IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No.: DA 16-0516

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

Plaintiffs/Appellants/Cross-Appellees,

vs.

STATE OF MONTANA,

Defendant/Appellee/Cross-Appellant,

and

CONFEDERATED SALISH AND KOOTENAI TRIBES,

Intervenor.

On Appeal from the Twentieth Judicial District Court, Lake County
Cause No.: DV-15-73

APPELLANTS' OPENING BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it determined the Waiver of Immunity provision contained in Senate Bill 262 (Mont. Code Ann., § 85-20-1901, Art. IV.I.8) did not grant the State a new immunity?

2. Did the District Court err when it determined the Immunity from Suit provision contained in Senate Bill 262, Mont. Code Ann., § 85-20-1902. 1-2-111, while unconstitutional, was severable?

STATEMENT OF THE CASE

The District Court action is captioned *Flathead Joint Board of Control and Jerry Laskody, Boone Cole, Tim Orr, Ted Hein, Bruce White, Shane Orien, Wayne Blevins and Gene Posivio, all members of the Flathead Joint Board of Control, Plaintiffs, vs. State of Montana, Defendant*, Montana Twentieth Judicial District Court, Lake County, Montana, Civil Cause No. DV-15-73. The Confederated Salish and Kootenai Tribes (the "Tribes") joined as intervenors. The action involves claims by the Flathead Joint Board of Control ("FJBC") against the State of Montana ("State") pertaining to Senate Bill 262 ("SB 262"), a 2015 legislative bill designed to create legislation entitled:

> *An Act Ratifying a Water Rights Compact Entered Into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the State of Montana, and the United States of America; Creating a Unitary Administration and Management Ordinance to Govern Water Rights on the Flathead Reservation Providing Exceptions from Certain State Water Laws Related to Department Powers, Judicial Enforcement, and Water Rights Permitting; Amending Sections 3-7-211, 85-2-111, 85-2-114, 85-2-301, 85-*

2-302, 85-2-306, 85-2-506, and 85-5-110, MCA and Providing an Immediate Effective Date.

Specifically, the controversy centers around whether or not SB 262 required a two-thirds vote of each legislative house in order to pass constitutional muster because it granted new immunities to the State. Mont. Const. Art. II, §18. (R @ 1) (Complaint-App. 1)

In summary, the District Court granted partial summary judgment in favor of the FJBC finding that the Immunity from Suit provision improperly granted the State a new immunity absent a two-thirds approval of each legislative house, while further determining the provision was severable. It also granted partial summary judgment in the State and Tribes' favor as to the Waiver of Immunity provision determining that it did not grant the State a new immunity. Order on Motions for Summary Judgment (R @ 69) (Order-App. 2) and Final Judgment (R@72) (App.3.)

STATEMENT OF FACTS

Plaintiff, the Flathead Joint Board of Control ("FJBC"), is the joint board of operations for the Flathead Irrigation District (FID), Mission Irrigation District (MID) and Jocko Valley Irrigation District (JVID) (collectively "the Districts"), which are elected local government bodies under Montana law generally empowering irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters, including relations

with the United States, the State of Montana and irrigation project operations. *See generally* Title 85, Chapter 7, Parts 1 through 22, Montana Code Annotated (2015). As the Districts' operating agent, the FJBC possesses the powers and duties of the Districts, including but not limited to, the authority to institute any action or proceeding proper to carry out the provisions of Chapter 7, Title 85, MCA, and to enforce and maintain, protect, or preserve any and all rights, privileges, and immunities created by that Chapter. Mont. Code Ann., §85-7-1612. The remaining Plaintiffs are FJBC board members, property owners and irrigators. (R @ 1) (App. 1 @ 3.)

SB 262 introduced during the 2015 Montana legislative session allegedly enacted the Confederated Salish and Kootenai-Montana Compact. The legislation consists of the Water Compact ("Compact") (Mont. Code Ann., §85-20-1901 *et seq.*) and the Water Resources Conservation, Development and Administration Law ("New Law of Administration") (Mont. Code Ann., § 85-20-1902 *et seq.*).

Significantly, SB 262 contained two immunity provisions. The Compact contains the Waiver of Immunity provision codified at Mont. Code Ann., § 85-20-1901, Art. IV.I.8:

> 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 the 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.

The New Law of Administration contains the Immunity from Suit provision codified at Mont. Code Ann., § 85-20-1902.1-2-111:

> 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.

The Compact does not contain a severability clause. Mont. Code Ann., § 85-20-1901. However, the New Law of Administration contains a severability clause. Mont. Code Ann., § 85-20-1902.1-1-113.

On February 26, 2015, the Montana Senate passed SB 262 with less than a two-thirds vote. (R @ 53) (App. 4 @ 293) Then, the Senate transmitted SB 262 to the House of Representatives. A question arose regarding whether or not the two immunity provisions required a two-thirds vote of each legislative house to pass constitutional muster. Mont. Const. Art. II, § 18. On April 14, 2015, the Solicitor General's Office opined the Waiver of Immunity provision was essentially

boilerplate language and the Mont. Const. Art. II, § 18 had been *"drained of any significant meaning"*. (R @ 53) (App. 4 @ 220.)

On April 15, 2015, Representative Jeff Essman proposed an amendment to remove "or the State" from Art. IV.I.8 (Waiver of Immunity). (R @ 53) (App. 4 @ 340.) The amendment was defeated. (R @ 53) (App. 4 @ 371-387.) On April 16, 2015, the House voted to approve SB 262 with a less than a two-thirds vote. Mont. Const. Art. II, §18. (R @ 53) (App. 4 @ 293.) SB 262 possessed an immediate effective date. (*Id at* 46.)

Absent a specific law or statute conferring immunity upon the State, it does not possess immunity from suit. Rather, Mont. Const. Art. II, § 18 requires a two-thirds vote of each legislative house to immunize the State from suit:

> **Section 18. State subject to suit**. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature.

SB 262 grants immunity to the State of Montana with respect to suits for any action for money damages, costs or attorneys' fees. Mont. Code Ann., § 85-20-1901, Art. IV.I.8. And, it limits any alleged waiver to only those waivers expressly stated therein:

> B. General Disclaimers. Nothing in this Compact shall be construed or interpreted:

> 11. To constitute a waiver of sovereign immunity by the Tribes or the State except as expressly set forth in this Compact.

(*Id.* at Art. V.B.11.)

The new administrative regulatory body termed the "Flathead Reservation Water Management Board" ("WMB")[1] controls all water rights (whether state, federal or tribally derived) within the Flathead Indian Reservation ("FIR"). Mont. Code Ann., § 85-20-1902.1-1-101.3. The Compact further creates positions for a Water Engineer, Designees, and Water Commissioners. Mont. Code Ann., § 85-20-1901, Art. IV.I and Mont. Code Ann., § 85-20-1902.1-2-102. The WMB is the "exclusive regulatory body on the Reservation for the issuance of Appropriation Rights, authorizations for Change in Use of Appropriation Rights and Existing Uses." Mont. Code Ann., § 85-20-1901, Art. 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 Tribes' Council and one (1) selected by the other four (4) members. Mont. Code Ann., § 85-20-1901, Art. IV.I.2. The Compact alleged to grant immunity to those authorizing, administering, allocating and enforcing water rights (whether derived from state, federal or tribal law) on the FIR, which includes governmental entities and politically appointed boards. Mont.

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[1] "Flathead Reservation Water Management Board" is defined as "the entity established by this Compact and 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).

Code Ann., § 85-20-1901, Art. IV.I.8 and Mont. Code Ann., § 85-20-1902. 1-2-111. The Compact abolishes the dual sovereign water administration system (*i.e.* Montana Water Court) and essentially eliminates application of the Montana Water Use Act. Mont. Code Ann., § 85-20-1902.1-1-101.3.

No other water compact adopted by the State of Montana vests a politically appointed board with complete control over all water rights whether derived under federal, state or tribal law. *Id.*; See also Mont. Code Ann. Title 85, Chapter 20. All other water compacts adopted by Montana have passed by a two-thirds, or greater, vote of each legislative house. Other water compacts also *implement* a dual sovereign water administration system where the Montana Water Use Act regulates state based rights and non-tribal water use while a tribal water code regulates the use of the respective tribe and tribal members. Chapter 20, Title 85, Parts 1-18, MCA. The State has already started implementing the Compact. (R @ 53) (App. 4 @ 397-404.)

STANDARD OF REVIEW

The Supreme Court reviews de novo a district court's grant of summary judgment. *Modroo v Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, ¶ 19 191 P.3d 389, ¶ 19. The court views the evidence in the light most favorable to the party opposing summary judgment, and draws all reasonable inferences in favor of the party opposing summary judgment. *Id.* Summary

judgment is only proper when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. M.R.Civ.P. 56(c)(3).

SUMMARY OF ARGUMENT

The District Court improperly used its remedial powers to circumvent the plain language of the statute, while ignoring the Montana Legislature's express intent, when it analyzed the Waiver of Immunity provision contained in the Compact. Mont. Code Ann., § 1-2-101. Further, analyzing the Compact's mechanical workings, the District Court erred when it held the Waiver of Immunity provision did not constitute a new grant of immunity to the State because the Compact's terms totally eliminate a party's right to obtain money damages against the State, resulting in a complete grant of immunity to the State for any action seeking money damages.

Absent a specific law or statute conferring immunity, the State does not possess immunity from suit. Rather, the Montana Constitution requires a two-thirds vote of each legislative house to immunize the State from suit. Mont. Const. Art. II, § 18. However, notwithstanding its passage by less than a two-thirds vote, the Compact clearly grants the State immunity with respect to suits for any action (without limitation) for money damages, costs or attorneys' fees. Mont. Code

Ann., § 85-20-1901, Art. IV.I.8. In its Order the District Court wrongly commandeered the Legislature's *"apparent intent"* concluding its intent was to provide a limited waiver of its sovereign immunity granted under the Eleventh Amendment to the U.S. Constitution. The District Court acknowledged that outside of the Compact, neither the State nor its political subdivisions are immune from suit in state court for monetary damages for injury to person or property. Despite that, the District Court improperly used its remedial powers to legislate and alter the plain language of the immunity statute.

Next, the District Court improperly analyzed the Compact's mechanical workings, which in conjunction with the definition of a "Court of Competent Jurisdiction" as defined under the Compact, fully immunizes the State from liability for monetary damages, costs and/or attorneys' fees. Mont. Code Ann., § 85-20-1901, Art. IV.I.8. The Compact creates a unilaterally one-sided, never-ending maze which completely eliminates a party's right to recover monetary damages against the State, unless the State (and anyone else who may be made a party to the action *i.e.* the Tribes) agrees to be sued in a Montana state district court. The State is not required to consent to a state district court's jurisdiction. As a result, a wronged party may never gain access to a court with jurisdiction sufficient to award monetary damages.

The District Court properly ruled the Immunity from Suit provision, contained in the New Law of Administration, unconstitutional. However, it erred when it determined that § 1-2-111 was severable because merely severing Mont. Code Ann., § 85-20-1902.1-2-111, does not resolve the problem because removal of that immunity provision affects the legislation's integrity and does not cure the *carte blanche* grant of immunity to the State. Further, the Compact itself does not contain a severability clause and the Court erred when it applied the severability clause contained within the New Law of Administration to the Compact itself.

The legislation, in its entirety, operates to immunize the State from any responsibility for money damages. Specifically, the Compact creates a new administrative hierarchy including the WMB, with defined judicial enforcement authority, which is responsible for administering the New Law of Administration. Mont. Code Ann., § 85-20-1901. The New Law of Administration governs the unitary administration and management of water on the FIR. Mont. Code Ann., § 85-20-1902. While it contains various appeal processes, it also prohibits the administrative bodies from awarding money damages. In sum, the legislation operates to eliminate a party's right to obtain money damages in any forum. The Court's Order should be reversed as more particularly set forth herein.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DETERMINED THE COMPACT'S WAIVER OF IMMUNITY PROVISION DID NOT GRANT THE STATE A NEW IMMUNITY.

The District Court improperly used its remedial powers to circumvent the plain language of the statute, while ignoring the Montana Legislature's express intent, when it analyzed the Waiver of Immunity provision contained in the Compact. Mont. Code Ann., § 1-2-101. Further, when reviewing the Compact's mechanical workings, the District Court erred when it held the Waiver of Immunity provision did not constitute a new grant of immunity to the State because the Compact's terms wholly eliminate a party's right to obtain money damages against the State resulting in a complete grant of immunity to the State for any action seeking money damages.

A. Per the Plain Language of the Statute, the Montana Legislature Expressly Intended to Immunize the State from Liability for Any Action for Money Damages Under the Compact.

The Confederated Salish and Kootenai-Montana Compact consists of the Compact (Mont. Code Ann., §85-20-1901 *et seq.*). In conjunction with the Compact, the Montana Legislature enacted the New Law of Administration; to wit: Water Resources Conservation, Development and Administration Law (Mont. Code Ann., § 85-20-1902 *et seq.*). Generally the Compact, through the State, the Tribes and the United States, creates a new hierarchy of administration consisting

of various regulatory bodies (*i.e.* Compact Implementation Technical Team, Water Management Board, etc.) which are responsible for the unitary administration and management of water (state, federal or tribally derived) on the FIR. Mont. Code Ann., § 85-20-1902.1-1-101.3. In turn, those parties administer the Compact under the New Law of Administration. Mont. Code Ann., § 85-20-1902. The Compact further eliminates the dual system of water management (*i.e.*, the Montana Water Court) existing in all other Montana water compacts. Mont. Code Ann., § 85-20-1902.

Absent a specific law or statute conferring immunity, the State does not possess immunity from suit. Rather, the Montana Constitution requires a two-thirds vote of each legislative house to immunize the State from suit:

> **Section 18. State subject to suit.** The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature.
>
> Mont. Const. Art. II, § 18.

Immunity granted under Mont. Const. Art. II, § 18, provides the State with immunity only from suit in Montana's state courts. *Mont. v. Gilham*, 133 F.3d 1133, 1136 (9th Cir. 1998).

Significantly, the Compact grants the State immunity with respect to suits for any action (without limitation) for money damages, costs or attorneys' fees:

> 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 the 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. (Emphasis added.)

Mont. Code Ann., § 85-20-1901, Art. IV.I.8.

Analyzing that statutory provision, the District Court incorrectly determined:

> ...*The **apparent intent** indicates an agreement by the state for a limited waiver of its sovereign immunity, under the Eleventh Amendment to the U.S. Constitution, which prohibits the state being sued in a federal court.* The waiver is limited to certain types of suit, and does not include a waiver of state sovereign immunity for suits in federal court for money damages for unlawful acts of the Board or it agents. Before passage of SB 262, the state already had immunity from such suits, pursuant to the Eleventh Amendment. The state could not be sued for such monetary or other suits in federal courts, (though some state agents could pursuant to certain limited congressional acts such as the civil rights law in 42 U.S.C. § 1983). Article II, § 18 of the 1972 Montana Constitution was just a waiver of sovereign immunity for monetary suits against the state in *state courts. The immunity language in provision #1 of SB 262 does not grant any new immunity to the state, **it merely operates as a limitation on this new waiver of sovereign immunity***. (Emphasis added.) (R @ 69) (App. 2 @ 6.)

It is simply wrong. Specifically, the District Court erred in its analysis because:

1.) the Montana Legislature's intent, as evidenced by the statute's plain language and the legislative history, was to grant the State immunity with respect to suits for

any action (state, federal, tribal, or otherwise) for money damages, costs and/or attorneys' fees; and 2.) the Compact's Waiver of Immunity statute, when read in conjunction with the Compact's remaining provisions, operates to fully immunize the State from liability for monetary damages, costs and/or attorneys' fees.

In its Order the District Court wrongly commandeered the Legislature's *"apparent intent"* concluding its intent was to provide a limited waiver of its sovereign immunity granted under the Eleventh Amendment to the U.S. Constitution. (*Id.*) But, that is not what the statute states. The plain language of the statute provides that the State waived its defenses, including (*but not limited to*) any defense it may have under the Eleventh Amendment to the U.S. Constitution, ***except*** such waivers did not extend to any action for money damages, costs, or attorneys' fees. Review of the legislative history and plain language of SB 262 clearly demonstrates the Legislature's intent was to grant the State *carte blanche* immunity with respect to any action for money damages, costs and/or attorneys' fees: Speaker of the House Austin Knudsen ruled that a two-thirds vote of each legislative house was required to pass SB 262. (R @ 53) (App. 4 @349-350.) On April 15, 2015, the House Rules Committee upheld that ruling. (*Id.*) Then on April 15, 2015, Representative Essman proposed an amendment to remove the words "or the State" from the Compact's Waiver of Immunity clause. (R @ 53) (App. 4 @340-360.) Speaker Knudsen's testimony demonstrates that the House

was fully advised and on notice it was about to pass a bill granting the State *carte blanche* immunity for *any action* seeking money damages:

> Members of the body, I rise in support of this amendment. Members, leadership in the House has taken a fairly hands-off position on the compact. We've never taken a hard leadership position. Individual members of leadership certainly have their own opinions on the compact, but we've never taken a caucus position on the water compact. That's because we respect that there's a lot of different opinions on both sides of the aisle on this Bill.
>
> But with that said, I feel that this is a necessary amendment. This came to our attention just a couple days ago, this language. And regardless of whatever the intent behind the language is, which according to the Attorney General its—number one, it's boilerplate language and, number two, is the intent is it only applies to the sovereign immunity in federal court under the 11th Amendment.
>
> Well, I understand that, ***but I can read the language in the Bill, and I don't believe that's what it says. While it may be the intent, the words on the page are what matters***. And I think we've got a situation with the words on this page, if you read that sentence. "The Tribes and the State hereby waive their respective immunities from suit," comma, so there's an offset. And there's some more language in there including the Eleventh Amendment. You go down to the next comma, there's the word ***"except that such waivers of sovereign immunity by the Tribes or the State shall not extend to any action." That does not say any federal action. That says "any action." To me, that language is clear.***
>
> I think we've got a situation here that if we leave this language in the Bill, someone who sues under the compact and feels like their property rights have been diminished or personal rights have been diminished, you sue in tort. You go to state court. And I think with this language here that says "any action" the State is immune from, would apply in this situation. I think this is an important amendment. I understand the concern about amendments, ***but we've got language in this Bill now that basically grants the State carte blanche immunity from anything. We're about to pass a thousand page-plus bill with far-reaching implications, and we're going to grant the State immunity. And we're going to do it with a 51 vote, I might***

add. I think this is an important amendment. It needs to go on. (R @ 53) (App. 4 @ 349-350.)

The Attorney General's Office opined the language was boiler plate and Art. II, § 18 of the Montana Constitution had been *"drained of any significant meaning"*. (R @ 53) (App. 4 @ 220.) Representative Arthur Wittich cautioned the Attorney General's opinion was not sacrosanct:

> So somehow this idea that if the Montana Attorney General provides an opinion, it is sacrosanct and cannot be questioned and it will pass all legal Constitutional muster, hogwash. So I just want to make sure that when people are looking at this, they're looking at it objectively through their own eyes... (R @ 53) (App. 4 @ 11, 351-352.)

Representative Essman confirmed no such *carte blanche* immunity for money damages previously existed under Montana law, so this would be a new grant of immunity:

> Members, here's the thing about waivers. If you're going to waive a right, you have to have the right; okay? What that means in this setting is that somewhere in the past, since 1974, a previous Montana legislature would have had to establish an immunity—a right of immunity, on behalf of the State for the takings involved here or the damages that might occur.
>
> In a question posed to the Code commissioner, no statute to that effect was found. So this—and there is no severability clause in this compact bill. Montana Supreme Court historically has taken a very – case a very gimleted eye on sovereign immunity and has construed it narrowly. Why? To uphold the Montana Constitution and the rights of our citizens. (R @ 53) (App. 4 @ 352.)

The House declined the amendment and approved SB 262 with less than a two-thirds vote. (R @ 53) (App. 4 @ 372.)

The Legislature's clear, informed and express (not "*apparent*") intent was to grant the State *carte blanche* immunity for "any actions for money damages". (*Id.*) And, that is what it did. The District Court acknowledged that "[a]t present, neither the state nor its political subdivisions are immune from suit in state court for monetary damages for injury to person or property". (R @ 69) (App. 2 @ 6.) Despite that, the District Court improperly used its remedial powers to legislate and alter the plain language of the statute. A district court's role is to interpret the law, not override the plain language of the statute, dismiss the legislature's express intent and inject what it believes to be the "*apparent*" intent into the statute.

The fundamental rule of statutory construction is that the intention of the legislature controls:

> Role of the Judge—preference to construction giving provision meaning. In the construction of a statute, *the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted.* Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Emphasis added.) Mont. Code Ann., § 1-2-102; *Missoula County v. American Asphalt, Inc.*, (1985), 216 Mont. 423, 426, 701 P.2d 990, 991. The legislature's intention must first be determined by the plain meaning of the words used. *Id.* If the intent cannot be determined from the plain meaning, then a court may resort to other rules of statutory construction. *Id.* citing *State ex rel Sol. v. Bakker*, (1982)

199 Mont. 385, 390, 649 P.2d 456, 459. A constitutional prohibition exists against a court exercising legislative powers to alter statutes. *Ingraham v. Champion Intern.*, (1990) 243 Mont. 42, 49, 793 P.2d 769, 773.

The District Court erred by using its remedial powers to circumvent the Legislature's express intent. (*Id.*) The Legislature refused to pass the bill without an express reference to the State's immunity. Then, it refused to amend the bill to delete three words "or the State" which would have arguably eliminated the problem. The plain, express language of SB 262 is clear. And, the legislative history supports the conclusion that the Waiver of Immunity provision grants the State *carte blanche* immunity from any action for money damages, fees or costs. Any other interpretation creates a legal fiction and legislation by judicial fiat. The District Court's Order should be so reversed.

B. The Compact's Waiver of Immunity Provision, in Conjunction with the "Court of Competent Jurisdiction" as Defined, Operates to Fully Immunize the State from Liability for Money Damages.

The District Court improperly analyzed and simply overlooked the Compact's mechanical workings, which in conjunction with the definition of a "Court of Competent Jurisdiction" as defined under the Compact, fully immunizes the State from liability for monetary damages, costs and/or attorneys' fees. Mont. Code Ann., § 85-20-1901, Art. IV.I.8. Significantly, the Compact creates a unilaterally one-sided, never-ending maze which completely eliminates a party's

right to recover monetary damages against the State, unless the State (and anyone else who may be made a party to the action such as the Tribes) agrees to be sued in a Montana state district court. The State is not required to consent to a state district court's jurisdiction. Rather, consenting to what otherwise would be valid jurisdiction, is subject to the State's whim. Simply put, an aggrieved party may never gain access to a court which would otherwise have jurisdiction to award monetary damages because the other parties simply refuse to consent to the court's jurisdiction. That is the epitome of a grant of immunity to the State.

Granting the State the independent free will to either submit itself to, or reject, a state district court's jurisdiction is absurd. Under the Montana Constitution every Montana citizen has the right to defend life, liberties, acquire, possess and protect property. Mont. Const., Art. II, § 3. No Montana citizen shall be denied equal protection of the laws. Mont. Const., Art. II, § 4. Nor shall any Montana citizen be deprived of life, liberty or property without due process of law. Mont. Const., Art. II, § 17. Courts of justice are to be open to every person, and a speedy remedy is to be afforded for every injury of person, property, or character. Mont. Const., Art. II, § 16. That unfettered power to accept or decline jurisdiction granted to the State in the Compact guts the aforementioned fundamental Constitutional rights guaranteed to every Montana citizen and wholly insulates the State from liability for money damages.

The Compact eliminates a party's constitutional right to seek redress for money damages in a court otherwise possessing legal jurisdiction as defined by law. For example, a water right is a valuable property right in Montana. *Roland v. Davis*, 2013 MT 148, ¶ 24, 370 Mont. 327, ¶ 24, 392 P.2d 91. A material threat exists that a taking of a water right will occur. If that occurs, under the Montana Constitution the aggrieved party is entitled to receive due process and have his or her day in court. Money damages are the logical remedy for any such taking. 42 U.S.C. § 1983. But, the Compact eliminates the aggrieved party's right to recover monetary damages. Importantly, the Compact defines a "Court of Competent Jurisdiction" as:

> A State or Tribal court that otherwise has jurisdiction over the matter **so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction**, but if no such court exists, a Federal court." (Emphasis added.) Mont. Code Ann., § 85-20-1901(26).

Plaintiffs submit that no other Montana water compact contains such a definition. So, if all of the parties do not unanimously consent to jurisdiction in state district court, the matter defaults to a Federal court. *Id.* Clearly, this statutory scheme results in a complete preclusion (immunity) of a monetary remedy against the State because the Eleventh Amendment to the U.S. Constitution precludes recovery of monetary damages against the State in Federal court. Representative Essman succinctly identified the issue during the April 15, 2015, House Chamber Session:

> ...I think there are a couple of things that need to be clear in this compact to help resolve some of this fight. And number one is that if vested rights are present, they're protected. And number two, if litigation becomes necessary, it needs to be clear which court you go to...But here's my concern. Article II, Section 18 of the Montana Constitution basically states that the State has no immunity from lawsuit unless the legislature specifically acts to create it. This language, I fear, can be argued to create an immunity from lawsuit for actions for money damages, costs or attorney's fees. That is why I felt a two-thirds vote was necessary. Ultimately, that issue will probably be decided by the courts. But you know, I'm not sure that the claim of vested rights are going to hold up...I'm not sure that a takings of a water right will occur, but it might. And if those two things happen, that injured party needs to have redress against the State of Montana for the damages of [sic] the taking that's occurred. This language could be used to deny that claim and, therefore, I think we should strike the words "or the State" so that it's clear the State cannot assert an affirmative defense for a takings claim. (R @ 53) (App. 4 @ 343-344.)

> The Eleventh Amendment to the United States Constitution provides:
>
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Courts have consistently interpreted the Eleventh Amendment to provide a non-consenting state immunity from suits brought in federal court by her own citizens for money damages or equitable relief, unless the state waives such immunity. *Hans v. Louisiana*, 10 S.Ct. 504, 505, 134 U.S. 1, 10, 33 L.Ed. 842 (1890); *State v. Peretti*, 661 F.2d 756 (9th Cir. 1981). Statutory waiver of a state's immunity from suit is strictly construed. *Storch v. Board of Directors of Eastern Montana Region Five Mental Health Center, et al.*, 169 Mont. 176, 545 P.2d 644, 646-647 (1976).

Under the Compact if a party lands in federal court, either through the federal default provision contained in the Waiver of Immunity clause or otherwise, the Eleventh Amendment shields the State from liability for any money damages in federal court. While the State is generally not immune in a Montana state district court from suit for money damages absent a statutory grant of immunity; in contrast, the Eleventh Amendment to the United States' Constitution protects the State from any action for money damages in a Federal court, unless the state waives such immunity. *Id.* So under the Compact, the only way for an aggrieved party to obtain money damages against the State is if all parties to the action consent to the jurisdiction of a Montana state district court or if the State voluntarily chooses to further waive its rights under the Eleventh Amendment and agree to a monetary remedy. The likelihood of either of those events is completely contingent upon the State's whim and is remote at best. In sum, the Eleventh Amendment along with the Waiver of Immunity provision fully immunizes the State from an award of money damages, costs and/or attorneys' fees. The District Court's Order should be reversed to correct the inherent error and rule that SB 262 required a two-thirds vote of approval of each legislative house.

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THE IMMUNITY FROM SUIT PROVISION CONTAINED IN THE NEW LAW OF ADMINISTRATION, § 1-2-111, WAS SEVERABLE.

The District Court properly ruled the Immunity from Suit provision, contained in the New Law of Administration, unconstitutional. (R @ 69) (App. 2 @ 6.) Stating "this is not a close call", the District Court found Mont. Code Ann., § 85-20-1902.1-2-111, unconstitutional because it "[c]reates a new sovereign immunity for the state, and for its agents or employees. The conclusion is clear by resort to either facial interpretation or legislative history." *Id.* However, the District Court erred when it determined that § 1-2-111 was severable. Without sufficient legal analysis or support, it further ruled:

> Any unconstitutional provisions should be severed, pursuant to case law precedent and the severability language in the Administrative Ordinance § 1-1-113. The Court agrees with the State on this point for the reason explained above, and grants partial summary judgment therefore. (*Id* @ 12)

Legislative intent is the key to determining whether a statutory provision may be severed. In *Ayotte v. Planned Parenthood of N. England*, 126 S.Ct. 961, 546 U.S. 320, 163 L.Ed.2d 812 (2006), the United States Supreme Court set forth three (3) interrelated principles to provide guidance as to the severability of a statute:

> 1.) a Court should try not to nullify more of a legislature's work than is necessary because "we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people'";
>
> 2.) a Court must restrain itself from "rewriting state law to conform it to constitutional requirements"; and

> 3.) the touchstone for any decision about a remedy is legislative intent, because a court cannot "use its remedial powers to circumvent the intent of the legislature." *Id.* at 968 and 329-330.

The United States Supreme Court expressly recognized the need to honor legislative intent when analyzing remedies involving severability clauses.

Montana has developed guiding principles when analyzing the severability of a statute. The essential principle of severability is that "[a] statute is not entirely voided by the inclusion of one or more unconstitutional sections, unless those sections are 'necessary to the integrity of the statute or [were] the inducement to its enactment. *White v. State*, (1988) 233 Mont. 81, 93, 759 P.2d 971, 978 citing *Montana Automobile Association v. Greely*, (1981) 193 Mont. 378, 396, 632 P.2d 300, 310. While the bill at issue in *White* contained a severability provision, this Court determined that severance of the unconstitutional provisions rendered the statute meaningless and void in its entirety. *Id.* at 978. A presumption exists that the absence of a severability clause demonstrates the legislature's intent that invalid portions of a bill cannot be severed. *Sheehy v. Public Employees Retirement Division*, (1993), 262 Mont. 129, 864 P.2d 762.

> The presumption is against the mutilation of a statute, and that the legislature would not have enacted it except in its' entirety. The incorporation of such a provision such as section 20 (severability clause) creates a presumption to the contrary; namely, that the legislature would have enacted the law without its invalid portions being incorporated therein. *Id. at 770* citing *State v.*

Holmes (1935), 100 Mont. 256, 291, 47 P.2d 624, 636 and *Ingraham v. Champion Int'l* (1990), 243 Mont. 42, 49, 793 P.2d 769, 773.

Here, severing Mont. Code Ann., § 85-20-1902.1-2-111, does not resolve the problem because severance of the Immunity from Suit provision affects the legislation's integrity and does not cure the *carte blanche* grant of immunity to the State. And significantly, the Waiver of Immunity provision remains intertwined with the New Law of Administration continuing to immunize the State for any action for money damages.

The legislation, taken in its entirety, operates to immunize the State from any responsibility for money damages. Specifically, the Compact creates a new administrative hierarchy including the WMB, with defined judicial enforcement authority, which is responsible for administering the New Law of Administration. Mont. Code Ann., § 85-20-1901. The New Law of Administration governs the unitary administration and management of water on the FIR. Mont. Code Ann., § 85-20-1902. And, while it contains various appeal processes, it effectively eliminates a party's right to obtain money damages against the State or otherwise.

Again, regardless of whether the immunity provision of the New Law of Administration is "severed," the inner-workings of the Compact and New Law of Administration taken together translate into a declaration of immunity for the State as to money damages: The WMB is comprised of both State and Tribal

appointees. Mont. Code Ann., § 85-20-1901, Art. IV.I.2. It possesses ***exclusive jurisdiction*** to resolve any controversy between parties over the meaning or interpretation of the Compact and to authorize, administer and enforce water rights on the FIR. Mont. Code Ann., § 85-20-1902.1-2-107.2. Its decisions are effective immediately. Mont. Code Ann., § 85-20-1901, Art. IV.I.6.a. The WMB does not have the power to award money damages, attorneys' fees or costs. *Id.* at Art. IV.I.5.b. Aggrieved parties may appeal a WMB decision to a "Court of Competent Jurisdiction."[2] *Id.* at Art. IV.I.6.c. If a party withholds consent, then jurisdiction automatically defaults to the federal court system (whether or not the federal court has actual jurisdiction under federal law).[3] Mont. Code Ann. § 85-20-1901(26). The withholding party has no obligation to consent to the jurisdiction of a court

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[2] "Court of Competent Jurisdiction" is defined as "a State or Tribal court that otherwise has jurisdiction over the matter so long as the parties to the dispute to be submitted to that court consent to its exercise of jurisdiction, but if no such court exists, a Federal court." Mont. Code Ann. § 85-20-1901(26).

[3] The Montana Legislature, simply by adding a "federal court" default provision in its definition of "Court of Competent Jurisdiction," cannot *create* federal jurisdiction where it otherwise wouldn't exist. Federal courts are courts of limited jurisdiction and their jurisdiction can only be created by Congressional acts, not by the acts of state legislatures. *See, e.g., Johnson v. Smith*, 630 F.Supp 1, 3-4 (ND Cal. 1986)("Although it may be that state courts of general jurisdiction must hear causes of action based on federal law, ... the reverse is simply not the case. It is axiomatic that the federal courts are courts of limited jurisdiction, and may entertain only those suits for which jurisdiction has been expressly provided by Congress or compelled by the Constitution." (*citing Turner v. President, Directors and Company of the Bank of North America,* 4 Dall 7, 11, 4 U.S. 7, 11, 1 L.Ed. 717 (1799)) (other citations omitted).

which legally possesses jurisdiction. Rather, it can refuse to consent without reason, explanation or legal repercussion.

The District Court recognized the risks created by the Compact and New Law of Administration and specifically an aggrieved party's inability to obtain a monetary damage award against the State (*i.e.* immunity) due to the amorphous nature of the State and Tribes' creation along with their refusal to accept responsibility for its actions:

> The Compact and SB 262 have also been controversial regarding the constitutional guaranteed of full legal redress, a remedy afforded for each wrong committed by the state or an individual, regarding the acts of the Water Management Board (Board), which is purportedly a kind of hybrid entity variously described herein as a quasi-sovereign (clothed with sovereign immunity) but at the same time not a part of any of the contracting governments. The Board is comprised of state and tribal appointees, and their appointee. **The governments contend both that it is not a subdivision of the sovereign state or tribal government, but is clothed with all or more of the immunity which either entity has. Each government denies responsibility for the Board, while the two governments create and effectively control the Board by holding the power to appoint and remove its members**. This Board is a legal creature never apparently seen before. The Compact and SB 262 vest the Board with extraordinary power to grant, permit, deny or change water use for an individual, and create groundwater protection areas. It will have power over a broad geographic area and over tribal and non-tribal individuals, property owners, irrigators, businesses and government. Whereas now a party could bring an action in state court for damages, or Montana Water Court for determination of water rights, the new statute: 1) **would eliminate monetary lawsuits against the state, and the Board and its members and staff, for tortious or other unlawful conduct** and 2) eliminate the water user's right to contest a change or denial of the user's historic use, or water right, in the Montana Water Court (a right which previously existed according to state and federal law). Upon passage, the only legal remedy would be to go to either state or tribal court if both parties agree (for

> declarative ruling, **not damages**). Assuming both parties would seldom agree on state or tribal court, the default forum would be federal court. **An obvious problem with that is that federal courts do not appear to even have subject matter jurisdiction to entertain such cases under current law.** Given the case load of the nearest federal district court, it is hard to imagine the federal judiciary being proponents for congressional expansion in their jurisdiction so the federal district court can, in effect, become the new Western Montana water court. The limited "remedy" outlined in the Compact thus appears to be illusory. It may never exist as postulated. (R @ 69) (App. 2 @ 5.)

The inability of a Montana citizen to access the Montana court system and seek monetary damages effectively immunizes the State for all of its actions. So, even if § 1-2-111 is severed from the New Law of Administration, the State remains immune from any actions for money damages. The WMB is a new quasi-sovereign entity never seen before. It is vested with significant powers. Mont. Code Ann., § 85-20-1901, Art. IV.5.a. Its creators (State and Tribes) refuse to assume responsibility for its actions. As the District Court noted, the State and Tribes' arguments at the summary judgment hearing demonstrate the problem:

> Interestingly, at oral argument, the Tribes and State had different answers to the question of whether the Board could be sued in state court for damages. The State contended it could; the Tribes contended it could not. This illustrates the amorphous nature of the board. If it is not a subdivision of the Tribes, or a tribal member, it is hard to understand why it could not be sued in state court, like any other non-governmental entity, for tortious conduct of its members, agents and employees. On the other hand, if, as the State contends, state courts have jurisdiction over the Board, it is hard to understand why this jurisdiction would not extend to monetary lawsuits. (R @ 69) (App. 2 @ 9.)

Both the State and the Tribes have immunized themselves from any action for money damages, attorneys' fees and/or costs. SB 262 did not receive a two-thirds vote of each legislative house and is therefore, unconstitutional. Mont. Const. Art. II, § 18. As the legislative history makes clear, the immunity provisions in both the Compact and the New Law of Administration were integral parts of legislation and simply cannot be "severed" to correct the significant constitutional problems they present. The issue created by the immunity provisions was undoubtedly a very hot topic of debate during the legislative session. The Legislature ultimately chose to leave the immunity provisions intact and chose to simply ignore Mont. Const. Art. II, § 18. Under Montana law, the proper remedy is to declare SB 262 void in its entirety. *Marshall v. State ex rel. Cooney* 1999 MT 33, 293 Mont. 274, 975 P.2d 325. The District Court's Order should be so reversed.

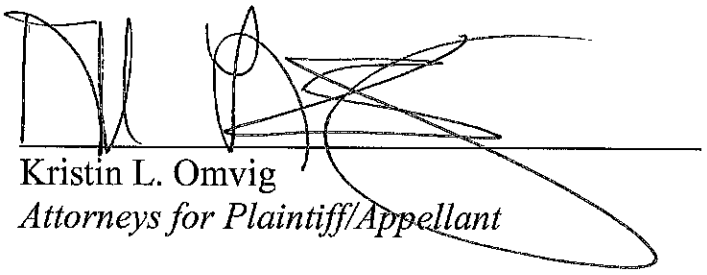
CONCLUSION

The District Court legislated by judicial fiat determining the Montana Legislature's *"apparent intent"* while ignoring the plain language of the Waiver of Immunity provision and the Legislature's express intent. In addition, the District Court incorrectly determined that the Immunity from Suit provision was severable. The inherent workings of the Compact in conjunction with the New Law of Administration operate to fully immunize the State from suits for money damages, costs and attorneys' fees. Severing the Immunity from Suit provision does not

cure the defect. Rather, the logical and correct remedy is to declare SB 262 unconstitutional and void in its entirety. The District Court's order should be reversed as set forth herein.

DATED this 9th day of December, 2016.

ROCKY MOUNTAIN LAW PARTNERS, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

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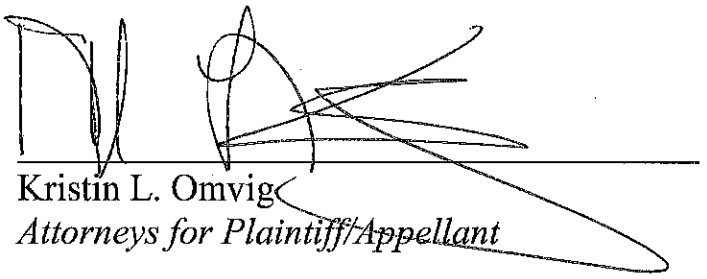
By: 

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CERTIFICATE OF SERVICE

I, Kristin L. Omvig, counsel for Plaintiffs/Appellants, hereby certify that I have filed a true and accurate copy of the foregoing APPELLANTS' OPENING BRIEF with the Clerk of the Montana Supreme Court on December 9th, 2016, by U.S. Mail directed to the Clerk of the Supreme Court and that I have served true and accurate copies of the foregoing APPELLANTS' OPENING BRIEF upon each attorney of record as follows:

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