Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

*Attorneys for Plaintiffs*

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

| | |
|---|---|
| RIKKI HELD, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF MONTANA, et al.,<br><br>Defendants. | Cause No. CDV-2020-307<br><br>Hon. Kathy Seeley<br><br>**PLAINTIFFS' RESPONSE TO BENCH MEMORANDUM ON THE CONSTITUTIONAL AND PROCEDURAL LIMITS OF THE MONTANA ENVIRONMENTAL POLICY ACT** |

## INTRODUCTION

In their latest attempt to prevent this Court from deciding Youth Plaintiffs' constitutional claims on the merits, Defendants present a flawed and disturbing interpretation of the Montana Environmental Policy Act ("MEPA") and the Montana Constitution. Defendants continue to mischaracterize Plaintiffs' redressability burden in this case and misapprehend the effect a declaration of unconstitutionality has on their conduct going forward. Defendants claim that MEPA is "procedural," and thus has no force, effect, or consequence. However, MEPA is modeled after the National Environmental Policy Act ("NEPA"), our Nation's "Magna Carta of Environmental law,"[1] and effectuates and implements ***substantive*** rights guaranteed by the Montana Constitution. § 75-1-102(1), MCA. Further, MEPA serves as an overlay to existing statutory authority and a constitutional check to ensure that when agencies implement such authority, they do so well-informed about the "environmental impacts that will likely result from agency actions or decisions." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env't Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712.

When Montana's agencies intentionally ignore the environmental impacts from climate change, as they are mandated to do under the 2011 and 2023 versions of MEPA, the evidence presented at trial confirms that the result is an agency pattern and practice of permitting fossil fuel activities that result in substantial levels of greenhouse gas ("GHG") emissions and unrebutted constitutional injuries to Plaintiffs and children as a class. It is axiomatic that the MEPA Limitation, since 2011 and through today, has perpetuated and facilitated Defendants' pattern and practice of blindly authorizing fossil fuel activities that cause local air pollution, exacerbate the global climate crisis, and harm children. A declaration from this Court declaring

[1] U.S. CEQ, National Environmental Policy Act, https://ceq.doe.gov (last visited June 23, 2023).

unconstitutional the provisions of MEPA that require agencies to ignore their constitutional obligations and also prohibit courts from setting aside unconstitutional agency decisions authorizing fossil fuel projects would at least partially redress Plaintiffs' injuries and alleviate their harm.

## ARGUMENT

### I. "Procedural" Does Not Mean Unimportant

The Montana Supreme Court has already disposed of Defendants' tired argument that because MEPA is procedural, it is meaningless. *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288 ("'Procedural,' of course, does not mean 'unimportant.'"). As previously noted, MEPA is modeled after NEPA, which has been characterized as "the First Commandment of environmental law."[2] The purpose behind NEPA and MEPA is for government officials to stop, look, and listen "in order to make informed decisions" when exercising their statutory authorities "in planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana human environment . . . ." *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877; § 75-1-201(1)(b)(i)(A), MCA.

Parroting NEPA, MEPA includes a mandatory directive that "all agencies of the state" "use a systematic, interdisciplinary approach that will ensure," among other things, "the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making for a state-sponsored project that may have an impact on the Montana human environment by projects in Montana." § 75-1-201(1)(b)(i)(A), MCA. This language confirms that MEPA, like NEPA, "is a 'science first' law and is written in full praise of the

[2] William Rodgers, Jr., Environmental Law in Indian Country, § 1:14(A) (Thomson West Pub. 2005).

'ecological sciences.' It puts science—in particular, the life sciences—into the mandates of all federal agencies." William H. Rodgers, Jr., *The Environmental Laws of the 1970s: They Looked Good on Paper*, 12 Vt. J. Env't L. 1, 18 (2010); § 75-1-102(3)(a), MCA (purpose of MEPA is "to inform the public and public officials of potential impacts resulting from decisions made by state agencies"). The Montana Legislature enacted MEPA "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution" and explicitly intended to provide for "adequate review" of state actions and ensure that "environmental attributes are *fully considered* by the legislature in enacting laws to fulfill constitutional obligations" and "the public is informed of the anticipated impacts in Montana of potential state actions." § 75-1-102(1)(a), (b) (emphasis added).

MEPA is distinct from NEPA, however, in an important respect: it is designed to effectuate Montana's constitutional right to a clean and healthful environment, which is a substantive provision of Montana law. *Park Cnty. Env't Council*, ¶ 70 (MEPA "enable[es] fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment."). While MEPA analysis itself does not dictate any independent, substantive result, *Water for Flathead's Future, Inc. v. Mont. Dep't of Env't Quality*, 2023 MT 86, ¶ 19, 412 Mont. 258, the point is that the agency will exercise its discretion under the substantive permitting statutes it implements to make a better decision once it understands how its actions will affect the natural environment and to ensure protection of Montanans constitutional rights. *See Park Cnty. Env't Council*, ¶¶ 56, 76 ("MEPA's environmental review process is complimentary to – rather than duplicative of – other environmental provisions, functioning to, for example, enable DEQ to make an informed

decision in responding to [a] permit application under [the statute the agency is implementing].").

The MEPA Limitation at issue in this case directly thwarts the explicit, constitutionally grounded purposes of MEPA by requiring agencies to ignore scientific information about climate change, thereby making it impossible for them to make fully informed decisions under their existing statutory authority, whether that authority is implemented to issue an air quality permit for a fossil fuel power plant or to permit a fossil fuel extracting project such as a coal mine or oil well. As demonstrated at trial, the consequence of this MEPA Limitation has been a long-standing, routine, and blind pattern and practice of approving permits for fossil fuel-based energy which has resulted in substantial GHG emissions that cause serious harm to and deny these Youth Plaintiffs their fundamental rights. Contrary to Defendants' assertions, the chain of causation and redressability underlying Youth Plaintiffs' injuries is clear and does not require the Court to import a substantive component to MEPA because the substance underpinning their claims is the Montana Constitution, against which MEPA must be measured.

## II. The MEPA Climate Change Limitation is Unconstitutional

Plaintiffs have repeatedly alleged, briefed, argued, and now supported with unrebutted factual evidence at trial, why the MEPA Limitation is unconstitutional, and Plaintiffs will not waste the Court's time by repeating those arguments here. *See, e.g.*, Docs. 1, 15, 299, 354, 382. Defendants' new argument that enactment of the 2023 MEPA Limitation is somehow supported by the U.S. Supreme Court's ruling in *West Virginia v. EPA* is nonsensical. *See* Bench Memo at 5.

In *West Virginia v. EPA*, the Supreme Court ruled that EPA lacked authority to promulgate the Clean Power Plan rule pursuant to Section 111 of the Clean Air Act, 42 U.S.C. §

7411(d). *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). In this federal statutory case having nothing to do with constitutional rights, the Court interpreted the Clean Air Act as not having conferred authority on EPA to promulgate the rule that it did because "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there.'" *Id*., 142 S. Ct. at 2609. The case at bar is entirely different, where the Legislature has clarified[3] a provision of law that demonstrably conflicts with not only the express purpose of the law (i.e., to make fully informed decisions), but results in agency decisions that deprive plaintiffs of their fundamental rights secured under the Montana Constitution. *West Virginia v. EPA*, a case about EPA's authority under the Clean Air Act does nothing to deprive this Court of its duty and obligation to review provisions of Montana law for constitutional compliance. *See* Doc. 217 at 3 ("While Justice Marshall thought it 'a proposition too plain to be contested,' the State is apparently unsure whether the judiciary has the power to declare statutes unconstitutional. This court assures the State that it can. Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether . . . the Climate Change Exception to the Montana Environmental Policy Act . . . with [its] appurtenant acts and policies, violate the Montana Constitution — particularly the 'clean and healthful environment' clause of Art. II, Sec. 3, and the 'non-degradation' provision under Art. IX, Sec. 1.").

Moreover, Plaintiffs' constitutional challenge does not hinge on whether the Montana Legislature has "authorized or empowered the Department of Environmental Quality, or any other state agency, to regulate greenhouse gas emissions or establish climate policies." Bench Memo at 5. As established at trial, the Montana Constitution secures a fundamental right to a

[3] *See*., *e.g.*, Doc. 379.

stable climate system, and like it or not, the Constitution defines Defendants' responsibilities to its citizens.[4] Defendants in this case need no additional statutory authority to fulfill their constitutional and statutory obligations to consider the effects of climate change under MEPA and make informed decisions when deciding whether to issue permits for fossil fuel activities under existing law; they merely require a declaration that any statutory provision compelling the opposite violates the Constitution.

At no time in this litigation have Plaintiffs argued that MEPA somehow expands Defendants' statutory jurisdiction. Bench Memo at 7. Defendants simply choose to ignore the fact that their authority is not wholly defined by statutory law, it is circumscribed by the Montana Constitution as well. When the two conflict, the unconstitutional statute(s) must give way. Defendants' position that they will "continu[e] to exercise their lawful[] authority under their respective governing statutes to issue permits for activities and projects that may emit greenhouse gases," *id*. at 2, only highlights the need for declarations of law in this case finding that Youth Plaintiffs have a fundamental right to a stable climate system and that the MEPA Limitation is unconstitutional. While the U.S. Supreme Court may have provided that NEPA cannot prohibit the destruction of 100% of a mule deer herd under NEPA in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the citizens of Montana are fortunate that the delegates in 1972 had the foresight through our Constitution's "anticipatory and preventative" provisions to ensure that dead fish would not need to float in our rivers, or our

[4] Indeed, at deposition and at trial, Defendants' representatives testified that regulatory agencies such as DEQ and DNRC are bound to follow the Constitution.

wildlife be annihilated, or Montana's stable climate system be irreversibly damaged before action could be taken to enforce this fundamental right.[5]

## III. *Bitterrooters* Does Not Narrow the Scope of MEPA

Contrary to Defendants' arguments, the *Bitterrooters* decision does not limit the scope of environmental review under MEPA to "the type of information the agency will find useful in evaluating and potentially approving the project." Bench Memo at 6. Instead, *Bitterrooters* affirmed that MEPA review is required to assess impacts that have a "reasonably close causal relationship between the subject government action and the . . . environmental effect." *Bitterrooters*, ¶ 25 (quotation and citation omitted); *id*. ¶ 33 (same). *Bitterrooters* did not sever the causal connection between Defendants' issuance of permits for fossil fuel activities, which could not operate lawfully in the state absent such state-issued authorizations, and all foreseeable impacts from such authorizations, including the emissions of GHGs and attendant climate impacts. Rather, the Supreme Court said that "[t]he problem for *Bitterrooters* is that the broader environmental impacts of the larger construction and operation of the retail store are not subject to MEPA review because the Legislature has not placed general land use control [i.e., the cause-in-fact of the pollution] in the hands of a state agency." *Bitterrooters*, ¶ 34. Here, by contrast, the climate change impacts that are the source of Plaintiffs' constitutional injuries are directly tied to

[5] Defendants claim that the Court must balance Plaintiffs claims against other inalienable rights, including private property rights. Bench Memo at 11. However, Defendants presented ***no*** evidence at trial that a declaration of Plaintiffs' rights as requested herein would infringe upon private property rights. In fact, the evidence showed the opposite is true. *See, e.g.,* Testimony of Rikki Held (detailing impacts to family ranch business and water rights to Powder River), Eva L. (detailing impacts to home and community as a result of flooding), Claire Vlases (detailing impacts to stream to which family has water right). Indeed, the uncontested evidence adduced at trial shows that the clean and healthful environment provisions in Montana's Constitution are both anticipatory and preventative, and that the framers of the 1972 Constitution intended to forestall any further degradation to Montana's environment from its condition in 1972. The uncontested evidence also shows that Montana's environment has been substantially degraded from its condition in 1972 and will continue to be degraded so long as Montana law forces Defendants to carry out their permitting and regulatory duties blind to environmental and human impacts of GHG emissions, climate change, and further fossil fuel production.

the GHG emissions that result from ***Defendants***' pattern and practice of permitting and authorizing fossil fuel activities—which could not occur without the agency-issued permits or authorizations. The permitting activities at issue here are clearly not "beyond the reach of MEPA," *id*., as the testimony confirmed that, since 2011, the Defendants have conducted MEPA reviews for their authorizations for fossil fuel activities, they have just ignored GHGs and climate change when doing so.

Defendants' reliance on *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), is similarly inapposite. In that case, the Supreme Court ruled that the Federal Motor Carrier Safety Administration ("FMCSA") was not required to evaluate the environmental impacts of cross-border operations of Mexican-domiciled trucks under NEPA because it was statutorily obligated to authorize a Mexican motor carrier for cross-border services. 541 U.S. at 766 (citing 49 U.S.C. § 13902(a)(1) which provides that FMCSA "*shall* register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" agency-created safety and financial responsibility requirements). The Court reasoned that because the "FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decision-making—FMCSA simply lacks the power to act on whatever information might be contained in the EIS."). *Id.* at 768.

In *Public Citizen*, as in *Bitterrooters*, the environmental impacts at issue resulted from actions entirely outside of the agency's express authority because it was the President, not the agency, who had exclusive authority over whether to allow the action subject to NEPA review. *See also Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1164 (9th Cir.

2020) (holding that *Public Citizen* only precludes NEPA review when an agency has "no discretion whatsoever" over the action subject to NEPA review).

Here, the situation is radically different because Defendants *do* have control over whether or not to issue permits for fossil fuel activities. Defendants themselves have repeatedly referenced the substantive statutes through which they carry out fossil fuel permitting activities. *See, e.g.*, Docs. 11, 290; Bench Memo at 8-9. Thus, only Defendants can act to prevent the harms revealed in a MEPA analysis of climate change impacts by declining to permit activities that result in unacceptable levels of GHG emissions. Of course, Defendants are incapable of making such a determination absent an analysis of those emissions. Notably, Defendants have pointed to no statutory language analogous to that in *Public Citizen* that mandates them to authorize fossil fuel activities. To the contrary, the substantive permitting statutes Defendants implement undeniably vest Defendants with the discretion to deny or withhold permits or other authorizations for fossil fuel activities. *See, e.g.,* §§ 75-2-203 to -204, MCA (discretion under Clean Air Act of Montana to prohibit facilities that cause air pollution); § 75-2-218(2), MCA (DEQ has discretion to deny air quality permits); § 75-20-301, MCA (DEQ can only approve permits for facilities after considering numerous discretionary factors, including environmental impacts and public health, welfare, and safety); § 77-3-301, MCA (state lands "may" be leased for coal if "in the best interests of the state"); § 77-3-401, MCA (state lands "may" be leased for oil and gas if consistent with the Constitution); § 82-4-227, MCA (DEQ has wide discretion to refuse mining permits); *see also* ARM 17.8.749 ("nothing in [air permitting rules] obligates the department to issue a Montana air quality permit . . . ."). Conversely, if such a mandate did exist, it would clearly be unconstitutional because it would mandate commission of the fundamental rights violations documented at trial.

## IV. Defendants' Interpretation of §§ 75-1-201(4)(a) and (4)(c) is Absurd, or Unconstitutional

Defendants reference §§ 75-1-201(4)(a) and (4)(c), MCA, as foreclosing any redressability here if the MEPA Limitation is struck down as unconstitutional because these provisions provide that that an "agency may not withhold, deny, or impose conditions on any permit or other authority to act based on [MEPA]" and that MEPA "does not confer authority to an agency that is a project sponsor to modify a proposed project or action." *See* Bench Memo at 7 (quoting §§ 75-1-201(4)(a) & (4)(c), MCA); *id*. at 10 ("even if MEPA required consideration of greenhouse gases and global climate change, nothing in MEPA obligates the state agency to take any affirmative or substantive action to address those issues . . .").

Defendants' argument and reliance on §§ 75-1-201(4)(a) and (4)(c), MCA, is misplaced. As detailed above, at no time in this litigation have Plaintiffs argued that MEPA somehow expands Defendants' statutory jurisdiction, and these provisions merely reflect the current state of the law—where a MEPA analysis itself does not specifically authorize the denial or issuance of a permit; instead, it informs whether a permit should be issued or denied, *Water for Flathead's Future*, ¶ 19. The point is not that Defendants will deny or amend a permit *pursuant to MEPA*, but rather that the agency—based on a comprehensive MEPA analysis which includes evaluation of a project's GHG emissions and contribution to climate change—*can and must exercise its discretion under the substantive permitting statutes it implements* to deny permits or other authorizations in order to adhere to its constitutional obligations.

Defendants' argument completely ignores the fact that, once a MEPA analysis provides a regulatory agency with the necessary information to "make an informed decision in responding to [a] permit application under [the statute the agency is implementing]," *Park Cnty. Env't Council*, ¶ 76, the agency must utilize that information in making substantive permitting

decisions under the substantive statutes which Defendants themselves have repeatedly referenced, and which provide Defendants with substantial discretion in denying such permits or authorizations. Simply put, §§ 75-1-201(4)(a) and (4)(c), MCA, do not bar redressability here because if the MEPA Limitation were struck down as unconstitutional, Defendants could act to prevent the harms revealed in a MEPA analysis of climate change impacts by denying permits, pursuant to substantive permitting statutes, for activities that result in unconstitutional levels of GHG emissions.

Thus, §§ 75-1-201(4)(a) and (4)(c), MCA do not foreclose redressability if the MEPA Limitation were declared unconstitutional. Further, to the extent that Defendants read §§ 75-1-201(4)(a) and (4)(c), MCA, as inhibiting them from denying permits for fossil fuel activities under the substantive permitting statutes they administer—*even if* an attendant MEPA analysis reveals that the projects GHG emissions and contribution to climate change (which § 75-1-201(2)(a), MCA currently prohibits Defendants from considering) will significantly degrade Montana's environmental life support systems—§§ 75-1-201(4)(a) and (4)(c), MCA are also unconstitutional. However, the Court can and should read those provisions in a manner consistent with the Constitution. *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 165 P.3d 1079 ("This Court has repeatedly recognized, however, that courts should constitutional issues whenever possible.").

## V. SB 557 is Unconstitutional

Finally, Defendants have invoked SB 557, also enacted in May of the 2023 legislative session, as limiting redressability over fossil fuel permitting. This Court should address the recently-enacted provisions of MEPA codified via SB 557 this legislative session in the Findings of Fact and Conclusions of Law and conform the Court's judgment in this case to the evidence.

Defendants have squarely placed the newly-enacted MEPA provisions in SB 557 at issue by expressly relying on the bill in their Bench Memo. *See* Bench Memo at 2, 4, 6, 7. Specifically, Defendants point to newly-enacted § 75-1-201(6)(a)(ii), MCA, as foreclosing redressability here because it provides that "an agency permit or decision cannot be vacated or voided based on a finding of inadequate review of greenhouse gas emissions or climate impacts 'unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant." Bench Memo at 5.

Section 75-1-201(6)(a)(ii), MCA, is unconstitutional because it would allow fossil fuel projects to proceed *even if* an attendant MEPA analysis concerning GHGs or climate change impacts (which § 75-1-201(2)(a), MCA currently prohibits) was either deficient or reveals the proposed project will significantly degrade Montana's environmental life support systems. Bench Memo at 7.[6] This provision—and the other amendments to § 75-1-201 enacted through SB 557 which substantially curtail public MEPA participation[7]—are unconstitutional and render meaningless all other MEPA provisions and guarantee infringement of Plaintiffs' right to a stable climate system, along with their other constitutional rights. *See Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568, 575 (1994) (declining to interpret statute in manner that "would render the entirety of the Act, and its primary purpose . . . a nullity" because "it is our duty to interpret

[6] As addressed in this Court's Order on Defendants' Motions to Dismiss for Mootness and for Summary Judgment, the two narrow exceptions to § 75-1-201(6)(a)(ii), MCA, which are identical to the exceptions to the MEPA Limitation, "cannot shield the statute's main text from constitutional review." Doc. 379 at 25.

[7] These provisions are: § 75-1-201(6)(a)(i), MCA, which requires persons challenging an agency permitting decision under MEPA to pay a fee for the actual costs of compiling and submitting the certified record; § 75-1-201(6)(a)(iv), MCA, which constrains courts' review of an agency decision or environmental review and removes the "otherwise not in accordance with law" (i.e., the Constitution) basis for a court's invalidation of an agency decision or environmental review; and § 75-1-201(6)(d), MCA, which adds onerous "lost-wages" or "lost project revenue" indemnities for unsuccessful injunctive actions and which requires MEPA litigants to file injunctions against the specific project or authorization when challenging the sufficiency of that project's MEPA analysis.

individual sections of an act in such a manner as to ensure coordination with the other sections of the act. In doing so, a statute will not be interpreted to defeat its evident object or purpose . . . .").

Given MEPA's vital role in ensuring the protection of Montana's constitutional right to a clean and healthful environment through "fully informed and considered decision making," *Park Cnty. Env't Council*, ¶¶ 70, 73, SB 557's attempt to render MEPA a nullity should be rejected. Uncontested testimony adduced at trial from Mae Nan Ellingson—the youngest delegate to Montana's 1972 Constitutional Convention and principal drafter of Article IX, Section 1—demonstrates that the framers intended that Montana's environmental rights were to be enforced through "injunctive relief before the environmental damage has been done." Mae Nan Ellingson Demonstrative Slide 15. Further, nothing in SB 557 explicitly amends Defendants' existing authority to authorize fossil fuel activities, which is discretionary in nature. *See, e.g.*, §§ 75-2-203 to -204, MCA (discretion under Clean Air Act of Montana to prohibit facilities that cause air pollution); § 75-2-211(2)(a), MCA (DEQ to provide rules governing suspension or revocation of air quality permits); § 75-2-218(2), MCA (DEQ has discretion to deny air quality permits); § 75-2-217(1), MCA (DEQ to provide rules governing suspension or revocation of operating permits); § 75-20-301, MCA (DEQ can only approve permits for Major Facility Siting Act facilities after considering numerous discretionary factors, including environmental impacts and public health, welfare, and safety); § 77-3-301, MCA (state lands "may" be leased for coal if "in the best interests of the state"); § 77-3-401, MCA (state lands "may" be leased for oil and gas if consistent with the Constitution); § 82-4-102(3)(a), MCA (stating purpose of surface and underground mining and reclamation laws to vest DEQ with rulemaking authority to "either approve or disapprove" new strip mines or new underground mines); § 82-4-227, MCA (DEQ has wide discretion to refuse mining permits).

Instructive here is the Montana Supreme Court's recent ruling in *Park Cnty. Env't Council*:

> ¶81 Restrictions on Lucky's ability to conduct mining operations on its private property stem from the MMRA, rather than MEPA. Completely apart from MEPA or its 2011 Amendments, the MMRA forbids Lucky from commencing mining activities until permitted to do so by the State. Section 82-4-335(1), MCA. Government regulation of mining has never been held to pose an undue burden on private property rights. *See, e.g., Northern Plains*, ¶ 17 (noting that mining companies "have no right to engage in mining operations until all necessary permits required by State law or regulation are obtained."); *Seven Up Pete Venture v. State*, 2005 MT 146, ¶¶ 27-28, 327 Mont. 306, 114 P.3d 1009 ("Clearly, the right to mine is conditioned upon the acquisition of an operating permit."). If the MMRA's requirement that Lucky await DEQ approval prior to commencing exploration activities does not cognizably burden a constitutional property right, then MEPA's requirement that DEQ's decision on the matter be well-informed certainly does not either.
>
> ¶82 Neither does an equitable remedy for a MEPA violation substantially interfere with constitutionally protected property rights. In essence, it simply requires an applicant to undergo the same wait now that it should have experienced before. There is no argument that simply waiting for DEQ to properly review and act upon an application constitutes an infringement upon property rights. Had DEQ completed the analysis of wildlife impacts and artesian flow containment plans *before* issuing the exploration permit, as required by MEPA, Lucky could not have complained that its private property rights were burdened by being forced to wait for that process to be completed. Waiting while DEQ completes that review *now* does not signify a substantially greater constitutional burden than that which would have been felt while awaiting the completion of that same review process when it should have occurred—*before* the permit was issued. That DEQ's error may give rise to some administrative delay with which to cure the shortfall does not demonstrate an unconstitutional infringement of private property rights.
>
> ¶83 DEQ's erroneously premature approval of Lucky's application did not grant Lucky an irrevocable and constitutionally-protected private property right. Even after a permit has been granted, DEQ has broad enforcement powers to address subsequent violations, including through permanent injunctive relief. *See* § 82-4-361(5), MCA. We do not see why a court-ordered injunction to remedy a MEPA violation poses more of a threat to property rights than an agency-ordered injunction to remedy a substantive violation. Any private property rights implicated by an equitable remedy here are far too minor to be constitutionally cognizable and move us from a strict scrutiny to a balancing analysis.
>
> ¶84 As noted previously, the parties do not contest the District Court ruling that the 2011 Amendments fail under strict scrutiny. They do not attempt to demonstrate the 2011 Amendments are narrowly tailored to further a compelling government interest. Because § 75-1-201(6)(c) and (d), MCA, burdens Counsel and Coalition's fundamental constitutional rights and does not withstand strict scrutiny, we hold that these

amendments are unconstitutional under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.

*Park Cnty. Env't Council*, ¶¶ 81-84.

In sum, SB 557 represents yet another action by Defendants to lock in their unconstitutional pattern and practice of authorizing fossil fuel activities while remaining deliberately ignorant of the devastating harms inflicted upon the environment, the Youth Plaintiffs, and the people of Montana. As such, Plaintiffs respectfully request that this Court conform the pleadings to the evidence presented at trial and declare that SB 557 is part and parcel of Defendants' unconstitutional pattern and practice established at trial and enjoin its future implementation.[8]

## CONCLUSION

For the reasons set forth herein, and as argued in previous filings, Defendants' Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act should be disregarded.

DATED this 25th day of June, 2023.

*/s/ Melissa Hornbein*
Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

[8] Importantly, Defendants did not raise SB 557 as a barrier to redressability in this case until they filed their Bench Memo, and *after* Plaintiffs had rested their case. Under Rule 15(b)(2), Mont. R. Civ. P., "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Further, under Rule 15(b)(1), Mont. R. Civ. P., the Court may permit the pleadings to be amended at trial if a party objects to evidence on the grounds that it is not within the issues raised in the pleadings. The Court "should freely permit an amendment when doing so will aid in presenting the merits . . ." Mont. R. Civ. P. 15(b)(1). The purpose of Rule 15(b), Mont. R. Civ. P., is to "put an end to wasteful and needless litigation and have trial on the merits of the case." *Reilly v. Maw*, 146 Mont. 145, 156, 405 P.2d 440, 447 (1965).

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Julia Olson (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
andrea@ourchildrenstrust.org
julia@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was delivered by email to the following on June 25, 2023:

AUSTIN KNUDSEN
*Montana Attorney General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549

MICHAEL RUSSELL
THANE JOHNSON
*Assistant Attorneys General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
michael.russell@mt.gov
thane.johnson@mt.gov

EMILY JONES
*Special Assistant Attorney General*
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

MARK L. STERMITZ
Crowley Fleck PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801
Phone: 406-523-3600
mstermitz@crowleyfleck.com

SELENA Z. SAUER
Crowley Fleck PLLP
1667 Whitefish Stage Road
Kalispell, MT 59901
ssauer@crowleyfleck.com

*/s/ Melissa Hornbein*
Melissa Hornbein

## CERTIFICATE OF SERVICE

I, Melissa Anne Hornbein, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief in Opposition to the following on 06-25-2023:

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: eService

Thane P. Johnson (Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401

Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation
Service Method: eService

Lee M. McKenna (Attorney)
1520 E. Sixth Ave.
HELENA MT 59601-0908
Representing: Montana Department of Environmental Quality
Service Method: eService

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: State of Montana
Service Method: eService

Julia A Olson (Attorney)
1216 Lincoln St
Eugene 97401
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: Other Means by Consent

Mathew dos Santos (Attorney)
1216 Lincoln St.

Eugene 97401
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: Other Means by Consent

Philip L. Gregory (Attorney)
1250 Godetia Drive
Redwood City 94062
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: Other Means by Consent

Andrea K. Rodgers (Attorney)
1216 Lincoln St.
Eugene 97401
Representing: Georgianna F, Kian T, Lander B, Eva L, Mika K, Badge B, Olivia V, Sariel S, Nathaniel K, Rikki Held, Kathryn Grace S, Jeffrey K
Service Method: Other Means by Consent

Austin Miles Knudsen (Attorney)
PO BOX 201401
Helena 59620-1401
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: Other Means by Consent

Selena Z. Sauer (Attorney)
P. O. Box 759
Kalispell 59903-0759
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: Other Means by Consent

Michael Russell (Attorney)
P O Box 201401
Helena 59620-1401
Representing: Mt Dept. Of Natural Resources And Conservation, State of Montana, Montana Public Service Commission, Greg Gianforte, Steve Bullock, Montana Department of Transportation, Montana Department of Environmental Quality
Service Method: Other Means by Consent

Nathan Bellinger (Attorney)
1216 Lincln St.
Eugen 97401
Representing: Rikki Held
Service Method: Other Means by Consent

Electronically Signed By: Melissa Anne Hornbein
Dated: 06-25-2023