

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs / Appellees,

v.

STATE OF MONTANA, et al.

Defendants / Appellants.

**BRIEF OF *AMICI CURIAE* MONTANA INTERFAITH POWER & LIGHT
IN SUPPORT OF PLAINTIFFS-APPELLANTS' BRIEF**

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to [TBD – CONFIRMING MONTANA LAW], *Amicus Curiae*

Montana Interfaith Power & Light states that it does not have parent corporations and that no publicly held company owns 10% or more of its stock.

Dated: _____, 2024

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TOA

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*¹

Montana Interfaith Power & Light (“IPL”) draws from multiple faith traditions, convinced of the dignity of life and the urgency of the climate crisis. A principle of theological ethics constantly stressed in that work is that future generations have a right to a livable world.

By championing clean energy, IPL amplifies the voice of the faith community and those disproportionately affected by climate change. IPL advocates for reduced pollution and clean energy through proactive policy change at local, state, and national levels. IPL’s mission is to shape climate policies that offer both mitigation strategies and adaptation support for communities at risk, both domestically and globally. Their health, and indeed their very survival, hangs in the balance. IPL is dedicated to fostering a widespread and inclusive shift to renewable energy sources, envisioning a clean energy economy wherein everyone can participate and benefit.

With chapters across 41 states, IPL is committed to supporting a path to realize the ambitious targets set by the Paris Agreement.

¹ **The State of Montana and the Youth Plaintiffs** consent to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than *the amicus curiae* and their counsel made any monetary contribution.

II. SUMMARY OF ARGUMENT

Amicus Curiae IPL believes this Court should rule in favor of the Plaintiffs-Appellants’ (“Youth Plaintiffs”) and affirm the trial court’s determination that Mont. Code Ann. §75-1-201(2)(a) (the “MEPA Limitation”) is unconstitutional. The most important and underlying role of government is protecting present and future generations. The 1972 Montana Constitution emphasizes the inalienable right to a clean and healthful environment, drawing heavily from the Public Trust Doctrine, and mandating the government to protect Montana’s resources (and its people) from depletion. The ruling at issue in this appeal highlights the State’s ethical and spiritual obligation towards the environment and the citizens of Montana—a crucial obligation this Court must uphold.

III. ARGUMENT

Seventeenth century English philosopher John Locke espoused the belief that morality could be found in the doctrines of God-given “natural rights” – rights that justified claims to the liberty, security, and property of individuals prior to the creation of a state, and which the state must protect in order to be morally justified and stable.²

² John Locke, *The Second Treatise of Government* 5-6, 70-73 (Thomas Peardon ed., Bobbs-Merrill 1952) (1690).

In 1941, President Franklin D. Roosevelt delivered his powerful speech to Congress, The Four Freedoms. Roosevelt proclaimed that one of the four fundamental and universal rights is the “freedom of every person to worship God in his own way—everywhere in the world.”³

A. Montana’s Constitution is Fundamentally Rooted in Faith and Spirituality

The 1972 Montana Constitution stand out for many reasons, including its drafting during a historic period of high activism featuring civil rights and feminist activism, anti-war protests, and the emerging environmental movement.⁴ In this context, the Constitution was drafted with a diverse group of 100 authors, including 24 lawyers, 19 women, 5 ministers, and 3 professors, as well as ranchers, farmers, and business leaders.⁵ Within this diverse group of drafters, respect for God and spirituality was a driving force, linked directly to every Montanan’s right to enjoy the majesty of Montana’s natural environment.⁶

³ Franklin D. Roosevelt, Annual Message to Congress (Jan. 6, 1941), National Archives, <https://www.archives.gov/milestone-documents/president-franklin-roosevelts-annual-message-to-congress> (last visited March 14, 2024).

⁴ Jack Tuholske, Going with the Flow: The Montana Court’s Conservative Approach to Constitutional Interpretation, 72 Mont. L. Rev. 237, p. 2 (2011).

⁵ Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide, p. 11 (2001).

⁶ See, e.g., Mont. Const. art. III, § 2 (“The state shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.”); *Id.*, art. II, § 5 (Declaration of Rights guarantees the freedom of religion); see also Thomas J. Bourguignon, The Poacher, the Sovereign Citizen, the Moonlighter, and the

During the proceedings of the 1972 Constitutional Convention, Delegates Mae Nan Ellingson (formerly Robinson, who testified at trial in this case) and Bob Campbell introduced and sponsored Delegate Proposal 59, a proposed Preamble to the Constitution, which stated:

We, the People of Montana, instilled with the Spirit of our Creator, gathering our strength from the grandeur of our mountains and the richness of our rolling grasslands, with a reverence for the quiet beauty of our state, [w]ith the desire to live in Peace, in order to improve the quality of life and equality of opportunity for this and succeeding generations, do hereby ordain and establish this Constitution.⁷

During deliberations, delegates of the Bill of Rights Committee expressed concern over the absence of a direct reference to “God” and advocated for unambiguous revisions. The final Preamble, which passed by a vote of 91-1, states:

We the People of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and

Denturists: A Practical Guide to Inalienable Rights in Montana, 77 Mont. L. Rev. 1 (2016) (Delegate Davis argued that an amendment prohibiting businesses from being open on Sunday would infringe the right of Seventh Day Adventists).

⁷ Fritz Snyder & Mae Nan Ellingson, The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance, 72 Mont. L. Rev. 53, pp. 3-4 (2011); Montana Constitutional Convention Proceedings, vol. 1, at 159 (Mont. Legis. Council 1972) (Delegate Proposals).

to secure the blessings of liberty for this and future generations do ordain and establish this constitution.⁸

The Preamble was intentionally different from any other state constitution because it expressed a deep reverence and pride for the land,⁹ which unequivocally included the right to a clean and healthful environment.¹⁰ The delegates envisioned the Declaration of Rights to be the “finest, most expansive declaration of individual rights enacted by any state of the United States.”¹¹ Ellingson described the Preamble as embracing four aspirations: “an attachment to the land; a guarantee of freedom . . .; a commitment to continue striving toward an improved quality of life; and the promise of equality of opportunity.”¹²

⁸ Mont. Const. pmb.; Snyder & Ellingson, *supra*, at p. 4; Montana Constitutional Convention Proceedings, *supra* n. #, at vol. 2, 1036 (Reports of Committee on Style, Drafting, Transition, and Submission).

⁹ Abigail R. Brown, Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law, 45 Pub. Land & Resources L. Rev. 41 (2022); Const. Convention, *supra* n. #, at vol. 5, 1635.

¹⁰ Mont. Const. art. II, §§ 3, 4 (clean and healthful environment and individual dignity, respectively).

¹¹ Const. Convention Vol. 5, *supra* n. #, at 1634.

¹² Snyder & Ellingson, *supra*, at p. 4; Montana Constitutional Convention Proceedings, *supra* n. #, at vol. 2, 1036 (Reports of Committee on Style, Drafting, Transition, and Submission); Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 26 (Greenwood Press 2001); Montana Constitutional Convention Proceedings, *supra* n. #, at vol. 7, 2627 (Verbatim Transcript).

The decisive inclusion of God in the Preamble of the Montana Constitution highlights the spiritual and religious lens through which the delegates expressed their reverence for Montana's natural beauty and their obligation to protect such beauty and freedoms for present and future generations.¹³ One delegate, a Methodist minister, reportedly preached: "Praise the Lord and pass the Constitution,"¹⁴ a play on the well-known World War II song which served as a call to both prayer and action during a time of crisis. Similarly, the minister invoked the phrase to signify the convention delegates' call for spiritual and political commitment during the Constitution's drafting.

Indeed, many environmental advocates, religious or not, identify God, Mother Nature, or natural law as the original creator of modern Public Trust, discussed below.¹⁵

¹³ Hallee C. Kansman, Constitutional Teeth: Sharpening Montana's Clean and Healthful Environment Provision, 81 Mont. L. Rev. 247 (2020).

¹⁴ G. Alan Tarr, State Constitutional Design and State Constitutional Interpretation, 72 Mont. L. Rev. 1 (2011), citing Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 4, 11 (2001); Harry W. Fritz, The 1972 Montana Constitution in a Contemporary Context, 51 Mont. L. Rev. 270, 273 (1990).

¹⁵ James L. Huffman, A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 Env'tl. L. 527 (1989).

B. Montana's Duty Under the Public Trust Doctrine

The Public Trust Doctrine, with its ancient lineage, affirms that certain resources are inherently public by nature. As articulated by the New Jersey Supreme Court, this principle finds its roots in Roman jurisprudence, which maintained that “by the law of nature ... the air, running water, the sea, and consequently the shores of the sea [were] common to mankind.” *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355, 360 (N.J. 1984), quoting Justinian, Institutes 2.1.1 (T. Sandars trans., 1st Am. ed., 1876). The Roman Emperor Justinian is credited with laying the groundwork for this doctrine by declaring that certain environmental elements should be protected: “The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.”¹⁶

The Public Trust Doctrine mandates that government act as a trustee, maintaining the quality of these natural resources and protecting them from depletion by private interests or detrimental expenditure so they remain accessible for future generations.

During the Convention, a spirited debate unfolded around Delegate Cate’s proposal to expressly integrate the Public Trust Doctrine into the Montana Constitution. Although its history in common law spans over a century, some

¹⁶ Justinian, Caesar Flavius. *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things. Oxford Press, 1996, at 533.

delegates deemed the doctrine too complex and uncertain.¹⁷ Indeed, during deliberations regarding the environmental rights under Article IX, Delegate Campbell voiced the necessity for such rights, despite the lack of political will to incorporate the doctrine expressly, stating: “The state shall maintain an environment which we all say we want to be clean and healthful but we’re too timid to say we want clean and healthful in there because it may cause some problems later.” This remark addressed the crucial need for environmental rights while also acknowledging the apprehension of granting the legislature excessive power—an apprehension that blocked the express incorporation of the Public Trust Doctrine in the Constitution.¹⁸

Nonetheless, a robust public trust doctrine has evolved in Montana.¹⁹ Thus this Court has since applied the Public Trust Doctrine to safeguard the public’s

¹⁷ The original public trust language suggested by Delegate Cate stated:

“The State of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to protect and enforce it by appropriate legal proceedings against the trustee.”

See Montana Constitutional Convention Transcript V, at 1211 (Mont. Legis. Council 1972).

¹⁸ Kansman, Hallee C. “Constitutional Teeth: Sharpening Montana’s Clean and Healthful Environment Provision.” 81 Mont. L. Rev. 247 (2020), citing Montana Constitutional Convention Transcript V, at 1211 (Mont. Legis. Council 1972).

¹⁹ Craig, Robin Kundis. “A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust.” 37 Ecology L.Q. 53, 4 (2010)

access to the natural environment. For instance, in the 1984 case of *Montana Coalition for Stream Access, Inc. v. Curran*, the Court relied on the doctrine in its rationale affirming the public's right to use the waters and the riverbed up to its high-water mark, despite passing through a private landowner's property. *Mont. Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984), overruled on other grounds by *Gray v. City of Billings*, 689 P.2d 268 (Mont. 1984). Shortly thereafter, in *Montana Coalition for Stream Access, Inc. v. Hildreth*, the Court again invoked the doctrine after a landowner appealed the trial court's ruling that the public has an absolute right to access the river up to the high-water mark. *Mont. Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984). The Court affirmed, citing the Public Trust Doctrine and the Montana Constitution. *Id.* at 1093.

In 1987, the Court in *Galt* identified Article IX, § 3 as the legal basis for Montana's Public Trust Doctrine, stating:

The public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution which provides: "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 subject to appropriation for beneficial uses as provided by law."

Galt v. Mont. by and through Dept. of Fish, Wildlife & Parks, 731 P.2d 912, 914-915 (Mont. 1987).

The Supreme Court's holdings in *Curran*, *Hildreth*, and *Galt* confirm that the Public Trust Doctrine has its roots in common law and, more importantly,

Article IX, § 3(3) of Montana’s 1972 Constitution. The government, as trustee, cannot ignore climate change that will, for instance, shrink rivers and lakes and raise water temperatures, causing the loss of fish and aquatic plants. Climate change affects the earth’s atmosphere in similar ways, as much as it affects oceans, rivers, and lakes.²⁰

The Constitution includes numerous provisions pertaining to water resources, public access, and environmental protection, all of which the Montana courts have recognized as relevant to the State’s public trust doctrine. *See, e.g., In re Adjudication of the Existing Rights to Use of all Water*, 55 P.3d 396, 404 (Mont. 2002) (discussing connection between the Constitution and the public trust doctrine). In addition to the Preamble, quoted above, relevant provisions include:²¹

- Art. IX, § 1: “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”; “The legislature shall provide for the administration and enforcement of this duty.”; “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.”
- Art. IX, § 3: “All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.”; “The use of all

²⁰ *See* Munro, Gregory S. “The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana,” 73 Mont. L. Rev. 123 (2012) (arguing that, given Montana’s decision to impose the doctrine on navigable waters, there is no reason not to extend it to atmosphere and the airwaves).

²¹ Mont. Const. art. IX, §§ 1(1)-(3), 3(1)-(4), 4, 7 (1972).

water that is now or may hereafter be appropriated for sale, rent, distribution or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.”; “All surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.”

- Art. IX, § 4: “The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic, scientific, cultural, and recreational areas, sites, records, and objects, for their use and enjoyment by the people.”
- Art. IX, § 7: “The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state and does not create a right of trespass on private property or diminution of other private rights.”

Accordingly, the government must administer the Public Trust Doctrine to prevent the widespread environmental damage caused by greenhouse gas emissions, and to carry out that responsibility, the government must consider climate change impacts when it makes decisions about permitting.

C. Montana’s Duty to Protect Vulnerable Communities from the Effects of Climate Change

1. Native American Rights to Clean Environment

Since 1972, the Montana Supreme Court has affirmed that tribes possess reserved environmental rights for past, present, and future uses. Specifically, the Court’s ruling in *Greely v. Confederated Salish and Kootenai Tribes* established that Indian reserved water rights originate from federal law, and that state courts have a “solemn obligation to follow federal law.” *State ex rel. Greely v.*

Confederated Salish and Kootenai Tribes, 219 Mont. 76, 97 (1985), citing *Winters v. United States*, 207 U.S. 564 (1908).²²

Montanan Native Americans are guaranteed the constitutional right to preservation of their unique cultural heritage and integrity, which includes their sacred relationship with Mother Earth. *In re Adoption of Riffle*, 922 P.2d 510, 514 (1996), citing Mont. Const. art. X, § 1(2). The richness and diversity of Montana's Native American cultures were directly addressed in the 1972 Constitutional Convention through Article X, which discusses the preservation of Native culture within the broader context of "educational goals and duties."²³ Importantly, the Bill of Rights Committee explained:

‘Culture’ was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. ‘Social origin or condition’ was included to cover discriminations based on status of income and standard of living.²⁴

²² See also Fletcher, Matthew L.M. “States and Their American Indian Citizens.” 41 Am. Indian L. Rev. 319, 319 (2017) (“While the federal government has a special trust relationship with Indians and Indian nations, Indian people are also citizens and residents of the states in which they live. Thus, states have obligations to Indians as well.”).

²³ Rebecca Tsosie, The Challenge of “Differentiated Citizenship”: Can State Constitutions Protect Tribal Rights?, 64 Mont. L. Rev. 1, 17 (2003)

²⁴ Montana Constitutional Convention Proceedings. Vol. 2, 628. Mont. Legis. & Legis. Council, 1972.

Inherent to Native American culture is their spiritual and religious practices, many of which involve reverence for the natural environment.²⁵ *See Stately v. Indian Community School of Milwaukee*, 351 F. Supp. 2d 858, 867 (E.D. Wis. 2004) (Despite not conforming to the same limitations as traditional western religions, Native American religions generally meet all constitutional criteria for being classified as a “religion.”). Frank Tenorio, Governor of San Felipe Pueblo tribe, spoke of the community values and spirituality that Native American people traditionally have associated with water:

There has been a lot said about the sacredness of our land which is our body; and the values of our culture which is our soul; but water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end.²⁶

There is no denying that Native American communities form part of the larger faith-based communities, and they are equally susceptible to infringements on their religious rights. Often, these rights must be upheld through the judicial system.

²⁵ As noted in Plaintiffs/Appellees’ Answer Brief at 18-19, Plaintiff Sariel is a member of the Confederated Salish and Koetani Tribes, and Plaintiffs Ruby and Lilian are members of the Crow Nation—and for all of them, climate change has adversely affected their ability to participate in spiritual and cultural activities.

²⁶ Charles F. Wilkinson, Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow, 19 *Envtl. L.* 425, 2 (1989).

For example, in *Native Village of Kivalina v. ExxonMobil Corp.*, an indigenous community in Alaska brought suit against oil and energy companies related to the destruction of a village due to the melting of Arctic sea ice, seeking reparations for erosion and beach loss due to climate change. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). In *Morrison v. Garraghty*, the court analyzed the rights of an inmate to practice Native American spirituality (239 F.3d 648, 652 (4th Cir. 2001)), and in *Bear Lodge Multiple Use Ass’n v. Babbitt*, the court discussed the intersection of Native American religious practices and government regulation. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 n. 2 (D. Wyo. 1998); *see also State v. McBride*, 955 P.2d 133, 134 (Kan. Ct. App. 1998) (discussing religious use of peyote by members of Native American Church, and legal implications of such use); *State v. Mooney*, 98 P.3d 420, 422 (Utah 2004) (discussing “long tradition among some Native American groups of worshiping peyote and of consuming the cactus and experiencing its effects in religious ceremonies”).

Because Native Americans are disproportionately affected by the severe impacts of climate change, they have a heightened need to have a say in climate

change debates in order to protect their right to a clean and healthful environment.²⁷

2. Disproportionate Impact on Native American Communities

Article IX of the Montana Constitution underscores the significance of the state’s natural, aquatic, and cultural resources, placing a critical duty on citizens to maintain and improve a “clean and healthful environment for present and future generations.”²⁸ Given the escalating threats posed by climate change to Montana and its residents, particularly the most vulnerable communities, it is crucial for the state government to take decisive action.

It is well understood that environmental harm disproportionately impacts impoverished, rural communities and racial minorities, particularly Native American tribes.²⁹ As a state with a substantial American Indian population and

²⁷ See Brown, Abigail R. “Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law.” 45 Pub. Land & Resources L. Rev. 41, 3 (2022).

²⁸ Kansman, Hallee C. “Constitutional Teeth: Sharpening Montana’s Clean and Healthful Environment Provision.” 81 Mont. L. Rev. 247 (2020); Mont. Const. art. IX, §§ 2-4; Kansman, Hallee C. “Constitutional Teeth: Sharpening Montana’s Clean and Healthful Environment Provision.” 81 Mont. L. Rev. 247 (2020); Mont. Const. art. IX, § 1.

²⁹ William C. Mumby, Annual Review of Environmental and Natural Resource Law, 44 Ecology L.Q. 195 (2017); Stefanie Spear, Fracking Boom in North Dakota Has Heavy Impact on Native Americans, ECOWATCH (Dec. 6, 2012), <https://urlzs.com/cLcA5> (reporting on the negative effects of fracking on rural communities and Native American tribes in North Dakota) [last accessed March 14, 2024].

large areas of Indian land, Montana is faced with unique challenges. Native Americans, who comprise 6.2% of the Montana population and about 19% of rural school enrollments, primarily reside in one of seven reservations within Montana's borders.³⁰

These reservations are inherently rural and the communities therein are among those most vulnerable to the adverse impacts of climate change and the decline of natural resources.³¹ For example, the High Plains Aquifer, a critical water source in Montana's arid plains regions, is depleting faster than it can replenish due to reduced rainfall and rising temperatures, exacerbating water resource strains.³² Reservations in these areas, already contending with water shortages, face increasingly complex challenges in adapting to climate change.³³

Moreover, water insecurity is a significant issue for Montana's rural, low-income, and native communities due to limited access to clean, affordable drinking

³⁰ Pruitt, Lisa R. "Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place." 71 Mont. L. Rev. 1, 29, 41-42 (2010).

³¹ Brown, Abigail R. "Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law." 45 Pub. Land & Resources L. Rev. 41, 3 (2022).

³² Brown, Abigail R. "Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law." 45 Pub. Land & Resources L. Rev. 41, 3 (2022).

³³ U.S. Global Change Research Program, Global Climate Change Impacts in the United States 135, 128 (Thomas R. Karl, Jerry M. Melillo, & Thomas C. Peterson eds., Cambridge U. Press 2009), available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>.

water. These communities are especially susceptible to the negative impacts of water scarcity as their economies often rely heavily on natural resources, such as agricultural production or ranching.³⁴

Finally, studies highlight that Native American children have a higher likelihood of low birth weight and increased infant mortality rate compared to other Montana population groups.³⁵ Given that 3% of all rural children are Native American,³⁶ the state has a critical responsibility to protect them. Indeed, one of the primary purposes of the Declaration of Rights was to ensure that minors received full recognition under the equal protection clause of the U.S. Constitution. *In re S.M.K.-S.H.*, 290 P.3d 718, 722 (Mont. 2012) (citing Mont. Const. art. II, § 15).

Montana's Constitution underscores the State's commitment to preserving its natural resources and environment. However, the State's rural, low-income, and native communities bear the brunt of climate change's negative impacts. As

³⁴ Brown, Abigail R. "Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law." 45 Pub. Land & Resources L. Rev. 41, 3 (2022), citing Dep't of Nat. Res. & Conservation, Montana's Regional Water Systems 2 (Jan. 2021), <http://dnrc.mt.gov> [<https://perma.cc/A73W-XMEW>] [last accessed March 13, 2024].

³⁵ Pruitt, Lisa R. "Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place." 71 Mont. L. Rev. 1, 29 (2010).

³⁶ *Ibid.*

such, it is crucial for the state government to proactively address these challenges to fulfill its duty to its citizens and protect Montana's future.

D. The Moral Imperative to Uphold the District Court's Order in Support of Youth Plaintiffs

Montana's progressive Constitution and public trust caselaw are destined to play an integral role in climate-change litigation,³⁷ including, as here, disputes over the appropriate role of government in regulating greenhouse gas emissions. The District Court's holding underscores the State's moral responsibility to protect the environment and the people of Montana, and it must be affirmed.³⁸

The foundation of the public trust doctrine lies in the government's authority to supervise and control the natural resource that is the subject of the trust. *Nat'l Audubon Soc'y v. Super. Ct. of Alpine Co.*, 658 P.2d 709, 712 (Cal. 1983).

Moreover, a trustee has the duty to **protect** the trust property. *Iverson v. Rehal*, 317 P.2d 869, 872 (Mont.1957). A trustee may not act in his own interest or the interest of any third party, and must act with utmost good faith toward the

³⁷ Luis José Torres Asencio, *Greening Constitutions: A Case for Judicial Enforcement of Constitutional Rights to Environmental Protection*, 52 Rev. Juridica U. Inter. P.R. 277 (2017-2018) (analyzing the Montana Constitution and subsequent case law as model of judicial enforcement of constitutional environmental rights in liberal democracies).

³⁸ See Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Env'tl. L.J. 338, 362 (1996) (discussing moral duty of states to uphold human rights, including environmental human rights).

beneficiary. *Wild West Motors, Inc. v. Lingle*, 224 Mont. 76 (1986). While typically the government has wide latitude to balance interests and mediate disputes between competing interests; it is far more restricted when serving as a trustee over a public resource. Hence, the State’s duty as trustee may forbid balancing of interests or tradeoffs that would damage or deplete the resources it is entrusted to protect.

The Montana Constitution explicitly includes the duty to maintain and improve a “clean and healthful environment ... for present and future generations.”³⁹ This Court has construed this right in relation to Article II, § 3, which provides the inalienable right to “a clean and healthful environment.” *Mont. Env’tl. Info. Ctr. v. Dept. of Env’tl. Quality & Seven-Up Pete Joint Venture*, 988 P.2d 1236, 1246 (Mont. 1999) (describing the two provisions as so interdependent that they must be considered and applied together). Indeed, the Court has “repeatedly recognized the rights found in Montana’s Declaration of Rights as being ‘fundamental,’ meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and,

³⁹ Mont. Const. art. IX, § 1, cl. 1; *see also* Jack Tuholske, Going with the Flow: The Montana Court’s Conservative Approach to Constitutional Interpretation, 72 Mont. L. Rev. 237, p. 1 (2011) (The Constitution reflects “the delegates’ intentions and [is] gradually reshaping our legal traditions.”).

thus, the highest level of protection by the courts.” *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003) (internal citations omitted).

Here, MEPA instructs the state to evaluate the impact of any major state action on the human environment’s quality.⁴⁰ Enacted only a year prior to the Constitution, the drafters undoubtedly considered MEPA’s directive and its requirements when they established the fundamental right to a clean and healthful environment. The language in Article II and Article IX mirrors some of MEPA’s language, further demonstrating the delegates’ intention to frame the rights as interconnected and interdependent.⁴¹ Upholding the District Court’s holding that the MEPA Limitation violates the Constitution and enjoining its enforcement is critical to ensure that the State fulfills its moral and legal responsibility to ensure a clean and healthful environmental for all Montanans.

IV. CONCLUSION

For all of the foregoing reasons, *amicus curiae* Montana Interfaith Power & Light, respectfully submits this brief in support of the Youth Plaintiffs and ask the Court to affirm the District Court’s August 14 Order, in its entirety.

⁴⁰ Mont. Code Ann. § § 75-1-201(1)(b)(iii).

⁴¹ Deborah B. Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 Mont. L. Rev. 2, 423-27 (1990).

Dated: _____, 2024

SHEPPARD, MULLIN, RICHTER &
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CERTIFICATE OF COMPLIANCE

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