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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause CDV 20–307 Hon. Kathy Seeley **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** [Oral Argument Requested]

INTRODUCTION

Plaintiffs' Response to Defendants' Motion for Summary Judgment and Brief in Support ("Response") reflects the overall strategy they have employed in this case: assert vague and emotionally charged claims based on an overbroad and nebulous interpretation of their constitutional rights to confuse the relevant issues and facts to avoid dismissal. Plaintiffs seek the

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spectacle of a trial—not because it will actually resolve the dispute or meaningfully redress their alleged injuries—but for a public relations and fundraising victory for their activism, win or lose.[1] This Court should not allow Plaintiffs to continue to use it as a political platform for an out-of-state special interest activist group. It should instead dismiss Plaintiffs' remaining claims for relief and end their efforts to undermine the will of Montana's electorate at the expense of its taxpayers.

Considering the confusion Plaintiffs propagate in their Response, a simple and realistic reframing of Plaintiffs' case may be helpful. Plaintiffs claim that (1) the Montana Constitution grants them rights that entitle them to an undefined "stable climate system;" (2) even the tiniest amount of greenhouse gas ("GHG") emissions destabilize the climate and therefore violate their constitutional rights; and (3) Section 90-4-1001, MCA (the "State Energy Policy Goal Statements") and Section 75-1-201(2)(a) (the "MEPA Limitation") are unconstitutional because they allow GHG emissions. Thus, contrary to Plaintiffs' assertion, this is indeed a case that can be decided on summary judgment because all of Plaintiffs' remaining claims for relief hinge on whether Plaintiffs have the right to a "stable climate system" under the Montana Constitution—a purely legal question. No *genuine* issues of *material* fact exist sufficient to preclude summary judgment despite Plaintiffs' efforts to conjure such issues.[2]

Judicial economy is served by resolution of this case as a matter of law at the summary judgment stage considering the virtual certainty that the Montana Supreme Court will ultimately decide the operative questions of law herein. Indeed, Defendants would have no choice but to seek review of any determinations of law that would so profoundly affect the legal, political, and economic interests of all Montanans. It is likewise clear that Our Children's Trust would appeal any ruling adverse to its interests as demonstrated by its advocacy in other jurisdictions.[3] The record is sufficiently developed to allow the Montana Supreme Court to conclusively decide whether a right to a "stable climate system" exists under the Montana Constitution and whether

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[1] *See* Our Children's Trust's website, at https://www.youthvgov.org/held-v-montana (containing a live, by-the-second "countdown to trial" and highlighting the nation's first ever "children's climate trial" well before its potential occurrence). This, and Plaintiffs' other efforts to publicly establish that their claims *will* go to trial should not pressure or sway the Court to relieve Plaintiffs of their burden at the summary judgment stage.

[2] To the extent Plaintiffs may argue summary judgment is precluded by Defendants' inadvertent omission of a statement of uncontested facts at the beginning of their Brief as set forth in the Court's Modified Scheduling Order (Doc. 145) at ¶ 5(c), this would amount to a 'form over substance' argument considering that Plaintiffs neither assert nor establish any resulting undue prejudice and instead submit a detailed Response. Defendants apologize for this oversight in any event.

[3] *See* Our Children's Trust's website, at https://www.ourchildrenstrust.org/other-proceedings-in-all-50-states and https://www.ourchildrenstrust.org/juliana-v-us (outlining the procedural history of their legal actions).

prudential considerations render Plaintiffs' claims non-justiciable as a threshold matter. Resolution of these questions in Defendants' favor would obviously terminate the controversy without the need for trial. Resolution of these questions in Plaintiffs' favor would significantly streamline the issues remaining for trial. Either outcome eliminates significant expense and benefits judicial efficiency, which weighs heavily in favor of concrete resolution of the applicable legal questions.

For all the reasons set forth in Defendants' Brief in Support of their Motion for Summary Judgment ("Brief") and this Reply, Plaintiffs' remaining claims fail as a matter of law, and the Court should dismiss the same accordingly.

APPLICABLE STANDARDS

Although set forth in detail in Defendants' Brief, (*Id.* at 2–3), certain aspects of the applicable standards bear repeating given Plaintiffs' apparent misapprehension of them. Conspicuously absent from Plaintiffs' Response is any acknowledgement of the presumptive constitutionality of statutes or their burden to prove unconstitutionality beyond a reasonable doubt. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357; *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Because Plaintiffs present facial challenges to the subject statutes, they must show those statutes are unconstitutional in *all* applications. *See Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. Moreover, Plaintiffs cannot now rely on the Courts' previous Orders which, pursuant to the motion to dismiss standard, assumed the truth of Plaintiffs' allegations—at this stage there must be evidence showing *genuine* issues of *material* fact that would preclude judgment as a matter of law. *See* Mont. R. Civ. P. 56(c)(3). *See also Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 17, 410 Mont. 239, 518 P.3d 840 ("A genuine issue of material fact exists only if the Rule 56 factual record manifests a non-speculative record fact that is materially inconsistent with proof of an essential element of an asserted claim or defense at issue.") (citation omitted); *Id.*, ¶ 18 ("To meet the responsive Rule 56 burden of demonstrating that genuine issues of material fact preclude summary judgment, the non-moving party must in proper form, and by more than mere denial, speculation, or pleading allegation, 'set out specific facts' showing the existence of a genuine issue of material fact.") (citations omitted). As demonstrated below, Plaintiffs cannot meet their summary judgment burden.

ARGUMENT

Plaintiffs' entire case, from their claims of standing to their claims for relief, rest on opinions and fears of children who have only been witness to Montana's climate for no more than a couple of decades, and a speculative and hypothetical "academic exercise in the conceivable," rather than established constitutional rights, the proper role and function of the legislature and judiciary, and provable *material* facts. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 688 (1973). When all is said and done, this case will not stand for the question of whether climate change is occurring and what Montana will do about it, rather it will stand for what is justiciable by our Montana Courts and how far a court can go to reinterpret the Montana Constitution.

I. PLAINTIFFS STILL FAIL TO DEMONSTRATE "CASE OR CONTROVERSY" STANDING.

A. PLAINTIFFS' ALLEGED INJURIES ARE NOT DISTINGUISHABLE FROM THE INJURY TO THE PUBLIC GENERALLY.

In their Response, Plaintiffs largely ignore the crux of Defendants' argument regarding the injury element of standing—that Plaintiffs' alleged injuries are effectively indistinguishable from those of the general public as a logical extension of their own allegations regarding the nature of climate change. (*See* Defs.' Br., at 4.) Plaintiffs' assertions that climate change is a threat to the very existence of all humanity while simultaneously arguing that their alleged physical, mental, emotional, aesthetic, cultural, and economic injuries from climate change are somehow distinguishable from the injury to the public generally is incongruent, particularly given that all other members of the general public would inevitably suffer those exact kinds of injuries from climate change if Plaintiffs' allegations are true. In other words, Defendants assert that, as a matter of law, Plaintiffs cannot satisfy the injury element of standing by essentially arguing that they have different subjective perceptions of the same phenomenon that affects *everyone*. This is not to say that standing should be denied to persons who allege injury "simply because many others are also injured" as Plaintiffs characterize Defendants' argument. (Pls.' Resp. Br. at 2) (citing *Helena Parents Commn. v. Lewis & Clark Cnty. Commrs.*, 277 Mont. 367, 374, 922 P.2d 1140, 1144 (1996)). Instead, this is to say that standing should be denied to those who allege injuries that are not realistically "distinguishable from the injury to the public generally" in accordance with

binding precedent. *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶ 41, 296 Mont. 207, 988 P.2d 1236.

To the extent Plaintiffs rely on their comparatively young age as a means of distinguishing themselves from the general public, this fails to acknowledge the existence of more than a quarter-million other Montanans in their age group.[4] Plaintiffs cannot reasonably distinguish their claimed injuries in this regard, and they certainly do not speak for all other Montana youths in this lawsuit. The fact remains that Plaintiffs' alleged injuries are no different from those to the public generally based on their own contentions about the very nature of the effects of climate change. Plaintiffs' injuries are insufficient to establish standing.

B. PLAINTIFFS FAIL TO ESTABLISH CAUSATION AS A MATTER OF LAW.

Plaintiffs' attempt to establish the causation element of standing also misses the mark. Plaintiffs must demonstrate "a *fairly traceable* connection" between their claimed injuries and the statutes they challenge. *Heffernan v. Missoula City Counsel*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80 (emphasis added); *see also Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (stating the requirement of "a *direct causal connection*" between the challenged conduct and the alleged harm) (emphasis added). Plaintiffs' causation allegations fail to meet this burden even if accepted as true: the Energy Policy Goal Statements allowing Defendants' so-called "aggregate acts" that cause "substantial" GHG emissions that cause "climate instability" that causes specific local effects in Montana (e.g. wildfire smoke, extreme weather, etc.) that cause Plaintiffs' claimed injuries is hardly a *direct* or *fairly traceable* connection in any sense of those words.

For example, several Plaintiffs living in Missoula, Montana allege that wildfire smoke causes physical injury, but they fail to offer anything more than a hypothetical and attenuated link between their alleged injuries and the challenged statutes and conduct. Wildfires can produce smoke from many states away, can be started in various ways, and can significantly differ in duration and manner based on many factors such as forest density and type, authorities' forest management activities, time of year, drought patterns, and the decisions of the officials in fighting them. Wildfire smoke is also carried on wind currents and concentrates in areas where inversions occur based on geography and weather patterns. Plaintiffs have come nowhere close to showing

[4] The United States Census Bureau counts just under 260,000 Montanans under the age of 20 based on 2021 data. *See* https://data.census.gov/profile/Montana?g=0400000US30.

how the statutes at issue are *directly* or *fairly* traceable to Defendants' alleged conduct, how that is traceable to GHG emissions, how that is traceable to a wildfire, and how that is traceable to wildfire smoke in Missoula, Montana entering a Plaintiffs' lungs, causing injury. This same reasoning also exposes the absence of the requisite causation with respect to Plaintiffs' other claimed injuries (e.g. pine beetles infecting trees recreational and aesthetic injuries, flooding events, and cultural losses like changes in the location and time of year to pick huckleberries, etc.).

Plaintiffs also cannot remedy their failure to identify and challenge the specific, substantive statutes directly regulating Defendants' "aggregate acts" or permitting actions by asserting—without proof—that those actions were taken to effectuate the State Energy Policy Goal Statements. This pleading defect is fatal to Plaintiffs' challenge to the State Energy Policy Goal Statements. Plaintiffs' strained argument regarding those specific statutes supposedly involving discretion in their implementation only underscores this point—Plaintiffs do not challenge the statutes that actually govern and directly "cause" the permitting decisions included in the subject "aggregate acts." This is overly broad as a matter of law. *See Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

Lastly, Plaintiffs' attempt to establish a causal link between their claimed injuries and the MEPA Limitation is proscribed by the causation standard explicitly established by the Montana Supreme Court:

> We hold that MEPA, like NEPA, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. We reject the unyielding "but for" causation standard...to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. We hold that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority...[R]equiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority.

Bitterrooters for Planning, Inc. v. Mont. Dept. of Envtl. Quality, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712. Thus, because Defendants have no independent statutory authority to regulate or prevent climate change or its environmental impacts, any exclusion from environmental review of climate change or its impacts pursuant to the MEPA Limitation cannot be considered a legal

cause of Plaintiffs' claimed injuries. *Id.* Plaintiffs therefore fail to establish causation as a matter of law with respect to their challenge to the MEPA Limitation, and the Court should dismiss the same accordingly.

C. PLAINTIFFS' ALLEGED INJURIES ARE NOT REDRESSABLE ACCORDING TO THEIR OWN ALLEGATIONS.

Redressability is closely related to causation, requiring the Plaintiffs demonstrate that "the alleged harm is of a type that *available* legal relief can *effectively* alleviate, remedy, or prevent." *Larson* at ¶ 46 (emphasis added). Plaintiffs cannot establish redressability for the same reasons they cannot establish causation. This is a strict matter of logic. This Court's invalidation of statutes or the injunction of "aggregate acts" that Plaintiffs cannot show caused their alleged injuries has no prospect of remedying those same injuries.

Plaintiffs, themselves, insist that "the science dictates what is needed to protect [them,]" and "the best available science today prescribes that global atmospheric CO_2 concentrations must be restored to no more than 350 ppm by 2100..." (Compl. at 87:13; *see also* Pls.' Resp. Br. at 13.) However, Plaintiffs point to no evidence that their remaining requested relief has any realistic prospect of producing this outcome—even if it resulted in the complete elimination of GHG emissions from Montana. Plaintiffs instead engage in a shell game by first *admitting* that "Montana on its own cannot stabilize the global climate system of which it is a part" before claiming that "Defendants' conduct can be adjudged as to whether it is consistent with achieving climate stability, or not." (Pls.' Resp. Br. at 13.) Notwithstanding their blatant efforts to make a moving target of standing's redressability requirement, Plaintiffs ultimately fail to cite any evidence that an Order from this Court granting their remaining requests for relief would lead to a "stable climate" by reducing atmospheric CO_2 concentrations to 350 ppm—the only relief that could truly alleviate their claimed injuries according to their own allegations.

Indeed, a declaration "is unlikely by itself to remediate [Plaintiffs'] alleged injuries absent further court action," and even an injunction from subjecting Plaintiffs to the State Energy Policy Goal Statements, the alleged "aggregate acts," and the MEPA Limitation would not "halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth," to effectively alleviate Plaintiffs' injuries. *See Juliana v. United States*, 947 F.3d 1159, 1179 (9th Cir. 2020). Nor can any expert prove that "elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs." *Id.* Rather, as noted in *Juliana*, "many of the

emissions causing climate change happened decades ago or come from foreign and non-governmental sources." *Id.*; *see also Park Cnty. Envtl. Council v. Mont. Dept. of Envtl. Quality*, 2020 MT 303, ¶ 76, 402 Mont. 168, 477 P.3d 288 ("[A] remedy implemented only *after* a violation is a hollow vindication of constitutional rights if a potentially irreversible harm has already occurred.") (citation omitted) (emphasis in original).

Plaintiffs' reliance on Anne Hedges' Declaration only underscores the lack of redressability here. Ms. Hedges states that she became aware that the Montana Legislature was considering amending or repealing the State Energy Policy Goal Statements, and expressed her opinion that this was occurring "to undermine *Held v. State of Montana.*" (Hedges Dec., ¶ 9.) She then explains it is clear to her that, even if the statute were repealed, Montana would still have a State Energy Policy that would maintain the status quo, in particular the Governor's energy policy.[5] (*Id.* at ¶ 13.) She further declares certain Senators noted that the energy policy is not in MCA § 90-4-1001, et seq., rather it is in other statutes and regulations including the tax policies.[6] (*Id.* at ¶ 19.) This confirms Defendants' point that Section 90-4-1001 is merely an aspirational statement of goals and highlights the obvious—a declaration that this statute is unconstitutional will not effectively alleviate Plaintiffs' injuries. It would have no effect on the status of the fossil fuel industry in Montana. Moreover, Ms. Hedges' opinions regarding the redress supposedly available via the invalidation of the MEPA Limitation are of no consequence considering that a State agency legally has no ability to consider climate change or its effects absent the Legislature granting it that authority. *See Bitterrooters*, ¶ 33; *see also Park Cnty. Envtl.* at ¶ 34 ("Regardless of MEPA's manifest beneficial purpose and...[what may be] otherwise compelling public policy arguments, [this Court] simply cannot properly stretch MEPA beyond the limits of its language and stated purpose to fill an environmental review gap created by the Legislature and remaining within its domain to remedy if so inclined.").

Plaintiffs also misconstrue Defendants' argument concerning declaratory relief. Defendants argued that the Uniform Declaratory Judgments Act ("UDJA") does not, itself, confer standing simply because a claim for declaratory relief is asserted. *See Mitchell v. Glacier Cnty.*, 2017 MT 258, ¶ 42, 389 Mont. 122, 406 P.3d 427 ("Without an independent ground for standing, [plaintiffs] cannot assert a claim under the [UDJA]."). In other words, Plaintiffs must establish

[5] These issues are not presently before the Court.
[6] This is also an issue not within the scope of this suit.

standing by demonstrating redressability of their alleged injuries independent of the fact that they seek relief under the UDJA. The mere satisfaction from potentially prevailing on a claim is not, itself, sufficient to establish redressability. (*See* Defs.' Br. at 9.) This hardly amounts to portraying declaratory relief as meaningless or demonstrating defiance of the Court's proper authority, as Plaintiffs claim. The fact remains that "[c]ourts do not function, even under the [UDJA], to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *Donaldson*, ¶ 9. Plaintiffs therefore cannot sufficiently establish standing by requesting declaratory relief that has the sought effect of "tell[ing] Defendants that their current mandate and course of conduct is unconstitutional and must be changed[,]" (Pls.' Resp. Br. at 8), without any ability to direct Defendants how that is to be done. *See Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State*, 962 N.W.2d 780, 791 (Iowa 2021) ("Think about it this way: If the court can't fix your problem, if the judicial action you seek won't redress it, then you are only asking for an advisory opinion."); *Id.*, at 792 ("As already noted, to a large extent the plaintiffs are simply seeking broad, abstract declarations in this litigation. *Such general declarations do not provide any assurance of concrete results, although they do herald long-term judicial involvement.*") (emphasis added). Plaintiffs fail to establish standing for this reason as well.

II. THE COURT SHOULD DISMISS PLAINTIFFS' CLAIMS BASED ON PRUDENTIAL CONCERNS.

Plaintiffs resort to mischaracterization and emotional appeals in response to Defendants' argument that the Court should dismiss Plaintiffs' remaining claims on prudential standing grounds. This is unsurprising considering that this is perhaps the strongest reason that Plaintiffs' remaining claims are not justiciable. In any event, Plaintiffs' emotional blackmail in framing judicial restraint as a fundamental abdication of the Court's "vital role in democracy" and its judicial duty "in a case involving danger and harm to children" should not distract the Court from sound jurisprudence.

Defendants must first address Plaintiffs' misleading citation to *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 59, 365 Mont. 92, 278 P.3d 455. In *Reichert*, the Montana Supreme Court decided that normal prudential concerns under a ripeness analysis did not prevent it from reviewing a challenge to a facially unconstitutional legislative referendum measure and enjoining its placement on the ballot for an upcoming election. *Id.* The Court reasoned:

> Where a measure is facially defective, placing it on the ballot does nothing to protect voters' rights. It instead creates a sham out of the voting process by conveying the false appearance that a vote on the measure counts for something, when in fact the measure is invalid regardless of how the electors vote. Placing it on the ballot would also be a waste of time and money for all involved—putting the Secretary of State, local election officials, and ultimately taxpayers to the expense of the election; putting proponents and opponents to the expense of needless campaigning; and putting voters to the task of deciding a ballot issue which this Court already knows cannot stand even if passed. Deferring decision to a later date so the measure can go forward is senseless. It consumes resources with no corresponding benefit. Nothing in ripeness doctrine mandates such an approach.

Id. This additional context and reasoning shows that *Reichert's* holding and underlying prudential analysis hardly undercut Defendants' argument here. First, this case does not involve a proposed legislative ballot measure. Second, Defendants make no argument based on the ripeness doctrine. And finally, Plaintiffs have not and cannot demonstrate the facial invalidity of the statutes challenged here. To the contrary, *Reichert's* reasoning supports Defendants' argument in light of the separation of powers doctrine already recognized by this Court—allowing Plaintiffs' remaining claims for relief to proceed would be a senseless waste of time and resources while doing nothing to meaningfully redress Plaintiffs' claimed injuries or resolve the controversy with any degree of finality. Plaintiffs' requested relief would instead raise more of the very same questions constitutionally reserved for Montana's political branches.

Indeed, invalidation and injunction of the challenged laws leave nothing in their place considering that this Court already acknowledged it cannot grant the remedial relief Plaintiffs sought. As this Court has stated, "the ability to enact new legislation lies exclusively with the Montana Legislature." (8/4/21 Or. at 19.) This statutory vacuum would amount to the functional equivalent of the Court ordering the Legislature to enact new legislation to address Montana's economic and energy needs, among the many other untold effects that would inevitably result. This is the exact proposition for which Defendants' cited *Donaldson* that Plaintiffs would rather ignore.[7]

In *Donaldson,* the plaintiffs challenged a "statutory structure" in Montana law that prohibited them from enjoying "significant relationship and family protections and obligations

[7] This is also entirely consistent with the Alaska Supreme Court's analysis regarding prudential standing in *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022). *See* Defendants' Brief, at 11.

automatically provided to similarly-situated different-sex couples who marry." *Id.* at ¶ 1 (quotations omitted). The Montana Supreme Court upheld the trial court's dismissal of those claims on prudential standing grounds, explaining:

> We agree with the District Court that Plaintiffs' requested relief exceeds the bounds of a justiciable controversy and decline to provide the declaratory relief requested. It is the opinion of this Court that the broad injunction and declaratory judgment sought by Plaintiffs would not terminate the uncertainty or controversy giving rise to this proceeding. Instead, a broad injunction and declaration not specifically directed at any particular statute would lead to confusion and further litigation. As the District Court aptly stated: "For this Court to direct the legislature to enact a law that would impact an unknown number of statutes would launch this Court into a roiling maelstrom of policy issues without a constitutional compass." A district court may refuse to enter a declaratory judgment if it would not terminate the uncertainty or controversy giving rise to the proceedings.

Id. at ¶ 9 (citations omitted). The *Donaldson* Court affirmed the dismissal on prudential standing grounds but remanded to allow the plaintiffs to amend their claims, further explaining that "[t]hese are important issues and *should be decided only after the statutes involved are specifically identified and specifically analyzed in district court proceedings*." *Id.* at ¶ 11 (emphasis added). *See also Id.* at ¶ 10 ("Broadly determining the constitutionality of a 'statutory scheme' that may…involve [many] separate statutes, is contrary to established jurisprudence.").

The *Donaldson* Court's reasoning is directly applicable here. Plaintiffs' claims improperly attempt to invalidate and enjoin Defendants' "aggregate acts" through a challenge to the inoperative State Energy Policy Goal Statements. The "aggregate acts" at issue include:

- The authorization and certification of "energy projects and facilities within the State of Montana that emit substantial levels of GHG pollution, including, but not limited to, projects that burn and promote the use of fossil fuels." (Compl. at 38:9–11.)
- PSC commissioners allegedly having "publicly expressed their affinity for coal power and publicly disparaged renewable energy sources." (Compl. at 38:16–18.)
- "[I]ssuing permits, licenses and leases that result in GHG emissions without considering how the additional GHG emissions will contribute to the climate crisis." (Compl. at 39:5–7.)
- Authorizing "four private coal plants to operate in the state, [which] are responsible for 30% of Montana's energy production." (Compl. at 39:8–9.)

- Continuing "to permit surface coal mining and reclamation in Montana," such as the expansion of the Rosebud Strip Mine and the Bull Mountain Mine. (Compl. at 39:10–14.)
- Allowing the Decker Mine's production of "23 million tons of coal, which will lead to nearly 50 million tons of carbon dioxide emission when burned[.]" (Compl. at 39:19–40:2.)
- Authorizing "the operation of the Colstrip Steam Electric Station[.]" (Compl. at 40:14.)
- Authorizing "the exploration and extraction of oil and gas in Montana." (Compl. at 41:15–16.)
- Adopting and enforcing "GHG emissions standards for petroleum refineries[.]" (Compl. at 41:17–18.)
- Certifying and authorizing "four petroleum refineries—Exxon/Mobil, Phillips 66, CHS Laurel, and Calumet Refining—in the State of Montana." (Compl. at 42:1–3.)
- Adopting and endorsing "fuel and fuel tax requirements for vehicles, commercial carriers, and aviation[.]" (Compl. at 42:7–9.)
- Exempting "certain facilities that burn fossil fuels from present and future compliance with GHG emission standards." (Compl. at 42:10–11.)
- Continuing "to finance, incentivize, and subsidize fossil fuel infrastructure and energy and transportation systems..., while refusing to harness Montana's potential for wind energy." (Compl. at 42:12–14.)
- Continuing "to aggressively pursue expansion of the fossil fuel industry in Montana[.]" (Compl. at 42:15–16.)
- Making statements acknowledging that "coal will continue to be a critical part of the nation's energy portfolio[,]" the need for "both carbon-based and renewable sources of energy[,]" and that "not enough is done in this country to advance clean-coal technologies." (Compl. at 42:18–43:2.)
- "[P]roviding favorable tax treatment for investments in carbon capture, sequestration, and transportation[.]" (Compl. at 43:4–5.)
- "[A]uthorizing Montana fossil fuel extraction, production, consumption, transportation, and exportation." (Compl. at 43:10–11.)

There can be no reasonable dispute that the permitting and other actions identified above are governed by and are the result of authority conferred by a variety of specific, substantive statutes that directly regulate fossil fuel development, transportation, storage, and use, etc. (*See*

Defs.' Br. at 6, fn 6.) It is patently improper for Plaintiffs to evade their burden to prove the invalidity of the relevant substantive statutes simply by pursuing their claims via the purely aspirational State Energy Policy Goal Statements based on their conclusory and unsupportable causation argument. Pursuant to *Donaldson*, Plaintiffs' failure to specifically identify and challenge the actual operative statutes weighs heavily in favor of dismissing Plaintiffs' claims.

III. AN ORDER GRANTING PLAINTIFFS' REMAINING CLAIMS WOULD LEAD TO ABSURD RESULTS.

Rather than contend with Defendants' argument that absurd results would follow from construing the Montana Constitution to render the emission of GHGs unconstitutional, Plaintiffs instead confuse the issues by denying and shifting their burden of proof. Plaintiffs simply point to the Court's prior decision applying the motion to dismiss standard by accepting the Complaint allegations as true and then leap to the apparent conclusion, without citation to any controlling authority, that the summary judgment standard and their burden of proof no longer apply.[8] But no matter how much Plaintiffs wish to ignore it, they still bear the burden of proving their claims beyond a reasonable doubt. *Powder River Cnty.*, ¶ 73; *Satterlee*, ¶ 10; *Mont. Cannabis*, ¶ 14.

Plaintiffs' demonstrated desire to avoid discussion of Defendants' argument is quite understandable considering the plethora of absurd results that would undoubtedly flow from an order granting their remaining requested relief.[9] Indeed, Plaintiffs' claim that "every molecule of CO_2 that is put into the atmosphere contributes to global warming" underscores the far-reaching effects of the sought declaration—even the slightest emission of CO_2 or any other GHG—would amount to an actionable constitutional violation. This means that all Montanans, including Plaintiffs, would be violating their own constitutional rights (and every Montanan's) every time they engage in any activity that emits GHGs. Further, such constitutional violations would arise from government officials performing essential government functions, including law enforcement patrols, firefighting training, controlled burns for forest management, Montana Air National Guard aviation activities, just to name a few. These violations would continue unabated unless and until

[8] Plaintiffs' reference to a law review article published in 2022 by their own attorneys directly addressing this litigation is not only blatantly self-serving, but the Court should disregard it as an improper attempt to circumvent the applicable page limitation for briefs.

[9] Plaintiffs do not dispute this and instead attempt to dismiss it as a "predictable 'opening the floodgates' refrain[.]" (Pls.' Resp. Br. at 13.)

they were somehow rendered GHG-free, whether through sufficient technological advancement reached at some unknown future point or outright cessation of those activities.

Moreover, only GHGs emitted within Montana's geographic borders would give rise to constitutional claims actionable only in Montana's courts. GHGs emitted outside of Montana would violate Montanans' state constitutional rights without any consequence or recourse considering Montana's axiomatic jurisdictional limitations and the inevitably conflicting sovereignty of every other state, the federal government, and other nations. Subsequent litigation would be prolific.[10] [11] Also, only Montanans would bear the burden of complying with their new constitutional obligations while simultaneously suffering the consequences of their primary sources of energy suddenly becoming sources of liability.

These are only a few of the many foreseeable absurdities that would result if the Court were to construe the Montana Constitution according to Plaintiffs' whims. Both prudence and common sense require dismissal of Plaintiffs' remaining claims.

IV. PLAINTIFFS FAILED TO JOIN INDISPENSABLE PARTIES.

Plaintiffs deny their failure to join indispensable parties as required by Section 27-8-301, MCA and Mont. R. Civ. P. 19(a)(1). Plaintiffs cite the requirement of Section 27-8-301that the attorney general "shall *also* be served..." (emphasis added) in actions alleging a statute to be unconstitutional, but they make no effort to explain how this relieves them from the duty to join as parties those "who have or claim any interest which would be affected by the declaration," *in addition to* the attorney general. MCA § 27-8-301. Plaintiffs then admit that "[t]he declarations of unconstitutionality that [they] seek would have an impact on Defendants' permitting of fossil fuel related projects via the injunctive relief sought in Request for Relief #5" before perplexingly claiming that "[a]ny impact on energy companies, landowners, or mineral holders is speculative at this stage, and Defendants provide no details on how such third parties may be impacted by a ruling in this case." (Pls.' Resp. Br. at 15.) Perhaps Plaintiffs should review the very "aggregate acts" they seek to enjoin, and they will have their answer. Further, Plaintiffs' Request for Relief

[10] It appears that Plaintiffs would also prohibit the State of Montana from filing suit in federal court to challenge impediments to interstate commerce if they deem such legal action a "climate destroying scheme." (Pls.' Resp. Br. at 17, fn 35.)

[11] Perhaps Plaintiffs would also charge Senator Jon Tester with constitutional violations by advocating against "shutting off the spigot of conventional energy." *See* U.S. Senator Jon Tester's February 20, 2023 address to the Montana Legislature: https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230220/8/46129 at 13:20:25.

#5 specifically seeks an injunction affecting "Defendants, their agents, employees *and all persons acting in concert with them*..." (Compl. at 103:7–8) (emphasis added). Lastly, Plaintiffs cite no authority in support of their implicit argument that "extensive media coverage" shifts the burden to join indispensable parties away from them and onto those parties to seek intervention. Plaintiffs would rather pursue their requested relief without considering the legitimate interests of other parties, but the law requires otherwise. Plaintiffs' claims fail for this reason as well.

V. PLAINTIFFS FAIL TO SUBSTANTIATE THEIR CLAIMS ON THE MERITS.

Yet again, Plaintiffs flatly ignore their legal burden to demonstrate that "no set of circumstances exists under which the [challenged sections] would be valid." *Mont. Cannabis*, ¶ 14 (internal citations and quotations omitted). *See also Advocates for Sch. Trust Lands*, ¶ 29 ("The crux of a facial challenge is that the statute is unconstitutional in all its applications."). The burden to show the absence of *any* constitutional applications beyond a reasonable doubt remains on Plaintiffs as the parties challenging the subject statutes. *Satterlee*, ¶ 10; *Mont. Cannabis*, ¶ 12. If any doubt as to constitutionality exists, it must be resolved in favor of the statute. *Espinoza v. Mont. Dept. of Revenue*, 2018 MT 306, ¶ 13, 393 Mont. 446, 435 P.3d 603; *Montana Cannabis*, ¶ 12. As established in Defendants' Brief (at 14–18) and further below, Plaintiffs have failed to meet their burden, and their remaining claims must be dismissed as a matter of law.

A. THE STATE ENERGY POLICY GOAL STATEMENTS ARE CONSTITUTIONAL.

In their Response, Plaintiffs merely repeat their broad assertions regarding Defendants' "aggregate acts" without any meaningful attempt to sustain their burden of showing that the statutory sections they specifically challenge (*i.e.* Section 90-4-1001(1)(c)-(g)) is unconstitutional in all of its applications. Plaintiffs simply hide behind their tired refrain that Defendants' "aggregate acts" are the manifestation of the State Energy Policy Goal Statements caused, all the while ignoring the specific, substantive statutes that directly regulate fossil fuel development, transportation, storage, and use, etc. (*See* Defs.' Br. at 6, fn 6.) Notwithstanding this fatal pleading defect, it is clear that the statute Plaintiffs actually challenge is constitutionally sound on the merits.

Plaintiffs argue that the State Energy Policy Goal Statements are facially unconstitutional merely because they promote the development of fossil fuel resources. However, Plaintiffs' reliance on this conclusory argument ignores the reality that the State Energy Policy Goal Statements have no realistic bearing on the permitting decisions referenced in Defendants' "aggregate acts." For example, the testimony of DEQ Director Christopher Dorrington, DEQ

Division Administrator Sonja Nowakowski, and former DEQ Air Quality Bureau Chief Dave Klemp made clear that DEQ makes permitting decisions based on specific permitting statutes under MCA Titles 75 and 82, not Section 90-4-1001. (Ex. P, Dorrington Aff., at ¶ 12; Dorrington Depo., at 120:21-25, 121:1-2 (Dec. 8, 2022), relevant excerpts attached as **Exhibit Y**; Nowakowski Depo., at 38:15-21, 55:6-25, 56:1-4 (Dec. 14, 2022), relevant excerpts attached as **Exhibit Z**; Nowakowski 30(b)(6) Depo., at 47:11–18 (Dec. 14, 2022), relevant excerpts attached as **Exhibit AA**; Klemp Depo., at 12:2–20 (Dec. 15, 2022), relevant excerpts attached as **Exhibit BB**.)

Moreover, the State Energy Policy Goal Statements do not apply to the state agencies whose activities are regulated by specific statutes. (Ex. Z, at 37:12-25, 38:1-11, 38:15-21.) Only the Legislature enacts statutes governing fossil fuels in Montana, not DEQ. (Ex. P, at ¶ 19) This means that an invalidation (or repeal) of the State Energy Policy will have no effect on DEQ because DEQ must follow the specific directives in Title 75 and 82, MCA. (*Id.*, ¶ 20; Ex. BB, at 11:15–25, 12:1–20, 14:6–25, 15:1–2.) The same holds true for every other state agency named as a defendant in this action. Each is governed by specific statutes which govern each agencies' decision-making processes. Plaintiffs have failed to cite a single permitting or other decision that any state agency made on the basis of Section 90-4-1001, MCA. None exists because that statute is simply a list of aspirational goal statements.

Plaintiffs also completely ignore section (d) of the State Energy Policy Goal Statements, which expressly advocates for action that is "environmentally sound" and includes the "mitigation of greenhouse gas and other emissions[.]" *Id.* This language is entirely consistent with Plaintiffs' aims on its face, yet Plaintiffs apparently still seek its invalidation. Plaintiffs fail to explain, or even address, how the existence of such language in the challenged statute does not render their facial claim patently meritless.

Ultimately, it is clear that Plaintiffs cannot sustain their challenge to the State Energy Policy Goal Statements, and the Court should dismiss the same as a matter of law.

B. THE MEPA LIMITATION IS CONSTITUTIONAL.

Plaintiffs contend that the MEPA Limitation, which procedurally prohibits state agencies from analyzing environmental impacts outside Montana, is unconstitutional because it does not allow for the consideration of the impacts of GHG emissions beyond Montana's borders. Plaintiffs therefore argue this provision should be declared facially invalid. But Plaintiffs cast too broad a

net, and they ignore the multiple instances of the statute's valid application that defeats their facial challenge as a matter of law.

In particular, the Affidavit of DEQ Director Dorrington provides two specific examples of how the MEPA Limitation is validly applied in environmental reviews of DEQ permitting decisions: DEQ Opencut Permitting Decisions and DEQ Solid Waste Permitting Decisions. (Ex. P, ¶¶ 5–10.) For these DEQ permitting decisions, and numerous others, environmental reviews do not analyze impacts beyond Montana's borders. If there are any impacts associated with these permitting decisions, such impacts would be essentially local in nature, especially in the case of Dryland opencut permits where water is not affected. Therefore, the MEPA Limitation appropriately, and constitutionally, limits the environmental reviews for these permits to impacts within Montana's borders.

Plaintiffs' attempt to analogize this case to *Park County* also falls flat. First, unlike the Plaintiffs here, the *Park County* plaintiffs challenged a specific MEPA review by filing a timely MEPA action in district court. *See Id.*, ¶¶ 9, 14. (DEQ issued the Final Environmental Assessment on July 26, 2017, and the plaintiffs filed a MEPA challenge to the Final EA on September 22, 2017—within the 60-day deadline for challenging MEPA reviews.) *See also* MCA § 75-2-201(6)(c)(i) (MEPA is an exclusive remedy statute.) Second, *Park County* determined the constitutionality of 2 statutes which set forth the remedy *after* a court determined that a MEPA violation had occurred. In contrast, the MEPA Limitation at issue here does not set forth any sort of remedy for a MEPA violation. It merely and appropriately limits MEPA review to impacts within Montana because, as *Park County* indicates, analyzing impacts to *Montana's natural environment* is the intent of the Montana Constitution. *See Id.*, ¶ 65. This, along with the plain language of the MEPA Limitation, is entirely consistent with the fact that state agencies only have the authority to review potential environmental impacts that fall within their statutory authority to regulate, and Plaintiffs cannot demonstrate otherwise. *See Bitterrooters*, ¶ 33. (*See also* Ex. AA, at 50:3-5, 51:3-18 (a MEPA analysis cannot condition a permitting decision).)

Plaintiffs' repetitive recitations of their experts' testimony and other references to immaterial facts and precedent fail to create any genuine issue of material fact sufficient to avoid summary judgment on their MEPA Limitation claims. The reality is that Defendants cited multiple constitutional applications of the MEPA Limitation that Plaintiffs have not sufficiently rebutted.

Plaintiffs therefore fail to meet their burden to demonstrate facial unconstitutionality, and the Court should dismiss Plaintiffs' claims related to the MEPA Limitation as a matter of law.

C. PLAINTIFFS' VARIOUS REMAINING CLAIMS DO NOT SAVE PLAINTIFFS FROM SUMMARY JUDGMENT.

Lastly, Plaintiffs attempt to avoid dismissal by arguing that the existence of discrete factual disputes precludes summary judgment on their equal protection claim and by falsely asserting that Defendants have not moved for summary judgment on their remaining claims regarding their rights to individual dignity, safety, health, and happiness. This argument fails to acknowledge that *all* of Plaintiffs claims are subject to dismissal under Defendants' arguments regarding standing, prudential concerns, absurd results, failure to join indispensable parties, and failure to demonstrate the facial invalidity of the two statutes challenged herein. None of these additional claims would survive summary judgment if Defendants prevail on any one of these arguments.

CONCLUSION

It is imperative that the Court dismiss Plaintiffs' remaining claims in the interest of maintaining the integrity of the judiciary. The Montana Constitution and relevant statutes would not leave Plaintiffs without recourse—they may challenge individual actions implementing resource development through timely permitting and environmental reviews, they may attempt to legislate by ballot initiative, they may lobby their legislators, and they may continue advocating their position to the public to generate the political will necessary to enact their preferred policies into law. However, Plaintiffs may not simply assume a preferential status under the law to evade the democratic process and force their policy views on all Montanans without their consent or participation. For all of the reasons set forth in Defendants' Brief and this Reply, the Court should enter an order dismissing Plaintiffs' remaining claims as a matter of law.

DATED this 28th day of February, 2023.

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Date: February 28, 2023

Dia C. Lang

EXHIBIT Y

Rikki Held v
State of Montana, et al.

Chris Dorrington 30(b)(6)
December 8, 2022

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with Montana's constitutional provisions into its environmental review and permitting process.
BY MR. SULLIVAN:
Q. And, sir, could you please explain to you what that knowledge is?
A. Sure. So overarching the Article IX is the clean and healthful provision of the Constitution, and then within our statutory responsibility, we have responsibility over protecting Montana's resources from activities ranging from mining or an industry, subdivision housing development, activities related to or impacting surface water and groundwater, waste and hazardous materials handling, the remediation and reclamation of -- of activities.
And then the state energy office has responsibility over energy policy and promotion of renewables and -- and work associated with renewable energy of which it conducts quite a lot of activity. So we have several divisions within the agency -- the water division, the waste management remediation division, and the air, energy, and mining division, and then an operations group.
The way in which we incorporate compliance with the constitutional provision is by understanding

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what the Constitution says by understanding the law, then implementing those laws through when they're discrete and separate, the law, or when we're given rule making authority, we then are subject to those rules and may amend.
Given all of that, we then permit and -- and require compliance with and in some cases enforce those permits for industry or housing or waste facilities generically. The review process includes when a state action is taken, a -- an appropriate MEPA review, which could include various versions of an environmental assessment up to and including environmental impact statement, EIS.
Q. And, Mr. Dorrington, are you aware as to whether there is any effort afoot to amend Montana's constitutional provisions related to the environment?
A. I'm aware of 3,500 legislative concepts coming at us in 2023, some of which will include revisions to environmental permitting and compliance efforts. Discreetly, I know there legislative concepts aimed as water and resource management, subdivisions and housing, water quality standards, taxation of equipment which may impact air quality equipment. I don't -- I don't really know because there's a language to it.

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There's pending legislation in concept only regarding meth use and -- and cleanup within residential properties. There is a placeholder for asbestos, and there's a placeholder for water quality standards for selenium.
There are laws -- or legislative concepts associated with the timing of the environmental permitting process, all generically referenced, but they're -- not everyone loves how fast or slow we do something, so there are laws related to our timing and timeliness of -- of our activities. That, I would say, is a -- as much as I can give you regarding my awareness of anything regarding laws.
On the constitutionality, I have heard it only rumored that constitutional challenges due to the super majority of legislature in 2023 are on the table. I don't know of anything in particular.
MR. SULLIVAN: Mr. Dorrington, I appreciate your assistance today. I think I'm -- I'm done. I wanted to get done by 2:30, but would you mind if we just took a couple-minute break so I could confer with my co-counsel? And then we'll come back on the record.
THE WITNESS: I'm just fine with that, yes. Thanks.

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MR. SULLIVAN: Thank you.
THE VIDEOGRAPHER: We're going off the record. The time is 2:15 p.m.
(Whereupon, a break was then taken.)
THE VIDEOGRAPHER: We are back on the record. The time is 2:18 p.m.
MR. SULLIVAN: Mr. Dorrington, I have no further questions. Thank you for your attendance at the deposition today.
MS. McKENNA: I have two follow-up questions to topic 13.
EXAMINATION
BY MS. McKENNA:
Q. Director Dorrington, would you agree that DEQ incorporates compliance with Montana's constitutional provisions through the legislative -- legislative enactment of the Montana Environmental Policy Act?
A. Yes.
Q. Would you agree that DEQ incorporates compliance with Montana's constitutional provisions into its permitting processes through Montana Code Annotated, Title 75?
A. Yes.

Q. And 82?
A. Yes to both.
MS. McKENNA: No further questions.
MR. SULLIVAN: Thank up, sir.
THE WITNESS: Thank you.
THE VIDEOGRAPHER: That concludes this deposition. The time is 2:19 p.m.
(Whereupon, the deposition concluded at 2:19 p.m.)
SIGNATURE RESERVED.
* * * * * * * * *

DEPONENT'S CERTIFICATE

I, CHRIS DORRINGTON, 30(b)(6), the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 121 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

_____
CHRIS DORRINGTON

Subscribed and sworn to before me this _____day of _____, 2023.

_____
PRINT NAME: _____
Notary Public, State of Montana
Residing at: _____
My commission expires: _____
DF - HELD VS. STATE OF MT

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of CHRIS DORRINGTON, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 1st day of January, 2023.

Q. And 82?
A. Yes to both.
MS. McKENNA: No further questions.
MR. SULLIVAN: Thank up, sir.
THE WITNESS: Thank you.
THE VIDEOGRAPHER: That concludes this deposition. The time is 2:19 p.m.
(Whereupon, the deposition concluded at 2:19 p.m.)
SIGNATURE RESERVED.
* * * * * * * * *

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_____
CHRIS DORRINGTON

Subscribed and sworn to before me this _____day of _____, 2023.

_____
PRINT NAME: _____
Notary Public, State of Montana
Residing at: _____
My commission expires: _____
DF - HELD VS. STATE OF MT

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I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 1st day of January, 2023.

EXHIBIT Z

Rikki Held, et al. v
State of Montana, et al.

Sonja Nowakowski 30(b)(6)
December 14, 2022

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A. Yes.
Q. And those topics relate to the state's energy policy. Correct?
A. Yes.
Q. Is the statute I just handed to you the Montana state energy policy statute?
A. Yes.
Q. So do you agree that Montana has a state energy policy that is codified at Montana Code Annotated Section 90-4 -- 90-4-1001?
A. Yes.
Q. Do you agree that DEQ has a duty to comply with that statute?
A. No.
Q. And what is your basis for disagreement with that?
A. Nowhere in the statute does it direct the DEQ has the authority to -- to enforce or enact any of these broad-reaching goal statements.
Q. So when the legislature sets policy through legislation such as the state energy policy, do state agencies implement that policy?
A. State agencies implement that policy when directed to implement that policy.
Q. And in what way would DEQ need to be

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directed in order to have that responsibility?
A. It would need to see "DEQ shall." It would -- the statutes would need to say the Department of Environmental Quality shall take steps to expand, promote, increase these various items that are outlined here.
Q. So your testimony is that without seeing the words "DEQ shall" in this legislation, that DEQ has no responsibility to implement or follow this statute?
A. Correct.
Q. Does DEQ have any internal policies with respect to implementing the energy policy act?
A. No.
Q. So if DEQ doesn't kind of turn to this statute to implement energy policy for the state, how else does DEQ implement energy policy?
A. DEQ implements energy policy as it's directed throughout other statutes. For example, in Title 75 we're directed to implement an alternative energy revolving loan program. In Title 50 we have some responsibility related to residential energy efficiency codes. Also in Title 90 there's a state energy building conservation program.
Q. Any other places in state law that directs

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DEQ to implement state energy policy?
A. There are other -- other places in state law.
Q. So who would you say sets state energy policy in Montana?
A. The legislature.
Q. And does DEQ have a role at all in setting the policy?
A. No. Senate Bill 290 in 2009 explicitly removed the DEQ from assisting in that process.
Q. Does the governor have a role in implementing the state -- or setting the state energy policy?
A. I can't speak for the governor.
Q. So do you understand that plaintiffs in this case are challenging the constitutionality of the statute Section 90-4-101 -- 1001 subparts 1C through G?
A. Yes.
Q. In subpart 1D there's a phrase about increasing utilization of Montana's vast coal reserves. Can you describe what, if anything, DEQ does to increase utilization of Montana's vast coal reserves?
A. DEQ is responsible for the permitting of

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coal mine applications -- permit applications that allow for additional mining, and they do so under the Underground and Surface Coal Mine Reclamation Act in Title 82.
Q. Okay. So would you agree that issuing a permit allowing a coal mine to operate would increase utilization of Montana's coal reserves?
A. Yes.
Q. Are there any other ways that DEQ increases utilization of Montana's coal reserves?
A. Not that I'm aware of.
Q. Can you describe what DEQ does to mitigate greenhouse gases and other emissions while increasing the utilization of Montana's vast coal reserves?
A. DEQ doesn't have any statutory authority in Title 82 to mitigate greenhouse gases.
Q. Does DEQ have a position on whether Montana's coal reserves can be utilized while also mitigating greenhouse gas emissions?
A. I don't believe DEQ has a position on that.
Q. Can you describe what DEQ does to increase local oil and gas exploration and development?
A. DEQ permits or provides air quality permits for oil and gas.

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was assigned and make sure that we -- we covered them thoroughly through your question.

Q. Sure. Let's do that. Okay. So if you can turn to that Exhibit 117, it would be like the second one in your stack.

A. Okay.

Q. So you were assigned to discuss those seven documents --

A. Uh-huh.

Q. -- in topic 3. Correct?

A. Correct.

Q. Okay. Anything that we have -- have not talked about today with regard to those documents that you intend to testify on at trial?

A. I can't -- I can't speculate. It would depend on the question I was asked.

Q. Sure. Okay. And we talked about topic 4, which is the knowledge of allegations in paragraph 90 of the complaint.

A. Uh-huh.

Q. And anything else there that you intend to testify on at trial that we didn't talk about?

A. I would again state it would depend on the additional questions that were asked. That's a -- paragraph 90 is quite broad.

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Q. True. Okay. Topic 9, knowledge of DEQ's role in implementing legislative policy. Is your answer the same there?

A. Yes.

Q. And how about for topic 10? Same answer?

A. Yes.

Q. And topic 11?

A. Yes. Same answer.

Q. Okay. And topic 12 same answer?

A. Yes.

Q. And topic 14 same answer?

A. Yes.

Q. Okay.

MS. CHILLCOTT: Can I just take a five-minute break to make sure I don't have other questions. We're about to wrap this one up.

THE WITNESS: Sounds good.

THE VIDEOGRAPHER: We are going off the record. The time is 10:06 a.m.

(Whereupon, a break was then taken.)

THE VIDEOGRAPHER: We are back on the record. The time is 10:18 a.m.

MS. CHILLCOTT: Thank you, Ms. Nowakowski. I have no further questions for this deposition.

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THE WITNESS: Thank you.

EXAMINATION

BY MS. McKENNA:

Q. This is Lee McKenna, attorney for DEQ. I have one question.

Ms. Nowakowski, in answering Ms. Chillcott's question as to, under 90-4-1001 MCA, whether DEQ increases coal -- I -- I just want to refer to the statute, so just give me one second.

So subsection 1(d), whether DEQ increases utilization of Montana's vast coal reserves in an environmentally sound manner that includes mitigation of greenhouse gas and other emissions, does DEQ increase utilization of Montana's vast coal reserves intentionally?

A. No. DEQ's responsibility, as outlined in Title 82, is upon submission of an application for a coal mine expansion or additional coal mining, that DEQ is responsible for reviewing that application and then moving forward and authorizing that with conditions that meet the requirements of Title 82.

Q. And are the coal mining -- so I'm -- I'm assuming you're talking about Montana Surface and Underground Mining Act, MSUMRA.

A. Yes.

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Q. Is that correct?

And what type of statute is that? What is the goal of MSUMRA?

A. Title 82 MSUMRA is a reclamation act.

MS. McKENNA: Thank you. No further questions.

THE VIDEOGRAPHER: That concludes this deposition. The time is 10:20 a.m.

(Whereupon, the deposition concluded at 10:20 a.m.)

SIGNATURE RESERVED.

* * * * * * * * *

DEPONENT'S CERTIFICATE

I, SONJA NOWAKOWSKI, 30(b)(6), the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 58 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

_____
SONJA NOWAKOWSKI

Subscribed and sworn to before me this _____day of _____, 2023.

_____
PRINT NAME: _____
Notary Public, State of Montana
Residing at: _____
My commission expires: _____

DF - HELD VS. STATE OF MT

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of SONJA NOWAKOWSKI, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 3rd day of January, 2023.

EXHIBIT AA

Rikki Held, et al. v
State of Montana, et al.

Sonja Nowakowski
December 14, 2022

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included in a greenhouse gas emission. I would rely on a scientist definition.

Q. So you would base your opinion on the science?

A. Yes.

Q. And can you, if you can, explain to me what you are referring to in terms of differences of opinion on what constitutes greenhouse gas emissions?

A. Sure. For example, I think there's just been discussions about, you know, whether or not you include the term black carbon or not or if carbon dioxide includes that. And then in terms of when you're calculating emissions, there's different ways of -- of -- of calculating those emissions. Are they -- you know, and -- and outcomes of -- in terms of consumption based versus straight emissions, emissions with control technologies.

Q. Okay. In your opinion what effect do greenhouse gas emissions have on Montana's environment?

A. I -- I would say I'm not really sure I'm qualified to speak to that. I'm not a scientist.

Q. Okay. So you don't have an opinion about the effect of greenhouse gas emissions on Montana's environment?

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A. I don't have the scientific background to give you a factual answer on the impacts.

Q. Okay. Do you have an opinion about whether greenhouse gas emissions are good for Montana?

A. I -- again, I'm not a scientist. I don't have an opinion on the impacts of greenhouse gases.

Q. Okay. Are you familiar with the term -- and I quote -- dangerous levels of greenhouse gas emissions?

A. I'm familiar. I don't think it's a defined term.

Q. Yeah. I don't think so either. Do you have any opinions as to what that term means, though?

A. I don't.

Q. Can you tell me what parts of paragraph 88 that you disagree with?

A. Sure. I would say DEQ is the administrator of -- of Montana's environmental regulatory cleanup and monitoring and some pollution prevention programs as established in statute. In terms of energy conservation laws, I don't think that's a -- a defined term.

I would say our energy bureau has some responsibilities as outlined, as I've discussed

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before, the alternative energy resolving loan program, the state building energy conservation program or role in some residential energy efficiency standards. And I disagree that DEQ has implemented its authority in a manner that's contributed to constitutional violations. I disagree that DEQ's act has a responsibility or has acted to further the state energy policy, and then I would also disagree that DEQ has contributed to dangerous levels of greenhouse gas emissions.

Q. Okay. Thanks. And with regard to the state energy policy, we discussed this morning that -- and correct me if I'm wrong, but your testimony was that because the legislation or the statute 90-4-1001 doesn't include the words "DEQ shall" in terms of implementing the state energy policy, then DEQ has no responsibility to do so?

A. That's correct.

Q. As far as energy conservation laws go, I have a question about whether, for example, the energy bureau for next legislative session, for example, has proposed any legislation to address or to deal with the energy conservation?

A. The DEQ energy bureau has not.

Q. In your experience with legislative

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services, did you -- do you recall having DEQ work with a sponsor to put forward a bill to implement energy conservation?

A. How would you define energy conservation?

Q. That's a good question. I thinnk it's a broad definition. I would say similar to what you testified -- I guess maybe that's an example, what you testified to earlier with regard to the types of legislation you drafted when you were with legislative services. Were any of the bills related to kind of energy conservation or greenhouse gas emissions agency bills?

A. I don't believe they were agency bills. I would need to review the -- the list of proponents. I wouldn't be able to speak to that. I can't remember.

Q. That's fair. Yeah. I was just curious. And so other than what we've just now discussed with regard to paragraph 88, is there anything else that you expect to testify to about that paragraph?

A. It will depend on how the questions are posed.

Q. Okay. Thank you. Let's turn to paragraph 89.

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A. Okay.
Q. So I'll read that. "Defendant DEQ is mandated to ensure that all projects and activities for which it issues permits, licenses, authorizations, or other approvals comply with Montana's environmental laws and rules, including the MEPA, to protect the quality of Montana's natural environment. DEQ -- sorry. Defendant DEQ is responsible for enforcing compliance with its permitting requirements."
Did I read that right?
A. Yes.
Q. Same question, in your opinion are you the person at DEQ who is most knowledgeable about the allegations in this paragraph 89?
A. Yes. There -- there could be someone who I'm not aware of --
Q. Got it.
A. -- that is more qualified.
Q. Thank you. You anticipated my question.
Do you agree with the allegations in paragraph 89?
A. I would kind of take that in -- in different pieces. DEQ is required to ensure that projects and activities for which it issues permits,

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licenses, authorizations, and other approvals comply with specific statutes and -- and laws and rules.
MEPA is procedural. It's not substantive. So, for example, a MEPA analysis can't condition the outcome of a permit. And yes. As -- as much as the laws provide for, we do protect the quality of Montana's natural -- natural environment. And DEQ, yes, is responsible for enforcing compliance with permitting requirements as outlined in statute and rule.
Q. Okay. So it sounds like maybe the only thing you don't necessarily agree with is with regards to MEPA because it is a procedural statute, not substantive?
A. Yes.
MS. McKENNA: Objection. That misstates her testimony.
THE WITNESS: Yeah. That --
BY MS. CHILLCOTT:
Q. Sorry. Could you --
A. Sure.
Q. -- explain to me what exactly you would disagree with in that paragraph --
A. Sure.
Q. -- 89.

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MS. McKENNA: Objection. Asked and answered.
THE WITNESS: DEQ in -- in -- DEQ is -- is required and does implement all the laws it is required to implement. And insofar as those provide for the permitting or authorization and licenses of projects, we follow those and comply with Montana's environmental laws and rules.
I would exclude MEPA because MEPA is procedural and a separate action, but that -- that the agency takes in terms of a "look before you leap" document but, again, procedural in nature and that the permitting requirements that are established in the statute provide for the protection of Montana's natural environment, and that DEQ does have a responsibility as outlined in statute for enforcing compliance through violations and enforcement processes.
BY MS. CHILLCOTT:
Q. Thanks. And sorry if I mischaracterized --
A. Okay.
Q. -- what you said before.
With regard to MEPA, DEQ is required to follow MEPA, though. Right?

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A. For any state action that is taken, DEQ, as well as any state agency, is required to do a MEPA analysis.
Q. Okay. And there are -- DEQ has its -- has administrative rules that dictate how it implements MEPA?
A. Yes.
Q. Correct?
Other than what we just talked about, do you expect to testify regarding any other issues about paragraph 89?
A. It will depend on how the questions are posed.
Q. Sure. All right. Turning to paragraph 90.
A. Yes.
Q. Are you doing okay?
A. Yeah.
Q. Okay.
MS. McKENNA: Actually, why don't we take a break. It's 11:30 and we've been going about an hour.
MS. CHILLCOTT: Yeah. Sure. Let's go off the record.
THE VIDEOGRAPHER: We're going off the

Q. Okay. If you could review the first line.
A. Okay.
Q. It states: "DEQ has authorized, permitted, and encouraged." And so let's -- let's look at those. Let's look at that language. So you already testified that DEQ does not encourage any activity. Correct?
A. Correct.
Q. Let's look at the language DEQ authorizes, quote, unquote. Does DEQ have independent authority to authorize anything?
A. DEQ does not. DEQ has permitting responsibilities as outlined in statute.
Q. Can you explain the difference between permitting and authorizing?
A. Sure. So permitting is -- is specifically outlined in statute and provides DEQ with its authority to, for example, issue a permit.
Q. So in the complaint the word -- the phrase "DEQ authorizes" appears a number of times. Do you agree that DEQ authorizes any action that is stated in the complaint?
A. I don't. I would state that DEQ has authority to issue permits.
Q. What does the -- the phrase in this

paragraph 93 "fossil fuel extraction" mean?
A. As I testified previously, I would need some specific examples.
Q. Next word is "transportation." Does that word in paragraph 93 -- is that clear to you?
A. It is not clear. I would like some further definition of transportation.
Q. How about combustion? Is the word "combustion" clear to you?
A. I also would like some additional clarification in terms of combustion, specifically how DEQ permits the combustion.
MS. McKENNA: Thank you. No further questions.
THE WITNESS: Thanks.
THE VIDEOGRAPHER: That concludes this deposition. The time is 3:56 p.m.
(Whereupon, the deposition concluded at 3:56 p.m.)
SIGNATURE RESERVED.
* * * * * * * *

DEPONENT'S CERTIFICATE

I, SONJA NOWAKOWSKI, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 190 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

_____
SONJA NOWAKOWSKI

Subscribed and sworn to before me this _____day of _____, 2023.

_____
PRINT NAME: _____
Notary Public, State of Montana
Residing at: _____
My commission expires: _____
DF - HELD VS. STATE OF MT

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of SONJA NOWAKOWSKI, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 6th day of January, 2023.

EXHIBIT BB

Rikki Held, et al. v
State of Montana, et al.

David Klemp
December 15, 2022

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Q. Oh, I apologize.
A. Am I reading that wrong?
Q. 87 to 90.
A. Okay. I see that.
Q. Is all the rest of that correct?
A. I believe so, yes.
Q. And are those the paragraphs that you are prepared to give testimony on today in your hybrid capacity?
A. Yes.
Q. Okay. We already went over your CV in the prior deposition. I don't see any need to go over that again unless there is anything you want to add.
A. No. Nothing.
Q. Okay. We already went over the preparation, so we don't need to do that again unless there is anything you want to add there.
A. No.
Q. Okay. I'm going to hand you what I am marking as Exhibit Number 169.
(Whereupon, Exhibit 169 was marked for identification.)
BY MS. HORNBEIN:
Q. Can you identify this document?
A. This is the notice of deposition of Dave

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Klemp.
Q. Okay. Have you seen this before?
A. I believe I have, yes.
Q. Okay. Do you remember when you reviewed it?
A. No. Not -- not specifically. I don't remember which date.
Q. Okay. Do you recollect who asked you to serve as a hybrid expert in this case?
A. To serve as a hybrid expert, I believe it was the attorney Lee McKenna.
Q. Okay. Not Director Dorrington as with the 30(b)(6) deposition?
A. I don't recall those specific legal terms used when I talked with Director Dorrington.
Q. Okay. And returning to the question I asked you earlier, why you?
A. I believe because of the experience that I have or have had while I worked at DEQ.
Q. Okay. I'm handing you what has previously been marked as Exhibit 65. Can you tell me what that is?
A. Exhibit 65 appears to be Montana Code Annotated 90-4-1001, state energy policy goal statements.

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Q. Are you familiar with this statute?
A. At a very high level.
Q. Okay. Do you agree that Montana has a state energy policy and that it is codified at Section 90-4-1001?
A. I believe that's accurate, yes.
Q. Okay. Do you agree that the defendants in this case have a duty to apply the laws that are passed by the Montana legislature?
A. Yes. I would generally agree to that.
Q. Okay. Do you believe that --
MS. McKENNA: I object to -- on that. I object on the grounds of legal conclusion.
BY MS. HORNBEIN:
Q. Do you agree that that duty applies under this statute 90-4-1001?
MS. McKENNA: Objection. Calls for a legal conclusion.
BY MS. HORNBEIN:
Q. You can go ahead and answer.
A. Okay. In -- in my capacity I believe we have a duty to comply with the Clean Air Act of Montana and some of the other statutes that govern our day-to-day work. I can't speak to whether or not there's something in here that someone else would

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need to comply with.
Q. Is it a correct characterization of your testimony that you don't take a position on whether DEQ is required to comply with the state energy policy?
A. I take a position that the DEQ, specifically the air quality bureau, needs to comply with the Clean Air Act of Montana, Montana Environmental Policy Act, and those statutes that govern our work.
Q. Okay. But not this statute?
A. Not this statute.
Q. Okay. What is the basis for your opinion that DEQ and specifically the air quality bureau does not need to comply with the provisions of this statute?
A. Making sure my attorney is good. I don't -- in the Clean Air Act of Montana, I don't recall that the -- this energy statute is referenced anywhere in that statute.
Q. Okay. Do you have an understanding about what this lawsuit is about?
A. Yes.
Q. What is your understanding of what this lawsuit is about?

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A. A couple different elements. The state's energy policy --
Q. Uh-huh.
A. -- encourages fossil fuel use.
Q. Uh-huh.
A. And Montana, maybe specifically DEQ and other agencies, aren't appropriately implementing the Montana Environmental Policy Act.
Q. Okay. Is it your understanding that plaintiffs are challenging the constitutionality of this section 90-4-1001, the state energy policy?
A. Yes.
Q. Okay. Do you have an understanding of whether DEQ implements this policy in any way?
A. I have an understanding that the Air Quality Bureau does not follow the statute in the -- through the normal course of the air quality work.
Q. Okay. Do you have an opinion about whether DEQ, the agency, has a role in implementing the statute?
A. I can't speak to other parts of the agency.
Q. Okay. Are you aware of any laws or policies suggesting that DEQ does not have to follow this statute?

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A. No.
Q. Okay. Are you aware of any laws or policies directing or requiring DEQ to act in a manner that is contradictory to this statute?
A. No.
Q. Okay. Were you asked to provide any opinions about this statute, the Montana state energy policy, in your role as a hybrid expert in this case?
A. As it relates to my previous employment in the air quality bureau, I think the answer to that would be yes.
Q. And what testimony were you asked to provide relative to section 90-4-1001?
A. Are you -- when you say testimony, are you referring to the deposition today or potentially at trial? I should clarify.
Q. Either today or at trial were you -- were you asked to provide opinions on this statute?
A. So at trial it remains to be seen. It depends on the question.
Q. Sure.
A. With regard to today, I looked at that to talk about whether or not it had any role in the issuance of air quality permits or the operation of the air quality program.

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Q. And your conclusion was?
A. No, it does not.
Q. Okay. Do you have any additional opinions about section 90-4-1001 that we haven't discussed?
A. No.
Q. You have familiarity with the Montana Environmental Policy Act, or MEPA, as part of your prior role -- roles really with DEQ. Is that correct?
A. Correct.
Q. I think you've already touched on this quite a bit in the prior deposition, but is there anything in terms of the manner in which you're familiar with MEPA implementation that we didn't discuss in the last deposition? In other words, we discussed MEPA in the context of permitting. Is there any other way that in your former roles with DEQ that you applied MEPA or used the statute outside of the -- say outside of the permitting context?
A. Not that I can think of.
MS. McKENNA: Objection. Vague.
THE REPORTER: Sorry. I didn't get that.
MS. McKENNA: Objection. Vague. That's a vague question.
THE WITNESS: Not that I can think of

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today.
BY MS. HORNBEIN:
Q. Are you familiar with the analysis that the state defendants undertake pursuant to MEPA with respect to fossil fuel development in Montana?
A. Not all of them. Can you please clarify what you mean by defendants?
Q. Sure. In what sense are you familiar with MEPA analysis in the context of fossil fuel development in Montana? Can I ask it that way?
A. Specifically as it relates to air quality permitting actions?
Q. Is that the scope of your knowledge?
A. Primarily.
Q. Sure. Go ahead.
A. There's also some permits, licenses that may -- might be required in other programs that might have air quality implications. So I or the bureau would be involved with some of those documents that were being prepared.
Q. I think you -- you provided an example in a prior deposition. Could you provide another example of that type of situation here?
A. Yes. There -- there could be a permit or license required by another program. I think the

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF GALLATIN)

I, Deborah L. Fabritz, Registered Professional Reporter and Notary Public for the State of Montana, residing in Bozeman, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of DAVID KLEMP, in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly RESERVED.

I further certify that I am not an attorney nor counsel of any of the parties, nor relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this 8th day of January 2023.