TIMOTHY C. FOX
Attorney General
ALAN JOSCELYN
Chief Deputy Attorney General
DALE SCHOWENGERDT
Solicitor General
J. STUART SEGREST
MATTHEW COCHENOUR
Assistant Attorneys 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

FLATHEAD JOINT BOARD OF CONTROL, ET AL., Plaintiffs v. STATE OF MONTANA, Defendants.	Cause No. DV-15-73 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' case is premature. They filed this action challenging certain provisions of the CSKT Water Compact even though the Compact has yet to win Congressional ratification, has yet to be implemented in any real way, and has yet to result in any non-hypothetical harm to actual Plaintiffs. The Court should dismiss this case under basic and binding rules of justiciability because Plaintiffs' claims are far from ripe.

But even if their claims were ripe, Plaintiffs cannot state a claim for relief because their argument that the Compact needed a two thirds vote under Article II, Section 18 ignores that the Compact did not grant the State any new immunity. And even if their reading were one possible interpretation, this Court has an obligation to interpret the Compact language in a way that renders it constitutional.

This Court should dismiss Plaintiffs' case, which they would be free to refile if and when they suffer actual, concrete harm.

FACTUAL BACKGROUND

Senate Bill 262 ("SB 262" or "Compact") is a negotiated settlement of competing water use claims between the State, the federal government, and the Confederated Salish and Kootenai Tribe. It has been years in the making.

But a few days before the House was set to vote on the Compact, and after the Senate already passed it, opponents developed a new theory to try to scuttle it. They claimed that two short clauses of the 140 page Bill granted the State and its officers a unique type of immunity, which in turn required the Legislature to pass the entire Compact by a two-thirds majority vote by each House under Article II, Section 18 of the Montana Constitution. The Compact passed 31-19 in the Senate, and ultimately passed Third Reading in the House by a vote of 53-47.

The two provisions of the Compact about which opponents complained are commonplace. The first reads:

> Waiver of Immunity. The Tribes and the State hereby **waive their respective immunities from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States**, in order to permit resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions as provided herein, **except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action for money damages, costs, or attorneys' fees**. The Parties recognize that only Congress can waive the immunity of the United States and that the participation of the United States in the proceedings of the Board shall be governed by Federal law, including 43 U.S.C. 666.

Compl. Ex. 1 at 46, ll. 21-27 (emphasis added by Plaintiffs).

Focusing on the bolded language, Plaintiffs argue that this provision is deceptive. They claim that rather than being a limited waiver of immunity, as the language suggests, it is actually an underhanded attempt to grant the State

immunity, although they do not identify what immunity the Compact gives that the State did not already have. Verified Complaint, ¶ 14.

Plaintiffs' argument against the second provision is a little more straightforward, since that provision actually deals directly with immunity:

> 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.

Compl. Ex. 1 at 76, ll. 25-29.

But Plaintiffs overlook that the Legislature has already granted immunity to public officers and employees acting within the scope of their employment. Mont. Code Ann. § 2-9-305 ("It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment"); *see* Mont. Code Ann. § 2-9-111 (granting immunity for legislative acts and omissions). Plaintiffs make no attempt to describe how this grant of immunity extends what the State already has granted to public officials and employees. But they do construct three hypotheticals in which they claim that the provisions could potentially shield public officials and the State from money damages. Brief in Support of Application for Order to Show Cause at 8. They

make no claim that any property owner has been damaged or is in imminent danger of being damaged by the Compact.

Based on these arguments, the Joint Board claims that these two provisions render the entire 140 page Compact void on its face. They ask this Court to declare it so and enjoin any state implementation of it.

STANDARD FOR MOTION TO DISMISS

Justiciability, including ripeness, is a threshold question in establishing whether a Court has jurisdiction to hear a case. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶18, 333 Mont. 331, 338 (2006). If a case is not ripe, dismissal under Rule 12(b)(1) is necessary. Rule 12(h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action"). Moreover, a Court should dismiss a case under Rule 12(b)(6) when, after viewing the facts most favorable to the Plaintiff, "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

I. THIS LAWSUIT IS NOT RIPE BECAUSE THE COMPLAINT IS BASED ON ABSTRACT HYPOTHETICALS OF SPECULATIVE FUTURE HARM AND A GENERALIZED GRIEVANCE THAT THE LEGISLATURE VIOLATED ARTICLE II, SECTION 18.

Plaintiffs' claims are not justiciable because they are not based on any actual or imminent concrete harm. The Montana Supreme Court has repeatedly affirmed the basic premise that "the judicial power of Montana's courts is limited to justiciable controversies." *Reichert v. State*, 2012 MT 111, ¶ 53, 365 Mont. 92, 114, 278 P.3d 455, 471 (citation and quotation omitted). A "justiciable controversy is one that is 'definite and concrete, touching legal relations of parties having adverse legal interests' and 'admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.'" *Id.* (quoting *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)).

Plaintiffs' claims are based on what they think could happen in the future, if the State were to claim immunity in certain hypothetical instances. To demonstrate what harm Plaintiffs' believe *may* arise, they list three hypotheticals:

1. The UMB, a board of political appointees, (including state appointments made by the governor) authorizes changes in allocation, change in use or betterment and rehabilitation wherein land, crops and the like are damaged by construction, driving across fee lands or alterations to the project. In that case, a cause of action **may lie** against the state for money damages.

2. Instream flows are changed causing flooding on irrigated lands thereby damaging private property (i.e. crops, land, hay). In that case, an action **may lie** against the state for money damages.

3. Private fee land and property is taken for public use. This is inverse condemnation. Yet, under the above referenced immunity clause, the state would not be liable for such an action. Clearly, a cause of action **may lie** against the state for money damages in that instance.

Brief in Support of Application for Order to Show Cause at 8 (emphasis added). This is not actual harm, it is hypothetical harm that "may lie" based on contingent future events. And hypothetical harm does not create a justiciable controversy because it is, among other things, not ripe.

"Ripeness is predicated on the central perception that courts should not render decisions absent a genuine need to resolve a real dispute; hence, cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Reichert*, ¶ 54. "Dismissal for lack of ripeness is appropriate where 'nothing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative.'" *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282, 1290 (D.C. Cir. 1982) (quoting *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972)). Takings and property related claims are especially subject to ripeness concerns because they "involve weighing various factors in specific settings . . .where novel claims are raised." *Metzenbaum*, 675 F.2d at 1290.

This case presents the most basic of ripeness problems. Several events must occur before Plaintiffs' fears even have the chance to become actual and concrete. First, Congress must ratify the Compact. Until that happens, except for a few preparatory steps by the State, the Compact will not be put into effect. Second, the events that Plaintiffs speculate about must actually happen, *e.g.*, private land is taken for public use, private property is damaged from flooding caused by instream flow changes, or land and crops are damaged by actions of the Unitary Management Board ("Board"). Plaintiffs acknowledge that none of these things has yet happened. They merely speculate that they could possibly happen sometime in the future. From the State's perspective, it is highly unlikely that any of them will ever happen. But the bottom line is that until one of them does, Plaintiffs do not have a legitimate basis for a cause of action.

Moreover, not only would one of these hypotheticals have to occur, but the State would have to actually claim immunity from damages based on the Compact for there to be cognizable harm. Lest there be any doubt, the State hereby disclaims *any* immunity based on the Compact, to the extent that immunity is not already granted under State law. But even if that concession does not satisfy Plaintiffs, the State would still have to claim immunity in a concrete situation before a justiciable cause of action would accrue. So, for yet another reason, Plaintiffs' suit is not ripe.

Plaintiffs' general argument that the Legislature passed the Compact in violation of Article II, Section 18, is not a cognizable either. A plaintiff does not have standing to lodge a generalized grievance that the legislature has done something that Plaintiffs believe to be unconstitutional. Courts "are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution." *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 598 (2007). Rather, courts may only decide questions based on an alleged violation of a personal right. As the United States Supreme Court has repeatedly recognized:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. **The question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act**. . . . The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Hein, 551 U.S. at 599 (emphasis added) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948) (recognizing that to establish a justiciable case or controversy, a plaintiff must show "that he has sustained, or is in immediate danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."). Plaintiffs lodge nothing more

than a generalized grievance that, even if true, they would share with all state citizens. That is not enough to give them standing, absent a direct and concrete injury.

II. PLAINTIFFS HAVE NOT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE COMPACT DOES NOT GRANT A NEW FORM OF IMMUNITY.

Even if the Plaintiffs had standing to make a generalized grievance that the law is unconstitutional based on hypothetical injury, their complaint still fails to present a cognizable claim because the Compact simply cannot be read as a new grant of immunity. Plaintiffs have gone to great effort to twist the Compact's language to manufacture a constitutional crisis. But a court must do just the opposite. All statutes carry a presumption of constitutionality, and courts are to "construe statutes narrowly to avoid an unconstitutional interpretation if feasible." *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19, 332 Mont. 85, 89, 134 P.3d 692, 695.

> Whenever possible, this Court will adopt statutory construction which renders challenged statutes constitutional rather than a construction which renders them invalid. When construing a challenged statute, the Court will read and interpret the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature. If there is any doubt regarding constitutionality, we resolve the issue in favor of the statute. Additionally, we interpret statutes so as to give effect to the legislative will, while avoiding an absurd result.

Id. So even if there were a reasonable argument that the Compact could be read as somehow granting new immunity to the State, the Court, when faced with two reasonable interpretations, must construe the language in a way that renders it constitutional.

But the doctrine of constitutional avoidance aside, the Compact cannot reasonably be read as Plaintiffs advocate in any case. It requires such a twist of logic, language, and legislative intent that no statute would be safe under their theory of statutory interpretation.

The first provision that Plaintiffs attack is the Compact's joint waiver of sovereign immunity. As Plaintiffs put it: "Although SB 262 purportedly waives state sovereign immunity and defenses under the Eleventh Amendment to the United States Constitution, then in the same sentence effectively guts that purported waiver by reclaiming immunity." Verified First Amended Complaint and Petition for Preliminary Injunction, ¶ 11 (citing Mont. Const. Art. II, § 18). Plaintiffs evidently acknowledge that the State had immunity to waive, and that the Compact effectively waived that immunity. But because the parties stipulated 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," Plaintiffs contend that this was "reclaiming immunity." Under Plaintiffs' theory, even though the state

had immunity only a few lines earlier, once it's gone, it's apparently gone. And "reclaiming" it requires a two thirds vote by both houses.

This argument could be called the "all or nothing" view of sovereign immunity: if the State waives immunity, it has no choice but to go whole hog and concede *all* immunity, or the State violates Article II, Section 18 without a two-thirds vote of each house.

The argument makes no sense. The State is not giving itself new immunity; it already had immunity. When the State waives immunity "in order to permit the resolution of disputes under the Compact by the Board, and the appeal or judicial enforcement of Board decisions," it is not prohibited by Article II, Section 18 from putting limits on how extensive the waiver is. Although the State and the Tribe agree to allow themselves to be sued to resolve disputes under the Compact, they reasonably did not want to extend that waiver to damages, costs, or attorneys' fees, from which the state already has immunity. *See, e.g., Finke v. State ex rel. McGrath*, 2003 MT 48, ¶34; 314 Mont. 314, 325, 65 P.3d 576, 583 (2003) (recognizing the State's broad immunity, including immunity for attorneys' fees). Plaintiffs cannot answer why, if the State already has immunity from damages, costs, and attorneys' fees, declining to waive that immunity would trigger Article II, Section 18.

Plaintiffs' second argument is no more successful. Plaintiffs point to the Compact's section concerning immunity from suit for the Board and other state employees. Ex. 1 at 76, ll. 25-29. Plaintiffs' argument falters after little scrutiny because Montana already has granted immunity to public employees performing public duties. Mont. Code Ann. § 2-9-305 (providing for the "immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment"); Mont. Code Ann. § 2-9-111 (granting governmental entities and employees immunity from suit for legislative acts and omissions); *see also Finke*, ¶ 34 (finding that there was "no avenue whereby attorneys' fees could be imposed against the State" because Mont. Code Ann. § 2-9-111 "provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body."). Because the Compact does not give public employees immunity that they do not already enjoy, Article II, Section 18 cannot pose an obstacle.

Plaintiffs may respond that there could, possibly, be some situation in which a public employee would claim immunity under the Compact that was not already granted under State law. But that just highlights the Plaintiffs' ripeness problem. If, at some point in the future, someone claimed harm from a public official, and that public official claimed immunity based on the Compact where it is not otherwise granted by State law, a court could decide the issue then. But even

there, the remedy would be not to extend immunity to that particular public official. The remedy would not be to declare the entire Compact void.

Indeed, even crediting Plaintiffs' best case, if the provisions that they attack were found unconstitutional that would not render the entire Compact unconstitutional because the offending provisions would simply be severed. The Unitary Management Ordinance contains an explicit severability clause. *See* Mont. Code Ann. § 1-1-113.1 ("The provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions.").

But even absent a severability clause, normal severability rules would dictate the same result. Courts will only strike the provisions of a statute that are unconstitutional and leave the remainder of the law intact unless it is clear that "the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment." *Finke*, ¶ 25. "When unconstitutional provisions are severed, the remainder of the statute must be complete in itself and capable of being executed in accordance with the apparent legislative intent." *Williams v. Board Of County Comm'rs*, 2013 MT 243, ¶64 371 Mont. 356, 376 (2013).

Here, there is no reasonable argument that the minor provisions that Plaintiffs cite are necessary to the integrity of the 140-page Bill, or that they were an inducement for its passage. Indeed, little attention was paid to the provisions by

anyone because they are so conventional, until Plaintiffs raised their Article II, Section 18 argument at the eleventh hour. So, even if all of Plaintiffs' arguments were correct, they still have no cognizable claim because the Court would have a duty to simply severe the offending provisions and leave the remainder of the Compact effective.

CONCLUSION

For the foregoing reasons, the State respectfully request that the Court dismiss Plaintiffs' complaint.

Respectfully submitted, July 2, 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 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: _____ _____
DALE SCHOWENGERDT