IN THE SUPREME COURT OF THE STATE OF MONTANA

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 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,

v.

THE STATE OF MONTANA,

Respondent.

STATE OF MONTANA'S SUMMARY RESPONSE TO PETITION FOR ORIGINAL JURISDICTION

Pursuant to this Court's order of May 17, 2011, the State of Montana responds to the above-titled Petition for Original Jurisdiction.

BACKGROUND

Petitioners are a group of adults and children who ask this Court to exercise original jurisdiction and declare that (1) the State holds the atmosphere in trust for present and future generations, and (2) the State has the affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limits on greenhouse gas emissions.

Petitioners' requests are part of a nationwide effort known as the Atmospheric Trust Litigation. See www.ourchildrenstrust.org. Montana appears to be the only jurisdiction in which the litigation was filed as an original proceeding in the state's highest court. See id.

ARGUMENT

Whether a case is appropriate for this Court's exercise of original jurisdiction is determined by this Court alone, since "original jurisdiction cannot be bestowed by agreement." Montanans for the Coal Trust v. State of Montana, 2000 MT 13, ¶ 22, 298 Mont. 69, 996 P.2d 856. Per Mont. R. App. P. 14(7)(a), a summary response, if ordered, is limited to "summarizing the arguments and authorities for rejecting jurisdiction . . . ."

Montana Rule of Appellate Procedure 14(4) provides:

> An original proceeding in the form of a declaratory judgment action may be commenced in the supreme court when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance.

This Court has divided these factors into three requirements: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process

inadequate. Montanans for the Coal Trust, ¶ 27 (citation omitted). These factors are disjunctive. Absent any one of these factors, the petition fails and original jurisdiction is declined. Id., Dunsmore v. State, 2010 MT ___, 356 Mont. 550, 228 P.3d 451.

The petition here should be rejected because the claims are not constitutionally based, involve fact-intensive questions, and are not exigent to the point of making the normal appeal process inadequate.

I. THE CLAIM REQUIRES FACTUAL INQUIRY

The Petition claims, without much analysis, that whether the State has an affirmative duty to regulate greenhouse gas emissions is a purely legal question. (Pet. at 5.) However, the Petition then claims that the State "has been prevented by the Legislature from taking any action to regulate GHG emissions . . . ." (Pet. at 7). Specifically, it claims that the Board of Environmental Review (BER) initiated greenhouse gas rulemaking, but was "forced to terminate the GHG rulemaking in response to formal objection by the EQC [Environmental Quality Counsel]," a legislative committee. The Petition specifically relies on "this record" to establish its claim. (Pet. at 8.)

The Petitioners are correct that the EQC objected to adoption of a proposed BER rule dealing with greenhouse gas regulation, but it is incorrect that the

Legislature prevented BER "from taking any action to regulate GHG emissions." The BER rule in fact sought to adopt regulations that would have provided *exemptions* from existing regulation for relatively small sources of greenhouse gas emissions. 2010 MAR Issue No. 2 at 225 (January 28, 2010) ("[t]he board's proposed rules would have immediately exempted from regulation persons and entities in Montana that emit less than 25,000 tons of carbon dioxide and other . . . greenhouse gases.").

The EQC's action and termination had no effect on existing regulation of air pollutant emissions in Montana, including State permitting requirements that became applicable to greenhouse gases on January 2, 2011, when the EPA's Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards imposed greenhouse gas limitations under the Federal Clean Air Act for the first time. See 75 Fed. Reg. 25324 (May 7, 2010). Furthermore, the Montana Legislature did not enact any legislation in the recently concluded session restricting BER's regulation of greenhouse gases.

This disputed record is just one example of the factual determinations this Court would need to make to rule for Petitioners. In addition, it would need to address, among other issues, the current state of climate change science; the role of Montana in the global problem of climate change; how emissions created in Montana ultimately affect Montana's climate; whether the benefits of energy

production must be balanced against the potential harm of climate change; and the concrete limits, if any, of the alleged "affirmative duty." Cf. Massachusetts v. EPA, 549 U.S. 497, 510 (2007) (detailing several factually developed "rulemaking petition[s]" in the procedural history of the appeal); Native Village of Kivalina v. Exxon Mobil, 663 F. Supp. 2d 863, 871-77 (N.D. Cal., 2008) (concluding climate change nuisance suit barred as political question because the claim lacks judicially discoverable and manageable standards and would require the court to make policy determinations); Plan Helena v. Helena Regional Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567 (an opinion will be considered advisory if it is not based on "definite and concrete" circumstances).

II. EMERGENCY CIRCUMSTANCES ARE NOT PRESENT

Petitioners' objective, like the other Atmospheric Trust litigants, is to extend the ancient common law public trust doctrine to proactively address climate change. They have provided no authority, though, as to why the district court is not the appropriate forum for litigation over the scope of the public trust. In fact, several cases are already underway in various superior

courts and administrative proceedings around the country. See www.ourchildrenstrust.org/legal-action/lawsuits. While those litigants presumably share the same sense of urgency as Petitioners regarding climate change, none of them have alleged an emergency that would warrant bypassing the normal appeals process.

Here, the relief Petitioners seek is a declaration of a general "duty" that will not have direct or immediate effect on the State or on greenhouse gas emissions. Petitioners presumably seek to use such a declaration as legal precedent in future suits or petitions for rulemaking, in which case this Court will again consider these issues on appeal. Whatever concrete action Petitioners seek at the end of the extensive administrative, legislative, or judicial proceedings that they contemplate, it is not imminent or urgent. It is not even proximate. This is in contrast to other accepted petitions for original jurisdiction, where emergency circumstances were created by fact-based circumstances. See e.g., Montanans for the Coal Trust, ¶ 30. Here, no impending event or action, of a concrete nature, requires immediate action by this Court, nor will specific action be effectuated by granting the Petition.

III. PETITIONERS' CLAIMS ARE NOT CONSTITUTIONALLY BASED

Petitioners suggest that the constitutional basis of their petition "cannot be denied." (Pet. at 3). A closer look at their claims, however, reveals otherwise.

Petitioners first argue that the atmosphere is part of the constitutionally protected public trust. Montana's constitutional public trust provision is found in article IX, section 3(3) of the Montana Constitution:

> **Section 3. Water rights. . . .**
>
> (3) 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 and are subject to appropriation for beneficial uses as provided by law.

This provision is limited both in terms and in application to the water resource. See Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); In the Matter of the Adjudication of the Missouri River, 2002 MT 216, 311 Mont. 327, 55 P.3d 396. This Court specifically recognized the limits of Montana's constitutional public trust doctrine in Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987), where the Court rejected an argument that land--not water--was the subject of Montana's public trust. Galt, 225 Mont. at 147, 731 P.2d at 915 ("The public trust doctrine in Montana's Constitution grants public ownership in water not in beds and banks of streams"). Furthermore, the common law public trust doctrine is distinguishable from the constitutional public land trust created by article X, section 1 of the Montana Constitution which is limited to trust lands, not air. See PPL Montana v. State, 2010 MT 64, ¶¶ 114-17, 355 Mont. 402, 229 P.3d 421 (rejecting PPL's analogy of the textually-rooted constitutional resource trust to the "public trust doctrine this Court discussed in Curran.").

Petitioners' public trust argument is therefore a nonconstitutional claim based on the pre-Erie federal common law principle that state sovereign land, lying underneath navigable waterways, is held by the State in trust for the public and may not be alienated to a private entity. See Illinois Central Railroad v. Illinois, 146 U.S. 387, 463-37 (1892) (defined as a "common law" doctrine "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment"). Petitioners concede this point when they cite to the work of Professor Mary Wood's scholarly article on "Atmospheric Trust Litigation." (Pet. at 13, n.1, article at 101 (describing the public trust doctrine as "[d]eriving from the common law of property")).

Petitioners also attempt to establish a constitutional claim by citing article IX, section 1 and article II, section 13 of the Montana Constitution (requiring that the state and each person maintain and improve a clean and healthful environment). Petitioners do not state, and cite no authority, for a separate clean and healthful environment claim. This constitutional provision thus does not require an advisory interpretation or declaratory ruling from this Court, at least absent concrete factual and procedural development of the alleged claims. Cf. Northern Plains Resource Council v. Board of Land Commissioners, No. DV 38-2010-2480/81 (consolidated) (Mont. 16th Dist. Ct.) (presenting in district court

fact-based claims under clean and healthful environment provision concerning leasing of Otter Creek coal tracts).

In short, while the petition may raise novel legal issues, it does not show that those issues could not or should not be addressed more effectively through the legislative process, normal administrative processes such as a petition for rulemaking, or if necessary, in district court litigation that may be appealed to this Court in due course. This Court's exercise of original jurisdiction is not warranted.

CONCLUSION

For the above-stated reasons, the Petition for Original Jurisdiction should be denied.

Respectfully submitted this 6th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing State of Montana's Summary Response to Petition for Original Jurisdiction to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this response to petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 4,000 words, excluding certificate of service and certificate of compliance.

J. STUART SEGREST