

CLERK OF THE
DISTRICT COURT
LYN FRICKER

2015 APR 24 PM 12:49

FILED BY _____
CLERK/DEPUTY

1 Bruce A. Fredrickson
Kristin L. Omgig
2 ROCKY MOUNTAIN LAW PARTNERS, PLLP
1830 3rd Avenue East, Suite 301
3 P. O. Box 1758
Kalispell, MT 59903-1758
4 Telephone: (406) 314-6011
Facsimile: (406) 314-6012
5 E-mail: bruce@rmtlawp.com
kristin@rmtlawp.com
6 *Attorneys for Plaintiffs*

7 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

8 FLATHEAD JOINT BOARD OF
CONTROL and JERRY LASKODY,
9 BOONE COLE, TIM ORR, TED HEINS,
BRUCE WHITE, SHANE ORIEN, WAYNE
10 BLEVINS AND GENE POSIVIO, all
members of the Flathead Joint Board of
11 Control,

12 Plaintiffs,

13 vs.

14 MEMBERS OF THE MONTANA 64TH
LEGISLATURE, a legislative body
15 comprised of Members of the Senate and
House of Representatives; AUSTIN
16 KNUDSEN, Speaker of the House; DEBBY
BARRETT, President of the Senate; STATE
17 OF MONTANA; STEPHEN C. BULLOCK,
Governor, State of Montana; TIMOTHY
18 FOX, Montana Attorney General;
REPRESENTATIVE DANIEL SALOMON,
19 representing Montana House District 93;
REPRESENTATIVE GREG HERTZ,
20 representing Montana House District 12;
REPRESENTATIVE GEORGE KIPP, III,
21 representing Montana House District 15;
SENATOR CLIFF LARSON, representing
22 Montana Senate District 57; SENATOR LEA
WHITFORD, representing Montana Senate
23 District 8; and JOHN DOES 1 - 10.

24 Defendants.

Cause No. DV-15-73

Judge: James A. Manley

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' APPLICATION FOR AN
EX PARTE TEMPORARY
RESTRAINING ORDER**

1 COME NOW Plaintiffs with their Reply to Defendants' Opposition Brief and state as
2 follows:

3 **ARGUMENT**

4 The Solicitor General begins his briefing by taking the apparent position that a
5 constitutional violation somehow does not constitute immediate and irreparable harm. That
6 position is absurd and patently wrong. Both the United States Supreme Court and the United
7 States Court of Appeals for the Ninth Circuit have held that the deprivation of constitutional
8 rights *unquestionably constitutes irreparable injury* for purposes of establishing a
9 preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) and *Melendres v. Arpaio*,
10 695 F.3d 990, 1002 (2012). Further, the Solicitor General's complaint that he did not receive
11 prior notice is also ill conceived. Although Plaintiffs' Verified Complaint and Verified
12 Application requested *ex parte* relief, all documents were personally served on all defendants
13 the day following their filing. The Solicitor General received actual and proper notice as is
14 apparent from his ability to respond to the filed pleadings.

15 **1. THERE IS NOTHING SPECULATIVE ABOUT PLAINTIFFS' ASSERTION OF**
16 **IMMEDIATE AND IRREPARABLE HARM.**

17 It is not the Plaintiffs who are asserting a "breathtaking and unprecedented" position
18 in this action, but rather it is the Solicitor General's response that is "breathtaking and
19 unprecedented." Neither is Plaintiffs' position "speculative" or "implausible." Plaintiffs'
20 complaint is based on a very clear reading of the CSKT Compact and on a very clear reading
21 of the Montana Constitution. The CSKT Compact does what it does – it creates rather than
22 waives the State's sovereign immunity. The waiver clause states:

23 Waiver of Immunity. The Tribes and the State hereby waive
24 their respective immunities from suit, including any defense
the State shall have under the Eleventh Amendment of the

1 Constitution of the United States, in order to permit the
2 resolution of disputes under the Compact by the Board, and the
3 appeal or judicial enforcement of Board decisions as provided
4 herein, **except that such waivers of sovereign immunity by**
5 **the Tribes or the State shall not extend to any action for**
6 **money damages, costs, or attorneys' fees.** The parties
7 recognize that only Congress can waive the immunity of the
8 United States and that the participation of the United States in
9 the proceedings of the Board shall be governed by Federal law,
10 including 43 U.S.C. § 666. (Emphasis added.)

11 *See Complaint Exhibit 1*, pg. 46, ll. 20-24. On page 76, SB 262 grants immunity to those
12 authorizing, administering, allocating and enforcing water rights (whether derived from state,
13 federal or tribal law) on the FIR, which includes governmental entities and politically
14 appointed boards:

15 1-2-111. Immunity from Suit. Members of the Board, the
16 Engineer, any Designee, any Water Commissioner appointed
17 pursuant to Section 3-1-114 of this Ordinance, and any Staff
18 shall be immune from suit for damages arising from the lawful
19 discharge of an official duty associated with the carrying out of
20 powers and duties set forth in the Compact or this Ordinance
21 relating to the authorization, administration, or enforcement of
22 water rights on the Reservation.

23 **Complaint Exhibit 1** pg. 76, ll. 25-29; *see also*, Complaint @ ¶¶ 15-20. The Plaintiffs'
24 position is not about what *may* happen; it is about what *did* happen. The CSKT Compact
unquestionably creates immunities much broader than any that might otherwise exist under
Montana law, and the Montana Constitution unquestionably requires a two-thirds vote of
each legislative house to create those immunities.

What *may* happen if the CSKT Compact is ultimately implemented is that Plaintiffs
may very well lose their day in court. As drafted, a party will NOT have his or her day in
court with respect to interpretive issues (as the Solicitor General argues in his brief) unless all
parties agree to an undefined court of competent jurisdiction or otherwise proceed to federal
court (assuming that a federal court would accept jurisdiction):

1 26. “Court of Competent Jurisdiction” means a State or Tribal
2 court that otherwise has jurisdiction over the matter so long as
3 the parties to the dispute to be submitted to that court consent
4 to its exercise of jurisdiction, but if no such court exists, a
5 Federal court.

6 **Complaint, Exhibit 1, p. 5.** If the matter in dispute involves a state right then the Eleventh
7 Amendment to the United States Constitution may protect the state in a federal forum from
8 money damages in tort, not in a state court. The Solicitor General’s argument rests on the
9 “horns of a dilemma” one might say....

10 **2. PLAINTIFFS’ ACTION IS RIPE AND PLAINTIFFS WILL SUFFER**
11 **IRREPARABLE HARM IF THE CSKT COMPACT IS IMPLEMENTED.**

12 The Solicitor General also argues that Plaintiffs’ claims are not “ripe” for
13 adjudication and that there is no present controversy. That position is also “breathtaking and
14 unprecedented.” Unconstitutional legislation has passed both bodies of the legislature and is
15 proceeding rapidly toward implementation, including the probable signing by Governor
16 Stephen C. Bullock. Those facts create an actual and present controversy, and the courts
17 have agreed that it is appropriate to halt efforts to implement legislation when a constitutional
18 claim has been raised. *See Burns v. Cline*, 339 P.3d 887, 2014 OK 90 (2014)(*per curium*)
19 (affirming preliminary injunction precluding implementation of legislation pending ultimate
20 decision on constitutionality); *Oklahoma Coalition for Reproductive Justice v. Cline*, 339
21 P.3d 887, 2014 OK 91 (Okla. 2014)(*per curium*)(same); *see also, American Academy of*
22 *Pediatrics v. Van de Camp*, 214 Cal.App.3d 831, 848-59, 263 Cal.Rptr. 46, 55 (1989). The
23 entire text of the *Burns* and *Oklahoma Coalition* decisions is as follows:

24 ¶ 1 This opinion addresses only the trial court’s denial of a temporary
 injunction to enjoin the enforcement of Senate Bill 1848, 2014 Okla. Sess.
 Laws ch. 370 (effective November 1, 2014) (Act). Appellant’s constitutional
 challenge to the enactment remains pending in the trial court. Upon
 consideration of “Appellant’s Emergency Motion for a Temporary Injunction

1 or, in the Alternative, an Emergency Stay of the District Court’s Order to
2 Preserve the *Status Quo*”, and pursuant to the authority provided by Article 7,
3 section 4, of the Oklahoma Constitution [jurisdictional provision], **this Court**
4 **temporarily enjoins enforcement of the Act until the constitutionality of the**
5 **Act is fully and finally litigated.**

6 ¶ 2 This matter is remanded to the trial court for determination of the
7 constitutional challenge to the Act to be memorialized by findings of fact and
8 conclusions of law. This Court expresses no opinion concerning the validity
9 of the Act. [bracketed material added] [emphasis added].

10 *Burns*, Id.

11 Further, there are several provisions of the CSKT Compact that are designated for
12 implementation upon, or shortly following, passage by the legislature – and not upon
13 ratification by Congress or the tribe. Although the end “‘Effective Date’ means the date on
14 which the Compact is finally approved by the Tribes, by the State, and by the United States,
15 and on which the Law of Administration has been enacted and taken effect as the law of the
16 State and the Tribes, whichever date is latest” (**Definitions**, p. 5, No. 28), other provisions
17 are not limited by the defined “Effective Date,” and will thus be implemented much sooner:

18 • **By its very title, SB 262 bears an immediate effective date.**

19 • **Article III Water Rights of the Tribes:**

20 Page 19-20

21 5. Co-ownership of Water Right Number 76M 94404-00 (Milltown Dam) in
22 Basin 76G (Upper Clark Fork).

23 ***Upon the date the ratification of this Compact by the Montana Legislature***
24 ***becomes effective under State law***, Water Right Arising Under State Law
number 76M 94404-00 is changed as follows: the right is split into two
separate active and enforceable Water Rights Arising Under State Law, 76M
94404-01 and 76M 94404-02, and the original water right elements are
changed to support the maintenance and enhancement of fish habitat and take
the form of two enforceable hydrographs. The elements of the changed and
split water right are set forth in the two water rights abstracts attached hereto
as Appendix 30. The measurement point for 76M 94404-01 is the USGS gage
#12334550 at Turah, Montana, and the measurement point for 76M 94404-02
is the USGS gage #1234000 at Bonner, Montana.

- 1 • **Article IV Implementation of Compact:**
Page 39

2
3 G. Compact Implementation Technical Team. *Within six months of the date*
4 *the ratification of the Compact by the Montana Legislature takes effect*
5 *under State law*, the Parties shall establish a Compact Implementation
6 Technical Team (CITT) to allow planning for and implementation of
7 Operational Improvements, Rehabilitation and Betterment, and Adaptive
8 Management prior to and following the Effective Date.

- 9 • **Article III D of the Compact:**
Page 19

10 *Upon the date the ratification of this Compact by the Montana Legislature*
11 *becomes effective under State law*, Water Right Arising Under State Law
12 number 76M 94404-00 is changed as follows: the right is split into two
13 separate active and enforceable Water Rights Arising Under State Law, 76M
14 94404-01 and 76M 94404-02, and the original water right elements are
15 changed to support the maintenance and enhancement of fish habitat and take
16 the form of two enforceable hydrographs. The elements of the changed and
17 split water right are set forth in the two water rights abstracts attached hereto
18 as Appendix 30. The measurement point for 76M 94404-01 is the USGS gage
19 #12334550 at Turah, Montana, and the measurement point for 76M 94404-02
20 is the USGS gage #1234000 at Bonner, Montana.

- 21 • **Article IV Implementation of the Compact:**
Page 38

22 G. Compact Implementation Technical Team.

23 *Within six months of the date the ratification of the Compact by the*
24 *Montana Legislature takes effect under State law*, the Parties shall establish
a Compact Implementation Technical Team (CITT) to allow planning for and
implementation of Operational Improvements, Rehabilitation and Betterment,
and Adaptive Management prior to and following the Effective Date.

- **Appendix 3.5 Adaptive Management / Compact Implementation
Technical Team**
Page 2

Compact Implementation Technical Team

The CITT shall form *within six months of the date of ratification of the
Compact by the Montana legislature takes effect under State law*. Each
Party and the Project operator shall assign a technical team member to the
CITT; these representatives must meet the qualifications in 2.b of this
Appendix. FIIP irrigators may assign and irrigator representative to the CITT

1 provided that the representative meets the irrigator qualification in 2.c of this
Appendix or the conditions of 2.c iii of this Appendix apply.

2 Contrary to the Solicitor General's assertion, the CSKT Compact is neither "far from
3 implementation," nor are Plaintiffs' asserted damage claims "purely speculative."

4 As a result of the immunities contained within the CSKT Compact, Plaintiffs would
5 likely be precluded from seeking recompense from the State under any of the following
6 hypotheticals:

- 7 1. The UMB, a board of political appointees, (including state appointments made by
8 the governor) authorizes changes in allocation, change in use or betterment and
9 rehabilitation wherein land, crops and the like are damaged by construction,
10 driving across fee lands or alterations to the project. In that case, and in absence
of the immunities created by the CSKT Compact, a cause of action may lie
against the state for money damages.
- 11 2. Instream flows are changed causing flooding on irrigated lands thereby damaging
12 private property (i.e. crops, land, hay). In that case, and in absence of the
immunities created by the CSKT Compact, an action may lie against the state for
money damages.
- 13 3. Private fee land and property is taken for public use. This is inverse
14 condemnation. Yet, under the above referenced immunity clause, the state would
15 not be liable for such an action. Clearly, and in absence of the immunities created
by the CSKT Compact, a cause of action may lie against the state for money
damages in that instance.

16 The foregoing hypotheticals illustrate the immunities unconstitutionally created by the CSKT
17 Compact, and the potential impact of those immunities on the irrigators, including Plaintiffs,
18 who will be most impacted by its implementation. There are also significant non-monetary
19 damages at stake in the event the CSKT Compact is implemented. For example, SB 262
20 creates a new governing law of the land coined the "Unitary Management Ordinance"
21 ("UMO"). The UMO is a new law of administration which will be enforced by a newly
22 created Unitary Management Board ("UMB") comprised of political appointees. It further
23 abolishes the dual sovereign water administration system by eliminating applicability of
24

1 Montana's Water Use Act and by stripping the Montana Water Court's application and
2 jurisdiction. The immunity granted to the UMB and other administrative positions is even
3 broader and extends beyond money damages. Rather, actions by the UMB, for example, are
4 immune from suit despite the form of requested relief. **Complaint, Exhibit 1**, p. 76.

5 Regardless of the potential and very significant monetary and non-monetary damages
6 at stake in the event the CSKT Compact is ultimately implemented; and regardless of the
7 irreparable nature of those damages, neither are necessary for Plaintiffs to establish the
8 existence of irreparable harm for purposes of their requested injunctive relief. **The**
9 **deprivation of the constitutional rights alleged unquestionably constitutes irreparable**
10 **injury for purposes of establishing a preliminary injunction.** See *Elrod v. Burns*, 427
11 U.S. 347, 373 (1976) and *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). That
12 deprivation, coupled with what on its face is a clear violation of Art. 2, Sec. 18 of the
13 Montana Constitution more than justifies the injunctive relief requested by Plaintiffs.

14 **3. PLAINTIFFS CLEARLY HAVE STANDING TO PURSUE THIS ACTION.**

15 The Solicitor General's argument relating to Plaintiffs' standing is also wholly
16 without merit. Each of the individual Plaintiffs are all standing members of the FJBC; all
17 reside in either Lake or Sanders County, Montana; and all are property owners and irrigators
18 directly impacted by the CSKT Compact. The FJBC is the operating agent of the Districts
19 and possesses the powers and duties of the Districts, including but not limited to, the
20 authority to institute any action or proceeding proper to carry out the provisions of Chapter 7,
21 Title 85, MCA, and to enforce and maintain, protect, or preserve any and all rights,
22 privileges, and immunities created by that Chapter. §85-7-1612, MCA, including the rights
23
24

1 of the individual irrigator members of the Districts. FJBC also owns property in Lake
2 County.

3 **4. ANY “GAMESMANSHIP” PRESENT IN THIS ACTION FALLS SQUARELY ON**
4 **THE BACK OF THE SOLICITOR GENERAL.**

5 A constitutional challenge to the CSKT Compact by virtue of the Legislature’s
6 decision to simply ignore Art. 2, Sec. 18 of the Montana Constitution can hardly be deemed
7 “patently frivolous,” “speculative,” “breathtaking,” “unprecedented,” or any other derogatory
8 adjective the Solicitor General wants to use. Those adjectives are unbecoming of the Office
9 of Solicitor General and are merely a pot stirring means to avoid the serious and substantive
10 nature of this action. That is particularly true in light of the House of Representative’s
11 reliance on an opinion authored by the Solicitor General that is simply wrong on its face and
12 which purports to justify the House decision to disregard the Montana Constitution in part by
13 claiming that Art. 2, Sec. 18 has “*been drained of any significant meaning.*” That position is
14 troubling at best when juxtaposed against the duties required of that office, both by the same
15 Constitutional provision that the Solicitor General has deemed “*drained of any significant*
16 *meaning*” and by State Legislation. The Office of the Attorney General and Solicitor
17 General are sworn to uphold, not denigrate, the Montana Constitution:

18 [Mont. Const., Art. III,] Section 3. Oath of office. Members of the
19 legislature and all executive, ministerial and judicial officers, shall take and
20 subscribe the following oath or affirmation, before they enter upon the duties
21 of their offices: “I do solemnly swear (or affirm) that ***I will support, protect***
and defend the constitution of the United States, and ***the constitution of the***
state of Montana, and that I will discharge the duties of my office with
fidelity (so help me God).” No other oath, declaration, or test shall be required
as a qualification for any office or public trust. [Emphasis Added]

22 [MCA §] 2-16-211. Oaths—form—before whom—when.
23 (1) Members of the legislature ***and all officers, executive, ministerial, or***
judicial, must, before they enter upon the duties of their respective offices,
24 take and subscribe the following oath or affirmation: “I do solemnly swear (or

1 affirm) that *I will support, protect, and defend* the constitution of the United
2 States and *the constitution of the state of Montana, and that I will discharge*
3 *the duties of my office with fidelity* (so help me God).” [Emphasis Added]

4 The Solicitor General’s assertion that a challenge to the enactment of the CSKT
5 Compact in direct violation of Art. 2, Sec. 18 should somehow be characterized by an
6 unseemly adjective would also indicate that it is the Solicitor General’s opinion that the
7 rulings by the Speaker of the Montana House of Representatives and the House Rules
8 Committee determining that passage of the CSKT Compact required a two-thirds vote were
9 also “patently frivolous.” That position is patently absurd.

9 CONCLUSION

10 There is one point raised by the Solicitor General upon which Plaintiffs can agree.
11 Although it’s more than a bit unfortunate that a majority of the House of Representatives
12 chose to follow an ill-advised Solicitor General opinion, Plaintiffs agree that they can’t
13 prevent the *passage* of unconstitutional legislation. They can, however, prevent its
14 *implementation* pending the Court’s ultimate determination of its unconstitutional nature.

15 The issue before the Court at this juncture is narrow and limited and focuses solely on
16 the clear and unambiguous voting requirements mandated by the Montana Constitution as
17 well as the clear and unambiguous language of the CSKT Compact creating new sovereign
18 immunity. Recognition by the Court that SB 262 was unconstitutionally enacted pursuant to
19 Art. 2, Sec. 18, avoids all of the probable and additional constitutional challenges that will
20 inevitably occur in the event the CSKT Compact is ultimately implemented, including
21 challenges based on the equal protection and due process clauses of both the Montana
22 Constitution and the United States Constitution.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24

The Court should issue the Plaintiffs' requested Temporary Restraining Order and should order the State Defendants to appear and show cause, if any there may be, why an injunction *pendent lite* should not issue enjoining the State Defendants, and all of their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of said injunction *pendente lite* by personal service or otherwise, from attempting to execute, transmit and/or implement SB 262 pending final determination of its unconstitutional passage.

DATED this 24th day of April, 2015.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

By: 

Bruce A. Fredrickson
Kristin L. Omvig
Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I, Bruce A. Fredrickson, one of the attorneys of ROCKY MOUNTAIN LAW PARTNERS, PLLP, do hereby certify that on the 24th day of April, 2015, 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.

TIMOTHY C. FOX Attorney General	<input checked="" type="checkbox"/>	U.S. Mail (first class postage)
ALAN JOSCELYN Deputy Attorney General	<input type="checkbox"/>	Federal Express
DALE SCHOWENGERDT Solicitor General	<input type="checkbox"/>	Hand-Delivery
215 North Sanders P.O. Box 201401 Helena, MT 59620-1401	<input type="checkbox"/>	Telefacsimile
	<input checked="" type="checkbox"/>	Other: Via E-Mail

