

The Climate Petition and the Public Trust Doctrine

by Amy Poehling Eddy, president, Montana Trial Lawyers Association

[Cover Story, The Montana Lawyer, August 2011](#)

On May 4, 2011, a team of Montana trial lawyers, including Montana Trial Lawyers Association Past Presidents Tom Beers, Elizabeth Best, Randy Bishop, Jim Manley, and Greg Munro, and I filed a petition for original jurisdiction directly with the Montana Supreme Court, asking the Court to enter judgment declaring that the State of Montana holds the atmosphere in trust for the present and future citizens of Montana, and that the state has the affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limitations on the levels of greenhouse gas (GHG) emissions as necessary to mitigate human-caused climate change.

The petition was based on the ancient public trust doctrine, which recognizes a government's fiduciary obligation to protect critical natural resources. The Court ordered the state to file a response, and ultimately denied original jurisdiction, instead indicating the action should be initially filed with the district court. The legal team is currently drafting a complaint to be filed in district court, but this article will outline the legal theories and proceedings to date.

The trial lawyers represented the petitioners without charge, because of their belief that continuation of the present course will be catastrophic for the planet their children and grandchildren will inhabit, and the time for serious action is already here.

Most informed people are aware of global warming and the long-term dangers. Few, however, are aware of the concepts of "feedback loops" and "tipping point." Most of us know that the human-caused planetary heating will raise the Earth's temperature.

In addition, there is broad scientific consensus about "feedback loops," referring to the phenomenon of climate heating causing secondary effects which will themselves cause more heating.

Examples include the melting of the polar ice caps and the release of trapped methane gas under thawing permafrost. As heat-reflecting polar icecaps become heat-storing blue water, planet heating will accelerate. As permafrost melts and releases trapped methane gas – a greenhouse gas 23 times more potent than carbon dioxide – planet heating will accelerate. At some time in the future, the interdependent heating cycles will reach a "tipping point," which is the point scientists identify as the heat level beyond which humans will lose the ability to prevent further heating.

There is wide scientific consensus about feedback loops and tipping points, but the exact date at which the tipping point will occur is uncertain. However, the latest science indicates this may be approaching at an earlier date than most people realize.

While the United States has some of the most comprehensive environmental protection laws in the world, they are ill-equipped to deal with modern environmental concerns, such as climate change, that transcend patchwork regulatory schemes and political discretion.

Through invoking the public trust doctrine, the inherent sovereign power of the government is triggered. Upon a favorable ruling by the Montana Supreme Court, only the issue of how, not whether, to protect the atmospheric trust would be transferred to the Executive and Legislative branches for important policy decisions to be made.

Montana petitioners

The petitioners were 12 Montana youths, ranging in age from 6 to 22, who had an immediate and direct interest in the state's current failure to regulate GHG emissions – despite the state's acknowledgement of the dire statewide consequences of climate change.

The petitioners included Kip Barhaugh, a premed the University of Montana learning about the health-related effects of climate change (as endorsed by the American Medical Association); Emily Howell, an Earth and Planetary Science student at Harvard College who has done field research on mountain pine beetles; and John Thiebes, a Montana State University student who is pursuing a degree in Sustainable Foods and Bioenergy Systems with a focus on sustainable crop production.

Other petitioners alleged injury to current recreational opportunities due to drought, wildfire, beetle kill, and disappearing glaciers, as well as threatened economic injury and health-related concerns. The current and threatened injury to the petitioners' recreational, health, property, and civil rights is sufficient to satisfy standing under *Mont. Env'tl. Information Center. v. Dept. of Env'tl. Qual.*, 1999 MT 248, ¶45, 296 Mont. 207, 988 P.2d 1236.

The relevant scientific community is very clear about the dire consequences this youngest generation will face if this generation of leaders does not act:

Human-caused agents, principally CO₂ from burning of fossil fuels, have driven planet Earth out of energy balance – more energy is coming in than is radiating back to space.

The climate system responds slowly, at least initially, to such forces because the Earth contains over 2-mile-deep oceans and over 1-mile-thick ice sheets that absorb much of the CO₂ we emit.

As a result, today's changes in atmospheric composition will be felt most by today's young people and the unborn, in other words, by people who have no possibility of protecting their own rights and their future well-being, and who currently depend on others who make decisions today that have consequences over future decades and centuries. "*The Case for Young People and Nature*," 2011.

Significantly, based on this scientific evidence, the American Medical Association has taken a leading policy role in highlighting the health-related effects of climate change on vulnerable

populations, including more asthma and respiratory illnesses, more heat stroke and exhaustion, and exacerbation of chronic diseases. The AMA has officially stated:

Ongoing global climate change is now widely accepted by the majority of scientists, climatologists, and meteorologists, and human activity is accelerating this process.

The extent of climate change will depend on many factors; most notably, changes in global greenhouse gas emissions. Anthropogenic contributions to global climate change exist, and the IPCC reports make a compelling case for linkage between these events.

The effects of global climate change may be widespread, with impacts on ecosystems, land composition, sea levels, weather patterns, and ice coverage. The potential exists for devastating events with serious health implications, including extreme heat and cold events, flooding and droughts, increases in vectors carrying infectious diseases, and increases in air pollution. The health effects from these events should be of concern to the medical community and require action.

Original jurisdiction

The petitioners argued that the Montana Supreme Court had original jurisdiction because: (1) the petition raised constitutional issues of major statewide importance; (2) the case involved purely legal questions of statutory and constitutional construction; and (3) urgency or emergency factors made the normal litigation and appeal process inadequate. Mont. Const. Art. VII, § 2; M.R.App. P. 14(4); *The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 2002 MT 280, ¶17, 312 Mont. 420, 59 P.3d 1093. The petition relied on undisputed acknowledgements by the state to demonstrate original jurisdiction was appropriate.

1. Major statewide importance. The Montana Department of Environmental Quality has expressly admitted that climate change poses a statewide imminent and growing threat to the lives and livelihood of the citizens of Montana:

While climate change is the ultimate global issue – with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another – it does manifest itself in particular ways in specific locales like Montana.

During the past century, the average temperature in Helena increased 1.3°F and precipitation has decreased by up to 20 percent in many parts of the state.

Over the next century, Montana's climate may change even more. In this region and state, concerns have been expressed by scientists and conservationists over a range of potential impacts, including:

- Glaciers melting and disappearing in Glacier National Park and elsewhere in the Rocky Mountains.
- A potential decline in the northern Rockies snowpack and stressed water supplies both for human use and cold-water fish.

- Survival of ski areas receiving more rain and less snow, drying of prairie potholes in eastern Montana and a concomitant decline in duck production.
- An increase in the frequency and intensity of wildfires as forest habitats dry out, and perhaps a conversion of existing forests to shrub and grasslands.
- Loss of wildlife habitat.
- Possible effects on human health from extreme heat waves and expanding diseases like Western equine encephalitis, West Nile virus, and malaria.
- Possible impacts on the availability of water for irrigated and dryland crop production alike.

Richard Opper, Director of the DEQ, has likewise acknowledged:

The changes taking place in our beautiful Glacier National Park . . . are becoming symbolic of what lies ahead. When Glacier was designated a national park 100 years ago, 150 glaciers glittered along its mountaintops. Only 27 remain today and they all may be gone by the year 2022, should current weather patterns continue. Perhaps more serious than the visual impact of melting glaciers are the deeper environmental and economic problems associated with a changing climate.

2. Purely legal issue. In light of the state’s undisputed acknowledgement of the problem, the petitioners argued that the petition met the requirement that it only presents legal issues. Existence of legal duties – whether the atmosphere is subject to the public trust, and the state’s affirmative duty to protect the trust resource – are questions of law. *Monroe v. Cogswell Agency*, 2010 MT 134, ¶31, 356 Mont. 417, 234 P.3d 79; *Dukes v. City of Missoula*, 2005 MT 196, ¶ 11, 328 Mont. 155, 119 P.3d 61.

3. Urgency. Again, relying on the state’s undisputed acknowledgement of the problem, the petition demonstrated that there is insufficient time to use ordinary litigation to address the problem.

The DEQ has specifically acknowledged that, “[t]he stakes associated with projected changes in climate are high,” and “[i]t is imperative that we all begin to do what we can to address this crucial issue for our own sake and the sake of the generations of Montanans to come.” The state further acknowledged “[s]cientists know with virtual certainty” human activities are affecting the composition of the atmosphere by releasing large quantities of CO₂ into the atmosphere by burning fossil fuels, deforestation, land uses, and industrial processes.

The scientists the state refers to is the Intergovernmental Panel on Climate Change’s Fourth Assessment Report, which was unequivocal about the dire consequence of human-caused climate change. Those leading scientists have recently issued an updated report related to this litigation:

Earth has experienced a huge range of climate states during its history, but there has never been such a large rapid increase of forces affecting climate as would occur with burning of most fossil fuels this century.

Atmospheric CO₂ is now at 390 ppm, and temperatures have risen only 1.4°F (.8°C) over the last century. Yet already we have had not only changes in weather, loss of sea ice, and expanding subtropics, but we also have evidence of the beginning of the slow feedbacks – melting of tundra with release of methane, submarine release of methane from sea-bed methane hydrates from sea water temperature increases and increasing ice mass loss from Greenland and Antarctica have all been documented.

That these observed effects so far are small suggests that these slow feedbacks may not be a major factor if maximum global warming is only about 2°F (1°C) and then recedes. But ice sheet disintegration and methane releases both have the potential to be highly non-linear, that is, changes can be slow until a tipping point is reached after which more rapid change occurs.

Thus, global warming of 1°C above the 1880-1920 mean, if maintained for long, is already close to or into the “dangerous” zone. We do not know how long, or how much higher we can remain above 350 ppm without irreversibly triggering these slow feedbacks; what we do know is that it is a gamble with immense stakes.

The carbon cycle is well understood. Recent calculations by Hansen et al. show that reducing CO₂ levels to 350 ppm or below is necessary to avoid triggering these feedbacks and restore the Earth’s energy balance, and precisely how fast we must reduce to reach the desired level. The longer we wait to begin reductions, and the more emissions grow in the interim, the worse odds we and future generations will face.

Climate change is the largest crisis humans have ever faced, and despite our inherent psychological tendency to deny anything we do not want to contemplate, we can no longer rationally or reasonably deny the overwhelming scientific evidence that we must act now to stop further travesty.

The urgency leading to the petition being filed was created by the Legislature. In 2005 Governor Schweitzer appointed the Climate Change Action Committee (CCAC) to prepare a Climate Change Action Plan to address the “profound consequences that global warming could have on the economy, environment, and quality of life in Montana.”

The CCAC Action Plan concluded that Montana has a rate nearly double the national average of GHG emissions per capita and recommended a number of measures for Montana to reduce its emissions of GHGs to 1990 levels by the year 2020. Some of the recommendations required legislative action.

Despite these recommendations, the Legislature prevented the State from acting to regulate GHG emissions, despite legal authority to do so.

In 2009, after the EPA determined that GHGs are a pollutant that must be regulated under the federal Clean Air Act, the Montana Board of Environmental Review (BER) initiated rulemaking proceedings for GHG emissions under the Montana Clean Air Act.

However, a legislative committee, the Environmental Quality Council, forced the BER to terminate the GHG rulemaking. The EQC reviews regulations proposed by the DEQ. While the DEQ could have adopted the rules despite the EQC's objection, it recognized any adopted rules would be ineffective for a minimum of two full years.

Because it was undisputed that the Legislative and Executive branches have shown that they view a response to the climate crisis as a matter of political discretion, it became clear that the state's legal obligation would have to be decided by the Judicial Branch. In light of the pure legal question, the clear constitutional duty, and the undisputed record, the petition was filed.

The Montana Supreme Court ultimately ruled the litigation needed to begin at the district court level, which is where a complaint will now be filed.

The public trust doctrine

The public trust doctrine is an ancient legal mandate establishing a sovereign obligation in states to hold critical natural resources in trust for the benefit of their citizens. "The theory underlying [the public trust] doctrine can be traced from Roman Law through Magna Carta to present day decisions."

Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 47, 682 P.2d 163, 167 (1984). The Romans recognized: "The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore." Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things (533). Likewise, under English common law, "There are some few things which . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air, and water . . ." *Geer v. State of Connecticut*, 161 U.S. 519, 668 (1896) (citing William Blackstone, 2 BL Comm. 14). More than a century ago, the U.S. Supreme Court recognized the public trust doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature:

The harbor of Chicago is of immense value to the people of the state of Illinois . . . and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation – one limited to transportation of passengers and freight between distant points and the city – is a proposition that cannot be defended.

Illinois Central Railroad v. Illinois, 146 U.S. 387, 452-453 (1892); see also *Geer*, 161 U.S. at 534 ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.").

Over time, courts have emphasized the flexibility of the doctrine to meet changing societal concerns. "The public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances." *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000). "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.'" *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (internal

citations omitted). “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’” *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998) (internal citations omitted). These cases demonstrate the public trust doctrine is sufficiently broad in scope to apply to the issue presented.

The public trust doctrine is rooted deep within and throughout Montana’s constitution and serves to protect all environmental resources for future generations. Indeed, *Curran* cited with approval a decision of the Minnesota Supreme Court holding that the doctrine protects “public purposes which cannot now be enumerated or even anticipated,” and that to limit the public trust to a narrow test “would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. . . .” *Curran*, 210 Mont. at 50-51, 682 P.2d at 169 (quoting *Lamprey v. State (Metcalf)*, 53 N.W. 1139, 1143 (1893)).

With these constitutional obligations specifically in mind, the Montana Legislature adopted the Montana Environmental Policy Act. MEPA recognized the state had a “continuing responsibility” “to use all practical 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.” Mont. Code Ann. §75- 1-103(2) (emphasis added).

Like other natural assets protected by the public trust, the atmosphere is a fundamental natural resource necessary for our very survival. As team member Jim Manley put it, the atmosphere is “the brain” upon which all other planetary systems rely.

[I]t is only logical that the public trust should protect the atmosphere and all other natural resources that are vital to the people and society at large. No one could seriously argue that the air is not a resource of “special character” that serves purposes “in which the whole people are interested.” Atmospheric health is essential to all facets of civilization and human survival.

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, 80-81 (2009).

The Montana petition was part of a coordinated national effort and is only one of many judicial and administrative actions filed simultaneously in all 50 states. The effort was spearheaded by a group of teenagers who, concluding they had little political or economic power, turned to the Judicial Branch to protect their future from the worst effects of the climate crisis.

Young people across the world organized more than 125 iMatter Marches on May 8, 2011, in conjunction with the filing of the petitions. This is the largest ever youth-led action against climate change and was started by Alec Looz when he was 13 (more about this movement can be found at www.iMatterMarch.org). It was Alec’s message that resonated with the team of trial attorneys in Montana – his generation, the generation that will be most hurt by climate change, is counting on our leaders to protect their future, and those leaders aren’t doing anything about it.

As eloquently stated by one of the world's leading climate scientists on the impacts of global warming caused principally by CO2 emissions from the burning of fossil fuels:

It is a matter of morality – a matter of intergenerational justice. The blame, if we fail to stand up and demand a change of course, will fall on us, the current generation of adults. Our parents honestly did not know that their actions could harm future generations. We, the current generation, can only pretend that we did not know.

Trial lawyers devote their careers to protecting people and the environment in the pursuit of justice. At this moment in time, there could be no greater calling than for trial lawyers across this country to devote their time, perspective and litigation expertise to this effort, and we hope more attorneys here in Montana will do the same.