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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

FLATHEAD JOINT BOARD OF CONTROL and JERRY LASKODY, BOONE COLE, TIM ORR, TED HEIN, BRUCE WHITE, SHANE ORIEN, WAYNE BLEVINS AND GENE POSIVIO, all members of the Flathead Joint Board of Control, Plaintiffs, vs. STATE OF MONTANA, Defendant and CONFEDERATED SALISH AND KOOTENAI TRIBES, Intervenor-Defendant.	Cause No. DV-15-73 Judge: James A. Manley **PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO INTERVENOR-DEFENDANT CONFEDERATED SALISH AND KOOTENAI TRIBES' MOTION FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs by and through their counsel of record, Rocky Mountain Law Partners, PLLP, and hereby file their Response Brief in Opposition to Intervenor-Defendant Confederated Salish and Kootenai Tribes' Motion for Summary Judgment (the "Tribes' Motion"). The Tribes' Motion must be denied because: 1.) Article II, § 18 of the Montana Constitution applies to the State of Montana (the "State") and therefore Senate Bill 262 ("SB

262"); and 2.) the Montana Legislature's failure to pass SB 262, a bill which grants the State *carte blanche* immunity for any action for money damages, attorney's fees and costs, by at least a 2/3 vote of each legislative house was unconstitutional and renders the bill *dead* as a matter of law. The Court should so rule.

ARGUMENT

I. ARTICLE II, SECTION 18 OF THE MONTANA CONSTITUTION APPLIES TO THE STATE AND THEREFORE, THE CSKT COMPACT.

Plaintiffs submit that the Montana Constitution applies to the Compact and Unified Management Ordinance ("UMO") because: 1.) the WMB is a *quasi*-State/Tribal entity which possesses State characteristics; and 2.) the State cannot abrogate the duties and responsibilities owed to its citizens and immunize itself from responsibility without following the Montana Constitution. According to the Tribes, the CSKT Compact (via the State of Montana and the Tribes) has *created* a new monstrosity dubbed the "Flathead Reservation Water Management Board" (the "WMB"). In summary, it is a creature which possesses plenary *quasi-governmental* powers (judicial, executive, legislative and enforcement etc.), operates under a new Law of Administration, answers to no one and is afforded absolute immunity for any action for money damages. Mont. Code Ann. § 85-20-1902. Simply put, the WMB IS ABOVE THE LAW.

As a further result of its creation, the State voluntarily abandons the historical dual system of water administration and abrogates all of its prior governmental responsibilities, duties and obligations owed to its citizens pertaining to Montana's waters and corresponding water rights on the Flathead Indian Reservation ("FIR") to the WMB. For example see: Mont. Const. Art. II, § 29 (Eminent Domain); Mont. Const. Art. IX, § 3 (Water Rights);

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Mont. Code Ann. § 85-1-101 *et seq*. In sum, the State has fully immunized itself from any action for money damages, attorney's fees and costs.

A. Art. II, § 18 of the Montana Constitution Applies to the Water Management Board as it Relates to the State.

The Compact defines the "Flathead Reservation Water Management Board" as:

> the entity established by this Compact and the Law of Administration to administer the use of all water rights on the Reservation upon the Effective Date." Mont. Code Ann. § 85-20-1901(34).

It is a *quasi*-state/tribal entity consisting of five (5) members: two (2) selected by the Governor of Montana; two (2) appointed by the CSKT Tribal Council, one (1) selected by the other four (4) members and an *ex officio* member selected by the Secretary of Interior. **Exhibit 1** to Plaintiffs' Brief in Support of Motion for Partial Summary Judgment. It further operates through an Engineer, Designees and Water Commissioners.[1] *Id.* The WMB is the "exclusive regulatory body on the Reservation for the issuance of Appropriation Rights, authorizations for Change in Use of Appropriation Rights and Existing Uses." *Id.;* Mont. Code Ann. § 85-20-1901 I.1. The State and Tribes have subordinated their autonomy to create the WMB. (Tribes' Brf. pg. 9.) And, the State, its officers and employees have relinquished all of their original powers and duties as water administrators under Montana law in favor of the WMB. *Id.*

The Tribes characterize the WMB as "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". *Id.* More particularly, they allege that because the WMB does not expressly

[1] Exhibits referred to herein are attached to Plaintiffs' Brief in Support of Motion for Partial Summary Judgment, except Exhibit 10 which is attached hereto.

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fit within the definition of "a local governmental entity", the State does not have to follow the Montana Constitution. *Id.* pg. 5-6. Mont. Const. Art. II, § 18 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 two-thirds vote of each house of the legislature. (Emphasis added.)

The Tribes' argument ignores the fact that the "State" is subject to Mont. Const. Art. II, § 18.

Under the Tribes' definition, the result is an entity which is completely immune from challenge, question or liability. Generally, one looks to case law to determine the scope and limits (if any) of an entity. However, germane case law is nearly nonexistent with respect to this new creature. In *State of Wisconsin v. Beaver Dam Area Development Corp.*, 752 N.W.2d 295 (2008) the Wisconsin Supreme Court, also a case of first impression, analyzed the nature of a quasi-governmental entity. That case involved an action brought by the State against an area development corporation whose exclusive function was to promote economic development around the city. The BDADC was a nonprofit corporation organized under Wisconsin law. It was not created by constitution, statute or ordinance. Its officers were private individuals elected by a board of directors. *Id.* at ¶16. A question arose as to whether or not the entity was a quasi-governmental entity subject to open meeting laws and public record laws. *Id.*

Considering the "totality of the circumstances" the court examined the vernacular understanding of the key terms and determined that "quasi" meant "having a likeness to something; resembling." *Id.* at 301. The court reviewed the history of open meeting laws and public record laws. It further considered indicative factors including but not limited to: the public purposes served by the entity; source of funding; principal place of business;

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financial and reporting requirements; whether or not the entity was subject to governmental control; and the degree of access to records. Ultimately, the Court concluded:

> Thus, BDADC resembles a governmental corporation in several important respects: (1) other than interest income, its sole source of funds is public tax dollars, (2) it serves a public function and has no purely private function, (3) it appears in its presentation to the public that it is part of the City, (4) the City maintains a degree of control over BDADC, and (5) the City has access to BDADC's financial information and management plan. No one of these ways is sufficient to conclude that BDADC is a quasi-governmental corporation. However, considering them in totality, we determine that BDADC resembles a governmental corporation in function, effect, or status. Thus, it is a quasi-governmental corporation within the meaning of §§ 19.82(1) and 19.32(1). *Id.* at 310.

A similar analysis can be applied here.[2] Montana law does not define *"quasi-governmental entity"*, *"quasi-state/tribal entity"*, *"multi-sovereign entity"* or anything akin thereto. What we do know is that the State and the Tribes are separate sovereigns. A "sovereign" is defined as "one possessing or held to possess supreme political power or sovereignty; one that exercises supreme authority within a limited sphere". Merriam-Webster. We also know the State abrogated its responsibilities and duties under Montana law and essentially turned them over to the WMB. It has further granted the WMB judicial powers, executive powers, legislative powers and enforcement powers. **Exhibit 1**. Yet, the State has not assumed responsibility for the WMB's actions.

Reviewing the totality of the circumstances as it relates to these facts one can only conclude that the WMB possesses State characteristics. More specifically:

- Its sole source of funding is tax dollars;
- It serves public functions previously held by the State, Montana Department of Resources, local governmental agencies and the Tribes;

[2] See also: Mont. Code Ann. § 18-11-101, et seq. re: State-tribal cooperative agreements: ability to become contracting employer in public employee system. M.C.A § 18-11-121.

- It appears to the public to be public in nature while possessing judicial, executive, administrative, legislative and enforcement powers;
- Its members are politically appointed by the State, the Tribes and the United States; and
- Arguably, its records pertinent to waters on the FIR, including but not limited to appropriations, changes in use, etc. should be accessible to the public.

This concept is absolutely frightening.[3] While Plaintiffs recognize that the Tribes and United States have immunities which are separate and distinct from the State's immunities, the State as a distinct actor, cannot immunize itself from responsibility for its agents absent a grant of immunity. Mont. Code Ann. §§ 2-9-305 and 2-9-102. Such an extreme action requires the State to abide by the Montana Constitution.

B. The State has Abrogated its Duties and Responsibilities Under Montana Law and Voluntarily Relinquished them to the WMB While Fully Immunizing Itself From Liability for Money Damages.

Plaintiffs submit that because the WMB retains State characteristics and the State has relinquished its responsibilities to the WMB and received *carte blanche* immunity for its conduct, the Montana Constitution applied to the grants of immunity to the State contained in the Compact and UMO. Consider its reach under the Tribes interpretation of the Compact:

- Tribes admit the dual system of water administration is eliminated. The CSKT Compact differs in material ways from all prior Indian Compacts in Montana. All prior Indian Compacts split management of water on a Reservation into a "dual sovereign water administration" where the State administers state-based rights under the Montana Water Use Act and the tribes administer tribal rights under tribal law. Tribes' Brf. pg. 4 and 8. And, the two sovereigns remain entirely autonomous in law

[3] Should the Compact vote's constitutionality be upheld, what type of entity the "WMB" is, who is responsible for its actions and the like will be the subject of a plethora of litigation in years to come assuming a court of competent jurisdiction exists. Plaintiffs reserve and preserve all of their arguments that may pertain thereto.

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and administration under all other Montana compacts. Not here however. *Id.*

- Tribes admit a new Law of Administration applies to the Flathead Indian Reservation. The CSKT Compact melds two sovereigns. Neither the State nor the Tribes administer or manage Reservation water independently. Rather, they *"have created the Water Management Board, comprised of State, Tribal and Federal representatives"* to act under a new Law of Administration called the Unified Management Ordinance ("UMO") not the Montana Water Use Act or tribal law. *Id.* pg. 4.

- Tribes admit WMB has two State appointees. The WMB consists of two State appointees, two Tribal appointees, a member picked by those four appointees and one *ex officio* member appointed by the United States Secretary of Interior. *Id.* pg. 5.

- Tribes admit State has abrogated its duties and responsibilities and relinquished them to the WMB. Unlike all prior Compacts, the State, its officers and employees retain none of their original powers and duties as water administrators. *"Rather, the State and Tribal sovereigns have subordinated their autonomy to create the Board as a single manager of non-FIIP water on the FIR." Id.* pg. 9.

- Tribes conclude that Montana law does not apply to the WMB. The WMB is above the law, because the WMB is not the state, county, city, town or local governmental entity. *Id.* pg. 9. Therefore, the WMB is not constrained by Article II, Section 18 of the Montana Constitution (or apparently Montana law in general including but not limited to Mont. Code Ann. § 2-9-305). *Id.* Rather, the WMB 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." Id.*

- Tribes admit as a matter of law the CSKT Compact had to be passed by the Legislature. As a matter of Montana law, the State Legislature must approve Indian water rights compacts. Mont. Code Ann. § 85-2-701 et seq. *Id.* pg. 8.

By voluntarily relinquishing its duties and responsibilities to the WMB, the State has abrogated its statutory and constitutional duties and fully insulated itself from liability for money damages. But, the WMB retains State characteristics. More particularly, its tentacles reach into State domain previously occupied by the State and assume roles traditionally held by the State. Its powers include but are not limited to:

- Exclusive regulatory body for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses and for the administration and enforcement of all Appropriation Rights and Existing Uses;

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Exhibit 1, pg. 40.

- Exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact, any controversy over the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation; *Id.*

- Power to promulgate procedures, prescribe forms, develop additional materials and implement amendments thereto to carry out its assigned functions under the Compact and the Law of Administration; *Id.* pg. 43.

- Power to hold hearings, take evidence, administer oaths, compel attendance of witnesses and to appoint technical experts; *Id.*[4]

- Power to determine any controversy and grant declaratory or injunctive relief; *Id.* pg. 44;

- While it does not have the power to award money damages, attorneys' fees or costs, it does have the power to award any kind of equitable relief; *Id.*

- Power to appoint one or more water commissioners to provide day-to-day administration of the water on the Reservation; *Id.*

- Impose conditions on future use of any Appropriation Rights; *Id.* pg. 124.

- Revoke or suspend Appropriation Rights. *Id.* pg.125.

These are State governmental functions under all other Montana water compacts. What is clear is that the State has surrendered its responsibilities and received total immunity in return without following the Montana Constitution. That violates Montana law.

With that said, Plaintiffs suggest that the Court need not go any further than to find that the WMB possess State characteristics, operates to fully insulate and immunize the State from liability for money damages, attorney's fees and costs and if that is the case, Mont. Const. Art. II, § 18 applies and SB 262 required a 2/3 vote of approval from each legislative house to legally become law. The State has created a new entity, which consists in part of

[4] Neither the Federal nor Montana Rules of Evidence apply as the Board is allowed to consider hearsay evidence. **Exhibit 1.**

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State agents who have exclusive control and jurisdiction over all water rights on the FIR, whether state, tribally or federally derived. Yet, actions by that entity are absolutely immune from liability. All other avenues for redress and laws pertaining to water rights that Montana citizens located on the FIR used to be able to access have been eliminated. And the State has absolutely immunized itself from liability for the actions of its State appointed agents who now control all water rights on the FIR. That is the ultimate grant of immunity.

In summary, the Tribe argues that Art. II, Sec. 18 of the Montana Constitution does not apply to the WMB because it does not fit within the meaning of "a local governmental entity". Tribes' Brf. pg. 5-6. That argument is disingenuous at best and demonstrates the inherent dangers in the argument. Apparently, the Tribes forget that Art. II, Sec. 18, Mont. Const. clearly applies to the State. If the WMB, through a collective decision of the Board (not an individual), commits an actionable tort who is responsible for the resulting money damages? The WMB is absolutely immune. The Tribe is absolutely immune. The United States is absolutely immune. And, under the Tribes' argument the State is absolutely immune for its appointees' collective conduct. If the Legislature is going to grant such an over-reaching immunity to the State, it must do so by at least a 2/3 vote of each legislative house. Art. II, § 18, Mont. Const.

II. AS A MATTER OF LAW, THE CSKT COMPACT IS UNCONSTITUTIONAL.

The Tribes argue that the canons of judicial construction support upholding the CSKT Compact's constitutionality with respect to the vote which allegedly enacted it. In this case, they are wrong because: 1.) the presumption of constitutionality of SB 262 is overcome; 2.) the CSKT Compact and UMO is a new stand-alone law which does not incorporate

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Montana's immunity laws; and, 3.) severance of the Compact's immunity provisions does not and cannot correct the inherent unconstitutionality of SB 262.

Generally, legislation's constitutionality may be challenged either facially or on an as-applied basis. A facial challenge may be brought shortly after the passage of legislation and generally seeks to prevent a law from being enforced in its entirety. Claims of facial invalidity often rest on speculation. *Sabri v. United States*, 541 U.S. 600, 609 (2004). A long history of case law exists wherein the United States Supreme Court has found facial challenges sufficient to invalidate a challenged statute. For example see: *Brown v. Board of Education*, 347 U.S. 483 (1954) (Court declared state laws establishing separate public schools for black and white children unconstitutional under the Equal Protection Clause); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (First Amendment challenge where Court struck down Ohio's criminal syndicalism statute); and *United States v. Lopez*, 514 U.S. 549 (1995) (challenge to Gun-Free School Zones Act of 1990 holding 18 U.S.C. § 922(q) unconstitutional because Congress exceeded its powers under the Commerce Clause). In contrast, an as-applied challenge seeks redress for a constitutional violation which has already occurred. *Ayotte v. Planned Parenthood of N. England*, 546 U.S. 320 (2006). Here, both violations arguably exist.

A. Presumption of Constitutionality is not an Unbridled Privilege to Sanction a Constitutional Violation.

While Montana courts generally construe statutes narrowly to avoid an unconstitutional interpretation if feasible, the presumption is not an unbridled privilege to sanction constitutional violations. *City of Great Falls v. Morris*, 332 Mont. 85, 134 P.3d 692 (2006). The party challenging a statute's constitutionality bears the burden of proving

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beyond a reasonable doubt that it is unconstitutional. *Id.* at ¶ 19. The statute must be read as a whole, without isolating specific terms from the context in which they were used by the legislature. *Id.* In doing so, courts interpret "[s]tatutes so as to give effect to the legislative will, while avoiding an absurd result." *Id.*

The instant litigation is somewhat different in the sense that it centers on the actual vote necessary to legally pass SB 262 as law coupled with the grant of immunity—not just the statute's language. Plaintiffs submit that Mont. Const. Art. II, § 18 required at least a 2/3 vote to pass it into law. In contrast, the Tribes argue that because the Tribes, the State and the United States participated in negotiations in years past, held Water Policy Interim Committee meetings, and then the Legislature voted by less than a 2/3 vote to approve SB 262 that constitutes *"legislative intent"* and preserves the presumption of constitutionality. The fact that it violates the Montana Constitution is apparently irrelevant.[5] The fact SB 262 grants the State *carte blanche* immunity for suits by its citizens for money damages without following the Montana Constitution (which the Attorney General's Office declares to have been "*drained of any significant meaning*") is also dismissed by the Tribes' argument. **Exhibit 4.** Now, those are absurd results.

The chronology of events and legislative hearings demonstrates the Legislature's intent and that the Legislature failed to pass SB 262 by at least a 2/3 vote of each legislative house:

- On April 14, 2015, Representative Austin Knudsen, the Speaker of the House ruled that Mont. Const. Art. II, §18, applied and that SB 262 must pass by at least a 2/3 vote of each house of the legislature in order to legally become law. A House Rules

[5] The Tribes further argue that the key goal under the Compact was to quantify the Tribes water rights and avoid a state-wide water adjudication. The 2015 CSKT Compact does not quantify the Tribes water rights; rather, it attempts to quantify the irrigators/landowners water rights.

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Committee hearing was held on April 15, 2015. **Exhibit 3a.**

- On April 14, 2015 at 5:41 p.m. the Solicitor General's Office issued its opinion that the waiver of immunity clause was essentially boilerplate language, indicating that Art. II, §18 has been *"drained of any significant meaning"*; that despite the State's waiver of its defenses under the Eleventh Amendment (as contained in SB 262) the State of Montana is still immune from suits for all money damages under the Eleventh Amendment of the United States Constitution, as a matter of law; and that the waiver of immunity clause in SB 262 is really a *"limited waiver of sovereign immunity"* as opposed to a *"grant to the state or state entity"* of immunity. **Exhibit 4.**

- On April 15, 2015, the House Rules Committee upheld Speaker Knudsen's ruling that under Art. II, § 18, Mont. Const. SB 262 required at least a 2/3 vote of each house in order to legally become law. **Exhibit 3a.**

- On April 15, 2015, the House of Representatives overturned the Speaker's ruling on a 52/48 (52%) vote. **Exhibit 3.**

- On April 15, 2015, Representative Jeff Essman proposed an amendment to SB 262 which simply suggested removing the phrase "or the State" from SB 262; **Exhibit 3b.** The proposed amendment failed. **Exhibit 5.**

- On April 15, 2015, the House of Representatives conducted a Second Reading of SB 262, stripped all of the attached amendments from the bill and voted to approve it by a 53-47 (53%) vote. **Exhibit 5.**

- On April 16, 2015, following the third reading, the House of Representatives voted to approve SB 262 with a 53/47 vote (53%) which again did not meet the mandatory 2/3 vote requirement. **Exhibit 2**; Defendant's Response to Request for Admission No. 9.

On April 15, 2015, Speaker of the House Austin Knudsen placed the House of Representatives on notice that passage of SB 262 (whether by a 2/3 vote or not) meant it was granting the State immunity:

> I think we've got a situation here that if we leave this language in the Bill, someone who sues under the compact and feels like their property rights have been diminished or personal rights have been diminished, you sue in tort. You go to state court. And I think with this language here that says "any action" the State is immune from, would apply in this situation. I think this is an important amendment. I understand the concern about amendments, ***but we've got language in this Bill now that basically grants the State carte blanche immunity from anything. We're about to pass a thousand page-plus bill with far-reaching implications, and we're going to grant***

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> ***the State immunity. And we're going to do it with a 51 vote, I might add.*** I think this is an important amendment. It needs to go on. **Exhibit 3b**, pg. 9-10.

Plaintiffs support the negotiation and resolution of a fair and reasonable water compact. Unfortunately, SB 262 does not fit that "bill".

Under Montana's statutory construction laws, this Court's role is to give preference to the construction of a statute, giving each provision meaning. Its role is not to insert what has been omitted or omit what has been inserted:

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. Mont. Code Ann. § 1-2-101.

Based upon a plain reading of the statute, the Montana Constitution required at least a 2/3 vote of approval of each house in order to eliminate a party's avenue for redress and ability to obtain money damages, fees or costs for any action filed against the State. Reading SB 262, as a whole, demonstrates it provides a new grant of immunity to the State. (See Plaintiffs' Brief in Support of Motion for Partial Summary Judgment dated February 16, 2016.) The presumption of constitutionality has been overcome. The Court should so rule.

B. The CSKT Compact is Unconstitutional on its Face and Creates a Stand Alone Law Administered by a Newly Created *Quasi*-State/Tribal Body.

The Tribes argue that since the Compact and UMO do not expressly repeal Mont. Code Ann. § 2-9-305, then no constitutional challenge exists. (Tribes' Brf. pg. 11-12.) They further suggest that no implied repeal exists, so no harm-no foul. That argument fails because: 1.) the CSKT Compact expressly grants the State *carte blanche* immunity from any action for money damages, fees or costs and provides that nothing in the Compact shall

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be construed or interpreted to waive the State's immunity except as expressly contained in the Compact ; 2.) interestingly, no Compact party (State, Tribal or United States) has stepped up to assume responsibility for the WMB's actions or conduct; and, 3.) the inconsistent application of Montana law is improper.

The CSKT Compact does not expressly, implicitly or otherwise incorporate Montana's general immunity laws including Mont. Code Ann. § 2-9-305. **Exhibit 1**. Rather, it does just the opposite and grants the State *carte blanche* immunity while isolating the Compact's immunity provision within its' four corners:

> 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 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 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. (Emphasis added.)

Exhibit 1, pg. 46, ll. 20-24; Mont. Code Ann. § 85-20-1901.

> B. General Disclaimers. Nothing in this Compact shall be construed or interpreted:
>
> 11. To constitute a waiver of sovereign immunity by the Tribes or the State **except as expressly set forth in this Compact**. (Emphasis added.)
>
> *Id.* pg. 48, ll. 9-10; Mont. Code Ann. § 85-20-1901.

The coupling of these provisions along with the muddy waters created by a "court of competent jurisdiction" defined under the Compact result in a complete preclusion to a party's ability to obtain monetary relief against the State of Montana; rather, the only legal avenue available to a party to obtain monetary relief against the State is IF the State of Montana consents to state court jurisdiction or waives its Eleventh Amendment rights in

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total. No legal mandate exists requiring the State to consent to jurisdiction in state or tribal court nor is it required to fully waive its' Eleventh Amendment rights. Rather, that consent and/or refusal may be unilaterally withheld at the State's whim. Clearly, no other such far-reaching form of sovereign immunity exists under Montana law and absent the immunities created by the Compact the injured party would clearly be able to obtain monetary redress. This is a new creation and a new grant of immunity to the State. In sum, if the State is going to fully insulate itself from any action for a money damage award and eliminate a party's avenue for redress, a 2/3 vote (at a minimum) should be required.

Next, and even more concerning, is the *creation* of the new monstrosity called the WMB which is a political board comprised of State, Tribal and federal appointees. **Exhibit 1**. This new board governs, controls and possesses *exclusive jurisdiction* over "all water rights whether derived from tribal, state or federal law" within the exterior boundaries of the FIR under a new Law of Administration. **Exhibit 1** pg. 75. It possesses judicial powers, executive powers, administrative powers, enforcement powers and it answers to no one:

> 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***. *Id.* at 76, ll. 25-29; Mont. Code Ann. § 85-20-1902.

So if the WMB commits a tort, who is responsible for the board's actions and any corresponding money damages? Interestingly, the State does not assume responsibility for the WMB's conduct. Nor, do the Tribes or the United States. Rather, the Tribes argue that because this new creature does not fit within the definition of *"local government entity"*, it is

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not subject to the Montana Constitution and therefore Montana law in general. (Tribes' Brf. pg. 6-7.) Under the prior dual system of water administration (state and tribal) the State retained duties, responsibilities and culpability for the actions owed to its citizens, including responsibility for its agents' actions. Mont. Code Ann. §§ 85-1-101 *et. seq.* and 2-9-305. But with eradication of the dual system of water administration, the State has effectively abrogated its responsibilities previously owed to Montana citizens. Again, that is a grant of immunity which required at least a 2/3 vote.

C. Mutilation by Severance of the CSKT Compact does not Cure the CSKT Compact's Inherent Unconstitutionality.

The CSKT Compact must be declared "*dead on arrival*" in its entirety because the Montana Legislature's originating vote which allegedly approved SB 262 was corrupted. In response, the Tribes suggest that a quick fix exists because the UMO contains a severance clause. Specifically, they argue the immunity provision of the Compact is easily severable as it applies to state-appointed members of the WMB. (Tribes' Brf. Pg. 12.) They are wrong. The new UMO contains a severance clause. Mont. Code Ann. § 85-20-1902. ***However, the Compact does not.*** Mont. Code Ann. § 85-20-1901 and **Exhibit 3b**. So, even if one severed the immunity provision as it pertained to the WMB, the State still retains immunity for any action for money damages, fees or costs under the Compact. In any event, the WMB as a governing body would remain shielded from liability.

The Tribes rely upon *Ayotte v. Planned Parenthood of N. England*, 546 U.S. 320 (2006) in support of their severance argument. *Ayotte* involved a 42 U.S.C. § 1983 action filed as a facial constitutional challenge seeking to have New Hampshire's Parental Notification Prior to Abortion Act declared unconstitutional. Ultimately, the lower courts

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declared the statute unconstitutional. On appeal, the United States Supreme Court avoided a substantive ruling on the statute's constitutionality; rather it considered the appropriate remedy. In doing so, it relied upon three (3) interrelated principles to provide guidance:

> 1.) a Court should try not to nullify more of a legislature's work than is necessary because "we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people'";
>
> 2.) a Court must restrain itself from "rewriting state law to conform it to constitutional requirements"; and
>
> 3.) the touchstone for any decision about a remedy is legislative intent, because a court cannot "use its remedial powers to circumvent the intent of the legislature." *Id.* at 329-330.

Mindful of honoring the legislature's intent, the Court reasoned:

> After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute or no statute at all? [citations omitted]. All the while, we are wary of legislatures who would rely on our intervention, for '[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied. [citation omitted]. This would to some extent, substitute the judicial for the legislative department of the government. *Id.* at 330-331.

Ultimately, the Court remanded the case back to the lower court to determine legislative intent. As a point of interest in 2007, the New Hampshire law was repealed and ultimately the New Hampshire Department of Justice was held responsible for Planned Parenthood's attorney fees and court costs. **Exhibit 10.**

The Tribes argue that *Ayotte* supports severance so as to eliminate the immunity provisions. Then they claim all is well. Plaintiffs respectfully disagree and maintain that *Ayotte* clearly supports not severing the bill; but rather, honoring legislative intent which results in SB 262 being declared unconstitutional. Mont. Const. Art. II, § 18. Here, the

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Montana 64th Legislature's intent could not have been any clearer. Consider the facts: Speaker of the House Austin Knudsen ruled that a 2/3 vote of each legislative house was required in order to pass SB 262. **Exhibit 3**. On April 15, 2015, the House Rules Committee upheld that ruling. **Exhibit 3**. Then on April 15, 2015, Representative Essman proposed an amendment to remove the words "or the State" from the Compact's immunity clause. A discussion ensued. **Exhibit 3b**. Speaker Knudsen's testimony demonstrates that the Legislature was on notice of what passage of SB 262 meant and their legislative intent was clear:

> Members of the body, I rise in support of this amendment. Members, leadership in the House has taken a fairly hands-off position on the compact. We've never taken a hard leadership position. Individual members of leadership certainly have their own opinions on the compact, but we've never taken a caucus position on the water compact. That's because we respect that there's a lot of different opinions on both sides of the aisle on this Bill.
>
> But with that said, I feel that this is a necessary amendment. This came to our attention just a couple days ago, this language. And regardless of whatever the intent behind the language is, which according to the Attorney General its—number one, it's boilerplate language and, number two, is the intent is it only applies to the sovereign immunity in federal court under the 11th Amendment.
>
> Well, I understand that, ***but I can read the language in the Bill, and I don't believe that's what it says. While it may be the intent, the words on the page are what matters***. And I think we've got a situation with the words on this page, if you read that sentence. "The Tribes and the State hereby waive their respective immunities from suit," comma, so there's an offset. And there's some more language in there including the Eleventh Amendment. You go down to the next comma, there's the word ***"except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action." That does not say any federal action. That says "any action." To me, that language is clear.***
>
> I think we've got a situation here that if we leave this language in the Bill, someone who sues under the compact and feels like their property rights have been diminished or personal rights have been diminished, you sue in tort. You go to state court. And I think with this language here that says "any action" the State is immune from, would apply in this situation. I think this is an important amendment. I understand the concern about amendments, ***but we've got language in this Bill now that basically grants the State carte blanche immunity from anything. We're about to pass a***

> ***thousand page-plus bill with far-reaching implications, and we're going to grant the State immunity. And we're going to do it with a 51 vote, I might add.*** I think this is an important amendment. It needs to go on. **Exhibit 3b**, pg. 9-10.

The Attorney General's Office opined that the language was boiler plate and Art. II, § 18 of the Montana Constitution had been drained of any significant meaning. **Exhibit 4.** Representative Wittich cautioned the House that the Attorney General's opinion was not sacrosanct:

> So somehow this idea that if the Montana Attorney General provides an opinion, it is sacrosanct and cannot be questioned and it will pass all legal Constitutional muster, hogwash. So I just want to make sure that when people are looking at this, they're looking at it objectively through their own eyes... *Id.* pg. 11-12.

Representative Essman confirmed no such *carte blanche* immunity for money damages previously existed for the State under Montana law so that this would be a new grant of immunity:

> Members, here's the thing about waivers. If you're going to waive a right, you have to have the right; okay? What that means in this setting is that somewhere in the past, since 1974, a previous Montana legislature would have had to establish an immunity—a right of immunity, on behalf of the State for the takings involved here or the damages that might occur.
>
> In a question posed to the Code commissioner, no statute to that effect was found. So this—and there is no severability clause in this compact bill. Montana Supreme Court historically has taken a very – case a very gimleted eye on sovereign immunity and has construed it narrowly. Why? To uphold the Montana Constitution and the rights of our citizens. *Id.* pg. 12, ll. 12-25.

With that said, the House declined the amendment and ultimately approved SB 262, as is, with less than a 2/3 vote. **Exhibit 5**. That was the Legislature's clear, informed and express *intent*—to grant the State *carte blanche* immunity for "any actions for money damages". This Court cannot use its remedial powers to circumvent the Legislature's intent, particularly here where the Legislature chose not to include a severability clause within SB 262 or to

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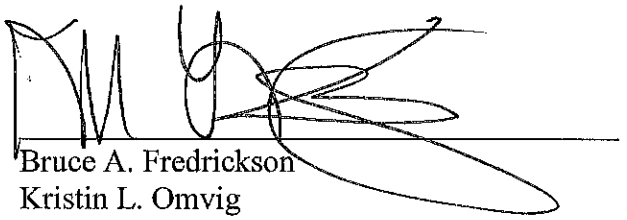
remove "or the State" from SB 262. *Ayotte, supra.* Nor, can it legislate and rewrite and/or severe the Compact immunity provisions. Rather, this Court's role is to interpret the law. *Id.* The express language of SB 262 is clear. It grants the State *carte blanche* immunity from any action for money damages, fees or costs; and likewise the Legislature's intent is clear – it refused to pass the bill without an express reference to the State's immunity. Any other interpretation creates a legal fiction and legislation by judicial fiat. Accordingly, the Court should deny the Tribes' motion for summary judgment.

CONCLUSION

No genuine issues of material fact exist as to the constitutional violation arising from the legislative vote allegedly approving SB 262. The State has effectively granted itself *carte blanche* immunity for any action for money damages, attorneys' fees and costs. Art. II, § 18 of the Montana Constitution required that SB 262, which contained the subject immunity provisions, pass by at least a 2/3 vote of each legislative house. That did not occur. As such, the Court must deny the Tribe's motion for summary judgment in its entirety.

DATED this 2nd day of March, 2016.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

By: 

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CERTIFICATE OF SERVICE

I, Kristin L. Omvig, one of the attorneys of ROCKY MOUNTAIN LAW PARTNERS, PLLP, do hereby certify that on the 2nd day of March, 2016, I served a true and correct copy of the foregoing document 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 telecopying a true and correct copy of said document.

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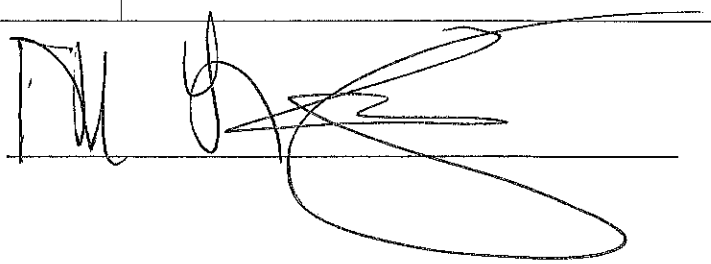

Planned Parenthood to have attorney's fees paid

GREENLAND — The New Hampshire Department of Justice will be paying the attorney fees for Planned Parenthood of Northern New England over a lawsuit filed in opposition to a parental notification law for underage teens seeking abortions.

By Karen Dandurant

Posted Sep. 4, 2008 at 1:30 PM

GREENLAND — The New Hampshire Department of Justice will be paying the attorney fees for Planned Parenthood of Northern New England over a lawsuit filed in opposition to a parental notification law for underage teens seeking abortions.

Planned Parenthood of Northern New England challenged a law requiring teenagers to notify parents before getting an abortion. They successfully proved it was unconstitutional because it didn't contain an exception in the case where a pregnant woman's life was in danger.

The law was passed in 2003 and repealed in 2007, making the lawsuit moot. In the interim, Planned Parenthood of Northern New England was able to obtain an injunction that kept the law from ever being enforced.

Attorney General Kelly Ayotte and her staff pursued the case all the way to the New Hampshire Supreme Court.

Nancy Mosher, President and CEO of Planned Parenthood of Northern New England, said their position was upheld at every level of the court system.

In an opinion released on Aug. 12, United States District Judge Joseph Di Clerico said Planned Parenthood is entitled to attorney fees and court costs. He ordered both sides to meet and make their best efforts to resolve the amount, to avoid further court proceedings.

"The reason we pursued this it that it's been very costly to take this case as far as the Supreme Court," Mosher said. "It wasn't in the budget. At this point we're grateful to be at the end of very long case and we are pleased that the unconstitutionality of this law has been upheld. Our primary concern is the health and safety of every woman and we feel that has also been upheld."