

Barnes, John

From: Schowengerdt, Dale
Sent: Tuesday, April 14, 2015 5:41 PM
To: Everts, Todd
Subject: Compact Immunity Issue

Todd, Here is my analysis of the immunity issue that was raised earlier today:

Some have asked whether the Compact's provision waiving sovereign immunity (p. 46, ln. 20-26) violates Art. II, Section 18 of the Montana Constitution. The short answer is that Article II section 18 clearly does not apply.

Article II, section 18 prohibits granting immunity to state and local governmental entities without a 2/3 vote of each house:

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. Mont. Const. Art. II, Section 18.

This provision of the constitution says that the state and other governmental agencies are not immune from suit, unless the Legislature makes it immune by a 2/3 vote. The 1972 constitution changed the common law doctrine that states cannot be sued for damages by its citizens. Since then, the Legislature has granted the state and other agencies fairly broad immunity (see, e.g., MCA § 2-9-11), which the Supreme Court has broadened even further (see, e.g., *Massee v. Thompson*, 2004 MT 121). As prominent scholars of the Montana Constitution have noted, “[c]ase interpretations coupled with an accumulation of statutory exceptions have drained the provision of any significant meaning.” *Elison, Larry & Snyder, Fritz, The Montana State Constitution*, 71 (2001).

But regardless of whether Article II, Section 18 has any substantial meaning left, the Compact's waiver of sovereign immunity is completely opposite of what Article II, Section 18 prohibits. It does not grant immunity; it waives it vis-à-vis the Eleventh Amendment). In fact, every other Compact that the State has passed has substantially similar language.

Here is what the provision states:

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. (Compact, p. 46, ln. 20-26)

The State, the federal government, and the Tribe are all sovereign. In other words, they generally can't be sued in court unless they waive their immunity. The state can't be sued in federal court or Tribal court under the Eleventh Amendment and related court decisions. See *Alden v. Maine*, 527 U.S. 707 (1999); *Holladay v. State*, 506 F.Supp. 1317 (D. Mont. 1981). The federal government can't be sued in state court. *Price v. U.S.*, 174 U.S. 373 (1899). And the Tribe can't be sued in state or federal court. *C&L Enters., Inc. v. Citizen Band*, 532 U.S. 411 (2001).

So the Compact ensures that each of these entities can be sued in an appropriate court for the limited purposes detailed in the Compact.

The Compact limits the extent of the waiver, however, by stating that "such waivers of sovereign immunity by . . . the State shall not extend to any action for money damages, costs, or attorney fees." Some have argued that this a specific grant of immunity that requires a 2/3 vote under Article II, Section 18 of the Montana Constitution. That is not the case.

Montana is immune from money damages in federal court under the Eleventh Amendment, regardless of Article II, Section 18. See *Brown v. Montana*, 442 F.Supp.2d 982, 988 (D. Mont. (2006) (noting that the Eleventh Amendment "bars [plaintiff] from proceeding in federal court with claims for money damages against the State of Montana"). The Ninth Circuit has held that Montana did not waive its Eleventh Amendment immunity by virtue of Article II, Section 18 of the Montana Constitution, and thus could not be sued in federal court or tribal court. *State of Montana v. Peretti*, 661 F.2d 756, 748 (9th Cir. 1981).

Thus, the Compact clarifies that the State and Tribe are waiving immunity for suit to resolve disputes arising under the Compact, but it is not waiving immunity to money damages under the Eleventh Amendment (and, presumably, the state's immunity in state court to the extent it's relevant under MCA § 2-9-11 and related provisions). Which of course makes sense. Parties can enforce the Compact by this waiver of immunity, but the State is not at the same time opening itself up to money damages on that basis.

In short, the Compact is not removing the state from liability for money damages, because the State is already immune from money damages under the Eleventh Amendment. It is simply clarifying the boundaries of its waiver, just as every other Tribal water Compact has done.

Because the provision at p.46, ln. 20-26 is a limited waiver of sovereign immunity, not a grant of immunity to the state or a state entity, Article II, Section 18 clearly has no application to the provision.

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