SpencerFane®

Held v. Montana. The Right to a Clean and Healthful Environment. Montana's Supreme Court Holds State Statutes Unconstitutional.

> "The framers of the Montana Constitution intended it to contain 'the strongest environmental protection provision found in any state constitution' that is 'both anticipatory and preventative.'"

That is how Chief Justice Mike McGrath referred to the Montana constitution's provision that ensures the citizens of Montana the "right to a clean and healthful environment" and on which he grounded the majority's opinion in his December 18, 2024, holiday gift to the environment and the 16 youth plaintiffs in *Held v. Montana*.

The 48-page Supreme Court's opinion upheld the rulings of District Court Judge Seeley in her 103-page opinion that followed a seven-day trial held between June 12-20, 2023. As this is the first case in the U.S. to reach trial, in my earlier blog posts, I detailed the proceedings over several years and posted comments on the Public Trust Doctrine and the trial.

Summary of the Issues on Appeal and the Court's Decisions

I list here the four issues on appeal to the Court and provide exact quotes from the opinion.

Issue One: Whether the Montana Constitution's guarantee of a "clean and healthful environment" includes a stable climate system that sustains human lives and liberties.

> "The District Court's conclusion of law is affirmed: Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system, which is clearly within the object and true principles of the Framers inclusion of the right to a clean and healthful environment."

Issue Two: Whether plaintiffs have standing to challenge the constitutionality of the Montana Environmental Policy Act (MEPA) Limitation.

> "Plaintiffs have standing to challenge the injury to their constitutional right to a clean and healthful environment. . . Plaintiffs have standing for the declaratory and injunctive relief they seek because they allege that the MEPA Limitation violates their right to a clean and healthful environment and declaring it unconstitutional will alleviate the harm that that statute causes to their constitutional right."

Issue Three: Whether the MEPA Limitation is unconstitutional under the Montana Constitution's right to a clean and healthful environment.

> "Foreclosing environmental review of [greenhouse gas] GHG emissions under MEPA prevents state agencies from using any information garnered during this process to inform and strengthen substantive permitting or regulatory decisions or any mutual mitigation measures or alternatives that might be considered when the environmental harms of the proposed project are fully understood. The MEPA Limitation arbitrarily excludes all activities from review of cumulative or secondary impacts from GHG emissions without regard to the nature or volume of the emissions absent a requirement by federal law.
>
> The MEPA Limitation thus violates those environmental rights guaranteed by Article II, Section 3, and Article IX, Section 1, of the Montana Constitution. The District Court is affirmed: section 75-1-201(2)(a), MCA, is unconstitutional and the State is permanently enjoined from acting in accordance with it."

Issue Four: Whether the district court abused its discretion by denying the state's motion for a psychiatric examination under Rule 35.

> "The State sought an order in the District Court allowing it to conduct a psychological evaluation of eight plaintiffs, including interviews focused on their

> 'psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma.'
>
> . . . We need not resolve this issue, as our standing analysis focused on Plaintiffs' injury to a constitutional right rather than to any mental, emotional, physical, aesthetic, or property interests harmed by the State's actions.
>
> "The District Court also concluded Plaintiffs had standing even without considering their psychological harms. Additionally, we note that the State only wanted to examine eight of the plaintiffs. Even absent those eight plaintiffs, the District Court concluded other plaintiffs had standing to challenge the MEPA Limitation. One plaintiff with standing is sufficient.
>
> "The State has failed to show the District Court abused its discretion in finding no good cause to order the Rule 35 examinations."

Two State Statutes Held Unconstitutional

While confirming that the plaintiffs had standing to "challenge the injury to their constitutional right to a clean and healthful environment," the 6-1 majority opinion held that the § 75-1-201(2)(a) of MEPA, which precluded an analysis of GHG emissions in environmental assessments and environmental impact statements during MEPA review, is unconstitutional. In addition, because the State agencies did not appeal the District Court's finding that §75-1-201(6)(a)(ii), MCA (2023) is also unconstitutional, the Supreme Court affirmed the trial court's order enjoining the State from acting in accordance with it.

MEPA Prior to 2011 – GHG Emissions Were on the Permitting Review Table

Prior to the state legislature's action in 2011 that effectively handcuffed state agencies with the so-called MEPA Limitation, state agencies would consider GHG emissions in permitting actions for a variety of operations that resulted in large amounts of GHG emissions; i.e., mining and extraction of coal, oil, and gas; processing, refinement, and transportation of fossil fuels; and consumption of fossil fuels such as in generating stations. MEPA, which was based on the federal National Environmental Policy Act (NEPA), required environmental assessments and impact

statements that considered GHG emissions for these types of projects.[1]

Then, in 2011, the legislature passed the MEPA Limitation, which was particularly explicit stating that, except for narrowly defined exceptions,

> "…an environmental review conducted pursuant to subsection (1) **may not include a review of actual or potential impacts beyond Montana's borders** [emphasis added]."

*And further:

> **"It may not include actual or potential impacts that are regional, national, or global in nature** [emphasis added]." Sections 75-1-201(2)(a), 90-4-1001(1)(c)-(g), MCNA (2011).

It was on the basis of that legislative limitation that state agencies in 2011 stopped analyzing impacts from GHG emissions that would result from permitted activities and that the Supreme Court held unconstitutional.

Procedural History of the Case Below

I often dive deeply into briefs and other documents that provide the procedural and substantive history of cases. Of particular note here is the plaintiffs' request at the trial level for an order requiring the state to prepare a remedial plan to reduce GHG emissions, which the trial court denied, and which was not raised on appeal.

In sum, the plaintiffs in *Held* sought injunctive relief seeking orders that: (1) enjoined the state from acting in conformance with unconstitutional laws [**which the trial court and Supreme Court granted**]; (2) required a full accounting of Montana's GHG emissions [**not granted**]; (3) required the state to develop a remedial plan to reduce GHG emissions and to submit the plan to the Court [**not granted**]; (4) appointment of a special master to review the remedial plan [**not granted**]; and allowed the court to retain jurisdiction until the state fully complied with the plan [**not granted**].

Beyond that, I refer the reader to the best compilations of briefs and documents that I've found and that are prepared by the State Court Report and the website of Our Children's Trust.

The Concurring Opinion of Justice Dirk Sandefur – A "Smokescreen" Diverting Attention from Inconvenient Facts

While he concurs "at bottom" with the majority opinion and the holdings on the ultimate issues in the case, Justice Sandefur takes the majority to task stating in part:

> **"The overly simplistic focus** of Plaintiffs and the Majority of this Court on the undisputed and indisputable fact that global warming 'is harming Montana's environmental life support system now and with increasing severity for the foreseeable future' **is no more than a political and public policy statement of the obvious**.
>
> "As such, **it further serves as a smokescreen** diverting attention away from those inconvenient facts of record and the other similarly indisputable fact: accelerated global warming caused by fossil fuel burning and other human sources of greenhouse gases is a highly complex global problem, **any solution or meaningful mitigation to or of which lies exclusively in the domain of federal and international public policy choices and cooperation**, rather than in a flashy headline-grabbing rights-based legal case in Montana [emphasis added]."

And on the issue of standing:

> I generally agree with the State that the complete lack of particularized causation evidence in this case calls into serious question the threshold jurisprudential standing of the Plaintiffs to assert the broad-scope legal claims for relief asserted and litigated in the district court below. However, I nonetheless agree with the Majority at bottom that Plaintiffs had minimally sufficient standing under our liberal jurisprudential standing requirements to assert the claims at issue, and that the recent legislative attempts at issue to pare back the generally required scope of MEPA review is unconstitutional in violation of the Mont. Const. art. II, § 3, right to a "clean and healthful environment."

The Dissent by Justice Jim Rice – the Standing Issue

In his dissent, Justice Rice focused exclusively on the issue of standing, which is indeed the fundamental issue that has prevented others from successfully pursuing

climate change cases in court. Justice Rice walks through the fundamental issues of standing including (1) particularized injury to the plaintiff; and (2) causation and redressability concluding:

> "In sum, I would decide this case on the constitutional standing principles articulated herein. Plaintiffs here present us with an **abstract injury** that is **indistinguishable from that to the public as a whole** and is not legally concrete to them personally. Even if the injury would be found to be sufficient, the case is presented in a vacuum whereby the provision challenged, the MEPA Limitation, has not been shown to cause the specific constitutional harm alleged, and therefore, **the Court's holding does nothing to redress the Plaintiffs' injuries.** They thus lack standing [emphasis added]."

And the Majority's Response?

A decent summary is problematic. Thus, here is the exact language used by the majority addressing the standing issue and Justice Rice's dissent.

> "Here, Plaintiffs have shown a sufficient personal stake in their inalienable right to a clean and healthful environment. Mont. Const. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . .")"
>
> . . .
>
> "Further, Plaintiffs have an additional personal stake under the plain language of MEPA, which states that the Legislature, mindful of its constitutional obligations to a clean and healthful environment, provides for an adequate review of state actions to ensure that 'environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations' and 'the public is informed of the anticipated impacts in Montana of potential state actions.' . . . Plaintiffs have a personal stake in being fully informed of the anticipated impacts of potential state actions."
>
> . . .

"Plaintiffs have shown a sufficiently concrete injury to their constitutional right to a clean and healthful environment – that the MEPA Limitation prevents the State from considering GHG emissions in all projects that may have an impact on the Montana human environment.'

. . .

"They showed at trial that since the MEPA Limitation was enacted in 2011, state agencies have stopped considering (and will continue to not consider) GHG emissions in all cases because of the MEPA Limitation's prohibition, even though the Constitution guarantees them a right to a stable climate system and MEPA is necessary to "help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.'"

. . .

"They showed that the State's policies, including the MEPA Limitation (and, before it was repealed, the state energy policy), impacts their right by prohibiting an analysis of GHG emissions, which blindfolded the State, its agencies, the public, and permittees when an analysis is necessary to inform the State's affirmative duty to take active steps to realize the right to a clean and healthful environment."

. . .

"Declaring the MEPA Limitation unconstitutional will redress the constitutional injury caused by that statute, regardless of whether or not other statutes also cause constitutional harms. To hold otherwise would close the doors of the courts to plaintiffs trying to vindicate personal constitutional rights unless they could identify every other instance where their rights might be infringed and sought to litigate those at the same time."

. . .

"Thus, the question is whether legal relief can effectively alleviate, remedy, or prevent Plaintiffs' constitutional injury, not on whether declaring a law unconstitutional will effectively stop or reverse climate change. Larson, ¶ 46. To make that a requirement for standing would effectively immunize the State from any litigation over whether its laws are in accordance with the 'affirmative [constitutional] duty upon the government to take active steps to realize' Montanans' right to a clean and healthful environment."

…

"The State repeatedly tries to redirect our focus to global climate change and the staggering magnitude of the issue confronting the world in addressing it. The State argues that it should not have to address its affirmative duty to a clean and healthful environment because even if Montana addresses its contribution to climate change, it will still be a problem if the rest of the world has not reduced its emissions. This is akin to the old ad populum fallacy: 'If everyone else jumped off a bridge, would you do it too?' See also 350 Mont., 50 F.4th at 1266 (rejecting environmental assessment's analysis that even though the project would 'add more fuel to the fire [of global warming],' it would have no significant impact because 'its contribution w[ould] be smaller than the worldwide total of all other sources of GHGs'). Plaintiffs may enforce their constitutional right to a clean and healthful environment against the State, which owes them that affirmative duty, without requiring everyone else to stop jumping off bridges or adding fuel to the fire. Cf. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008). Otherwise, the right to a clean and healthful environment is meaningless."

. . .

"Plaintiffs have standing for the declaratory and injunctive relief they seek because they allege that the MEPA Limitation violates their right to a clean and healthful environment and declaring it unconstitutional will alleviate the harm that that statute causes to their constitutional right."

. . .

"Finally, the Dissent also takes issue with the fact that Plaintiffs have not brought their challenge to the MEPA Limitation in the context of a specific permit. While this would be necessary if Plaintiffs had brought this as an 'as applied' constitutional challenge (i.e., the statute is unconstitutional as applied to the specific circumstances presented), here Plaintiffs alleged the statute was facially unconstitutional—that no set of circumstances exists where the State could prohibit state agencies from analyzing GHG emissions in all permitting actions."

. . .

"Like the District Court's Order, this Opinion is not limited to any particular set of facts as Plaintiffs facially challenge the constitutionality of the MEPA Limitation."

"Although not necessary for our constitutional standing analysis, we summarize the multitude of personal, aesthetic, economic, and property injuries Plaintiffs showed at trial stemming from Montana's energy and permitting policies. *See* Barrett v. State, 2024 MT 86, 31, 416 Mont. 226, 547 P.3d 630 (declining to address whether plaintiffs had standing for alleged injuries to constitutional rights when individualized injuries were sufficient). Generally, the District Court found that children are uniquely vulnerable to the impacts and consequences of climate change (including the impacts from heatwaves, droughts, air pollution, and other extreme weather events on young bodies) because their bodies and minds are still developing. More specifically, Plaintiffs discussed at trial: the fear they feel from disappearing glaciers in Montana (both aesthetically and from the dependence many communities place on the water they provide throughout the summer); the impacts climate change is having on culturally important native wildlife, plants, snow, and practices; summer smoke and extreme heat preventing Plaintiffs from enjoying outdoor activities and sports which are important to them; the economic effects that less snowpack and more drought are having on ranches owned by Plaintiffs' families and the resulting emotional harm; the emotions they face when confronted with growing up in this quickly changing state and the prospect of raising the next generation in increasingly dangerous weather patterns; and many other harms to their recreational, work, and physical and emotional wellbeing. See also generally Brief of Amici Curiae Public Health Experts and Doctors, No. DA 23-0575 (Mont. March 21, 2024) (corroborating harms

with peer-reviewed medical literature). These aesthetic, recreational, and economic injuries are also sufficient to satisfy the constitutional requirements for personalized injury, even though widely shared."

Examples of Standing as a Major Hurdle for Climate Change Cases

*Colorado***.** In Colorado, we need go no further than the recent Colorado Supreme Court's decision in *State v. Hill*, 2023 CO 31, 22SC119 (Colo. June 05, 2023) to see the "standing" gauntlet plaintiffs would face here.

Although not a "climate change" case, *per se*, the Court in Hill ignored as irrelevant hundreds of pages of briefs from the parties as well as from a host of amici (friends of the court) that based their arguments on the public trust doctrine stating:

> "This dispute has produced hundreds of pages of briefing from the parties and amici involving extensive discussions of the public trust doctrine, the equal footing doctrine, and arguments around who is best positioned to determine legal policy on access to rivers. But those subjects are ultimately irrelevant to the issue before us."

The Supreme Court held that an individual lacks standing to pursue a declaratory judgment "that a river segment was navigable for title at statehood and belongs to the State."

The Court emphasized that a declaratory judgment is procedural, not substantive, in nature. And to demonstrate a legally protected interest to establish standing for a declaratory judgment, a party must assert a legal basis on which a claim for relief can be grounded.

The Court said that the plaintiff has no legally protected right independent of the state's alleged ownership of the riverbed onto which he can hook a declaratory judgment claim. Therefore, "these asserted interests cannot provide him with standing to pursue a declaratory judgment action. . . Rather, this case requires us to answer just one question: 'Whether Roger Hill has a legally protected interest that affords him standing to pursue his claim for a declaratory judgment that a river segment was navigable for title at statehood and belongs to the State.' He does not."

In New Mexico, a Case Continues. The case of *Mario Atencio, et al v. The State of New Mexico, et al* is one of many cases filed in various states contending with a particular state's version of the "healthful environment" constitutional provision. The full title of the Complaint is:

Complaint to Enforce Constitutional Rights for a Healthful and Beautiful Environment and Protection of Natural Resources from Despoilment Due to Oil and Gas Pollution, and to Enforce the Rights of Frontline Communities, Indigenous Peoples, and Youth to Life, Liberty, Property, Safety, Happiness, and Equal Protection in the Face of the State's Permitting of Oil and Gas Production and Pollution, and for Declaratory and Injunctive Relief.

Defendants include the State of New Mexico, the New Mexico Legislature, the Governor of New Mexico, other executive officials and departments, the Oil Conservation Commission, and the state's Environmental Improvement Board.

Plaintiffs seek declarations that the defendants are out of compliance with their constitutional duties, and that the current statutory, regulatory, and administrative framework results in a violation of certain rights of Plaintiffs enumerated in the New Mexico Constitution.

In addition to other requested injunctive relief, Plaintiffs ask the Court to enjoin defendants to suspend additional permitting of oil and gas wells until the defendants have come into compliance with their constitutional duties, and enjoin Defendants to enact, fund and implement a statutory, regulatory and enforcement structure and plan that complies with the State's constitutional mandate to protect our beautiful and healthful environment, air, water, and other natural resources from despoilment by pollution caused by the oil and gas industry.

In his June 10, 2024, Order, District Court Judge Matthew Wilson denied motions to dismiss but granted the defendants' request to submit the issues for interlocutory appeal, the briefing for which has not been completed.

And *Juliana* **at the Federal Level.** The issue of standing in climate change cases may arrive in the U.S. Supreme Court.

In the *Juliana* case, which was filed on August 12, 2015, the plaintiffs are challenging the U.S. government's role in driving climate change as unconstitutional. Plaintiffs seek declaratory relief from the ongoing harm to their physical health and safety caused by federal fossil fuel policies.

In 2020, the Ninth Circuit Court of Appeals issued an order and "reluctantly" dismissed the *Juliana* case stating that the issues plaintiffs raised on climate change were political and not a decision for the courts.

The plaintiffs were able to persuade the trial court to revive the case by allowing them to file a revised and narrower version of the complaint. Nevertheless, the Ninth Circuit subsequently issued an order directing the trial court to dismiss the case. Under the appellate court's order, Judge Ann Aiken of the U.S. District Court for the District of Oregon was required to dismiss the case for lack of standing without leaving an opening to amend the complaint.

On November 12, 2024, the U.S. Supreme Court denied the *Juliana* plaintiffs' mandamus petition that requested the Court to determine whether the Ninth Circuit Court of Appeals exceeded its jurisdiction when it directed the district court to dismiss the amended complaint.

And just two weeks ago, on December 9, 2024, the 21 young plaintiffs in *Juliana v. United States* filed a *petition for certiorari* with the U.S. Supreme Court, asking the Court to approve their petition pending the Court's decision in another case it will decide this term, *Gutierrez v. Saenz*, which presents a very similar legal question in the context of a death penalty case.

The *Juliana* plaintiffs ask the Court to vacate the Ninth Circuit's dismissal of their case and remand the matter to the lower court so they can move forward on their amended complaint.

The plaintiffs argue that the Ninth Circuit's decision conflicts with the law of standing in other circuits, Supreme Court precedents over the past 100 years, and undermines Acts of Congress.

The youths' petition for *certiorari* asks the Supreme Court to review two Ninth Circuit decisions from 2020 and 2024 dismissing the case based on a ruling that the

plaintiffs had not shown that their claims against the government could be redressed by a judgment in their favor.

The plaintiffs in both the *Juliana* and *Held* cases are represented by attorneys for Our Children's Trust, the website for which provides a detailed description, history, and status of the cases.

This blog was drafted by John L. Watson, an attorney in the Spencer Fane Denver, Colorado, office. For more information, visit www.spencerfane.com.

[1] See A Guide to the Montana Environmental Policy Act.

Click **here** to subscribe to Spencer Fane communications to ensure you receive timely updates like this directly in your inbox.