IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No.: DA 16-0516

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/Appellants/Cross-Appellees,

vs.

STATE OF MONTANA,

Defendant/Appellee/Cross-Appellant,

and

CONFEDERATED SALISH AND KOOTENAI TRIBES,

Intervenor.

On Appeal from the Twentieth Judicial District Court, Lake County
Cause No.: DV-15-73

APPELLANTS'/CROSS-APPELLEES' REPLY BRIEF

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INTRODUCTION

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2. The District Court properly held that the Immunity from Suit provision implicated Mont. Const. Art. II, § 18 and the State.

3. The District Court erred when it determined the Immunity from Suit provision, Mont. Code Ann., § 85-20-1902. 1-2-111, was severable.

4. The District Court erred when it determined the Waiver of Immunity provision (Mont. Code Ann., § 85-20-1901, Art. IV.I.8) did not grant the State a new immunity.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED A RIPE, JUSTICIABLE CONTROVERSY EXISTED, APPELLANTS HAD STANDING AND THE COURT HAD JURISDICTION.

A. A Justiciable Controversy Exists:

The Montana Uniform Declaratory Act's ("MUDA") purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." Mont. Code Ann., § 27-8-102. A justiciable controversy must exist. *Montana-Dakota Utilities Co. v. City of Billings*, 318 Mont. 407, 411, 80 P.3d 1247, 1250, (2003). In Montana, a justiciable controversy exists if:

> 1. the parties have existing and genuine, as distinguished from theoretical, rights or interests;

> 2. the controversy must be one which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and
>
> 3. there must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them. *Id.* citing *Powder River County v. State*, 312 Mont. 198, ¶ 101 60 P.3d 357, ¶ 101 (2002) (citing *Northfield Ins. Co. v. Montana Ass'n of Counties*, 301 Mont. 472, ¶ 12, 10 P.3d 813, ¶ 12 (2000)).

Montana recognizes that an action for declaratory judgment relief is ripe and a justiciable controversy may arise out of challenges to voting on constitutional amendments and governmental initiatives. *State v. Board of Com'rs of Silver Bow County*, 34 Mont. 426, 87 P. 450 (1906). *See also State v. Alderson*, 49 Mont. 387, 142 P. 210 (1914) finding justiciable controversy based upon referendum petition challenging the law on constitutional basis.

In *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981), the Court determined a justiciable controversy existed based upon a constitutional challenge to a statute:

> The acts of the legislature which directly concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless where a plaintiff proposed to test the constitutional validity of a statute directly affecting him. Gary Lee, an automobile driver on Montana highways, has a personal, direct interest for which he can claim judicial protection when one Montana statute grants him a right or privilege to drive under basic safety requirements and another statute permits that right or privilege to be delimited without action of the legislature. Were we to hold

> otherwise, we would deprive Lee of judicial relief, and let stand the conflict that now exists between two enactments of the legislature. *Id.* at 1285.

See also Marshall v. State ex rel. Cooney, 293 Mont. 274, 975 P.2d 325, 331 (1999), request for declaratory relief challenging the validity of a constitutional initiative deemed ripe and a justiciable controversy existed.

Appellees suggest standing to challenge a governmental action should be held to a higher scrutiny level.[1] State Appellee's Brf. pg. 5-16. Relying on *Arnone v. City of Bozeman*, 2016 MT 184, 384 Mont. 250, 376 P.3d 786, Appellees argue Appellants seek a mere "advisory" opinion because neither the United States Congress nor Confederated Salish and Kootenai Tribes ("Tribes") have ratified the Compact. *Id.* at 16-17. In *Arnone*, Bozeman city residents brought an action against the city requesting a legal declaration that an ordinance that prohibited discrimination by landlords, providers of public accommodations, and parties engaged in real estate transactions on the basis of sexual orientation or gender was invalid. The court dismissed the complaint, determining the petitioners were requesting an advisory opinion. On appeal, this Court considered *Arnone* in

[1] Raines v. Byrd, 521 U.S. 811 (1997) involved a challenge by individual Congressional members. Individual members did not have a sufficient personal stake or concrete injury to establish standing. Claimed loss was based on a loss of political power as opposed to loss of a private right. *Id.* at 820.

relation to *Gryczan v. State* and *Mont. Immigrant Justice Alliance v. Bullock*[2] stating:

> The critical distinction between these two cases and the present case, however, is that in *Gryczan* and *MIJA* there existed at least a putative dispute between the plaintiffs and the defendants. In *Gryczan*, the plaintiffs were three homosexual couples who acknowledged their past violations of § 45-5-505, MCA, and their intent to violate the statute in the future. *Gryczan*, 283 Mont. at 439, 942 P.2d at 115–16. …
>
> In contrast to both *Gryczan* and *MIJA*, the Respondents in this case are not promising to withhold enforcing the Ordinance as a basis to render the Petitioners' claims "hypothetical, speculative, or illusory," *see MIJA*, ¶ 26, because the Respondents in this case have no basis to enforce the Ordinance against the Petitioners, in any event. The plaintiffs in both *Gryczan* and *MIJA* either had violated, or possessed the unilateral power to violate, the laws being challenged. Likewise, in both *Gryczan* and *MIJA*, the parties being sued—the State of Montana and various public officials—had the power to prosecute those violations. ***However, the Petitioners in this case do not have the power to unilaterally violate the Ordinance, and the Respondents do not have the power to prosecute violations of the Ordinance even if they wanted to.*** The only enforcement mechanism under the Ordinance is a private suit, brought by a private individual who meets the Ordinance's definition of an "aggrieved party." Notably, such an "aggrieved party" is not a Respondent in this case, nor has a potential aggrieved party been identified, precisely because no such individual exists, and such individual may never exist. In short, the Petitioners in this case ask us not only to resolve a hypothetical dispute, they seek resolution of a hypothetical dispute with an entirely hypothetical opponent.

(Emphasis added.) *Id.* at ¶¶ 12-13.

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[2] *Montana Immigration Justice Alliance v. Bullock*, Cause No. BDV-2012-102 (June 20, 2014), Montana First Judicial District Court, Lewis and Clark County, involved a challenge to Legislative Referendum (LR) 121codified at Mont. Code Ann., § 1-1-411.

Therein lies the distinction. In *Arnone*, the State could not (even if it wanted to) enforce the ordinance. In contrast, the Compact is law in this State, is being implemented and funded by taxpayer dollars. As such, a justiciable controversy exists because:

> 1. if the vote violated the Montana Constitution, then the Compact is void *ab initio*, does not legally exist and cannot be implemented, enforced or funded by Montana taxpayers' monies;
>
> 2. judgment by a court will determine whether or not the Compact has become law or if the less than 2/3 vote violated the Constitution and the Appellants' constitutional rights, as opposed to invoking a purely political, administrative, philosophical or academic conclusion; and
>
> 3. if the Legislature was required to pass SB 262 by a 2/3 vote, then its failure to do so gives rise to a justiciable controversy as the State is currently implementing the Compact.

The District Court properly determined a justiciable controversy existed.

B. The Appellants Possess Standing:

Montana adopted the following test to establish standing:

> (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *Helena Parents v. Lewis & Clark Cty*., 277 Mont. 367, 371, 922 P.2d 1140, 1142 (1996) (citing *Sanders v. Yellowstone County* (1996), 276 Mont. 116, 119, 915 P.2d 196, 198; *Stewart v. Bd. of Cty. Com'rs of Big Horn Cty.* (1977), 175 Mont. 197, 201, 573 P.2d 184, 186).

A plaintiff is required to allege "a personal stake in the outcome of the controversy." *Id.* at 1143 citing *Bowen v. McDonald*, 276 Mont. 193, 915 P.2d 201, 206 (1996) and *Olson v. Dept. of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). The injury need not be exclusive to the complaining party. *Sanders v. Yellowstone County*, 276 Mont. 116, 915 P.2d 196, 198 (1996). Rather, a potential economic injury is sufficient to establish standing. *Missoula City-County Air Pollution Control Board v. Board of Environmental Review*, 282 Mont. 255, 937 P.2d 463, 468 (1997) citing *Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982).

A direct quantifiable money damage injury is not required to establish standing. In *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997), respondents brought a declaratory action seeking a declaration that a statute was unconstitutional. The State argued that absent concrete facts, the dispute was purely political in nature and no "injury in fact" existed because there was no evidence of a credible threat of prosecution since no one had ever been prosecuted under the statute. *Id.* at 117. The court found that respondents had standing to challenge the statute "because they feared prosecution and were harmed by the very existence of the statute." *Id.* at 116. A justiciable controversy existed and respondents had standing to challenge the statute's constitutionality:

> Respondents are precisely the individuals against whom the statute is intended to operate. This is sufficient to give Respondents standing to

> challenge the constitutionality of the statute. Moreover, to deny Respondents standing would effectively immunize the statute from constitutional review. *Id.* at 120.

Here, the Compact applies only to individuals residing within the Flathead Indian Reservation ("FIR"). Appellants' alleged injuries are clearly distinguishable from the general public's interest. Citizen organizations have been held to have sufficient standing to challenge governmental actions.[3] *MEIC v. DEQ*, 296 Mont. 207, 988 P.2d 1236 (1999). Appellants consist of, or represent, approximately 2,500 irrigators who are being threatened with SB 262. They possess standing as individuals against whom the statute is intended to operate. The threatened injury is real.

Appellees argue because neither the Tribes nor the United States Congress has ratified the Compact, it is "contingent" in nature and therefore, the Appellants' challenge is premature and they lack standing. While those parties have not approved the Compact, the Montana Legislature has approved it. State approval is a prerequisite to submitting SB 262 to the United States and Tribes for consideration. Absent a successful judicial challenge, SB 262 will not undergo further review or action by the Legislature (absent amendment). Judicial review as

[3] Defendant implies the FJBC may not be "currently constituted". Judge Christensen's decision erroneously failed to recognize the reformation. *Flathead Joint Board et al v. Sarah "Sally" Jewel et al.*, United States District Court, Missoula Division, Cause No.CV-14-88-M-DLC is on appeal to the Ninth Circuit Court of Appeals.

to the constitutionality of the Legislature's vote on SB 262 is ripe and therefore Appellants have standing to bring this action because: 1.) absent a judicial declaration of unconstitutionality with respect to the Legislature's vote, it is law in the State of Montana; 2.) the State is actively implementing SB 262; and 3.) SB 262 and its immunity provisions constitute a *threatened injury* to Appellants. Implementation of the Compact, with or without Congressional and/or Tribal approval, constitutes a concrete threat to Appellants' constitutionally protected interests and property rights and gives rise to potential economic harm.

C. The Case is Ripe:

The doctrine of ripeness "requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative. (citation omitted) The basic rationale behind the ripeness doctrine is to 'prevent the courts through avoidance of premature adjudication from entangling themselves in abstract disagreements'". *Havre Daily News, LLC v. City of Havre*, 333 Mont. 331, 338, 142 P.3d 864, 870 (2006). This Court has relied upon federal law stating:

> In considering whether a case is ripe for review, federal courts consider the "fitness of the issues for judicial review" and the extent of hardship that will be suffered by the parties if the court withholds review. *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1247 (3rd Cir. 1996). In conducting the former inquiry, "[t]he principal consideration is whether the record is factually adequate to enable the court to make the necessary legal determinations. The more the question presented is purely one of law, and

> the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.* at 1249.

The State claims this action is premature because the Compact is "contingent" upon ratification by the Tribes and the United States. This Court has upheld constitutional challenges to proposed laws as opposed to those that have already passed into law. In *Reichert v. State*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455, citizens brought a declaratory judgment action seeking a declaration that a legislative referendum's (LR-119) proposed changes to the qualification and selection process for Supreme Court justices were unconstitutional. On appeal, the Court stated:

> There is both a constitutional and a prudential component to the ripeness inquiry. *Portman*, 995 F.2d at 902; *accord Natl. Park Hospitality Assn. v. Dept. of Int.*, 538 U.S. 803, 808, 123 S.Ct. 2026, 2030, 155 L.Ed.2d 1017 (the ripeness doctrine is drawn both from constitutional limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction); (citation omitted) the ripeness doctrine is grounded in the Constitution as well as in judicial prudence). *The constitutional component focuses on whether there is sufficient injury, and thus is closely tied to standing. Portman, 995 F.2d at 902–03. "Whether framed as an issue of standing or ripeness, the [constitutional] inquiry is largely the same: whether the issues presented are definite and concrete, not hypothetical or abstract." Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (internal quotation marks omitted). The prudential component, on the other hand, involves a weighing of the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. (citation omitted). The principal consideration under the fitness inquiry is whether there is a factually adequate record upon which to base effective review. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 20, 333 Mont. 331, 142 P.3d 864 (citation omitted). The more the question presented is purely one of law, and the less that additional facts will aid the

> court in its inquiry, the more likely the issue is to be ripe, and vice-versa. (Emphasis added.) *Id.* at ¶ 56.

The Court determined LR-119 would deprive individuals of their right to vote for and held that the complaint was ripe and justiciable and the offending provisions could not be severed. *Id.*

The State admits that SB 262 is "a preliminary step to full implementation". (R @ 60, pg. 6). The Compact Implementation Technical Team ("CITT") is formed, meeting and performing duties authorized under Appendix 3.5. *Id*. The CITT possesses a plethora of powers including implementing adaptive management.[4] Appellees argue that neither the CITT nor the Water Management Board ("WMB") will have authority to affect water use until the Compact is fully implemented and a final decree is entered by the water court. State Appellees' Brief, p. 10. The Compact's appendices suggest otherwise:

> 3. Responsibilities of the Compact Implementation Technical Team.

[4] The CITT's duties include:

- allocation of water between instream and irrigation;
- engage in planning, design, and implementation of Adaptive Management[4];
- plan and implement Operational Improvements;
- plan and implement stock water mitigation measures, plan and implement on-farm efficiency measures, plan and implement farm delivery accounting measures;
- implement river diversion allowances processes;

a. **Planning, Design and Implementation of Adaptive Management Tools Prior to the Effective Date—Upon formation**, the CITT shall engage in planning, design, **and implementation of Adaptive Management prior to the effective date** as settlement funds are appropriated. The CITT shall design and implement these programs according to the schedule set forth in Appendix 3.4. (Emphasis added.) (R @ 53.) **Ex. 9**.

The CITT has power to implement Adaptive Management. Suggesting that the time to challenge the constitutionality of the vote on SB 262 is after the United States and Tribe have approved it is too little, too late. Appellants have standing and a real, ripe, justiciable controversy exists over which the District Court had jurisdiction.

II. THE DISTRICT COURT PROPERLY DETERMINED THE IMMUNITY PROVISION IMPLICATED MONT. CONST. ART. II, § 18.

The District Court held the Immunity from Suit provision, contained in the New Law of Administration, unconstitutional because it "[c]reates 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." (R @ 69) (App. 2 @ 6.) Absent a specific law or statute conferring immunity, the State does not possess immunity from suit. Rather, the Constitution requires a two-thirds vote of each legislative house to immunize the State from suit. Mont. Const. Art. II, § 18.

The Constitution provides the State with immunity only from suit in state courts. *Mont. v. Gilham*, 133 F.3d 1133, 1136 (9th Cir. 1998). The District Court

recognized the risks created by the Compact and New Law of Administration ("NLA") and specifically an aggrieved party's inability to obtain a monetary damage award against the State (*i.e.* immunity) due to the amorphous nature of the State and Tribes' creation along with their refusal to accept responsibility for its actions:

> 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 is clothed with all or more of the immunity which either entity has**. **Each government denies 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…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…An obvious problem with that is that federal courts do not appear to even have subject matter jurisdiction to entertain such cases under current law…** (R @ 69) (App. 2 @ 5.)

The inability of a Montana citizen to access the Montana court system and seek monetary damages effectively immunizes the State for all of its actions. The WMB is a new quasi-sovereign entity never seen before. It is vested with significant powers. Mont. Code Ann., § 85-20-1901, Art. IV.5.a. Its creators (State and Tribes) refuse to assume responsibility for its actions. As the District Court noted, the State and Tribes' disagreed as to whether or not the Board could be sued in state court for damages. (R @ 69) (App. 2 @ 9.)

The State has suggested that immunity already exists pursuant to Mont. Code Ann., § 2-9-305. Mont. Code Ann., § 2-9-305 does not grant immunity to the State. Rather, it is an immunization, defense and indemnification statute for State employees. While the employee, under the doctrine of *respondeat superior*, is generally protected from any damage award for actions performed within the scope of employment, the State is not. The State remains liable for the employee's actions, inactions and/or conduct. *Id.* *See also* Mont. Code Ann., § 2-9-102 (State remains liable for tort damages).

Under Montana law, governmental entities are generally liable for their employees' tortious conduct and resulting money damages, absent a "grant" of immunity. Mont. Code Ann., § 2-9-102. But that is not the legal result under SB 262. Simply put, the State waives immunity in order to permit the resolution of disputes under the Compact by the WMB, and the appeal or judicial enforcement of its decisions as provided in the Compact except such waivers of immunity do not extend to any action for money damages, costs, or attorney fees. SB 262 does not imposes liability upon the State for the WMB's actions. Rather, it immunizes the State. As a result, if the WMB or its' agents actions result in a claim for money damages, the aggrieved party is deprived of a money damages remedy.

III. THE DISTRICT COURT ERRONEOUSLY DETERMINED THE WAIVER OF IMMUNITY FROM SUIT PROVISION, § 1-2-111, WAS SEVERABLE.

The District Court properly ruled the Immunity from Suit provision, contained in the NLA, unconstitutional because it "[c]reates 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." (R @ 69) (App. 2 @ 6.) However, it erred when it determined that § 1-2-111 was severable. Without persuasive authority, Appellees conclude the provision is severable while ignoring both legislative intent and the fact that severance will not resolve the underlying issue. Legislative intent is the key to determining whether a statutory provision may be severed. *Ayotte v. Planned Parenthood of N. England*, 126 S.Ct. 961, 546 U.S. 320, 163 L.Ed.2d 812 (2006).

The Compact itself does NOT contain a severability clause. However, the NLA attempts to re-insert a severability provision. In either event, severing § 1-2-111, does not resolve the problem because severance affects the legislation's integrity and does not cure the *carte blanche* grant of immunity to the State. Rather, the legislation immunizes the State from responsibility for money damages. Specifically, the Compact creates a new administrative hierarchy with defined judicial enforcement authority, which is responsible for administering the NLA. Mont. Code Ann., § 85-20-1901. The NLA governs the unitary administration and management of water on the FIR. Mont. Code Ann., § 85-20-

1902. And, while it contains various appeal processes, it effectively eliminates a party's right to obtain money damages against the State or otherwise. The WMB possesses ***exclusive jurisdiction*** to resolve any controversy between parties over the meaning or interpretation of the Compact and to authorize, administer and enforce water rights on the FIR. Mont. Code Ann., § 85-20-1902.1-2-107.2. The WMB does not have the power to award money damages, attorneys' fees or costs. *Id.* at Art. IV.I.5.b. Aggrieved parties may appeal a WMB decision to a "Court of Competent Jurisdiction." *Id.* at Art. IV.I.6.c. If a party withholds consent, then jurisdiction automatically defaults to the federal court system (whether or not the federal court has actual jurisdiction under federal law).[5] Mont. Code Ann. § 85-20-1901(26).

The District Court recognized the inherent risks created by amorphous nature of the State and Tribes' creation:

> 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

[5] The Montana Legislature cannot *create* federal jurisdiction where it otherwise would not exist. Federal courts are courts of limited jurisdiction and their jurisdiction can only be created by Congressional acts, not by the acts of state legislatures. *See, e.g., Johnson v. Smith,* 630 F.Supp 1, 3-4 (ND Cal. 1986).

> understand why this jurisdiction would not extend to monetary lawsuits. (R @ 69) (App. 2 @ 9.)

The State and the Tribes have immunized themselves from any action for money damages, attorneys' fees and/or costs. SB 262 did not receive a two-thirds vote of each legislative house and is therefore, unconstitutional. Mont. Const. Art. II, § 18. As the legislative history makes clear, the immunity provisions in both the Compact and the NLA were integral parts of legislation. Severance does not cure the *carte blanche* grant of immunity.

IV. THE WAIVER OF IMMUNITY PROVISION GRANTS THE STATE A NEW IMMUNITY.

The Waiver of Immunity provision constituted a new grant of immunity to the State because the Compact's terms wholly eliminate a party's right to obtain money damages.

A. Mont. Code Ann., § 85-20-1901, Art. IV.I.8 is a Grant, Not Waiver, of Immunity for the State from Liability for Any Action for Money Damages.

The Compact grants the State immunity with respect to suits for any action (without limitation) for money damages, costs or attorneys' fees:

> 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.)

Mont. Code Ann., § 85-20-1901, Art. IV.I.8.

The District Court erred in its analysis because: 1.) the Montana Legislature's intent, as evidenced by the statute's plain language and the legislative history, was to grant the State immunity with respect to suits for any action (state, federal, tribal, or otherwise) for money damages, costs and/or attorneys' fees; and 2.) the Compact's Waiver of Immunity statute, when read in conjunction with the Compact's remaining provisions, operates to fully immunize the State from liability for monetary damages, costs and/or attorneys' fees.

The statute's plain language provides that the State waived its defenses, including (*but not limited to*) any defense it may have under the Eleventh Amendment to the U.S. Constitution, ***except*** such waivers did not extend to any action for money damages, costs, or attorneys' fees. The legislative history and SB 262's plain language demonstrates the Legislature's intent was to grant the State *carte blanche* immunity with respect to any action for money damages, costs and/or attorneys' fees. See: Representative Essman's testimony that action constituted a new grant of immunity. (R @ 53) (App. 4 @ 352.)

The Legislature's clear, informed and express intent was to grant the State complete immunity for "any actions for money damages". *Id.* The District Court acknowledged "[a]t present, neither the state nor its political subdivisions are immune from suit in state court for monetary damages for injury to person or property". (R @ 69) (App. 2 @ 6.) Then, it used its remedial powers to circumvent the Legislature's intent. (*Id.*) The Legislature refused to pass the bill without an express reference to the State's immunity. Then, it refused to amend the bill to delete three words "or the State" which would have arguably eliminated the problem. The plain, express language of SB 262 is clear. The District Court's Order should be so reversed.

B. The Compact's Waiver of Immunity Provision, in Conjunction with the "Court of Competent Jurisdiction" Immunizes the State from Liability for Money Damages.

The Compact defines a "Court of Competent Jurisdiction" as:

> A State or Tribal court that otherwise has jurisdiction over the matter **so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction**, but if no such court exists, a Federal court." (Emphasis added.) Mont. Code Ann., § 85-20-1901(26).

The Compact, in conjunction with a "Court of Competent Jurisdiction", fully immunizes the State from liability for monetary damages, costs and/or attorneys' fees. Mont. Code Ann., § 85-20-1901, Art. IV.I.8. The only way an aggrieved party may recover money damages against the State is if all parties to the suit agree

to be sued in a state court. The State is not required to consent to a state court's jurisdiction. Rather, consenting to what otherwise would be valid jurisdiction, is subject to the State's whim. Simply put, an aggrieved party may never gain access to a court which would otherwise have jurisdiction to award monetary damages because the other parties simply refuse to consent to the court's jurisdiction.

Appellee argues that the Compact "does not authorize the taking of any water right that is vested under State, Tribal or Federal law. (State Appellee's Brf. pg. 33.) While that may be the case, importantly, the Compact also eliminates money damage awards against the State. Clearly, this statutory scheme results in a complete preclusion (immunity) of a monetary remedy against the State. The only way for an aggrieved party to obtain money damages against the State is if all parties consent to the jurisdiction of a state district court or if the State voluntarily waives its rights under the Eleventh Amendment and agrees to a monetary remedy. The likelihood of either of those events is remote.

CONCLUSION

Appellants had standing and the court had jurisdiction over a ripe, justiciable controversy. The Immunity from Suit provision violated the Montana Constitution. However, that provision is not severable. The District Court's Order should be so reversed.

DATED this 8th day of June, 2017.

ROCKY MOUNTAIN LAW PARTNERS, P.C.

By: /s/ Kristin L. Omvig
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of one inch; and the word count calculated by Microsoft Word is 4974 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 8th day of June, 2017.

ROCKY MOUNTAIN LAW PARTNERS, P.C.

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CERTIFICATE OF SERVICE

I, Kristin L. Omvig, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-08-2017:

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