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CLERK OF DISTRICT COURT
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11 *Attorneys for Plaintiffs*

12 MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

13 FLATHEAD JOINT BOARD OF
14 CONTROL and JERRY LASKODY,
15 BOONE COLE, TIM ORR, TED HEIN,
16 BRUCE WHITE, SHANE ORIEN, WAYNE
17 BLEVINS AND GENE POSIVIO, all
18 members of the Flathead Joint Board of
19 Control,

Plaintiffs,

vs.

STATE OF MONTANA,

Defendant

and

CONFEDERATED SALISH AND
KOOTENAI TRIBES,

Intervenor-Defendant.

Cause No. DV-15-73

Judge: James A. Manley

**PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT
MONT.R.CIV.P. 56(c)
(STATE OF MONTANA)**

20 COME NOW Plaintiffs by and through their counsel of record, Rocky Mountain Law
21 Partners, PLLP, and hereby file their Reply Brief in Support of Motion for Partial Summary
22 Judgment Mont.R.Civ.P. 56(c) to the State of Montana's Response Brief (the "Reply"). The
23
24

1 State of Montana (the “State”) characterizes this case as “murky”.¹ (Ct. Doc. 60, pg. 1.)
2 That effectively sums up the CSKT Compact—it is a darkly vague and obscure law that the
3 State of Montana has adopted while freeing itself from all responsibility thereunder. Instead,
4 Montana citizens residing within the Flathead Indian Reservation (“FIR”) are left without an
5 avenue for redress or recourse for any action for money damages. Rather, they are
6 imprisoned in a never ending maze governed by a new “unique multi-sovereign” entity
7 which operates through a new law of administration. In creating the new sovereign, the State
8 has voluntarily removed itself from the chain of liability and has created this conundrum.
9 Here, summary judgment in Plaintiffs’ favor is proper.

10 ARGUMENT

11 I. PLAINTIFFS’ FACTS ARE UNDISPUTED.

12 The State criticizes certain of the Plaintiffs’ Statement of Undisputed Facts. The
13 alleged challenges are meritless as the facts are undisputed:

14 1. The State complains about the status of the Flathead Joint Board of Control
15 (“FJBC”) as the joint operation agent for the Jocko, Mission and Flathead Irrigation Districts
16 based upon a comment in *Flathead Joint Board et al v. Sarah “Sally” Jewel et al.*, United
17 States District Court, Missoula Division, Cause No.CV-14-88-M-DLC. As noted in
18 Plaintiffs’ Response Brief, while the Jocko and Mission Districts withdrew from the FJBC in
19 December 2013, the FJBC was subsequently reformed in May of 2014. Despite Defendant’s
20 allegations to the contrary, Plaintiffs have provided responsive discovery to Defendant
21 demonstrating the existence of the FJBC. **Exhibit 11**, Response to Request for Admission
22 No. 5 and Request for Production No. 13. Judge Christensen’s decision overlooked the

23 ¹ “Murky” is defined as “characterized by a heavy dimness or obscurity caused by or like that caused by
24 overhanging fog or smoke; characterized by thickness and heaviness of air; darkly vague or obscure.” Merriam
Webster.

1 reformation because the original complaint, filed before the reformation (complaint filed
2 April 2, 2014), recognized the two districts' withdrawal. He denied a motion to file a second
3 amended Complaint which sought to add the Jocko-Mission Districts to the litigation. That
4 case is currently on appeal to the Ninth Circuit Court of Appeals. **Exhibit 12.**

5 2. The immunity from suit provisions apply to the State of Montana as
6 demonstrated by the inability of an individual to obtain money damages under SB 262. (Ct.
7 Doc. 53.)

8 3. The Compact does NOT contain a severability clause. Plaintiffs have
9 acknowledged that the Unitary Management Ordinances ("UMO") contains a severability
10 clause. (Ct. Doc. 56.) However, the Compact does not.

11 4. SB 262 does in fact strip the Montana Water Court of jurisdiction. SB 262
12 enacted a new Law of Administration² which governs "all water rights, whether derived from
13 tribal, state or federal law and shall control all aspects of water use, including permitting of
14 new uses, changes of existing uses, enforcement of water right calls and all aspects of
15 enforcement within the exterior boundaries of the Flathead Indian Reservation. Any
16 provision of Title 85 MCA, that is inconsistent with this Law of Administration is not
17 applicable within the Reservation." Mont. Code Ann. § 85-20-1901; § 1-1-101.3. The dual
18 system of administration found in all other Montana compacts no longer exists because the
19 Montana Water Court, Montana Water Use Act and Montana Department of Natural
20 Resources have effectively been eliminated (and rendered powerless) from the equation. *Id.*
21 No other Compact in Montana eliminates those bodies and/or law or places exclusive control

22 ² The new "Law of Administration" or "Unitary Management Ordinance" is defined as "the body of laws
23 enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater
24 within the Reservation, that are both materially consistent with the substantive provisions of Appendix 4."
Mont. Code Ann. § 85-20-1901(45).

1 of *all* waters rights (federal, state or tribal) in a single regulatory body. See generally Title
2 85, Chapter 20. Rather, the Montana Water Court’s role is to ultimately rubber stamp the
3 Compact. The Tribes admit that the CSKT Compact differs in material ways from all prior
4 Indian Compacts in Montana. All prior Indian Compacts split management of water on a
5 Reservation into a “dual sovereign water administration” where the State administers state-
6 based rights under the Montana Water Use Act and the tribes administer tribal rights under
7 tribal law. (Ct. Doc. 51, pp. 4 and 8.) And, the two sovereigns remain entirely autonomous
8 in law and administration under all other Montana compacts. Not here however. *Id.* Here,
9 the CSKT Compact melds two sovereigns. Neither the State nor the Tribes administer or
10 manage Reservation water independently. Rather, they “*have created the Water*
11 *Management Board, comprised of State, Tribal and Federal representatives*” to act under a
12 new Law of Administration not the Montana Water Use Act or tribal law. *Id.* pg. 4.

13 **II. PLAINTIFFS POSSESS STANDING.**

14 The State fails to consider existing Montana precedent which clearly holds that a party
15 need not have hard quantifiable damages in order to have standing to challenge the
16 constitutionality of a statute. The State’s arguments are remiss:

17 1. The State continues to rely upon the Attorney General’s Office (“AGO”)
18 unilateral pronouncement that the SB 262 does not grant the State additional immunity.
19 Interestingly, that is not what the Legislature concluded. As Speaker of the House,
20 Representative Austin Knudsen stated it is “the words on the page that matter”:

21 ...And regardless of whatever the intent behind the language is, which according to
22 the Attorney General its—number one, it’s boilerplate language and, number two, is
23 the intent is it only applies to the sovereign immunity in federal court under the 11th
24 Amendment.

1 Well, I understand that, *but I can read the language in the Bill, and I don't believe*
2 *that's what it says. While it may be the intent, the words on the page are what*
3 *matters.* And I think we've got a situation with the words on this page, if you read
4 that sentence. "The Tribes and the State hereby waive their respective immunities
5 from suit," comma, so there's an offset. And there's some more language in there
6 including the Eleventh Amendment. You go down to the next comma, there's the
7 word "*except that such waivers of sovereign immunity by the Tribes or the State*
8 *shall not extend to any action.*" *That does not say any federal action. That says*
9 *"any action." To me, that language is clear.*

10 I think we've got a situation here that if we leave this language in the Bill, someone
11 who sues under the compact and feels like their property rights have been diminished
12 or personal rights have been diminished, you sue in tort. You go to state court. And I
13 think with this language here that says "any action" the State is immune from, would
14 apply in this situation. I think this is an important amendment. I understand the
15 concern about amendments, *but we've got language in this Bill now that basically*
16 *grants the State carte blanche immunity from anything. We're about to pass a*
17 *thousand page-plus bill with far-reaching implications, and we're going to grant*
18 *the State immunity. And we're going to do it with a 51 vote, I might add.* I think
19 this is an important amendment. It needs to go on. **Exhibit 3b**, pg. 9-10.

20 As the AGO is well aware, it cannot legislate or override legislative intent.

21 2. Plaintiffs admit that neither the United States Congress nor the Confederated
22 Salish and Kootenai Tribes have ratified the Compact. The State distorts Plaintiffs' argument
23 contained in their Brief in Response to CSKT's Motion to Intervene. (Ct. Doc. 60, pg. 5.) Its
24 argument is taken completely out of context. Plaintiffs stated that given the requirement that
any water compact must pass a progression of governmental approvals, the "Applicant's
[CSKT] expectation in the subject matter of this litigation is premature and purely
speculative." (Ct. Doc. 48, pg. 7.) The CSKT does not have standing to challenge the
Montana Legislature's vote under Mont. Const. Art. II, § 18. However, citizens of the State
certainly do have the right to challenge the Legislature's vote. Clearly, the State of Montana
thinks it has passed the Compact into law; otherwise, it would not have been signed into law
by the Governor nor would \$3,000,000.00 of taxpayer dollars have been appropriated for its

1 implementation. **Exhibit 6.** Today, absent judicial action declaring the vote on SB 262
2 unconstitutional, SB 262 is and will be the law in the State of Montana. But, it remains
3 unknown if it will ultimately be approved by the United States Congress or the Tribes.

4 3. The State admits that SB 262 is “a preliminary step to full implementation”.
5 (Ct. Doc. 60, pg. 6.) It further admits the Compact Implementation Technical Team
6 (“CITT”) is formed, meeting and performing duties authorized under Appendix 3.5. *Id.* That
7 is “*adaptive management*” which underlies the Compact.³ It then reasons that “neither the
8 CITT nor the Water Management Board will have authority to affect water use until the
9 Compact is fully implemented and a final decree is entered by the water court.” *Id.* The
10 language of the Compact appendices suggests otherwise:

11 3. Responsibilities of the Compact Implementation Technical Team.

12 a. **Planning, Design and Implementation of Adaptive Management Tools**
13 **Prior to the Effective Date—Upon formation,** the CITT shall engage in
14 **planning, design, and implementation of Adaptive Management prior to**
15 **the effective date** as settlement funds are appropriated. The CITT shall
16 design and implement these programs according to the schedule set forth in
17 Appendix 3.4. (Emphasis added.) **Exhibit 9.**

18 The express language of the appendices gives the CITT authority to begin implementation of
19 Adaptive Management. To suggest otherwise is a falsehood. Assuming that Congress, the
20 Tribes and the Montana Water Court approve the Compact, is the State suggesting that is the
21 time to challenge the constitutionality of the vote on SB 262? That is too little, too late.
22 Such a conclusion is nonsensical and a drain of judicial, legislative and administrative
23 resources (arguably including Montana taxpayers’ dollars).

24 ³ “Adaptive Management” is defined as “an ongoing process of decision-making based on water measurement,
and accounting designed to continuously manage and improve the allocation of water between Instream Flows,
Minimum Reservoir Pool Elevations, and FIIP Water Use Rights pursuant to the Adaptive Management
Appendix 3.5.” Mont. Code Ann. § 85-20-1901(2).

1 4. Finally, the WMB has ties to the CITT and CMC (Compact Management
2 Committee). Art. IV, G.5. states:

3 5. Disputes Related to Compact Implementation Team. The Parties agree to
4 perform each obligation set forth in this Compact in good faith and with
5 diligence and loyalty to this agreement. The Parties shall form a Compact
6 Management Committee (CMC) comprised of the Director of Montana
7 Department of Natural Resources, the Chairman of the Tribal Council, the
8 Regional Director of the Northwest Region of the Bureau of Indian Affairs
9 and their designees. The CMC will provide policy and administrative
10 oversight of the CITT.

11 a. The CITT shall attempt to reach consensus on all of its actions.

12 b. Where consensus is not achieved, the CITT will resolve disputed issues by
13 majority vote.

14 c. If the CITT vote results in a tie, or is appealed, the disputed issue will be
15 referred to the CMC. The CMC will review and attempt to reach consensus on
16 the disputed issue and if consensus is not possible, will resolve the issue by
17 majority vote.

18 d. A majority vote of the CMC may be appealed using the following
19 procedures:

20 i. Disputes arising out of any act, failure to act, error or omission of the BIA or
21 Project Operator involving Operational Improvements or Rehabilitation or
22 Betterment or otherwise affecting real property owned by the United States
23 may be appealed under Title 25, Part 2, Code of Federal Regulations.

24 ii. *For disputes raising questions of Compact interpretation, the CMC shall*
immediately seek a determination of those questions from the Water
Management Board, which determination will be provided in writing within
30 days.

 iii. *All other disputes may be appealed to a Court of Competent Jurisdiction.*
In considering a Petition for relief, a Court of Competent Jurisdiction will
review the CMC's legal conclusions for correctness and its factual findings
for abuse of discretion. (Emphasis added.) Mont. Code Ann. § 85-20-1901.

 In sum, disputes relating to the CITT, may be appealed to the CMC and those
disputes raising questions regarding Compact interpretation are to be resolved by the WMB.
The bodies are inextricably intertwined and ultimately impact each other.

1 **III. ART. IV, §I(8) GRANTS A NEW IMMUNITY.**

2 The State confuses the grant of immunity with a waiver of immunity. Art. IV, I(8)
3 (Implementation of Compact), provides that the State waives its immunities from suit except
4 that such waivers do not extend to any action for money damages, costs or attorneys' fees in
5 order to permit resolution of WMB matters:

6 Waiver of Immunity. The Tribes and the State hereby waive their
7 respective immunities from suit, including any defense the State shall
8 have under the Eleventh Amendment of the Constitution of the United
9 States, in order to permit the resolution of disputes under the Compact
10 by the Board, and the appeal or judicial enforcement of Board
11 decisions as provided herein, **except that such waivers of sovereign**
12 **immunity by the Tribes or the State shall not extend to any action**
13 **for money damages, costs, or attorneys' fees.** The parties recognize
14 that only Congress can waive the immunity of the United States and
15 that the participation of the United States in the proceedings of the
16 Board shall be governed by Federal law, including 43 U.S.C. § 666.
17 (Emphasis added.)

18 **Exhibit 1**, pg. 46, ll. 20-24; Mont. Code Ann. § 85-20-1901.

19 The State argues that no grant of immunity exists. However, the Legislature's conduct
20 suggests otherwise. For example, it could have simply included in SB 262's text that
21 Montana's general immunity laws applied; it could have included the Montana immunity
22 laws in their entirety in SB 262's text; it could have provided in SB 262's text that the State
23 is responsible for the conduct of its agents as set forth in Mont. Code Ann. § 2-9-305
24 (including the WMB, etc.) and/or it could have simply eliminated three words "or the State"
25 from the Compact. However, none of those things happened. In fact, the Legislature
26 actually declined to amend SB 262 to eliminate those three words. **Exhibit 3b.**

27 Plaintiffs' argument is simple with respect to Mont. Code Ann. § 85-20-1901, Art. V,
28 §B(11). The Compact's express terms state nothing in the Compact may be construed to
29 waiver sovereign immunity except as set forth in the Compact. It does not say that Montana

1 general immunity laws apply or provide interpretation or guidance. Rather, it states that
2 waiver of sovereign immunity is as expressly set forth in the Compact. *Id.* So, when that
3 provision is read in conjunction with Art. IV, I(8), it results in a newly created, stand-alone
4 immunity provision that limits any alleged waiver of sovereign immunity as “*expressly set*
5 *forth in this Compact.*” *Id.*

6 **IV. SO WHO IS RESPONSIBLE FOR THE WMB’S ACTIONS OR MONEY DAMAGES**
7 **RESULTING THEREFROM?**

8 It is undisputed that under SB 262 the State and Tribes *create* the WMB. (Ct. Doc.
9 51, pg. 9.) The Tribes claim it is a “unique multi-sovereign entity” and that the dual system
10 of water administration previously administered respectively by the State (State based rights)
11 and Tribal (tribal based rights) has been eliminated . *Id.* pg. 8-9. The WMB has exclusive
12 jurisdiction over all waters (federally, state or tribally derived) within the exterior boundaries
13 of the FIR. **Exhibit 1.** The State fails to answer the question: What is the WMB? But, it
14 does acknowledge that it is doubtful that the WMB would qualify as an agency of the State
15 or a local government due to its makeup. (Ct. Doc. 60, pg. 10 footnote 1.) The Tribes do not
16 appear to be willing to assume responsibility for the WMB’s actions. However, if the dual
17 system of water administration which exists under all other Montana water compacts had not
18 been replaced by the WMB and UMO, the State would undeniably be responsible for it or its
19 agents’ wrongdoings and the Tribes would be responsible for their or their agents’
20 wrongdoings. Further, while the State argues the WMB can be sued in State Court, the
21 Tribes disagree. (Oral Argument March 18, 2016.) Here, the WMB is all powerful, but
22 neither of its anticipated creators will assume responsibility for its conduct or for any money
23 damages which may arise therefrom. That is a grant of immunity to the State.

1 **V. THE STATE HAS CREATED A PANDORA’S BOX.**

2 To Plaintiffs knowledge, no other Montana water compact defines a “Court of
3 Competent Jurisdiction” as “a State or Tribal court that otherwise has jurisdiction over the
4 matter so long as the parties to the dispute to be submitted to that court consent to its
5 exercise of jurisdiction, but if no such court exists, a Federal court” which also eliminates
6 the dual system of water administration. Mont. Code Ann. § 85-20-1901(26). By virtue of
7 that definition the State has opened a Pandora’s box:

8 1. Under SB 262, the State along with the Tribes creates the WMB. It complains
9 the Plaintiffs’ arguments lack logic. Review and analysis of the State’s creation proves the
10 contrary. The State vests all of its prior duties, responsibilities, obligations and governmental
11 functions in the WMB, yet it fails to assume any responsibility for the WMB’s conduct.
12 Then it defines a “Court of Competent Jurisdiction” in such a manner so as to allow a party
13 to unilaterally refuse to submit to the jurisdiction of a state or tribal court without reason,
14 explanation or recourse. Then, a party may default to federal court whether or not
15 jurisdiction exists and be subject to the Eleventh Amendment’s limitations. By virtue of
16 adoption of SB 262, the State has created a Pandora’s box.⁴

17 2. The State relies upon the argument that Plaintiffs have failed to explain how
18 the State might effect a taking. (Ct. Doc. 51, pg. 3.) The Legislature understood. Allow us
19 to explain again: A water right is a valuable property right in Montana. *Roland v. Davis*,
20 2013 MT 148, ¶ 24, 370 Mont. 327, 392 P.2d 91. All water rights whether state, tribally or
21 federally derived are under the exclusive jurisdiction and control of the WMB, the entity to
22 which the State has abrogated all of its prior duties and responsibilities. **Exhibit 1.** So, if the

23 _____
24 ⁴ A source of many troubles: something that will lead to many problems. Merriam-Webster.

1 WMB's conduct results in the taking of a vested water right, who is responsible for
2 compensating the aggrieved party with money damages? Representative Essman succinctly
3 identified the issue during the April 15, 2015, House Chamber Session:

4 ...I think there are a couple of things that need to be clear in this compact to help
5 resolve some of this fight. And number one is that if vested rights are present,
6 they're protected. And number two, if litigation becomes necessary, it needs to be
7 clear which court you go to...But here's my concern. Article II, Section 18 of the
8 Montana Constitution basically states that the State has no immunity from lawsuit
9 unless the legislature specifically acts to create it. This language, I fear, can be
10 argued to create an immunity from lawsuit for actions for money damages, costs
11 or attorney's fees. That is why I felt a two-thirds vote was necessary.
12 Ultimately, that issue will probably be decided by the courts. But you know, I'm
13 not sure that the claim of vested rights are going to hold up...I'm not sure that a
14 takings of a water right will occur, but it might. And if those two things happen,
15 that injured party needs to have redress against the State of Montana for the
16 damages of [sic] the taking that's occurred. This language could be used to deny
17 that claim and, therefore, I think we should strike the words "or the State" so that
18 it's clear the State cannot assert an affirmative defense for a takings claim.
19 **Exhibit 3b**, pg. 3, ll. 18-25 and pg. 4, ll. 1-20.

20 No avenue for redress or recourse exists under the Compact in the event a taking of a water
21 right occurs.

22 **VI. ATTORNEYS' FEES ARE PROPER.**

23 An award of attorneys' fees and costs under the Montana Private Attorney General
24 Doctrine (the "Doctrine") is proper when constitutional interests are vindicated. *Baxter v.*
State, 2009 MT 449, 354 Mont. 234, 224 P.3d (2009); *Montanans for Responsible Use of*
School Trust v. State ex rel Bd. of Land Comm'rs, 1999 MT 263, 296 Mont. 402, 989 P.2d
(1999); and *Am. Cancer Society v. State*, 2004 MT 376, 325 Mont. 70, 103 P.3d 1085 (2004).
Here, the FJBC represents approximately 2,500 families located within the FIR. The instant
litigation serves to enforce the Montana Constitution as to equal access to courts, applying
due process and preventing the State from granting itself immunity absent a 2/3 vote of each

1 legislative branch. Protection of such constitutional interests is significant. Here, an award
2 of attorneys' fees is proper.

3 **CONCLUSION**

4 No genuine issues of material fact exist as to the constitutional violation arising from
5 the legislative vote allegedly approving SB 262. The State has effectively granted itself *carte*
6 *blanche* immunity for any action for money damages, attorneys' fees and costs. Art. II, § 18
7 of the Montana Constitution required that SB 262, which contained the subject immunity
8 provisions, pass by at least a 2/3 vote of each legislative house. That did not occur. As such,
9 the Court must grant Plaintiffs' motion for partial summary judgment in its entirety.

10 DATED this 21st day of March, 2016.

11 ROCKY MOUNTAIN LAW PARTNERS, PLLP

12
13 By: 

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15 Kristin L. Omgvig
16 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

I, Kristin L. Omgig, one of the attorneys of ROCKY MOUNTAIN LAW PARTNERS, PLLP, do hereby certify that on the 21st-day of March, 2016, 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.

<p>TIMOTHY C. FOX Attorney General ALAN JOSCELYN Deputy Attorney General DALE SCHOWENGERDT Solicitor General J. STUART SEGREST MATTHW COCHENOUR MELISSA SCHLICHTING Assistant Attorneys General 215 North Sanders P.O. Box 201401 Helena, MT 59620-1401 <i>Attorneys for Defendant State of Montana</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input type="checkbox"/> Other: E-Mail</p>
<p>JOHN B. CARTER DANIEL J. DECKER P.O. Box 278 Pablo, MT 59855 <i>Attorneys for Confederated Salish and Kootenai Tribes</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail (first class postage) <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Telefacsimile <input type="checkbox"/> Other: E-Mail</p>

