

by Ed Berry, PhD

With the help of about 120 dedicated Montanans and *Climate Physics LLC*, Montana's Climate Change Freedom Day occurred on June 15, 2011. Here's the story of how it happened.

### **The phone call.**

On Thursday, May 19, at 1:42 pm, Gary Marbut called me. I answered and he asked,

"Why are you breathing so heavily?"

I said, "I was in the middle of a 400-meter run when I stopped to answer your call."

He said,

"An environmental group *Our Children's Trust* from Oregon filed a *Petition for Original Jurisdiction* in the *Montana Supreme Court* on May 4 about climate change. Our supreme court has allowed until Monday, June 6, for public response."

Finally getting my breath, I said,

"I know how to beat them on the science, but June 6 gives us only 2 weeks to organize a whole legal response ... and we don't even have a lawyer."

We asked each other,

"Can we trust our Democratic Attorney General to take a firm stand against the Petition?"

Gary and I agreed someone must take a stand to protect Montana. We could not risk a loss on this because it would be very costly to Montana's citizens.

Gary said, "I will help you find a good lawyer."

During the next week, I asked the Montana Farm Bureau and other organizations if they planned to file an Intervention. I called lawyers.

In every case, I found no organization or lawyer willing to stand up for Montana against the Petition. They all seemed lost when it came to rebutting the Petition's scientific claims.

### **Gary finds a lawyer.**

On Thursday, May 26, with one week to go, Gary called, saying,

"I found a good attorney who will handle our case. He is Quentin Rhoades. He has done other work like this, and he is willing and available to take this job."

I called Quentin, who said,

"I will be your attorney and work at my best discount rate and I can begin work immediately. But I need a client willing to sign our legal agreement."

We had no time to lose, so I told Quentin,

"I will sign as client so we can get moving."

So, I guaranteed to pay Quentin's fee. I had no idea what the cost would be. After we win, I would ask for donations to help pay my costs. I trust the good people of Montana to support a worthy cause.

We needed to file our *Motion to Intervene* by the following Friday, June 3, to meet the Monday, June 6, deadline and to give our AG time to read our Motion before he filed his statement.

We had one week to construct our whole defense against a petition developed over months by a full team of expert lawyers. One week!

Quentin and I worked full-time and overtime for the next week to prepare our Intervention. Quentin's group organized our List of Intervenors.

**Senator Jason Priest** (R) SD 30, Red Lodge, MT, and **Representative Krayton Kerns** (R) HD 58, Laurel, MT, really went to bat to organize Intervenors from our state legislature. Their work was crucial. Since the Petition faulted our legislature, the petitioners would be in a weak position to argue that our legislative Intervenors did not have "standing" to intervene.

**Quentin filed our Intervention on Friday afternoon, June 3, as planned.** Our *Motion to Intervene* included 118 Intervenors, with 13 minor children, 15 state representatives, 7 state senators, and 8 elected state officials.

Now we waited for the AG filing and the court decision.

**Here are the fundamental claims the Petition made, which are absurd because they assume, in contradiction to data, that human CO<sub>2</sub>, not nature, causes the effects they list:**

1. A scientific consensus exists that increasing emissions of greenhouse gases (GHG) are affecting the Earth's climate.
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 (GHG) emissions as necessary to mitigate human caused climate change.
3. Petitioners have standing ... because their personal and economic well-being is directly and uniquely dependent upon timber, wilderness, water and weather; and is threatened with injury by wildfire, loss of water resources, changes in precipitation patterns, extreme weather events, flood, beetle kill and other consequences of climate change.
4. The Montana Department of Environmental Quality (MDEQ) has expressly admitted 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.

5. 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 dry land crop production alike.

6. Richard Opper, Director of the MDEQ, claimed, without evidence, that human CO2 emissions have caused these effects across Montana:

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.

7. Considering the scientific evidence cited by the Respondent (e.g., the State of Montana as run by Governor Schweitzer), **there is not enough time to effectively arrest the effect of human-caused climate change unless immediate action is taken.**

8. MDEQ says,

- The stakes associated with projected changes in climate are high, and it 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. Climatological "tipping points" lie directly ahead and drive the urgency of taking action.

- The farther we look into the future, the worse that the costs of inaction will become. The longer we do nothing, the greater the risks of an irreversible climate catastrophe, such as a massive rise in sea levels that could make the world unable to support anything like the current levels of population and economic activity. The costs and risks of inaction are overwhelmingly worse than the moderate and manageable costs of an immediate effort to reduce carbon emissions.
9. The State admits “scientific consensus [exists] that increasing emissions of greenhouse gases (GHG) are affecting the Earth’s climate.”
  10. Further, the State acknowledges that scientists “*know with virtual certainty*” that human activities are affecting the composition of the atmosphere by releasing large quantities of CO<sub>2</sub> into the atmosphere by burning fossil fuels, deforestation, land uses, and industrial processes. The resulting measurable increase of carbon dioxide and other greenhouse gases links to rising global temperatures.
  11. The adverse consequences of unregulated GHG emissions are so threatening that 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.”
  12. The subsequent Action Plan determined that “a 14% increase in GHG emissions from 1990 to 2005 moved Montana from a net carbon sink to a net carbon emitter.” It determined Montana also has a higher rate of GHG emissions per capita – nearly double the national average.
  13. The Action Plan recommended a number of measures for Montana to “reduce its emissions of GHGs to 1990 levels by the year 2020. Some of the recommendations can be implemented immediately and some will require the support of the Montana State Legislature.”
  14. This record establishes beyond dispute that the legislative and executive branches consider the State’s response to the climate crisis – which the State fully recognizes exists – to be a matter of political discretion, not legal obligation.
  15. Petitioners respectfully submit that it therefore falls to the judicial branch, and uniquely to this Court, to exercise original jurisdiction to decide the scope of the duty imposed by Montana’s constitution and statutes to preserve and protect the atmospheric trust for present and future generations, and whether that duty allows continued inaction by the political branches.

**Based upon the above invalid assumptions, the Petitioners declared:**

- (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 (GHG) emissions as necessary to mitigate human-caused climate change.

**Here's the problem with the Petition's so-called scientific claims:**

MDEQ and Governor Schweitzer's CCAC are political organizations, not scientific organizations. There is not a known climate scientist among them.

MDEQ Director Richard Opper, not a climate scientist, parrots disproven, over-repeated, environmentalist claims about climate change cause and effect.

The Petition uses political statements of MDEQ and CCAC as if they were scientific authority and ignores mountains of scientific evidence disputing their claims.

The Petition has not described any hypothesis capable of making valid predictions. In short, the Petition makes claims without any evidence. This is pseudo-science.

In summary, the Petition's claims are scientific nonsense.

**Here's why we needed to Intervene:**

No court in Montana or America has ever subjected the Petition's claims to legal review. Otherwise, the Petition would have merely cited such a court decision. In this case, the petitioners were looking for a backdoor to establish a precedent without having to prove their claims.

Neat. Or should I say, "Nice try"?

Had no Intervenor objected to the Petition's claims, Montana's our supreme court would have accepted the Petition's claims as fact. Such acceptance would have established a precedent that the claims were correct, and it would have been very difficult and costly to overturn such a precedent.

Therefore, it was urgent that we took a stand for scientific truth by Intervening in the Petition's claims.

**Here's how we rebutted the Petition's foundational claims:**

We do not need an elaborate scientific argument. We only needed to show evidence that many qualified climate scientists disagree with the Petition's claims. We did this by referencing two comprehensive scientific reports. Our *Motion to Intervene* included:

1. A 321-page "*Climate Depot Special Report*" compiled by Marc Morano
2. *The Heartland Institute's "Nature, Not Human Activity, Rules the Climate"* edited by S. Fred Singer.

**Statement by Attorney General Bullock**

On June 7, we received a copy of Attorney General Bullock's statement. He took our side against the Petition and concluded:

In addition, [the Petition] would need to address, among other issues, the current state of climate change science; the role of Montana in the global problem of climate change; how emissions created in Montana ultimately affect Montana's

climate; whether the benefits of energy production must be balanced against the potential harm of climate change; and the concrete limits, if any, of the alleged "affirmative duty."

Here, the relief Petitioners seek is a declaration of a general "duty" that will not have direct or immediate effect on the State or on greenhouse gas emissions. Petitioners presumably seek to use such a declaration as legal precedent in future suits or petitions for rule making, in which case this Court will again consider these issues on appeal. Whatever concrete action Petitioners seek at the end of the extensive administrative, legislative, or judicial proceedings that they contemplate, it is not imminent or urgent.

The Petition said that we must address climate change. The attorney general is saying we must address the Petition's claims about climate change.

Our *Motion to Intervene* introduced the argument that the Petition's claims need addressing.

### **The Montana Supreme Court Decision**

On June 15, the Supreme Court's decision dismissed the Petition, saying,

Petitioners further contend that this trust imposes on the State the affirmative duty to protect and preserve the atmosphere, including establishing and enforcing limitations on the levels of greenhouse gas emissions as necessary to mitigate human-caused climate change.

The petition incorporates factual claims such as the State "has been prevented by the Legislature from taking any action to regulate [greenhouse gas] emissions". The State posits that the relief requested by Petitioners would require numerous other factual determinations, such as the role of Montana in the global problem of climate change and how emissions created in Montana ultimately affect Montana's climate.

We conclude this case does not involve purely legal questions. This Court is ill equipped to resolve the factual assertions presented by Petitioners.

We further conclude that Petitioners have not established urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process.

The Montana Supreme Court said the Petition's claims about climate change are not factual.

### **Rep. Krayton Kerns emailed me,**

"Had you not stepped up with the motion to intervene the AG's response would have been tepid at best. Once your position was filed, he had no choice but to maneuver to the right of your motion, because to pussy-up then would have destroyed any future political ambitions."

## **Conclusion**

Thanks to many who stood together to defend Montanans against *Our Children's Trust*, Montana became the first state in America to rule that the science of climate change is NOT settled. The court further required that environmental claims about climate change must be resolved in a lower court before a ruling or law can be made based upon the environmental claims.

## **A final request.**

Please support [Climate Physics LLC](#) and the team that saved Montana from the environmental absurdity and economic disaster of the Climate Change Petition. Help give *Climate Physics* the monetary foundation to stand up to future environmental attacks.