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Montana Court Finds State Environmental Policy Unconstitutional

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As we touched on last week, on August 14, the Montana First Judicial District Court, Lewis and Clark County, entered its Findings of Facts and Conclusions of Law in *Held v. State of Montana, et al.* striking down certain provisions of the Montana Environmental Policy Act (MEPA), which restricted Montana from incorporating the impact of greenhouse gas emissions or other forms of climate change in environmental reviews (the MEPA Limitation). Plaintiffs were sixteen youths who, at the time of filing the initial complaint, ranged in ages from two through eighteen and, among other requests for relief, sought declarations of law concerning their constitutional rights in Montana to a clean environment and that Montana’s “aggregate actions to implement a fossil fuel-based energy system . . . are unconstitutional.”

Article II of the Montana Constitution provides that all persons have the “right to a clean and healthful environment.” **Article IX** provides that the “state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations” and charges the state legislature to “provide for the administration and enforcement of this duty” and “provide adequate remedies for the protection of the environmental life support system from degradation.”

In *Held*, the court conducted an analysis of climate science and environmental projections, drawing on expert testimony it declared “informative and credible,” to find that there is an “overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels,” that “carbon dioxide . . . is the GHG most responsible for trapping excess heat within Earth’s atmosphere,” and that “science is unequivocal that dangerous impacts to the climate are occurring due to human activities,

primarily from the extraction and burning of fossil fuels.” In sum, the court stated that “Montana is warming, and the rate of warming is increasing.”

The court then went on to find that climate change harms children uniquely and more acutely than adults. In the court’s assessment, children are “uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.” The court grounded its view not only on the impact of environmental degradation on children through poor air quality and other physical forms of pollution and changing weather patterns, but also the “stress and distress” caused by fears of a changing environment and loss of cultural landmarks and nature’s wonders that “can impact their physical health.”

By enacting the MEPA Limitation, the court found that Montana was responsible for harming plaintiffs. The court found that the state has been aware of the harmful dangers posed by climate change since at least the 1990s, yet its modern energy policy and the MEPA Limitation “constrain[] [Montana] from making fully informed decisions through their environmental analysis about the scope and scale of impacts to the environment.” Additionally, the court highlighted how expert testimony and other factual evidence showed that Montana could replace 100% of its GHG emissions with clean and renewable energy by 2050, demonstrating that the continued use and promotion of fossil fuels was not factually supported as a necessity for its energy policy.

Based on its factual determinations, the court held that plaintiffs had successfully shown that the MEPA Limitation was directly connected with the promotion of fossil fuel generation, that eliminating the MEPA Limitation would provide plaintiffs with appropriate redress by allowing the state to consider the impact of approved projects on the climate and environment, and that, in sum, the MEPA Limitation did not pass a strict scrutiny analysis because the State failed to show a compelling governmental interest that was necessary to overcome plaintiffs’ rights under Montana’s constitution. Accordingly, the court found that defendants continued “act[ions] in accordance with the statute would be unconstitutional.”

It is expected that the Montana Attorney General’s office will appeal the decision.

Taking the Temperature: As we have previously reported, it is likely that the decision in *Held* will become part of the discussion around climate-related litigation across the United States. There are currently multiple climate-related matters pending in state courts across the country. At least two other states have similar constitutional provisions protecting individual rights to enjoy a clean environment: Massachusetts and Pennsylvania. And, overall, there is a general upward trend globally in climate litigation.

If courts prove to be receptive to climate-centered litigation in the United States, that may also prove to be a significant development in the anti- and pro-ESG partisan divide. As we have reported, Republicans in Congress have attempted to pass legislation that would restrict investment advisors’ ability to consider ESG factors when acting in the “best interests” of clients. GOP Attorneys General have targeted certain large asset managers for their ESG practices. And there has been a growing movement to use non-legal strategies to challenge companies and investment firms that utilize ESG metrics and pursue ESG goals. Depending on future developments in *Held* and other climate-related litigation in the United States, the judicial system may prove to be an

increasingly prominent arena for resolution of competing positions in this area in the U.S. than it has to date.