

0p11-0258

FILED

May 4 2011

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. _____

KIP BARHAUGH; TIMOTHY BECHTOLD as natural parent and on behalf of S.B. and B.B.;
RYAN BUSSE as natural parent and on behalf of L.B. and B.B.; GRADEN OEHLERICH
HAHN and JAMUL F. HAHN as natural parents and on behalf of A.H. and A.H.; EMILY
HOWELL; LARRY HOWELL as natural parent and on behalf of S.H.; MAYLINN SMITH as
natural parent and on behalf of W.F. and M.F.; and JOHN THIEBES,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

PETITION FOR ORIGINAL JURISDICTION *REDACTED*

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I. RELIEF REQUESTED

Petitioners respectfully petition this Court, pursuant to Rule 14(4), Montana Rules of Appellate Procedure, and Article VII, § 2 of the Montana Constitution, to take original jurisdiction of this proceeding and enter judgment declaring (1) that the State of Montana holds the atmosphere in trust for the present and future citizens of the state of Montana, and (2) that the State of Montana has the affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limitations on the levels of greenhouse gas (GHG) emissions as necessary to mitigate human caused climate change.

II. PARTIES

Petitioners are Montana children of diverse backgrounds and residences. Ex. 1 (Affidavits of Petitioners). Petitioners have standing to bring this Petition because their personal and economic well-being is directly and uniquely dependent upon timber, wilderness, water and weather; and is threatened with injury by wild fire, loss of water resources, changes in precipitation patterns, extreme weather events, flood, beetle kill and other consequences of climate change. See *Missoula City-County Air Pollution Control Bd. v. Board of Environmental Review*, 282 Mont. 255, 262, 937 P.2d 463, 467-68 (1997); *MEIC v. Dept. of Environmental Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236; *National Audubon Society v. Super. Ct.*, 658 P.2d 709, 716 n.11 (Cal. 1983) (“any member of the

general public has standing to raise a claim of harm to the public trust.”).

Respondent is the State of Montana, and, more particularly, its legislative branch acting through its Environmental Quality Council (EQC), and its administrative agencies, the Montana Department of Environmental Quality (MDEQ) and Board of Environmental Review (BER).

III. FACTS

In the interest of brevity and clarity, the undisputed facts making it appropriate for this Court to accept original jurisdiction and enter declaratory judgment are incorporated within Petitioners’ arguments below explaining why the Court should accept jurisdiction and grant the relief requested.

IV. ARGUMENT

1. The requirements for exercising original jurisdiction are satisfied.

This Court has original jurisdiction over declaratory judgment actions when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency or emergency factors make the normal litigation and appeal process inadequate. Mont. Const. art. VII, § 2; M.R.App. P. 14(4); *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 2002 MT 280, ¶17, 312 Mont. 420, 59 P.3d 1093. Exercising original jurisdiction is particularly appropriate where, as here, the issues presented have significant impact on the

operation of government in regard to its citizens.

a. This Petition presents constitutional issues of major statewide importance.

The issue of whether the atmosphere is part of the constitutionally protected public trust in Montana invokes the “clean and healthful environment” guarantees for present and future generations under the Montana Constitution. Mont. Const. art. IX, § 1 and art. II, § 3. It also invokes the Montana Environmental Policy Act (MEPA), which incorporates these constitutional guarantees and further directs that the State has a “continuing responsibility” “to use all practical means consistent with other considerations of state policy . . . so that the state may fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” Mont. Code Ann. §75-1-103(2). Accordingly, the constitutional basis of this Petition cannot be denied.

Additionally, the State has already acknowledged climate change is an issue of statewide importance. The MDEQ has expressly admitted climate change poses a statewide imminent and growing threat to the lives and livelihood of the citizens of Montana:

While climate change is the ultimate global issue – with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another – it does manifest itself in particular ways in specific locales like Montana. During the past century, the average temperature in Helena increased 1.3°F and precipitation has decreased by up to 20 percent in many parts of the state.

Over the next century, Montana's climate may change even more. In this region and state, concerns have been expressed by scientists and conservationists over a range of potential impacts, including:

- ~ glaciers melting and disappearing in Glacier National Park and elsewhere in the Rocky Mountains;
- ~ a potential decline in the northern Rockies snowpack and stressed water supplies both for human use and coldwater fish;
- ~ survival of ski areas receiving more rain and less snow, drying of prairie potholes in eastern Montana and a concomitant decline in duck production;
- ~ an increase in the frequency and intensity of wildfires as forest habitats dry out, and perhaps a conversion of existing forests to shrub and grasslands;
- ~ loss of wildlife habitat;
- ~ possible effects on human health from extreme heat waves and expanding diseases like Western equine encephalitis, West Nile virus, and malaria;
- ~ possible impacts on the availability of water for irrigated and dryland crop production alike.

Ex. 2, p. 3-46 (Final EIS Highwood Generating Station) (internal citations omitted).

Richard Opper, Director of the MDEQ, provided a compelling description of the effects of climate change across Montana:

The changes taking place in our beautiful Glacier National Park . . . are becoming symbolic of what lies ahead. When Glacier was designated a national park 100 years ago, 150 glaciers glittered along its mountaintops. Only 27 remain today and they all may be gone by the year 2022, should current weather patterns continue. Perhaps more serious than the visual

impact of melting glaciers are the deeper environmental and economic problems associated with a changing climate.

Ex. 3(a).

Accordingly, through the Respondent's own evidence, the statewide importance of this issue cannot be denied.

b. This Petition presents purely legal issues.

"Whether a legal duty is owed from one party to another is a question of law for the court." *Monroe v. Cogswell Agency*, 2010 MT 134, ¶31, 356 Mont. 417, 234 P.3d 79. "The existence of a legal duty and the scope of any duty are questions of law." *Dukes v. City of Missoula*, 2005 MT 196, ¶ 11, 328 Mont. 155, 119 P.3d 61. The questions of whether the atmosphere is part of the constitutionally protected public trust in Montana, and subsequently, whether the State of Montana has an affirmative obligation to protect that trust resource, including regulation of GHG emissions, are purely legal issues, appropriate for resolution in this proceeding.

c. Urgent or emergency circumstances make the normal litigation and appeal process inadequate.

Through the normal litigation and appeals process, this issue would likely take a minimum of two to three years just to reach this Court, in contrast to the average 60 days needed to resolve original proceedings. Ex. 4. Considering the scientific evidence cited by the Respondent, there is not enough time to effectively

arrest the effect of human-caused climate change unless immediate action is taken. MDEQ acknowledges that “[t]he stakes associated with projected changes in climate are high,” and “[i]t is imperative that we all begin to do what we can to address this crucial issue for our own sake and the sake of the generations of Montanans to come.” Ex. 2, p. 3-46 (emphasis added); Ex. 3(a) (emphasis added). Climatological “tipping points” lie directly ahead and drive the urgency of taking action:

The farther we look into the future, the worse that the costs of inaction will become. The longer we do nothing, the greater the risks of an irreversible climate catastrophe, such as a massive rise in sea levels, that could make the world unable to support anything like the current levels of population and economic activity. The costs and risks of inaction are overwhelmingly worse than the moderate and manageable costs of an immediate effort to reduce carbon emissions.

Ex. 5, p. 3 (Dr. Frank Ackerman, Senior Economist SEI-US Tufts University, Congressional Testimony, dated 4/22/09).

The State admits “scientific consensus [exists] that increasing emissions of greenhouse gases (GHG) are affecting the Earth's climate.” App. 7. Further, the State acknowledges “[s]cientists know with *virtual certainty*” human activities are affecting the composition of the atmosphere by releasing large quantities of CO₂ into the atmosphere by burning fossil fuels, deforestation, land uses, and industrial processes. Ex. 3(b); Ex. 7, p. 1-1. The resulting measurable increase of carbon dioxide and other greenhouse gases is linked to rising global temperatures.

The adverse consequences of unregulated GHG emissions are so threatening that in 2005 Governor Schweitzer appointed the Climate Change Action Committee (CCAC) to prepare a Climate Change Action Plan to address the “profound consequences that global warming could have on the economy, environment, and quality of life in Montana.” Ex. 6. The subsequent Action Plan determined that “a 14% increase in GHG emissions from 1990 to 2005 moved Montana from a net carbon sink to a net carbon emitter.” Ex. 7, p. EX-1. It determined Montana also has a higher rate of GHG emissions per capita – nearly double the national average. Ex. 7, p. EX-2. The Action Plan recommended a number of measures for Montana to “reduce its emissions of GHGs to 1990 levels by the year 2020. Some of the recommendations can be implemented immediately, and some will require the support of the Montana State Legislature.” Ex. 7, p. EX-2.

However, while the economic and social harms attributable to climate change are well studied and documented by the State, including the need to take immediate action, the State has been prevented by the Legislature from taking any action to regulate GHG emissions, despite a legal obligation to do so. Following the U.S. Environmental Protection Agency’s determination that GHGs constitute a pollutant that must be regulated under the federal Clean Air Act, in December of 2009 the BER laudably initiated rulemaking proceedings pertaining to GHG

emissions pursuant to its authority under the Montana Clean Air Act. Ex. 8, pp. 5:18 to 6:15; Mont. Code Ann. §75-2-101. However, BER was forced to terminate the GHG rulemaking in response to formal objection by the EQC. Ex. 9. The EQC is a legislative committee with responsibility to review administrative rules proposed by MDEQ. Mont. Code Ann. §5-16-101, §75-1-324(10); §1.3.312(3)(a) ARM. While the MDEQ could have adopted the rules despite the EQC's objection, it recognized any adopted rules governing GHG emissions would be entirely ineffective for two full years, at an absolute minimum. Ex. 9; §1.3.312(3)(b) ARM.

This record establishes beyond dispute that the legislative and executive branches consider the State's response to the climate crisis—which the State fully recognizes exists—to be a matter of political discretion, *not* legal obligation. Petitioners respectfully submit that it therefore falls to the judicial branch, and uniquely to this Court, to exercise original jurisdiction to decide the scope of the duty imposed by Montana's constitution and statutes to preserve and protect the atmospheric trust for present and future generations, and whether that duty allows continued inaction by the political branches.

2. The Montana Constitution and public trust doctrine obligate the State of Montana to hold the atmosphere in trust for present and future generations.

a. The scope of the public trust doctrine is broad and far reaching.

The public trust doctrine is an ancient legal mandate establishing a sovereign obligation in states to hold critical natural resources in trust for the benefit of their citizens. "The theory underlying [the public trust] doctrine can be traced from Roman Law through Magna Carta to present day decisions." *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 47, 682 P.2d 163, 167 (1984). The Romans recognized: "The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore." Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). Likewise, under English common law, "There are some few things which . . . must still unavoidably remain in common Such (among others) are the elements of light, air, and water" *Geer v. State of Connecticut*, 161 U.S. 519, 668 (1896) (citing William Blackstone, 2 BL Comm. 14). The public trust doctrine was incorporated into the colonial charters when the American colonies were first established. *Martin v. Waddell*, 41 U.S. 367, 413 (1842). Following the Revolution, the doctrine was likewise adopted into the American common law.

More than a century ago the United States Supreme Court recognized the public trust doctrine was needed as a bulwark to protect resources too valuable to

be disposed of at the whim of the legislature:

The harbor of Chicago is of immense value to the people of the state of Illinois . . . and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, --one limited to transportation of passengers and freight between distant points and the city, --is a proposition that cannot be defended.

Illinois Central Railroad v. Illinois, 146 U.S. 387, 452-453 (1892); *see also Geer*, 161 U.S. at 534 (“[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.”).

Original American public trust doctrine cases focused on navigable waters and submersible lands. However, as society industrialized the doctrine expanded accordingly to different geographic areas and to other modern concerns. Indeed, courts have emphasized the flexibility of the doctrine to meet changing societal concerns. “The public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.” *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000). “Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be ‘fixed or static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’” *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (internal citations omitted). “Since as early as 1821, the public trust doctrine has been applied

throughout the United States ‘as a flexible method for judicial protection of public interests’” *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998) (internal citations omitted). These cases demonstrate the public trust doctrine is sufficiently broad in scope to apply to the issue presented.

b. Montana’s public trust doctrine is constitutionally grounded.

In Montana, the public trust doctrine was first referenced and enforced in *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 47, 682 P.2d 163, 167 (1984). There, this Court held that, “upon statehood, title [to riverbed and surface waters] was transferred to the State, burdened by this public trust.” *Curran*, 210 Mont. at 52, 682 P.2d at 170. This Court’s conclusion was mandated by Article. IX, § 3(3) of the Montana Constitution: “All surface, underground, flood, and atmospheric waters within the boundaries of the state *are the property of the state for the use of its people.*” *Curran* thus established that the public trust doctrine is not a mere creature of common law that can be abrogated by legislative or administrative bodies. It is a constitutional imperative.

The public trust doctrine is infused throughout Montana’s Constitution:

- (1) *The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.*
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide

adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. art. IX, § 1 (emphasis added). Additionally, the Constitution establishes that: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment" Mont. Const. art. II, § 3.

As these provisions clearly reveal, the public trust doctrine is rooted deep within and throughout Montana's constitution and serves to protect *all* environmental resources for future generations. Indeed, *Curran* cited with approval a decision of the Minnesota Supreme Court holding that the doctrine protects "public purposes which cannot now be enumerated or even anticipated," and that to limit the public trust to a narrow test "would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated" *Curran*, 210 Mont. at 50-51, 682 P.2d at 169 (quoting *Lamprey v. State (Metcalf)*, 53 N.W. 1139, 1143 (1893)).

With these constitutional obligations specifically in mind, the Montana Legislature adopted the Montana Environmental Policy Act. MEPA recognized the State had a "*continuing responsibility*" "to use all practical means consistent with other considerations of state policy . . . so that the state may fulfill the responsibilities of each generation as *trustee of the environment for succeeding generations.*" Mont. Code Ann. §75-1-103(2) (emphasis added). Based on these

constitutional and statutory provisions, it is beyond dispute that the purposes of the public trust doctrine underpin constitutional and statutory environmental protections in Montana.

c. The public trust doctrine naturally encompasses the atmospheric trust¹

Like the navigable waters in *Illinois Central*, the atmosphere is “a subject of public concern to the whole people of the state.” *Illinois Central*, 146 U.S. at 455. This is universally understood to be true, because the atmosphere is a fundamental natural resource necessary for our very survival:

[I]t is only logical that the public trust should protect the atmosphere and all other natural resources that are vital to the people and society at large. No one could seriously argue that the air is not a resource of “special character” that serves purposes “in which the whole people are interested.” Atmospheric health is essential to all facets of civilization and human survival.

Mary Christina Wood, *Advancing The Sovereign Trust Of Government To Safeguard The Environment For Present And Future Generations (Part I): Ecological Realism And The Need For A Paradigm Shift*, 39 *Envtl. L.* 43 , 80-81 (2009).

¹ The concept of applying the public trust doctrine to the atmosphere was developed by University of Oregon School of Law Professor Mary Wood, the Philip H. Knight Professor of Law and Faculty Director of the school’s Environmental and Natural Resources Law Program. Professor Wood first coined the term “Atmospheric Trust Litigation” in a scholarly article, and the strategy has been described in several subsequent publications. Mary Christina Wood, *Atmospheric Trust Litigation*, *Adjudicating Climate Change: State, National, And International Approaches* (William C.G. Burns & Hari M. Osofsky, eds., Cambridge Univ. Press, 2009), available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmospheric.pdf>.

Whether the public trust doctrine applies to any particular resource is typically treated as a question of state law. *Montana v. United States*, 450 U.S. 544, 551 (1981). Other jurisdictions have recognized the applicability of the public trust doctrine to air generally. *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 720 (Cal. 1983); *Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989); Haw. Const. art. XI, §1; La. Const. art. IX, §1; *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 606 (R.I. 2005)); Pa. Const. art. I, §27. In Montana, our constitution, and the decisions of this Court, leave no doubt that the atmosphere is squarely within the ambit of the public trust. As such, the State of Montana has an affirmative constitutional, statutory, and common law duty to protect the atmospheric trust for current and future generations.

3. As trustee of the environment for future generations, the State of Montana has continuing responsibility to protect the atmospheric trust from degradation, including regulation of GHG emissions.

In *MEIC v. Dept. of Environmental Quality*, this Court concluded that the rights guaranteed by Article II, §3 and Article IX, §1, are not merely reactionary, but both anticipatory and preventative:

[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.

1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236.

Additionally, MEPA expressly declares:

it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may . . . *fulfill the responsibilities of each generation as trustee of the environment for succeeding generations . . .*

Mont. Code Ann. §75-1-103(2)(a) (emphasis added).

These obligations to protect the public trust run to all three branches of government, and cannot be abdicated by any branch. *Illinois Central*, 146 U.S. at 460. “Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust.” *Ariz. Center for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. App. Div. 1 1991). The duty to protect has been defined as: “the duty to ensure the continued availability and existence of [trust] resources for present and future generations,” and “incorporates the duty to promote the development and utilization of [trust] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state.” *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1003 (Haw. 2006).

Accordingly, the State has a continuing obligation to protect the atmosphere, “as trustee of the environment for succeeding generations.” Mont. Code Ann. §75-

1-103(2)(a).

V. CONCLUSION

“It is horrifying,” Ansel Adams once said, “that we have to fight our own government to save the environment.” However, when the State of Montana refuses to fully acknowledge the affirmative duties imposed by the public trust doctrine and Montana’s Constitution, and instead interferes with and nullifies administrative actions intended to fulfill those obligations for present and future generations, Petitioners are left with no alternative but to fight their government. As MDEQ Director Opper eloquently states:

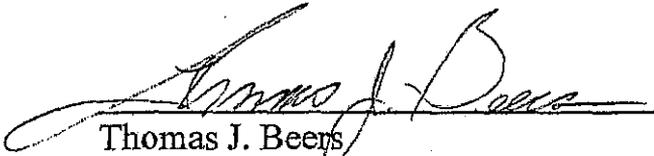
Montana’s natural resources are the priceless treasures of the Treasure State. Our forests, rivers, and lakes contribute quality to life in an otherwise harsh landscape. Our native plants and animals further endear us to this place on the world map.

As Montanans, we are rightfully concerned that climatic changes will lessen our historic accesses to these resources. Parents and grandparents worry that we may pass along something less than what we have known.

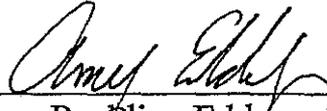
Ex. 3(c).

Accordingly, Petitioners pray this Court take original jurisdiction of this proceeding and enter judgment declaring: (1) The State holds the atmosphere in trust for the present and future citizens of the state of Montana; and (2) The State of Montana has the affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limitations on the levels of greenhouse gas (GHG) emissions as necessary to mitigate human-caused climate change.

RESPECTFULLY SUBMITTED this 4th day of May, 2011.



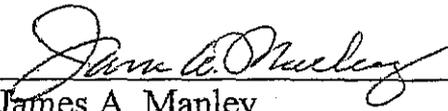
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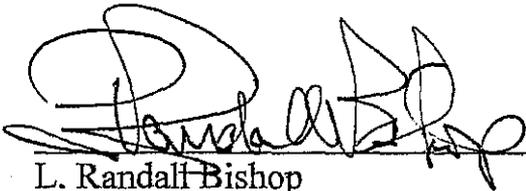
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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(4)(e) and 14(9)(b) of the M.R.App.P., I certify that this Petition for Original Jurisdiction is produced in proportional font (Times New Roman) of not less than 14 point type, utilizes double line spacing, except in footnotes, headings, and extended quotations, which are single spaced, and the text of the petition does not exceed 4,000 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance. The word count function of the word-processing system used to prepare this brief was relied upon in this calculation.

RESPECTFULLY SUBMITTED this 4th day of May, 2011.

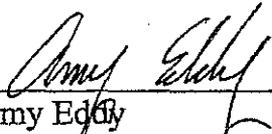


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CERTIFICATE OF SERVICE

I, Amy Eddy, an attorney at BOTTOMLY EDDY & SANDLER Trial Attorneys, pllp, do hereby certify that on the 4th day of May, 2011, a true and correct copy of the foregoing Petition for Original Jurisdiction was personally served on the following:

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MONTANA ATTORNEY GENERAL
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