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IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs and Appellees,

v.

THE STATE OF MONTANA, et al.,

Defendants and Appellants.

Appeal from the Montana First Judicial Court
Lewis and Clark County
The Honorable Kathy Seeley, Presiding
Court Cause No. CDV 2020-307

AMICUS CURIAE BRIEF OF THE OFFICERS OF THE LEGISLATURE IN SUPPORT OF DEFENDANTS/APPELLANTS

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I. INTRODUCTION

This brief sets forth why the District Court's decision in *Held* must be reversed because The Judiciary's constitutional authority does not allow the District Court to determine *how* The Legislature should provide for the promise of a "clean and healthful environment" under *Mont. Const. Art. II and IX*.

II. REASON FOR AMICI'S APPEARANCE

The Legislature is given specific and unique constitutional authority, apart and separate from the executive branch and judicial branch, to consider numerous environmental laws in each legislative session under Mont. Const. Art. V.

III. DISCUSSION

A. *Mont. Const. Art. IX* Directs The Legislature to Determine *How* to Breathe Life into The Inalienable Right to A "Clean and Healthful Environment."

Before this Court, the issue was whether the District Court understood that under *Mont. Const. Art. IX § 1 (2)-(3)*, it is The Legislature's directive, not The Judiciary's directive, to determine what the right to a "clean and healthful environment" means.

Mont. Const. Art. II, § 2 provides that:

> All persons are born free and have certain inalienable rights. ***They include the right to a clean and healthful environment*** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities***. (Emphasis added.)***

The right to a "clean and healthful environment" under *Mont. Const. Art. II* is not self-executing, meaning it relies on The Legislature to breathe life into the promise of a "clean and healthful environment." The Legislature's power to determine what laws should be passed concerning a "clean and healthful environment" is expressly stated in *Mont. Const. Art. IX, § 1 (1) -(3):*

> (1) The state and each person shall maintain 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. (Emphasis added.)***

Given this specific requirement for The Legislature to provide for the administration and enforcement of the duty to ensure the promise of a "clean and healthful environment", The Judicial branch must presume that The Legislature is

enacting laws mindful of both Art. II and Art. IX. The District Court must give deference to The Legislature's determination of what that duty requires, even if it does not agree with The Legislature's approach.

This mandate for deference is rooted in the Separation of Powers doctrine.

The Montana Constitution divides the power of government "into three distinct branches – legislative, executive, and judicial." Mont. Const. Art. III, § 1. Montana's Separation of Powers provision provides:

> The power of the government of this state is divided into three distinct branches-legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly or directly permitted. *Id.*

The Separation of Powers doctrine arises from an inherent distrust of concentrated governmental power. Our country and the great state of Montana have found that the best way to prevent too much power in any one set of hands is to utilize a system of checks and balances among the three branches of government.

In the 2023 legislative session alone, The Legislature considered 1698 bills. The Legislature is entrusted to consider how these bills implement a constitutional directive. It is uniquely poised to understand and evaluate environmental laws,

some of which intend to help fulfill the promise of a clean and healthful environment. This entrustment to The Legislature necessarily includes *Mont. Const. Art. IX, § 1 (2)-(3).*

For example, Montana's overall energy and environmental policy is multi-faceted, ranging from regulating coal extraction to multimillion-dollar expenditures on renewable energy development. *Trial Tr. 1362:8-1363:34.*

One of the Acts the Legislature has passed to detail the procedure for permitting some energy projects is the Montana Environmental Policy Act (MEPA).

MEPA aims to further the goals set forth under *Mont. Const. Article II, § 3*. It contains language to clarify the scope and purpose of the Act and serves as guidance for administrative agencies sitting underneath The Executive Branch.

> (1) The Legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the Legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that:
>
> (a) environmental attributes are fully considered by the Legislature in enacting laws to fulfill constitutional obligations; and

> (b) the public is informed of the anticipated impacts in Montana of potential state actions.
>
> (2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.
>
> (3) (a) The purpose of requiring an environmental assessment and an environmental impact statement under part 2 of this chapter is to assist the Legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies.
>
> (b) Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to 75-1-201(4)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency. *Id.*

While MEPA is a procedural statute under *Mont. Const. Art. II, § 3*, The Legislature also passed substantive Acts to provide for administrative and enforcement mechanisms when permit terms are violated in furtherance of *Mont. Const. Art, II, § 2*. These include reclamation statutes like strip and underground mine sitting, coal and uranium mine reclamation, metal mine reclamation, opencut mining reclamation, and Interstate Mining Compact, with statutory penalties, fees,

and interest. *Mont. Code Ann. §§ 82-4-201 et seq*. Defendants/Appellants produced a complete list of substantive statutes and acts in the underlying trial. *See Doc 12 at 9; Doc. 12 at 15* (for a collection of environmental and substantive statutes).

Given the complex nature of the doctrine of separation of powers and the inevitable overlap, tension among the three branches of government is an expected reality.

Justice Laurie McKinnon eloquently explained one process to elevate tension:

> "First, the Legislature has the power to define the substantive law that courts must apply; however, the Judiciary must ensure that those laws do not violate individual rights. If the Legislature disagrees with a court's decision, it may enact a statute to reverse the effect of the decision, provided it does not change the result of the specific case." *McLaughlin v. Mont. State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980 ¶ 69.

The Legislature used the process set forth by Justice McKinnon by passing The "MEPA Limitation" after district courts began interpreting statutes to allow administrative agencies to regulate GHGs. However, The District Court disagreed with The MEPA Limitation itself and struck it down as unconstitutional.

B. The District Court Ignored Mont. Const. Art. IX § 1 (2).

On March 13th, 2020, sixteen Montana youths filed a Complaint for Declaratory and Injunctive Relief against Defendants challenging the constitutionality of the State's fossil fuel-based state energy system, eventually resulting in the District Court order filed on August 14th, 2023, and now the matter before this Court. *See Doc. 405.*

The following year, on October 27th, 2021, Plaintiffs Montana Environmental Information Center and Sierra Club filed their First Amended Complaint for Declaratory Relief against Montana Department of Environmental Quality and Northwestern Energy, Inc., challenging DEQ's decision to permit Northwestern to construct and operate a natural gas-firing power plant in Montana. *Doc. 405 at 238-240*; *MEIC v. DEQ*, 2003 ML 3093 (Thirteenth Dist. Ct., April 6th, 2023).

Then, on April 6th, 2023, Hon. Michael Moses (Ret.) issued an order regarding the statutory interpretation of one provision of the MEPA statute. *Id.*, *Mont. Code Ann. §75-1-201(2)(a)*; *Order on Summary Judgment at 29:3-9*. At that time, §75-1-201(2)(a) provided:

> "Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or

> potential impacts that are regional, national, or global in nature."

Judge Moses opined that the statute "does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana…Because of this misinterpretation of the plain meaning of the statute, DEQ's failure to evaluate the plant's greenhouse gas emissions and corresponding impacts of the climate in Montana violates MEPA." *MEIC v. DEQ*, 2003 ML 3093.

The Legislature disagreed with Judge Moses's interpretation of the statute and immediately amended it during the 2023 Montana Legislature by HB 971 ("The MEPA Limitation"), exercising the procedural processes affirmed by this Court. *McLaughlin v. Mont. State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980 ¶ 69. HB 971 was signed into law on May 10th, 2023, about one month after Judge G. Moses's Order.

The MEPA Limitation states:

> "(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders."

SB 557 further clarified the legislative intent to prohibit using GHGs and Climate Change data in MEPA reviews unless a federal agency or federal law

requires it, and it was signed into law by the governor on May 19th, 2023. *Mont. Code Ann. §75-1-201(6)(a)(ii)*

The Legislature took Justice McKinnon's advice by clarifying legislative intent concerning these environmental law statutes even as lawsuits were ongoing. *(Mont. Const. Art. III, §1*; *See McLaughlin v. Mont. State Legislature*, 2021 MT 178 (Mont. 2021) 2021 MT 179, ¶ 69. 493 P.3d 980 (Mont. 2021).

Then, the District Court found the MEPA Limitation violated *Mont. Const. Art. IX, §1(1)* ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations") and struck it down as unconstitutional.

When the District Court found that The MEPA Limitation violated *Art. IX §1(1)*, it failed to provide support as to why *Mont. Const. Art. IX, §1 (2)-(3)* did not apply.

While the general promise to a clean and healthful environment is listed in Article II, and is thereby an inalienable right, it is not self-executing, meaning that The Legislative Branch has the sole duty to provide for this constitutional directive.

Mont. Const. Art. IX, § 1 (2) states, "The Legislature shall provide for the administration and enforcement of this duty."

There is no case precedent allowing the District Court to arbitrarily pick what it likes or does not like, and then apply strict scrutiny for the latter in matters involving the promise of a "clean and healthful environment."

Forming an opinion of what is adequate or not to fulfill *Mont. Const. Art. II* goes beyond The Judicial Branch's authority to *interpret* the law passed by The Legislature. It violates *Art. IX* by stepping into the shoes of The Legislature to determine what law should be passed to fulfill the promise of a "clean and healthful environment."[1]

C. The District Court Improperly Concluded That DEQ Could Consider GHG Emissions by Striking the "MEPA Limitation."

In *Held*, The District Court concluded, "If the MEPA Limitation is declared unconstitutional, *state agencies will be capable of considering GHG emissions and the impacts of projects on climate change*." *Doc. 405 FOF at 257.*

[1] The District Court relied on transcripts from the 1972 Constitutional Convention and testimony from Convention Delegate Mae Nan Ellingson, but neither her trial testimony nor the Constitutional Convention records demonstrate express intent for the promise of a "clean and healthful environment" to include GHG data as a factor when determining whether to grant fuel-emissions projects. *Doc 405 COF 284-289.* As the maxim goes, you do not hide elephants in mouseholes.

Upon receiving the District Court's order, the Plaintiffs sent two letters to DEQ claiming that, to comply with its order, "DEQ must now calculate the GHG emissions that will result from proposed projects" and threatened DEQ with contempt if it did not comply. *Doc 242 Ex. 1 at 6-7, Ex 2 at 6-7.*

However, even if the Legislature *wanted* to confer authority on the administrative agency to use GHG data to reject emissions projects, it would need to state its intent and guidelines for the authority expressly.

When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and prescribe standards and guides for the grant of power given to the agency.

The Montana Supreme Court has set a clear standard for a delegation of legislative power. In *Bacus v. Lake Cty.,* this Court ruled,

> "The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. In other words, in order to avoid the pure delegation of legislative power by the creation of an administrative agency, the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the

> performance of its function; and, if the legislature *fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad*, its attempt to delegate is a nullity. *Bacus v. Lake Cty., 138 Mont. At 77, 354 P.2d at 1060 (citing § 69-809 R.C.M. (1947).*

Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the Legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid. *Id*. At 1061; *See Montana Legislative Services Division, Legal Services Office Memorandum Re Delegations of Legislative Authority* (Jan. 2008).

Here, the Legislative Branch did not expressly delegate the necessary authority to the DEQ to use GHGs in MEPA reviews. Rather, The Legislature prohibited it with HB 971 and SB 557. Thus, the District Court's conclusion that DEQ can consider GHG emissions in MEPA reviews by striking The MEPA Limitation must be in error.

IV. CONCLUSION

This Court should grant the Petition and reverse *Held* for the previously stated reasons.

Dated: February 23nd, 2024

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DATED this 23nd day of February 2024

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Representing: Badge B., Lander B., Lilian D., Ruby D., Georgianna Fischer, Kathryn Grace Gibson-Snyder, Rikki Held, Taleah Hernandez, Jeffrey K., Mika K., Nathaniel K., Eva L., Sariel Sandoval, Kian T., Olivia Vesovich, Claire Vlases
Service Method: Conventional

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2898 Alpine View Loop
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Representing: Northwestern Corporation
Service Method: Conventional

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Representing: State of Alabama, State of Alaska, State of Arkansas, State of Idaho, State of North Dakota, State of Indiana, State of Mississippi, State of Missouri, State of Nebraska, State of South Carolina, State of South Dakota, State of Utah, State of Wyoming, Commonwealth of Virginia, State of Iowa
Service Method: Conventional

Electronically Signed By: Abby Jane Moscatel
Dated: 02-23-2024