

TIMOTHY C. FOX  
Attorney General  
ALAN JOSCELYN  
Deputy Attorney General  
DALE SCHOWENGERDT  
Solicitor General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Telephone: (406) 444-2026  
Facsimile: (406) 444-3549

COUNSEL FOR DEFENDANTS

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

<p>FLATHEAD JOINT BOARD OF CONTROL, ET AL.,</p> <p>Plaintiffs</p> <p>vs.</p> <p>MEMBERS OF THE 64TH LEGISLATURE, ET AL.,</p> <p>Defendants.</p>	<p>Cause No. DV-15-73</p> <p><b>DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR AN <i>EX PARTE</i> TEMPORARY RESTRAINING ORDER</b></p>
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To receive the extraordinary relief of an *ex parte* Temporary Restraining Order (TRO) under MCA § 27-19-315, Plaintiffs have the burden to show that:

- 1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or the party's attorney could be heard in opposition; and
- 2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the applicant's claim that notice should not be required.

Plaintiffs' claims of immediate and irreparable injury under the first prong are patently frivolous. Moreover, Plaintiffs do not even make an attempt to meet the second prong by stating why it was not possible to give the State prior notice of the TRO. The Court must therefore deny their application for an *ex parte* TRO.<sup>1</sup>

**I. PLAINTIFFS' CLAIM TO IMMEDIATE AND IRREPARABLE HARM IS BASED ON HIGHLY SPECULATIVE "INJURY" FROM A LAW THAT WILL LIKELY NOT BE IMPLEMENTED FOR YEARS.**

Plaintiffs' claim is essentially that someday there *may* be a law suit against CSKT Water Compact in which some plaintiff *may* try to get damages against the State, and the State *may* in turn claim immunity from damages based on the Compact's language, which Plaintiffs claim would violate Article II, Section 18 of the Montana Constitution absent the Compact passing the Legislature by a two-thirds vote. *See, e.g.*, Brief in Support of Application for Order to Show Cause, at 8. Based on that speculation and Plaintiffs' implausible reading of the Compact's language, they have sued the Governor, the Attorney General, and the entire Legislature, claiming—in a verified complaint—that if the Court does not grant them a TRO enjoining the Governor from signing SB 262, they will suffer irreparable and immediate injury.<sup>2</sup> Plaintiffs' request for relief is breathtaking

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<sup>1</sup> Defendants object that venue is not appropriate in this Court, and will file an appropriate motion shortly.

<sup>2</sup> As an initial matter, the State notes that Plaintiffs have sued several individuals, such as the Attorney General and individual legislators that have absolutely no role in the implementation of SB 262 and are improper Defendants. But Defendants will address that issue in more depth in subsequent briefing.

and unprecedented; their claim of irreparable and immediate injury fails for at least four reasons.

First, Plaintiffs' claims are far from 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. 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*, 2006 MT 215, ¶ 19, 333 Mont. 331, 142 P.3d 864 (citations and quotations omitted). As the Supreme Court has repeatedly explained, judicial review "is not justified where the only allegation of harm is speculation that further agency action may take place, and if it takes place, it may have legal consequences." *Id.*, ¶ 32. As Plaintiffs are well aware, Congress and the Tribe must ratify the CSKT Water Compact before it is effective. Compact, at 57; Article VII.A.1. That will likely take years. Plaintiffs' claim that the Compact will be implemented immediately and that they will suffer immediate irreparable harm as a result is simply wrong, and they surely know it. The reality is that the Compact is far from implementation, and any harm that Plaintiffs think that property owners may suffer is purely speculative.

Second, the Plaintiffs' only claims to injury involve potential money damages, which is not a proper basis for injunctive relief. "Money damages are not considered 'irreparable harm' because money damages may be recovered in an action at law without resort to equity." *Dicken v. Shaw*, 255 Mont. 231, 236-37, 841 P.2d 1126, 1129 (1992).

The hypothetical injuries listed by Plaintiffs (which they actually label as hypotheticals, see Brief in Support of Application to Show Cause, at 8:13-21) are that in subsequent litigation land owners may be denied money damages if the State claims immunity based on the Compact language that Plaintiffs' cite. But if in the very unlikely event that events pan out as Plaintiffs' predict, and the State actually claims immunity based on the Compact (an even more unlikely event), a plaintiff would be able to argue at that juncture that the court must grant it money damages based on Montana Constitution Article II, Section 18. So even crediting Plaintiffs' worst-case scenario, at the end of the day potential money damages is all that this case is about, and that is not a proper basis for injunctive relief.

Third, Plaintiffs lack standing. The Joint Board of Control is not a property owner that would suffer harm, even under Plaintiffs' far-fetched hypotheticals. *Olson v. Dep't of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162 (1986) ("At a minimum, the constitutional aspect of standing requires a plaintiff to show that he has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation."). Because Plaintiffs have no concrete injury, or even potential injury, they are not proper parties and have no basis for relief, injunctive or otherwise. *Id.*

Fourth, Plaintiffs have presented a purely political, non-justiciable question that, if seriously entertained by this Court, would wreak havoc in the legislative process.

*Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, P.8, 355 Mont. 142, 226 P.3d 567 (recognizing that courts do entertain political questions or render advisory opinions). It takes little imagination to predict the mischief that plaintiffs' attorneys could

create by inventing last minute claims that a bill is unconstitutional, and then suing for a TRO on that basis before the bill is even implemented or applied against actual plaintiffs. That is precisely what the political question doctrine prevents, and it is precisely what Plaintiffs have done here. Plaintiffs cite no authority supporting their novel argument that they can simply enjoin the Governor from signing a law simply because some opponents of the law believe it to be unconstitutional. As courts have repeatedly held, the manner in which the Legislature passes a law is a non-justiciable political question, and this is certainly no exception.

In short, if Congress and the Tribe ratify the Compact, any putative plaintiff will get his or her day in court. There will be opportunity to challenge the Compact's constitutionality if particular plaintiffs believe that it is being applied against them unconstitutionally or if they claim that a certain provision was not legitimately passed. And if at that time the State claims immunity based on Plaintiffs' theory, that particular plaintiff can challenge that aspect of the Compact as violating Article II, Section 18 and as therefore unenforceable.<sup>3</sup> But as it stands now, Plaintiffs' theories are at best speculative. Plaintiffs clearly will not suffer immediate and irreparable harm. Consequently there is no basis for granting an extraordinarily unprecedented TRO.

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<sup>3</sup> As the State will soon describe in subsequent briefing, Plaintiffs' claims that the Compact actually gives the state immunity are fanciful, at best. But it is not necessary to resolve that issue on the incredibly short timeframe that Plaintiffs have demanded before denying the Plaintiffs' *ex parte* motion for TRO because they clearly do not meet the requirements of MCA § 27-19-315.

**II. PLAINTIFFS MADE NO ATTEMPT TO GIVE THE STATE NOTICE OF THIS MOTION, EVEN THOUGH IT WOULD HAVE BEEN EASY FOR THEM TO DO SO.**

Plaintiffs were evidently in such a rush that they were unable to give the State simple notice of their motion, even though they had counsel's email address and direct telephone line. (See Complaint, Exhibit 2). That failure, and the lack of any reasonable explanation as to why notice was not possible, is enough to deny Plaintiffs' *ex parte* TRO application. MCA § 27-19-315(2).

Plaintiffs filed their lawsuit and application for an *ex parte* TRO on Monday morning, April 20. They then served the complaint and TRO application at the end of the day on Tuesday, April 21, just as counsel for the State was preparing to leave the office. When counsel for the State attempted to call counsel for Plaintiffs, the receptionist for Plaintiffs' counsel stated that she could not reach either of Plaintiffs' counsel on their cell phones after repeated attempts, but that she left messages. Counsel for the State also sent Plaintiffs' counsel an email asking what their intentions were in regard to timing of the TRO motion. As of the filing of this response, that email and the repeated phone messages have gone unanswered.

A TRO under MCA § 27-19-315 is for serious emergencies, not gamesmanship. Plaintiffs' have offered absolutely no explanation as to why they could not give the State notice of its motion.

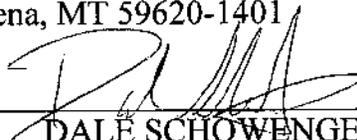
**CONCLUSION**

For the foregoing reasons, this Court should deny Plaintiffs' application for an *ex parte* TRO.

Respectfully submitted, April 22, 2015.

TIMOTHY C. FOX  
Montana Attorney General  
ALAN JOSCELYN  
Deputy Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: \_\_\_\_\_



DALE SCHOWENGERDT  
Solicitor General  
Counsel for Defendants

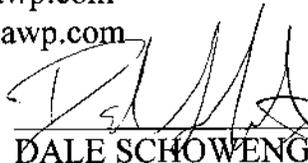
**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Defendants' Opposition to Plaintiffs' Application For An *Ex Parte* Temporary Restraining Order to be mailed and emailed to:

Bruce A. Fredrickson  
Kristin L. Omvig  
ROCKY MOUNTAIN LAW PARTNERS, LLP  
1830 3rd Avenue East, Suite 301  
Kalispell, MT 59903-1758  
bruce@rmtlawp.com  
kristin@rmtlawp.com

Date: \_\_\_\_\_

4/22/15



DALE SCHOWENGERDT