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MEMORANDUM

Is Montana's ratification of the water rights compact with the Confederated Salish and Kootenai Tribes valid under the Article II, Section 18 of the Montana Constitution?

Montana ratified a water rights compact (Compact) with the Confederated Salish and Kootenai Tribes in the 2015 Montana Legislature through Senate Bill 262, codified at Title 85, Chapter 20, Part 19 of the Montana Code Annotated. Farmers and Ranchers for Montana (FARM) asked me to analyze whether Montana's ratification of is valid under the Montana Constitution. In particular, in light of claims raised in *Flathead Joint Board of Control v. State* (Mont. S.Ct., DA 16-0516), does the legislature's failure to enact the Compact and its associated Ordinance with a two-thirds vote in each house invalidate the law because it provides immunities from suit within the meaning of Article II, Section 18 of the Montana Constitution?

Executive Summary

The Compact is valid because neither immunity provision in the Compact and Ordinance concerns sovereign immunity within the meaning of Article II, Section 18. That provision waives the tort immunity of the State of Montana for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature. First, the Compact's limited waiver of immunity from suit is a waiver of immunity, not a provision of immunity. It also concerns jurisdictional immunity from suit in federal or tribal courts, not tort liability immunity from suit in state courts, and therefore falls outside of the meaning of Article II, Section 18. Second, the Ordinance's provision of immunity concerns personal immunity for members and staff of the joint Water Management Board from suit for damages, not the sovereign immunity of the state within the meaning of Article II, Section 18. In any event, the Ordinance's immunity provision would be severable from the Ordinance if a court held otherwise.

Part I of this memorandum will introduce the varieties of state sovereign immunity and common law personal immunities as they have developed in federal and Montana law. Part II of this memorandum will analyze the text of the Compact and Ordinance to determine which forms of immunity the law invokes, and consider the implications of these immunity provisions for the law's constitutionality under Article II, Section 18.

I. A state and its officers enjoy several immunities from suit.

Sovereign immunity and related doctrines grew from roots in the common law long before Montana statehood. There are two main strands of immunities at play in claims brought against a state and its officers. First, sovereign immunity protects a state from jurisdiction in a court without its consent, and from entity liability for damages in civil suits. It arises from principles of sovereignty in constitutional law, including popular sovereignty, under which the source of the law may not be subjected to the law. Second, personal immunity protects state officers from personal liability for damages in civil suits for actions taken as state officers. It arises from public policy concerns in tort law, under which a fear of civil suits may interfere with an officer's faithful execution of his duties. Personal immunity can be absolute depending on an officer's function, and can be qualified depending on whether the officer acted in good faith. The form of sovereign immunity that comes to Montana law through the Montana Constitution, the legislature, and judicial decisions draws on these various immunities. Several forms of immunities may be at issue in the Compact and Ordinance, so it is worth examining each of them.

A. Constitutional sovereign immunities can protect states from either jurisdiction, or liability, or both.

The concept of sovereign immunity arrived in the United States from English law, under which "no suit or action can be brought against the king … because no court can have jurisdiction over him."[1] Such jurisdiction would imply a superior power of courts over the king, which is inconsistent with the supreme power of the king as sovereign.[2] In the Federalist Papers, Alexander Hamilton assured the states that the ratification of the United States Constitution would not alter the sovereign immunity "now enjoyed by the government of every State in the Union," because "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[3] Sovereign immunity stands "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[4] The implications of sovereign immunity, as discussed below, include both jurisdictional and liability immunities.[5]

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[1] 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765).
[2] *Id.*
[3] THE FEDERALIST No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis in original).
[4] *Nevada v. Hall,* 440 U.S. 410, 416 (1979) (quoting *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907) (Holmes, J.)).
[5] *Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) ("There are two forms of sovereign immunity: (1) sovereign immunity under the Eleventh Amendment, which bars federal lawsuits against states and (2) sovereign immunity under the broader doctrine of state sovereign immunity, which shields a state from liability in both federal and state court, unless it has consented to be sued.").

1. Federal sovereign immunity protects states from both jurisdiction and liability.

The question of whether the states consented to suit in federal court under the new Constitution soon arose in a case brought by a citizen of North Carolina against the State of Georgia.[6] A majority of justices in that case held that Georgia was subject to suit, relying on the text of Article III, section 2 ("The judicial Power [of the United States] shall extend … to Controversies … between a State and Citizens of another State"),[7] as well as new American principles of popular sovereignty (that the People not their governments are sovereign).[8] The states, apparently surprised at the Court's conclusion, within two years ratified the Eleventh Amendment: "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."[9] Although the Constitution speaks only to suits against states by citizens of other states, the Supreme Court now recognizes general state sovereign immunity against federal jurisdiction[10] and most federal law regardless of the plaintiffs' state citizenship,[11] except when expressly abrogated by Congress and the Constitution.[12] The federal courts' extension of sovereign immunity beyond the text of the Eleventh Amendment has drawn critics,[13] but is well-established in law.

Sovereign immunity of states under federal law exists independent of state law and is motivated by both jurisdictional and liability concerns. With respect to jurisdiction, sovereign immunity "prevent[s] the indignity of subjecting a State to the coercive process of judicial tribunal at the instance of private parties."[14] With respect to liability,

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[6] *See Chisolm v. Georgia*, 2 Dall. 419 (1793).

[7] *See, e.g., Chisholm*, 2 Dall. at 450-53 (opinion of Blair, J.).

[8] *See*, e.g., *Chisholm*, 2 Dall. at 469-80 (opinion of Jay, C.J.); *but see id.* at 449 (Iredell, J., dissenting) ("there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy").

[9] U.S. CONST., Amend. XI.

[10] *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[11] *See Alden v. Maine*, 527 U.S. 706 (1999).

[12] *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) ("the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

[13] *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 71 MONT. L. REV. 285, 291 (arguing "the concept of sovereign immunity was inconsistent with the rule of law," and the Eleventh Amendment only preserves narrow immunity for diversity jurisdiction); *but see* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. __ (forthcoming 2017) (summarizing several defenses of state sovereign immunity, and offering a novel defense of it as a common-law rule protected as a "constitutional backdrop").

[14] *In re Ayers, 123 U.S. 443, 505* (1887) ("It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their

sovereign immunity prevents a state from "the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf."[15] Consistent with these concerns, federal constitutional sovereign immunity has limits. States can consent to suit through powers delegated in the United States Constitution such as the federal judicial power of Article III and the congressional civil rights enforcement power of the Fourteenth Amendment, or through legislation or other official waiver of sovereign immunity from suit in state, federal, or tribal courts.[16] Furthermore, state officers acting on behalf of a state remain subject to suit in their official capacity for injunctive or declaratory relief, even when a judgment would have the effect of enjoining or declaring invalid the execution of state law.[17] As described below, sovereign immunity under federal law also does not prevent some damages claims against state officers in their personal capacity, as long as the claim does not result in a judgment against the state treasury.[18]

2. Montana's sovereign immunity also protects the state from both jurisdiction and liability.

Like the Eleventh Amendment, Montana's original 1889 Constitution addressed state sovereign immunity only indirectly. Prior to statehood, the territorial supreme court recognized sovereign immunity against a contract claim in 1868, holding, "unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it."[19] The statehood constitution assumed rather than expressed sovereign immunity in state courts, providing for a Board of Examiners to consider "all claims against the state" before the legislature acted upon them.[20] As the Montana Supreme Court later put it, "the legislature found itself in the unpalatable position of acting as judge, jury, and responsible party in determining and settling such tort

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public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

[15] *Alden v. Maine*, 527 U.S. 706, 749 (1999); *see also Hess v. Port Authority Trans-Hudson Corporation*, 513 US 30, 48-49 (1994).

[16] *See Alden*, 527 U.S. at 755; *see also Lapides v. Board of Regents of Univ. System of Ga.*, 535 US 613, 622 (2002) ("This Court consistently has found a waiver when a State's attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction.").

[17] *See Alden*, 527 U.S. at 756-57; *see also Ex parte Young* (209 U.S. 123, 159 (1908) ("the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.").

[18] *See Alden,* 527 U.S. at 757; *see also Edelman v. Jordan*, 415 US 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").

[19] *Langford v. King*, 1 Mont. 33, 38 (1868).

[20] *See* 1889 MONT. CONST. Art. VII, Sec. 20; *cf.* 1884 MONT. CONST., Art. V, Sec. 18.

claims."[21] In 1963, the legislature limited sovereign immunity by deeming the purchase of liability insurance for either state or local governments to waive immunity to the extent of the insurance coverage.[22] The Montana Supreme Court unanimously reaffirmed the doctrine on the eve of the 1972 Constitutional Convention, citing the legislature's attempts to limit sovereign immunity as evidence of its continued existence.[23]

a. Article II, § 18 concerns only state liability immunity from tort damages.

For a brief period, Montana abolished a form of sovereign immunity through its new 1972 Constitution.[24] Delegate Jerome Cate, joined by Delegates Jerome Loendorf, Bob Campbell, Arlyne Reichert, Mae Nan Robinson, and Carman Skari, introduced a proposed provision in the Declaration of Rights: "The State of Montana and its subdivisions shall be subject to the same liabilities as a natural person."[25] The Judiciary Committee referred the proposal to the Bill of Rights Committee.[26] That committee proposed "Non-Immunity from Suit" as new Section 18 to the Declaration of Rights: "The state and its subdivisions shall have no special immunity from suit. This Provision shall apply only to causes of action arising after June 1, 1973."[27] The committee report noted trends in citizen concern, legal scholarship, and sixteen state judiciaries that "the doctrine no longer has a rational justification in law."[28] The committee's conclusions found support in the influential Bill of Rights study prepared for the delegates by Rick Applegate, who reviewed modern criticism of the ancient doctrine yet also noted the difficulties presented by abolition.[29] Indeed, the committee found sovereign immunity "repugnant to the fundamental premise of the American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency."[30]

In the floor debate, the delegates focused on tort liability, despite expressing broader concerns about sovereign immunity. Delegate Marshall Murray introduced the proposal by explaining "the doctrine of sovereign immunity, which we are attempting to do away with by

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[21] *Pfost v. State*, 713 P.2d 495, 498 (Mont. 1985), *overruled in part*, *Meech v. Hillhaven West, Inc.*, 776 P. 2d 488, 491 (Mont. 1989).
[22] Section 40-4402, R.C.M. 1947.
[23] *See Kaldahl v. State Hwy. Comm'n*, 490 P.2d 220, 221 (1971) ("The legislature has spoken and we are bound by its enactments.").
[24] *See* Barry L. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 MONT. L. REV. 283, 288 (1973) (Illinois abolished sovereign immunity in its 1970 Constitution, but allowed the legislature to create exceptions).
[25] Del. Prop. 30, I MONT. CONST. CONV. 124 (Introduced Jan. 26, 1972).
[26] *Id.* at 531.
[27] Bill of Rights Cmmte. Rpt., II MONT. CONST. CONV. 637 (Reported Feb. 23, 1972).
[28] *Id.* at 637.
[29] *See* Rick Applegate, "Bill of Rights," MONT. CONST. CONV. STUDY NO. 10, 289 (1971-72).
[30] II MONT. CONST. CONV. at 637.

this particular provision, really means that the king can do whatever he wants but he doesn't have to pay for it; and we'd like to do away with that doctrine."[31] Delegate Wade Dahood explained how the Supreme Court and legislature both seemed to defer to the other in hesitating to abolish sovereign immunity, even if "it's an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not."[32] Delegate Otto Habedank proposed, and the convention unanimously approved, a proposal to limit the abolition's scope to "suit for injury to a person or property," which he understood to include tort actions, leaving the legislature "free to make [the immunity waiver] more open if they desire to in the future."[33] Later, the Style and Drafting Committee retitled the provision "State subject to suit," and clarified the scope of "The State of Montana and its subdivisions" to include "The state, counties, cities, towns, and all other local governmental entities."[34] In retrospect, this clarification of the provision's application to tort liability was fateful. It sacrificed the broader principle originally suggested by the text "no special immunity to suit," in favor of a narrower right to recover tort damages from the state treasury.[35]

The People of Montana ratified the new Constitution, including the sovereign immunity provision, described as a "[n]ew provision abolishing the doctrine of sovereign immunity ('the King can do no wrong') and allowing any person to sue the state and local governments for injury caused by officers and employees thereof."[36] The legislature responded to the abolition of sovereign immunity with the Montana Comprehensive State Insurance Plan and Tort Claims Act.[37] At the same time, critics speculated about the fiscal and administrative impacts of governmental liability.[38] In 1974, the Montana Legislature proposed, and the voters ratified, the power to invoke sovereign

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[31] V MONT. CONST. CONV. at 1760 (Verb. Trans. Mar. 8, 1972).

[32] *Id.* at 1764; *cf.* MONT. CONST., Art. II, Section 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.")

[33] *Id.* at 1761. In narrowing the scope to tort liability, Delegate Habedank noted the waiver would not extend to other forms of liability like contract. *See id.* ("I think there are many instances where there may be some governmental employees [who] do some things in connection with contractual fields that we try to stick the government for where there is a good reason to maintain our governmental immunity in those situations.")

[34] VII MONT. CONST. CONV. at 2503 (Verb. Trans. Mar. 16, 1972).

[35] As Delegate Habedank explained: "Limited as it is, for injury to a person or property, the Legislature is still free to make it more open if they desire to do so in the future. But we at least have assured the people of the State of Montana that they can sue for negligent injury." V MONT. CONST. CONV. At 1761 (Verb. Trans. Mar. 8, 1972).

[36] Constitution VIP (1972) *Prop. 1972 Const. for the State of Montana: Official Text with Explanation* (1972), *available at* http://sos.mt.gov/Elections/Archives/1970s/1972/1972_VIP.pdf.

[37] Ch. 380, Laws of 1973, now codified as sections 82-4301 through 82-4327, R.C.M. 1947.

[38] *See* Hjort, 34 MONT. L. REV. at 297 ("If left unchanged, Article II, § 18 portends, at best, an uncomfortable uncertainty. At worst, the spectre of disaster.")

immunity by legislative supermajorities.[39] Professors Larry M. Elison and Fritz Snyder comment, "[t]he people accepted the proposed change" to sovereign immunity in the ratification of the 1972 Constitution, but "[e]ffective lobbying by tradition-bound politicians and frightened government employees quickly reversed the change.[40] Still, they did so through ratification by 55% of voters at the 1974 general election.[41] The ballot language for the amendment explained, "[p]resently the Constitution of Montana provides that the state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to person or property. This amendment would allow specific exceptions to the waiver of sovereign immunity by a 2/3 vote of each house of the legislature."[42] The provision now reads, as amended:

> **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 2/3 vote of each house of the legislature. ~~[This provision shall apply only to causes of action arising after July 1, 1973.]~~

Thus, sovereign immunity, which once arose only in common-law decisions of the courts of Montana, gained express constitutional status in a backlash against an attempt to abolish it.

b. Article II, § 18 does not affect other forms of liability immunity, or jurisdictional immunity.

Montana courts generally read Article II, Section 18 consistent with its text and history to focus on tort liability against the state itself.[43] The legislature recognizes an arguably broader waiver in statute, including both state tort liability and liability for torts "of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, section 18, of The Constitution of the State of Montana."[44] The legislature also acted to provide immunity

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[39] *See* SJR 64; Const. Amend. No. 2 (approved Nov. 5, 1974).
[40] Larry M. Elison & Fritz Snyder, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 64 (Greenwood Press 2001).
[41] Mont. Sec'y of State, "Amendments to the 1972 Montana Constitution," *available at* http://sos.mt.gov/Elections/Ballot_Issues/documents/Constitutional-Ballot-Issues-1972-Current.pdf.
[42] Voters' Info. Pamphlet on Prop. Amend. C-2 (1974), *available at* http://sos.mt.gov/Elections/Archives/1970s/1974/1974_VIP.pdf.
[43] *Peretti v. State*, 777 P. 2d 329, 332 (Mont. 1989) ("the waiver found in Art. II, sec. 18 extends only to *tort* actions, and *not contract* actions, involving injuries to a person or property").
[44] MONT. CODE ANN. § 2-9-102.

from exemplary and punitive damages,[45] and capped governmental liability for tort damages.[46]

Alongside its assumption of liability for officers acting within the scope of their duties, the legislature enacted several forms of what might more accurately be termed personal immunities for legislative, judicial, and certain quasi-legislative executive decisions.[47] These provisions immunize not just the state when sued as an entity, but also immunize state employees when sued in their personal capacities.[48] Relatedly, the legislature "provide[s] for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment."[49] This immunization and indemnification of state officers in their personal capacities exceeds the traditional scope of sovereign immunity under federal law, at least to the extent the personal capacity claims do not clearly seek damages from the public treasury.[50]

The remaining jurisdictional and liability immunity outside of tort claims is not diminished by the Montana Constitution, or subject to Article II, Section 18. Beyond the scope of that provision's tort immunity waiver, the general rule of sovereign immunity applies: "a state cannot be sued in its own courts without its plain and specific consent to suit either by constitutional provision or by statute."[51] The state waives sovereign immunity and consents to suit on certain claims, including contract claims.[52] Where there is no consent to suit,

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[45] *See* MONT. CODE ANN. § 2-9-105.
[46] *See* MONT. CODE ANN. § 2-9-108.
[47] *See* MONT. CODE ANN. §§ 2-9-111 (Immunity from suit for legislative acts and omissions), -112 (Immunity from suit for judicial acts and omissions), -113 (Immunity from suit for certain gubernatorial actions), & -114 (Immunity from suit for certain actions by local elected executives).
[48] *See, e.g.,* MONT. CODE ANN. § 2-9-112 ("A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court.").
[49] MONT. CODE ANN. § 2-9-305(1).
[50] *See Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (in claims seeking indemnification under Mont. Code Ann. § 2-9-305, holding "The eleventh amendment does not wholly bar plaintiffs from federal court, however, because the complaint can be amended to claim only damages from the defendants in their individual capacities. A state indemnification statute does not automatically extend immunity to state officials. Thus, the eleventh amendment does not bar plaintiffs' claim for damages against the defendants in their individual capacities.") (citations and footnotes omitted); *see Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 317 n.10 (1990) ("It may be that a simple indemnification clause, without more, does not trigger the doctrine [of sovereign immunity]. Lower courts have uniformly held that states may not cloak their officers with a personal Eleventh Amendment defense, by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment.").
[51] *Peretti*, 777 P. 2d at 332; *see also Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) (holding a state agency is immune to a federal Family and Medical Leave Act claim in federal court "because the State of Montana has not consented to be sued in state court under like circumstances," outside of the scope of Article II, § 18).
[52] MONT. CODE ANN. § 18-1-404.

or where the state affirmatively confirms of immunity, however, the law recognizes the state's sovereign immunity untouched by the state constitution's limited abolition of tort immunity.

B. Common-law personal immunities, not sovereign immunity, provide liability immunity to state officials.

American courts adapted the doctrine of personal immunities from English common law. For example, the United States Supreme Court recognized judicial immunity as early as 1872 in a case arising from a trial of one of the alleged participants in President Abraham Lincoln's assassination. In holding the trial judge immune from civil suit, the Court cited English law for the absolute immunity of a judge's actions in his official capacity: "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."[53] A related "qualified" immunity developed in the common law where "absolute" immunity is unavailable, yet officers act in good faith pursuit of the law. In these cases the Court recognizes that "the general costs of subjecting officers to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," outweigh the benefit of holding even careless public officials liable for abuse of power.[54]

Personal immunities are distinct from sovereign immunity, because they arise from public policy embedded in tort law rather than sovereignty principles recognized in constitutional law. As the United States Court of Appeals for the Ninth Circuit recently summarized:

> As a general matter, individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law," and that were taken in the course of his official duties. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself… For this reason, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, *qua* entity, may possess." *Id.* at 167. An officer sued in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such

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[53] *Bradley v. Fisher*, 80 U.S. 335, 349 n. †† (1872); *see also* Pierson v. Ray, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction").

[54] *Harlow v. Fitzgerald*, 457 US 800, 816 (1982). Like sovereign immunity, qualified immunity is well established but criticized. *See, e.g.,* William Baude, *Is Qualified Immunity Unlawful*, U. Chi. Pub. L. Working Paper No. 609 (Jan. 9, 2017), *available at* https://ssrn.com/abstract=2896508.

> as objectively reasonable reliance on existing law," *id.* at 166-67, cannot claim sovereign immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999).[55]

Thus, damages claims against the state as an entity are subject to sovereign immunity, conditional on compliance with Article II, section 18 for tort liability. Damages claims against officers may be subject to personal immunities, either absolute or qualified.

Montana has adopted both forms of personal immunity, absolute and qualified, with its inheritance of the common law.[56] State agencies and their officers enjoy quasi-judicial immunity from damages suits in their discretionary decisions to initiate and adjudicate administrative proceedings.[57] Reiterating the English common law principle, the Montana Supreme Court has explained, "[l]ike judicial immunity, quasi-judicial immunity benefits the public—not the person being sued—by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences; also like judicial immunity, quasi-judicial immunity extends only to acts within the scope of the actor's jurisdiction and with the authorization of law."[58] Where this quasi-judicial immunity does not apply, an additional layer of common law immunity is provided by qualified immunity, which "operates to shield government officers performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[59]

Montana courts consistently distinguish these common-law personal immunities of individuals from constitutional state sovereign immunity, including the state's immunity from tort liability addressed by Article II, section 18. These "are different concepts and are supported by different considerations of public policy," the latter arising from ancient principles of sovereignty, the former arising from modern tort doctrine's common-law adaptation to the ebb of those ancient principles as applied to public officers.[60] Thus, the "1972 Montana Constitution did not abolish prosecutorial immunity,"[61] or the related quasi-judicial immunity, as these immunities are "separate

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[55] *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).
[56] *See* MONT. CODE ANN. § 1-1-108 ("In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.").
[57] *See Koppen v. Board of Medical Examiners*, 759 P. 2d 173, 175-76 (Mont. 1988); *but see Nelson v. State*, 195 P.3d 293, 296-297 (Mont. 2008) ("Where the administrative function is mandated by statute and, thus, purely ministerial in nature, the administrative entity is not acting in a quasi-judicial manner and is not entitled to quasi-judicial immunity.").
[58] *Steele v. McGregor*, 956 P. 2d 1364, 1369 (Mont. 1998).
[59] *Rosenthal v. County of Madison*, 170 P.3d 493, 500 (Mont. 2007).
[60] *State ex rel. Dept. of Justice v. District Court of Eighth Judicial Dist. In and For Cascade County*, 560 P.2d 1328, 1330 (Mont. 1977).
[61] *Id.*

and distinct from sovereign immunity," and therefore are "unaffected by the language of Art. II, Sec. 18."[62] Because of this distinction, and because "quasi-judicial immunity is not a subject of Montana statutory law,"[63] there is no requirement for the legislature to act under the supermajority requirement of Article II, section 18 for quasi-judicial immunity to protect state officers otherwise subject to these common-law personal immunities.

II. The Compact and Ordinance provide different immunities.

The Compact's implementing legislation is a statute consisting of two sections. The first section is the Compact itself, which settles outstanding water rights claims between the tribes (including the federal government on behalf of the tribes) and the state.[64] The second section is the Unitary Administration and Management Ordinance, which codifies a unified body of parallel state and tribal water law to "govern all water rights, whether derived from tribal, state or federal law, and shall control all aspects of water use, including all permitting of new uses, changes of existing uses, enforcement of water right calls and all aspects of enforcement within the exterior boundaries of the Flathead Indian Reservation."[65] Unlike the Compact part of the law, which is a negotiated settlement of claims among sovereigns, the Ordinance part of the law functions as ordinary legislation and contains a severability clause.[66]

A. The Compact waives jurisdictional immunity, and does not touch sovereign immunity from liability.

The Compact waives the tribes' and the state's "immunit[y] from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States … to permit the resolution of disputes under the Compact by the board" and through

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[62] *Koppen*, 759 P.2d at 175; *compare Rahrer v. Board of Psychologists*, 993 P.2d 680, 684-685 (J. Nelson, specially concurring) ("In my view our creation of the doctrine of quasi-judicial immunity is in direct violation of Article II, Section 18 of the Montana Constitution which abolished governmental immunity from suit absent a 2/3 vote of the legislature.").

[63] *See Koppen*, 759 P.2d at 175; *see also Rosenthal*, 170 P.3d at 498 ("Although Article II, Section 18, of the 1972 Montana Constitution abolished the concept of 'sovereign immunity,' we have stated that neither the Constitution nor the Montana Tort Claims Act abolished prosecutorial immunity" for quasi-judicial officers).

[64] *See* MONT. CODE ANN. § 85-20-1901.I ("the Parties agree to enter into the Compact for the purpose of settling the water rights claims of the Confederated Salish and Kootenai Tribes, their members, and Allottees of the Flathead Indian Reservation, and of the United States on behalf of the Tribes, their members and Allottees").

[65] *See* MONT. CODE ANN. § 85-20-1902.1-1-101(3); *cf.* MONT. CODE ANN. § 85-20-1901.II(45) ("'Unitary Administration and Management Ordinance' means the body of laws enacted by both the State and the Tribes to provide for the administration of surface water and Groundwater within the Reservation").

[66] *See* MONT. CODE ANN. § 85-20-1902.1-1-113(1) ("The provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions.").

judicial enforcement.[67] As the reference to the Eleventh Amendment and judicial enforcement suggests, this is a waiver of jurisdictional immunity, not liability immunity. It permits the Board to resolve controversies over the Compact and related water rights with jurisdiction over both the tribes and the state, preexisting jurisdictional immunities from suit notwithstanding.[68] Such jurisdiction may carry over into a court of competent jurisdiction for review and enforcement of Board decisions.[69]

This jurisdictional waiver by the state is reciprocal. "[A]s coexistent sovereigns, conflicts between States and tribes cannot be resolved judicially without one of them giving up sovereign immunity."[70] Thus, the tribes waive their jurisdictional immunity from suit in the same provision.[71] It also parallels the McCarran Amendment's general waiver of federal sovereign immunity to consent to suit for the adjudication and administration of water rights.[72] The Compact's reciprocal waivers of jurisdictional immunity benefit the state as well as the tribes and the federal government, because they are consistent with the federal law presumption that state court is an appropriate forum for resolving water rights issues among these three sovereigns.[73] Consistent with this presumption, the Compact provides for initial approval by, and subsequent water rights adjudication in, the Montana Water Court.[74] Indeed, the Compact disclaims any intent by the parties "[t]o prevent the Montana Water Court from adjudicating any properly filed claims or objections to the use of water within the Flathead Indian Reservation."[75]

The jurisdictional waiver excludes "any action for money damages, costs, or attorneys' fees," consistent with its purpose to permit jurisdiction over the resolution, review, and enforcement of the

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[67] MONT. CODE ANN. § 85-20-1901(IV.I.8).
[68] *See also* MONT. CODE ANN. § 85-20-1901.IV(I)(1) ("The Board shall also have exclusive jurisdiction to resolve any controversy over the meaning and interpretation of the Compact on the Reservation, and any controversy over the right to the use of water as between the Parties …").
[69] *See* MONT. CODE ANN. § 85-20-1901.IV(I)(6).
[70] *State of Montana v. Gilham*, 133 F.3d 1133, 136 (9th Cir. 1998).
[71] *See* MONT. CODE ANN. § 85-20-1901.IV(I)(8); *cf. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, PC*, 476 US 877, 890-91 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance …. in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.").
[72] *See* 43 U.S.C. § 666; *cf.* MONT. CODE ANN. § 85-20-1901.IV(I)(8) (recognizing participation of the United States in Board proceedings is governed by the McCarran Amendment).
[73] *See Colorado River Water Cons. Dist. v. United States*, 424 US 800, 819 (1976) ("The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.").
[74] *See* MONT. CODE ANN. § 85-20-1901.VII(B).
[75] *Id.* at (V)(B)(15).

Compact.[76] This also parallels the McCarran Amendment.[77] Notably, the scope of the waiver is "to permit resolution of disputes under the Compact *by* the board," not *against* the board. Properly considered, it does not provide sovereign immunity from liability for tort claims against the Board. Instead, it limits the waiver of the state's preexisting jurisdictional sovereign immunity from suit in federal or tribal courts. In any event, because the immunity at issue is jurisdictional it is not subject to the Article II, section 18 limitation on liability immunity. The Board itself only possesses jurisdiction to resolve controversies under the Compact and related water rights, not to adjudicate tort liability against any of the parties. Thus, there is no applicable liability to immunize from suit, with or without the jurisdictional waiver and its limitations.

B. The Ordinance confirms the Board's common-law personal immunities, not the State's sovereign immunity.

A Unitary Administration and Management Ordinance, parallel to tribal legislation, governs "all water rights" and "all aspects of water use" under the Compact.[78] It provides the substantive and procedural law governing water rights within the exterior boundaries of the Flathead Indian Reservation,[79] and establishes a Water Management Board to administer those rights.[80] By expressly incorporating elements of both the Compact and provisions of Montana water law, the Ordinance serves as a bridge between the specific settlement terms of the Compact and the general background of state law.[81] The Compact and Ordinance empower the Water Management Board to register existing uses of water rights, authorize changes in those uses, and issue new water rights.[82] The Board may employ staff including a Water Engineer,[83] and Water Commissioners,[84] to enforce water rights on the Reservation. Water Commissioner actions and inactions are appealable on petition to the Engineer,[85] and the Engineer's decisions are appealable to the Board.[86] To ensure uniform administration of the Compact and Ordinance, the Board possesses "exclusive jurisdiction to resolve any controversy as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation

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[76] MONT. CODE ANN. § 85-20-1901.IV(I)(8).
[77] *See* 43 U.S.C. § 666(a) ("*Provided*, That no judgment for costs shall be entered against the United States in any such suit.).
[78] *See* MONT. CODE ANN. § 85-20-1902.1-1-101(3).
[79] *See* MONT. CODE ANN. § 85-20-1902.1-2-101.
[80] *See* MONT. CODE ANN. § 85-20-1902.1-2-102.
[81] *See* MONT. CODE ANN. § 85-20-1902.1-1-101 ("This Ordinance parallels legislation adopted by the Confederated Salish and Kootenai Tribes pursuant to Tribal approval of the Confederated Salish and Kootenai Tribes-Montana Compact and the Montana Water Use Act of 1973 to effectuate Unitary Administration and Management on the Flathead Indian Reservation.").
[82] *See* MONT. CODE ANN. § 85-20-1902.2-1-101, *et seq.*; *cf.* MONT. CODE ANN. § 85-20-1901.IV(I)(4).
[83] *See* MONT. CODE ANN. § 85-20-1902.1-2-109, -110.
[84] *See* MONT. CODE ANN. § 85-20-1902.3-1-114, -115.
[85] *See* MONT. CODE ANN. § 85-20-1902.3-1-105.
[86] *See, e.g.*, MONT. CODE ANN. § 85-20-1902.2-2-111, .3-1-104.

over the meaning and interpretation of the Compact and this Ordinance."[87]

As the Ordinance suggests, the Board and its staff must "deal with a diverse and sometimes contentious public."[88] The Ordinance provides: "Members of the Board, the Engineer, any Designee, any Water Commissioner … 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."[89] This provision mirrors the judicial immunity provided to agents of the judiciary "from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court."[90] That judicial immunity arguably is available to agents of the Montana Water Court, so the effect of the Ordinance's immunity provision is to harmonize the Board's status with that of its state counterpart.[91]

Regardless of the statutory counterparts to the Board's immunity from suit, however, the Board and its agents enjoy a personal quasi-judicial immunity to the extent it could be treated as a state entity. (If it were not a state entity, it would not present an issue under Article II, section 18.)[92] State Boards and their officers enjoy quasi-judicial immunity from damages suits in their discretionary decisions to initiate and adjudicate administrative proceedings.[93] The Ordinance's immunity provision fairly states this rule of quasi-judicial immunity from suit for damages as applied to the Board and its staff's discretionary "authorization, administration, or enforcement of water rights on the Reservation."[94] To the extent the Ordinance invokes common-law immunity from suit for damages arising from the Board's quasi-judicial functions, it is not actually providing for sovereign immunity within the meaning of Article II, section 18. In this light, the Ordinance may be understood best to provide a personal immunity, and not a form of sovereign immunity at all.[95]

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[87] MONT. CODE ANN. § 85-20-1902.1-2-107(2).
[88] MONT. CODE ANN. § 85-20-1902.1-2-109(3) (Engineer's qualifications).
[89] MONT. CODE ANN. § 85-20-1902.1-2-111.
[90] MONT. CODE ANN. § 2-9-112(2).
[91] *See* 2-9-112(3) (immunity applicable to agents of "those courts established in accordance with Article VII of The Constitution of the State of Montana," here either the Water Court itself or the Supreme Court as the Water Court's principal); *cf. Fellows v. Office of Water Comm'r*, 285 P. 3d 448, 452 (Mont. 2012) (noting but not reviewing lower court's holding that water commissioners are entitled to judicial immunity).
[92] The Board is an entity created by agreement between the state and the tribes, not the state or an ordinary political subdivision, as only a minority two of five members are appointed by the Governor. *See* MONT. CODE ANN. § 85-20-1901.IV(I)(2)(a); *compare* MONT. CONST. Art. II, sec. 18 ("The state, counties, cities, towns, and all other local government entities shall have no immunity from suit for injury to a person or property").
[93] *See Koppen*, 759 P. 2d at 175-76 (Mont. 1988).
[94] MONT. CODE ANN. § 85-20-1902.1-2-111.
[95] While the individual Board members and staff may enjoy common law personal immunities, neither the Compact nor the Ordinance indemnify them

For the sake of argument, and notwithstanding the discussion above, assume the Ordinance may be read to provide a form of sovereign immunity, in which case it might implicate Article II, Section 18. Such immunity would apply only to a narrow range of hypothetical damages claims. First, the Ordinance only confers immunity on the individual members and staff of the Board, so it has no application to claims brought against the Board itself.[96] Second, the Ordinance limits immunity to "suit for damages arising from the lawful discharge of an official duty,"[97] so the claim could not arise from actions outside of those duties. Nor could the claim seek injunctive or declaratory relief, even against the members in their individual capacities, because those claims lie outside of the immunity provision.[98] Third, to avoid quasi-judicial immunity the claim would have to arise from a purely ministerial duty. Fourth, to avoid qualified immunity the claim would have to arise from clearly established statutory or constitutional rights. Finally, to fall under Article II, section 18, the claim must sound in tort and likely seek damages from the state; note this last condition arguably conflicts with the first. Given these parameters, the hypothetical scope of an invalid grant of immunity under the Ordinance is a case with the following elements: (1) a tort claim (2) against individual Board members or staff (3) for damages from the state, that (4) alleges a violation of clearly established rights statutory or constitutional rights, and (5) arises from the lawful discharge of (6) purely ministerial official duties.

It is difficult to predict whether such a hypothetical case could arise under the Ordinance and within the complex contours of sovereign and personal immunities. If it did, the result would be the invalidity of the immunity provision as-applied to that case, or perhaps the invalidation of the immunity provision on its face, but not the invalidation of the

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for personal-capacity claims. Montana law does indemnify "public officers and employees civilly sued for their actions taken within the course and scope of their employment," MONT. CODE ANN. § 2-9-305(1), and such indemnification arguably implicates the policies behind sovereign immunity. *See Alden*, 527 U.S. at 757. Yet it is doubtful that the state would in fact be liable through indemnification of the Board members and staff in their individual capacity. That indemnification extends to "any employee of a state, county, city, town, or other governmental entity." MONT. CODE ANN. § 2-9-305(2). The catch-all "governmental entity" category "means the state and political subdivisions." MONT. CODE ANN. § 2-9-101(3). "State" includes "any … board … or other instrumentality of the state." MONT. CODE ANN. § 2-9-101(3). "Political subdivision" includes "any … other political subdivision or public corporation, or any entity created by agreement between two or more political subdivisions." MONT. CODE ANN. § 2-9-101(5). In any event, indemnification alone would be insufficient to bring the Board within the scope of jurisdictional sovereign immunity. *See Blaylock*, 862 F.2d at 1354. Regardless, this jurisdictional sovereign immunity is not the concern of Article II, Section 18.

[96] *See* MONT. CODE ANN. § 85-20-1902.1-2-111.

[97] *Id.*

[98] Note these injunctive or declaratory claims, including constitutional claims, could be brought notwithstanding sovereign immunity. *See Alden*, 527 U.S. at 756-57. State constitutional tort claims, if recognized by the Montana Supreme Court, also could give rise to damages notwithstanding sovereign or personal immunities. *See Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002).

entire Ordinance or Compact. This result is required by the Ordinance's severability clause, which provides "[t]he provisions of this Ordinance are severable, and a finding of invalidity of one or more provisions hereof shall not affect the validity of the remaining provisions."[99] The Montana Supreme Court recently reviewed the meaning of severability clauses:

> The inclusion of a severability clause in a statute is an indication that the drafters desired a policy of judicial severability to apply to the enactment.... When unconstitutional provisions are severed, the remainder of the statute must be complete in itself and capable of being executed in accordance with the apparent legislative intent. [I]f removing the offending provisions will not frustrate the purpose or disrupt the integrity of the law, we will strike only those provisions of the statute that are unconstitutional.[100]

Were any court to hold the immunity provision to violate the Montana Constitution, the severability clause would require the court to excise that provision and uphold the remainder of the legislation. Because the immunity provision is a standalone section of the Ordinance, such an excision would be far simpler than in other cases in which a court considered more complex statutory surgery.[101] Moreover, given the immunity provisions in the Compact and Ordinance were technical issues not reflected in the bill's title, questions arose about them only at the very end of the legislative process, and a majority of the House of Representatives rejected an interpretation of the provisions that would bring them within the scope of Article II, Section 18,[102] they could not be the inducement for the enactment of, or integral to, the legislation.[103] The immunity provision is, by its text and purpose, easily severable from the rest of the law.

Regardless of severability, "whenever there are differing possible interpretations of statute, a constitutional interpretation is favored over one that is not."[104] Under the analysis above, a court would strain to read either immunity provision to confer a new sovereign immunity

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[99] MONT. CODE ANN. § 85-20-1902.1-1-113.

[100] *Williams v. Board of County Comm'rs*, 308 P. 3d 88, 102 (2013); *see also Newville v. Dept. of Family Services*, 883 P.2d 793, 804 (Mont. 1994) (severing, under a severability clause, an amendment to comparative negligence statute held to violate substantive due process, and holding state agency liable in tort).

[101] *See, e.g., Williams*, 308 P.3d at 101 (severing a subsection under a severability clause that was lost in a recodification); *Finke v. State ex rel. McGrath*, 65 P.3d 576, 582 (Mont. 2003) (refusing to sever six different sections of a law, three of which contributed as the inducement for the enactment of the law, in the absence of a severability clause); *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300, 311 (Mont. 1981) (severing all or part of fourteen different statutory sections or subsections under a severability clause).

[102] Mont. Leg., Sen. Bill No. 262, Detailed Bill Information.

[103] *See Sheehy v. Public Employees Retirement Div.*, 864 P.2d 762, 770 (Mont. 1993).

[104] *Department of State Lands v. Pettibone*, 702 P. 2d 948, 956 (1985).

of the state against tort damages in violation of Article II, Section 18. The Compact is a waiver of the state's constitutional jurisdictional immunity for enforcement proceedings in state, federal, and tribal courts, and does not create any new tort liability immunity implicating Section 18. The Ordinance does not create any state immunity at all, but recognizes preexisting common law personal immunities of the Board and its members. These readings are clear against the background of sovereign and personal immunity law developed in federal and Montana courts. Yet should either immunity provision raise any constitutional doubt, the canon of constitutional avoidance favors resolution of the doubt in favor of constitutionality. In that instance, the best reading is the Compact and Ordinance do not create any new immunities that did not already exist as a matter of federal constitutional doctrine and state common law.

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