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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,

20 Plaintiffs,

21 vs.

22 STATE OF MONTANA,

23 Defendant

24 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)
(CONFEDERATED SALISH AND
KOOTENAI TRIBES)**

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 Confederated Salish and Kootenai Tribes' Response
23 Brief (the "Reply"). Plaintiffs respectfully ask the Court to grant their Motion for Partial
24

1 Summary Judgment in its entirety and deny the Confederated Salish and Kootenai Tribes'
2 Motion for Summary Judgment in its entirety.

3 **ARGUMENT**

4 **I. THE MONTANA 64TH LEGISLATURE'S INTENT WAS TO GRANT THE STATE**
5 **CARTE BLANCHE IMMUNITY UNDER SB 262.**

6 The Tribes argue that the Flathead Reservation Water Management Board ("WMB") is
7 a "multi-sovereign entity" which may never come into existence. (Ct. Doc. 57, pg. 3.) And,
8 that while it is created by both the State and Tribes, "neither the State, the Tribes, nor the
9 United States has any authority to act unilaterally as an independent sovereign for Board
10 duties." *Id.* No question exists that the State of Montana ("State") believes it has enacted SB
11 262 as codified at Mont. Code Ann. §§ 85-20-1901 and 1902. It is implementing the
12 Compact. As such, the Tribes' argument is a red herring. Significantly, both the Tribes and
13 the State avoid the overriding question in this case:

14 **WHO IS RESPONSIBLE FOR THE WMB'S CONDUCT AND ANY MONEY**
15 **DAMAGES THAT MAY BE AWARDED AGAINST IT?**

16 Under the Tribes' own reasoning, no sovereign (State, Tribes or United States) bears the
17 financial responsibility for any money damages awarded against the WMB. Further, both
18 the State and the Tribes disagree as to whether or not the WMB can even be sued in state
19 court. See Oral Argument March 18, 2016. This is the quintessence of a *carte blanche* grant
20 of immunity to the State.

21 1. The Tribes reason that while the WMB will be empowered to permit new
22 water uses, issue changes of water use, issue leases and create groundwater protection areas
23 within the Flathead Indian Reservation ("FIR") the WMB does not impact the water used by
24

1 the Flathead Irrigation Project. *Id.* That is not exactly accurate. The language of the
2 Compact appendices suggests otherwise:

- 3 3. Responsibilities of the Compact Implementation Technical Team.
- 4 a. **Planning, Design and Implementation of Adaptive Management Tools**
5 **Prior to the Effective Date**—Upon formation, the CITT shall engage in
6 planning, design, and implementation of Adaptive Management prior to
7 the effective date as settlement funds are appropriated. The CITT shall
8 design and implement these programs according to the schedule set forth in
9 Appendix 3.4. (Emphasis added.) **Exhibit 9.**

10 The express language of the appendices gives the CITT authority to begin implementation of
11 Adaptive Management. The WMB has ties to the CITT and CMC (Compact Management
12 Committee). Art. IV, G.5. states:

- 13 5. Disputes Related to Compact Implementation Team. The Parties agree to
14 perform each obligation set forth in this Compact in good faith and with
15 diligence and loyalty to this agreement. The Parties shall form a Compact
16 Management Committee (CMC) comprised of the Director of Montana
17 Department of Natural Resources, the Chairman of the Tribal Council, the
18 Regional Director of the Northwest Region of the Bureau of Indian Affairs
19 and their designees. The CMC will provide policy and administrative
20 oversight of the CITT.
- 21 a. The CITT shall attempt to reach consensus on all of its actions.
- 22 b. Where consensus is not achieved, the CITT will resolve disputed issues by
23 majority vote.
- 24 c. If the CITT vote results in a tie, or is appealed, the disputed issue will be
referred to the CMC. The CMC will review and attempt to reach consensus on
the disputed issue and if consensus is not possible, will resolve the issue by
majority vote.
- d. A majority vote of the CMC may be appealed using the following
procedures:
- i. Disputes arising out of any act, failure to act, error or omission of the BIA or
Project Operator involving Operational Improvements or Rehabilitation or
Betterment or otherwise affecting real property owned by the United States

1 may be appealed under Title 25, Part 2, Code of Federal Regulations.

2 ii. *For disputes raising questions of Compact interpretation, the CMC shall*
3 *immediately seek a determination of those questions from the Water*
4 *Management Board, which determination will be provided in writing within*
5 *30 days.*

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

10 So, disputes relating to the CITT (which may include irrigation water issues) regarding
11 Compact interpretation may be appealed to the CMC and those disputes raising questions
12 regarding Compact interpretation are to be resolved by the WMB. Some disputes may be
13 appealed under Title 25, Part 2, Code of Federal Regulations¹ or to a Court of Competent
14 Jurisdiction--which as stated in prior briefing creates its own problems. The CITT which is
15 also an entity established to plan and advise the project operator on the implementation of
16 FIIP Operational Improvements, Rehabilitation and Betterment, and Adaptive Management
17 is comprised of state, tribal and federal appointees and an irrigator appointee. Mont. Code
18 Ann. § 85-20-1901(24). These entities (WMB, CITT and CMC) are inextricably intertwined
19 and ultimately impact each other. To suggest otherwise is disingenuous at best.

20 2. Finally, Plaintiffs have a significant personal stake in the outcome of this
21 litigation and the threat of economic harm. *Missoula City-County Air Pollution Control*
22 *Board v. Board of Environmental Review*, 282 Mont. 255, 937 P.2d 463, (1997); *Montana*
23 *Human Rights Div. v. City of Billings*, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982);

24 _____
¹ While disputes relating to "Operational Improvements" and "Rehabilitation and Betterment" are appealable under Title 25, Part 2, Code of Federal Regulations, it does not appear to include disputes relating to "Adaptive Management" or the interpretation thereof under the Compact (a role designated to the WMB) which is the "ongoing process of decision-making base 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.

1 *Rosebud Cty. v. Dept. of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993) *Gryzan v. State*, 283
2 Mont. 433, 949 P.2d 112 (1997); and *Reichert v. State*, 2012 MT 111, ¶ 53, 365 Mont. 92,
3 278 P.3d 455.

4 **II. UNDER SB 262, EVEN PERSONS WITH STANDING HAVE NO AVENUE FOR**
5 **RECOURSE.**

6 1. The Tribes argue that persons with standing who have suffered an injury as a
7 result of the WMB's actions will have a remedy. In support they cite *ex Parte Young*, 209
8 U.S. 123 (1908). The Plaintiffs agree that case affords injured parties non-monetary
9 injunctive and declaratory relief. But what about money damage awards? The Tribes state
10 “[s]imilarly, in this Compact, as in all others, no one can seek monetary relief.” (Ct. Doc. 57,
11 pg. 4.) But again, this Compact is a unique animal comprised of multi-sovereign entities
12 wherein the dual system of water administration has been eliminated. Under all other
13 Montana water compacts, the State retained responsibility for its agents. Not here however.
14 Rather the State has achieved absolute immunity under SB 262 as there is no conceivable
15 way that money damages can be awarded against the State.

16 Further, the Tribes argue that because the Flathead Joint Board of Control represents
17 irrigators “injury will likely not arise under the Compact or actions of the Board” but rather
18 may suffer injury as a result of BIA action. *Id.* That argument is absurd. The CITT, CMC
19 and WMB by virtue of the express language of the Compact control the FIR waters and
20 affect Instream Flows, Adaptive Management, Operational Improvements, Rehabilitation and
21 Betterment, administration of all use of water rights on the FIR, Minimum Reservoir Pool
22 Elevations and the like. See: Mont. Code Ann. §§ 85-20-1901 and 1902. These factors
23 affect irrigation water and will likely trigger interpretation of the Compact. Disputes relating
24

1 to Compact interpretation by the CIIT are appealable to the WMB. And, ultimate liability
2 questions are to be determined by a Court of Competent Jurisdiction. In sum, Plaintiffs
3 possess standing to bring this action.

4 2. During oral argument on March 18, 2016, the Court inquired regarding the
5 applicability of *State ex rel. City of Havre v. District Court of Twelfth Judicial District*, 187
6 Mont. 181, 609 P.2d 275 (1980) which was subsequently overruled by *Cantrell v.*
7 *Henderson*, 221 Mont. 201, 718 P.2d 318 (1986). In sum, Montana law holds that dismissal
8 of an employee “with prejudice” does not release the employer from liability under the
9 theory of *respondeat superior* unless the documents intend to do so, payment is full
10 compensation or the release so provides. *Id.* at 321. Here, the WMB as a “multi-sovereign”
11 entity is comprised of state, tribal and federal appointees. Acts of the WMB are appealable
12 to a “Court of Competent Jurisdiction”. Hypothetically speaking if the WMB as a whole or a
13 member thereof committed an action subjecting it to a money damage claim, the action
14 would properly lie against the WMB since that is the entity to which any appointee (state,
15 tribal or federal) is ultimately responsible, but that does not translate into a claim against the
16 State. While an *ultra vires* action may lie against the State for an agent’s conduct outside of
17 the appointee’s scope of agency, actions by the WMB (or its agents) performed in the course
18 of their agency would properly lie against the WMB, since it is the WMB that is the principal
19 to which the appointees act as agents. Further, the WMB is a multi-sovereign entity which
20 the Tribes argue could not be sued in state court. To the contrary, the State believes the
21 WMB could be sued in state court. However, neither the State nor the Tribes have accepted
22 responsibility for the WMB’s actions as a whole or on behalf of any appointee thereof under
23 SB 262. For those reasons, *Cantrell* does not apply.

1 **III. SEVERING THE IMMUNITY PROVISIONS MUTILATES THE STATUTE AND DOES**
2 **NOT SOLVE THE PROBLEM.**

3 The Tribes argue that because SB 262 consisted of approximately 144 pages, the Court
4 should consider its size in determining if the Legislature violated the Montana Constitution.
5 While an interesting argument, Plaintiffs have been unable to find any law to support the
6 argument that the size or weight of a bill is a determining factor when analyzing its
7 constitutionality. That argument is a non-starter. As this Court is well aware, legislative
8 intent is key. In *Ayotte v. Planned Parenthood of N. England*, 546 U.S. 320 (2006), the
9 United States Supreme Court set forth three (3) interrelated principles to provide guidance as
10 to the severability of a statute:

- 11 1.) a Court should try not to nullify more of a legislature's work than is necessary
12 because "we know that '[a] ruling of unconstitutionality frustrates the intent of the
13 elected representatives of the people'";
14 2.) a Court must restrain itself from "rewriting state law to conform it to
15 constitutional requirements"; and
16 3.) the touchstone for any decision about a remedy is legislative intent, because a
17 court cannot "use its remedial powers to circumvent the intent of the legislature." *Id.*
18 at 329-330.

17 In that case, the United States Supreme Court expressly recognized the need to honor
18 legislative intent when analyzing remedies involving severability clauses. Here, the Montana
19 64th Legislature's intent could not have been any clearer.

20 The Tribes suggest that the Court could merely strike the phrase "except that such
21 waivers of immunity by the Tribes and [or] the State shall not extend to any action for money
22 damages, costs and attorney's fees." (Ct. Doc. 57, pg. 6.) The proposed remedy is a
23 complete violation of the Legislature's intent. On April 15, 2015, Representative Essman
24

1 proposed an amendment which would have resulted in an even less extensive alteration to SB
2 262 to remove “or the State” from the phrase the Tribes now suggest the Court strike in its
3 entirety:

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

11 The Legislature struck down the amendment indicating its clear intent to preserve the
12 immunity provisions (as applied to the State) of the Compact. Suggesting the Court strike
13 the above referenced phrase obliterates the Legislature’s intent. And, it is not this Court’s
14 role to rewrite state law or override legislative intent.

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

17 Finally, the Tribes criticize the Plaintiffs’ statement of facts. Yet again, the Tribes
18 fail to address the overriding question in this case: **Under SB 262 who is responsible for
19 the WMB’s actions or money damages resulting therefrom?** Plaintiffs provide the
20 following with respect to their statement of facts:

21 1. Fact 21:

22 SB 262 creates a new governing law over the lands within the Flathead Indian
23 Reservation (“FIR”) termed the “Unitary Management Ordinance” (“UMO”). The
24 new law of administration which will be enforced by a newly created Water
Management Board (“WMB”) comprised of political appointees. **Exhibit 1.**

1 The Tribes misconstrue the statement. It is true that SB 262 creates a new governing law
2 called the UMO “which will be enforced by a newly created” WMB. SB 262 is law in the
3 State of Montana. While the WMB may not yet be created, the CITT has been created and it
4 has the power to implement Adaptive Management before Congress or the Tribes ratify SB
5 262.

6 3. Responsibilities of the Compact Implementation Technical Team.

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

11 The express language of the appendices gives the CITT authority to begin implementation of
12 Adaptive Management. Imminent threat of harm is sufficient to provide a party with
13 standing². *Missoula City-County Air Pollution Control Board v. Board of Environmental*
14 *Review*, 282 Mont. 255, 937 P.2d 463, (1997); *Montana Human Rights Div. v. City of*
15 *Billings*, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982); *Rosebud Cty. v. Dept. of Revenue*,
16 257 Mont. 306, 849 P.2d 177 (1993) *Gryzan v. State*, 283 Mont. 433, 949 P.2d 112 (1997);
17 and *Reichert v. State*, 2012 MT 111, ¶ 53, 365 Mont. 92, 278 P.3d 455.

18 2. Fact 22:

19 SB 262 enacts and creates a new administrative regulatory body termed the “Flathead
20 Reservation Water Management Board” (“WMB”)³, designed to control all water
rights (whether state, federal or tribally derived) within the FIR. It consists of: the

21 ² The Tribes submit the Affidavit of Peter L. Plant, Assistant Manager of the Flathead Irrigation Project, Bureau
22 of Indian Affairs. The Affidavit recognizes the existence of the CITT and that Mr. Plant as the FIP Assistant
Manager has been appointed as a CITT member. Given the CITT’s authorization to implement Adaptive
Management prior to the “effective date” creates an imminent threat of harm.

23 ³ “Flathead Reservation Water Management Board” is defined as “the entity established by this Compact and
24 the Law of Administration to administer the use of all water rights on the Reservation upon the Effective Date.”
Mont. Code Ann. § 85-20-1901(34).

1 WMB, a Water Engineer, any Designee⁴, and Water Commissioners. **Exhibit 1**, pg.
2 40. The WMB is the “exclusive regulatory body on the Reservation for the issuance
3 of Appropriation Rights, authorizations for Change in Use of Appropriation Rights
4 and Existing Uses.” *Id.*; Mont. Code Ann. § 85-20-1901 I.1. In sum it is a *quasi*-
state/tribal entity consisting of five (5) members: two (2) selected by the Governor of
Montana; two (2) appointed by the CSKT Tribal Council and one (1) selected by the
other four (4) members. *Id.* Its’ powers include, but are not limited to:

- 5 • Exclusive regulatory body for the issuance of Appropriation Rights
6 and authorizations for Changes in Use of Appropriation Rights and
7 Existing Uses and for the administration and enforcement of all
8 Appropriation Rights and Existing Uses **Exhibit 1**, pg. 40;
- 9 • Exclusive jurisdiction to resolve any controversy over the meaning and
10 interpretation of the Compact, any controversy over the right to the use
11 of water as between the Parties or between or among holders of
12 Appropriation Rights and Existing Uses on the Reservation. *Id.*;
- 13 • Power to promulgate procedures, prescribe forms, develop additional
14 materials and implement amendments thereto to carry out its assigned
15 functions under the Compact and the Law of Administration. *Id.* pg.
16 43;
- 17 • Power to hold hearings, take evidence, administer oaths, compel
18 attendance of witnesses and to appoint technical experts. *Id.*⁵;
- 19 • Power to determine any controversy and grant declaratory or
20 injunctive relief. *Id.* pg. 44;
- 21 • While it does not have the power to award money damages, attorneys’
22 fees or costs, it does have the power to award any kind of equitable
23 relief. *Id.*;
- 24 • Power to appoint one or more water commissioners to provide day-to-
day administration of the water on the Reservation. *Id.*;
- Impose conditions on future use of any Appropriation Rights. *Id.*
pg.124; and

⁴ The term “Designee” is defined as “an individual selected by the Engineer to exercise, in regard to a particular application or objection, those powers assigned to the Engineer under Chapter II of this Ordinance. Any Staff is eligible to be selected as a Designee provided that he or she has not previously worked on the particular application or objection at issue.” Mont. Code Ann. § 85-20-1902(14).

⁵ Neither the Federal nor Montana Rules of Evidence apply as the Board is allowed to consider hearsay evidence. **Exhibit1**.

- 1 ▪ Revoke or suspend Appropriation Rights. *Id.* pg.125.

2 The Tribes complain and assert that the WMB does not control all water rights within the
3 FIR. Plaintiffs submit that by virtue of SB 262's express language, the WMB is "the entity
4 established by this Compact and the Law of Administration to administer the use of all water
5 rights on the Reservation upon the Effective Date." Mont. Code Ann. § 85-20-1901(34). In
6 any event, the fact is not determinative as to the question before this Court.

7 The Tribes' next complaint centers on part of Plaintiffs' arguments, not stated facts.
8 The argument pertains to the elimination of the dual system of water administration found in
9 all other Montana water compacts. Simply put, the Compact eliminates those bodies/laws
10 and the effect of SB 262 is to place primary, if not exclusive, control in the CITT, WMB
11 and/or CMC. In any event, the fact is not determinative as to the merits of the question
12 pending before this Court on summary judgment.

13 3. Fact 31:

14 The Compact further abolishes the dual sovereign water administration system by
15 eliminating applicability of Montana's Water Use Act and by stripping the Montana
16 Water Court's jurisdiction. **Exhibit 1.**

17 The Tribes have submitted the following "Undisputed Material Facts":

- 18 2. The 2015 Montana Legislature passed the Compact and Unitary
19 Administration and Management Ordinance ("UAMO") in S.B. 262 by less
20 than a 2/3 vote in each House. (citation omitted.)
- 21 6. All prior Compacts have a "dual sovereign" administrative system where
22 Montana acts on its own under the Montana Water Use Act and the
23 compacting tribe acts on its own under tribal law. (citation omitted).
- 24 7. In this Compact Montana does not act on its own under the Montana Water
Use Act nor do the Tribes act on their own under Tribal law. (citation
omitted.)

1 8. Under the Compact, neither Montana nor the Tribes administer or manage
2 Reservation water independent of each other. Rather they have created⁶ the
3 Water Management Board, comprised of State, Tribal and Federal
4 representatives to act as a collective body under the UAMO, not the Montana
5 Water Use Act. (citation omitted.)

6 The statements are strikingly similar. And while the Compact may contain a disclaimer as to
7 adjudication of rights in the Montana Water Court, the overriding provisions of the Compact
8 place the power to “*administer the use of all water rights on the Reservation upon the*
9 *Effective Date*” with the WMB. Mont. Code Ann. § 85-20-1901(34). See also: Mont. Code
10 Ann. § 85-20-1901(I) authorizing establishment of Flathead Reservation Water Management
11 Board, Jurisdiction and its Powers and Duties etc. Administration occurs under a new law of
12 administration as admitted by the Tribes.

13 Next, the Tribes complain about the Plaintiffs’ arguments contained in their briefing.
14 Plaintiffs respond as follows:

- 15 1. Page 2: “The WMB is above the law”. As defined, the WMB possesses judicial,
16 legislative, enforcement and administrative powers.” Mont. Code Ann. § 85-20-
17 1901(I)(5) and (6). It will administer the use of all water rights on the FIR. Mont.
18 Code Ann. § 85-20-1901(34). WMB decisions are appealable to a “Court of
19 Competent Jurisdiction” which may be state or tribal court as long as everyone
20 agrees to the jurisdiction. During oral argument on March 18, 2016, the State’s
21 attorney testified that he believes the WMB can be sued in state court. The
22 Tribes’ attorney testified he did not believe the WMB could be sued in state court.
23 The State and the Tribes cannot even agree regarding jurisdiction over the WMB

24 ⁶ The Tribes criticize the Plaintiffs’ grammatical use of the word “create” in the context of their briefing.
 Plaintiffs submit the Tribes are using similar context and terminology.

1 and the anticipated creators have certainly not agreed to assume monetary damage
2 responsibility for its conduct, torts or the like. The WMB is arguably above the
3 law.

4 2. Page 5: Source of WMB funding. Undeniably, tax dollars will be used to fund
5 the Compact and WMB. Mont. Code Ann. § 85-20-1901 Art. VI provides that the
6 State's "contribution to settlement shall be \$55 million." The Tribes and United
7 States are also anticipated to contribute. *Id.* While the sole source of funding may
8 not be tax dollars, Plaintiffs qualify and contend that a significant portion of the
9 State's funding would come from public funds, certainly not private funds.

10 3. Page 11: Compact does not quantify the Tribes' water rights. The Plaintiffs'
11 argument was submitted in direct response to the Tribes' suggestion that the
12 Compact quantifies the Tribes' water rights. (Ct. Doc. 51, pg. 11.) Plaintiffs are
13 entitled to respond in kind to the Tribes' unsupported suggestions. However, that
14 is a question of fact, which Plaintiffs submit is not necessary for determination of
15 the question pending before this Court on summary judgment (*i.e.* grant of
16 immunity to the State and application of the Montana Constitution).

17 4. Page 15: Board's exclusive authority over state, federal and tribal water rights on
18 FIR. The Tribes complain about an inadvertent mis-cite in Plaintiffs' briefing.
19 (Ct. Doc. 57, pg. 8.)⁷ The WMB is defined as "the entity established by this
20 Compact and the Law of Administration to administer the use of all water rights
21 on the Reservation upon the Effective Date." (Emphasis added.) Mont. Code
22 Ann. § 85-20-1901(34). It will possess "[e]xclusive jurisdiction over the issuance
23

24 ⁷ The actual citation should have been Exhibit 1, pg. 56 not Exhibit 1, pg. 76.

1 of all new Appropriation Rights on the Reservation.” Mont. Code Ann. § 85-20-
2 1901(I)(4). It possesses judicial powers, administrative powers, legislative
3 powers and enforcement powers. Mont. Code Ann. § 85-20-1901(I)(5). The new
4 Law of Administration found at Mont. Code Ann. § 85-20-1902, § 1-1-101(3)
5 (also found at page 56 of Exhibit 1) which is administered by the WMB states:

6 Upon the Effective Date of this Compact, this Ordinance *shall govern all*
7 *water rights, whether derived from tribal, state or federal law and shall*
8 *control all aspects of water use*, including all permitting of new uses, changes
9 of existing uses, enforcement of water right calls and all aspects of
10 enforcement within the exterior boundaries of the Flathead Indian
Reservation. Any provisions of Title 85, MCA, that is inconsistent with this
Law of Administration is not applicable within the Reservation. (Emphasis
added.)

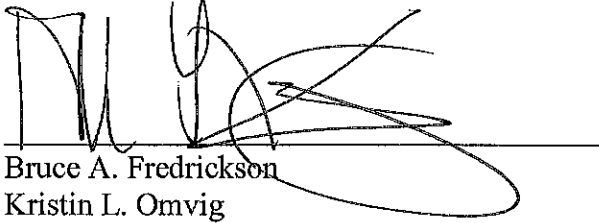
- 11 5. Pages 15-16: WMB not subject to Montana Constitution. The Tribes complain
12 that Plaintiffs have asserted that the Tribes argue that the WMB is not subject to
13 the Montana Constitution. Rather, they distinguish between Mont. Art. II, § 18
14 and the Montana Constitution as a whole. Plaintiffs submit this is an argument
15 without a distinction. First, the State of Montana IS subject to the Montana
16 Constitution, including but not limited to Mont. Art. II, § 18. The Tribes’
17 attorney has testified during the March 18, 2016, oral argument that it is the
18 Tribes’ position that the WMB cannot be sued in state court. At base however,
19 the question before this Court is whether or not Mont. Art. II, § 18 applies to SB
20 262. It appears the parties agree as to that question. So, further debate is not
21 required.

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provisions, pass by at least a 2/3 vote of each legislative house. That did not occur. As such,
the Court must grant Plaintiffs' motion for partial summary judgment in its entirety.

DATED this 23rd day of March, 2016.

ROCKY MOUNTAIN LAW PARTNERS, PLLP

By: 
Bruce A. Fredrickson
Kristin L. Omgig
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, Kristin L. Omgvig, one of the attorneys of ROCKY MOUNTAIN LAW PARTNERS, PLLP, do hereby certify that on the 23rd 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.

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>	<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
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