IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court No. OP-11-0258

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 S.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,

ANSWER TO PETITION FOR ORIGINAL JURISDICTION

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ANSWER TO PETITION FOR ORIGINAL JURISDICTION

Intervenors, Climate Physics Institute, a Montana non-profit association; Western Montana Fish and Game Association, Inc., a Montana non-profit association; Representative Krayton Kerns; Senator Jason Priest; Representative Champ Edmunds; Representative Mike Miller; Representative Cary Smith; Representative Jerry O'Neil; Representative James Knox; Representative Tom Burnett; Representative Keith Regier; Representative Dan Skattum; Representative Alan Hale; Representative Matt Rosendale; Representative Dan Salomon; Representative Lee Randall; Senator Greg Hinkle; Senator Joe Balyeat; Senator Verdell Jackson; Senator Ed Walker; Senator Chas Vincent; Senator Bruce Tutvedt; Representative Joe Reid; and Representative Mike Cuff, all Montana legislators, residents and citizens, as well those listed in Exhibit A1, attached, answer the Petition for Original Jurisdiction as follows:

I. RELIEF REQUESTED

The Petition fails to state a claim for which relief can be granted:

A. The Court lacks subject matter jurisdiction because there is no justiciable controversy.

Parties must present a justiciable controversy before a Montana court has jurisdiction can consider the merits of an issue. *Dennis v. Brown*, 2005 MT 85, ¶ 8, 326 Mont. 422, 110 P.3d 17. The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interest; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment equity upon the rights, status or legal relationship of one or more of the real parties in interest, or lacking these qualities, be of such overriding

public moment as to constitute the legal equivalent of all of them. *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284-85 (1981).

In this case, the Petition was filed at the behest of Our Children's Trust in Eugene, Oregon. It is part of an organized campaign of what the promoters call "guerilla law-fare."[1] (See "Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn," *New York Times*, May 4, 2011.)[2] According to Columbia University's Center for Climate Change Law, "[B]y filing such lawsuits, environmentalists [are] 'trying to use all available options in view of the failure of Congress' to act on greenhouse gas emissions."[3] As Clauswitz said of war, this is politics by other means.[4]

The political nature of the Petition is demonstrated by the vague and unenforceable remedy being sought. The Petition requests a declaration that "the state of Montana has the affirmative duty to

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1 http://www.dailykos.com/story/2011/05/05/973520/-guerrilla-law-fare:-climate-activist-youth-sue-government

2 http://www.nytimes.com/2011/05/05/science/earth/05climate.html

3 *Id.*

4 http://www.climatecasechart.com/

protect and preserve the atmospheric trust, including establishing and enforcing limitations on the levels of greenhouse gases (GHG) emission as necessary to mitigate human caused climate change." (*Petition*, p. 1.) But if the Court were to allow such relief, then what? Petitioners would have nothing more than a judicial declaration endorsing their political point-of-view. There would be no remedy granted, nothing to enforce, and no consequences for anyone should Montana simply ignore the Court's advisory.

The justiciable controversy test prevents courts "from determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies which may arise later, declaring social status, dealing with theoretical problems, answering moot questions, or giving abstract or advisory opinions." *Northfield Ins. Co.*, ¶ 12. The Uniform Declaratory Judgments Act, cannot "be used as a platform for courts in this state to plunge into indefinite amorphous ponds of [legal] interpretation." *Id.* ¶ 15.

But this is exactly what Petitioners seek. They have failed through the political process to convince sufficient of their neighbors to successfully demand the U.S. Congress or the Montana Legislature to

implement their policy preferences. So they turn to the Court to impose those preferences. Yet, even if the Court were to grant the relief sought, and rule that Montana must reduce greenhouse gases emissions "as necessary to mitigate human caused climate change," the very next, immediate and unavoidable argument would center on the appropriate level of regulation. Intractable dispute would therefore remain. A justiciable controversy "must be a controversy on which a judicial determination will have the effect of a final judgment regarding the rights, status or legal relations of one or more of the parties." *Northfield Ins. Co.*, ¶ 19. In this case, a ruling would end nothing. Allowing Petitioners' request would instead spawn years of ensuing controversy and continued litigation. It is therefore not a justiciable case.

Likewise, disputes over non-self-executing clauses of constitutions are non-justiciable "political questions." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663, 686 (1962); *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 73, 132 P.2d 689, 700 (1942). The right to a clean and healthful environment, as invoked by the Petition, is not a self-executing clause of the Montana Constitution.

A provision is self-executing only when "it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative." *General Agric. Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975);. A provision is not self-executing when legislation is necessary to give a provision effect.

The Court outlined the legal distinction between a self-executing and a non-self-executing constitutional provision in *Columbia Falls Elementary School District No. 6, et al. v. State of Montana*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257. "[N]on-self-executing clauses of constitutions are ***non-justiciable*** political questions." *Id.* at ¶ 15 (emphasis added). The determination of whether a constitutional provision is self-executing turns on whether the Constitution addresses the language to the courts or to the Legislature. *Columbia Falls*, ¶ 16. If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, the provision is self-executing. *Id.* The Court held that if a constitutional provision begins with the phrase, "The Legislature shall ...," such a provision is non-self-executing. *Columbia Falls*, ¶ 16.

In this case, Article IX, section 1 of the Montana Constitution declares that "[t]he legislature shall provide" for the administration, enforcement, and remedies for violations of the right to a clean and healthful environment. This ends the inquiry. The rights pertaining to a clean and healthful environment are non-self-executing; and are, therefore, their enforcement is a non-justiciable political question.

The following emphasized proceedings of the 1972 Constitutional Convention confirm the delegates' intent: "***The legislature*** shall provide by law for the implementation and enforcement of this public policy." Mont. Const. Conv., Vol. I, 75. "***The Legislature*** must implement effective enforcement of this basic environmental right." *Id.* at 261. "***The legislature*** must provide the administration and enforcement of this duty." *Id.* "***The Legislature*** is to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent the unreasonable depletion of natural resources." *Id.,* Vol. II, 552. "The method of enforcement of the reclamation must be established ***by the legislature***." *Id.* The Natural Resources and Agriculture Committee reinforced this language with its own comments on Article IX, Section 1:

> Subsection (2) mandates ***the legislature*** to administer and enforce the duty to maintain and enhance the Montana environment. Your committee was urged by many to detail the manner of accomplishing this duty but the temptation to legislate in the Constitution was resisted and confidence reposed in the legislature. To those who may lack such confidence in the elected representatives of the people the clear and concise duty to maintain and enhance the Montana environment cannot be contravened.

Id. at 554.

Thus, it is up to the Legislature to decide whether eliminating carbon gas is necessary to secure a clean and healthful environment for Montanans, and if so, the Legislature decides how such a policy should be pursued. The controversy set-out by the Petition is, as a result, a non-justiciable political question.

B. Petitioners' proposed application of Mont. R. App. P. 14(4) is unconstitutional.

In requesting original jurisdiction with the Supreme Court, Petitioners rely on Article VII, Section 2 of the Montana Constitution and Rule 14(4) of the Montana Rules of Appellate Procedure. Yet, neither of these authorities permit the Court to assume original jurisdiction. Article VII, Section 2, of the Montana Constitution, gives the Supreme Court original jurisdiction only to "issue, hear, and

determine writs of habeas corpus and such other writs ***as may be provided by law***." (Emphasis added.) The only original jurisdiction "provided by law" elsewhere is set forth at Mont. Code Ann. § 3-2-202, which gives the Supreme Court original jurisdiction to decide ballot contests. Since this case is not a habeas case or ballot case Article VII, Section 2, does not provide the Court with original jurisdiction. See E.g,. *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61 ("the expression of one thing in a statute to imply the exclusion of another").

Similarly, Mont. R. App. P. Rule 14(4), cannot provide the Court with original jurisdiction because it would be unconstitutional for it do so. Under Mont. R. App. P. 14(4), the Court cannot create the power of original jurisdiction. Under Article VII, Section 2, of the Montana Constitution, the Supreme Court is given the power only to "make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members." Mere rule making authority does not include the authority to create original jurisdiction or to expand upon the jurisdiction set forth in the Constitution, or, by extension, the Legislature ("such other writs as

may be provided by law"). Accordingly, the request for the Court to assume original jurisdiction, absent other legal authority, is unconstitutional.

C. Original jurisdiction with the Supreme Court is a denial of Intervenors' constitutional right to a jury trial.

The right of trial by jury is secured to all and shall remain inviolate. Article 2, Section 26, Mont. Const. The only circumstances in which a jury trial may be properly denied is "upon default of appearance or by consent of the parties expressed in such manner as the law may provide… ." Discussing the right to a jury trial, the Montana Supreme Court has stated as follows:

> Article II, Section 26 of Montana's Constitution guarantees that "[t]he right of trial by jury is secured to all and shall remain inviolate." That this constitutionally guaranteed right of a jury trial is "fundamental" and, therefore, deserving of the highest level of court scrutiny and protection is beyond argument.

Kloss v. Edward D. Jones & Co., 2002 MT 129 ¶ 53, 310 Mont. 123, 139-140, 54 P.3d 1, 12 (citations omitted).

The Court has repeatedly instructed that where a jury is requested, no court may try facts without a jury:

> We fail to see any distinction in legal principle between the case where a jury may not be waived and one where it may be waived but in fact was not, as here. ***The only tribunal that has jurisdiction to try issues of fact in a case where the statute confers the right to a jury trial when demanded is the court sitting with a jury, where as here the jury has not in fact been waived.***

Mahan v. Hardland, 147 Mont. 78, 86, 410 P.2d 156, 160 (Mont.1966) (emphasis the Court's). Thus:

> …where either the Constitution or statute gives the right to a trial by jury and the jury is demanded and not waived, the jury constitutes an essential part of the tribunal authorized to determine the facts, and that the court in attempting to determine the facts without a jury exceeds its jurisdiction.

Application of Banschbach, 133 Mont. 312, 314, 323 P.2d 1112, 1113 (1958).

Plainly, to the extent Intervenors are allowed to intervene, they have to right to a trial of the facts of this case by jury. They hereby so demand. The Supreme Court therefore should not try the facts of this case because it sits without a jury. It should reject original jurisdiction.

II. PARTIES

Intervenors deny that Petitioners' personal and economic well-being "is directly and uniquely dependent" upon the direction or rate of global climate change.

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III. FACTS

Intervenors deny that the facts alleged by Petitioners. For example, Montana is not, as Plaintiffs allege, hotter and drier. (*Petition*, p. 3.) NOAA's National Climatic Data Center reports that "average temperature in April 2011 was 38.6 F."[5] It adds, "[t]his was -3.2 F cooler than the 1901-2000 (20th century) average, the 20th coolest April in 117 years."[6] "The temperature trend for the period of record (1895 to present) is 0.0 degrees Fahrenheit per decade."[7] Precipitation was "0.54 inches more than the 1901-2000 average, the 15th wettest such month on record."[8] "The precipitation trend for the period of record (1895 to present) is 0.03 inches per decade." Consequently, if the National Climatic Data Center is to be believed, Montana has gotten no warmer in the last 115 years, and its gotten just a little wetter.

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5 http://www.ncdc.noaa.gov/oa/climate/research/cag3/mt.html

6 *Id.*

7 *Id.*

8 *Id.*

Intervenors also deny other facts alleged in the Petition. The Montana Climate Advisory Group and the Center for Climate Strategies, it is admitted, developed the Montana Climate Change Action Plan to reverse global warming. (*Petition*, p. 7.) It includes no less than 54 policy dictates designed, it claims, to require Montana residents to counteract the global warming allegedly caused by their lifestyles. The Action Plan, however, suffers from a number of analytical flaws. (Exhibit B.)[9]

First, the Action Plan fails to quantify benefits in a way that can be meaningfully compared to costs. (*Id.*, p. 4.) Second, when estimating economic impacts, the Action Plan misinterprets costs to be benefits. (*Id.*, p. 5.) Third, the estimates of costs leave out important factors, causing the Action Plan to understate the true costs of it recommendations. (*Id.*) When it comes to the desirability of policies aimed at reducing the impacts of carbon gases associated with global warming, the Action Plan fails to perform the most basic of any cost-benefit analyses.[10] Thus, despite Petitioners' insistence on a

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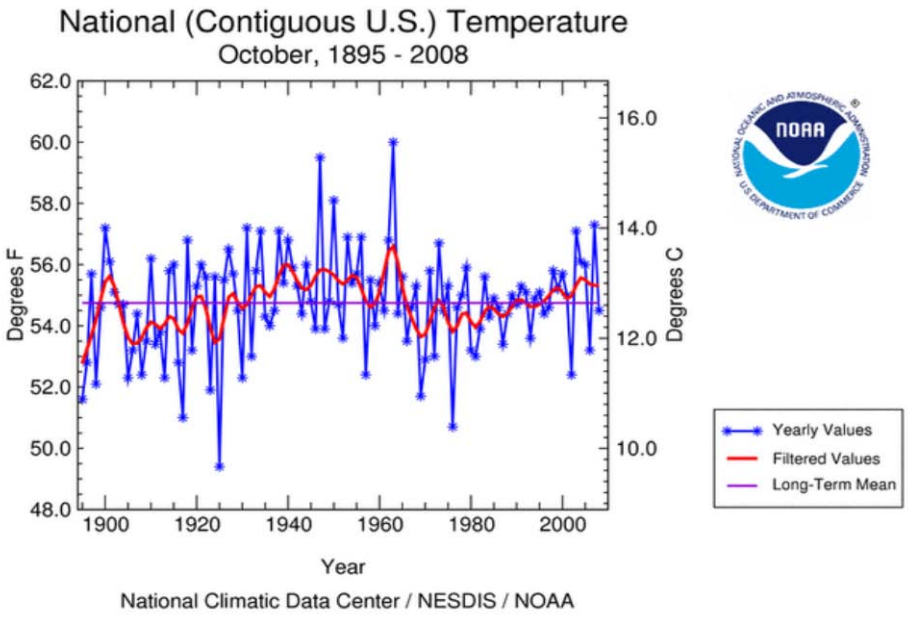
[9] http://www.montanapolicy.org/files/mpi_mccap_review.pdf.

[10] *Id.*, p. 8.

"scientific consensus," the economic facts alleged in the Petition are in hot dispute.

Meanwhile, scientifically credible evidence against human-caused climate change abounds. A good example is the following chart, prepared by National Oceanic and Aeronautics Administration.



It shows that whatever warming may have occurred in the last decade, it is not unprecedented. And again, the National Climatic Data Center makes clear that, officially, Montana is a bit wetter – and no warmer – than it was in the late 19th Century.[11]

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[11] http://www.ncdc.noaa.gov/oa/climate/research/cag3/mt.html

In view of facts like these, more than 1,000 dissenting scientists from around the globe have now challenged man-made global warming claims made by the United Nations Intergovernmental Panel on Climate Change ("IPCC"). (Exhibit C.)[12] In a 321-page report ClimateDepot.com, a climate and eco-news center, has presented the skeptical views of over 1,000 international scientists, including many current and former IPCC scientists, who have now turned against the IPCC. (See, *id.*)[13] This updated 2010 report includes a dramatic increase of over 300 additional (and growing) scientists and climate researchers since the last update in March 2009. (*Id.*)

In 2008, the Nongovernmental International Panel on Climate Change ("NIPCC") published an extensive report rebutting the idea that human emission of greenhouse gases is upsetting the environment.

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[12] A summary is found on the World Wide Web at:

http://www.climatedepot.com/a/9035/SPECIAL-REPORT-More-Than-1000-International-Scientists-Dissent-Over-ManMade-Global-Warming-Claims--Challenge-UN-IPCC--Gore

[13] The full report is on the World Wide Web at:

http://hw.libsyn.com/p/b/f/6/bf663fd2376ffeca/2010_Senate_Minority_Report.pdf?sid=b6490162e8c6b8b276855890708724f0&l_sid=27695&l_eid=&l_mid=2336201

(Exhibit D.)[14] NIPCC is an international panel of nongovernment scientists and scholars who have come together to understand the causes and consequences of climate change. (*Id.*) Because it is not a government agency, NIPCC is able to offer an independent "second opinion" of the evidence reviewed by the IPCC. The NIPCC report, with emphasis added, concludes:

> To sum up: This NIPCC report falsifies the principal IPCC conclusion that the reported warming (since 1979) is very likely caused by the human emission of greenhouse gases. ***In other words, increasing carbon dioxide is not responsible for current warming.*** Policies adopted and called for in the name of 'fighting global warming' are ***unnecessary***.[15]

NIPCC followed up a year later with more compelling evidence. In "Climate Change Reconsidered: The 2009 Report of the NIPCC," coauthors Dr. S. Fred Singer and Dr. Craig Idso and 35 contributors and reviewers present an authoritative and detailed rebuttal of the findings of the UN's IPCC.[16] The scholarship in this book

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[14] http://www.heartland.org/custom/semod_policybot/pdf/22835.pdfhttp://www.heartland.org/custom/semod_policybot/pdf/22835.pdf

[15] http://www.heartland.org/custom/semod_policybot/pdf/22835.pdf http://www.heartland.org/custom/semod_policybot/pdf/22835.pdfhttp://www.heartland.org/custom/semod_policybot/pdf/22835.pdf

[16] http://www.heartland.org/ClimateChangeReconsidered/index.html

demonstrates overwhelming scientific support for the position that the warming of the 20th century was moderate and not unprecedented, that its impact on human health and wildlife was positive, and that carbon dioxide probably is not the driving factor behind climate change. The authors cite thousands of peer-reviewed research papers and books that were ignored by the IPCC, plus additional scientific research that became available after the IPCC's self-imposed deadline of May 2006.[17]

In addition, the Court should consider what was learned after the notorious "Climategate" cover-up. Last year Professor Phil Jones, the former director of the University of East Anglia's Climatic Research Unit – whose data is relied upon by the IPCC to bolster its alarmist approach – admitted in a interview with the British Broadcasting Company that there has been no global warming since 1995:

> Q. Do you agree that from 1995 to the present there has been no statistically-significant global warming?
>
> A. ***Yes,*** but only just. I also calculated the trend for the period 1995 to 2009. This trend (0.12C per decade) is positive, but not significant at the 95% significance level. The positive trend is quite close to the significance level. Achieving statistical significance in scientific terms is much more likely for longer periods, and much less likely for shorter periods.

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[17] *Id.*

(Emphasis on "yes" added).[18] Prof. Jones went on to admit that the science is far from settled:

> Q. When scientists say "the debate on climate change is over", what exactly do they mean - and what don't they mean?
>
> A. It would be supposition on my behalf to know whether all scientists who say the debate is over are saying that for the same reason. ***I don't believe the vast majority of climate scientists think this. This is not my view.*** There is still much that needs to be undertaken to reduce uncertainties, not just for the future, but for the instrumental (and especially the palaeoclimatic) past as well.

Id. (emphasis added). Prof. Jones has spent the better part of his professional life advocating that human caused global warming exists. Only now does he finally divulge that the difference in warming rates for the periods 1860-1880, 1910-40 and 1975-2009 is "statistically insignificant." *Id.*

The foregoing, and other evidence that Intervenors should be allowed to develop, makes it impossible for Petitioners to demonstrate the to be "undisputed." (E.g., Exhibit E.) As such, original

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[18] http://news.bbc.co.uk/2/hi/8511670.stm

jurisdiction in the Supreme Court is not appropriate. A jury trial is needed.

IV. ARGUMENT

Public trust doctrine has never been applied in Montana outside the context of the state's waters. See, *e.g.*, *Galt v. State by and through Dept. of Fish, Wildlife and Parks*, 225 Mont. 142, 731 P.2d 912 86-178 (1987); *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38 682 P.2d 163 83-164 (1984). Ignoring the precedent, Petitioners also skip past the limits of the state's political boundaries and its geographic natural environment, and urge the Court to stretch the doctrine around the world's entire atmosphere to declare Montana to be a Global Trustee. Compare, Mont. Const. Art. IX, § 3(3) (resources "within the boundaries of the state" are for the use of the people). Montana, they insist, has the legal duty to set aside its interests – and spend resources it could otherwise use to protect its own local environment, local wildlife, local economy, and local social structure – in sacrifice for the good of the rest of the world. As they put it, "the public trust doctrine ... serves to protect ***all*** environmental resources for future generations." (*Petition*, p. 12 (emphasis

Petitioners').) The sole authority they offer for such a breathtaking expansion of Montana's environmental responsibilities, however, is an imaginative professor from the University of Oregon. (*Id.*, p. 13.) With limited resources available to protect Montana's *local* environment, the Court should reject such sweeping reform offered on such a thin and unsubstantiated academic theory.

Furthermore, Petitioners suggest no remedy that Montana could offer to actually accomplish a change the global climate change they posit. According to the U.S. Census, Montana has a population of only 975,000 people.[19] Meanwhile, the Census measures the world population at 6,922,325,229 souls.[20] For every "child of Montana," then, there are almost 7,000 people who live elsewhere. As a result, even if all Montanans decided, for the good of the Earth, to simply vanish, there would still be 6,921,000,000 people left to continue to pollute it. In view of such a monumental imbalance, it is impossible to believe that carbon emissions by 1/7,000 of the world's population poses an exigency sufficient for the Court to assume emergency jurisdiction –

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19 http://quickfacts.census.gov/qfd/states/30000.html

20 http://www.census.gov/main/www/popclock.html

or to expand public trust jurisprudence to encompass the climate of the entire world – in a "last desperate effort to save the planet."

In sum, there can be no public trust if the public trustee – the government – is utterly powerless as a practical matter to effectively protect the corpus of the trust. In this case, the corpus is the global atmosphere. Even if it were undisputed that global climate change is human caused, Petitioners fail to allege – let alone prove – that any measure Montana could possibly take would reduce total global carbon gas emissions sufficiently to have any measurable impact on the direction or rate of climate change. If they cannot prove a connection between eliminating of Montana's minute carbon emissions, and a reduction in the pace of global climate change, then public trust doctrine cannot, even under their own flawed legal theory, apply.

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V. CONCLUSION

Accordingly, the Petition should be dismissed.

Dated this 3rd day of June, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By:_____
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of MONT. R. APP. P. 11(4)(a) because, according to the word count function of WordPerfect X3, this brief contains 3,716 words and no more than 161 words per page, excluding the parts of the brief exempted by MONT. R. APP. P. 11(4)(c).

2. This brief complies with the typeface and the type style requirements of MONT. R. APP. P. 11(2) because this brief is prepared in a proportionally spaced typeface using WordPerfect X3 Century Font type and a 14 point font size.

DATED this 3rd day of June, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By:_____
Quentin M. Rhoades
Robert Erickson
For Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2011, I filed the foregoing with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of same upon each attorney of record, and each party not represented by an attorney in the above-referenced action as follows:

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