

1 HON. JAMES A. MANLEY
2 20th Judicial District Court
3 Lake County Courthouse
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6 (406) 883-7250

CLERK OF THE
DISTRICT COURT
LYN FRISVOLD

2015 DEC 2 PM 4 29
FILED BY *Wayne Beal*
CLERK/DEPUTY

7 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

Cause No. DV-15-73

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

15 Plaintiffs,

16 vs.

17 STATE OF MONTANA,

18 Defendant.

19 **ORDER**
20 **DENYING MOTION TO DISMISS**

21 Plaintiffs' Amended Complaint seeks declaratory and injunctive relief regarding SB262,
22 passed by the 2015 legislature, which adopts and implements the agreement generally known as
23 the Water Compact.

24 Plaintiffs contend that two provisions in the Compact, and therefore the statute, violate Art.
25 II, § 18 of the 1972 Constitution of Montana, by granting immunity to the state or its agents or
26 appointees; Plaintiffs contend the statute constitutes an attempt to amend the constitution without
the requisite 2/3 vote of the legislature.

ORDER DENYING MOTION TO DISMISS

1 Defendant moves to dismiss pursuant to Rules 12(b)(1) for lack of subject matter
2 jurisdiction, 12(b)(6) for failure to state a claim upon which relief may be granted, and 12(h)(3) for
3 lack of subject matter jurisdiction.

4 This is a Rule 12 motion to dismiss, to be either granted or denied, unlike a Rule 56 motion
5 for summary judgment, which charges the district court with determining which parts of the case
6 contain genuine disputes of material fact, and eliminating those parts which do not. Rule 56(d),
7 M.R.Civ.P.

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9 The Amended Complaint includes a claim for declaratory and injunctive relief. The
10 requirement that Plaintiff show likelihood of success on the merits for injunctive relief does not
11 apply to a Rule 12 motion to dismiss a complaint for declaratory judgment.

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13 Finally, the Court is guided by the policy that in this state, perhaps unlike developing
14 federal law, the doors to the courthouse should be open to the public as a forum for their serious
15 disputes. The State's motion seeks to close the courthouse doors to these plaintiffs.

16 For these reasons, and the rationale below, Defendant's Motion to Dismiss is denied.

17 This does not necessarily mean Plaintiffs will ultimately prevail on some or all issues. It
18 does mean the Plaintiffs will have their day in court.

20 RATIONALE

21 For purposes of Rule 12 motion to dismiss, the motion must be decided on the basis of the
22 Amended Complaint (including the attachments incorporated therein). Nothing outside the
23 Amended Complaint may be considered by the Court, and all allegations in the Amended
24 Complaint must be taken to be true. *Stokes v. State*, 2005 MT 42, ¶¶6-12, 326 Mont. 138, 107
25 P.3d 494.
26

1 Defendant's arguments can be summarized as:

- 2 1. Dismissal is appropriate for lack of justiciability and ripeness.
- 3 2. Failure to State a Claim; Plaintiffs' claim, of unconstitutional waiver of sovereign
- 4 immunity in the compact and statute, fails because:
- 5 a. The statute does not grant new immunity;
- 6 b. MCA 2-9-305 already grants immunity; and
- 7 c. The public duty doctrine already grants immunity.
- 8 3. Severability.

9 1. Justiciability and Ripeness

10 The State argues there is a lack of subject matter jurisdiction, pursuant to Rule 12(b)(1),

11 because the complaint is premature, and the case is not ripe for determination because the water

12 compact is not completed and still needs ratification by Congress and the Tribes. The State argues

13 that the statute, though passed by the legislature, signed by the governor, and immediately

14 effective, is not being implemented by the State "except for a few preparatory steps", and therefore

15 no harm has yet been suffered sufficient to create a justiciable case or controversy.

16 Paragraph 28 of the Amended Complaint alleges the State is in fact engaged in

17 implementing the compact pursuant to the newly-passed statute, and has authorized or committed

18 \$3,000,000 toward that end. Based on the allegations in paragraph 28 and established Rule 12

19 authority, these allegations are sufficient to overcome the motion to dismiss for lack of

20 justiciability.

21 The State may be correct, that Congress and the Tribes may not ratify the compact for 2

22 years or 20 years or ever. However, that argument raises the real-world situation of the State going

23 forward with costly implementation, and an indefinite period of uncertainty for Plaintiffs and other

24 water users, absent Court determination of these and other issues. It is not in the best interests of

25 the water users or other citizens of Montana that such uncertainty continue for years or decades.

26

1 This case meets the three-part test in *Lee v. State*, 195 Mont. 1, 6, 625 P.2d 1282, 1288
2 (1981).

3 Defendant relies on Montana case authority which does not strongly support its position.
4 For example, in *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶18, 333 Mont. 331, the
5 plaintiff newspaper had been denied access to criminal justice information (a police report) which
6 allegedly showed preferential treatment for the relative of a city officer. The newspaper sought not
7 only this one report, but also prospective injunctive relief to define and govern what information a
8 city must disseminate in future, hypothetical cases and myriad situations. The complaint would
9 have required a fact-finding study and determination better suited to legislative or administrative
10 branches of government. Before the case came before the district court for decision, the city had
11 already provided the police report to the plaintiff. The case was filed in March, 2004. In August,
12 2004, the Montana Department of Justice promulgated rules for dissemination of exactly this kind
13 of police report. The district court granted summary judgment, and the Montana Supreme Court
14 affirmed, reasoning that, upon production of the police report and promulgation of exactly the kind
15 of rules sought, there was no longer any justiciable case, and at that point the plaintiff was
16 effectively asking for judicial redetermination which would usurp the rule-making authority of the
17 Department of Justice. (*see, footnote 2, ¶22*). The instant case seeks relief which clearly presents a
18 judicial question (determination of a statute's constitutionality) and which relates to two specific
19 provisions in the Water Compact which is adopted by the statute.
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21
22

23 Defendant's reliance on *Reichert v. State*, 2012 MT 111, ¶53, 365 Mont. 92, 278 P.3d 455
24 is essentially reliance on dicta. Plaintiffs sought declaratory judgment to declare that a certain
25 legislative-created ballot referendum, if passed in the following election, would be
26 unconstitutional, and sought injunctive relief to decertify it before the election. The actual ruling in

1 the case was that there was a justiciable, ripe controversy and that the courts did not have to wait
2 until after a referendum passed for there to be sufficient legal harm to render the dispute ready for
3 judicial determination.

4 Defendant also relies on the 1948 case of *Chovanak v. Mathews*, 120 Mont. 520, 188 P.2d
5 582 (1948), a case so old that the Montana Attorney General defending the case has since retired
6 from the Montana practice of law, as has his son and grandson. The plaintiff sought declaratory
7 judgment about a 1932 law, which allowed certain slot machines if they were operated by
8 religious, fraternal or charitable organizations. Plaintiff contended the law was unconstitutional
9 because it discriminated on the basis of class. The case was dismissed for lack of a justiciable
10 controversy, though today it would more likely have been dismissed for lack of standing. Plaintiff
11 had no interest in slot machines, didn't intend to own one, and had never been denied a license for
12 one. He apparently just disliked slot machines generally. He was found to have suffered no past
13 or prospective harm. By comparison, the Plaintiffs here have alleged harm to their property
14 interests, specific to them (as members of the joint board of control, individual irrigators, and
15 persons who apparently claim a water right or a cause of action to claim a water right).

16 2. Failure to State a Claim

17 The State argues variously that the statute and compact do not grant any new immunity, and
18 that it wouldn't matter anyway because the immunity already exists.

19 The two provisions at issue are:

20 **Waiver of Immunity. The Tribes and the State hereby waive their**
21 **respective immunities from suit, including any defense the State**
22 **shall have under the Eleventh Amendment of the constitution of**
23 **the United States, in order to permit resolution of disputes under the**
24 **Compact by the board, and the appeal or judicial enforcement of**
25 **Board decisions as provided herein, except that such waivers of**
26 **sovereign immunity by the Tribes or the State shall not extend to**

1 course of their employment. This statute does not give the State immunity from monetary
2 damages from such suits. It does just the opposite: it recognizes and affirms that the State is
3 legally accountable for such acts of such agents:

4 “...Except as provided in subsection (6), the employer shall pay all
5 expenses relating to the retained defense and pay any judgment for
6 damages entered in the action...MCA 2-9-305(3).1

7 The “employer” referred to is: “...a state, county, city, town or other governmental entity...” MCA
8 2-9-305(2).

9 Some language in that statute may be confusing, because the title and content of MCA 2-9-
10 305(1) refers to “immunization”. That *immunization* does not refer to immunity being granted to
11 the state; it refers to immunizing the *employee* from personal liability for defense costs and
12 damages, by the state’s acknowledging and paying such costs (instead of the employee or agent
13 paying them). For a discussion of the interaction of the constitutional waiver of sovereign
14 immunity and the Montana Tort Claims Act, *see, State v. District Court*, 175 Mont. 63, 572 P.2d
15 201 (1977).

16 Defendant also contends the immunity exists anyway because of the *public duty doctrine*.
17 That doctrine does not create immunity. It is a judicially-created principal which, in the context of
18 common law tort rules, seeks to define the scope of duty, primarily on the basis of foreseeability,
19 with respect to the elements required for an actionable tort. It is similar to the analysis in the
20 famous Cardozo case everyone studied in law school, *Palsgraf v. Long Island R.R. Co.*, 248 N.Y.
21 339, 162 N.E. 99 (N.Y. 1928). *Gatlin-Johnson v. City of Miles City*, 2012 MT 302, ¶¶ 13-21, 367
22 Mont. 414, 291 P.3d 1129 explains this.

1 There may be a question about the constitutionality of 2-9-108, to the extent the legislature seeks to limit the waiver of sovereign immunity by placing caps on damages, but that issue is not raised here.

1 Defendant also contends the State is immune from judgment for attorneys' fees (and
2 perhaps all monetary damages), based on *Finke v. State ex rel. McGrath*, 2003MT48, 314 Mont.
3 314, 65 P.3d 576. The ruling in that case was not based on sovereign immunity. Attorney's fees
4 were denied for several reasons, including failure to ask for them in the complaint, attorney's fees
5 were not provided for in the statute the suit was brought upon, and there is legislative immunity for
6 actions which were essentially against the legislature for legislative enactments. None of those
7 reasons apply here.

9 3. Severability

10 The State may be correct that even if one or more of the statutory or Compact provisions are
11 determined unconstitutional, it will not render the balance of the statute and Compact
12 unconstitutional. That determination is not best addressed by a motion to dismiss the entire case.
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14 DATED this 2nd day of December, 2015.

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17 JAMES A. MANLEY
18 District Court Judge
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22 cc: Bruce A. Fredrickson and Kristin L. Omgig, Attorney for Plaintiffs
23 Timothy C. Fox, Alan Joscelyn, Dale Schowengerdt, J. Stuart Segrest, Matthew Cochenour, Attorneys for Defendants
24 12/05/15 cWMc
25
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