

# THE PUBLIC TRUST DOCTRINE AND THE MONTANA CONSTITUTION AS LEGAL BASES FOR CLIMATE CHANGE LITIGATION IN MONTANA

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## I. INTRODUCTION AND SCOPE

Climate change has impacted and will continue to impact both Montana's prairie and mountain environments. The northwestern United States has already experienced temperature increases ranging from 1.5 to 4 degrees Fahrenheit, and climate-change experts predict additional increases of 3 to 10 degrees Fahrenheit in this century.<sup>1</sup> Increased temperatures will reduce springtime snow packs, strain water supplies, increase insect infestations, increase wildfires, and substantially decrease habitat for cold-water fish, such as trout.<sup>2</sup> Up to 75 percent of the water in Northwest streams comes from snowmelt,<sup>3</sup> and "models indicate that by the 2080s there would be little to no snowpack left."<sup>4</sup> This decrease in precipitation will exacerbate the State's drought stress,<sup>5</sup> which is predicted to lengthen by two months by that time.<sup>6</sup>

On the arid Montana plains, most of the region's water comes from the High Plains Aquifer, which is being drawn down faster than it can recharge due to reduced precipitation, and temperature increases will stress the already precarious water resources.<sup>7</sup> Insects will spread north in greater numbers after emerging earlier in the spring.<sup>8</sup> Wetland ecosystems, such as prairie potholes, will be affected by temperature increases that could in-

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

2. *Id.* at 135–137.

3. Steven W. Running, *Impacts of Climate Change on Forests of the Northern Rocky Mountains* 3 (The U. of Mont. 2009) (available at <http://www.bipartisanpolicy.org/sites/default/files/RockyClimate-pages-Proof150.pdf>).

4. *Id.*

5. "Drought stress" means absence of rainfall for a period of time sufficient to deplete soil moisture and injure plants. *See generally* 4 New Ency. Britannica 231 (15th ed., 2007); *see also* 16 New Ency. Britannica at 494.

6. Running, *supra* n. 3, at 3.

7. U.S. Global Change Research Program, *supra* n. 1, at 124.

8. *Id.* at 126.

crease as much as 13 degrees Fahrenheit by this century's end.<sup>9</sup> Montana's plains area Indian reservations, which already suffer from water scarcity, will struggle to adapt to climate change.<sup>10</sup> Simply put, predicted temperature increases in the arid Great Plains area of Montana will upset the precarious balance that allows agricultural communities to exist in that region.

We must resort to law and the legal process to address the risk posed by climate change to Montana and its people. As Roger Kennedy, the former Director of the National Park Service, said of the climate crisis, "action is required of everyone, every jurisdiction, every court, every legislature—and across time—along a very long 'now.'"<sup>11</sup>

Section II provides a brief overview of the scientific consensus that global warming is real and that humans have caused it, before outlining governments' failure to address the problem. Section III demonstrates that civil litigation can and should provide a meaningful role in addressing climate change<sup>12</sup> by analogizing climate-change litigation to tobacco and asbestos litigation. Section IV traces the origins of the public trust doctrine and how the United States Supreme Court and Montana Supreme Court have applied the doctrine in the past. Section V argues that the principles underlying the public trust doctrine make it appropriate for Montana courts to expand the doctrine to atmospheric water. Section VI expands on that concept by showing why Montana's 1972 Constitution, and particularly its right to a clean and healthful environment, requires Montana courts to expand the public trust doctrine to the atmosphere to protect Montana's environment. Section VII outlines the current state of climate-change litigation in the United States, and Section VIII outlines the state of climate-change litigation in Montana. Section IX previews where climate-change litigation is headed in Montana after the Montana Supreme Court's denial of original jurisdiction in *Barhaugh v. Montana*. This article concludes in Section X that Montana's progressive Constitution and public trust caselaw should play an integral role in what two leading legal climate-change scholars describe as the overarching themes of climate-change litigation: "(1) disputes over the appropriate role of government in regulating greenhouse gas emis-

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9. *Id.* at 123.

10. *Id.* at 128.

11. Roger Kennedy, *Foreword*, in Burns H. Weston & Tracy Bach, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights and Intergenerational Justice* x (Vt. L. Sch. & U. Iowa 2009).

12. This article will use "global warming" to mean heating of the atmosphere, oceans and earth surfaces caused by trapping of anthropogenic greenhouse gases in the atmosphere. "Climate change" will refer to the abnormal fluctuation of climate caused by global warming.

sions and (2) efforts to force major corporate emitters to reduce their emissions.”<sup>13</sup>

## II. GLOBAL WARMING

### A. *The Global Warming Problem and Its Consequences*

Contrary to the impression one might gain from the media, there is a scientific consensus that global warming is caused by human activity that releases greenhouse gases into the atmosphere.<sup>14</sup> This article is based on three assumptions supported by the majority of scientific evidence: (1) global warming exists, (2) humans are its cause, and (3) ramifications of global warming are potentially catastrophic. Consequently, the brief science included here is intended to reflect the urgent necessity of turning to courts to address manmade climate change and not to convince doubters of its existence.

Global warming is now “unequivocal,” based on observations of increases in average temperature of air and oceans, melting ice and snow, and global rise in sea levels.<sup>15</sup> The International Panel on Climate Change (“IPCC”) makes a “best estimate” that global temperatures will increase somewhere between 1.8 degrees Celsius (3.2 degrees Fahrenheit) and 4.0 degrees Celsius (7.1 degrees Fahrenheit) by the end of this century.<sup>16</sup> Measured observations for the past 50 years show that temperature change has now reached 3,000 meters into the depths of the oceans, which absorb 80 percent of the heat added to the climate system.<sup>17</sup>

Most scientists believe the increase in global temperatures is primarily due to the observed increase in human-caused greenhouse gas concentrations.<sup>18</sup> IPCC scientists have concluded that it is “extremely unlikely” that

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13. William C. G. Burns & Hari M. Osofsky, *Overview: The Exigencies That Drive Potential Causes of Action for Climate Change*, in *Adjudicating Climate Change: State, National, and International Approaches* 20, 25–26 (William C. G. Burns & Hari M. Osofsky eds., Cambridge U. Press 2009).

14. Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 *Science* 1686 (2004); Anna T. Moritz, *Scientific Consensus on Climate Change*, in *Climate Change: A Reader* 16 (Carolina Academic Press 2011); see also Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis* (J.T. Houghton et al. eds., Cambridge U. Press 2001) (involving 4,000 scientists from 150 countries); Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (Susan Solomon et al. eds., Cambridge U. Press 2007).

15. Richard B. Alley et al., *Summary for Policymakers*, in *Climate Change 2007: The Physical Science Basis* at 5.

16. *Id.* at 13.

17. *Id.* at 5.

18. *Id.* at 10; Center for Climate and Energy Solutions, *Atmospheric Carbon Dioxide & Global Surface Temperature Trends*, <http://www.c2es.org/facts-figures/trends/co2-temp> (accessed Feb. 9, 2012).

the increases can be explained solely by external forcing.<sup>19</sup> As the concentration of carbon dioxide in the atmosphere has increased, so has the temperature.<sup>20</sup> This is consistent with patterns over the past 400,000 years that show clear correlation between carbon dioxide levels and average global surface temperatures.<sup>21</sup> Ice cores reveal that the concentrations of carbon dioxide and methane in the atmosphere now far exceed the natural concentrations of the last 650,000 years.<sup>22</sup> This temperature increase is causing rising sea levels and decreasing snow cover in the northern hemisphere,<sup>23</sup> as well as significant shrinking of arctic sea ice and normally frozen ground.<sup>24</sup> While some projections predicted disappearance of all late-summer sea ice in the arctic by the end of the century,<sup>25</sup> recent computer models show that it could happen by 2016.<sup>26</sup>

The stunning thing about the impacts scientists have observed to date is that they are the result of carbon dioxide emissions from thirty years ago:

The roughly 30-year lag between the emission of CO<sub>2</sub> and its effects on climate means that the rapid melting of ice caps and glaciers, more severe droughts, heat waves, and storms visible today are the results of the fuels that we burned decades ago. In the meantime we have roughly doubled the flow of carbon into the atmosphere, and as a result are committed to a substantial further temperature increase. This is not just “global warming,” however, but rather a progressive and accelerating destabilization of the entire planet.<sup>27</sup>

Perhaps the gravest risk inherent in what may appear to non-scientists as moderate temperature increases is the triggering of “feedback loops”<sup>28</sup>

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19. A forcing mechanism is a process, like solar irradiance or volcanic eruptions, that “changes the balance between incoming solar radiation and outgoing infrared radiation from earth.” EPA, *Glossary of Climate Change Terms*, <http://www.epa.gov/climatechange/glossary.html> (accessed Feb. 23, 2012).

20. Center for Climate and Energy Solutions, *Atmospheric Carbon Dioxide & Global Surface Temperature Trends*, <http://www.c2es.org/facts-figures/trends/co2-temp> (accessed Feb. 14, 2012).

21. Center for Climate and Energy Solutions, *Long-Term Trends in Carbon Dioxide & Surface Temperature*, <http://www.c2es.org/facts-figures/trends/long-co2-temp> (accessed Feb. 14, 2012).

22. Alley et al., *supra* n. 15, at 2.

23. *Id.* at 5.

24. *Id.* at 7. In 2007, the melting of sea ice “crushed all previous records” and outran the computer modeling, and that melting continued in 2008 at virtually the same rate even though the temperatures were cooler than in 2007. Anna T. Moritz, *The Progression of Climate Science: Scientific Consensus on Climate Change* in William H. Rodgers, Jr. et al., *Climate Change: A Reader* 16, 20 (Carolina Academic Press 2011).

25. Alley et al., *supra* n. 15, at 15.

26. International Polar Foundation, Science Poles, *Maslowski and Team Offer New Estimate on Summer Arctic Sea Ice Disappearance*, [http://www.sciencepoles.org/news/news\\_detail/maslowski\\_and\\_team\\_offer\\_new\\_estimate\\_summer\\_arctic\\_sea\\_ice\\_disappearance](http://www.sciencepoles.org/news/news_detail/maslowski_and_team_offer_new_estimate_summer_arctic_sea_ice_disappearance) (Nov. 4, 2011).

27. David W. Orr, *Down to the Wire: Confronting Climate Collapse* 3 (Oxford U. Press 2009).

28. “Feedback loop” in global warming means that the predicted temperature increase triggers another process that amplifies the rate of temperature increase. For instance, increased temperature melts the ice cap, which, instead of reflecting heat away then absorbs heat amplifying the predicted increase in heat. EPA, *Glossary of Climate Change Terms*, <http://www.epa.gov/climatechange/glossary.html> (accessed Mar. 18, 2012).

that can cause runaway temperature increases. For example, thawing of permafrost caused by predicted temperature increases will release massive amounts of methane into the atmosphere.<sup>29</sup> Melting of snow and ice at the caps and other locations will cause surfaces that formerly reflected light and heat out of the atmosphere to become dark surfaces that absorb more heat.

Additionally, the absorption of atmospheric carbon dioxide in the oceans is causing significant ocean acidification, to the point where plankton, coral and shellfish struggle to survive.<sup>30</sup> The loss of these and other species would mean wholesale destruction of the ocean food web and ecosystem.<sup>31</sup>

Greenhouse gas emissions at or above the current rates will likely cause greater climate change in the 21st century than in the 20th century.<sup>32</sup> Mountain ecosystems could lose more than half their wildlife species.<sup>33</sup> The IPCC predicts that death and disease caused by severe climate will hit some of the poorest nations the hardest.<sup>34</sup> The IPCC also predicts that “[t]he resilience of many ecosystems is *likely* to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g. flooding, drought, wildfire, insects, ocean acidification) and other global change drivers (e.g. land-use change, pollution, fragmentation of natural systems, over-exploitation of resources).”<sup>35</sup>

### B. *The Failure of Government to Address Climate Change*

The failure of governments at both the state and national level to address climate change derives from two sources primarily: (1) lack of political will of Congress and state legislatures to pass effective legislation, and (2) lack of effective enforcement of existing legislative regulation due to outside influences and agency discretion. With regard to lack of political will, Professor David W. Orr succinctly summed up the problem in *Down*

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29. Thawing of methane ice lattices under the sea floor could also become a new and uncontrolled source of greenhouse gases causing “extremely rapid climate change.” Moritz, *supra* n. 14, at 20 (citing T.R. Christensen et al., *Thawing Sub-Arctic Permafrost: Effects on Vegetation and Methane Emissions*, 31 *Geophysical Research Ltrs.* L04501 (2004); M. Kennedy et al., *Snowball Earth Termination by Destabilization of Equatorial Permafrost Methane Clathrate*, 453 *Nature* 642 (2008)).

30. James C. Orr et al., *Anthropogenic Ocean Acidification Over Twenty-First Century and Its Impact on Calcifying Organisms* vol. 437, 681 (Nat. Publ. Group 2005).

31. *Id.* at 685.

32. Alley et al., *supra* n. 15, at 8, 13.

33. James Owen, National Geographic News, *Warming May Spur Extinctions, Shortages, Conflicts, World Experts Warn*, [http://news.nationalgeographic.com/news/2007/04/070406-global-warming\\_2.html](http://news.nationalgeographic.com/news/2007/04/070406-global-warming_2.html) (Apr. 6, 2007) (available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf)) (quoting IPCC Chairman Rajendra Pachauri).

34. Lenny Bernstein et al., *Climate Change 2007: Synthesis Report* § 5.2, 65 (Intergovernmental Panel on Climate Change 2008); *see also* James Owen, *supra* n. 33.

35. Bernstein et al., *supra* n. 34, at § 3.3.1, 48.

*to the Wire: Confronting Climate Change*: “The global crisis ahead is a direct result of the largest political failure in history.”<sup>36</sup> Orr indicted the federal government and elected officials, particularly in recent years, for:

- Ignoring the increasingly urgent and rigorous warnings of danger;
- Failing to anticipate ecological and climate trends;
- Making little or no effort to alert the public to the dangers ahead;
- Being oblivious to the security implications of rapid climate change;
- Taking none of the obvious steps to recalibrate the economy to protect natural capital, including climate stability;
- Doing little to promote energy efficiency and renewable energy; and
- Creating a legacy of debt and deficits both ecological and financial.<sup>37</sup>

As the greatest contributor to the greenhouse gases accumulated in the atmosphere, the United States government has been noticeably reticent to assume any responsibility for addressing climate change in talks at Kyoto, Copenhagen, or Durban.

After Jim Hansen, the National Aeronautics and Space Administration’s (“NASA”) chief climate scientist, testified to Congress in 1988 about the catastrophic potential of global warming, 32 climate-related bills were introduced in Congress—none of them were passed.<sup>38</sup> Most recently, the American Power Act, which would have set a declining cap on carbon emissions with target reduction of 83 percent by 2050, failed to even come to a floor vote in the United States Senate.<sup>39</sup> Congress has not passed any significant legislation to directly address climate change.

With regard to the lack of effective enforcement of congressional mandates, the United States Supreme Court 2007 decision in *Massachusetts v. EPA*<sup>40</sup> provides an excellent illustration of the problem. Prior to that decision, and in spite of Congress’s dictate in the Federal Clean Air Act<sup>41</sup> that the EPA regulate pollutants in the atmosphere, the EPA refused to recognize greenhouse gases as pollutants under George W. Bush’s Administration.<sup>42</sup> The EPA issued an endangerment finding<sup>43</sup> only after the Court held the agency’s feet to the fire by ruling that the EPA had a duty to regulate carbon dioxide gas if the agency determined the gas was a pollutant under the Clean Air Act.<sup>44</sup>

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36. Orr, *supra* n. 27, at 6.

37. *Id.* at 6–7.

38. Moritz, *supra* n. 14, at 26.

39. Sen. 1733, 111th Cong. (Feb. 2, 2010) (as placed on Sen. Legis. Calendar under General Orders).

40. *Mass. v. EPA*, 549 U.S. 497 (2007).

41. 42 U.S.C. §§ 7401 et seq. (2006).

42. *Mass. v. EPA*, 549 U.S. at 510–513.

43. 74 Fed. Reg. 66496, 66499 (Dec. 15, 2009).

44. *Mass. v. EPA*, 549 U.S. at 528–529.

Professor Mary Christina Wood, the leading American advocate of “atmospheric trust litigation,” argues that systemic failure of state and federal environmental regulation in the United States is a root cause of our inability to deal with global warming.<sup>45</sup> Wood notes that environmental regulation in the United States is delegated to agencies that exercise discretion in granting permits.<sup>46</sup> She makes a persuasive case that in the face of political and economic forces, agencies charged with protecting the environment now function primarily to process and grant permits for polluting the earth, water, and air.<sup>47</sup> Wood calls this a “political discretion system of natural resource management”<sup>48</sup> and argues that it fails to adequately address pollution in the United States, leading to the United States’ place as the world’s largest contributor to global warming.<sup>49</sup> The overarching problem in the system, as Wood sees it, is that the permit system is designed around political expediency and the short-term interests of politicians and corporations.<sup>50</sup> As Wood stated:

Modern environmental law has proved a colossal failure, despite the good intentions and the hard work of many citizens, lawyers, and government officials. Notwithstanding the most extensive and complex set of legal mandates the world has ever known, government is driving runaway greenhouse gas emissions and resource depletion.<sup>51</sup>

Wood argues that resurrection of the ancient doctrine of public trust is the remedy for the failure of this political discretion system to protect the atmosphere. Under the public trust, the courts would recognize that the atmosphere is held by all sovereign governments at all levels in trust for the public, and those governments owe a fiduciary obligation to the trust beneficiaries—the public.<sup>52</sup> Public trust assets cannot be exhausted or degraded for purposes of political expediency or the interests of politicians and corporations. Using this reasoning, under public trust doctrine, the Montana state government (and other state governments) would owe a fiduciary obligation to its citizens to protect the atmosphere from environmental degradation.

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45. Mary Christina Wood, *Advancing The Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism And The Need for A Paradigm Shift*, 39 *Envtl. L.* 43, 54–61 (Winter 2009).

46. *Id.* at 55 (citing Laura H. Kosloff & Mark C. Trexler, *Consideration of Climate Change in Facility Permitting*, in *Global Climate Change* 259, 259 (Michael B. Gerrard ed., ABA Publg. 2007)).

47. Wood, *supra* n. 45, at 55.

48. Mary Christina Wood, *CLI Recommendation No. 8: Advance the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations*, in Burns H. Weston & Tracy Bach, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* 78 (Vt. L. Sch. & U. Iowa 2009).

49. *Id.*

50. Wood, *supra* n. 45, at 56–58.

51. *Id.* at 78.

52. *Id.* at 75–77.

In the twenty plus years since the IPCC issued its first report in 1990,<sup>53</sup> neither Congress nor the Montana Legislature has enacted legislation to address climate change. From 1990 to 2005, Montana's gross greenhouse gas emissions increased by 14 percent, while national emissions increased about 16 percent.<sup>54</sup> James Hansen recently said: "The earth's climate is nearing, but has not passed, a tipping point, beyond which it will be impossible to avoid climate change with far-ranging undesirable consequences."<sup>55</sup> Consequently, we must significantly reduce carbon in the atmosphere from its present level.<sup>56</sup>

In Montana, the legislature rejected the "Montana Global Warming Solutions Act," which sought to regulate and reduce greenhouse gases.<sup>57</sup> In 2005, because of the "profound consequences that global warming could have on the economy, environment, and quality of life in Montana," Governor Schweitzer's administration formed the Montana Climate Change Advisory Committee under the Montana Department of Environmental Quality ("DEQ").<sup>58</sup> The resulting Montana greenhouse gas inventory reported that Montana's greenhouse gas emissions rate per capita was nearly double the national average.<sup>59</sup> Moreover, Montana's greenhouse gas emissions were projected to grow by thirty percent over 1990 levels by 2020.<sup>60</sup> Montana emits greenhouse gasses equivalent to 37 million metric tons of carbon dioxide annually,<sup>61</sup> about 0.6 percent of total United States greenhouse gas emissions.<sup>62</sup>

Montanans per capita emit about forty metric tons of carbon dioxide per year, which can likely be traced to the State's extensive fossil-fuels industry, large agriculture industry, and significant transportation dis-

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53. Intergovernmental Panel on Climate Change, *First Assessment Report* (Cambridge U. Press 1990).

54. Center for Climate Strategies & Montana Department of Environmental Quality, *Montana Greenhouse Gas Inventory and Reference Case Projections 1990–2020* iii (available at <http://www.mt.climatechange.us/ewebeditpro/items/O127F13145.pdf>) (Sept. 2007).

55. James Hansen, *Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity* 115 (Bloomsbury USA 2009).

56. *Id.* at 180.

57. Mont. H. 753, 60th Legis., Reg. Sess. (Feb. 16, 2007).

58. Montana Climate Change Advisory Committee, *Montana Climate Change Action Plan: Final Report of the Governor's Climate Change Advisory Committee* EX-1 (available at <http://www.mt.climatechange.us/ewebeditpro/items/O127F14041.pdf>) (Nov. 2007).

59. *Id.* at EX-2.

60. *Id.* at 1–6.

61. Carbon dioxide equivalent is a "metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential ("GWP"). Carbon dioxide equivalents are commonly expressed as 'million metric tons of carbon dioxide equivalents[.]'" United States Environmental Protection Agency, *Glossary of Climate Change Terms*, <http://www.epa.gov/climatechange/glossary.html> (accessed Feb. 20, 2012).

62. Center for Climate Strategies & Montana Department of Environmental Quality, *supra* n. 58, at 4.



tances.<sup>63</sup> The Montana greenhouse gas inventory culminated in 54 recommendations for reducing Montana's carbon footprint by the year 2020, thereby reducing its emissions of greenhouse gases to 1990 levels.<sup>64</sup> The Legislature was unwilling to adopt any of these recommendations.

After the United States Supreme Court determined in *Massachusetts v. EPA*<sup>65</sup> that the EPA had a duty to regulate greenhouse gases if it determined that they contribute to climate change,<sup>66</sup> the EPA determined that greenhouse gasses constitute "pollutants" that must be regulated under the Federal Clean Air Act.<sup>67</sup> However, the Montana Environmental Quality Council, which is a legislative committee authorized to review administrative rules proposed by the Montana DEQ, effectively forced the termination of rule-making aimed at similar regulation.<sup>68</sup>

Lest we tar all government with the same brush, we should note what Professor Shi-Ling Hsu calls activity of "subnational actors."<sup>69</sup> These activities include: the U.S. Mayors Climate Protection Agreement<sup>70</sup> initiated by Seattle Mayor Greg Nickel and including approximately 600 cities; the Regional Greenhouse Gas Initiative of nine northeastern states;<sup>71</sup> California's Global Warming Solutions Act;<sup>72</sup> British Columbia's agreement to adopt similar emission reduction targets and initiate agreement between other western states and Manitoba;<sup>73</sup> and the introduction of a provincial carbon tax by Quebec.<sup>74</sup> It may be that local actors are taking up the mantle of protecting the atmosphere. Such initiatives indicate that, though governments at the national level are not meeting any legal duty to address global warming, governments of major cities and some states are. Conceivably, action by those government entities reflects awareness of the importance of

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63. *Id.*

64. Montana Climate Change Advisory Committee, *Montana Climate Change Action Plan* at EX-2.

65. *Mass. v. EPA*, 549 U.S. 497 (2007).

66. *Id.* at 501.

67. EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, <http://epa.gov/climatechange/endangerment.html> (accessed Sept. 23, 2011).

68. Proc. Transcr. Bd. of Env'tl. Rev. of the St. of Mont. 4, 21 (Jan. 14, 2010).

69. Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. Colo. L. Rev. 701, 707 (2008).

70. The U.S. Conference of Mayors, *The U.S. Mayors Climate Protection Agreement* (available at <http://usmayors.org/climateprotection/documents/mcpAgreement.pdf>) (2005).

71. Regional Greenhouse Gas Initiative, *Welcome*, <http://www.rggi.org/> (accessed Sept. 23, 2011).

72. Cal. Health & Safety Code § 38500 (2006).

73. CBC News, *Schwarzenegger, Campbell Formalize Green Agreement*, <http://www.cbc.ca/news/canada/british-columbia/story/2007/05/31/bc-green.html> (May 31, 2007); Adam Tanner, *U.S., Canadian West Set Joint Carbon-Cutting Target*, <http://www.reuters.com/article/2007/08/22/environment-climate-west-goals-dc-idUSN2244930020070822> (Aug. 22, 2007).

74. CBC News, *Quebec to Collect Nation's First Carbon Tax*, <http://www.cbc.ca/canada/montreal/story/2007/06/07/carbon-tax.html> (last updated June 7, 2007).

climate change and frustration with the federal government's abdication of responsibility.

### III. LITIGATION'S ROLE IN SOLVING THE PROBLEM

Civil litigation can play a critical role in addressing the seemingly intractable problem of climate change. Civil lawsuits present the fossil-fuels industry with potential exposure to massive liabilities for damages it has caused. This exposure can create a nearly immediate agent for change. After observing what happened in asbestos and tobacco litigation, the mere filing and reporting of climate change legal actions will likely drive competent investors and insurers away from the fossil fuels industry because of the risk involved in its continued operation. State and Federal Rules of Civil Procedure give plaintiffs in climate litigation the ability to call into a public court the largest and most sophisticated corporate and government defendants and to demand accountability for damages foreseeable by reason of their malfeasance or nonfeasance. Corporate defendants, adept at hiding their role in climate change, swaying public opinion, or influencing government regulators, will find it difficult to avoid that legal process. Plaintiffs are entitled to extensive discovery, which can expose the institution's role in causing or failing to address climate change. Lawsuits trigger publicity and can be reported worldwide in minutes on the internet. The corporation may have a duty to report the lawsuit as a "contingent liability" in its annual financial statements to investors and lenders. Moreover, a lone lawsuit has the potential to trigger additional lawsuits and major legal expenses.

The history of asbestos and tobacco litigation provides a road map for what could happen to the fossil fuels industry. Even though "asbestosis was by 1935 widely recognized as a mortal threat affecting a large fraction of those who had regularly worked with the material,"<sup>75</sup> it was not until development of modern product-liability law in the 1960s that litigation presented a threat to manufacturers.<sup>76</sup>

After 1960, a forty-year wave of asbestos product cases ensued and by 2002, 730,000 asbestos claimants had filed lawsuits against 8,400 companies.<sup>77</sup> By 2006, \$36 billion in claims had been paid out by United States insurers and reinsurers toward an estimated total payout that could range from \$200 to \$265 billion, making it the largest mass toxic tort claim in

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75. Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 33 (5th ed., Aspen Publishers 2005).

76. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); *Restatement (Second) of Torts* § 402(a) (1964); Am. Acad. of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends* 5 (Am. Acad. of Actuaries, Aug. 2007).

77. Carroll et al., *Asbestos Litigation* (RAND Inst. for Civ. Just. 2005).

American history.<sup>78</sup> Recent studies indicate that 100 million Americans suffered significant occupational exposure to asbestos,<sup>79</sup> and 80 corporations have reportedly filed bankruptcy as a result of the asbestos claims.<sup>80</sup> In essence, civil litigation developed to address this massive environmental problem and to place the burden of compensating those injured by asbestos on manufacturers.

Tobacco litigation has a parallel history in which the industry won successive waves of suits from 1954 through 1992<sup>81</sup> and did not suffer its first adverse verdict until 1988.<sup>82</sup> However, the dam began to break in 1992, when the Supreme Court ruled that the 1965 law requiring cigarette warning labels did not preempt plaintiffs' claims that they had been deceived about the health effects of smoking.<sup>83</sup> In 1994, a coalition of 60 Louisiana attorneys filed the "*Castano* case" against the industry,<sup>84</sup> which became the largest class-action lawsuit in history.<sup>85</sup> That same year, Mississippi became the first of many states to file suit against the tobacco industry to recover Medicaid expenditures caused by treating smokers.<sup>86</sup> By 1997, so many states had joined the "pile-on" that tobacco was ultimately forced to enter a "Master Settlement Agreement." It required the industry to pay tobacco-related health care costs incurred by the states' Medicaid programs, to pay in perpetuity certain costs of caring for persons with tobacco related illnesses, to cease specified marketing practices (including marketing to children), to fund an anti-smoking advocacy group, and to dissolve the three tobacco industry groups responsible for misinformation regarding tobacco.<sup>87</sup> Subsequently, the industry has been subject to many product lawsuits and some sizeable verdicts. As in asbestos, this mass toxic-tort-producing industry was forced by civil litigation to bear the burden of a significant part of the damages it had caused and is causing.

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78. Am. Acad. of Actuaries' Mass Torts Subcomm., *supra* n. 76, at 5.

79. *Id.* at 1.

80. *Id.* at 11.

81. Gene Borio, *Tobacco Timeline: The Twentieth Century 1950–1999—The Battle is Joined, “The Eighties,”* [http://www.tobacco.org/resources/history/Tobacco\\_History20-2.html](http://www.tobacco.org/resources/history/Tobacco_History20-2.html) (accessed Sept. 16, 2011).

82. *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (*Liggett* was filed in 1983, and resulted in a \$400,000 financial award in 1988—the first ever in a liability suit against a tobacco company.)).

83. Borio, *supra* n. 81, at “The Nineties: The Millenia Approaches.”

84. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

85. Borio, *supra* n. 81, at “The Nineties: The Millenia Approaches.” The case certified a class of the millions of persons who smoked the defendants' cigarettes and were dependent on nicotine. *Castano*, 84 F.3d 734.

86. Borio, *supra* n. 81, at “The Nineties: The Millenia Approaches”; The Tobacco Control Resource Center, *The Multi State Master Settlement Agreement and The Future of State and Local Control*, [http://www.tobacco.neu.edu/tobacco\\_control/resources/msa/](http://www.tobacco.neu.edu/tobacco_control/resources/msa/) (Nov. 23, 1998).

87. The Tobacco Control Resource Center, *supra* n. 86.

The asbestos and tobacco liability stories are not lost on the fossil fuels industry. Those who finance and insure the industry recognize that those stories are likely bellwethers for the fossil fuels industry. In the case of both the tobacco and asbestos, seemingly impregnable bastions fell under the pressure of increasing claims. In the last four years, hundreds of climate change legal actions have been filed in the United States against the fossil-fuels industry and various governmental entities.<sup>88</sup> Any chief executive officer, risk manager, insurer, or investor involved in the fossil fuel industry that looks at the history of asbestos and tobacco litigation should have nightmares about the risk of climate-change liability that could dwarf the liability of tobacco and asbestos. Any global warming lawsuit filed today is likely to draw the attention of the fossil fuels industry and its trade groups, as well as corporations emitting greenhouse gasses and their insurers and investors.<sup>89</sup> Those entities have likely paid close attention to such cases as *Massachusetts v. EPA*,<sup>90</sup> *Connecticut v. American Electric Power Co.*,<sup>91</sup> *Comer v. Murphy Oil USA, Inc.*,<sup>92</sup> and *Native Village of Kivalina v. ExxonMobil Corp.*<sup>93</sup>

Moreover, there are numerous indicators that climate change will result in mass tort litigation. First, the proliferation of hundreds of lawsuits in the last four years indicates that legal action is becoming a preferred method to confront climate change. Though the legal hurdles of standing, preemption, and political question have whittled away many of those lawsuits, it does not appear that any court has made a finding that disputes that global warming exists or that humans are its cause. The battles being fought in court today will serve as the foundation for future legal actions. Second, based on the large damage awards in tobacco and asbestos litiga-

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88. For an excellent comprehensive chart of the climate change legal actions, prepared by the law firm of Arnold & Porter LLP, see Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, <http://www.climatecasechart.com> (accessed Sept. 18, 2011).

89. *Id.*

90. *Mass. v. EPA*, 549 U.S. 497 (In a suit by Massachusetts to force the EPA to engage in rulemaking to prevent climate change, the Supreme Court held that Massachusetts had standing because of damage to the State's coastline. Further, the Court held that the Clean Air Act authorized EPA regulation of greenhouse gases and the EPA could avoid regulation only if it determined greenhouse gases did not contribute to climate change.)

91. *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) (suit for nuisance tort brought by eight states and New York City against the five largest fossil-fuel-fired electric power plants in the United States).

92. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *rev'd*, 607 F.3d 1049 (5th Cir. 2010) (en banc) (Mississippi landowners whose property was damaged during Hurricane Katrina sued certain oil, coal, and chemical companies under negligence, nuisance, trespass and conspiracy to commit fraud, claiming the defendants' emissions exacerbated the intensity of the hurricane).

93. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (public nuisance suit by Native Village against certain oil and energy companies alleging destruction of the village by melting of arctic sea ice that once protected its coastal area from destruction by winter storms).

tion, people injured by climate change have a strong incentive to file legal claims. Indeed, the massive damages obtained by plaintiffs in tobacco and asbestos litigation would pale in comparison with the damage awards of litigants subject to the potentially catastrophic consequences of global warming. Third, the fossil fuels industry and governments all over the world were put on notice of global warming, its causes, and potential consequences in the first report of the IPCC over twenty years ago.<sup>94</sup> Thus, plaintiffs can claim potential corporate and government defendants had notice of the damages they were causing sufficient to place on them a duty to avoid the injuries. Arguably, action taken 20 years ago could have avoided the crisis we face today. Fourth, as in asbestos and tobacco litigation, the trial bar can be expected to continually hone winning legal theories necessary to address climate change in court, while climate experts are developing the technical expertise to prove causation and damages. Fifth, each year the effects of global warming become more obvious, provable, and compelling to the public.<sup>95</sup> These factors all dictate that climate change litigation in the judicial arena will play a major role in addressing global warming.

A potential investor would, obviously, not invest in a coal-fired generator that is expected to make its financial return over a period of 50 years when there is a significant risk the generator may be shut down in five or ten years. Commercial General Liability insurance policies provide both indemnity against liability and unlimited defense of claims.<sup>96</sup> How long will insurers sell environmental liability endorsements to a coal-fired power plant likely to become the subject of mass tort litigation?<sup>97</sup>

But, civil litigation cannot effectively address climate change by invoking laws and regulations developed by the “political discretion” system that has condoned the pollution that created the climate crisis. The courts must turn to common law that can provide a substantive basis for protecting society from climate change, and the public trust doctrine has the greatest potential to fill the void.

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94. See generally Intergovernmental Panel on Climate Change, *First Assessment Report* (Cambridge U. Press 1990).

95. National Aeronautics and Space Administration, *Climate Change: How Do We Know?*, <http://climate.nasa.gov/evidence/> (accessed Jan. 11, 2012).

96. Susan J. Miller & Philip Lefebure, *Miller's Standard Ins. Policies Ann.*, vol. I, 403.1 (West Publ. 2009).

97. For consideration of the impact of climate change on insurers and insurance and the industry's response, see Gregory S. Munro, *Insurance and Climate Change*, *Trial Trends: A Quarterly Publication of the Mont. Trial Lawyers Assn.* 26 (Summer 2010); Jeffery W. Stempel, *Insurance and Climate Change Litigation*, in *Adjudicating Climate Change: State, National, and International Approaches* 230 (William C. G. Burns & Hari. M. Osofsky eds., Cambridge U. Press 2009).

IV. ORIGIN OF THE PUBLIC TRUST DOCTRINE AND THE COURTS'  
RECOGNITION OF IT

A. *Ancient Foundations of the Doctrine*

Professor Mary Christina Wood argues that law can only address the atmospheric pollution causing global warming by imposing common-law trust theory on the air we breathe.<sup>98</sup> The public trust doctrine has an ancient lineage that reflects that certain resources are, by their nature, public. As the New Jersey Supreme Court aptly put: “The genesis of this principle is found in Roman jurisprudence, which held that ‘[b]y the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea’ were ‘common to mankind.’”<sup>99</sup> The Roman Emperor Justinian is credited with having laid the foundation for this doctrine by declaring that certain elements of the environment should be protected: “The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.”<sup>100</sup> The public trust doctrine requires the government to act as a trustee, to maintain some level of quality in the resources, and to protect those resources from being depleted by private interests or expended to the detriment of future generations.<sup>101</sup>

The foundation of the public trust doctrine is the government’s authority to supervise and control the natural resource that is the subject of the trust.<sup>102</sup> Normally, political leaders, in the exercise of their offices, have wide latitude to balance interests and mediate disputes between competing interests. However, they are much more restricted when they wear the hat of a trustee over a public resource. A trustee has the duty to protect the trust property.<sup>103</sup> A trustee may not act in his own interest or the interest of any third party but must act with utmost good faith toward the beneficiary.<sup>104</sup> Hence, a trustee’s duty may forbid balancing of interests or trade-offs that would damage or deplete the resource.

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98. Wood, *supra* n. 45, at 45.

99. *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355, 360 (N.J. 1984) (quoting Justinian, *Institutes* 2.1.1 (T. Sandars trans. 1st Am. ed., 1876)).

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

101. For writings about the development of the public trust doctrine in American courts, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 558–566 (1990); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 *Envtl. L.* 515 (Spring 1989); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State’s Natural Resources*, 16 *Duke Env’tl. L. & Policy Forum* 57 (Fall 2005).

102. *Nat’l Audubon Socy. v. Super. Ct. of Alpine Co.*, 658 P.2d 709, 712 (Cal. 1983).

103. *Iverson v. Rehal*, 317 P.2d 869, 872 (Mont. 1957).

104. *Wild West Motors, Inc. v. Lingle*, 728 P.2d 412, 416 (Mont. 1986).

B. *United States Supreme Court Adoption of Public Trust Doctrine*

The United States adopted the public trust doctrine from English common law in order to protect public commerce along navigable waters.<sup>105</sup> The United States Supreme Court first recognized the doctrine in 1892 in *Illinois Central Railroad Company v. Illinois*.<sup>106</sup>

The possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.<sup>107</sup>

In *Illinois Central Railroad Company*, the Court reversed the granting of shoreline property on Lake Michigan to a railroad company:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.<sup>108</sup>

Hence, in one stroke the Court established that all navigable waters in the United States and the lands under them are held in public trust by the government for the public interest.

The Court furthered the public trust doctrine in *Geer v. Connecticut* in 1896.<sup>109</sup> *Geer* involved ownership of feral game in a case involving hunting violations.<sup>110</sup> The Court discussed ancient law and English common law regarding the public trust over air and water, and, in speaking of those things that remain in common ownership, quoted renowned 18th-century French legal scholar Robert Joseph Pothier,<sup>111</sup> who said: “These things are those which the juriconsults called ‘res communes.’ Marcien refers to several kinds, the air, the water which runs in the rivers, the sea, and its shores.”<sup>112</sup> Referring to the common property of game, the Court set forth the duty of government:

[T]he development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common

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105. Weston & Bach, *Recalibrating the Law of Humans with the Laws of Nature* at 43.

106. *Ill. C. R.R. Co. v. Ill.*, 146 U.S. 387 (1892).

107. *Id.* at 436.

108. *Id.* at 453.

109. *Geer v. Conn.*, 161 U.S. 519 (1896), *overruled*, *Hughes v. Okla.*, 441 U.S. 322 (1979).

110. *Geer*, 161 U.S. at 519.

111. Robert Joseph Pothier was a renowned 18th century French lawyer and professor who arranged the texts of the Roman Law. Auguste Boudinhon, *Robert Joseph Pothier*, <http://www.newadvent.org/cathen/12321a.htm> (accessed Jan. 16, 2012).

112. *Geer*, 161 U.S. at 525.

ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.<sup>113</sup>

In 1907, Justice Oliver Wendell Holmes famously stated: “[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”<sup>114</sup> Recently, the United States Supreme Court has also recognized that “individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”<sup>115</sup>

### C. Recognition of Public Trust Doctrine by the Montana Supreme Court

The Montana Supreme Court has invoked the public trust doctrine to protect its waterways. In 1984, in *Montana Coalition for Stream Access, Inc. v. Curran*,<sup>116</sup> the Court used the public trust doctrine as one basis for its decision to recognize the public’s right to use the waters and streambed of a river up to its high water mark as it flowed through a private landowner’s property.<sup>117</sup>

In *Curran*, Curran and Curran Oil Company held land along six to seven miles of the Dearborn River.<sup>118</sup> Curran attempted to restrict public access for fishing and floating, claiming title to the banks and streambed of the river and the right to restrict public use.<sup>119</sup> The trial court determined the Dearborn River was navigable in 1889, the year Montana gained statehood, by applying the federal “log-floating” test.<sup>120</sup> Because the river was navigable, the trial court concluded the riverbed was owned by the federal government prior to statehood and was transferred to the State of Montana at the time of statehood.<sup>121</sup> The Montana Supreme Court upheld that decision based upon the public trust doctrine.<sup>122</sup> The Court also recognized that the State, as an attribute of its sovereignty, could determine as a matter of local law which rivers were navigable and therefore part of the public trust.<sup>123</sup> Moreover, the Court recognized that public recreational use, such

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113. *Id.* at 529.

114. *Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

115. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 475 (1988).

116. *Mont. Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1894).

117. *Id.* at 172.

118. *Id.* at 165.

119. *Id.*

120. *Id.* at 166.

121. *Id.*

122. *Curran*, 682 P.2d at 170.

123. *Id.* at 167.



as fishing and floating, was a basis for declaring a river navigable in Montana and, therefore, worthy of public trust designation.<sup>124</sup> Finally, the Court held the public's right to use the river extended up to the high water mark on the banks, thereby determining the boundaries of the public trust.<sup>125</sup>

The *Curran* Court determined that navigability for use, as opposed to navigability for title, is determined under state law.<sup>126</sup> Ultimately, the Court stated:

If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.<sup>127</sup>

Most importantly, the Court concluded by expressly founding its decision on the public trust doctrine and the Montana Constitution: "In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for non-recreational purposes."<sup>128</sup>

In the same year as *Curran*, in *Montana Coalition for Stream Access, Inc. v. Hildreth*,<sup>129</sup> the Court again invoked the public trust doctrine after a landowner challenged the public's right to access by way of Hildreth's ranch.<sup>130</sup> Hildreth erected a fence to block floaters on the Beaverhead River where it crossed his land.<sup>131</sup> The Court affirmed the trial court's ruling that the public had the right to access the river up to the high water mark.<sup>132</sup> The Court articulated that the legal foundations for its decision were the public trust doctrine and the Montana Constitution.<sup>133</sup>

Because *Curran* and *Hildreth* established that all Montana waters suitable for recreational use were held and protected in the public trust, damage to navigable waters from climate change implicates the public trust doctrine. The government, as trustee, should not be permitted to ignore climate

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124. *Id.* at 169.

125. *Id.* at 172.

126. *Id.* at 170.

127. *Id.*

128. *Curran*, 682 P.2d at 171. *Curran* is in accord with the famous case of *Natl. Audubon Socy. v. Superior Ct.*, 658 P.2d 709 (Cal. 1983), which held that the public trust doctrine restricted how much water California authorities could divert from Mono Lake's tributaries to be consumed by the city of Los Angeles. The California Supreme Court held that the public trust doctrine applied because the public used the lake for recreation. *Id.* at 719.

129. *Mont. Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984), *overruled on other grounds*, *Gray v. City of Billings*, 689 P.2d 268 (Mont. 1984).

130. *Hildreth*, 684 P.2d at 1093.

131. *Id.* at 1090.

132. *Id.* at 1091.

133. *Id.* at 1093.

change that will, for instance, dewater rivers and lakes and raise water temperatures causing the loss of fish and aquatic plants. In addition, the government should administer the public trust doctrine to prevent Montana's waters from being polluted by discharges, such as mercury and carbon dioxide, from coal-fired electrical generators.

In 2002, in what is known as the "*Missouri Drainage Case*," the Court expanded the application of the public trust doctrine to protect appropriation of in-stream water flows for the public.<sup>134</sup> During adjudication of water claims in the Missouri River Basin, the Montana Fish, Wildlife and Parks Department filed five claims in the Water Court, asserting water rights for fish, wildlife, and recreational purposes.<sup>135</sup>

Although the Montana Supreme Court declined to recognize such a right 14 years earlier in *In re Dearborn Drainage Area* (known as the *Bean Lake Case*),<sup>136</sup> in the *Missouri Drainage Case* the Court reversed itself, recognizing that "[u]nder the Constitution and the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters."<sup>137</sup> The *Missouri Drainage Case* Court reasoned that the decision in *Curran* was based on "not only the 1972 Constitution, but also the *public trust doctrine* which dates back to Montana's statehood."<sup>138</sup> Overruling the *Bean Lake Case*, the Court held that fish, wildlife, and recreational use are "beneficial uses" for the purposes of water-appropriation claims.<sup>139</sup> Further, the Court held that water-appropriation claims for these non-diversionary uses were valid and existed prior to 1973.<sup>140</sup>

The *Missouri Drainage Case* is in accord with the California Supreme Court's seminal 1983 decision, *National Audubon Society v. Superior Court of Alpine County*.<sup>141</sup> There, the California Supreme Court held that the public trust doctrine protected non-navigable tributaries of Mono Lake, a navigable water body, from diversions by the city of Los Angeles. The Court rooted its expansion of the public trust doctrine in the doctrine's elastic nature: "The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."<sup>142</sup> Like-

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134. *In re Adjudication of the Existing Rights to the Use of All the Water*, 55 P.3d 396 (Mont. 2002) [hereinafter *Missouri Drainage Case*].

135. *Id.* at 398.

136. *In re Dearborn Drainage Area*, 766 P.2d 228, 236 (Mont. 1988) [hereinafter *Bean Lake Case*], overruled, *Missouri Drainage Case*, 55 P.3d 396.

137. *Missouri Drainage Case*, 55 P.3d at 404; accord *Natl. Audubon Socy.*, 658 P.2d at 719.

138. *Missouri Drainage Case*, 55 P.3d at 404 (emphasis added).

139. *Id.* at 407.

140. *Id.*

141. *Natl. Audubon Socy.*, 658 P.2d 709.

142. *Id.* at 719.

wise, the public trust doctrine in Montana has expanded from protecting only commercial uses to protecting recreational uses and instream water flows.<sup>143</sup> Montana's *Missouri Drainage Case* and California's *National Aududon Society* decision constitute a precedential foundation for protecting navigable waters from damage arising from climate change.

While in *Curran* and *Hildreth* the Court appeared to apply the public trust doctrine apart from the Montana Constitution, in the 1987 case *Galt v. State ex rel. Department of Fish, Wildlife and Parks*,<sup>144</sup> the Court indicated that the doctrine arose from the Montana Constitution:

In *Curran*, we held that under the public trust doctrine as derived from the Montana Constitution the public has a right to use any surface waters capable of use for recreational purposes up to the high water marks and may portage around barriers in the water in the least intrusive manner possible. This holding was reaffirmed in *Hildreth*.<sup>145</sup>

In fact, the *Galt* Court identified Article IX, § 3 as the precise location of the public trust doctrine for water rights under the Montana Constitution, stating:

The public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution which provides: "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law."<sup>146</sup>

While simultaneously invoking the public trust doctrine and identifying its constitutional foundation, the *Galt* Court actually put its first limits on the doctrine as applied to recreational rights on rivers by overturning statutes which purported to give the public rights to make portages onto private land around obstacles in the river and to build duck blinds and permanent moorings within the high water marks.<sup>147</sup> The Court said those were not within the rights necessary to public use of the waters.<sup>148</sup>

In summary, the public trust doctrine has been repeatedly invoked to protect navigable waters in Montana and has expanded to include even instream appropriations. *Galt* and *Hildreth* established that the public trust doctrine has its basis in common law and in Article IX, § 3(3) of the Montana's 1972 Constitution.<sup>149</sup> The expansion of public trust by the *Missouri*

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143. The Montana Supreme Court recently reaffirmed the public trust doctrine's application to non-navigable, in-stream flows of navigable waters in *Montana Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179 (Mont. 2011), where it held that a private organization had standing to enforce the public trust protection of in-stream flows of the Big Hole River, *id.* at 186.

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

145. *Id.* at 913.

146. *Id.* at 914–915.

147. *Id.* at 915–916.

148. *Id.*

149. *Id.* at 914; *Hildreth*, 684 P.2d at 1091.

*Drainage Case* to protect in-stream waterflow should be heartening to those advocating for public trust protection of the air. The question is: why should we not apply the protections of public trust doctrine in Montana to the air?

## V. PUBLIC TRUST DOCTRINE AS APPLIED TO AIR

### A. *The Flexible Nature of the Public Trust Doctrine*

The public trust doctrine in Montana should extend to protect the air. Application of the doctrine to waters serves as the doctrine's foundation but not its limits. While the public trust doctrine has never been extended to air, applying the foundational principles of the doctrine will protect the air by creating a cognizable tort action against polluters and restricting the government's licensing of its pollution.

Courts in other jurisdictions have indicated that the public trust doctrine is flexible and can be applied to meet society's changing needs. In 2000, the Hawaii Supreme Court said: "The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."<sup>150</sup> The New Jersey Supreme Court similarly stated in 1984: "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'"<sup>151</sup> And the Washington Supreme Court explained in 1998: "Since as early as 1821, the public trust doctrine has been applied throughout the United States 'as a flexible method for judicial protection of public interests . . . .'"<sup>152</sup>

Several state constitutions include provisions recognizing public trust over air. For example, Article I, § 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>153</sup>

Article XI, § 1 of the Hawaii Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natu-

150. *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000).

151. *Matthews*, 471 A.2d at 365 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972)).

152. *Weden v. San Juan Co.*, 958 P.2d 273, 283 (Wash. 1998).

153. Pa. Const. art. I, § 27.

ral resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.<sup>154</sup>

The Louisiana Constitution provides in Article IX, § 1:

The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.<sup>155</sup>

The Michigan Environmental Protection Act recognizes a cause of action in any person or entity against any person or entity “for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.”<sup>156</sup> That section is based on Article IV, § 52 of the Michigan Constitution which provides: “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people.” The statute and constitutional provision have been recognized as imposing a public trust over the air.<sup>157</sup>

#### *B. Policy Analysis of Applying the Public Trust Doctrine to Air*

The policy underlying the public trust doctrine in Montana applies to the atmosphere as well as it does to water. One could argue that the public trust doctrine precedent only recognizes protection of the use of the water and access by shoreline but not the quality of the water. Such an argument would deny public trust for protecting air quality. However, by its nature, degradation of water also takes away “use” and even access to navigable water. If a private party is permitted to dump chemicals in navigable Montana waters, making them so toxic or offensive as to preclude recreational or agricultural use, the public trust doctrine could be invoked to protect those waters. The public trust doctrine should also protect against pollution that makes air incompatible with the earth’s temperature control and unfit for human breathing or even recreation.

Why should the public trust doctrine apply to navigable water and not to the atmosphere? Some may object to using the public trust doctrine to protect air because air moves and no single government or level of government could assume or be burdened with a fiduciary trust responsibility over

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154. Haw. Const. art XI, § 1.

155. La. Const. art. IX, § 1.

156. Mich. Comp. Laws Ann. § 691.1202 (repealed 1994).

157. *Her Majesty the Queen in Right of the Province of Ont. v. Det.*, 874 F.2d 332, 337 (6th Cir. 1989).

it. This argument is not credible because rivers also flow through many jurisdictions. The Madison, Gallatin, and Jefferson Rivers, for example, meet in Montana to form the Missouri, which flows through Montana, North Dakota, and Minnesota before joining the Mississippi, which then flows through multiple states on its way to the Louisiana Delta. Yet it is likely that the entirety is protected by the public trust doctrine and that any state along the way could exercise a fiduciary responsibility for protection of the waters within its boundaries. Furthermore, individual states have clean air acts and clean water acts by which they assume responsibility for air and water moving through and over their states.<sup>158</sup>

The more pertinent inquiry is: In what manner, if any, are the nature of air and water different so as to justify a refusal to apply public trust to air? For example, one might argue that navigable waters are contained in the geographic vessels of oceans, lakes, rivers, and streams, whereas the air is everywhere. An understanding of the global reach of the oceans and rivers and the hydrologic cycle, however, makes that distinction dubious. Hence, the Montana Constitution includes “atmospheric waters” in the public trust. Global warming is impacting the world’s oceans, which are the main absorbers of the heat from global warming and whose temperature change from such warming reaches now to 3,000 meters below the surface.<sup>159</sup> Global warming affects the earth’s air in the same way as it affects oceans, rivers, and lakes.

The objection that the public trust doctrine was developed only to protect navigable waterways is not persuasive, given that it is the recognition of the doctrine that is important, not what it has been applied to in the past. If, as the seminal cases suggest, public use of navigable waters deserves public trust protection because they are used as avenues of human commerce, then the airways also deserve protection as a modern locus of transportation for people and cargo.

The public trust doctrine has been invoked in situations where the law appears to provide no effective protection for a vital resource. In the case of the atmosphere, existing statutory schemes for atmospheric protection have not only failed to halt degradation that results in global warming, but they have sanctioned it under a permit regime.

Ultimately, other than a blunt refusal to admit that cases recognizing a public trust in waters could also be precedent for recognizing a public trust in air, there appears no reason why the public trust doctrine should not be

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158. The Clean Air Act requires each state to implement statutes that comply with its requirements. 42 U.S.C. § 7410(a)(1) (2006). For a collection of those state statutes, see Environmental Protection Agency, *Compliance & Enforcement Through State Government: State Review Framework*, <http://www.epa.gov/compliance/state/srf/index.html> (last updated Jan. 23, 2012).

159. Alley et al., *supra* n. 15, at 5.

applied for the protection of the atmosphere. The courts should recognize an atmospheric trust under which governments have a fiduciary responsibility for maintaining the atmosphere for this and future generations. Courts cannot leave the protection of the air to the political discretion of governing bodies that have created the global warming crisis and its attendant climate change.

## VI. THE CONSTITUTIONAL BASIS FOR CLIMATE CHANGE LITIGATION IN MONTANA

### A. *Implications of Montana's Constitutional Provisions*

The Montana Constitution provides foundational underpinnings for application of the public trust doctrine to climate change. Most public trust doctrine cases discussed above appear to recognize common law as the basis of the doctrine. The *Galt* Court recognized, however, that the public trust doctrine in Montana is “derived from the Montana Constitution.”<sup>160</sup> If the public trust doctrine in Montana arises Article IX, § 3(3) of the Montana Constitution, as *Galt* indicated, we must begin by looking at the scope of the public trust in the context of Article IX, § 3:

Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily use in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use. (3) *All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.*<sup>161</sup>

The *Galt* Court cited subsection 3 as the basis of public trust imposition on waters.<sup>162</sup> Because § 3 is titled “Water rights” and its content relates to impoundment and distribution of water, one could argue that insofar as it is a basis for public trust, it simply applies to water. However, because subsection 3, expressly includes “atmospheric waters,” it necessarily includes the atmosphere. Consider whether, under that provision, one group could be precluded from extensive cloud seeding that would produce rain on its agricultural land and drought for anyone downwind. The public trust then would appear to expressly reach and protect such “atmospheric waters” from such diversion.

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160. *Galt*, 731 P.2d at 913.

161. Mont. Const. art. IX, § 3 (emphasis added).

162. *Galt*, 731 P.2d at 913.

More expressly, because Article IX, § 1 mandates: “The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources,” it is also an avenue by which the public trust doctrine could govern the air. The drafters of Article IX, § 1 intentionally protected “the environmental life support system” and not just the water. At the 1972 Montana Constitutional Convention, Delegate C.B. McNeil articulated that:

Subsection 3 mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term “environmental life-support system” is all-encompassing, including but not limited to air, water and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*.<sup>163</sup>

The two sections, taken together, are a basis for the courts’ imposition of the public trust doctrine over atmospheric litigation in Montana. Hence, common law, as expressed in *Curran* and *Hildreth*, establishes the public trust doctrine while the Montana Constitution provides the basis for its extension to protection of the air. It is clear that the public trust protections in the Montana Constitution, to the extent they are expressed or implied, extend to the “environmental life support system” which encompasses the air and certainly to “atmospheric waters.”

### B. *The Right to, and Protection of, a Clean and Healthful Environment*

Montanans take pride in what they consider to be strong environmental provisions in Montana’s 1972 Constitution. Because constitutional provisions are the primary statements of public policy in Montana,<sup>164</sup> it is important to examine and analyze the environmental provisions of the Constitution insofar as they may provide a legal basis for climate-change litigation.

While efforts to place environmental rights in the United States Constitution have failed, “[m]ore than a third of all state constitutions, including all written since 1959, address modern concerns of pollution and resource preservation.”<sup>165</sup> The movement among the states to “constitutionalize the

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163. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 168 (Greenwood Press 2001) (emphasis added); see also *Montana Constitutional Convention Proceedings* vol. 4, 1201 (Mont. Legis. & Legis. Council 1972) (available at [http://courts.mt.gov/library/montana\\_laws.mcp](http://courts.mt.gov/library/montana_laws.mcp)).

164. See e.g. *First Bank (N.A.)—Billings v. Transamerica Ins. Co.*, 679 P.2d 1217, 1219 (Mont. 1984); *State ex rel. McCarten v. Corwin*, 177 P.2d 189, 194 (Mont. 1947).

165. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 Mont. L. Rev. 157, 158 (2003).



environment” has also come to Montana.<sup>166</sup> Montana’s 1972 Constitution makes a “right to a clean and healthful environment” the first inalienable right guaranteed to Montanans.<sup>167</sup> However, surprisingly few environmental lawsuits invoke such constitutional provisions, relying instead on statutory claims.<sup>168</sup> Furthermore, courts have rendered the constitutional environmental provisions relatively obscure by holding that they are not self-executing.<sup>169</sup> As a result, some of the states with constitutional provisions “affirming the importance of the environment” have the weakest environmental policies, while the five states with the strongest environmental policies have no environmental provisions in their constitutions.<sup>170</sup>

The 1972 Montana Constitution contains two sections setting forth express environmental rights and protections. Article II, § 3 states the “Inalienable Rights”:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.<sup>171</sup>

The only right guaranteed by this provision is the right to a clean and healthful environment.<sup>172</sup> The others aspects of this section are described as “temporizing,” meaning “the right to pursue, enjoy or to seek.”<sup>173</sup> In the 1999 case *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court solidified the importance of Article II, § 3 when it held that the right to a clean and healthful environment is fundamental.<sup>174</sup>

The other key environmental provision of the Montana Constitution is Article IX, “Environment and Natural Resources” which contains § 1, “Protection of the Environment”:

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

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166. See e.g. *id.*

167. Mont. Const. art. II, § 3.

168. Thompson, *supra* n. 158, at 160.

169. *Id.*

170. *Id.* at 158–159.

171. Mont. Const. art. II, § 3.

172. Elison & Snyder, *supra* n. 163, at 31.

173. *Id.*

174. *Mont. Envntl. Info. Ctr. v. Dept. of Envntl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) [hereinafter *MEIC*].

This section had no counterpart in Montana's 1889 Constitution. Because the Montana Supreme Court has deemed this section closely interrelated with Article II, § 3, it is also deemed a fundamental right, so that any restriction of it triggers strict scrutiny.<sup>175</sup>

Article IX covers a broad range of people and activities. Drafters of the Montana Constitution intended the "each person" language of Article IX to include corporations and other business entities.<sup>176</sup> The delegates included the language ensuring the protection of an "environmental life support system" intentionally to include, but not be limited to, air, water and land.<sup>177</sup> As Delegate McNeil said: "the term 'environmental life-support system' is all-encompassing including but not limited to air, water and land and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*."<sup>178</sup> While implying that there is some reasonable depletion or degradation of natural resources that needs not be remedied, Subsection 3 appears to provide for absolute protection of the environmental life-support system from nearly all forms of degradation.

The Montana Environmental Policy Act was enacted to meet the constitutional obligations of Article II, § 3 and Article IX.<sup>179</sup> This Act expressly recognized that the State has a "continuing responsibility . . . to use all practicable means consistent with other considerations of state policy . . . so that the state may fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."<sup>180</sup>

Recognizing a cognizable right to a clean and healthful environment, the important questions remaining for climate-change litigants are (1) whether the constitutional provisions for a right to, and protection of, a clean and healthful environment are self-executing and (2) whether those provisions provide an independent basis in constitutional tort for breach of these rights. Unfortunately, treatment of the right to, and protection of, a clean and healthful environment by the Montana Supreme Court and legal scholars has made answers to these questions unclear.

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175. Elison & Snyder, *supra* n. 163, at 169.

176. *Id.*

177. *Id.*

178. *Montana Constitutional Convention Proceedings*, *supra* n. 163, at vol. 4, 1201 (emphasis added).

179. Mont. Code Ann. § 75-1-102(1) (2011).

180. Mont. Code Ann. § 75-1-103(2).

C. *The Question of Whether the Right to a Clean and Healthful Environment is Self-Executing*

Constitutional rights that address language to the legislature are not “self-executing” and require legislative action to make them effective.<sup>181</sup> Those addressed to the courts are deemed self-executing.<sup>182</sup>

1. *Treating the Right as Self-Executing*

The inclusion of the fundamental right to a clean and healthful environment in the Montana Constitution makes questions of self-execution arguably moot. Determining whether the right is self-executing is important because a constitutional tort for the violation of a right can only exist for self-executing rights. If a right is not self-executing, those who violate the right will argue that it can provide no basis for a tort, unless the legislature has activated the provision through legislation.

In 1999, the Montana Supreme Court first addressed the question of whether the right to a clean and healthful environment was self-executing in *MEIC*.<sup>183</sup> The Montana Legislature had amended the Water Quality Act by passing Montana Code Annotated § 75–5–317(2)(j), which excluded certain activities from review under the Act’s non-degradation policy.<sup>184</sup> The Seven-Up Pete Joint Venture applied for a massive open-pit gold mine in the upper Blackfoot River valley and petitioned to dump and mix arsenic-contaminated waters into receiving waters of the Blackfoot and Landers Fork Rivers.<sup>185</sup> Under § 75–5–317(2)(j), the DEQ approved the dumping. Plaintiffs contended that the statute created an unconstitutional blanket exclusion from review where the facts could show degradation would occur.<sup>186</sup> The Court held the statute unconstitutional for violating Article IX, §§ 1 and 3 of the Montana Constitution because it allowed discharges from well-water tests to degrade high quality waters without review under Montana’s non-degradation policy found at Montana Code Annotated § 75–5–303(3).<sup>187</sup>

More importantly, the *MEIC* Court held the right to a clean and healthful environment contained in the Montana Constitution was fundamental<sup>188</sup> and said the mere degradation of water quality without actual injury is suffi-

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181. *Columbia Falls Elementary Sch. Dist. v. State*, 109 P.3d 257 (Mont. 2005).

182. *Id.*

183. *MEIC*, 988 P.2d at 1244.

184. *Id.* at 1241; Mont. Code Ann. § 75–5–317(2)(j) (1995).

185. *MEIC*, 988 P.2d at 1237–1238.

186. *Id.* at 1241.

187. *Id.* at 1249; Mont. Code Ann. § 75–5–303(3) (1995).

188. *MEIC*, 988 P.2d at 1246.

cient to implicate the fundamental right, triggering strict scrutiny analysis:<sup>189</sup>

[W]e conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute *or rule* which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.<sup>190</sup>

Moreover, even though it is not found in the Declaration of Rights, the Court went on to apply strict scrutiny to Article IX, § 1 as well.<sup>191</sup> The Court determined that "the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the constitution's framers to be interrelated and interdependent and that state or private action which implicates either, must be scrutinized consistently."<sup>192</sup> The Court consequently stated that it would apply strict scrutiny to actions implicating either Article II, § 3 or Article IX, § 1.<sup>193</sup>

Having established the interdependent relationship between the two provisions after a thorough review of debate and discussion in the 1972 Constitutional Convention, the Court concluded that they must be applied in tandem.<sup>194</sup> The Court supported this conclusion by quoting delegate McNeil:

Subsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*.<sup>195</sup>

The Court then said:

We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections

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189. *Id.* at 1249.

190. *Id.* at 1246 (emphasis in original).

191. *Id.* at 1245–1246.

192. *Id.* at 1246.

193. *Id.* at 1246.

194. *MEIC*, 988 P.2d at 1246.

195. *Id.* at 1247–1248 (emphasis in original) (citing *Montana Constitutional Convention Proceedings*, *supra* n. 163, at vol. 4, 1201).

which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. The delegates repeatedly emphasized that the rights provided for in subparagraph (1) of Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.<sup>196</sup>

The *MEIC* decision certainly supports the conclusion that the constitutional right to a clean and healthful environment is self-executing. In 2001, Professors Larry Elison and Fritz Snyder of the University of Montana School of Law wrote that delegates intended it to be self-executing "for those whose health or property may be affected."<sup>197</sup> In addition, Elison and Snyder asserted that the delegates intended to guarantee to this and future generations a clean and healthful environment.<sup>198</sup> After *MEIC*, Barton Thompson drew the conclusion that "the Montana constitutional provisions, whether advisable or not, are self-executing . . ."<sup>199</sup>

The *MEIC* decision was harshly criticized, however, by Professor John Horwich of the University of Montana School of Law,<sup>200</sup> who said that the decision assumed the provisions were self-executing without deciding the issue of whether they actually were.<sup>201</sup> Particularly troubling was the fact that Article IX, § 1 specifically provided that: "The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."<sup>202</sup> Horwich noted that the practice in other appellate courts (whose decisions he alleged the Court ignored) was to treat such provisions as enforceable by courts only when the legislature had acted as required, which was not the case when *MEIC* was decided.<sup>203</sup>

In 2001, hard on the heels of *MEIC*, the Court in *Cape-France Enterprises v. Estate of Peed* invoked the constitutional right to a clean and

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196. *Id.* at 1249.

197. Elison & Snyder, *supra* n. 163, at 33 (citing Mont. Const. Conv. Verbatim Transcr., *supra* n. 163, at vol. 5, 1645).

198. Elison & Snyder, *supra* n. 163, at 33 (citing Mont. Const. Conv. Verbatim Transcr., *supra* n. 163, at vol. 5, 1637).

199. Thompson, *supra* n. 165, at 160.

200. John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 Mont. L. Rev. 269 (Summer 2001).

201. *Id.* at 284.

202. Mont. Const. art. IX, § 1 (internal numbering omitted).

203. Horwich, *supra* n. 200, at 282–287.

healthful environment, voiding a contract between private parties.<sup>204</sup> Peed entered a contract to purchase five acres of land near Bozeman, Montana from Cape-France under a provision that the buyer had responsibility for acquiring water for the proposed subdivision.<sup>205</sup> When Peed applied for a drilling permit, the DEQ advised Cape-France that there was a pollution plume in the groundwater near the property; that they would have to drill a test well for the pollution; and that, if the pollution spread as a result of drilling of the wells, Cape-France would be liable for the environmental damage.<sup>206</sup> On cross motions for summary judgment, the district court ruled that the agreement could be rescinded on the basis of mutual mistake of fact and impracticability and impossibility of performance.<sup>207</sup> Peed appealed.<sup>208</sup>

In resolving the matter on appeal, the Montana Supreme Court invoked the guarantee of Article II, § 3 that all persons in this State have a right to a clean and healthful environment.<sup>209</sup> The *Peed* decision noted that if the parties were to proceed with the subdivision, “the public would be exposed to potential health risks and possible environmental degradation.”<sup>210</sup> Again, the *Peed* decision confirmed the interrelationship of the “clean and healthful environment” provision with the mandate of Article IX, § 1 that “the State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”<sup>211</sup> The Court pointed out that in *MEIC* it recognized that “the text of Article IX, Section 1 applies the protections and mandates of this provision to private action—and thus to private parties—as well.”<sup>212</sup> The Court continued by reasoning that the subdivision would violate the protections and mandates of the constitutional provisions for a clean and healthful environment. Thus, because the object of the contract was unlawful, the Court voided it.<sup>213</sup>

Notably, *Peed* used the constitutional right to a clean and healthful environment to void a contract between two private litigants. *Peed*, like *MEIC*, certainly appeared to be based on a self-executing constitutional right to a clean and healthful environment. The decisions that would follow *MEIC* and *Peed*, however, are mystifying in that they do not appear to fol-

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204. *Cape-France Enters. v. Est. of Peed*, 29 P.3d 1011, 1016–1017 (Mont. 2001).

205. *Id.* at 1013.

206. *Id.*

207. *Id.* at 1014.

208. *Id.* at 1012–1013.

209. *Id.* at 1016.

210. *Peed*, 29 P.3d at 1016.

211. *Id.* at 1017 (ellipses omitted).

212. *Id.* (citing *MEIC*, 988 P.2d at 1246).

213. *Id.* at 1017.

low, distinguish, or repudiate those cases. As the reader will see, the Court treated them as if they did not exist.

## 2. *Treating the Question of Self-Execution as Unanswered*

In 2002, in *Dorwart v. Caraway*,<sup>214</sup> the Court posed this broad question: “Does a violation of rights guaranteed by the Montana Constitution give rise to a cause of action for damages?”<sup>215</sup> The Court noted that “[b]y 1998, twenty-one states had recognized an implicit cause of action for state constitutional violations,” while three states indicated they would do so under narrow circumstances, and four had statutory provisions recognizing such actions.<sup>216</sup> Seven states specifically rejected constitutional causes of action.<sup>217</sup> In answering the question, the Montana Supreme Court relied on the United States Supreme Court’s decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>218</sup> and the English common-law principle that a violation of individual rights preserved in a fundamental document could be remedied by a traditional action for damages.<sup>219</sup> The *Dorwart* Court followed *Bivens* and § 874A of the *Restatement (Second) of Torts*, holding that a person could recover money damages if the government violated the rights guaranteed by Article II, §§ 10 (right of privacy), 11 (freedom from unreasonable search and seizure), or 17 (right to due process) of the Montana Constitution.<sup>220</sup> The Court concluded that those three constitutional provisions were self-executing.<sup>221</sup> *Dorwart* made no comment on *MEIC* or *Peed*.

The Court limited its holding to rights of privacy, due process, and freedom from unreasonable searches and seizures because they protect from wrongs committed by persons acting with the authority of the state, distinguishable from wrongs committed by a private individual.<sup>222</sup> Notably, the Court asserted “Constitutional rights that cannot be enforced are illusory. It is as if those rights cease to exist as legal rights.”<sup>223</sup> Justice Nelson specially concurred, arguing that provisions of the Montana Constitution guaranteeing fundamental rights are self-executing.<sup>224</sup>

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214. *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002).

215. *Id.* at 133.

216. *Id.*

217. *Id.*

218. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

219. *Dorwart*, 58 P.3d at 134–135.

220. *Id.* at 136.

221. *Id.* at 141.

222. *Id.* at 136.

223. *Id.* at 145 (quoting *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 13 (Mont. 2002) (Nelson, J., concurring)).

224. *Id.* at 147 (Nelson, J., specially concurring).

Both proponents and opponents of a self-executing right cite *Columbia Falls Elementary School District No. 6 v. Montana*<sup>225</sup> to support their positions. There, the Court said, “[t]o determine whether the provision is self-executing, we ask whether the Constitution addresses the language to the courts or to the Legislature. If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing.”<sup>226</sup> However, the Court also said that “provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own,” giving the Courts, as final interpreters of the Constitution, the “obligation to guard, enforce, and protect every right granted or secured by the Constitution.”<sup>227</sup>

Under *Columbia Falls Elementary School District No. 6*, the right to a clean and healthful environment provided by Article II, § 3 would be addressed to the courts and therefore self-executing. On the other hand, the protection of the environment under Article IX, § 1 is clearly addressed to the Legislature. In 1942, the Montana Supreme Court in *State ex rel. Stafford v. Fox-Great Falls Theater Corp.*<sup>228</sup> established the “*Stafford* rule” that non-self-executing clauses of the Constitution present non-justiciable political questions that depend on the Legislature for execution.<sup>229</sup> However, the fact that in *MEIC* the Court found the two clauses to be so interrelated that they must be read together and protected under a strict scrutiny standard likely overrides *Stafford*’s simple rule. Moreover, the right to a clean and healthful environment is the only right guaranteed by Article II, § 3, and the Court declared it a fundamental right. Therefore, it falls in the class of rights the *Columbia Falls* Court described as “in a category of their own,” giving courts the “obligation to guard, enforce, and protect” it.<sup>230</sup>

In *Sunburst School District No. 2 v. Texaco, Inc.*,<sup>231</sup> the Court again treated the self-execution issue as an open question, as though *MEIC* had never been decided.<sup>232</sup> Remarkably, the Court purported to defer deciding that issue under the principle that it should avoid constitutional issues whenever possible:

The parties fully briefed this question and presented oral argument to the Court. In fact, we expressly framed the issues to be presented at oral argument to include whether “the right to a clean and healthful environment, Article II, Section 3, Constitution of Montana, is self-executing?” This Court re-

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225. *Columbia Falls Elementary Sch. Dist. No.*, 109 P.3d 257.

226. *Id.* at 260 (internal citations omitted).

227. *Id.* at 260–261 (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (ellipses omitted)).

228. *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 132 P.2d 689 (Mont. 1942).

229. *Id.* at 700.

230. *Columbia Falls Elementary Sch. Dist. No. 6*, 109 P.3d at 261.

231. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

232. *Id.* at 1093.



peatedly has recognized, however, that courts should avoid constitutional issues whenever possible. We deem it possible in light of our decision in *Dorwart* to resolve this case without resort to determining whether Article II, Section 3, is self-executing and consequently could support a private cause of action for monetary damages.<sup>233</sup>

Because the *Sunburst* Court adopted *Restatement (Second) of Torts* § 929 to provide for restoration damages, which it considered an adequate remedy to ensure a clean and healthful environment, it was relieved of deciding whether Article II, § 3 was self-executing.<sup>234</sup> In his concurring opinion, Justice Nelson said he read the majority opinion to reject, *per se*, a constitutional tort for violations under Article II, § 3. According to Justice Nelson, the Court's opinion simply held that it was not necessary to discuss the issue in this case and that a future case may require the Court to address the constitutional tort theory.<sup>235</sup>

In her concurrence and dissent, Chief Justice Karla Gray disagreed with the position that Article II, § 3 "compelled" restoration damages, submitting instead that Texaco's argument was that Article II, § 3 was not self-executing.<sup>236</sup> *Sunburst* illustrates that the Court was aware of the implications of any decision as to whether the guarantee of a clean and healthful environment is self-executing and that the majority was unwilling to announce that the right was self-executing or the basis for a constitutional tort. *Sunburst* indicates that, where the landowners have complete legal redress, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties.<sup>237</sup> Justice Nelson left the door open for a future holding that there is a constitutional tort for violation of the fundamental right to a clean and healthful environment.<sup>238</sup>

In 2007, in *Shammel v. Canyon Resources Corp.*, the Court followed the *Sunburst* decision when it denied the plaintiffs' constitutional tort claim because they had adequate, alternative tort claims.<sup>239</sup> The plaintiffs in *Shammel* brought claims for damages caused to their natural water supply by the mining activity of Canyon Resources Corporation.<sup>240</sup> The claims were based in trespass, negligence, nuisance, and constitutional tort.<sup>241</sup> The Court held that the landowners could not support their claims for money damages with the constitutional right to a clean and healthful environment

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233. *Id.* (internal citation omitted).

234. *Id.*

235. *Id.* at 1098 (Nelson, J., concurring) (internal citations omitted).

236. *Id.* at 1110 (Gray, J., concurring in part and dissenting in part).

237. *Shammel v. Canyon Resources Corp.*, 167 P.3d 886, 888 (Mont. 2007).

238. *Id.* at 888.

239. *Id.*

240. *Id.* at 887.

241. *Id.*

because they had adequate tort claims for money damages, including restoration claims recognized in *Sunburst* and the equitable relief of remediation.<sup>242</sup>

*Sunburst* and *Shammel* raise two critical questions with regard to climate-change litigation. First, each case mentioned the apparently pivotal fact that the litigation was between two private parties, raising the question of whether similar litigation would be actionable against a government entity for breach of its duty to address climate change. Second, these cases raise the issue of whether a plaintiff can bring a constitutional tort claim based on climate change if there is potential for redress through traditional tort claims of negligence, trespass, or nuisance. The very nature of greenhouse-gas pollution and the fact that its catastrophic damage will manifest decades from now makes it uncertain that the classic tort remedies will provide full legal redress. In climate-change litigation, *Sunburst* and *Shammel* provide potential authority for recognizing the constitutional tort of breach of duty to provide a clean and healthful environment.

## VII. PRESENT STATUS OF CLIMATE CHANGE LITIGATION

In recent years, federal and state courts have begun processing an increasing array of important climate change lawsuits raising issues of liability and damages. This litigation is occurring while legislative and administrative branches are still ignoring or debating the existence of climate change. The law firm Arnold & Porter, LLP, has created and maintains an excellent, comprehensive chart of climate change litigation in the United States.<sup>243</sup> From its work, it appears that ongoing climate change litigation fits into four basic categories. The first category is statutory claims. Included in this category are claims that aim to force the government to act under the Clean Air Act and climate-regulating statutes. Other statutory claims (including industry lawsuits against government) aim to stop government action under National Environmental Policy Act<sup>244</sup> and similar state and federal administrative procedures acts. Still other statutory claims attempt to regulate private conduct.

The second category consists of common law claims seeking injunctive relief and money damages. This category includes the famous cases of *Connecticut v. American Electric Power*<sup>245</sup> (seeking to enjoin the largest coal fired electrical generating companies in the U.S.), *Native Village of Kivalina v. Exxon Mobil Corporation*<sup>246</sup> (seeking money reparations for

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242. *Id.* at 888.

243. Gerrard & Howe, *supra* n. 88.

244. 42 U.S.C. §§ 4321 et seq.

245. *Am. Elec. Power Co., Inc. v. Conn.*, 131 S. Ct. 2527, 2532 (2011).

246. *Native Village of Kivalina*, 663 F. Supp. 2d at 868.

erosion and loss of the beaches supporting the village), and *Comer v. Murphy Oil USA, Inc.*<sup>247</sup> (seeking damages for increasing the intensity of Hurricane Katrina caused by defendants' contributions to global warming).

The third category of climate actions involves public international law claims, such as the *Inuit Petition to Inter-American Commission on Human Rights*,<sup>248</sup> which would include climate-change actions seeking reparations or other remedies for injury to global peoples or communities already suffering from the effects of climate change.

The fourth category does not directly involve climate-change torts; it is comprised of disputes between climate change deniers and climate change advocates and scientists.<sup>249</sup>

The climate-change actions tracked by Arnold & Porter, LLP, number in the hundreds and have virtually all been filed in the last four years. Some are filed in common law courts, while others consist of petitions for rule making, etc., filed with state and federal agencies. Analysis of the claims indicates that a significant number have been dismissed on grounds such as lack of standing, preemption, or political question. Many of those are on appeal and can be expected, like *Massachusetts v. EPA*, to result in the making of significant appellate law. Climate change litigation will likely involve extensive and prolonged discovery and pretrial motions. Consequently, the tracked cases have not been to trial; the absence of jury verdicts or appeals of jury verdicts is therefore not surprising. As pretrial dismissals are appealed, and as cases reach trial, one can predict that the decisions will create a body of climate change law that will provide a stronger foundation for addressing climate change in the courts.

#### VIII. THE INITIAL APPEARANCE OF PUBLIC TRUST DOCTRINE AND THE MONTANA CONSTITUTION IN CLIMATE CHANGE LITIGATION

The case of *Barhaugh v. Montana* was initiated on May 4, 2011, as a petition invoking the Montana Supreme Court's original jurisdiction to hear legal constitutional issues of major statewide importance in urgent or emergency circumstances that make the normal litigation and appeal process inadequate.<sup>250</sup> The petitioners were twelve Montana youth from grade

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247. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859–860 (5th Cir. 2009).

248. Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States at 70 (available at [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf)) (Dec. 7, 2005).

249. See e.g. *Chamber of Com. of U.S. v. Servin*, 2011 WL 871735 (D.D.C. Mar. 11, 2011); see also *Koch Indus., Inc. v. Does*, 2011 WL 1775765 (D. Utah May 9, 2011).

250. Pet. for Original Jxn. at 2, *Barhaugh v. Mont.*, No. OP 11–0258 (Mont. Sup. Ct. May 4, 2011) (available at <http://supremecourtdocket.mt.gov/search/case?case=14512>); Mont. R. App. P. 14(4); Mont. Const. art. VII, § 2.

school to college age who claimed standing “because their personal and economic well-being . . . [was] threatened with injury by wild fire, loss of water resources, changes in precipitation patterns, extreme weather events, flood, beetle kill and other consequences of climate change.”<sup>251</sup> The petition asked the Court to declare that:

(1) The State holds the atmosphere in trust for the present and future citizens of the state of Montana; and (2) The State of Montana has the affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limitations on the levels of greenhouse gas emissions as necessary to mitigate human-caused climate change.<sup>252</sup>

The litigation arose out of the state’s failure to address global warming in spite of the 54 recommendations in the 2007 report of the Climate Change Advisory Committee.<sup>253</sup> The petition alleged that the State government had unlawfully failed to address greenhouse gas pollution and that the Legislature effectively blocked greenhouse-gas rulemaking proceedings following the EPA’s determination that greenhouse gasses constitute pollutants.<sup>254</sup>

The petition was grounded in the public trust doctrine and the “clean and healthful environment” guarantees of the Montana Constitution as well as the Montana Environmental Policy Act, which incorporated those guarantees and vested the State with “continuing responsibility” to implement them.<sup>255</sup> Petitioners chose to file an original petition with the Montana Supreme Court because the case could have resulted in the Court’s declaration—in 60 days or less—that the State was responsible for protecting the atmosphere under the public trust doctrine. That declaration by an appellate court could be of great assistance as precedent for other climate-change actions.

The Court, however, denied the petition and dismissed the action on procedural grounds, making findings that the petition did not involve purely legal questions and it did not involve urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process.<sup>256</sup> The Court noted that the petition was part of a nationwide effort known as the Atmospheric Trust Litigation<sup>257</sup> and asserted that the Montana action was the only one filed as an original petition on the ground of urgent

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251. Pet. for Original Jxn. at 1, *Barhaugh v. Mont.*, No. OP 11–0258.

252. *Id.* at 16.

253. Montana Climate Change Advisory Committee, *Montana Climate Change Action Plan* at EX–2.

254. Pet. for Original Jxn. at 7–8, *Barhaugh v. Mont.*, No. OP 11–0258.

255. Mont. Code Ann. § 75–1–103(2).

256. Or. 7–8, *Barhaugh v. Mont.*, OP 11–0258 (Mont. Sup. Ct. June 15, 2011) (available at <http://supremecourtdocket.mt.gov/search/case?case=14512>).

257. *Id.* at 2. Atmospheric Trust Litigation (“ATL”) is a volunteer organization of lawyers from many states and a handful of foreign countries which acted in concert for purposes of filing climate

or emergency circumstances.<sup>258</sup> Consequently, the merits could not be heard as an original petition but would have to be filed in a state district court. The decision contains no ruling or dicta relevant to global warming or its causes.<sup>259</sup> As of this writing, the case has not been filed in a state district court, and counsel are evaluating the options.

#### IX. GOING FORWARD

The Montana Constitution and Montana Supreme Court decisions recognizing the public trust doctrine constitute the foundational underpinnings for climate change jurisprudence in this state. Montana law is particularly poised to allow application of the public trust doctrine for the protection of the atmosphere. Two things are necessary, however, for Montana to lead the way in climate change litigation. First, the Court needs to clarify that the fundamental right to a clean and healthful environment found in the Montana Constitution is self-executing, so as to provide a legal basis to protect the air from harmful greenhouse gases. The right to a clean and healthful environment is the first of the fundamental rights mentioned in our Constitution. It becomes meaningless if it exists only insofar as the legislature sees fit to effectuate it. The door is still open for the Court to clarify that it has not overturned or distinguished *MEIC* or *Peed*, which were correctly decided because of the inextricable interrelationship and interdependence of the “right to a clean and healthful environment” clause of Article II, § 3 and Article IX. Second, Montana Courts should apply the public trust doctrine to the air under Article II, § 3 and Article IX, which are in accord with such an expansion. By their nature, common-law doctrines in general and the public trust doctrine in particular are flexible enough to accommodate extensions of the law to fit the needs of society. There can be no more pressing need than the protection of the air that sustains the biosphere.

#### X. CONCLUSION

By virtue of its strong common-law recognition of the public trust doctrine and the environmental provisions of its 1972 Constitution, Montana is a uniquely suited forum for climate-change lawsuits in the civil justice system. Montana jurisprudence includes ample precedent that recognizes and applies the public trust doctrine in protection of navigational and recreational waters. There appears to be no sound theoretical basis for a govern-

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change lawsuits or rule-making petitions in all states in early May 2011. ATL reports to the author that rulemaking petitions or civil suits were filed in 37 states.

<sup>258.</sup> *Id.*

<sup>259.</sup> *See id.*

ment to impose a trust on navigable waters and not navigable air and airways. Moreover, the Montana Constitution provides the underpinnings for using public trust doctrine for protection of the atmosphere and airways.

By its nature, common law has historically been flexible and subject to extension. One would be hard-pressed to cite a situation in human history that makes a more compelling argument to extend the law to protect the public than climate change resulting from global warming. If resort to the judicial branch of government is to have any effect on the climate crisis, those litigating the cases will have to move quickly and seek remedies with the highest impact and most visibility. The public trust doctrine and the environmental provisions of the Montana Constitution may be the most effective tools in the litigation arsenal.