From Down Dirt Roads

…Opinions of our readers

Honor the Rule of Law

By Lawrence Kogan

George Ochenski's recently published article "Honor the Salish-Kootenai and Drop the Kerr Dam Lawsuit" -- appearing in the September 7 issue of the Missoulian and reprinted below -- lowers the bar for objective and informed journalism yet another notch.

It is unfortunate that, among many, George Ochenski is not familiar with the underlying facts set forth and issues raised in this case, which, if reviewed and understood, elicit a proper sense of alarm and call forth prudence, which would have suggested delay of any formal transfers of significant elements of the Kerr Dam project to any party possessing the "federally recognized tribal entity" status enjoyed by this tribal government.

Unanticipated discovery of growing and evolving relations between this tribal government, as well as others, and the islamic Republic of Turkey is a clear cause for precaution and further independent investigation by the highest authorities. The alarm expressed by Mr. Ochenski is misplaced; the evidence and resultant questions regarding the motives of a major Middle Eastern power seen to be becoming an opponent of the United States in a region of great turmoil should have triggered urgent close examination of the facts where potential domestic terrorist activity is a paramount U.S. concern and an overriding national interest.

Any belief that the transfer of an asset of the value of a standing dam, especially one bearing "black start" capabilities and a "category 3 / high risk" designation, is a moral or practical offset, at the possible expense of national security for cumulated generational grievances, is unjustified, imprudent, and dangerous.

Mr. Ochenski is correct in identifying the prior improper treatment of Native Americans, but he fails to acknowledge the more than 50 years of federal policies that successive administrations have employed to "right the wrongs of the past." Today, no one can argue that Native American tribal governments, as opposed to their members, haven't received fair, just, and equitable treatment in almost any venue; nor can they argue that, in business or commercial dealings, tribal governments have not been more than adequately compensated at market rates. One need only cite as evidence the $1 billion defense contract this tribal government had been recently awarded.

This leaves the remainder of my response to discuss the facts of the case at bar, which Mr. Ochenski has selectively failed to address. The crux of this litigation concerns the ongoing failure of the Federal Energy Regulatory Commission (FERC) and the Department of Interior (DOI), Bureau of Indian Affairs (BIA), and Fish & Wildlife Service (FWS) to comply with the provisions of the Federal Power Act and the Administrative Procedure Act. These federal statutes call upon federal agencies to provide for public hearings and adequate responses to public comments solicited in response to major agency actions that had resulted in the substantial transformation of the terms and conditions of the 1985 Kerr Dam License & Settlement Agreement.

In essence, during the past 30 years, FERC has continued to portray itself to the Montana public as the official agency of record overseeing Kerr Dam licensee implementation of the 1985 Agreement. The reality, however, is that FERC was beholden to DOI which had, like the Wizard of Oz manipulating the levers behind the curtain, developed new fish, wildlife, and environment conditions that DOI had directed FERC to adopt and which FERC did, in fact, adopt without question, as the FERC orders pertaining to the 1997, 1998, and 2000 amendments to that Agreement confirm. FERC and DOI achieved these changes without detection by engaged Montanans vis-à-vis their arbitrary and capricious use of a flawed and improper process and procedure, contrary to law, that radically redefined the purpose and objectives of the license. In other words, the FERC and DOI repeatedly, over the course of 30 years, deceived the Montana public in service to both this tribal government's "federally recognized tribal entity" status and DOI's nonscientific, unsubstantiated classifications, including that relating to bull trout, as "threatened species" under the federal Endangered Species Act requiring inter alia broadly expansive habitats that DOI also unilaterally defined.

Mr. Ochenski apparently is neither offended nor disturbed by the federal government's deliberate ignoring of its own statutes and of the inalienable natural rights, including private property (land and water) rights expressly recognized by the U.S. Constitution and its accompanying Bill of Rights. He also chose not to focus on the unconstitutionality of this tribal government's one-fourth quantum blood policy contained in Article II, Sections 2-3 of its tribal constitution and bylaws. In so doing, he conveniently sidesteps the sensitive issue regarding how this tribal government's "federally recognized tribal entity" political status serves to legally 'cleanse' such racial discrimination of its otherwise offensive taint. Indeed, Mr. Ochenski should have reviewed the 1973 Bureau of Indian Affairs memorandum (set forth in Exhibit 66 of 68 exhibits filed with the Court) to support the factual claims made in the Complaint to this lawsuit, accessible at www.koganlawgroup.com/Our_Practice_DSQ3.php. It clearly reveals a federal government policy-in-the-making designed to treat this and other tribal governments' racially discriminatory policies, as well as federal and state laws implemented in furtherance of racial preferences for the benefit of "federally recognized tribal entities," as a form of "benign," legally nonactionable, racial discrimination subject to a more lenient "rational basis" rather than more rigorous "strict scrutiny" level of judicial review.

In the present case, the federal government relied upon the use of racial preferences, as applied pursuant to an otherwise racially neutral Endangered Species Act, to favor the cultural, religious, and spiritual rights of this tribal government. Such conduct had the direct effect of diminishing the scope and strength of the state-sanctioned water and land rights of farmers, ranchers, and other businesses, including my clients, operating on and appurtenant to the Flathead Indian Reservation and dependent upon equitably administered water infrastructure resources. These racially discriminatory preferences also served to violate my clients' and similarly situated parties' constitutional rights, particularly their constitutional right to equal protection and due process of law as guaranteed by the Fifth Amendment to the U.S. Constitution.

Regrettably, Mr. Ochenski, like the U.S. federal government, will not recognize this travesty of justice in order to cast negative aspersions on my clients. This is a terribly high price to pay for political correctness and self-comfort. And for this reason, Mr. Ochenski owes each of my clients a well-deserved written apology for the inappropriate, racially charged, and foundationless claims he made in his recent article.

Note: Lawrence Kogan is Managing Principal of the Kogan Law Group, P.C., New York, NY, and Co-Counsel of Record in the recently filed case of Keenan v. Bay.

Honor the Salish-Kootenai and drop the Kerr Dam lawsuit

By George Ochenski
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Once again bigotry has raised its ugly head in the Flathead with the filing of a last-minute lawsuit by a couple of right-wing white guys against the transfer of the Kerr Dam to the Confederated Salish and Kootenai Tribes. And given their extremely specious concerns, reasonable Montanans should reject and condemn this embarrassing spectacle for the baseless fear-mongering that it is.

The lawsuit -- which was filed in Washington D.C. federal court by two Republicans, former Kalispell (MT) legislator Verdell Jackson and Bigfork (MT) State Senator Bob Keenan -- is intended to stop the high-level transfer, which was begun by contract in 1985 and will make the Salish-Kootenai the first American Indian tribe in the nation to acquire a major hydroelectric facility.

The reasons for filing the suit fully define "frivolous lawsuits" and range from the fear that Turkey will infiltrate the Salish-Kootenai to spread Islam and then make off with the "uranium deposits" around Flathead Lake to taking control over all other dams and water resources on and off the reservation.

It's a mystery how Keenan could somehow forget that the legislature in which he served only months ago passed the Salish-Kootenai Water Compact that clearly lays out the preservation of existing water rights for on- and off- reservation users. As for worrying about Turkish Islam terrorists taking over the Salish-Kootenai, well, I'd say after a century of having non-Indians try to take over everything the tribe was supposed to get in the Hellgate Treaty of 1855, Turks are the least of tribal or non-tribal citizens' worries.

But what's astounding is the use of such fear-mongering to attempt to once again deny any semblance of self-determination to the Salish-Kootenai. Truth is, it's not the first time Montanans have seen such tactics.

Way back in 1993, the Salish-Kootenai came to the Montana Legislature with a bill to allow the tribes to enforce the law on their own tribal members for misdemeanor offenses. The measure, known as "retrocession," would have ended an agreement made by the tribes decades before in which they ceded law enforcement of tribal members to Lake County. Because the tribes did not have functioning law enforcement, with tribal judges, officers, detention facilities, etc., at that time, they believed assurances that, when they did have those abilities, they would simply be able to take back authority over tribal members.

But like so much in the shameful history of how Indians have been treated by this nation, when it came time for the Salish-Kootenai to run their own law enforcement, they were told it would take legislation to do so, a considerable hurdle in the face of legislators who predicted chaos and lawlessness would ensue.

Long story short, the tribes fought a very tough battle, but to no avail. The bill was killed and "indefinitely postponed" in the House. But in a brilliant understanding of just how the modern world works, then-Tribal Chairman Mickey Pablo, a truly brilliant leader, threatened to pull tribal funds out of the local banks. That would have meant the loss of tens of millions of dollars a year to those banks... and suddenly the bankers weren't so hot to deny the Indians jurisdiction over their tribal members. The bankers started pulling strings on legislative leaders, and the bill was revived and passed through the House and Senate on the last day of the session in a series of supermajority votes, an astounding turnaround that brought justice and victory to the Salish-Kootenai after so many years of broken promises. In the 22 years since, the tribal money remains in the banks, and the fears of tribal law enforcement proved to be as baseless as the current supposed threat of Turkish terrorism in the Flathead.

Fact is, from starting one of the first tribal colleges to saving the remnant bison population, the Salish-Kootenai have always been a visionary people. Were it not for Michel Pablo, one of the early tribal leaders, it's very possible there would be no bison in Yellowstone National Park. It was through his tremendous efforts more than a century ago that the few remaining bison were saved from extinction and repopulated in Yellowstone and Canada.

Keenan and Jackson ought to call up their New York lawyer and pull this foolish, fear-mongering lawsuit. They, and all Montanans, should honor the Salish-Kootenai for the tremendous accomplishment of becoming the first tribe in the nation to own a major hydroelectric dam and continuing their long record of tribal self-determination.