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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

<p>RIKKI HELD, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA, et al.,</p> <p>Defendants.</p>	<p>Cause No. CDV-2020-307</p> <p>Hon. Kathy Seeley</p> <p>PLAINTIFFS' UNOPPOSED MOTION AND BRIEF FOR (1) CERTIFICATION OF ORDERS AS FINAL FOR PURPOSES OF INTERLOCUTORY APPEAL; AND (2) STAY OF ISSUE OF ATTORNEYS' FEES AND COSTS</p>
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INTRODUCTION

Come now Plaintiffs, through counsel, and pursuant to their representations in Plaintiffs' Unopposed Motion for Extension of Time to File Attorneys' Fees and Costs (Doc. 406), as further explained in the Declaration of Plaintiffs' Counsel Philip L. Gregory filed herewith, hereby move this Court for an order: (1) certifying its Findings of Fact, Conclusions of Law, and Order filed August 14, 2023 (Doc. 405), together with the Court's prior Orders ancillary thereto and referenced therein, as final for purposes of interlocutory appeal under Rule 54(b), Mont. R. Civ. P. and Rule 6(6), Mont. R. App. P., excluding the only outstanding issues of Plaintiffs' entitlement to and amount of attorneys' fees and costs; and (2) staying only the issues of entitlement to and amount of attorneys' fees and costs pending the Montana Supreme Court's ruling on the merits of the interlocutory appeal.

Certification of this Court's Findings of Fact, Conclusions of Law, and Order filed August 14, 2023 (Doc. 405), and ancillary orders, as final for purposes of interlocutory appeal furthers judicial economy and public policy by permitting swift and efficient adjudication of the merits in this case of statewide concern without expending the further time and resources that will attend the determination of Plaintiffs' motion for attorneys' fees and costs—a matter that is more effectively resolved if Plaintiffs prevail at the Montana Supreme Court on the merits, and which would then be subsequent to the Montana Supreme Court's ruling in two pending cases regarding the availability of attorneys' fees under the Private Attorney General Doctrine and Uniform Declaratory Judgments Act.

In addition to the pressing constitutional issues of statewide concern raised in this case, prompt interlocutory review of the merits of this case by the Montana Supreme Court is warranted in light of other cases currently pending before the Montana Supreme Court presenting overlapping

legal questions and related issues. Timely resolution of the merits and delayed resolution of Plaintiffs' entitlement to and amount of attorneys' fees and costs will best serve the Parties, the litigants of related cases, and judicial economy. *See Montana Env't Info. Ctr. v. Montana Dep't of Env't Quality*, No. DA 23-0225 (appeal docketed April 17, 2023) (concerning the constitutionality of the MEPA Limitation, § 75-1-201(2)(a), MCA); and *Forward Montana v. State*, No. DA 22-0639 (appeal docketed November 14, 2022) (concerning the availability of attorneys' fees under the Private Attorney General Doctrine and Uniform Declaratory Judgments Act, § 27-8-313, MCA, against the State); *see also Barrett v. State*, No. DA 22-0586 (appeal docketed October 13, 2022) (concerning availability of attorneys' fees under the Private Attorney General Doctrine and whether § 25-10-711(1)(b), MCA, applies when fees are sought pursuant to the Private Attorney General Doctrine).

As set forth in this Court's Order Granting Plaintiffs' Unopposed Motion for Extension of Time to File Attorneys' Fees and Costs (Doc. 408), should this Court decline to issue an Order as requested herein and as set forth in the Proposed Order submitted herewith, or should the Montana Supreme Court decline to enter an order allowing the appeal to proceed pursuant to Rule 4(4)(b), Mont. R. App. P., Plaintiffs will file their motion for attorneys' fees and costs and supporting documentation within fourteen (14) days from the date of this Court's denial of certification or the Montana Supreme Court's order declining to allow the appeal to proceed, whichever is later. Should certification be granted by both Courts, Plaintiffs' motion for attorneys' fees and costs will be deferred pending remand after resolution of the merits by the Montana Supreme Court.

DISCUSSION

Given the statewide importance of the constitutional and regulatory issues presented in this case, the Parties agree there is no just reason for delay and it is in the interest of sound judicial

administration and public policy for this Court to certify its Findings of Fact, Conclusions of Law, and Order filed August 14, 2023 (Doc. 405), together with the Court's prior Orders ancillary thereto and referenced therein, as final for purposes of appeal pursuant to Rule 54(b), Mont. R. Civ. P., *see* Mont. R. App. P. 6(6), and to stay the issues of Plaintiffs' entitlement to and amount of attorneys' fees and costs pending the Montana Supreme Court's ruling on the merits of the interlocutory appeal.

Pursuant to Rule 54(b)(1), Mont. R. Civ. P., in cases, such as this one, involving more than one claim for relief or multiple parties, district courts may direct entry of final judgment as to one or more, but fewer than all, claims under certain conditions. Because Plaintiffs' Complaint requested an award of reasonable attorneys' fees and costs (Doc. 1 at 104), this Court's August 14, 2023 Order (Doc. 405) is not final for purposes of Rule 4(1)(a), Mont. R. App. P., without an adjudication of Plaintiffs' request for attorneys' fees and costs. *See also* Mont. R. Civ. P. 58(e).

A district court may direct entry of final judgment of an otherwise interlocutory order under Mont. R. Civ. P. 54(b) "only upon an express determination that there is no just reason for delay" and, "[i]n so doing, the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and the court shall, in accordance with existing case law, articulate in its certification order the factors upon which it relied in granting certification." Mont. R. App. P. 6(6). If a district court directs entry of final judgment under Rule 54(b), Mont. R. Civ. P., following the filing of a notice of appeal with the Montana Supreme Court, the Montana Supreme Court will review the district court's certification order and determine whether the certification order complies with Rule 54(b), Mont. R. Civ. P., and Rule 6(6), Mont. R. App. P., and will either enter

an order allowing the appeal to proceed or declining to allow the appeal to proceed. Mont. R. App. P. 4(4)(b).

As set forth in *Roy v. Neibauer*, 188 Mont. 81, 87, 610 P.2d 1185, 1189 (1980), the factors normally considered for a Rule 54(b) certification include: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

In certifying an order under Mont. R. Civ. P. 54(b), a district court must follow three “guiding principles”: (1) the burden is on the party seeking certification to convince the district court the case is the “infrequent harsh case” meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and; (3) the district court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated. *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 16, 317 Mont. 413, 77 P.3d 531 (quoting *Roy*, 188 Mont. at 87, 610 P.2d at 1189). This Court “must clearly articulate its reasoning behind any factors set forth,” so the Montana Supreme Court “has some basis for distinguishing between well-grounded orders and ‘mere boiler-plate approval unsupported by the facts or an analysis of the law.’” *In re Marriage of Armstrong*, 2003 MT 277, ¶ 12, 317 Mont. 503, 78 P.3d 1203 (quoting *Kohler*, ¶ 14).

In sum, this Court has “the discretion . . . to grant . . . a Rule 54(b) certification.” *Weinstein v. Univ. of Mont.*, 271 Mont. 435, 439, 898 P.2d 101, 104 (1995). To do so, the Court must make two separate determinations. *Rogers v. Lewis & Clark Cnty.*, 2020 MT 230, ¶ 13, 401 Mont. 228, 472 P.3d 171. First, the Court must “expressly determine[] that there is no just reason for delay,” as required by M. R. Civ. P. 54(b) and M. R. App. P. 6(6).” *Id.* (citations omitted). Second, the Court must address the five-factor test set by the Montana Supreme Court. *Id.* The burden is on the moving party to sway the Court that Rule 54(b) certification is appropriate. *Satterlee v. Lumberman’s Mut. Cas. Co.*, 2007 MT 325, ¶ 15, 340 Mont. 176, 178 P.3d 689.

REASONS FOR CERTIFICATION

As set forth herein, Plaintiffs submit that, based on the factors articulated by the Montana Supreme Court in *Roy* and its progeny, this Court should certify as final its Findings of Fact, Conclusions of Law, and Order filed August 14, 2023 (Doc. 405), together with the Court’s prior Orders ancillary thereto and referenced therein, excluding only the issues of Plaintiffs’ entitlement to and amount of attorneys’ fees and costs, because there is no just reason for delay in doing so, certification furthers judicial economy and public policy, and certification is likely to reduce future, piecemeal litigation on the substantive constitutional issues in this case. Certification will also ensure this Court has the most recent precedent from the Montana Supreme Court on attorneys’ fees and costs that will result from two pending cases before ruling on the issues of Plaintiffs’ entitlement to and amount of attorneys’ fees and costs.

A. No just reason exists to delay the Montana Supreme Court’s consideration of the merits

In addition to the *Roy* factors in favor of certification as set forth below, the three “guiding principles” that facilitate a district court’s certification under Mont. R. Civ. P. 54(b) likewise support certification. *Kohler*, ¶ 16 (quoting *Roy*, 188 Mont. at 87, 610 P.2d at 1189). Plaintiffs

submit this case presents pressing fundamental constitutional issues of statewide concern. The Court's August 14, 2023 Order (Doc. 405) made detailed findings of fact and conclusions of law that relate directly to several of Montanans' fundamental rights, and in particular their right to a clean and healthy environment under Article II, Section 3, and Article IX, Section 1, Montana Constitution.

Further, the Findings of Fact in this Court's August 14, 2023 Order (Doc. 405) make compellingly clear that this case is the "infrequent harsh case" meriting a favorable exercise of discretion and certification. *Kohler*, ¶ 16. The Youth Plaintiffs' injuries increase and compound each passing day:

92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future. [SR 168:17-169:7; CW 279:14-20, 314:20-315:8, 318:2-5; PE-40].

98. According to the Intergovernmental Panel on Climate Change (IPCC), "Climate change is a threat to human well-being and planetary health (*very high confidence*). [SR-48]. There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*)... The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*)." [SR 149:15-150:7; P143; SR-48, SR-63; LB-43].

101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives. Dr. Byron is a well-qualified expert, and the Court found her testimony informative and credible.

108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions. [LB 498:12-25, 524:11-22; LVS 1178:13-1179:6, 1196:6-11, 1200:7-1201:25, 1202:6-24, 1204:21-1205:19, 1206:19-1209:12, 1218:2-16, 1219:25-1220:11, 1221:19-21; MDJ 595:18-596:2, 597:6-18, 600:23-604:14, 606:11-607:2, 608:1-13, 609:23-610:10].

138. The unrefuted testimony at trial established that climate change is a critical threat to public health. [LB 536:10-537:14].

139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs. [LB 534:25-535:9].

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

(Doc. 405).

It was in this factual context that the Court's August 14, 2023 Order (Doc. 405) made rulings on a range of constitutional issues and questions which are of critical interest not only to the Parties, but are of environmental, economic, and social import to Montanans. In particular, the Court's August 14, 2023 Order (Doc. 405), striking down the MEPA Limitations, § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, as unconstitutional and permanently enjoining their enforcement, significantly affects the environmental review and permitting process for both Montana's regulatory agencies and regulated industry. While there is no question this Court's August 14, 2023 Order is final and enforceable, the delay in the Montana Supreme Court's review of the merits of these important issues that would result from this Court having to adjudicate Plaintiffs' request for attorneys' fees and costs will only serve to prolong the State's current posture of lack of finality and legal certainty. Given the constitutional issues of statewide importance raised

in this case, it is essential that the Montana Supreme Court adjudicate the merits as expeditiously as practicable so Montanans have certainty as to the nature of their rights and the State has clarity and guidance as to the nature and extent of its constitutional obligations—and so the substantial harms daily inflicted on the Youth Plaintiffs can be permanently abated by the State.

Second, upon balancing the competing factors present in the case, the Youth Plaintiffs believe it is in the interest of sound judicial administration and public policy to certify the Court's August 14, 2023 Order (Doc. 405) as final. As noted above, the case of *Montana Env't Info. Ctr. v. Montana Dep't of Env't Quality*, No. DA 23-0225 (appeal docketed April 17, 2023), currently before the Montana Supreme Court, also involves a challenge to the constitutionality of the MEPA Limitation as violative of Montanans' right to a clean and healthful environment. Thus, to avoid the possibility of conflicting or contradictory rulings on this point of law, and to ensure the Youth Plaintiffs in *Held* have equal opportunity to argue their case on that issue before the issue is resolved in a different matter before the Montana Supreme Court, it is essential the merits of this case proceed to consideration by the Montana Supreme Court as quickly as practicable. This urgency is underscored by the fact that *Montana Env't Info. Ctr.* involves an as-applied constitutional challenge to the MEPA Limitation whereas the instant case raises a facial challenge. Should the Montana Supreme Court agree with this Court's holdings that both § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, are facially unconstitutional, it would obviate the need to decide the as-applied challenge to the MEPA Limitation raised in *Montana Env't Info. Ctr.*, thereby furthering judicial economy.

B. Plaintiffs' unopposed Motion satisfies the five-factor test utilized by the Montana Supreme Court

As set forth more fully below and as detailed in the Proposed Order submitted herewith, Plaintiffs submit the Court can readily articulate the factors supporting certification as requested herein so that prompt and effective review can occur. *Roy*, 188 Mont. at 87, 610 P.2d at 1189.

1. The relationship between the adjudicated and unadjudicated claims

First, the relationship between the adjudicated and unadjudicated claims is not such that they must be heard together on appeal. The substance of Plaintiffs' case—the pressing constitutional claims of statewide concern—has already been adjudicated by this Court through the Court's August 14, 2023 Order (Doc. 405). The sole remaining unadjudicated claim in the instant case is Plaintiffs' request for attorneys' fees and costs—the adjudication of which is not necessary, essential, or relevant to the merits of Plaintiffs' constitutional claims, except insofar as they will be affected by the Montana Supreme Court's decision on the merits.

2. The possibility that the need for review might or might not be mooted by future developments in the district court

Second, there is no possibility that the need for Supreme Court review of the merits of the instant case might be mooted by future developments in the district court. There are no pending actions with this Court that might moot or would otherwise affect the merits of Plaintiffs' adjudicated constitutional claims. Indeed, as the third factor here demonstrates, there is higher likelihood this Court would be presented with one or more of the pressing constitutional issues of statewide concern raised in this case on future occasions if the merits of this case are not promptly addressed and finally adjudicated by the Montana Supreme Court.

3. The possibility that the reviewing court might be obliged to consider the same issue a second time

Third, there is a significant, if not guaranteed, possibility the Montana Supreme Court might be obliged to consider the fundamental constitutional issues raised in the instant case for a

second time based on similar claims raised in other cases currently pending on appeal. For example, the issue of the constitutionality of the MEPA Limitation, albeit in a far narrower, as-applied challenge relating to the authorization of a fossil fuel power plant, is already before the Montana Supreme Court, and is being briefed. *See Montana Env't Info. Ctr. v. Montana Dep't of Env't Quality*, No. DA 23-0225 (appeal docketed April 17, 2023). Given the extensively developed factual record in this case currently before this Court and the detailed findings of fact and conclusions of law set forth in the Court's August 14, 2023 Order (Doc. 405), as well as the fact that the instant case is a facial, rather than as-applied, challenge, the Youth Plaintiffs submit this case presents an appropriate vehicle for the Montana Supreme Court to conclusively and comprehensively adjudicate the constitutionality of the challenged MEPA Limitation and § 75-1-201(6)(a)(ii), MCA, albeit the Montana Supreme Court may choose to decide the cases in conjunction with each other. Certification would provide the Montana Supreme Court with the opportunity to consider briefing and hear oral arguments on both cases simultaneously, for further judicial economy.

In addition, certification will enable the resolution of other cases currently pending before the Montana Supreme Court, which involve issues relevant to Plaintiffs' request for attorneys' fees and costs, prior to resolution of the same issue before this Court. *See Forward Montana v. State*, No. DA 22-0639 (appeal docketed November 14, 2022) (concerning the availability of attorneys' fees against the State under the Private Attorney General Doctrine and Uniform Declaratory Judgment Act, § 27-8-313, MCA); *see also Barrett v. State*, No. DA 22-0586 (appeal docketed October 13, 2022) (concerning availability of attorneys' fees under the Private Attorney General Doctrine and whether § 25-10-711(1)(b), MCA, is applicable when fees are sought pursuant to the Private Attorney General Doctrine). Since the outcome of *Forward Montana* and *Barrett* could

potentially affect the analysis on the availability of attorneys' fees and costs in this case, the Youth Plaintiffs submit that a stay of the attorneys' fees and costs issues here is warranted to avoid extensive briefing on law that may be clarified by the Montana Supreme Court.

In sum, certification and stay as requested herein would further judicial economy and public policy by allowing the pressing constitutional issues of the moment, which are all but guaranteed to recur, to proceed up on appeal while the Montana Supreme Court clarifies the law of attorneys' fees and costs under the Private Attorney General Doctrine and Uniform Declaratory Judgments Act in Montana, thereby clarifying this Court's eventual review of Plaintiffs' motion for attorneys' fees and costs.

4. The possibility that the reviewing court might be obliged to consider the same issue a second time

Fourth, there are no claims or counterclaims which could result in a set-off against the Court's August 14, 2023 Order (Doc. 405) which is sought to be made final. All of the claims the Parties seek to certify are declaratory or injunctive in nature. Indeed, this case presents no claim for money damages, or any other form of pecuniary relief save attorneys' fees and costs, which, as stated above, have no bearing on the outcome of the underlying merits claims. In fact, the opposite is true: the Youth Plaintiffs are only entitled to attorneys' fees and costs if they prevail in their case.

5. Prudential reasons support entering a Rule 54(b) certification order

Fifth and finally, the Youth Plaintiffs submit that miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like all weigh compellingly in favor of certification.

Indeed, as this Court observed in its August 14, 2023 Order (Doc. 405), not only are the Youth Plaintiffs suffering *now* the harms copiously catalogued by the Court, but the Court's ruling

“will influence the State’s conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts.” (Doc. 405 at 102). Given this Court’s well-supported findings and conclusions that: (1) “Montana’s land contains a significant quantity of fossil fuels yet to be extracted”; (2) “[e]very ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs now and additional harms in the future”; and (3) “Montana’s climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change,” (Doc. 405 at 24, 69, 98), it is paramount the pressing issues concerning young Montanans’ constitutional rights and the State’s obligations during the environmental review and permitting processes are conclusively and expeditiously decided by the Montana Supreme Court without delay. The Montana Supreme Court’s conclusive adjudication of these constitutional issues will have a similar conduct-influencing and obligations-clarifying effect.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move this Court to grant their unopposed Motion and to enter an Order certifying this Court’s Findings of Fact, Conclusions of Law, and Order filed August 14, 2023 (Doc. 405), together with the Court’s prior Orders ancillary thereto and referenced therein, excluding only the issue of entitlement to and amount of attorneys’ fees and costs, as final for purposes of interlocutory appeal under Mont. R. Civ. P. 54(b) and Mont R. App. P. 6(6), and staying the issues of Plaintiffs’ entitlement to and amount of attorneys’ fees and costs pending the Montana Supreme Court’s ruling on the merits of the interlocutory appeal.

A Proposed Order granting this Motion is submitted herewith.

RESPECTFULLY SUBMITTED this 7th day of September, 2023.

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I certify that a true and correct copy of the foregoing was delivered by email to the following on September 7, 2023:

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