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20th Judicial District Court
Lake County Courthouse
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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

FLATHEAD JOINT BOARD OF CONTROL and JERRY LASKODY, BOONE COLE, TIM ORR, TED HEINS, BRUCE WHITE, SHANE ORIEN, WAYNE BLEVINS and GENE POSIVIO, all members of the Flathead Joint Board of Control,

Plaintiffs,

vs.

STATE OF MONTANA,

Defendant.

Cause No. DV-15-73

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Each party filed a motion for summary judgment.

From the briefs, exhibits and arguments presented, the Court enters the following

ORDER

Each party's Motion for Summary Judgment is GRANTED in part and DENIED in part.

RATIONALE

The Parties raise the following issues and arguments:

Plaintiffs (Irrigators):

> The provisions in SB262 violate Article II, §18 of the 1972 Montana Constitution, because they provide immunity to the state, or its agents or employees, and constitute a statutory amendment of the constitution without the required two thirds vote of each house of the legislature.

The Tribes:

1. The statute grants immunity to the Water Management Board (Board), which is created by the Water Compact agreement. The Board is not a political subdivision of the State of Montana, so Article II, §18 is not violated.
2. A statute is presumed to be constitutional.
3. If one or both immunity provisions are unconstitutional, each unconstitutional provision should be severed from the statute, rather than void the entire statute.

The State:

1. A statute is presumed to be constitutional.
2. Plaintiffs lack standing to bring this suit, because there is not a justiciable controversy ripe for decision.
3. The first provision at issue is a limited waiver of sovereign immunity; new immunity language just acts as a limitation on the waiver, and does not constitute a new grant of immunity to the state.
4. The second provision at issue does not apply to political subdivisions of the state, and therefore Article II, §18 is not violated.
5. Any unconstitutional provisions should be severed, pursuant to case law precedent, and the severability language in Administrative Ordinance § 1-1-113.

Provisions Allegedly Unconstitutional:

Article II, §18 is the state constitution's waiver of sovereign immunity for suits against the State of Montana. It states:

> **Section 18. State subject to suit.** The state, counties, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

The contested issues herein derive from Article II, §18, as it relates the following two provisions in the Water Compact which was codified by the 2015 legislature in SB 262:

> #1: Waiver of Immunity. The Tribes and the State hereby waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the constitution of the United States, in order to permit resolution of disputes under the Compact by the board, and the appeal or judicial enforcement of Board decisions as provided herein, except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees. The Parties recognize that only Congress can waive the immunity of the United States and that the participation of the United States in the proceedings of the Board shall be governed by Federal law, including 43 U.S.C. 666.
>
> #2: 1-2-111. Immunity from Suit. Members of the Board, the Engineer, any Designee, any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, and any Staff shall be immune from suit for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and duties set forth in the Compact or this Ordinance relating to the authorization, administration or enforcement of water rights on the Reservation.

Background Facts

Senate Bill 262 was submitted to the 2015 legislature to implement the water agreement between the state, tribes, and federal government, generally known as the Water Compact. The Water Compact requires approval by Montana Legislature, Tribal Council, and Congress.

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The tortured legislative history of SB 262 is relevant to the question of legislative intent which was raised by some of the parties here. As accurately set forth in Plaintiffs' brief:

1. February 26, 2015, the Montana Senate passed SB 252 on a 31-19 vote (62%).

2. April 14, 2015, House Speaker Knutsen ruled SB 262 provided the state with immunity from suit, and therefore required a two thirds vote of each legislative house.

3. The same date, the Montana solicitor general's office issued a letter opinion, generally opining that the Montana Constitution waiver of sovereign immunity had been largely "*drained of any significant meaning*", and that the state is already immune from monetary damage lawsuits. The Solicitor seemed to focus only on the first provision at issue here, and did not address the second provision at issue. (Exhibit 1, Plaintiff's Brief). [1]

4. April 15, 2015, the House Rules Committee upheld the Speakers ruling.

5. April 15, 2015, Representative Essman proposed an amendment to remove "*or the state*" from the bill. In other words, the amendment would have removed the immunity provision that would give the state immunity in SB 262. The amendment would have removed the constitutional question.

6. April 15, 2015, the House voted 53-48 to overrule the findings of the Speaker and the House Rules Committee which had ruled that a 2/3 vote was required.

7. April 16, 2015, the House voted 53-47 (53%) to pass SB 262, and thereby approve and adopt all provisions of the Water Compact, and including immunity provisions.

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[1] As explained in this Court's December 2, 2015 Order Denying Motion to Dismiss, the solicitor general's office misunderstood the continuing vitality of the Montana Constitution's waiver of sovereign immunity, and the meaning of MCA 2-9-305.

ANALYSIS

This controversy is broader than the limited scope of this lawsuit. [2]

Most issues are, however, not before this Court in this lawsuit. Ultimate determination of ultimate water rights is in the exclusive jurisdiction of the Montana Water Court. The Montana Water Court is currently the only federal, state or tribal court which has jurisdiction over all these parties and over all issues pertaining to ownership of water rights. This case is limited to the question of the constitutionality of the two provisions quoted above. This case is unlikely to resolve the larger controversies.

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2 Statements in various pleadings or forums have raised numerous questions about the constitutionality of the statute and Compact, such as whether they violate Article II, §16, Article II §17, Article II, §26 or Article IX, §3(3). The latter provision states that all unappropriated water belongs to the state; the Compact appears to eliminate that constitutional provision, and instead provides that all that water belongs to the tribes.

The Compact and SB 262 have been also controversial regarding the constitutional guarantee of full legal redress, and a remedy afforded for each wrong committed by the state or an individual, regarding the acts of the Water Management Board (the Board), which is purportedly a kind of hybrid entity variously described herein as a *quasi-sovereign* (clothed with sovereign immunity) but at the same time not a part of any of the contracting governments. The Board is comprised of state and tribal appointees, and their appointee. The governments contend both that it is not a subdivision of the sovereign state or tribal government, but it is clothed with all or more of the immunity which either entity has. Each government denies legal responsibility for the Board, while the two governments create and effectively control the Board by holding the power to appoint and remove its members. This Board is a legal creature never apparently seen before. The Compact and SB 262 vest the Board with extraordinary power to grant, permit, deny or change water use for an individual, and create groundwater protection areas. It will have power over a broad geographic area and over tribal and non-tribal individuals, property owners, irrigators, businesses and governments. Whereas now a party could bring an action in state court for damages, or Montana Water Court for determination of water rights, the new statute 1) would eliminate monetary lawsuits against the state, and the Board and its members and staff, for tortious or other unlawful conduct and 2) eliminate the water user's right to contest a change or denial of the user's historic use, or water right, in the Montana Water Court (a right which previously existed according to state and federal law). Upon passage, the only legal remedy would be to go to either state or tribal court *if both parties agree* (for declarative ruling, not damages). Assuming both parties would seldom agree on state or tribal court, the default forum would be federal court. An obvious problem with that is that federal courts do not appear to even have subject matter jurisdiction to entertain such cases under current laws. Given the case load of the nearest federal district court, it is hard to imagine the federal judiciary being proponents for congressional expansion of their jurisdiction so the federal district court can, in effect, become the new Western Montana water court. The limited "remedy" outlined in the Compact thus appears to be illusory. It may never exist as postulated.

It is therefore not difficult to understand the strong emotions evoked in some quarters by this legislative action.

Plaintiffs' Summary Judgment Motion

Plaintiffs' Motion for Summary Judgment is denied regarding provision #1 above, and granted regarding provision #2.

Regarding provision #1, the language is admittedly confusing.[3] The apparent intent indicates an agreement by the state for a limited waiver of its sovereign immunity, under the Eleventh Amendment to the U.S. Constitution, which prohibits the state being sued in a federal court. The waiver is limited to certain types of suit, and does not include a waiver of state sovereign immunity for suits in federal court for money damages for unlawful acts of the Board or its agents. Before passage of SB 262, the state already had immunity from such suits, pursuant to the Eleventh Amendment. The state could not be sued for such monetary or other suits in federal courts, (though some state agents could pursuant to certain limited congressional acts such as the civil rights laws in 42 U.S.C.§1983). Article II, §18 of the 1972 Montana Constitution was just a waiver of sovereign immunity for monetary suits against the state in *state courts.* The immunity language in provision #1 of SB 262 does not grant any new immunity to the state, it merely operates as a limitation on this new waiver of sovereign immunity.

Regarding provision #2, the Court agrees with Plaintiffs. This is not a close call. The provision creates a new sovereign immunity for the state, and for its agents or employees. The conclusion is clear by resort to either facial interpretation or legislative history.

At present, neither the state nor its political subdivisions are immune from suit in state court for monetary damages for injury to person or property. Such immunity was waived in Article II, §18. As with any employer or master, the state and its political entities are legally responsible for its agents and employees acting within the scope of their duties. These agents were also individually subject to judgment before the passage of MCA 2-9-305.

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3 The language could also be read to waive immunity for suits against the State in Tribal Court. Because the State would have to agree, on a case by case basis, that does not appear to be a blanket waiver.

The State initially argued this waiver of sovereign immunity was eliminated (or "*drained of any significant meaning*") by MCA 2-9-305. That statute does not eliminate state legal responsibility. The statue does just the opposite: it recognizes and affirms that the State *is* legally accountable for the acts of such agents:

> "...*Except as provided in subsection (6), the employer shall pay all expenses relating to the retained defense and pay any judgment for damages entered in the action*...MCA 2-9-305(3).

The "*employer*" referred to is: "...*a state, county, city, town or other governmental entity...*" MCA 2-9-305(2).

Some language in that statute may be confusing, because the title and content of MCA 2-9-305(1) refers to "*immunization*". That *immunization* does not refer to immunity being granted to the state; it refers to immunizing the *employee* from *personal* liability for defense costs and damages, by the state's acknowledging and paying such costs (instead of the employee or agent paying them). For a discussion of the interaction of the constitutional waiver of sovereign immunity and the Montana Tort Claims Act, *see, State v. District Court,* 175 Mont. 63, 572 P.2d 201 (1977).

SB 262 grants new immunity to the State and its agents. The immunity provisions of SB 262 would therefore constitute an amendment of this constitutional provision, and require a 2/3 vote of each house of the legislature. It did not receive a 2/3 vote of either legislative body. Therefore, the immunity provision is void for failure of passage as required by Article II, §18.

The State and Tribes seem to argue this was not intended to grant the State immunity. The legislative history demonstrates otherwise. As Plaintiffs correctly point out in their brief (p.29):

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"The argument is further bolstered by the Legislature's conduct during the 2015 session.

"In order to address the question and eliminate any ambiguity, the Legislature had several options. For example, it could have simply included in SB 262's text that Montana's general immunity laws applied; it could have included the Montana immunity laws in their entirety in SB 262's text; it could have provided in SB 262's text that the State is responsible for the conduct of its agents as set forth in Mont. Code Ann. § 2-9-305 (including the WMB, etc.) and/or it could have simply eliminated three words "or the State" from the Compact. However, none of those things happened. In fact, the Legislature actually declined to amend SB 262 to eliminate those three words.

"On April 15, 2015, Representative Jeff Essman proposed a simple amendment to SB 262 to remove three words: "or the State". **Exhibit 3b.** He supported a 2/3 vote in order to pass SB 262. *Id.* pg. 4, ll. 6-7. Representative Essman recognized that water rights are a valuable, vested property right. *Roland v. Davis*, 2013 MT 148, ¶ 24, 370 Mont. 327, 392 P.2d 91. And that if those rights are wrongfully taken from a party the State had effectively insulated itself from responsibility via SB 262:

> *"...I think there are a couple of things that need to be clear in this compact to help resolve some of this fight. And number one is that if vested rights are present, they're protected. And number two, if litigation becomes necessary, it needs to be clear which court you go to...But here's my concern. Article II, Section 18 of the Montana Constitution basically states that the State has no immunity from lawsuit unless the legislature specifically acts to create it. This language, I fear, can be argued to create an immunity from lawsuit for actions for money damages, costs or attorney's fees. That is why I felt a two-thirds vote was necessary. Ultimately, that issue will probably be decided by the courts. But you know, I'm not sure that the claim of vested rights are going to hold up...I'm not sure that a takings of a water right will occur, but it might. And if those two things happen, that injured party needs to have redress against the State of Montana for the damages of [sic] the taking that's occurred. This language could be used to deny that claim and, therefore, I think we should strike the words "or the State" so that it's clear the State cannot assert an affirmative defense for a takings claim. **Exhibit 3b**, pg. 3, ll. 18-25 and pg. 4, ll. 1-20. "*

"The House of Representatives voted outright to decline this simple amendment which would have addressed Representative Essman's concern. **Exhibit 5.** Instead, it passed SB 262 knowing full well of the lack of redress available to a party for claims such as a taking or tort claim."

The statute language granting a new immunity to the state is clear. Even if others argue there is ambiguity or the statute is capable of a different interpretation, the legislative history provides clear evidence that immunity was, in fact, the purpose of the immunity language.

The Tribes' Arguments

1. The statute grants immunity to the Water Management Board (Board), which is created by the water compact agreement. The board is not a political subdivision of the State of Montana, so Article II, §18 is not violated.

The Tribes are correct that Article II, §18 only waives sovereign immunity for the state and it's political subdivisions ("*The state, counties, cities, towns and all other local governmental entities...*" Interestingly, at oral argument, the Tribes and State had different answers to the question of whether the Board could be sued in state court for damages. The State contended it could; the Tribes contended it could not. This illustrates the amorphous nature of the board. If it is not a subdivision of the Tribes, or a tribal member, it is hard to understand why it could not be sued in state court, like any other non-governmental entity, for tortious conduct of its members, agents and employees. On the other hand, if, as the State contends, state courts have jurisdiction over the Board, it is hard to understand why this jurisdiction would not extend to monetary lawsuits.

This Court need not wander through the cornrows of that esoteric question. The State has control over the members of the Board which only the State can appoint and control. Those appointees are given the power to hire engineers and other staff who would be acting in the course of their agency, doing the work of the State if they engage in tortious or other wrongful conduct while exercising the considerable power transferred to them by this statute. The State is liable therefore, both by common law and statute. *State v. District Court, supra*, at 66; MCA 2-9-305.

2. A statute is presumed to be constitutional.

The Tribes's authority is correct. There is a presumption the statute is constitutional, and courts are to interpret the statute, where possible, so that it does not violate the constitution. However, this maxim of statutory construction is employed where the statute is capable of two or more meanings, one of which is constitutional.

In interpreting a statute, "... *the intention of the legislature is to be pursued in possible. When a general and particular provision is inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.*" MCA 1-2-102. Provision #2 above is not capable of more than one interpretation. There is no inconsistency between the general and particular intent of the legislature. The clear meaning of the language grants immunity to the Board, the State and the State's appointees and agents. The intent is clearly to grant immunity, which is evidenced by the legislative history.

3. If one or both immunity provisions are unconstitutional, each should be severed from the statute, rather than void the entire statute.

The Court agrees with the Tribes on this point, and grants partial summary judgment to the Tribes and the State, and declares that the unconstitutional immunity provision can be voided without voiding the entire statute.

§ 1-1-113(1) of the Administration Ordinance provides that the provisions "... are severable and a finding of invalidity of one or more provisions shall not affect the validity of the remaining provisions."

This immunity provision does not appear to be central or pivotal in the overall compact scheme. If the State contends it was, following final determination, the State can pass a curative statute and withdraw from the compact, an outcome that appears doubtful. If the Tribes or federal government contend it is not severable, all they have to do is decline to act legislatively to adopt the Compact.

The State's Arguments

1. A statute is presumed to be constitutional.

This argument was addressed above.

2. Plaintiffs lack standing to bring this suit, because there is not a justiciable controversy ripe for decision.

This argument was largely decided by the Order Denying State's Motion to Dismiss herein, filed December 2, 2015.

The State is engaged in implementing the compact pursuant to the newly-passed statute, and has authorized or committed $3,000,000 toward that end.

The State may be correct, that Congress and the Tribes may not ratify the compact for many years or ever. However, that argument raises the real-world situation of the State going forward with costly implementation, and an indefinite period of uncertainty for Plaintiffs and other water users, absent Court determination of these and other issues. It is not in the best interests of the water users or other citizens of the various governments that such uncertainty continue for years or decades.

This case meets the three-part test in *Lee v. State*, 195 Mont. 1, 6, 625 P.2d 1282, 1288 (1981).

This case is similar to *Reichert v. State,* 2012 MT 111, ¶53, 365 Mont. 92, 278 P.3d 455. Plaintiffs sought declaratory judgment to declare a certain legislative-created ballot referendum, if passed in the following election, would be unconstitutional, and sought injunctive relief to decertify it before the election. The Montana Supreme Court held there was a justiciable, ripe controversy and that the courts did not have to wait until after a referendum passed for there to be sufficient legal harm to render the dispute ready for judicial determination.

Defendant also relies on the 1948 case of *Chovanak v. Mathews,* 120 Mont. 520, 188 P.2d 582 (1948), a case so old that the Montana Attorney General defending the case has since retired from the Montana practice of law, as has his son and grandson. The plaintiff sought declaratory judgment about a 1932 law which allowed certain slot machines if they were operated by religious, fraternal or charitable organizations. Plaintiff contended the law was unconstitutional because it discriminated on the basis of class. The case was dismissed for lack of a justiciable controversy, though today it would more likely have been dismissed for lack of standing. Plaintiff had no interest in slot machines, didn't intend to own one, and had never been denied a license for one. He apparently just disliked slot machines generally. He was found to have suffered no past or

prospective harm. By comparison, the Plaintiffs here have alleged harm to their property interests, specific to them (as members of the joint board of control, individual irrigators, and persons who apparently claim to own an affected water right or a cause of action to claim a water right).

3. The first provision at issue is a limited waiver of sovereign immunity; new immunity language does not constitute a new grant of immunity to the state.

The Court agrees with this analysis, and grants partial summary to the State.

4. The second provision at issue does not apply to political subdivisions of the state, and therefore Article II, §18 is not violated.

This argument was addressed above. The argument may be correct, as far as it goes. But it does not address the grant of immunity to the state for the actions of its appointees and agents.

5. Any unconstitutional provisions should be severed, pursuant to case law precedent and the severability language in Administrative Ordinance § 1-1-113.

The Court agrees with the State on this point for the reason explained above, and grants partial summary judgment therefore.

ORDER

Partial summary judgment is GRANTED and DENIED, and Declaratory Judgment is entered as follows:

1. Partial summary judgment is GRANTED to Plaintiffs. Declaratory Judgment shall issue, that SB 262 is unconstitutional, in violation of Article II, §18 of the 1972 Montana Constitution, to the extent of the following provision (provision #2 above):

> 1-2-111. Immunity from Suit. Members of the Board, the Engineer, any Designee, any Water Commissioner appointed pursuant to Section 3-1-114 of this Ordinance, and any Staff shall be immune from suit for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and duties set forth in the Compact or this Ordinance relating to the authorization, administration or enforcement of water rights on the Reservation.

2. Partial summary judgment is GRANTED to the State and Tribes as to the severability of the provision above.
3. Except as granted above, each Party's Summary Judgment Motion is DENIED.
4. Each party prevailed in part. Each party shall pay its own costs and attorney's fees.

DATED this 18th day of July, 2016.

JAMES A. MANLEY

JAMES A. MANLEY
District Court Judge

cc: Bruce A. Fredrickson / Kristin L. Omvig, Attorney for Plaintiffs
Timothy C. Fox / Alan Joscelyn / Dale Schowengerdt / J. Stuart Segrest, Matthew Cochenour, Attorneys for Defendants
John B. Carter / Daniel J. Decker, Attorneys for Confederated Salish and Kootenai Tribes
07/18/16 cWMc