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July 8, 2020

The Hon. Chairman Sen. John Hoeven, Vice-Chairman Sen. Tom Udall, and members of the Senate Committee of Indian Affairs

838 Hart Senate Office Building

Washington D.C., 20510

Submitted via email to: Avis_dubose@indian.senate.gov

Re: Legislative Hearing on S. 3019, June 24, 2020.

Dear Chairman Hoeven, Vice-Chairman Udall, and Members of the Committee:

The Margery Hunter Brown Indian Law Clinic (“MHBILC”) at the Alexander Blewett III School of Law at the University of Montana appreciates the opportunity to submit these comments to be entered in the record of the hearing on Senate Bill 3019 (S. 3019), which took place on June 24, 2020.

The MHBILC was established in 1980 to provide law students with the opportunity to gain practical experience regarding Indian law issues and generally focuses on projects affecting tribal governments, their citizens, and the rights of both. Although the MHBILC often works with and represents tribes and tribal members, these comments are not submitted on behalf of any tribe or tribal interest and do not advocate for a particular outcome or decision. Instead, consistent with the commitment to public service on behalf of both the MHBILC and its home institution, the MHBILC developed these comments with the intent of assisting in the consideration of important Indian law-related issues in the context of this bill.

As discussed at the Committee’s hearing, S.3019, co-sponsored by Montana Senators Steve Daines and Jon Tester, will ratify the water compact negotiated between the Confederated Salish and Kootenai Tribes (CSKT) and the State of Montana and transfer the management of the National Bison Range from the U.S. Fish and Wildlife Service to the Tribes. The compact would settle tribal claims to water rights across what is now Montana and, in light of these longstanding issues, S.3019 and the water compact it seeks to ratify is best understood within the historical and legal contexts in which they arise.

For over a century, the United States Supreme Court has recognized the importance and nature of water rights reserved by tribes through treaties and the creation of Indian reservations. *See* United States v. Winans, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908). Despite those rulings, however, tribal rights have not been protected. In 1973, for example, the National Water Commission reported to the President and Congress on the state of water and water rights in the nation at the time and noted that, “[i]n the history of the United States Government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.” National Water

Comm'n, Water Policies for the Future—Final Report to the President and to the Congress of the United States 475 (1973), available at https://www.epw.senate.gov/public/_cache/files/0/9/09fa2cfd-e480-40e6-bdf6-fc9fc8b5b0e3/6A20EC2999F0441563294B9DFFCFDD6E.water-policies-for-the-future-final-report-1973.pdf.

Like Indian tribes across the country, the CSKT have historically been deprived of the full extent and use of water rights reserved by and for the Tribes in the Hellgate Treaty of 1855. The water compact to be ratified by S. 3019 would enable the Tribes to take advantage of the rights guaranteed to them by the Treaty and the U.S. Supreme Court by confirming the CSKT's water rights, returning the management of the water on the sovereign CSKT nation to the Tribes, and establishing a collaborative and innovative management plan for water resources with the state of Montana. While the use of water and water rights in Montana have certainly evolved since the Hellgate Treaty of 1855, the compact and S. 3019 take these adaptations into account, and, like the application of many principles of federal Indian law in modern times, the CSKT and the State of Montana have negotiated the compact to balance the Tribes' legal rights with the development of an equitable and effective management plan.

In addition to the historic, treaty-based nature of the rights that the compact and S. 3019 seek to resolve, more recent history is also relevant to consider. The compact was developed through a collaborative, negotiated process designed to resolve reserved rights across the State of Montana. The Montana Reserved Water Rights Compact Commission (RWRCC), specifically. The RWRCC was established by the 1979 Montana Legislature “to conclude compacts for the equitable division and apportionment of waters between the state, its people, and the several Indian tribes and the federal government claiming reserved water rights within the state. Section 85-2-701, MCA”. Since its foundation, the RWRCC has helped to negotiate eighteen compacts, including those settling the reserved water rights of the Indian tribes in Montana.

The compact to be ratified and authorized by the Montana Water Rights Protection Act was negotiated by the RWRCC, which noted in a recent report in support of the bill's ratification that the approval of S.3019 will result in “significant benefits to Montanans.” The RWRCC's deliberations on Montana's behalf, in the context of past compacts, have taken into account public consideration, cooperation, and “common-sense solutions to water use problems” (dnrc.mt.gov). The compacts that the commission has supported in the past have been forward-thinking and collaborative; the Montana Water Rights Protection Act does not stray from these principles. The RWRCC's support of S.3019 serves as yet another example of the benefits and the widespread support of this legislation.

Finally, though technically separate from the legal status of the CSKT's reserved rights to water and the negotiation of the compact through the RWRCC, the transfer of the National Bison Range to the Tribes is a viable conservation decision that, like the Tribes' water rights, should be viewed through the lens of history. The CSKT have a cultural imperative to ensure the preservation and well-being of bison, as has been demonstrated in the Salish and Kootenai's integral role in saving the animal from extinction in the 1800s. *See* <https://bisonrange.org/>. S.3019 would restore the National Bison Range to the federal trust ownership for the benefit of the CSKT, which would again ensure the lands are reserved for the Tribes benefit as set forth in the Hellgate Treaty of 1855.

The restoration of the National Bison Range to the CSKT is not only a wise decision for the continued health and longevity of the National Bison Range, but would also serve as some measure of justice for the long-standing injury caused by the unconstitutional taking of the land that became the National Bison Range from the Tribes without their consent. *See, e.g.,* *Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458 (Ct. Cl.1971). Like the compact's innovative approach to the management of historically reserved water rights, S. 3019's inclusion of the return of the National Bison Range to the CSKT's oversight presents a workable, modern approach to a century-old legal issue.

These historical and legal matters are relevant to the consideration of S. 3019 and the water compact that it proposes to ratify and we hope this letter is helpful in that process.

Sincerely,



Monte Mills

