

ENVIRONMENTAL LAW SECTION

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Forging a Montana Response to Climate Change

I have participated in litigating some challenging environmental issues over the course of my career, but I was stumped when it came to addressing climate change. Although considered *the* environmental issue of our time, I saw global warming as just that – a *global* problem. Other than feeling overwhelmed watching Al Gore in “An Inconvenient Truth” and buying a Prius, I found it hard to imagine that a trial lawyer in rural Montana could help in any meaningful way.

1. Early efforts with proposed coal-fired plants

I didn’t realize at the time, but my perspective on the efficacy of local action was about to change when, in 2006, I received a call from trial lawyer Elizabeth Best of Great Falls. Beth was representing a group of concerned citizens, farmers, and ranchers opposing the construction of a proposed 250-megawatt coal fired power plant east of Great Falls. Called the Highwood Generating Station, State and Federal agencies were well along the path to issuing many of the required permits to the applicant, Southern Montana Electric Generation and Transmission (SME). Significantly, at the local level, the re-zoning of over 600 acres of land zoned Agricultural to Heavy Industrial was still in play.

The nearby landowners were working with Anne Hedges, program director of the Montana Environmental Information Center (MEIC). Anne provided the concerned neighbors with a wealth of information ranging from predictable impacts on human health and the local

environment to land use considerations. *And* she helped to reframe the issue from one of “just” local concern to a decision that would contribute to the looming menace of global warming.

Four years of litigation ensued, capped by the 2010 decision by the Montana Supreme Court in *Plains Grains, et al v. Board of County Commissioners of Cascade County, Southern Montana Electric Generation and Transmission, et al.*² A four justice majority, over a strenuous dissent: 1) reversed the district court’s affirmance of the rezoning; 2) held that the rezoning constituted illegal spot zoning; and 3) ruled that the plaintiffs did not need to obtain interim injunctive relief to avoid the “mootness” argument advanced by SME on grounds that it had already spent millions of dollars and commenced construction since the rezoning request had been approved.³

Across the state and just prior to the proposal to build the High Generating Station, there was a proposal to build the Roundup Power Project, a new 780-megawatt coal-fired power plant. Although the project received an air pollution permit from the Montana DEQ, four legal challenges were brought by MEIC and others: two regarding the emissions of nonhazardous and hazardous air pollutants, one involving the state’s noncompliance with the Montana Environmental Policy Act, and one for a failure to protect the Montana Constitutional right to a clean and healthful environment.⁴ Although DEQ offered an extension to the permit for construction, a successful challenge to

the Board of Environmental Review (BER) resulted in BER attorney’s 2007 recommended order to invalidate the DEQ extension.⁵ Ultimately, the company withdrew their permit and the 780-megawatt coal-plant was never built.

These early successes in stopping new coal-fired power plants from being built in our state were heartening to the growing ranks of Montanans concerned with climate change. Along with others, I was learning about climate change impacts in Montana, and how Montana’s vast coal resources and existing coal-fired power plants were impacting the climate change crisis and how future development would exacerbate the problem.

In the United States, coal plants were clearly identified as the single largest source of CO₂ emissions.⁶ And in Montana, mounting research was documenting that global warming was putting the state’s agriculture, water availability, tourism, forest health, and wildlife at risk:

1. Since 1999, Montana’s wheat yields have been 15-30% less than the previous ten years. The models developed by MSU on global warming impacts on Montana agriculture predict a further 20-40% decrease in yields.⁷
2. Of the 150 glaciers present in Glacier National Park 100 years ago, only 26 remain. Even these are expected to vanish within 30 years.⁸
3. In Montana, spring melt-off occurs 15 days earlier than 50 years ago according to University of Montana scientist, Steve Running, with the Montana Climate Center.⁹

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4. Snowfall in the Missoula area has fallen from 55 inches to 40 inches, and the number of frost-free days has increased by 15 in the last 50 years.

It was becoming equally clear that contributing sources to these local impacts also lie close to home. Montana holds the largest recoverable coal reserves of any state at 120 billion tons, almost one-quarter of the known U.S. reserves.¹⁰ The Colstrip complex, four coal-fired plants with a capacity to produce 2,094 megawatts of electricity, is the second largest coal-fired power plant west of the Mississippi River,¹¹ burning 12 train cars of coal every hour. This results in massive amounts of air pollution, including sulfur oxides, nitrogen oxides, mercury, and fine particulate matter. It is the second largest source of carbon dioxide (the primary “greenhouse” gas) in the west and one of the largest sources in the country.¹² Most of Colstrip’s electricity is shipped to out of state utilities via a massive transmission grid.¹³

Against this backdrop of daunting facts and figures, the staff and members of MEIC were formulating their strategic response. After thoroughly researching the issues, MEIC:

1) focused on the externalized costs of coal mining and coal burning especially in the form of water pollution, air pollution and attendant health im-

pacts; 2) provided information to concerned citizens, government agencies, and the media; 3) participated in public decision-making processes across the state; 4) formed strategic alliances;¹⁴ and 5) when all else failed, litigated.

Impressed by their vision and inspired by their grit, I signed on to the MEIC Board of Directors and was able to witness and participate in a grass roots response to the environmental issue of our time.¹⁵

The resulting initiative to hold the owners and operators of the Colstrip complex and Montana’s coal mines responsible for *all* costs associated with their operations has many dimensions. Although not exhaustive, what follows is a summary of efforts involving litigation and administrative proceedings.

2. Air pollution litigation at existing coal fired plants

In March of 2013, MEIC and the Sierra Club filed suit in Montana federal court¹⁶ alleging that Colstrip’s owners and operators were in violation of the “New Source Review” requirements of the federal Clean Air Act (CAA) and implementing state rules.¹⁷ In particular, the plaintiffs alleged violation of Part C of the CAA, entitled “Prevention of Significant Deterioration of Air Quality” (PSD). Those provisions require states to adopt emission limitations

and other measures necessary to prevent significant deterioration of air quality.¹⁸ The PSD program requires any facility constructing or modifying, and subsequently operating a new or modified “major emitting facility,” to obtain and comply with a specific permit for the project.¹⁹ Additionally, the new or modified facility is subject to best available control technology (“BACT”) emission limitations and must demonstrate that its emissions will not cause violations of air quality standards nor adversely impact visibility or other air quality related values of special areas such as National Parks.²⁰ The gravamen of the CAA litigation involving the four Colstrip units is whether the projects complained of were modifications within the meaning of the CAA, thereby triggering compliance with contemporary permitting and emissions requirements or, as the owners of Colstrip contend, merely routine maintenance of grandfathered facilities. Competing motions for summary judgment are pending before the court with a bench trial scheduled for November of 2015 to resolve remaining disputed issues of fact.

In September 2012, the EPA promulgated the federal implementation plan (FIP) for maintaining and improving visibility in Montana’s national parks and wilderness areas, so-called “Class I areas” under the CAA’s regional haze program.²¹ The CAA’s visibility provisions establish different legal requirements based

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The administration of justice.

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen’s Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

Montana Constitution, Article II, Section 16

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upon when the facility was constructed. Thus, EPA was required to develop a Best Available Retrofit Technology (BART) standard for the older Colstrip Units 1 and 2, while the standard for the newer Colstrip Units 3 and 4 was “reasonable progress” toward the national goal of eliminating human-caused visibility impairment in Class I areas by 2064. Represented by Earthjustice,²² MEIC, Sierra Club, and the National Parks Conservation Association, as well as PPL Montana and the owners of Colstrip (collectively PPLM), appealed the EPA’s Regional Haze Plan to the Ninth Circuit. The environmental plaintiffs contended the EPA’s decision to require only minimal pollution control upgrades at Units 1 and 2, and no upgrades on Units 3 and 4 was unsupported by the record and arbitrary and capricious. The Colstrip owners contended that the record did not support the agency decision to impose the pollution control upgrades on Units 1 and 2. In June 2015, the Ninth Circuit ruled that several elements in the Regional Haze Plan challenged by PPLM and the environmental groups were indeed arbitrary and capricious and remanded the proceeding back to the EPA to develop a record that justifies the decision reached.²³ The environmental plaintiffs will participate in the remand proceeding with the objective of achieving pollution control upgrades in accordance with the CAA.

3. Water pollution litigation at existing coal fired plants

The huge coal ash impoundment reservoirs at Colstrip have been leaking contaminants into the groundwater since their construction. In July 2012, the Montana Department of Environmental Quality entered into and Administrative Order of Consent

(AOC) with the Colstrip operator that required PPLM to develop a plan to investigate and remediate the leaking ash impoundments. The AOC has no deadlines, remediation requirements, nor cleanup standards despite the fact that the impoundments have been leaking for decades and PPLM has been investigating the problem for years.²⁴ Earthjustice represents MEIC, Sierra Club, and the National Wildlife Federation in the challenge to the AOC alleging DEQ has violated clear legal duties under the Montana Water Quality Act²⁵ and the Montana Major Facility Siting Act.²⁶ The case remains pending in state district court with expert reports recently exchanged. Trial is scheduled for April 2016.

4. Coal mining litigation

The Colstrip units receive their coal from the nearby Rosebud Mine, which is a 25,000-acre sub-bituminous coal mine located adjacent to the town of Colstrip and owned by Western Energy Company, a subsidiary of Westmoreland.²⁷ The mine has expanded a number of times over the years; about 400 acres of new surface disturbance occurs each year. The mine discharges wastewater to several tributaries of the Yellowstone River.²⁸ In September 2012, DEQ issued the Rosebud Mine a new permit under the Montana Pollution Discharge Elimination System (MPDES).²⁹ The previous permit had expired in 2004. MEIC and Sierra Club, represented by the Western Environmental Law Center,³⁰ filed suit in state district court³¹ alleging that the permit issued by DEQ violates MDPEs and Clean Water Act standards by: 1) allowing discharges into waterways that are already impaired as a result of coal mining and which waterways do not have the required Total Maximum

Daily Limits (TMDL);³² 2) reclassifying receiving waters as ephemeral without a Use Attainability Analysis (UAA);³³ and 3) failing to ensure compliance with applicable monitoring regarding water quality standards.³⁴ The case awaits a decision by the district court.

In March of 2010 the Montana State Land Board approved coal leases to Arch Coal covering State lands located in the Otter Creek drainage, a tributary of the Tongue River in southeastern Montana. The State received a bonus payment of \$85 million. Relying on a statutory provision allowing for the deferral of environmental review if a lease is subject to further permitting,³⁵ the State Land Board conducted no environmental review under the Montana Environmental Policy Act (MEPA)³⁶ prior to approving the leases. If permitted, it would be the largest coal mine in the U.S. Several environmental groups³⁷ challenged the Board’s deferral, but both the District Court and the Montana Supreme Court rejected the appellants’ arguments that issuing the leases implicated the Montana Constitution’s right to a clean and healthful environment thereby requiring environmental review notwithstanding the statutory deferral.³⁸ In 2012, a subsidiary of Arch Coal, Inc. filed an application for a surface coal-mining permit for up to 1.3 billion tons of coal, primarily intended to be transported to foreign markets, from the Otter Creek tracts in southeastern Montana. The DEQ is currently reviewing the mining application for adherence to the Surface and Underground Mine Reclamation Act and permits for water Pollutant Discharge and Air Quality. Most recently, in March 2015, DEQ outlined

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the extensive deficiencies in the permit application, ranging from missing water quality data to missing information regarding cultural resources. Arch Coal will submit amendments to the permit application to address these deficiencies. At present DEQ is ensuring a thorough permit application process that addresses a multitude of concerns, which in turn, stays potential litigation as long as the proper considerations and public processes are followed. In addition, the Federal Surface Transportation Board is conducting an updated Environmental Impact Statement on the proposed rail line that would transport the coal from Otter Creek to the various markets.³⁹ The preferred route would cross 42 miles of private agricultural land then travel across Montana, Idaho, Oregon, and Washington to West Coast terminals for shipment.

5. Consumer protection

NorthWestern Energy (NWE) purchased a 30% interest in Colstrip Unit 4 in 2009. The portion of NorthWestern's electricity from Colstrip Unit 4 sold to Montana consumers is subject to regulation by the Montana Public Service Commission (PSC).⁴⁰ At the time of purchase, NWE estimated that Colstrip Unit 4 would be an inexpensive and reliable source of power. Since then Unit 4 has broken down on several occasions, including from July of 2013 to late January 2014 for which NorthWestern requested and received a temporary rate increase from PSC to cover costs associated with that six-month outage of Unit 4. In the pending rate case, NWE is seeking to pass on \$32 million to its Montana customers. Again represented by Earthjustice, MEIC and Sierra Club have intervened in the rate case

proceeding by challenging the prudence of NWE's decision to pass the replacement power costs on to rate-payers. Expert reports were filed with the PSC in May 2015 and the hearing is set for October 2015.

6. Conclusion

Although much quieter than the media intensive effort to block construction of the Keystone XL pipeline and EPA efforts to regulate carbon in the waning months of the Obama administration,⁴¹ over the last ten years there has been a highly effective effort afoot in Montana to address climate change by an alliance of public interest environmental organizations, especially MEIC and the Sierra Club, and their attorneys including Montana trial lawyers, Earthjustice, and WELC. This effort has steadfastly focused agency decision makers on the externalized costs of coal mining and coal burning in Montana – especially in the form of air pollution, water pollution, and increased consumer rates. Often litigation has ensued. Although a number of cases remain pending before Montana agencies and courts, the cumulative impacts emanating from Montana, and other states across the country, are transforming the U.S. electric grid and the global climate debate.⁴² Although the fights in Montana and other states are over local air and water, “The fights also have a global context. The Earth is already getting hotter, and the death of American coal would not avert a climate catastrophe if the rest of the world did not follow our lead. But the decline of American coal emissions will help U.S. negotiators insist that other countries do their part in the global negotiations in Paris.”⁴³ So much remains at stake. Yet a group of dedicated Montanans has been

steadfastly doing what they can⁴⁴ to preserve the quiet beauty of our state for this and future generations.⁴⁵

ENDNOTES

1. Thanks to Dustin Leftridge for his contributions and editing.
2. 2010 MT 155, 238 P.3d 332, 357 Mont. 61.
3. *Id.*, ¶¶ 32-66. SME eventually filed for bankruptcy.
4. George Hays, a highly regarded environmental attorney from San Francisco, was lead counsel for the challengers.
5. In the Matter of the Air Quality Permit for the Roundup Power Project (Permit No. 3182-01), before the Board of Environmental Review, Case No. BER 2005-21 AQ (July 12, 2007).
6. Energy Information Administration (EIA), Emission of Greenhouse Gases in the United States (2006).
7. See Antle et. al., Adaptation, Spatial Heterogeneity, and the Vulnerability of Agricultural Systems to Climate Change and CO2 Fertilization: An Integrated Assessment Approach, Climatic Change (June 2004).
8. See USGS, Retreat of Glaciers in Glacier National Park, http://nrmssc.usgs.gov/research/glacier_retreat.htm (May 2013).
9. See Leppi et. al., Impacts of climate change on August stream discharge in the Central-Rocky Mountains, Climatic Change (August 2011).
10. Montana Department of Environmental Quality, Climate Change & Energy Supply, <http://deq.mt.gov/ClimateChange/Energy/EnergySupply/SScoal.mcpix> (Updated December 20, 2011).
11. See Puget Sound Energy, Colstrip Generating Station, http://pse.com/aboutpse/PseNewsroom/Media-Kit/064_Colstrip.pdf (July 2014).
12. Associated Press, EPA: Power plants main global warming culprits, http://billingsgazette.com/news/state-and-regional/montana/epa-power-plants-main-global-warming-culprits/article_03ebdd92-3c90-11e1-9e01-001871e3ce6c.html (January 11, 2012).

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13. Puget Sound Energy, *supra* n.11.
14. These alliances have included working closely with the Sierra Club, Earthjustice, and the Western Environmental Law Center.
15. I served on the MEIC board from October 2008 until October 20014, and as president from 2011 thru 2014.
16. Sierra Club and MEIC v. PPL Montana LLC, et al, Case No. CV 13-32-BLG-DLC-JCL. I serve as local counsel for the plaintiffs, with highly experienced CAA litigators leading the litigation teams for both plaintiffs and defendants.
17. 42 U.S.C. §§ 7401-7671q; ARM 17.8.801, et seq.
18. 42 U.S.C. §§7470–7492.
19. 42 U.S.C. §7475. Montana promulgated PSD program implementation regulations in 1982, which EPA approved into Montana’s federally enforceable state implementation plan (“SIP”) in 1983. 48 Fed. Reg. 20231 (May 5, 1983). The State’s PSD and related air quality permitting regulations are currently codified within ARM § 17, Chapter 8, Subchapters 7, 8, 10 and 11. Montana’s PSD program applies to any “major stationary source,” including the Colstrip plant. ARM 17.8.801(22)(a)(i).
20. 42 U.S.C. § 7475(a)(1)-(5).
21. 77 Fed. Reg. 57,864 (Sept. 18, 2012).
22. Earthjustice is a national non-profit public interest law firm with an office in Bozeman consisting of 5 attorneys. See www.Earthjustice.org. Earthjustice attorney Jenny Harbine is lead counsel for the environmental groups.
23. Nat’l Parks Conservation Ass’n v. EPA, No. 12-73757 (9th Cir. June 9, 2015).
24. The lawsuit of nearby private landowners over the contamination of their property was subject to settlement in 2008.
25. § 75-5-101 et seq.
26. § 75-20-101 et seq.
27. See MDEQ Permit No. MT0023965 – Modification I Major Industrial, Appendix III p. 2.
28. *Id.* at 2, 4.
29. MDEQ Permit No. T0023965 – Modification I Major Industrial - Pursuant to the Montana Water Quality Act, Title 75, Chapter 5 MCA and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.
30. WELC is a regional non-profit law firm with an office in Helena Montana. Megan Anderson and Shiloh Hernandez in the Helena office researched and are litigating this case. See www.westernlam.org
31. MEIC v. DEQ, Case No. CDV 2012-1075 (Mont. 1st Dist.).
32. See Friends of the Wild Swan v. U.S. Envtl. Prot. Agency, 130 F.Supp. 2d 1204, 1206 (D. Mont. 2000) (affirmed in part and reversed in part on other grounds), 74 Fed.Appx. 718 (9th Cir. 2003); see also 40 C.F.R. § 122.4(i).
33. 40 C.F.R. § 131.10(g), (h), and (j); ARM 17.30.602 (40), -606,-15(2).
34. 40 C.F.R. §§ 122.41(j)(1),122.44(a)(2), 122.45(a).
35. MCA § 77-1-121(2).
36. MCA §§ 75-1-101, et seq.
37. Including the Northern Plains Resource Council represented by Jack Tuholske, and the National Wildlife Federation, MEIC, and Sierra Club represented by Earthjustice.
38. See Northern Plains Resource Council, et al v. Montana Board of Land Commissioners, et al, 2012 MT 234, ¶¶ 17-21, 288 P3d 169 (holding that the requisite environmental review would occur at the mine permitting stage, when there was a specific proposal to consider).
39. Which was itself subject to an earlier successful appeal by the Northern Plains Resource Council and others, represented by attorney Jack Tuholske. See Northern Plains Resource Council, et al v. Surface Transportation Board, et al, 668 F.3d 1067 (9th Cir. 2011).
40. Admin. R. Mont. 38.1.101 (2013).
41. All of which efforts are important, as are efforts to have the public trust doctrine and the Montana Constitution judicially recognized as legal bases for climate change litigation. See Gregory S. Munro, The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation In Montana, 73 Mont. L. Rev. 123 (Winter 2012).
42. For cogent observations on some of these transformational impacts, see Grunwald, Inside the War on Coal, Politico, <http://www.politico.com/agenda/story/2015/05/inside-the-war-on-coal-000002> (May 2015).
43. *Id.* at p. 15. The Paris negotiations will occur in December 2015.
44. And help is arriving from many fronts. At this writing Pope Francis has just released his encyclical on climate change. According to the New York Times, “He placed most of the blame on fossil fuels and human activity while warning of an ‘unprecedented destruction of ecosystems, with serious consequence for all of us’ if swift action is not taken.” Yardley & Goodstein, Pope Francis, in Sweeping Encyclical, Calls for Swift Action on Climate Change, The New York Times (June 18, 2015).
45. Taking inspiration once again from the Preamble to the Montana Constitution. ♦