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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, Defendants,	)	Cause No. DV-15-73 Judge: James A. Manley **INTERVENOR-DEFENDANT CONFEDERATED SALISH AND KOOTENAI TRIBES' MOTION AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

MOTION FOR SUMMARY JUDGMENT

Comes now the Confederated Salish and Kootenai Tribes and moves this Court for a summary judgment ruling upholding the Constitutionality of the water rights Compact that is the subject of this law suit. As discussed in the Tribes' accompanying Brief in Support, there are no genuine issues of material fact and the Tribes are entitled to judgment as a matter of law.

BRIEF IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

The Flathead Joint Board of Control ("FJBC") raises a very narrow question of law: do the two immunity provisions of the Confederated Salish and Kootenai Tribes' ("Tribes") water rights Compact (codified at 85-2-1901, et seq. M.C.A., et seq.) and Unitary Administration and Management Ordinance ("UAMO") (codified at 85-2-1902, M.C.A., et seq.) violate Article II, Section 18 of the Montana Constitution, rendering the Compact and the UAMO unconstitutional?

First, the plain language of Article II, Section 18 makes it clear that this section of the Constitution doesn't apply to the Compact or UAMO. But even if it did, the application of the canons of constitutional analysis and of statutory construction demonstrate that the Compact is a lawful Legislative enactment of Legislative intent. It is a settlement of litigation as well as a contract between sovereign governments with differing principles of sovereign immunity.

II. THIS CASE IS RIPE FOR SUMMARY JUDGMENT

The purpose of summary judgment is to avoid a trial if the movant is entitled to judgment as a matter of law and there are no material facts in dispute. Hughes v. Boston Sci. Corp., 631 F.3d 762, 767 (5th Cir. 2011). Summary judgment allows a close look at the merits, rather than mere allegations, to determine whether there is an actual case or controversy worthy of trial. Mere unsubstantiated assertions of claim will not, without more, justify

summary judgment. Irving Trust Co. v. United States, 221 F.3d 303, 305 (2nd Cir. 1955).[1] Here, a summary judgment ruling upholding the Constitutionality of the Compact is proper because there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56 (c) (3), Montana Rules of Civil Procedure.

A. Undisputed Material Facts in This Case.

1. The 2015 Montana Legislature passed the Compact and Unitary Administration and Management Ordinance (" UAMO") in S.B. 262 by less than a 2/3 majority vote in each House. See, First Amended Complaint, p. 6.

2. The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation are a federally-recognized Tribal government. The Tribes are not a state, county, city town or other local governmental entity under Montana law. See, Compact Article I, page 2, Exhibit 1 to the Amended Complaint.

3. The Compact contains the following provision entitled "Waiver of Immunity";

> The Tribes and the State hereby waive their respective immunities from suit, including any defense the State may have under the Eleventh Amendment of the Constitution of the United States, in order to permit the 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 State shall not extend to any action for money damages, costs or attorney's 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. (emphasis added). See, page 46 of Exhibit 1 to the First Amended Complaint, p. 4.

[1] As the Tribes discussed in their Reply Brief in Support of Intervention, at pp 5-6, FJBC has failed to allege anything other than 3 self-proclaimed and highly contingent hypotheticals that do not demonstrate any basis for standing in this case.

4. The word "Board" refers to the Flathead Reservation Water Management Board established in Article IV.I of the Compact. See, Section 1-1-104 (67), page 62 to Exhibit 1 of the Amended Complaint.

5. With the exception of the word "Board", every Indian water rights compact enacted by the Montana Legislature contains substantively indistinguishable sovereign immunity language. See, Amended Complaint, page 6.

6. All prior Compacts have a "dual sovereign" administrative system where Montana acts on its own under the Montana Water Use Act and the compacting tribe acts on its own under tribal law. See, Amended Complaint, page 4.

7. In this Compact Montana does not act on its own under the Montana Water Use Act nor do the Tribes act on their own under Tribal law. See, Compact Article IV I, Exhibit 1 to the Amended Complaint.

8. Under the Compact, neither Montana nor the Tribes administer or manage Reservation water independent of each other. Rather they have created the Water Management Board, comprised of State, Tribal and Federal representatives to act as a collective body under the UAMO, not the Montana Water Use Act. See, Article IV I of the Compact, Exhibit 1 to the Amended Complaint.

9. Section 1-2-111 of the UAMO provides that;

> 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. See, page 76 of Exhibit 1to the Verified First Amended Complaint, p. 5.

10. Article IV. I of the Compact specifies that The Water Management Board consists of two qualified Tribal appointees, two qualified State appointees, a fifth qualified member chosen by the four appointees and an ex officio member appointed by the United States Secretary of Interior. See, pp 40-41 of the UAMO, Exhibit 1 to the Amended Complaint.

11. Section 1-1-113, 1, of the UAMO, entitled "Codification, Severability and Defense", contains a severability clause stating that;

> The provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions. See, page 75 of Exhibit 1 to the Verified First Amended Complaint.

12. Neither the Compact nor the UAMO contain an express repeal of 2-9-305, M.C.A., entitled "Immunization, defense, and indemnification of employees".

B. Uncontested Issues of Law.

1. Article II, Section 18 of the Montana Constitution, entitled "State subject to suit", provides that;

> 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 specified by law by a 2/3 vote of each house of the legislature. (emphasis added).

2. The Montana Code Annotated defines and identifies what constitutes a "local governmental entity" in the following statutes; 7-6-602, 2-7-501, 53-30-503, 17-2-301, and 17-8-311, M.C.A. (2015). See, M.C.A., General Index, Vol. 12, under the heading "WORDS AND PHRASES DEFINED", p. 1579, all of which are entities or sub-entities of Montana State government.

3. Neither the Tribes nor the United States are contained in any Montana statutory definition of "local governmental entity".

4. 2-9-305 (1), M.C.A., provides that;

> It is the purpose of this section to provide for the immunization, defense and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.

III. ARTICLE II, SECTION 18 OF THE MONTANA CONSTITUTION DOES NOT APPLY TO THE WATER COMPACT

This case raises a question of first impression. Plaintiffs (FJBC) allege that the entire water rights Compact and UAMO are unconstitutional because they did not meet the Legislative vote requirement of Article II, Section 18 of the Montana Constitution. Article II, Section 18 states,

> 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 provided by law by a 2/3 vote of each house of the legislature. (emphasis added)

Both a plain language and a strict reading of this Constitutional provision demonstrates that it does not apply to the Compact. It is clear from the plain language of Article II, Section 18 what types of entities are encompassed by that article: states, counties, cities, towns, and all other local governmental entities. The plain meaning of "state, counties, cities and towns" by definition excludes Indian Tribes and their sub-entities and the United States.

The Montana Legislature has provided further clarification when it statutorily enumerated what constitutes a "local governmental entity". The legislatures' five definitions of the phrase "local governmental entity" are found in the Montana Code Annotated (2015)

General Index, Volume 12 under the heading 'WORDS AND PHRASES DEFINED IN CODE'. None of those statutory provisions include Indian Tribes or Tribal entities. Nor do the provisions include entities comprised of intergovernmental appointees from State, Tribal and Federal governments. These definitions of 'local government entity' encompass only subsets of State governmental entities that are entirely creatures of State law and State law alone.

When a legislature does define statutory language, its definition is binding upon the courts. "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary definition." Stenberg v. Carhart, 530 U.S. 914, 942 (2000). "It is axiomatic that the statutory definition of the term excludes unstated meanings of the term." Meese v. Keene, 481 U.S. 465, 484 (1987).

The legal maxim *expressio unius est exclusio alterius* further makes clear that if a statute or constitutional choice of words designates a particular thing as its focus, it does not apply to other things. Halverson v Slater, 129 F.3d 180, 186 (DC Cir. 1997). The maxim has been used to interpret constitutions as well as statutes. The maxim "applies equally to constitutional or statutory construction." Yunker v Murray, 554 P.2d 285, 289, 170 Mont. 427, 434 (1978). See also, Norman J. Singer & Shambie Singer, Sutherland Statutes & Statutory Constr. § 47.24 (7th ed. 2014).

Montana's courts are under an "affirmative duty to interpret statutes so as to give effect to the underlying legislative intent." Hohenlohe v Mont. Dep't of Natural Res. & Conservation, 240 P.3d 628, 635, 2010 Mont. 203 ¶ 40. Here the Legislatures' intent in identifying what constitutes a "local governmental entity" is clear and it does not include the Board created under the Compact.

The Compact is a negotiated settlement of litigation under the Montana Water Use Act and Federal law.[2] As a matter of Montana law, the Legislature must approve Indian water rights compacts. 85-2-701, *et seq*, M.C.A. The Compact is also a contract between three sovereigns to settle the water rights claims of the Tribes instead of engaging in a general inter *sese* water rights adjudication. Such an adjudication of the eight thousand eight hundred and thirty five of water rights claims the Tribes, and United States as trustee for the Tribes, have filed in the State-wide general water rights adjudication will take many contentious and expensive years.

Montana differs from all other states by statutorily providing Compacting as an alternative to protracted litigation of Indian reserved and aboriginal water rights. The Compact here is uniquely tailored to the history, hydrology, and physical limitations of the Flathead Indian Irrigation Project (FIIP) irrigation infrastructure on the Flathead Indian Reservation (FIR). The Tribes' Compact differs in material ways from all prior Indian Compacts in Montana. All prior Indian water compacts in Montana split management of water on a Reservation into a "duel sovereign water administration system"[3], meaning that the State administers state-based water rights under the Montana Water Use Act and tribes administer tribal water rights under tribal law.[4] In all prior Compacts the two sovereigns remain entirely autonomous in law and administration. That is not the case here.

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[2] This Compact expressly settles the cases identified in Article VII C, entitled Disposition of State and Federal Suits. See, Exhibit 1 to Amended Complaint at page 53.
[3] Plaintiffs' Verified First Amended Complaint and Petition for Preliminary Injunction (First Amended Complaint) at page 4.
[4] On Indian reservations with federal irrigation projects, such as the Blackfeet, Crow and FIR, it is actually a "three sovereign system" as a matter of federal law. See, for example, 25 Code of Federal Regulations 171, the federal regulations pursuant to United States Bureau of Indian

The State, Tribes and United States negotiated a different administration system on the FIR. Unlike all prior Compacts, the State, its officers and employees retain none of their original powers and duties as water administrators. The permitting, administration and management provisions of the Montana Water Use Act will not apply on the FIR, the UMAO will. See, Exhibit 1 to the Amended Complaint. Management and administration of water on the FIR is conducted not by the State and not by the Tribes. Rather, the State and Tribal sovereigns have subordinated their autonomy to create the Board as the single manager of non-FIIP water on the FIR.

The Board is not the "state", not one of Montana's "counties', not a "city", and not a" town" as enumerated in Article II, Section 18. Accordingly, the authority and immunity of the Board is not constrained by Article II, Section 18 of the Montana Constitution.

Similarly, the Board in no way constitutes a "local governmental entity" as envisioned in Article II, Section 18 of the Montana Constitution and as defined by the Legislature. The Board doesn't fit any of the State statutory definitions of a "local governmental entity." Local governmental entities are exclusively subsets of State entities that are entirely creatures of State law and State law alone. No Tribal or Federal entities are included in the Legislative definitions of the Constitutional phrase "local governmental entity." No amalgamations of State, Tribal and Federal entities are included in Montana's definitions or identification of "local governmental entity." The Board is a unique multi-sovereign entity not addressed in the Montana Constitution and it is not subject to Article II, Section 18 of the Montana Constitution.

Affairs operates and manages the federal Flathead Indian Irrigation Project on the Flathead Indian Reservation.

The plain language of Article II, Section 18, and subsequent legislative definitions, have made clear what is to be considered a state, county, city, town, and other local governmental entity, subject to its provisions. It does not include the Board created under the Compact. Accordingly, since the Board is not encompassed in any of the definitions in Article II, Section 18 of the Montana Constitution, and since the legal maxim of *expressio unius est exclusio alterius* states that we must keep the scope of the law to those definitions, the authority and immunity of the Board is not constrained by Article II, Section 18 of the Montana Constitution.

IV. EVEN IF ARTICLE II, SECTION 18 APPLIES, THE CANONS OF CONSTRUCTION DIRECT A JUDICIAL INTERPRETATION UPHOLDING THE CONSTITUTIONALITY OF THE COMPACT AND UAMO

A. Statutes Carry a Presumption of Constitutionality.

"All statutes carry with them a presumption of constitutionality and it is the duty of the courts to construe statutes narrowly to avoid constitutional difficulties if possible." State v. Lilburn, 265 Mont. 258, 266, 875 P.2d 1036, 1041 cert. denied, 513 U.S. 1078 (1995); State v. Martel, 273 Mont. 143, 148, 902 P.2d 14, 17 (1995). Furthermore, "It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Members of the City Council v. Taxpayers for Vincent , 466 U.S. 789, 800-801 (1984).

The Montana Supreme Court has concluded that "we interpret statutes so as to give effect to the legislative will, while avoiding an absurd result." City of Great Falls v. Morris, 332 Mont. 85, 89, 134 P.3d 692, 695 (2006). Here the Legislative will is clear. The Legislature passed

the Compact and the Governor signed it into law. Hundreds of hours of public negotiation sessions, public hearings conducted by the State, Tribes and United States throughout the State, two years of the Montana legislative Water Policy Interim Committee study and recommended changes to the Compact and numerous Legislative committee hearings were all keyed on one goal: quantifying the Tribes' water rights and avoiding a state-wide adjudication of the thousands of Tribal and Federal water rights claims filed in the Montana general water adjudication. That lengthy, contentious and profoundly expensive litigation is the "absurd result" the Legislature evaluated and intended to avoid by enacting the Compact.

B. Courts Disfavor Repeal of Statutes By Implication.

"Whenever possible, the Montana Supreme Court will adopt statutory construction which renders challenged statutes constitutional, rather than a construction that renders them invalid. State v. Ross, (1995), 269 Mont. 347, 352; Martel at 148. Any doubt is to be resolved in favor of the constitutionality of the statute. Martel at 148.

Repeals by implication are viewed with disfavor. Morton v. Mancari, 417 U.S. 535, 551 (1974). The intention of the Legislature to repeal "must be clear and manifest." United States v. Borden Co., 308 U.S. 188, 198 (1939). Nowhere does the Compact or the UAMO carry any language expressly or implicitly repealing the existing statutory immunity provisions for State officers and employees contained in 2-9-305, M.C.A. Therefore, 2-9-305 M.C.A., which is the immunity provision for State officers and employees, is still good law. Couple that with the rule that an "implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict'", Branch v. Smith, *et al*, 538 U.S. 254, 273 (2003), and the Constitutional challenge disappears. As discussed in the Tribes' Brief in Support of Intervention, the challenged

sovereign immunity provisions of the Compact are necessary as a matter of federal Indian law for the Tribes to participate in the Compact. Given the existence of 2-9-305 M.C.A., that same Compact provision may not be necessary for the State, its officers and employees.

C. Even Ignoring the Plain Language of Article II and the Canons of Construction, Portions Of the Compact and UAMO Can be Severed, And The Remainder Is Still Enforceable.

FJBC's claim that the entire Compact should be declared unconstitutional is the wrong remedy. The United States Supreme Court has addressed constitutional challenges to state legislative action numerous times. One of the Courts' guiding rules is that

> when confronting a constitutional flaw in a statute we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force [citations omitted], or to sever its problematic portions while leaving the remainder intact.

Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-329 (2006). To put it another way, limit the remedy to the narrowest scope possible, or alternatively, sever the unconstitutional portions and leave the rest intact. The Compact and the UAMO are 140 pages long. See Exhibit 1 to the Amended Complaint. As discussed above, the immunity provision of the Compact is easily severable as it applies to state-appointed members of the Board because 2-9-305, M.C. A. is still good law.[5]

The Ayotte Court established a three-part test on the issue. First, the Court will "try not to nullify more of a legislatures' work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people'" Ayotte at

[5] It's a much easier proposition for the UAMO. Section 1-1-113(1) contains an express severability clause that would clearly, without more, allow the application of 2-9-305 M.C.A to the State-based appointees to the Board. See, p 72 of Exhibit 1 to the Amended Complaint.

329. As discussed above, the intent of the majority of the 2015 Montana Legislature was to pass the Compact and they succeeded. To rule the entire Compact and UAMO unconstitutional because of three sentences would profoundly frustrate the intent of the Montana Legislature and the Governor who signed it into State law.

The second prong of the Ayotte test requires the Court to "restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it". Ayotte at 329. In other words, if the totality the Compact can be found lawful by adhering to the canons of construction and federal Indian law discussed above, the issue of Tribal sovereign immunity is covered by the Compact language and the issue of State sovereign immunity is covered by 2-9-305, M.C.A.

The third prong of Ayotte is the most compelling reason to uphold the Constitutionality of the Compact. "Third, the touchstone for any decision about remedy is legislative intent, for the court cannot 'use its remedial powers to circumvent the intent of the legislature.'" Ayotte at 330. For this Court to rule any portion of the Compact unconstitutional is a direct repudiation and circumvention of the intent of the Montana Legislature's act of passing the Compact and the UAMO.

V. CONCLUSION

A plain reading of the Constitutional provision FJBC relies upon, and the Legislature's identification of what constitutes a "local governmental entity" interpreting that provision, make clear that Article II, Section 18 does not apply to the Compact. Alternatively, assuming

arguendo, Article II, Section 18 does apply, the canons of construction and severability demand that the Compact and UAMO be upheld as constitutional.

Respectfully submitted this 11th day of February, 2016.

John B. Carter, Tribal Attorney

Daniel J. Decker, Tribal Attorney

CERTIFICATE OF SERVICE

I, John B. Carter, Attorney for the Confederated Salish and Kootenai Tribes, do hereby certify that on the 11th day of February, 2016, I served a duplicate original or true and correct copy of the **INTERVENOR-DEFENDANT'S MOTION AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, as indicated upon the person(s) named below, at the address set out below, either by mailing, hand delivery, or Federal Express, in a properly addressed envelope, postage prepaid, or by tele-copying a true and correct copy of said document.

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