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Subject: Fake News vs. Fact: Daines' CSKT Water Legislation



FAKE NEWS vs. FACT: Montana Water Rights Protection Act (MWRPA)

On January 10th 2020, the Montana Water Court's stay on thousands of water rights claims filed by the Confederated Salish and Kootenai Tribes (CSKT) on the reservation was set to expire. Since Montana is a prima facie state, if the stay expired, those claims could be enforced immediately until the water court judge, appointed by Montana's liberal supreme court, completes the adjudication of the claims which would take decades. That means during the litigation process, hundreds of Montanans would be forced into decades long and costly litigation, while CSKT controls the ability to shut off the water at any time on all irrigated land, immediately controlling all irrigated land on the reservation. With the introduction of federal legislation, and legal briefs filed by the Trump administration showing progress towards a settlement with CSKT, the judge agreed to extend the stay for three years. Had Senator Daines not introduced federal legislation before the stay expired, the water rights of Montanans could have been immediately infringed.

A great deal of confusion and misinformation exists on the Senator's legislation and President Trump's efforts to protect Montana water users with a settlement. The information below should help answer and clarify the facts.

Fake News: MWRPA is taking away water rights from 350,000 western Montanans.

FACT: The MWRPA protects the water rights of all Montanans. The legislation requires the CSKT to **permanently** relinquish 97% of all water rights claims, including all in the Flathead Basin. Further, the 2.7% of remaining claims will be co-owned by the state of Montana and the final .3% will be limited to protecting fishing habitat by maintaining in-stream flows.

According to the Trump administration, a significant number of CSKT's claims to Montanans' water rights are likely to be upheld in court, resulting in Montanans losing their rights – including the ability to irrigate their property. (Letter from Secretary Bernhardt, November 2019).

United States Attorney General Barr stated: *"People should not assume that they're going to end up with a better deal"* through litigation.

Fake News: The settlement is not needed. It can be resolved in court.

FACT: Under MWRPA, the water rights of all Montanans are protected. Without MWRPA, the water rights of Montanans are infringed.

According to the Trump administration, a significant number of CSKT's claims would be upheld in court. This means thousands of Montanans will be fighting a decades long and costly court case, which is most likely to fail. **MWRPA prevents this!**

Here is what will happen if the case is resumed in court:

- Thousands of Montanans will be forced to hire expensive attorneys to fight their claims in court.
- In the interim while the case is ongoing, which can take over a decade, the CSKT would be emboldened to begin adjudication and have power over 1.85 million acres making up 73% of irrigated land across Montana.
 - The water will literally be controlled by the Tribe. This means that whether or not Montana's farmers or ranchers will be able to continue use of the water before the case is concluded, is up to the discretion of the Tribe.
- The judge who is hearing the water dispute, a Democrat-appointed judge, will rule.
 - A recent, similar case over tribal water rights in Oregon known as the *Klamath* decision (Baily V. U.S, 11/14/19), took 18 years, costs millions in litigation fees and ruled the Tribe had off-reservation water rights to maintain fisheries. **This case was heard by the Circuit Court – with two of the three judges appointed by Republican Presidents.**

Fake News: MWRPA gives the CSKT \$1.9 billion without any accountability or requirement to improve the Flathead Indian Irrigation Project (FIIP).

FACT: MWRPA funding is required under the purposes of the legislation (Section 8(g)) to rehabilitate, modernize and restore FIIP which is critical to the economies of Lake and Sanders Counties. Further, the infrastructure investment will create thousands of jobs in Northwest Montana.

MWRPA saves taxpayers and reduces the settlement cost by \$400 million. The \$1.9 billion is held in trust by the Department of the Interior, where the **Tribe must submit a spending plan** any time they withdraw money from the trust fund.

The current state of FIIP is not sustainable. Without MWRPA, rehabilitation of FIIP would not be possible. Without rehabilitation, FIIP could be shut down due to ESA violations and water quality violations, which would be devastating to the economies of Lake and Sanders counties.

Fake News: The Montana Water Rights Protection Act creates more controversy.

FACT: MWRPA was reached after years of negotiations between Senator Daines, the CSKT, ag stakeholders, legislators and importantly, those who opposed the state-passed Compact and Senator Tester's previous legislation.

MWRPA includes significant concessions from the CSKT that were not included in the alternative proposals, and the changes resolve concerns raised by parties opposed to both.

MWRPA vs. Alternative Proposals:

- Reaffirms state ownership of water. (Section 2, paragraph 1)
- Relinquishes 97% of all CSKT water rights claims with prejudice, including in the Flathead Basin where CSKT had been awarded Senior water rights in the state-passed compact. Further, 2.7% of remaining claims will be co-owned by the state of Montana and the remaining .3% will be limited to protecting fishing habitat by maintaining in stream flows (Section 10, Subsection (a)1-4)
- Prohibits the sale of water outside the State of Montana. (Section 5(e)(2))
- Gives Montanans access to state courts in water disputes between tribal and non-tribal members. (Section 12(j))
- Releases liens on FIIP irrigators (Section 12(b))
- Provides funding for road infrastructure to Sanders and Lake Counties on FIIP (Section 12(k))
- Protects Refuge Revenue Sharing payments for counties in Bison Range Transfer (Section 12(k)(3))

Fake News: The MWRPA will have a devastating impact upon the sovereignty of the State of Montana and its western counties.

FACT: MWRPA protects Montana's sovereignty. Under MWRPA, all state water rights remain in the management of the State of Montana. The legislation reaffirms Article IX, Section 3 of the Montana Constitution which states that the State of Montana owns all of the water within state boundaries (Section 2, paragraph 1).

Further, Section 10(d) of MWRPA ensures that state or local jurisdiction will not be impacted.

MWRPA permanently protects all non-irrigation uses of water from call, saves hardworking Montana farm families millions of dollars in litigation costs, release liens on FIIP irrigators, restore the FIIP, improve road infrastructure, protect state sovereignty over water. These benefits cannot be overstated and would otherwise not exist absent MWRPA.

Fake News: MWRPA expands CSKT sovereignty and rewrites history through federal law by redefining how we use the term "Reservation," giving the CSKT government civil and criminal jurisdictional authority over all the rights-of-way within the boundaries of the reservation.

FACT: MWRPA prevents an expansion of CSKT's authority off reservation, mimics the federal code definition of Indian Country (18 usc 1151), and protects local jurisdiction.

MWRPA protects water rights of ALL Montanans and secures water rights of existing users.

MWRPA does not extend tribal jurisdiction over roads or rights-of-ways. MWRPA does not change anything currently in law (Section 10(d)).

Absent a settlement with the CSKT, the Trump administration, the U.S. Department of Justice, the Courts (Klamath decision in Baily V. U.S, 11/14/19) and the State of Montana have interpreted that Steven Treaty Tribe language in the 1855 Hellgate Treaty gives the Tribe water rights off-reservation. Further, according to the Trump administration, a significant number of CSKT's claims would be upheld in court. This means thousands of Montanans will be fighting a decades long, costly court case, which is most likely to fail. This is why Senator Daines introduced MWRPA. **MWRPA prevents this!**

MWRPA protects local jurisdiction and state authority by reaffirming Article IX, Section 3 of the Montana Constitution which states that the State owns all of the water within state boundaries. (Section 2, paragraph 1).

Fake News: MWRPA awards legal jurisdiction and control of all non-Indian Montanans who live on and travel through the reservation to CSKT.

FACT: MWRPA strengthens protections of property owners and affirms local and state jurisdiction (Section 10(d)).

Fake News: MWRPA weakens the sovereignty of the State of Montana and its counties by taking jurisdiction and control of public and private rights-of-way from the local county and state government and granting this power to the CSKT tribal government.

FACT: Under MWRPA, the sovereignty of the State of Montana is protected, as well as state and local jurisdiction. Tribal jurisdiction is not expanded in MWRPA. Section 10(d) protects state and local jurisdiction. The right-of-way language is necessary to facilitate the rehabilitation of FIIP.

Fake News: The MWRPA would destroy Lake County's legal standing in their suit against CSKT in regards to rights-of-way of the county public roads within the Reservation.

FACT: MWRPA does not extend tribal jurisdiction over county roads or rights-of-way. MWRPA helps facilitate rehabilitation of the FIIP and will have no bearing on any current court proceeding.

The current state of FIIP is not sustainable. Without MWRPA, rehabilitation of FIIP would not be possible. Without rehabilitation, FIIP could be shut down due to ESA and other federal violations, which would be devastating to the economies of Lake and Sanders counties.

Fake News: MWRPA gives the CSKT 36,808 acres of land owned by the state of Montana, without the input or consent of Montana's Board of Land Commissioners.

FACT: Under MWRPA, private land owned by Montanans is protected. Moreover, the State of Montana is not required to give up a single acre of land. Public access is also protected under MWRPA.

MWRPA authorizes a five-year process where the Department of the Interior may negotiate on behalf of the CSKT with the State to trade state lands on the reservation for federal land off of the reservation.

The Montana Land Board would need to approve any land consolidation authorized under MWRPA. This also provides an excellent opportunity to swap lands that might not be productive or accessible, for federal lands off the reservation that can be used for better uses like timber management or recreation.

Fake News: MWRPA would impact farmers', ranchers', and irrigators' abilities to own and/or renew their state land leases on the CSKT reservation without input from the irrigating and ranching families.

FACT: Any consolidation of land would have to be agreed to by the State Land Board and all land board proceedings are open to public input. There is no mandate for the federal government nor the tribe to acquire land.

Fake News: MWRPA mandates that the federal government acquires private land within the CSKT reservation to fulfill the 36,808-acre threshold if the state does not agree to exchange its state-held properties.

FACT: Under MWRPA, private landowners are protected and are not required to give transfer or give up rights to their property. (Section 12(i)(1)(g) references willing sellers)

After the five-year period of negotiations over state land, MWRPA authorizes a process where the Department of the Interior may negotiate on behalf of the CSKT, with willing

land owners, for land exchanges. MWRPA ensures private landowners who chose to negotiate a land exchange for federal land are adequately compensated.

Fake News: MWRPA creates a legal structure that grants the CSKT potential jurisdiction and control of off-reservation public infrastructure "that intersects or located within, the supply and distribution networks of the Flathead Irrigation Project."

FACT: Nothing in the bill expands tribal jurisdiction. Section 10(d) protects state and local jurisdiction. Referenced off-reservation infrastructure has a direct connection to the FIIP and would be eligible under MWRPA for rehabilitation in order to restore flows to the project.

Fake News: MWRPA applies WOTUS.

FACT: MWRPA protects the water rights of ALL Montanans, including farmers, ranchers and irrigators. MWRPA has **nothing** to do with WOTUS.

WOTUS has never come into effect in Montana. In fact, there is a federal stay on the rule in Montana. Moreover, President Trump has rescinded Obama's WOTUS rule and replaced it with a new policy that protects private property rights and family farms.

Fake News: MWRPA actually retains all of CSKT's water rights claims under the Clean Water Act and CERCLA.

FACT: Under MWRPA, the CSKT is required to **permanently relinquish** 97% of water rights claims, including ALL in the Flathead Basin, **with prejudice**. With prejudice, under MWRPA, means the CSKT can **NEVER** try and reclaim any of their relinquished water rights. That's why MWRPA is so important. (Section 10)

The dispute of CSKT water rights claims deals with water **quantity**, not **quality**. MWRPA allows the U.S. to enforce **water quality** laws under the Clean Water Act and CERCLA. CSKT has no pending **water quality** claims on the reservation. Inclusion of the **water quality** language was a direct request from the Trump administration, and has no bearing on CSKT relinquishing water rights claims.

Moreover, this language is identical to other Indian water rights settlements that have passed our state legislature and signed into law: Blackfeet Water Rights Settlement P.L. 114-322 Section 3720(d); Crow Water Settlement Public Law 111-291 Section 410(c).