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Montana must seek independence from CSKT

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Montanans Must Seek Independence from CSKT Water Compact

By Guest Column --Lawrence Kogan -- Bio and Archives July 2, 2015

July 4th celebrations are a time for recalling the birth and exceptionalism of our great nation. The United States of America has remained a unique global experiment in which Enlightenment-era principles (political, social, economic, scientific, philosophical and legal) have been deployed to successfully promote and defend our natural rights-based individualism and freedoms, especially private property. This 4th of July is particularly noteworthy, because it is both the 239th year since the signing of the Declaration of Independence and the 800th year since the signing of the English Magna Carta.

The Magna Carta strongly influenced the drafting of the Declaration of Independence and the U.S. Constitution's Bill of Rights. Its significance to Americans lies primarily in its guarantee to "We the People" of certain rights and its binding of an oppressive sovereign (government at all levels) to the rule of law. These documents together memorialize the Founding Fathers' distrust of concentrated political power and confidence that representative government, the idea of a supreme law and independent judicial review can serve as indispensable counterweights to tyranny.

Unfortunately, these core principles and values are now threatened by a presidential administration that rejects the commonly held notion of American exceptionalism, steadily usurps its constitutional authority and violates the rule of law, all in an effort to unilaterally transform this nation into a Europeanized post-modern regulatory utopia in which a new political class and elitist bureaucracy control what the people can and cannot do.

Apparently, the ‘cram-down’ approach that many Montana politicians and legislators recently employed to ensure the Confederated Salish & Kootenai Tribes (CSKT) Water Compact’s hasty enactment into State law, over the expressed protest of Montana’s citizens, reveals that they, too, subscribe to such thinking. The Compact is actually a Treaty to be ratified by Congress that was entered into by three distinct sovereigns (the governments of Montana, the United States and the CSKT (a deemed ‘dependent’ and ‘hostile’ nation pursuant to Supreme Court jurisprudence and 43 U.S.C. 1457(10))) that implements at the state and local levels the European and United Nations doctrine of environment-centric sustainable development i.e., Agenda 21. It is foremost an attack on their private property that diminishes the use and value of land and water rights. However, as discussed in a recent interview in which I participated, it also will surely harm free enterprise and the State’s sizeable ranching and agricultural economy and impair Montanans’ cherished personal and economic freedoms, including recreational hunting.

As I stated in Billings in a May presentation I delivered before a group convened by Regulatory Lawfare Relief, LLC (a new public interest-focused Montana-based company established by former executive Robert T. Fanning, specifically, to organize, manage and secure legal representation for those whose rights have been harmed by the Compact), “You can’t just focus anymore on what occurs locally, because what is local may be global.” In other words, those who, up to now, have focused narrowly on CSKT federally reserved waters rights must reconsider their provincial approach. Instead, Montana’s citizens must more broadly scrutinize the Compact’s complex provisions as restated in recently enacted SB262.

In particular, Montanans must carefully examine the many technical water abstracts that will govern the Compact’s implementation if deemed inconsistent with its textual terms. Their legislators’ inability to review these abstracts amid an unsavory voting process generated considerable confusion and doubt regarding the Compact’s true purpose, objectives and impacts. These abstracts effectively sanction the transformation of common law and statutory water and land rights into aboriginal rights by enabling the CSKT government, as owner and operator (Federal Energy Regulatory Commission licensee) of the Kerr Dam (ownership to be finalized in September 2015) to severely restrict water flows from the Kerr Reservoir and Kerr Dam to the Flathead River and the Jocko and Clark Fork Rivers downstream therefrom, both on and off the Flathead Indian Reservation, on prioritized environmental and cultural rights grounds.

In addition, the CSKT, which the Department of Interior’s (DOI’s) Bureau of Indian Affairs recently placed in control of the Flathead Irrigation System in violation of federal statute, has expressed its intention to suspend operations of the pumping stations along the Flathead River that flow to numerous feeder canals and lateral irrigation canals throughout the Reservation, consistent with the tribe’s aboriginal rights. Severely diminished water flows will adversely affect the land and appurtenant water rights held by, and consequently, the economic interests of, farmers and ranchers operating on and downstream from the Reservation, whose crops and grazing lands will perish and whose cattle and beef production will materially suffer.

And, there are a host of other actionable procedural and substantive law irregularities surrounding the CSKT Water Compact’s execution by federal, state and tribal government officials that also warrant closer public inspection.

For example, neither the Federal Environmental Protection Agency nor the DOI's Bureaus of Reclamation and Indian Affairs, or its Fish and Wildlife Service, performed an environmental assessment to determine whether the Compact's projected change(s) in water flows required a full-fledged environmental impact assessment to be undertaken, even though much of the Reservation is designated as containing federal wetlands and wildlands replete with sensitive wildlife, and the Flathead and Clark Fork Rivers are part of the Columbia River Basin, among the largest rivers and ecosystem-rich river basins in the United States.

Such National Environmental Policy Act (NEPA) violations would not have been tolerated (and indeed would have been publicly protested by nongovernmental environmental organizations (ENGOS)) had changes in water flows been proposed by private parties, and as had previously proposed improvements to highway 93 running through the Reservation been subject. Also, the DOI Bureau of Reclamation failed to ensure that the scientific assessment (water basin depletion study) it developed in support of the change(s) in water flows incident to the Compact's implementation satisfied Federal Information Quality Act requirements. Similarly, the National Oceanic and Atmospheric Administration's and DOI Fish & Wildlife Assessment's biological assessments of water flow changes to the Columbia River Basin, upon which the Bureau of Reclamation's assessment principally relied, had failed to satisfy IQA certification requirements.

Furthermore, it has been reported that tribal members who have assembled and spoken up in opposition to the CSKT Compact because their individual land and water rights have been and will be adversely affected by the CSKT government's intended changes to water flows, including those who testified during recent Montana Senate Judiciary Committee hearings, have been intimidated and threatened, in clear violation of the Indian Civil Rights Act and the U.S. and Montana Constitutions.

Moreover, while the public debates surrounding the CSKT Water Compact were building during the past several years, a group of lawyers (all former partners in one Montana-based law firm, who had worked or are currently working as paid lobbyists on both sides of the CSKT Water Compact legislative vote, as Northwestern Energy inside and/or outside counsel, or as State public officials), were simultaneously choreographing the quiet and discrete purchase by Northwestern Energy of twelve major Montana dams owned previously by Montana PPL, one of which includes the highly controversial Kerr Dam. Indeed, the current and former public officials among them failed to abide by Montana's Good Governance/Code of Ethics statute by failing to disclose their prior apparent and/or real conflicts of interest.

In their totality, these and other aberrations lead those cognizant among us to reasonably conclude that laws have been violated and ethical standards breached. As a result, Montanans now face an array of government and lobbying resources that have been committed to securing the U.S. Congress's ratification of the Compact at their expense.

At the present time, Congress is unfamiliar with the CSKT Water Compact's true details and the actual legal and economic harms its ratification will engender. Congress, therefore, must promptly become educated about the Compact's technical terms, as drafted and as they will be implemented. It also must be prepared to devote the time necessary to engage in the type of robust due diligence review that the Montana legislature had been denied the opportunity to

undertake. Until this occurs, the rights and interests of tribal and non-tribal residents of the Flathead Reservation and of residents living downstream therefrom, as well as, those of all Montanans, will remain in jeopardy. However, citizens from other States, principally those with abundant “waters of the United States” and “federally recognized tribes” that EPA has “treated as States” for Clean Water Act and Clean Air Act implementation purposes, have little reason to take comfort, for it is they who may be targeted next.

Lawrence Kogan is managing principal of The Kogan Law Group, P.C. and chief executive of the nonprofit Institute for Trade, Standards and Sustainable Development. He is currently assembling a legal team to broadly represent those Montanans whose land, water and other economic rights and interests, on and downstream from the Flathead Reservation, have been and will be impaired by the CSKT Water Compact.