

Climate Change Litigation: The Montana Precedent

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Climate change litigation is falling into pressing fashion. In Australia, the 2021 case of [Sharma](#), despite eventually failing before three judges in the Federal Court in 2022, suggested that ministers had been put on notice regarding a potential duty of care regarding the consequences of approving fossil fuel projects.

The lower court decision had shaken the fossil fuel industry with its finding in favour of the eight children and their litigation guardian, an octogenarian nun. Justice Bromberg found that considering the potential harm arising from carbon dioxide emissions was a mandatory consideration of the *Environment Protection and Biodiversity Conservation Act*. The Minister for the Environment also had a duty of care given that it was reasonably foreseeable that the Australian children would face a risk of harm in extending the mine project. Furthermore, the Minister had control over that risk, given that she could approve the extension, and that the children were vulnerable to a real risk of harm arising from climatic threats.

While the three Federal Court justices disagreed with Justice Bromberg's reasoning, rejecting his finding that the minister needed to consider the potential harm arising from greenhouse gas emissions to the children under the EPBC, one of the justices did leave room for a future consideration about finding a duty of care.

In Montana, a court has found in favour of 16 individuals aged from 5 to 22 who argued that their constitutional right to a clean and healthful environment was violated by permitting fossil fuel projects. Only a smattering of states in the US, including Hawaii, Illinois, New York, Massachusetts, and Pennsylvania, have enshrined environmental protections in their constitutions. The Montana constitution specifically enumerates that "the state and each person shall maintain and improve a clean and healthful environment ... for present and future generations."

In her [August 14 decision](#), District Court Judge Kathy Seeley specifically held that the policy

of evaluating fossil fuel permits, a process that did not permit agencies to consider greenhouse gas emissions, was unconstitutional. “Every additional ton of GHG (greenhouse gas) emissions exacerbates the plaintiffs’ injuries and risks locking in irreversible climate injuries.” As it stood, the policy had already contributed, unlawfully, to “depletion and degradation” of the state’s environment.

The judge refused to accept the state’s contention that Montana’s environmental role was miniscule and insignificant in the scheme of such emissions, and that stopping carbon dioxide emissions would have no effect in any tangible way given the global contributions of other countries.

Talking heads have expressed a range of views about the significance of the decision. Michael Gerrard of Columbia University’s Sabin Center for Climate Change [called](#) the *Held* decision “the strongest decision on climate change ever issued by any court.”

Richard Lazarus, Harvard Law School professor, suggests that the impact of the decision should not be exaggerated, though nonetheless accepted its singular nature. (The decision is the first of its kind in the US.) “To be sure, it is a state court not a federal court and the ruling is based on a state constitution and not the US Constitution,” he [stated](#) to the Associated Press, “but it is still clearly a major, pathbreaking win for climate plaintiffs.”

James Huffman of the Portland-based Lewis & Clark Law School was even [less impressed](#). “The ruling really provides nothing beyond emotional support for the many cases seeking to establish a public trust right, human right or federal constitutional right.”

Indeed, the judge’s finding is also hampered by a failure to enforce the remedial right. The plaintiffs can only expect the Montana legislature to implement policies that do not violate entitlements to a clean environment, suggesting that the right is negative in nature. It involves no imposition of any duty to adopt a GHG mitigation strategy.

That said, the state regulator now faces the prospect of having to consider climate effects and greenhouse gas emissions regarding current projects, [including](#) the \$283 million, 175 MW gas-fired powerplant under construction on the Yellowstone River south of Billings. As Seeley noted, construction on the project was initially paused as a consequence of an April court ruling that the Department of Environment Quality had erred in not considering the effects of an estimated 23 million tons of GHG emissions. Work had resumed, however, after the legislature’s amendment to the state energy law explicitly preventing state agencies from considering “an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state’s borders.” Such a resumption of construction had taken place in the absence of any review about the “cumulative impacts of the permits [the regulator] issues on GHG emissions or climate change.”

Seeley also noted that four private coal power plants have been authorised to produce 30% of Montana’s energy needs “without considering how the added GHG emissions will contribute to climate change or be consistent with the standards the Constitution imposes” on the state’s entities “to protect people’s rights.”

The Montana legislature, which remains the least impressed of all, promises to appeal the decision, and they, as with the Australian Commonwealth in the *Sharma* case, might well succeed. Emily Flower, spokesperson for the state’s attorney general, Austin Knudsen, [restated](#) the government position that those in Montana “can’t be blamed for changing the

climate.” The legal theory being tested “has been thrown out of federal court and courts in more than a dozen states. It should have been here as well.”

Despite such consternation and opposition from legislatures, a judicial clearing is being made for plaintiffs keen to drag lawmakers and decision-makers away from blithe complacency and comfortable accommodation with the fossil fuel lobby. Ecological sustainability, in time, promises to become a matter, not merely of express rights as solemnly implied ones.

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