United Nations “High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples (WCIP).”³²⁰ The UN General Assembly adopted an “Outcome Document” at

³¹³ *Id.*

³¹⁴ See Executive Order 13647 - *Establishing the White House Council on Native American Affairs*, 78 FR 39539 (July 1, 2013), available at: <https://www.gpo.gov/fdsys/pkg/FR-2013-07-01/pdf/2013-15942.pdf>.

³¹⁵ *Id.*, at Section 1.

³¹⁶ *Id.*, at Section 4(d).

³¹⁷ *Id.*

³¹⁸ See Mission of the United States of America, Geneva, Switzerland, *Item 8: Best Practices and Strategies for the Implementation of the UN Declaration on the Rights of Indigenous Peoples*, U.S. Statement as delivered by Ambassador Keith Harper U.S. Representative to the Human Rights Council (July 14, 2016), available at: <https://geneva.usmission.gov/2016/07/14/item-8-best-practices-and-strategies-for-the-implementation-of-the-un-declaration-on-the-rights-of-indigenous-peoples/> (“The agenda changes each year to reflect the most pressing topics for tribal leaders and their communities. Beginning with the December 2014 conference, there has been a breakout session on ‘International Issues.’”).

³¹⁹ See National Congress of American Indians, *Tribal Leader Briefing Book*, 2014 White House Tribal Nations Conference (Wash., D.C., Dec. 2-4, 2014), available at: <http://www.ncai.org/conferences-events/ncai-events/WHTNC - Final briefing book 2014-11-21.pdf>.

³²⁰ *Id.*, at p. 99.

the WCIP which “included a reaffirmation of the [...] UNDRIP” and “set forth timeframes for actions by the UN and by member states” to implement the declaration.³²¹

Paragraph 21 of the Outcome Document is potentially significant. It reaffirmed the General Assembly’s recognition of the “commitments made by States, with regard to the Declaration, to establish at the national level, in conjunction with the indigenous peoples concerned, fair, independent, impartial, open and transparent processes *to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources.*” (emphasis added).³²²

Paragraph 28 also is quite important. It “invited the Human Rights Council to review the mandates of its existing mechanisms, in particular, the Expert Mechanism on the Rights of Indigenous Peoples, [...] with a view to modifying and improving [it] so that it can [...] better assist[] Member States *to monitor, evaluate and improve the achievement of the ends of the Declaration.*” (emphasis added).³²³ The Expert Mechanism had previously been established as a subsidiary body to the WCIP.³²⁴ It also was consistent with prior NCAI Resolution # REN-13-040, which, in part, “cal[led] on the United Nations to establish a body to monitor implementation of the UNDRIP both within the United Nations itself, and by States.”³²⁵ The NCAI Briefing Book distributed at the 2014 White House Tribal Nations Conference similarly called for the U.S. to “push for a monitoring and implementation body with an expanded membership and with a mandate to receive relevant information, to share best practices, to make recommendations, and otherwise to work toward the objectives of the UNDRIP.”³²⁶

The bottom line: The Obama administration is steadily moving toward domestic implementation of the international Declaration on the Rights of Indigenous Peoples – UNDRIP, and congressional ratification of the CSKT Water Compact is part of that trajectory.

V. Conclusion

³²¹ *Id.*

³²² See United Nations General Assembly, *Outcome Document of the World Conference of Indigenous Peoples*, A/RES/69/2, Website of Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples (Sept. 25, 2014), at para. 21, available at: <http://unsr.vtaulicorpuz.org/site/index.php/links/outcome-doc-wcip>.

³²³ *Id.*, at para. 28.

³²⁴ See United Nations Office of the High Commissioner of Human Rights, *Expert Mechanism on the Rights of Indigenous Peoples*, available at: <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> (“The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established by the Human Rights Council, the UN’s main human rights body, in 2007 under Resolution 6/36 as a subsidiary body of the Council.”).

³²⁵ See National Congress of American Indians, *The National Congress of American Indians Resolution # REN-13-040 - Status for Constitutional and Customary Indigenous Governments at the United Nations World Conference on Indigenous Peoples 2014, UNDRIP and Indigenous Peoples Priorities* (June 24-27, 2013), at p. 2, available at: http://www.ncai.org/attachments/Resolution_ZLtgVNCNxQtakiIDIXbSLRotnHONQlfXNJwETdKpeKkwqsfkXwt_REN-13-040%20final.pdf.

³²⁶ See National Congress of American Indians, *Tribal Leader Briefing Book*, 2014 White House Tribal Nations Conference (Wash., D.C., Dec. 2-4, 2014), *supra* at p. 99.

Given the *political* setting into which the CSKT Water Compact has been introduced, farmers and ranchers and all those concerned should challenge the Compact in Congress and in the media using language that Montana’s politicians will easily understand. Such persons should launch a “Peoples’ Campaign” that would: 1) develop and purchase newspaper ads; 2) engage in grass roots letter-writing campaigns, congressional office phone calls, and townhall meetings; and 3) develop grass roots advocacy websites and media articles. The bottom-line of the “Peoples’ Campaign” would be to show Montana’s congressional and state representatives that they will lose votes and their reelection come this November. The “Peoples’ Campaign” should focus on the legal precedential value of a ratified CSKT Water Compact, its U.S. Constitutional violations, the economic harm it would cause to regional agricultural markets (i.e., the elimination, consolidation and acquisition of small farms and ranches by “big agriculture”), and consequently, the unsettling of the West and the revision of Western Civilization’s history.

Notwithstanding the above, the CSKT Water Compact has a very clear and distinct legal dimension. It builds on Ninth Circuit legal precedents regarding federal reserved water rights and takes such legal precedents, including those concerning forest management established by some on the U.S. Supreme Court, to new heights by conflating them with and expanding their application to aboriginal (pre-European Settlement) water rights. Ultimately, the DOI’s increasingly relied upon, but nevertheless, shaky aboriginal rights legal theory must be legally challenged in Court. It is but one legal theory that The Kogan Law Group, P.C. (“KLG”) plans to address in its soon-to-be relaunched federal lawsuit. That lawsuit will seek, among other things, to reverse the transfer of Kerr Dam to the CSKT.

It is reassuring that even the American Indian Policy Review Commission’s 1977 report recognized and concluded that, “Congress’ plenary power over Indians is subject to other constitutional limitations upon congressional power, such as the Bill of Rights.”³²⁷ Thus, S.3013 opponents who can show that congressional ratification of S.3013 will, in fact, result in a violation of their constitutional rights under the 5th, 10th and 14th Amendments could potentially pursue such claims as part of the KLG lawsuit. For example, it is arguable that, S.3013, if enacted into *federal* law, would violate Flathead irrigators’ 5th Amendment Rights by facilitating the Interior Secretary’s and State of Montana’s taking of Montana irrigator land & water rights for a public use (i.e., to honor the federal government’s fiduciary obligation to protect Indian trust assets) without payment of just compensation.

The following is a general discussion of those Sections of the U.S. Constitution and Bill of Rights.

1. The Fifth Amendment Takings Clause:

- a. *Property and the U.S. Constitution: Individual vs. Public Rights*

³²⁷ See “Final Report of the American Indian Policy Review Commission Submitted to Congress”(May 17, 1977), *supra* at p. 107.

The U.S. Constitution and the Fifth Amendment of its accompanying Bill of Rights guarantee individuals that their private property will be protected against arbitrary and wanton government interference,³²⁸ ostensibly intended to serve the public good.³²⁹

b. *Individual Natural Rights Include the Right to Private Property*

The Constitution imposes limitations on the sphere of government and its anticipation of individual's natural rights. Included among those rights is the exclusive right to own and enjoy private property.³³⁰ The history surrounding the drafting of the U.S. Constitution and its accompanying Bill of Rights instructs us that an individual's rights, including his or her exclusive property rights, must be preserved and protected by and from government.³³¹ "Property is not, however, entirely a natural right. The Founders understood that it would need to be further defined in statute."³³² In support of this proposition, the U.S. Supreme Court, in the case of *Lynch v. Household Finance Corp.*, defined the right to private property as a basic civil right.³³³

c. *The Bill of Rights Limits Government Action Against Exclusive Private Property*

i. Federal Government Action – 'Just Compensation'

The 'just compensation' requirement was added in 1791, as the Fifth Amendment to the U.S. Constitution.³³⁴ It effectively limits the powers of the federal government otherwise conferred by Articles I and II of the U.S. Constitution, including the power of eminent domain, which is the

³²⁸ See Laurence H. Tribe, "American Constitutional Law" 1-2 (1978) ("That *all lawful power derives from the people* and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism." (emphasis added)).

³²⁹ See Peter Goldsmith et al., "Food Safety in the Meat Industry: A Regulatory Quagmire 8 (2002), available at <http://www.ifama.org/conferences/2003Conference/papers/goldsmith.pdf> (discussing the role of the individual in the U.S. Constitutional system in the context of food safety, "[the US system is *rooted in the Bill of Rights and the sanctity of the individual*. The Constitution of the United States... places great symbolic weight on human rights. It *elevates the basic rights of man to supreme constitutional status*." (citation omitted) (emphasis added)).

³³⁰ See Laurence H. Tribe, "American Constitutional Law" (1978), *supra* at pp. 427-428.

³³¹ See *Knapp v. Schweitzer*, 357 U.S. 371, 376-77 n.4 (1958); Laurence H. Tribe, "American Constitutional Law" (1978), *supra* at pp.3-4 ("[A] Bill of Rights directed against federal abuses was thought necessary in addition to separation and division of powers. . .institutional boundaries in the absence of such a list of liberties were not deemed quite sufficient to preserve individual rights." (footnote omitted)); See also Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 "The Papers of Thomas Jefferson," Aug. 1787 - Mar. 1787, at 438-40 (Julian P. Boyd ed., 1955); Letter from James to Thomas Jefferson (Oct. 17, 1788), in 14 "The Papers of Thomas Jefferson", Oct. 1788 - Mar. 1789, at 16,18 (Julian P. Boyd ed., 1958); Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 "The Papers of Thomas Jefferson", Oct. 1788 - Mar. 1789, at 659-61 (Julian P. Boyd ed., 1958).

³³² See Douglas W. Kmiec, *The Takings Clause*, in "The Heritage Guide to the Constitution" 342 (Edwin Meese III et al. eds., 2005).

³³³ See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." (footnote omitted))

³³⁴ See U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.").

power to take private property for public use by federal, state, or local government.³³⁵ This limitation is intended to prevent government from sacrificing the rights of individuals for the public good.³³⁶

Several rationales have been advanced to explain the intention underlying the Bill of Rights' "no taking without just compensation" clause: 1) to prevent the government from deliberately redistributing wealth, directly or indirectly; 2) to prevent the government from indirectly reallocating property among citizens by generating a uniformly desired good or by reducing a uniformly disliked public bad, without otherwise affecting the distribution of wealth; and 3) to prevent government from acting out of some high sense of morality to forbid a formerly accepted and tolerated use of property.³³⁷

The U.S. Supreme Court has defined the 'just compensation' requirement as ensuring payment that amounts to 'full and adequate compensation'³³⁸ or 'a full and perfect equivalent for' whatever interest in or share of real or personal property has been taken.³³⁹ It also ruled that the value of the property interest in question shall be determined "by refer[ring] to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future..."³⁴⁰ In other words, just compensation must reflect the fair market value of the property, or what a willing buyer would pay a willing seller.³⁴¹

If circumstances render it difficult to calculate fair market value, or such value is not otherwise ascertainable, then other data must be utilized that will yield a fair compensation that reflects the true economic value of the asset taken.³⁴² Calculating 'just compensation' remains particularly

³³⁵ See Douglas W. Kmiec, *The Takings Clause*, in "The Heritage Guide to the Constitution" 342 (Edwin Meese III et al. eds., 2005) ("[T]he federal [government's] power of eminent domain resides in, and is limited by, the Necessary and Proper Clause (Article I, Section 8, Clause 18), or by Congress' implied powers as confirmed by the Necessary and Proper Clause. Under this perspective, Congress may exercise the power of eminent domain only in order to effectuate one of its delegated powers. Similarly, the executive is limited to property takings allowable only under Article II executive powers, but they are far more restricted. Inasmuch as James Madison came to support and propose a Bill of Rights because he realized the range of congressional power under the Necessary and Proper Clause, and inasmuch as the Takings Clause is primarily his offering, such a reading has historical credence." (citations omitted)).

³³⁶ See Laurence H. Tribe, "American Constitutional Law" (1978), *supra* at p. 463 ("[T]he just compensation requirement appears to express a limit on government's power to isolate particular individuals for sacrifice to the general good."); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

³³⁷ *Id.*

³³⁸ See *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573 (1898).

³³⁹ See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

³⁴⁰ See *Chicago B. & Q. R. v. Chi.*, 166 U.S. 226, 250 (1897).

³⁴¹ See *United States v. Miller*, 317 U.S. 369, 374 (1943).

³⁴² See *Miller*, 317 U.S. at 374; *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *United States v. Felin & Co.*, 334 U.S. 624 (1948); *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *Vogelstein & Co. v. United States*, 262 U.S. 337 (1923); *United States v. Cors*, 337 U.S. 325 (1949); *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949).

difficult where direct or indirect government action or threat of action actually results in an artificial or irregular diminution in the fair market value of such property.³⁴³

The due process of law to which the Fifth Amendment refers relates to both substantive and procedural safeguards guaranteed to individuals against arbitrary governmental actions.³⁴⁴ An individual's due process rights are deemed to be implicated "whenever government action seemingly conflict[s] with substantive individual rights."³⁴⁵ It has thus been said that these rights include the right to the preservation and protection of private property, even to a greater extent than had been afforded by the common and statutory law of England prior to the formation of the United States.³⁴⁶ Procedurally speaking, the due process clause guaranteed, at a minimum, the right to notice and a hearing prior to deprivation of such a substantive right.³⁴⁷

ii. State and Local Government Action – 'Takings'

The notion of 'due process of law,' and its application to the Takings Clause, was extended to the States by the 14th Amendment to the U.S. Constitution in 1868.³⁴⁸ The 14th Amendment has been interpreted by the U.S. Supreme Court as requiring the protection, at the state and local level, of virtually all of the rights guaranteed to individuals by the Bill of Rights at the Federal level.³⁴⁹ This entails both procedural and substantive rights, including those protected by the 'takings' clause.³⁵⁰ The U.S. Supreme Court affirmed the purpose behind the 'takings clause' in the case of *Lingle v. Chevron USA, Inc.*³⁵¹ According to the Court, the takings clause was "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."³⁵²

The U.S. Supreme Court's 'takings' jurisprudence has addressed the issue of private property 'takings' mostly in disputes involving states and local municipalities, where it was alleged that real property had been unfairly appropriated without adequate compensation.³⁵³ The Court has

³⁴³ See *Brazil, Gilead Agree AIDS Drug Price Cut*, TODAY ONLINE, May 10, 2006, <http://www.todayonline.com/articles/117593.asp>.

³⁴⁴ See Laurence H. Tribe, "American Constitutional Law" (1978), *supra* at p. 501. ("These procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action."(footnote omitted)).

³⁴⁵ *Id.*, at p. 507.

³⁴⁶ See *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

³⁴⁷ See *Id.* at 507-508.

³⁴⁸ See U.S. CONST. amend. XIV ("[Nor shall any State deprive any person of life, liberty, or property, without due process of law ...]").

³⁴⁹ See Laurence H. Tribe, "American Constitutional Law" (1978), *supra* at 507. ("Thus, apart from the specific declarations of the Bill of Rights - virtually all of which later came to be applied to the states through the due process clause of the fourteenth amendment - there was no attempt to tie the invocation of due process protection to positive rules." (footnote omitted)).

³⁵⁰ See *Id.* at 508 ("The fifth and fourteenth amendments' due process clauses as interpreted in the Supreme Court's substantive due process analyses have furnished a broad definition of the 'liberty' that was in turn afforded procedural protection against arbitrary deprivation.").

³⁵¹ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

³⁵² *Id.* at 537 (quoting *First English Evan. Luth. Ch. v. Los Angeles*, 483 U.S. 304, 315 (1987)); See also *Id.* ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the existence of that power.'" (quoting *First English*, 482 U.S. at 314)).

³⁵³ See *Lingle*, 544 U.S. at 538-39.

held that a taking can occur even in the absence of a direct physical appropriation of, or ousting from, private property.³⁵⁴ If a government regulation deprives an owner of substantially all of the beneficial use, enjoyment, or value of his or her private property, then a taking is deemed to have occurred.³⁵⁵ In *Lingle v. Chevron USA, Inc.*, for example, former Justice Sandra Day O'Connor discussed how both “the permanent physical invasion” of private property and “the complete elimination of a property's value”, i.e. the “total deprivation of [its] beneficial use,” are equivalent in that they both “eviscerate the owner's right to exclude others from entering and using her property.”³⁵⁶ She explained that the Court’s historical analysis has generally focused on the severity of the burden that government imposes indirectly via regulation on private property rights, rather than on the failure of a regulation to substantially advance legitimate state interests.³⁵⁷

iii. Takings for ‘Public Use’

U.S. Supreme Court’s 2005 decision in *Kelo, et al. v. New London*³⁵⁸ placed the U.S. Supreme Court’s takings jurisprudence in conflict with itself. It narrowly concerned the legality of a municipality’s forced sale (taking) of private real property belonging to one class of individuals (current land owners) for the benefit of a different class of individuals (for the private use of future purchasers and lessees newly constructed dwellings and commercial office space), incident to a municipal economic redevelopment plan.³⁵⁹ The Court’s majority ruled that it was not necessary for the replacement property to be actually used by the general public to be considered a ‘public use.’³⁶⁰ Rather, redevelopment use need only have a conceivable public character or serve a public purpose to be deemed legitimate.³⁶¹

This decision is troubling, in the first instance, because contrary to prior court jurisprudence it focused on the legitimate state interests that the particular regulation sought to advance rather than the burden that it placed on private property rights. It then proceeded to effectively liberalize the ‘legitimate state interest’ requirement. The majority explained that a conceivable public character or public purpose would be inferred if the economic development plan had either eliminated some undesirable ‘social and economic evil,’ such as crime, time-consuming and costly data research, etc., or had sought to create some broad public benefit (e.g., a

³⁵⁴ See *Lingle*, 544 U.S. at 538 (“Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of ‘all economically beneficial us[e]’ of her property.” (emphasis in original) (citation omitted)).

³⁵⁵ *Id.* at 539 (“The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property - perhaps the most fundamental of all property interests.... In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor.” (citations omitted)).

³⁵⁶ See *Id.* at 539 (emphasis added) (citations omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1117 (1992)).

³⁵⁷ See *Id.*

³⁵⁸ See *Kelo v. New London*, 125 S. Ct. 2655 (2005).

³⁵⁹ See *Id.*

³⁶⁰ See *Id.* at 2662-2664.

³⁶¹ See *Id.* at 2665.

community that is “beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled”).³⁶² It does not matter whether some private individuals would benefit at the expense of others in the process.³⁶³

In response to the public outcry following the *Kelo* decision and the growing number of state and municipal-led economic redevelopment plans resulting in real property takings, former President Bush issued Executive Order (EO) 13406 entitled, *Protecting the Property Rights of the American People*.³⁶⁴ This EO is largely based on prior EO 12630,³⁶⁵ which had been issued during the Reagan administration to deal with the much larger problem of state and local environmental regulatory-based takings that had plagued the U.S. countryside during the 1970s and early 1980s.³⁶⁶ It recognized that “governmental actions that do not formally invoke the [eminent domain] condemnation power, including regulations, may [in fact] result in a taking for which just compensation is required.”³⁶⁷

³⁶² *Id.* at 2663 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)); *Id.* at 2664. This reasoning was apparently consistent with the rationale underlying the Court's earlier decision in *Ruckelshaus*, where the Court held that there was a compensable ‘taking’ of private property for a ‘public use,’ even though some private persons would benefit at the expense of others. See *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1014-15 (1984).

³⁶³ See *Kelo*, 125 S. Ct. at 2666 (“Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.... ‘The public end may be as well or better served through an agency of private enterprise than through a department of government - or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.’” (quoting *Berman*, 348 U.S. at 34)).

³⁶⁴ See Exec. Order No. 13,406, 71 Fed. Reg. 36, 973 (June 23, 2006), available at: <http://www.presidency.ucsb.edu/ws/?pid=229> (“It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”). See also Office of the Attorney General, Memorandum for All Department and Agency Heads, *Implementation of Executive Order 13406: Protecting the Property Rights of the American People* (Sept. 16, 2008), available at: <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-091608.pdf>.

³⁶⁵ See Exec. Order No. 13,406, 71 Fed. Reg. 36, 973 (June 23, 2006), *supra* at § 4(c) (“This order shall be implemented in a manner consistent with Executive Order 12630 of March 15, 1988.”); See also Exec. Order No. 12,630, 53 Fed. Reg. 8, 859, §§ 1(c), 3(b-c) (Mar. 15, 1988).

³⁶⁶ See Harvey M. Jacobs, *The Politics of Property Rights at the National Level - Signals and Trends*, 69 J. AM. PLAN. ASS'N. 2, 181, 181-182 (2003) (“[T]hrough the 1988 Executive Order 12630...the administration sought to initiate a national level process analogous to environmental impact assessments (EIAs) called takings impact assessments. Under this procedure, all government agencies were required to conduct an analysis of the anticipated impact of proposed laws, rules, and regulations on private property rights. This order was promoted by its advocates as a prudent ‘look before you leap’ action, like EIAs. Its advocates maintained that the intent of the order was to clarify the impact of proposed governmental action so that legislators and agency heads could then decide if the social benefits of laws, rules, and regulations outweighed the costs to private individuals.”).

³⁶⁷ 501. Exec. Order No. 12,630, 53 Fed. Reg. 8, 859, § 1(a) (Mar. 15, 1988). EO 12630's guidelines were updated after the release of a 2003 General Accounting Office report which found that federal agencies had conducted few 12630 takings implications assessments during the 1990s. See U.S. Gen. Accounting Office, 162 Cong., Report to the Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use 2* (Sept. 2003), available at <http://www.gao.gov/new.items/d031015.pdf>; See also William G. Laffer, *Realistic Options for Reducing the Burden of Excessive Regulation*, Heritage Foundation, Jan. 19, 1993, <http://www.heritage.org/Research/Regulation/CM15.cfm> (“[Federal] agencies [could have] easily circumvent[ed] EO 12630 simply by routinely finding ‘no takings implications’ each time they perform the ‘Takings Implication Assessment’ required by the Attorney General's guidelines for implementing the Order.”).

d. *Potential Claims*

Generally speaking, it is arguable that congressional ratification of the CSKT Water Compact, a key purpose of which is “to achieve a fair and equitable water rights settlement for the Tribes and allottees” – i.e., for the purpose of fulfilling the federal government’s fiduciary obligation/duty to protect CSKT tribal trust assets (e.g., on-Reservation or off-Reservation (aboriginal) tribal water rights, forests, etc.), and subsequent federal and Montana state government actions undertaken in implementation of that Compact purpose, would individually and collectively qualify as a “public use” within the meaning of the 5th Amendment jurisprudence. Article VIII of the Hellgate Treaty³⁶⁸ resurrected by the CSKT Water Compact provides that, while the Tribes

“pledge themselves to commit no depredations upon the property of [] citizens [...of] the Government of the United States, [...] should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property take shall be returned, or in default thereof, or is injured or destroyed, compensation may be made by the Government out of the annuities.”³⁶⁹

If it can be shown that Interior Secretary determinations and actions and/or Flathead Reservation Water Management Board and/or Compact Implementation Technical Team determinations and actions made or engaged in in implementation of the CSKT Water Compact result in the “taking” of valuable Montana irrigator land and water rights, without payment of fair and just compensation, the CSKT Water Compact could arguably be successfully challenged at the U.S. Court of Claims as violating Montana irrigators’ Fifth Amendment rights.

2. 5th/14th Amendment – Equal Protection Clause:

Should Congress ratify the CSKT Water Compact, it would effectively sanction U.S. Interior Department policies that demonstrate an unmistakable bias toward and preference for one select group or classification of persons, including entities owned and controlled by them that are known to qualify as CSKT tribal members. Congressional enactment of the CSKT Water Compact into federal law would be tantamount to approving agency behaviors that discriminate in favor of the CSKT, which is designated by the U.S. government as a “federally recognized tribal entity,” and against non-CSKT members. It would perpetuate the legal fiction the DOI’s BIA, BOR and FWS have created to enable these agencies to grant express or implied preferences for tribes’ cultural and religious rights, such as significant fish, wildlife and environment rights and interests, were converted into ‘protected’ political rights.

This legal fiction was made possible once the federal government had designated the CSKT as a “federally recognized tribal entity” based on its meeting of tribal community/group organization, membership and other political criteria. In other words, such preferences are based on the Nixon and subsequent presidential administrations’ conviction that they are a “benign” type of justified

³⁶⁸ See Hellgate Treaty of July 16, 1855, 12 Stat. 975; (II Kapp. 722), *supra* at Article VIII.

³⁶⁹

racial discrimination that is not unconstitutional and, consequently, is worthy of only rational basis judicial review. This legal fiction was premised on the U.S. Supreme Court’s 1974 decision in *Morton v. Mancari*,³⁷⁰ which “reframed the issue to emphasize that the question was not about race discrimination but about the right of American Indian tribes to *political* sovereignty” (emphasis added).³⁷¹ In other words, “[t]he Court emphasized that the blood quantum preference in *Mancari* dealt only with members [i.e., the membership] of federally recognized tribes, and thus the preference was *political* rather than racial” (emphasis added).³⁷²

Arguably, if the Compact is ratified and enacted into federal law, and Montana irrigators are able to show that the CSKT Water Compact preferences are intended to favor and protect the CSKT members’ cultural, religious and spiritual rights, values and related interests at the expense of Flathead Reservation non-tribal member irrigator, government and business interests, then the Compact or certain of its provisions may be actionable under the 5th and 14th Amendments to the U.S. Constitution.

3. The 10th Amendment to Which the Federal Government and the State of Montana Must Adhere:

a. *Protects States From Federal Government Overreach*

The Founders determined that power must be divided among the different levels of government: national and state. Under the U.S. Constitution, the national government was to be supreme in certain areas, but the states were not to become mere administrative units of the central government. The 10th Amendment to the Constitution was intended to protect the rights of the states by making clear that a number of spheres of activity were to be reserved for the states. For example, State governments are largely responsible for managing their own budgets and making and enforcing laws in many areas that impact residents of the state.

In *United States v. Sprague*,³⁷³ the U.S. Supreme Court held that “The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified.”³⁷⁴

A decade later, in *United States v. Darby*,³⁷⁵ the U.S. Supreme Court held that,

³⁷⁰ See *Morton v. Mancari*, 417 U.S. 535 (1974).

³⁷¹ See Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008) at pp. 811 and 814, available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1179&context=californialawreview> (“The Court emphasized that the blood quantum preference in *Mancari* dealt only with members of federally recognized tribes and thus the preference was political rather than racial. By contrast, the blood quantum rule in *Rice* [*Rice v. Cayetano*, 528 U.S. 495 (2000)], which did not deal with a federally recognized tribe, lacked a political purpose and thus, constituted an impermissible racial classification.”) *Id.*

³⁷² *Id.*

³⁷³ See *United States v. Sprague*, 282 U.S. 716 (1931).

³⁷⁴ See *Id.*, at p. 733.

³⁷⁵ See *United States v. Darby*, 312 U.S. 100 (1941).

“The [Tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”³⁷⁶

More recently, in *Fry v. United States*,³⁷⁷ the U.S. Supreme Court held that,

“While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’ [citing Darby], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”³⁷⁸

A year later, in *National League of Cities v. Usery*,³⁷⁹ the U.S. Supreme Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was “undoubtedly within the scope of the Commerce Clause.”³⁸⁰ However, it cautioned that

“there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”³⁸¹

Even more recently, in *Garcia v. San Antonio Metropolitan Transit Authority*,³⁸² the U.S. Supreme Court held that, “States retain a significant amount of sovereign authority ‘only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government’”³⁸³ The Court also held that, “Apart from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”³⁸⁴

b. Protects State Citizens From State Governments

³⁷⁶ See *Id.*, at p. 124.

³⁷⁷ See *Fry v. United States*, 421 U.S. 542 (1975).

³⁷⁸ See *Id.*, at p. 547 n.7.

³⁷⁹ See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

³⁸⁰ See *Id.*, at p. 845.

³⁸¹ *Id.*

³⁸² See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

³⁸³ See *Id.* at p. 549.

³⁸⁴ *Id.*, at p. 550.

In *Gregory v. Ashcroft*,³⁸⁵ the U.S. Supreme Court held that,

“[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at ‘the heart of representative government’ [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause].”³⁸⁶

More recently, in *New York v. United States*,³⁸⁷ the U.S. Supreme Court held that,

“Congress may not ‘commandeer’ state regulatory processes by ordering states to enact or administer a federal regulatory program. [...] While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, *the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.*³⁸⁸ [...] The Court has been explicit about this distinction. ‘Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.’ (emphasis added).³⁸⁹ The Court has made the same point with more rhetorical flourish, although perhaps with less precision, on a number of occasions. In Chief Justice Chase’s much-quoted words, ‘the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.’ (emphasis added).³⁹⁰

Significantly, in rejecting arguments that New York’s sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court held the following:

“*The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. **To the contrary, the***

³⁸⁵ See *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

³⁸⁶ See *Id.*, at p. 463.

³⁸⁷ See *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992).

³⁸⁸ See *Id.*, at p. 162, referencing *Coyle v. Smith*, 221 U. S. 559, 565 (1911).

³⁸⁹ See *New York v. United States*, 505 U.S. at p. 162, citing *Lane County v. Oregon*, 74 U.S. 71 (1868).

³⁹⁰ See *New York v. United States*, 505 U.S. at pp. 162-163, citing *Texas v. White*, 74 U.S. 700 (1868); *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523 (1926) (“[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers; *Tafflin v. Levitt*, 493 U. S. 455, 458 (1990) (“[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government”); *Gregory v. Ashcroft*, 501 U. S., at 461 (“[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere”).

Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’³⁹¹ ‘Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.’³⁹² [...] **Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials. [...] State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.**³⁹³

Consequently, in the event the Congress ratifies the CSKT Water Compact, and it can be shown that such Compact effectively sanctions the Interior Department’s taking of Montanans’ private property rights for a public use without payment of just compensation, the effective consent of the Montana legislature and Governor’s Office to the CSKT Water Compact via enactment and implementation of it at the state level, would seem to expose such State officials to potential federal constitutional liability under the 10th Amendment.

4. The Ninth Amendment to Which the State of Montana and the Federal Government Must Adhere:
 - a. *The Ninth Amendment Protects Against the Exercise of Expansive Federal Power That Undermines Individual Rights*

At least two legal scholars of originalist constitutional thought have produced historical evidence dating back to the state ratifying conventions demonstrating that the Ninth Amendment to the U.S. Constitution provides “a meaningful check on federal power and a significant guarantee of individual liberty.”³⁹⁴ The Ninth Amendment states as follows:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others* retained by the people.” (emphasis added).³⁹⁵

Professor Randy Barnett has argued that,

³⁹¹ See *New York v. United States*, 505 U.S. at p. 181, citing *Coleman v. Thompson*, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting).

³⁹² See *New York v. United States*, 505 U.S. at pp. 181-182, citing *Gregory v. Ashcroft*, 501 U. S., at 458; The Federalist No. 51, p. 323 (C. Rossiter ed. 1961).

³⁹³ See *New York v. United States*, 505 U.S. at p. 182.

³⁹⁴ See Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev 1-82 (2006), available at: <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1850&context=facpub>. See also Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Texas L. Rev. 331, 394-99 (2004), available at: http://constitution.org/911/schol/kurt_lash_lost_9th.pdf.

³⁹⁵ See U.S. CONST. amend. IX.

“The evidence of original meaning that has been uncovered in the past twenty years confirms the first impression of untutored readers of the Ninth Amendment and undercuts the purportedly more sophisticated reading that renders it meaningless. *The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before*; and its existence argued against a latitudinarian interpretation of federal powers.” (emphasis added).³⁹⁶

Professor Kurt Lash has argued that Founding Father James Madison and other Revolutionary War-era legal writers viewed **the Ninth and Tenth Amendments as “twin guardians of our federalist structure of government”** (emphasis added).³⁹⁷ His research reveals that the state ratifying conventions had been very concerned about the “danger of expansive interpretations of federal power,” and had “insisted on adding *a rule of construction that limited the interpretation of enumerated federal power*.” (emphasis added).

“James Madison complied by drafting the Ninth Amendment. According to Madison, the purpose of the Ninth Amendment was to ‘[guard] against a latitude of interpretation’ while the Tenth Amendment ‘exclud[ed] every source of power not within the constitution itself.’”³⁹⁸

Professor Lash adds that the unique text of the Ninth Amendment was rooted in the concerns first expressed by the anti-Federalists who had warned of the risk that federal courts would, unless checked, “engag[e] in ‘latitudinarian interpretations’ of federal power.”³⁹⁹ The state ratifying conventions then responded by “submit[ting] proposed amendments to the Constitution expressly prohibiting the constructive enlargement of federal power.”⁴⁰⁰ Consequently, “[o]ne of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters except those expressly restricted.”⁴⁰¹

According to Lash,

“Recounting the concerns of the state conventions regarding expansive interpretations of federal power at the expense of the states, *Madison argued that the Constitution had been ratified with the understanding that constructive enlargement of federal power was prohibited*. Madison concluded by noting that *the Ninth and Tenth Amendments were added specifically to address these*

³⁹⁶ See Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006), *supra* at pp. 2; See *Id.*, at p. 4 “it is worth noting that Professor Lash and I end up in a nearly identical place: the Ninth Amendment justifies a narrow or “strict” construction of federal powers, and especially implied federal powers.[fn] On both of our accounts, the Ninth Amendment undermines what Madison called a “latitudinarian” interpretation of the enumerated powers—including the Necessary and Proper Clause.[fn].”

³⁹⁷ See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Texas L. Rev. 331, *supra* at p. 336.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ See Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L. Rev. 1, 22 (2004), available at: http://constitution.org/911/schol/kurt_lash_juris_9th.pdf.

concerns, with the Ninth guarding against ‘a latitude of interpretation’ and the Tenth declaring the principle of delegated power.” (emphasis added).⁴⁰²

Moreover, Professor Lash has uncovered U.S. Supreme Court jurisprudence, “ignored by the framers of the Fourteenth Amendment” and that has languished since the New Deal reflecting judicial application of the Ninth Amendment to address a host of important national public policy issues.

“Beginning in 1789 and extending to 1964, the Ninth Amendment played a significant role in some of the most important constitutional disputes in our nation’s history, including the ratification of the Bill of Rights, the constitutionality of the Bank of the United States, the scope of exclusive versus concurrent federal power, the authority of the federal government to regulate slavery, the right of states to secede from the Union, *the constitutionality of the New Deal*, and the legitimacy and scope of incorporation doctrine.” (emphasis added).⁴⁰³

Lash argues that history and jurisprudence clearly show that, from our Nation’s

“Founding to the Civil War, courts interpreted the Ninth Amendment precisely along the lines anticipated by James Madison and insisted upon by the state ratifying conventions. *Instead of being read as a source of individual rights, courts deployed the Ninth as a tool for preserving state autonomy.* Of particular concern was the degree to which states could exercise concurrent authority over matters falling within the scope of enumerated federal power. In a previously unrecognized discussion of the Ninth Amendment, *Justice Joseph Story* described how *the Ninth mandates a limited construction of federal power in order to preserve the concurrent powers of the states.* Story’s reading of the Ninth Amendment echoed that of James Madison, and his opinion, though lost to us today, remained influential for more than a century.” (emphasis added).⁴⁰⁴

Lash also explains that, from the era of

“Reconstruction to the New Deal, courts and commentators continued to cite the Ninth Amendment in conjunction with the Tenth as one of the twin guardians of *state autonomy.* ***Instead of reading the Ninth Amendment as foreshadowing the newly protected privileges or immunities of United States citizens,*** courts applied the rule of construction represented by the Ninth to limit the interpretation of Fourteenth Amendment rights. [...] Given their common [] application as states’ rights provisions, it is no surprise that John Bingham left both the Ninth and Tenth Amendments off his list of privileges

⁴⁰² See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Texas L. Rev. 331, *supra* at p. 337.

⁴⁰³ See Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L. Rev. 1 (2004), *supra* at Abstract.

⁴⁰⁴ *Id.*, at p. 5.

or immunities protected against state action by the Fourteenth Amendment.” (emphasis added).⁴⁰⁵

Lash then explains that, from the New Deal era to the U.S. Supreme Court’s holding in *Griswold v. Connecticut*,⁴⁰⁶

“the traditional reading of the Ninth Amendment disappeared during the dramatic reconfiguration of federal power that occurred after 1937. Although initially relied upon by courts in resistance to President Roosevelt’s attempts to regulate the national economy, both the Ninth and Tenth Amendments were reduced to no more than truisms by Justice Robert’s ‘switch in time.’ Free from the restraining rule of construction previously associated with the Ninth Amendment, the Supreme Court expanded the scope of federal power without regard to the impact on state regulatory autonomy.” (emphasis added).⁴⁰⁷

Finally, Lash explains that, in order for the U.S. Supreme Court to have expanded federal power to the extent it had during and since the New Deal era, it needed to curtail its previous conception of “liberty” under the Fourteenth Amendment’s due process clause by limiting due process to the rights expressly enumerated in the Bill of Rights. This proceeded unabated until the Court addressed the application of the Ninth Amendment in *Griswold*.

“The expansion of regulatory power at the time of the New Deal required a concomitant reduction in the Court’s previously broad interpretation of liberty under the Due Process Clause. After 1937, the issue became how to reconstruct that liberty in light of the New Deal Court’s general deference to the political process. In particular, having limited due process liberty to the rights listed in the text of the Bill of Rights, the New Deal Court had to decide whether all of the Bill of Rights should be incorporated against the states. It was here that the traditional doctrine of the Ninth Amendment made its last stand. Applying a rule of construction based on the Ninth and Tenth Amendments, the Supreme Court initially resisted incorporation claims in order to preserve the states’ retained rights to establish local rules of criminal procedure. As the Court gradually incorporated most of the Bill of Rights, this final application of the traditional Ninth Amendment also faded away.” (emphasis added).⁴⁰⁸

⁴⁰⁵ *Id.*

⁴⁰⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (In *Griswold*, the Court addressed the constitutionality of “§§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides: ‘Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.’ Section 54-196 provides: ‘Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.’”). *Id.*, at p. 480.

⁴⁰⁷ See Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L. Rev. 1 (2004), *supra* at p. 6.

⁴⁰⁸ *Id.*

In *Griswold v. Connecticut*, the Supreme Court recognized that its jurisprudence had strongly suggested the existence of a “zone of [individual] privacy” inherent within the Ninth Amendment and other of the Bill of Rights upon which government may not to intrude.

“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [...] Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’” (emphasis added).⁴⁰⁹

Ultimately, the Court held that, the “right of privacy [is] older than the Bill of Rights—older than our political parties, older than our school system,” is protected by the Due Process Clause of the Fourteenth Amendment.⁴¹⁰ The Court, in effect, inferred the existence of an inherent penumbra (or shaded gray zone) surrounding the Fourteenth Amendment from within which the right to privacy can be found.

Justice Goldberg’s concurring opinion in *Griswold*, in which Chief Justice Warren and Justice Harlan joined, went in a different direction. It went into greater detail explaining the original meaning of the Ninth Amendment, and why he could not “accept[] the view that ‘due process’ as used in the Fourteenth Amendment *incorporates all of the first eight Amendments.*”⁴¹¹ To this end, Justice Goldberg’s concurring opinion emphasized how

“the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[fn] While this Court has had little occasion to interpret the Ninth Amendment,[fn] ‘[i]t cannot be presumed that any clause in the constitution is intended to be without effect.’ *Marbury v. Madison*, 1 Cranch 137, 174. In interpreting the Constitution, ‘real effect should be given to all the words it uses.’ *Myers v. United States*, 272 U. S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. *To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many*

⁴⁰⁹ See *Griswold v. Connecticut*, 381 U.S. at 484.

⁴¹⁰ 381 U.S. at 481.

⁴¹¹ *Id.*, at 486.

words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. **Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment**, which specifically states that ‘[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’ [...]**T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. [...] The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.**” (emphasis added).⁴¹²

Consequently, in the opinion of Justices Goldberg, Warren and Harlan, “the proper constitutional inquiry in [each] case is whether th[e state or local] statute [in question] infringes the Due Process Clause of the Fourteenth Amendment *because the enactment violates basic values ‘implicit in the concept of ordered liberty.’*” (emphasis added).⁴¹³ According to Professor Barnett, this means that, “the Ninth Amendment mandates the ‘equal protection’ of enumerated and unenumerated rights: unenumerated rights should be judicially protected to the same extent that enumerated rights are protected.”⁴¹⁴

b. *The Ninth Amendment Incorporates a Broad Concept of ‘Liberty’*

In *Griswold*, moreover, Justice Goldberg construed the Ninth Amendment as incorporating “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.”⁴¹⁵ It should not be forgotten that the concept of liberty which preceded the Bill of Rights is synonymous with the phrase “life, liberty and the pursuit of happiness” contained in the Declaration of Independence:

“We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & ***inalienable***, among which are the preservation of life, & liberty, & the pursuit of happiness;”⁴¹⁶

⁴¹² *Id.*, at pp. 490-492.

⁴¹³ *Id.*, at p. 500.

⁴¹⁴ See Randy E. Barnett and Louis Michael Seidman, *The Ninth Amendment*, The Constitution Center, available at: <http://constitutioncenter.org/interactive-constitution/amendments/amendment-ix>.

⁴¹⁵ See *Griswold v. Connecticut*, 381 U.S. at p. 500.

⁴¹⁶ See American History From Revolution to Reconstruction and Beyond, *The Final Text of the Declaration of Independence July 4 1776*, available at: <http://www.let.rug.nl/usa/documents/1776-1785/the-final-text-of-the-declaration-of-independence-july-4-1776.php>.

Professor Lash argues, further, that the Ninth Amendment’s recognition of the concept of liberty incorporates by necessity the views of the states toward natural rights prior to their ratification of the U.S. Constitution.

“Because so much of the debate over the original meaning of the Ninth Amendment has involved the issue of natural rights, it seems appropriate to consider the relationship of such rights with the federalist reading of the Ninth Amendment. Libertarian scholars have criticized federalist readings of the Ninth for ignoring the Founders’ commitment to protect natural rights.[fn] In fact, evidence that many Founders embraced the idea of natural rights is broad and deep.[fn] Madison himself referred to natural rights in his speech introducing the Bill of Rights.[fn] Most state constitutions referred to natural rights,[fn] and prior to the adoption of the Constitution, state courts referred to natural rights, as did some early Supreme Court cases.[fn] *In light of this evidence, there is no textual reason and little historical reason to believe that the ‘other rights’ [referred to in] the Ninth Amendment did not include natural rights.*” (emphasis added).⁴¹⁷

Professors Lash and Barnett agree that, “even if the traditional understanding of the Ninth Amendment until now has been lost, the rule of construction represented by the Ninth lives on.”⁴¹⁸ Indeed, Professor Barnett argues that the Ninth Amendment should be given judicial effect by interpreting the scope of Congress’ enumerated powers, “especially its implied powers under the Necessary and Proper Clause,” more narrowly.⁴¹⁹

Thus, according to Professor Barnett, there should be a **‘presumption of liberty’**—to protect all the retained rights of the people by placing the onus on legislatures to justify their restrictions on liberty as both necessary and proper, without judges needing to specifically identify the retained individual rights.” (emphasis added).⁴²⁰ In other words,

“the courts could put the burden of justification on the federal government whenever legislation restricts the exercise of liberty. [...T]his presumption may be rebutted by a showing that a particular law was a necessary regulation of a rightful act or a prohibition of a wrongful act.[fn] What is barred by the Ninth Amendment under this model is the prohibition or unnecessary regulation of rightful acts. According to a presumption of liberty, the unenumerated liberties retained by the people would receive the same presumptive protection as that now accorded some of the enumerated rights.” (emphasis added).⁴²¹

⁴¹⁷ See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Texas L. Rev. 331, *supra* at p. 401.

⁴¹⁸ See Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L. Rev. 1 (2004), *supra* at p. 6.

⁴¹⁹ See Randy E. Barnett and Louis Michael Seidman, *The Ninth Amendment*, The Constitution Center, *supra*.

⁴²⁰ *Id.*

⁴²¹ See Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006), *supra* at p. 15. See also Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty, at pp. 118-130 (Princeton Univ. Press 2004), available at: <https://www.amazon.com/Restoring-Lost-Constitution-Presumption-Liberty/dp/0691159734>.

Professor Lash has similarly concluded that “[i]t is the Ninth, not the Tenth [Amendment], that literally provides a rule of interpretation limiting the construction of enumerated federal power in order to protect the retained right of the people to local self-government.”⁴²²

“The degree of local political autonomy depends on the amount of ‘space’ between national powers and national rights. As a rule of interpretation limiting the constructive enlargement of federal authority, the Ninth Amendment held back the encroaching tide of federal jurisdiction and, along with the Tenth, maintained areas of local self-government. Without this interpretive restraint, federal power threatened to expand right up to the threshold of federal rights, thus leaving the Tenth Amendment no more than a truism preserving a null set of ‘reserved’ powers. From its adoption, the Ninth Amendment was intended to prevent such an expansion of federal power, and this is how the Ninth was applied for more than one hundred and fifty years.”⁴²³

Professors Barnett and Lash have engaged in a truly indispensable discussion of the origins and jurisprudence of the Ninth Amendment, including the need to reinstate *a presumption of liberty* to limit the enlargement of the federal government and to ensure the proper functioning of federalist system without unnecessarily limiting the powers retained by the states. It places into clearer context the U.S. Supreme Court’s holding in *New York v. United States* referenced in Section V.3 of this memorandum, namely, that “the Constitution divides authority between federal and state governments *for the protection of individuals*.”⁴²⁴

- c. *Possible Application of the Ninth Amendment to Address the Government’s Expansive Federal Trust Obligation Owed to Indian Tribes Anchoring the Tester Bill and the Tribal Forestry Management Provisions of S.3014, H.R. 2647 and S.3085*

The writings of Professors Barnett and Lash also place into clearer perspective the concurring opinion of U.S. Supreme Court Justice Clarence Thomas in *U.S. v. Bryant*.⁴²⁵ In *Bryant*, Justice Thomas argued against the Court’s enlargement of federal government authority vis-à-vis its prior creation of a new federal power that recognizes both Indian tribes’ right to self-determination and their status as dependent “sovereigns” when necessary to protect Indian tribal members from themselves. According to Justice Thomas,

⁴²² See Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L. Rev. 1 (2004), *supra* at pp. 117-118.

⁴²³ *Id.*, at p. 115.

⁴²⁴ See *New York v. United States*, 505 U.S. at p. 182.

⁴²⁵ See *United States v. Bryant*, 579 U. S. ____ (2016) (This case concerned the constitutionality of the Major Crimes Act (18 U. S. C. §117(a)) which punished crimes committed by Indians against Indians on Indian land. The Court held that, since “Bryant’s tribal-court convictions occurred in proceedings that complied with ICRA [The Indian Civil Rights Act of 1968] and were therefore valid when entered, use of those convictions as predicate offenses in a §117(a) prosecution does not violate the Constitution.”). Slip Op. at p. 2, available at: https://www.supremecourt.gov/opinions/15pdf/15-420diff_0n13.pdf.

“Three basic assumptions underlie this case: that the Sixth Amendment ordinarily bars the Government from introducing, in a later proceeding, convictions obtained in violation of the right to counsel, [...]; that tribes’ retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the Constitution,⁴²⁶ [...]; and that Congress can punish assaults that tribal members commit against each other on Indian land [...]. **Although our precedents have endorsed these assumptions for decades, the Court has never identified a sound constitutional basis for any of them, and I see none.**” (emphasis added).⁴²⁷

“[...] Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes’ distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. *And by treating all tribes as possessing an identical quantum of sovereignty, the Court’s precedents have made it all but impossible to understand the ultimate source of each tribe’s sovereignty and whether it endures.* See Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).” (emphasis added).⁴²⁸

“Congress’ purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress’ power to ‘regulate Commerce...with Indian Tribes,’ not the Senate’s role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara*, supra, at 224–225 (THOMAS, J., concurring in judgment)⁴²⁹ [...] Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama*, supra, at 377–380; cf. ante, at 5. ***The Court asserted: ‘The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection...It must exist in***

⁴²⁶ See *United States v. Bryant*, 579 U.S. ____ (2016), Thomas, J., concurring at Slip Op., p. 2 (“By virtue of tribes’ status as “separate sovereigns pre-existing the Constitution,” tribal prosecutions need not, under our precedents, comply with “those constitutional provisions framed specifically as limitations on federal or state authority.” *Ante*, at 7–8 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).”)

⁴²⁷ *Id.*, at pp. 1–2.

⁴²⁸ *Id.*, at p. 3.

⁴²⁹ See *United States v. Lara*, 541 U.S. 193, 224–225 (2004) (“I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. *Ante*, at 200. I cannot agree that the Indian Commerce Clause “provide[s] Congress with plenary power to legislate in the field of Indian affairs.” *Ibid.* [...] Next, the Court acknowledges that “[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, ‘to make Treaties.’” *Ante*, at 201 (quoting U. S. Const., Art. II, § 2, cl. 2). This, of course, suffices to show that it provides no power to Congress, at least in the absence of a specific treaty. [...] The treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty. Such an assertion is especially ironic in light of Congress’ enacted prohibition on Indian treaties.”)

that government, because it has never existed anywhere else.’ Kagama, supra, at 384. Over a century later, Kagama endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. [...] Lara, supra at 224 (Thomas, J., concurring in judgment) (‘The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.’ It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the ‘remnants of a race’ for its own good. Kagama, supra, at 384.” (emphasis added).⁴³⁰

Western Constitutional Rights, LLC and its membership should pay close attention to these legal commentators’ arguments demonstrating the relationship between the Ninth and Tenth Amendments and the enumerated and non-enumerated natural rights that inhere within the Bill of Rights. Western Constitutional Rights, LLC and its membership also should pay close attention to Justice Thomas’ concurring opinions in *Bryant* and *Lara* identifying the lack of enumerated Constitutional provisions justifying Congress’ exercise of plenary authority over (in favor of) Indian tribes.

Perhaps, these arguments may be collectively harnessed in favor of the presumption of liberty to invalidate another New Deal-era plenary power the U.S. Supreme Court had previously created outside the enumerated provisions of the Constitution to weaken the Bill of Rights – namely, “the distinctive obligation of trust incumbent upon the [Federal] Government in its dealings with these dependent and sometimes exploited people.”⁴³¹ This guiding principle now serves as the basis for the unconstitutional private property (water and land right) “takings” the Tester bill (S.3013) facilitates, and the tribal forest management provisions of S.3014, H.R.2647 and S.3085 expand upon, at the expense of Montanans’ and all Americans’ constitutional rights.

END

⁴³⁰ See *United States, v. Bryant*, 579 U.S. ____ (2016), Thomas, J., concurring at Slip Op., pp. 3-4.

⁴³¹ See *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942) (“[T]his Court has recognized **the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.** [...] In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress[fn] and numerous decisions of this Court, **it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.**”) (emphasis added).