

# ENVIRONMENTAL LAW SECTION

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## Forging Fundamental Rights To A Sustainable Future For Montana Youth - The Constitutional Climate Lawsuit Against The State

### 1. Introduction.

Montana's 1972 Constitution commences with a covenant between generations of Montanans:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and *future generations* do ordain and establish this constitution.<sup>1</sup>

More than a hollow aspiration, this solemn commitment to future generations is part and parcel of the fundamental rights it presages.<sup>2</sup> This includes the Constitution's mandate that, "The state and each person *shall maintain and improve* a clean and healthful environment in Montana for present *and future generations*."<sup>3</sup> Congruent with the Montana Constitution's intergenerational covenant, the Constitution, through Article II, Section 15, explicitly extends all constitutional rights to Montana's children and youth.

As cogently articulated by the Montana Supreme Court in the seminal 1999 case of *MEIC v. DEQ*:

[W]e conclude that the delegates' *intention was to provide language and protections which are both anticipatory and preventative*. The delegates did not intend to merely prohibit that degree

of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.<sup>4</sup>

While the environmental threat at issue in *MEIC* was concerning enough (arsenic pollution in the upper reaches of the Blackfoot River), the threats posed by fossil fuels and the climate crisis are existential. Science is unequivocal that dangerous climate change is upon us and is occurring due to human activities, primarily from the extraction and burning of fossil fuels. The unremitting release of anthropogenic greenhouse gas (GHG) emissions into the atmosphere is already triggering a host of adverse consequences in Montana, including dangerously increasing temperatures, changing precipitation patterns, increasing droughts and extreme weather events, increasing the frequency and severity of wildfires, increasing glacial melt, and causing numerous adverse health risks – especially to children.<sup>5</sup> Moreover, a substantial portion of every ton of CO<sub>2</sub> emitted by human activity persists in the atmosphere for as long as a millennium or more, resulting in the persistent increase of atmospheric concentrations of GHGs. Today's children and future generations will disproportionately bear the harm from present-day GHG emissions.

### 2. The Constitutional Climate Lawsuit Against the State.

To protect their fundamental and inalienable rights, sixteen Montana

youth, ages two to eighteen (Youth Plaintiffs), have brought a constitutional case against the State of Montana.<sup>6</sup> The Youth Plaintiffs are geographically and culturally diverse, include the children of working ranch families, enrolled tribal members, and families who actively participate in Montana's outdoor traditions of hiking, hunting, and fishing. In a copiously detailed 104-page complaint for declaratory and injunctive relief filed in District Court,<sup>7</sup> Youth Plaintiffs allege that conduct by State Defendants<sup>8</sup> has resulted in the implementation of a fossil-fuel based energy system that results in dangerous levels of greenhouse gas (GHG) pollution, contributes to the climate crisis, and violates their (1) fundamental constitutional rights to a clean and healthful environment; (2) to seek safety, health, and happiness; (3) individual dignity and equal protection; and (4) public trust resources.

### 3. The Challenged Statutes.

Montana's State Energy Policy<sup>9</sup> directs energy production and utilization, resulting in a fossil-fuel based energy system comprised of a multiplicity of agency actions. Youth Plaintiffs challenge the constitutionality of the provisions of the State Energy Policy that explicitly promote increasing development and utilization of coal, oil, and gas (as well as how the Policy is being implemented through Defendants' aggregate acts) notwithstanding the worsening climate injuries to these young Montanans. Youth Plaintiffs also challenge the constitutionality of the section of Montana's Environmental Policy Act (MEPA) that Defendants have interpreted to exclude from MEPA analysis the impacts of GHG emissions on the

climate.<sup>10</sup> Youth Plaintiffs contend this exclusion facilitates the Defendants' willful blindness to their contributions to the climate crisis and contributes to Youth Plaintiffs' injuries.

#### 4. Judicial Remedies for Systemic Constitutional Violations.

Both Montana and National landmark constitutional rulings have approved declaratory and injunctive relief, including remedial plans, to remedy systemic constitutional violations like those at issue here. For example, in *Columbia Falls Elementary School Dist. No. 6 v. State*,<sup>11</sup> schools, on behalf of children, called upon the courts to reform pervasive deficiencies in Montana's system of funding public elementary and secondary schools.<sup>12</sup> Similarly, federal courts have declared unconstitutional systemic racial injustice in school systems,<sup>13</sup> government-sanctioned segregated public housing systems,<sup>14</sup> and cruel and unusual conditions across California's state prison system.<sup>15</sup>

Here, in a pending motion to dismiss, the State Defendants have compared the Youth Plaintiffs' challenge to the specific statutory provisions referenced above to the failed challenge of an entire, undefined statutory scheme in *Donaldson v. State*.<sup>16</sup> In *Donaldson*, the plaintiffs sought a general declaration of their rights *without* challenging any particular statute as unconstitutional, as well as an order that the State provide plaintiffs a "statutory structure" that protects their rights.<sup>17</sup> In this case, however, Youth Plaintiffs seek to invalidate *specific provisions* of the State Energy Policy and MEPA and they *do not* seek an order requiring the legislature to enact any laws. Thus, Youth Plaintiffs' case is the type of "specific suits directed at specific, identifiable statutes," that the

*Donaldson* court found justiciable.<sup>18</sup>

In arguing for dismissal, State Defendants also rely on the recent majority opinion of the sharply divided Ninth Circuit Panel in *Juliana v. United States*.<sup>19</sup> The redressability analysis in that decision is contrary to Montana precedent, which makes clear that: (1) declaratory relief alone is adequate to establish justiciability;<sup>20</sup> and (2) Montana courts have authority to oversee reform of unconstitutional state systems, *e.g.*, *Columbia Falls*.<sup>21</sup> *Juliana* also premised its ruling on concerns related to the "unelected and politically unaccountable" federal judiciary.<sup>22</sup> Here, by contrast, Montana's courts are democratically elected and politically accountable, Mont. Const. Art. VII, § 8, and "the right to a clean and healthful environment" is likewise an express statement of the electoral will of Montana citizens, entitled to the highest level of *judicial* protection.<sup>23</sup> The claims here are also distinguishable from *Juliana*. Unlike *Juliana*, the Youth Plaintiffs here have alleged injuries stemming from specific laws, which are at least partially redressable by declaratory and/or injunctive relief. When courts are presented with an unconstitutional statute that is causing injuries, as here, it is their duty to provide redress.<sup>24</sup>

This climate lawsuit against the State is distinguishable from the significantly different approach taken in the original proceeding filed before the Montana Supreme Court in May of 2011.<sup>25</sup> There, a seventeen-page petition was filed seeking to have the Supreme Court declare that the State holds the atmosphere in trust for present and future citizens of Montana and that the trust imposes on the State the duty to protect and preserve the atmosphere. One month later, a unanimous Supreme Court rejected

the petition, explaining:

We conclude this case does not involve purely legal questions. This Court is ill-equipped to resolve the factual assertions presented by Petitioners. We further conclude that Petitioners have not established urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process.<sup>26</sup>

Following the directive of the Montana Supreme Court, this lawsuit was filed in a trial court, where the veracity of factual assertions can be tested. Youth Plaintiffs stand prepared to establish (a) that Montana is the source of enormous quantities of GHG emissions; and (b) those emissions are contributing to climate destabilization and causing dangerous impacts in Montana to the detriment of Youth Plaintiffs.

#### 5. Factual Underpinnings: Montana Sources of GHG Emissions.

Montana is a significant source of GHG emissions.<sup>27</sup> The most complete (albeit outdated) data for GHG emissions that result from Montana's fossil fuel-based energy system is from a 2007 report, *Montana Climate Change Action Plan*, a report of the Governor's Climate Change Advisory Committee ("CCAC").<sup>28</sup> According to this report, Montana's GHG emissions were 39.2 million metric tons of carbon dioxide equivalent ("CO<sub>2</sub>e") emissions in 1990; 43.7 million metric tons of CO<sub>2</sub>e in 2000; and were projected to be 50.0 million metric tons of CO<sub>2</sub>e in 2010 and 54.6 million metric tons of CO<sub>2</sub>e in 2020.<sup>29</sup> These twenty-year-old projections significantly *underestimate* the GHG emissions attributable to Montana because

it *excludes* emissions from fossil fuels extracted in Montana but exported and combusted out of state as well as embedded emissions. The lack of transparency regarding these emissions is due in part to State Defendants' ongoing and systemic refusal, pursuant to the Climate Change Exception to MEPA, to disclose the climate change impacts of their actions.<sup>30</sup>

Defendants have never completed a comprehensive accounting and inventory that accounts for all of Montana's GHG emissions, including emissions from fossil fuels extracted in Montana but exported and combusted out of state. As such, Defendants have failed to disclose to the public the danger caused by its implementation of its State Energy Policy. Nevertheless, from publicly available information, we do know much about Montana sources of GHG emissions, including:

- Coal-fired power plants, which are authorized to operate by Defendants, provide the largest share of Montana's electricity generation, roughly 47% in 2018.<sup>31</sup> Roughly half of the electricity generated in Montana is used in-state while the other half is sent to other states via high-voltage transmission lines.
- Montana has six coal mines,<sup>32</sup> all of which Defendants authorize to operate, and the Nation's largest estimated recoverable coal reserves, accounting for nearly one-third of the Nation's recoverable coal reserves and is a substantial supplier of coal for the rest of the country.<sup>33</sup> In 2018, over 38 million short tons of coal were mined from Montana, with authorization from Defendants, making it the sixth-largest coal producer in the United States.<sup>34</sup> Once combusted,

that 38 million short tons of coal is equivalent to approximately 72.8 million metric tons of CO<sub>2</sub> emissions. About 22% of the coal mined in 2018 was consumed in-state, almost all in the electric power sector; 42% was sent to other states; and 36% was exported to other countries.<sup>35</sup>

- There were over 4,600 producing oil wells as of 2017.<sup>36</sup> With the authorization of Defendants, Montana produced 20,706,000 barrels of crude oil in 2017 alone that, once combusted, resulted in 8,948,719 metric tons CO<sub>2</sub>. Between 1960 and 2017, Defendants authorized the production of 1.59 billion barrels of crude oil that, once combusted, resulted in 689 million metric tons of CO<sub>2</sub>.
- According to U.S. Energy Information Administration, there were over 7,400 state-authorized natural gas producing wells in 2018 and Montana's monthly natural gas production was approximately 4,000 million cubic feet as of September 2019.<sup>37</sup> Total gas production in 2017 was 46,090 million cubic feet that, once burned, resulted in 2,509,139 metric tons of CO<sub>2</sub>. Between 1960 and 2017, 3.26 trillion cubic feet of gas was produced in Montana, resulting in 177.7 million metric tons of CO<sub>2</sub>.

## 6. Climate Destabilization Is Causing Dangerous Impacts in Montana.

Against this backdrop of Montana as a major contributing source of GHG emissions looms the overwhelming scientific consensus that human-caused GHG climate disruption is occurring and is dangerous to humans and the very ecosystems on which

humans depend. More than 45 eminent scientists from over 40 different institutions have published in peer-reviewed journals finding that the maximum level of atmospheric CO<sub>2</sub> consistent with protecting humanity and other species is 350 ppm. No one, including the Intergovernmental Panel on Climate Change, has published any scientific evidence to counter that 350 ppm is the maximum safe concentration of CO<sub>2</sub>.<sup>38</sup>

The scientific evidence clearly establishes that the present rate of global heating and ocean acidification is a result of anthropogenic GHG emissions, primarily CO<sub>2</sub> emissions, from the combustion of fossil fuels. This release of GHG emissions into the atmosphere, combined with carbon released through deforestation and soil degradation, has disrupted Earth's energy balance, thereby changing Earth's climate, resulting in climate disruption globally and in Montana. The global annual average atmospheric CO<sub>2</sub> concentration for 2019 was 411.4 ppm compared to the pre-industrial concentration of 280 ppm.<sup>39</sup> The atmospheric CO<sub>2</sub> concentration continues to increase as a direct result of human combustion of fossil fuels.

The resultant impacts of climate disruption in Montana are pervasive:

- Annual average temperatures across Montana have risen significantly more than the global average, between 2° and 3° F between 1950 and 2015.<sup>41</sup> By mid-century, when the Youth Plaintiffs will be adults, models project that the annual average daily maximum temperature in Montana will increase by approximately 4.5-6.0° F, a temperature increase that would imperil human civilization. By the end of the century, models predict that the annual average

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daily maximum temperature in Montana will increase by approximately 5-10° F.<sup>42</sup>

- Climate disruption in Montana – specifically, temperature rises resulting in warmer springs and the delay of frost in the fall – will have a significant economic impact on Montana’s two primary agricultural sectors. The economic impact is projected as a 20% decline in rangeland cattle production and a 25% reduction in grain production.<sup>43</sup> The economic losses associated with this aspect of climate disruption would be the loss of about 25,000 jobs and \$736 million in labor earnings by 2055.<sup>44</sup>
- Higher temperatures are also leading to increased severity and frequency of wildfires.<sup>45</sup> Wildfires are expected to get significantly worse in the coming years without immediate steps to limit global heating.<sup>46</sup> The wildfire season in the western United States is at least 87 days longer than it was in the 1980s.<sup>47</sup> Aside from the danger posed to residents – including Youth Plaintiffs – wildfires also impact ecosystems, property, and livelihoods.<sup>48</sup> In 2017 – Montana’s worst wildfire season in more than 100 years in terms of the number of acres burned – wildfires cost the state approximately \$70 million.<sup>49</sup> In 2018 wildfires cost the state more than \$95 million.<sup>50</sup>
- As a result of ecosystem disruption, including drought conditions and wildfires, boating and fishing are being adversely impacted and certain rivers and fisheries have been closed.<sup>51</sup> As a result of impacts to Montana’s wildlife and outdoor economy, approximately 11,000 jobs and \$281 million in in-

come is threatened due to stream closures, lost hunting opportunities, wildfires, and reduced snowpack.<sup>52</sup>

- Children, even those without pre-existing illnesses, are considered a “sensitive population” to the effects of the climate crisis because their bodies are still developing.<sup>53</sup> Air pollution poses severe health risks for Montana’s youth and is shown to impede their physical development. Montana’s persistent drought conditions and record wildfire seasons have doubled respiratory-related emergency room visits.<sup>54</sup> Montana, in particular western Montana, already experiences some of the worst wildfire smoke conditions in the United States.<sup>55</sup>

These are not merely a litany of potential impacts; rather, Youth Plaintiffs have set forth detailed allegations of such injuries – which they stand prepared to prove – as a result of State Defendants’ conduct, including injuries to their property, their physical and psychological health, their recreational and aesthetic interests, and economic injuries.<sup>56</sup>

## 7. Conclusion.

The State Defendants argue that this effort at forging rights to a sustainable future for Montana youth through this constitutional climate lawsuit fundamentally involves political questions best left to the legislative and executive branches. As a matter of scientific fact, that is a prescription for the continuation of a lethal status quo. As a matter of law, while non-self-executing provisions of the Montana Constitution may raise nonjusticiable political questions, constitutional provisions that implicate fundamental rights are “in a category of their own.” The courts are the “final

interpreters of the Constitution [and] have the final ‘obligation to guard, enforce, and protect every right granted or secured by the Constitution ...’”<sup>57</sup> Just as the courts are the “final guardian and protector of the right to education” so too are the courts the “final guardian and protector” of Youth Plaintiffs’ fundamental rights to a clean and healthful environment; to seek safety, health, and happiness; to individual dignity and equal protection; and to public trust resources. *Columbia Falls*, ¶19. Reviewing statutes and government conduct for compliance with fundamental constitutional rights is squarely within the scope of the judiciary and does not raise political question issues.<sup>58</sup> To the contrary, when courts are presented with unconstitutional statutes that are causing injury, as here, it is their *duty* to provide redress.<sup>59</sup>

## ENDNOTES

1. Preamble, Mont. Const. (1972) (all emphasis herein is added).
2. *MEIC v. DEQ*, 1999 MT 248, ¶ 77, 296 Mont. 207, 230, 988 P.2d 1236, 1249.
3. Mont. Const. Art. IX, § 1.
4. *Supra* n. 2, finding that “based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution.”
5. World Health Organization (WHO), *Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s*, 48 (Simon Hales, et al., eds., 2014).
6. *Held et al. v. State of Montana et al.*, filed in Montana’s First Judicial District Court (No. CDV-2020-307). Counsel for plaintiffs include Shiloh Hernandez of Western Environmental Law Center,

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Roger Sullivan and Dustin Leftridge of McGarvey Law, and Nate Bellinger of Our Children's Trust.

7. The complaint is available at: [ourchildrenstrust.org/montana](http://ourchildrenstrust.org/montana)

8. "State Defendants" include the State of Montana, Governor Bullock, Montana Department of Environmental Quality (DEQ), Montana Department of Natural Resources and Conservation (DNRC), Montana Department of Transportation (MDT), and the Montana Public Service Commission (PSC). Complaint, ¶¶ 82-105.

9. See Mont. Code Ann., §90-4-1001(c)-(g) ("State Energy Policy").

10. See Mont. Code Ann. § 75-1-201(2)(a) ("Climate Change Exception"), which states: "Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature."

11. 2005 MT 69, 326 Mont. 304, 109 P.3d 257.

12. See also *Helena Elementary School Dist. No. 1 v. State*, (1989), 236 Mont. 44, 769 P.2d 684.

13. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

14. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

15. *Brown v. Plata*, 563 U.S. 493 (2011).

16. 2012 MT 288, 367 Mont. 228, 292 P.3d 364.

17. *Id.* ¶ 8.

18. *Id.* at ¶¶ 4, 8.

19. 947 F.3d 1159 (9th Cir. 2020) (awaiting *en banc* determination).

20. *MEIC*, ¶ 80 (standing established where plaintiffs sought declaratory judgment that a statute was unconstitutional); *Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 110, 679 P.2d 1223, 1226 (1984) (same).

21. *Columbia Falls*, ¶ 31. It is also contrary to U.S. Supreme Court and Ninth Circuit precedent. See *Juliana*, 947 F.3d at 1189 (Staton, J., dissenting) ("Plaintiffs request for a 'plan' is neither novel nor judicially incognizable." Instead, it is

"consistent with our historical practices ...").

22. 947 F.3d at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)).

23. See Mont. Const. art. II, § 3; MEIC, ¶ 63; see also *Columbia Falls*, ¶ 19 (courts are "final guardian and protector" of constitutional rights).

24. *In re Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 406 (1937) (if a statute is unconstitutional, "declin[ing] to so declare would be a violation of our oaths of office"); See also Mont. Const. art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("where there is a legal right, there is also a legal remedy").

25. *Barbough et al., v. State of Montana* (No. OP 11-0258), filed in May 4, 2011.

26. Order (No. OP 11-0258), at p.2.

27. GHG emissions include emissions from carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

28. This November 2007 report was prepared with input from the Montana Department of Environmental Quality and the Center for Climate Strategies and relied heavily on in the September 2007 report titled *Montana GHG Emissions Inventory and Reference Case Projections, 1990-2020*, for Montana's GHG inventory and projections. The September 2007 report was presented to the CCAC, which unanimously approved it.

29. *Montana Climate Change Action Plan: Final Report of the Governor's Climate Change Advisory Committee*, *supra* note 28, at 1-9. These emissions numbers include emissions from agriculture and from the generation of electricity sent out of state. They do not include emissions sinks, such as forestry and soil sinks. *Id.*

30. Since 2011, the Montana legislature has barred state agencies from considering climate change under MEPA. See Mont. Code Ann. § 75-1-201(2)(a).

31. See *Montana State Energy Profile*, *supra* note 51.

32. Montana Department of Environmental Quality, *Coal Tables Workbook* –

2018 Update (2018), [http://deq.mt.gov/Portals/112/Energy/Documents/Energy\\_Statistics/CoalTables2018\\_Final.xlsx](http://deq.mt.gov/Portals/112/Energy/Documents/Energy_Statistics/CoalTables2018_Final.xlsx).

33. See *Montana State Energy Profile*, *supra* note 51; U.S. Energy Information Admin., *Annual Coal Report 2018, Table 15, Recoverable Coal Reserves at Producing Mines, Estimated Recoverable Reserves, and Demonstrated Reserve by Mining Method, 2018*, Annual Coal Report, <https://www.eia.gov/coal/annual/pdf/table15.pdf> (last accessed Feb. 5, 2019).

34. See *Montana State Energy Profile*, *supra* note 51; *Understanding Energy in Montana 2018*, *supra* note 34.

35. U.S. Energy Information Admin., *Profile Analysis*, Montana State Profile and Energy Estimates <https://www.eia.gov/state/analysis.php?sid=MT> (last updated Jan. 16, 2020); *Understanding Energy in Montana 2018*, *supra* note 34.

36. Montana Department of Environmental Quality, *Petroleum Tables Workbook – 2019 Update, Table P3* (2019), [http://deq.mt.gov/Portals/112/Energy/Documents/Energy\\_Statistics/PetroleumTables2019.xlsx](http://deq.mt.gov/Portals/112/Energy/Documents/Energy_Statistics/PetroleumTables2019.xlsx); see also *Montana State Energy Profile*, *supra* note 51.

37. U.S. Energy Information Admin., *Montana Natural Gas Data and Map*, <https://www.eia.gov/beta/states/states/mt/data/dashboard/natural-gas> (last visited Dec. 24, 2019).

38. See, e.g., James Hansen et al., *Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim?*, 2 *The Open Atmospheric Science Journal* 217 (2008); James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 *PloS one* e81648 (2013); James Hansen et al., *Young People's Burden: Requirement of Negative CO<sub>2</sub> Emissions*, 8 *Earth Syst. Dynam.* 577 (2017).

39. *Mauna Loa CO<sub>2</sub> Annual Mean Data*, [ftp://afpt.cmdl.noaa.gov/products/trends/co2/co2\\_annmean\\_mlo.txt](ftp://afpt.cmdl.noaa.gov/products/trends/co2/co2_annmean_mlo.txt) (last updated Mar. 5, 2020).

40. Rebecca Lindsey, *Climate Change: Atmospheric Carbon Dioxide*, National Oceanic and Atmospheric Administration (NOAA) (Feb 20, 2020), <https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide>; National