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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

FLATHEAD JOINT BOARD OF CONTROL, ET AL., Plaintiffs v. MEMBERS OF THE 64TH LEGISLATURE, ET AL., Defendants.	Cause No. DV-15-73 **STATE'S REPLY IN SUPPORT OF MOTION TO DISMISS**

I. PLAINTIFFS FAIL TO DEMONSTRATE ANY CONCRETE, IMMINENT HARM FROM THE CSKT WATER COMPACT, BEYOND THEIR GENERALIZED GRIEVANCE THAT TWO COMPACT PROVISIONS REQUIRED A 2/3 VOTE.

Plaintiffs acknowledge that their claims must be ripe to proceed, but they fail to demonstrate any concrete, imminent harm that would make them so. Moreover, they admit that the hypothetical harms that they fear may happen were only "offered to show the *potential* damage resulting from a strict reading of SB 262's immunity provision." Pls. Opposition, at 13:2-21 (emphasis added). That hypothetical harm does not amount to a justiciable controversy, which Plaintiffs at least tacitly acknowledge.

Rather, Plaintiffs hang their hat on their general argument that the Compact violated Art. II, § 18 because:

1. if the Defendant violated Art. II, § 18 of the Montana Constitution, as Plaintiffs [sic] allege, 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 this Court will effectively operate to determine whether or not the Compact has legally become Montana law or if the less than 2/3 vote violated the Montana Constitution and the Plaintiffs' 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 of each legislative branch, then its failure to do so gives rise to an enormous justiciable controversy as the State is currently implementing the Compact in a very *real* way.

Plaintiffs' Response Brief, 9:16-22.

This is essentially saying the same thing three different ways: Plaintiffs' baseline contention is that the Compact needed a 2/3 vote under Article II, § 18 of the Montana

Constitution. But Plaintiffs have no answer for the State's argument that their claim is nothing more than a generalized grievance, for which Plaintiffs have no standing. *See* State's Brief Supporting Motion to Dismiss, 9-10 (quoting *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 599 (2007) (recognizing that a plaintiff "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")); *see also Gryczan v. State*, 283 Mont. 433, 441, 942 P.2d 112, 117 (1997) (recognizing that a plaintiff must have some direct, concrete injury and not just a generalized grievance that a law is unconstitutional).

Plaintiffs cite two categories of cases that they claim give them a right to lodge a general grievance against the constitutionality of a law. The first type of cases Plaintiffs cite are declaratory judgment actions that involve actual, concrete harm, which Plaintiffs lack, and so they are not helpful to them. The second type of case involves specific constitutional provisions that provide for certain constitutional challenges, including pre-enforcement challenges to ballot initiatives and challenges that a bill contains more than one subject. Neither type of case helps Plaintiffs here.

1. Cases Involving Concrete Harm. Plaintiffs cite *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981), in which a driver challenged a statute that gave the Attorney General discretion to set highway speed limits. But there the plaintiff had a direct and personal injury because it limited the speed that he could drive his vehicle, and subjected him to criminal penalties if he did not comply. The Court had little trouble concluding

that the plaintiff had a concrete claim. *Id.* at 7 (finding that the plaintiff "is directly affected by the operation of the statute he attacks in this case. His right or privilege to drive a motor vehicle by the basic rule of safety . . . has been adversely limited by the enforcement or threatened enforcement of section 61-8-304, MCA.").

Similarly, in *Gryczan*, the Court held that the plaintiffs, who were gay, had standing to challenge the State's statute criminalizing sodomy, 283 Mont. at 444-45, 942 P.2d at 119. Although no one had yet been prosecuted under the law, the Court noted that the Legislature had recently amended the law and that there was no commitment not to prosecute those found to be violating the law, which was classified as a felony. "The existence of a criminal law aimed specifically at one group of citizens, the enforcement of which has not been disavowed by the state, creates a fear of prosecution sufficient to confer standing unless there are other circumstances which make that fear imaginary or wholly speculative." *Id.* Thus, the plaintiffs had standing to challenge the law because it had a direct impact on them and threatened real injury in the form of a criminal sanction.

Both cases are much different than the facts Plaintiffs present here, because they make no attempt to show a direct and personal injury. That is especially so before Congress ratifies the Compact and it is implemented in a way that directly affects Plaintiffs. They can only point to a generalized, academic disagreement about how two provisions of the Compact were passed. Moreover, the State has disavowed the

Plaintiffs' interpretation of the Compact as granting immunity, which further undermines their claim to imminent and actual harm.

2. Initiative and Single Subject Cases. Plaintiffs cite other cases claiming that they allow a party to challenge the constitutionality of legislation without having suffered a direct injury. But those cases involve procedural challenges to initiatives. "The Montana Constitution allows Montana citizens to go to court and present pre-election challenges to the manner in which a referendum qualifies for the ballot." *MEA-MFT v. State*, 2014 MT 76, ¶7, 374 Mont. 296, 297, 323 P.3d 198 (2014) (citing Mont. Const. art. IV, § 7(2)); *see also State ex rel. Boese v. Waltermire*, 224 Mont. 230, 730 P.2d 375 (1986) (recognizing right to pre-election challenge of ballot initiatives). In fact, that is when a challenge to the sufficiency of a petition must be made, if ever. *Montanans for Laws v. State ex rel. Johnson*, 2007 MT 75, ¶ 25, 336 Mont. 450,455, 154 P.3d 1202, 1207 (2007).

The second type of cases that Plaintiffs cite are challenges that a law or constitutional amendment encompasses more than one subject. The Montana Constitution, however, explicitly allows single subject challenges within two years after a bill is passed. Mont. Const. article V, § 11; *see also Reeves v. Ille Elec. Co.*, 170 Mont. 104, 551 P.2d 647 (1976) (recognizing that the Montana Constitution, article V, section 11, explicitly authorizes challenges to bills that encompass more than one subject within two years of passage). That is nothing new. Challenges based on the single subject requirement have always been allowed, even under Montana's original constitution. 1889 Mont. Const. art. V, § 23 (prohibiting the legislature from submitting a bill with more than one subject and rendering void any portions of the bill not complying with this

provision). Plaintiffs' citation of cases applying this provision is beside the point. *See State ex rel. Hay v. Alderson*, 49 Mont. 387, 405, 142 P. 210, 213 (1914); *State ex rel. Teague v. Board of Comm'rs*, 34 Mont. 426, 87 P. 450 (1906). The same is true for the Oregon case that Plaintiffs cite, *Armatta v. Kitchaber*, 327 Ore. 250, 959 P.2d 49 (1998) (a single-subject challenge to a state initiative in which the Court severed the offending provision and allowed the remainder of the law to go forward).

There is no parallel provision under article II, section 18, and even if there were, Plaintiffs would still have to claim a concrete interest. Thus, under normal and binding rules of justiciability, this Court lacks jurisdiction to consider Plaintiffs' general grievance that two provisions of the Compact violated article II, section 18, absent some concrete injury or imminent harm.

II. DECLARATORY JUDGMENT ACT CASES ARE NOT EXEMPT FROM REQUIRING A RIPE, CONCRETE HARM.

Plaintiffs suggest that the standing and ripeness inquiries for their case are somehow relaxed simply because the Declaratory Judgment Act is to be liberally construed. That is incorrect. In *Montana Dep't of Natural Resources and Conservation v. Intake Water Co.*, 171 Mont. 416, 439-40, 558 P.2d 1110, 1123 (1976), the Montana Supreme Court clarified that courts are not to suspend normal justiciability rules simply because the case is brought under the Declaratory Judgment Act, and that claims based on "a future hypothetical contingency that may or may not occur" should not be entertained. *Id.* The Court put it bluntly: "The Uniform Declaratory Judgment

Act does not license litigants to fish in judicial ponds for legal advice." *Id.* (citation omitted).

Similarly, in *Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶¶ 18-19, 329 Mont. 511, 127 P.3d 359, the Court dismissed a declaratory judgment act case *sua sponte* for lack of jurisdiction because the case was based on speculative injury and was therefore not ripe. The Court reiterated that just because the Declaratory Judgment Act is to be liberally construed does not license courts to dispense with the requirement that a plaintiff have actual or imminent concrete harm. *Northfield Ins. Co. v. Montana Ass'n of Counties*, 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813 (2000) ("liberal interpretation of the [Declaratory Judgment Act] is tempered by the necessity that a justiciable controversy exist before courts exercise jurisdiction"); *see also id.*, ¶ 12 ("We apply the justiciable controversy test to actions for declaratory judgment to prevent courts from determining purely speculative or academic matters entering anticipatory judgments, providing for contingencies which may arise later, declaring social status, dealing with theoretical problems, answering moot questions, or giving abstract or advisory opinions."). In *Northfield*, the Court dismissed the case because it was based on a "hypothetical controversy" where "no litigant before [the Court] is in immediate danger of sustaining direct injury." *Id.*, ¶¶ 14-15. *See also Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364 ("Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions."); *id.* (also noting that statutes are

presumed constitutional and that the Court "avoids deciding constitutional issues whenever possible").

So regardless of whether this is an action for damages or an action under the Declaratory Judgment Act, Plaintiffs must still allege concrete injury rather than a generalized or academic grievance that a law is unconstitutional.

III. PRELIMINARY IMPLEMENTATION OF THE COMPACT DOES NOT THREATEN CONCRETE HARM TO PLAINTIFFS OR A CLAIM OF IMMUNITY BY THE STATE.

Plaintiffs spend a lot of time discussing how the Compact may be implemented by the Compact Implementation Technical Team (CITT). But of all the activity that they list, they fail to detail what of that activity is going to result in imminent harm to them. Instead, they continue to rely on speculation that the Compact may harm them and that the State or State officials may claim immunity at some point in the future.

And although it is true that the Compact was effective immediately after the Governor signed it, all of the implementation steps that the CITT takes are only preliminary. As the exhibit Plaintiffs include shows, the Compact itself "will not be implemented until Congress is [sic] ratified . . . as far as water rights and the river diversion allowances and all of those things . . . that can't be accomplished until it's ratified." Exhibit D, Senator Vincent, 21:10-13. And in all events, Plaintiffs cannot show how these preliminary steps result in an actual injury to them where public officials are claiming immunity based on the Compact. Indeed, their speculation even extends to the Bureau of Indian Affairs when they suggest that perhaps a recent proposed operation

and maintenance tax is due to the Compact, with nothing at all to support the allegation that the rate increase is due to the Compact.

Moreover, Plaintiffs have no response to the State's argument that, even if their argument were correct that the Compact needed a 2/3 vote for immunity provisions to be effective, the Court must simply sever those provisions or declare them not effective in a particular case. Brief in Support of Motion to Dismiss, 14-15. Plaintiffs have cited no authority whatsoever for declaring the entire Compact void.

Nor do they offer a persuasive argument as to how the Compact granted immunity to the state or public officials that did not already exist. Rather, Plaintiffs double down on their argument that the Compact "reclaimed" immunity by supposedly disclaiming it in one sentence, and taking it back in the next. But they fail to explain how the Compact could reclaim something that the state already had. Brief Supporting Motion to Dismiss, 11-12.

They also claim that the state could someday amend the state statute granting public officials immunity, in which case the Compact would differ from State law, and potentially extend immunity beyond what the State grants. But that is just more speculation. There is nothing to indicate that the immunity statute will be amended--and certainly not imminently. And if it ever were amended, and immunity was claimed by an official based on the Compact, the Court could then address that issue. But even then, as the State discussed, the remedy would be to either not extend immunity in that case or strike that provision of the compact. It would not be to strike the entire Compact.

But no matter, these issues, should they ever occur, are for another day. Plaintiffs have not established a ripe injury for which they have standing and the Court should dismiss their complaint.

Conclusion

For the foregoing reasons, the State requests that the Court dismiss Plaintiffs' Complaint.

Respectfully submitted this 21st day of August, 2015.

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I hereby certify that I caused a true and correct copy of the foregoing to be mailed and emailed to:

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