# RECENT CASES

ENVIRONMENTAL LAW — CLIMATE CHANGE — MONTANA COURT HOLDS THAT MONTANA YOUTH CAN ACCESS EQUITABLE RELIEF FOR CLIMATE IMPACTS. — *Held v. State*, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023).

Climate litigation has emerged[1] as a means of addressing the existential threat of "irreversible impacts" posed by anthropogenic climate change.[2] While such litigation under federal law has encountered challenges,[3] activists and litigants have continued to pursue state law claims through varying approaches, including via common law claims under tort law.[4] Additional causes of action have since arisen in states that have added a right to a quality environment to their constitutions: Hawai'i, Illinois, Massachusetts, Montana, New York, and Pennsylvania.[5] Recently, in *Held v. State*,[6] a state trial court in Montana found the State in violation of its own constitutional environmental protections — the first affirmative ruling of its kind.[7] Consequently, *Held* reveals a viable complement to tort litigation in the fight for climate accountability. It demonstrates how constitutional protections may ease challenges for litigants and extend accountability to governments for aggregate climate impacts.

On March 13, 2020, sixteen Montana youth residents initiated litigation against Montana,[8] alleging that the State's role in exacerbating climate change violated the State's constitutional provision guaranteeing a "clean and healthful environment."[9] Their lawsuit challenged "fossil fuel–based provisions" of the State's energy policy, including directives to promote natural gas, petroleum, and oil and gas.[10] It also challenged

---

[1] *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2021 SNAPSHOT 10 (2021).

[2] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 3, 8 (Valérie Masson-Delmotte et al. eds., 2021).

[3] *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020) (dismissing for lack of standing litigation levying constitutional claims against federal government's failure to phase out fossil fuels).

[4] Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENV'T AFFS. L. REV. 1, 3 (2007).

[5] John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis*, *in* ENVIRONMENTAL LAW BEFORE THE COURTS: A US–EU NARRATIVE 35, 36 (Giovanni Antonelli et al. eds., 2023).

[6] No. CDV-2020-307 (Mont. Dist. Ct. Aug. 14, 2023).

[7] Press Release, Our Child.'s Tr., Sweeping Constitutional Win for *Held v. State of Montana* Youth Plaintiffs 2 (Aug. 14, 2023), https://static1.squarespace.com/static/571d109b04426270152febe0/t/64da6d67161d05783fbca2f9/1692036457635/08.14.2023+Montana+Climate+Youth+Win.pdf [https://perma.cc/FN5R-PNMJ].

[8] Complaint for Declaratory and Injunctive Relief at 104, *Held*, No. CDV-2020-307.

[9] *See Held*, slip op. at 96; *see also id.* at 1, 9.

[10] *Id.* at 2 (citing MONT. CODE ANN. § 90-4-1001(1)(c) to (g) (2021)).

a provision of the Montana Environmental Policy Act[11] (MEPA) that "forbids the State and its agents from considering the impacts of greenhouse gas (GHG) emissions or climate change" in any environmental review.[12] The youth plaintiffs challenged both these provisions and any aggregate impacts that may have resulted from the State's actions pursuant to the energy policy or the MEPA limitation.[13] They sought injunctive relief to prevent Montana and its agents from continuing to act in accordance with the energy policy, and for the State to prepare a "statewide GHG accounting"[14] and a "remedial plan" to lower statewide emissions.[15] The suit also requested declaratory relief stating that the MEPA limitation and its corollary impacts were unconstitutional under Montana's constitution.[16] The State moved to dismiss the youth plaintiffs' case on multiple grounds.[17] However, the court declined and noted that it maintained authority to grant declaratory or injunctive relief, though not the power to order a remedial plan.[18]

Two key developments occurred between the initial filing date in March 2020 and August 2023 when the *Held* court handed down its final opinion. First, in early 2023, Montana repealed the energy policy; the State subsequently moved to dismiss the youth plaintiffs' related claims.[19] After some procedural discussion, the court eventually dismissed all claims regarding the impacts of the energy policy.[20] Second, in response to a narrow judicial interpretation of the MEPA limitation,[21] the state legislature amended the MEPA limitation to more explicitly prohibit "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" in reviews.[22] The State accordingly filed a motion to dismiss the youth plaintiffs' claims regarding the MEPA limitation in light of these changes.[23] However, upon reviewing the new language in the MEPA limitation, the Montana Supreme Court observed that the amendments did not substantially change the content or the allegations outlined in the youth

---

[11] MONT. CODE. ANN. §§ 75-1-101 to -324 (2021).

[12] *Held*, slip op. at 2 (citing MONT. CODE ANN. § 75-1-201(2)(a) (2021)).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 3.

[16] *Id.* at 2.

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.* at 6. The State argued that any claims related to the energy policy were moot. *Id.*

[20] *Id.* at 8.

[21] *Id.* at 70. A separate Montana court interpreted the MEPA limitation to not explicitly preclude consideration of GHG emissions as they relate to their impact within Montana. *See id.* (citing Mont. Env't Info. Ctr., Inc. v. Mont. Dep't of Env't Quality, No. DV-56-2021-1307 (Mont. Dist. Ct. Apr. 6, 2023)).

[22] *Id.* at 7 (quoting H.B. 971, 68th Leg. (Mont. 2023)).

[23] *Id.*

plaintiffs' complaint.[24] As a result, the *Held* court ruled on the constitutionality of the amended MEPA limitation alone.[25]

Judge Seeley of the First Judicial District Court of Montana ruled that Montana had violated the State's constitutional guarantee to a clean and healthful environment.[26] In conducting fact-finding, the court considered the impacts, causes, and scientific background of climate change.[27] It concluded that there was an "overwhelming scientific consensus"[28] that human activity and GHG emissions have directly caused global warming and that fossil fuel consumption and carbon dioxide emissions have caused Montana temperatures to rise.[29] Moreover, each of the sixteen youth plaintiffs testified that they had faced negative effects of climate change.[30] Consequently, the court found that climate change had "acute and chronic"[31] impacts that had doled out both physical and psychological harms, including to the youth plaintiffs, who had experienced distress, anxiety, despair, asthma, economic deprivation, and loss of culture.[32] The court observed that Montana had faced extreme temperatures, increased wildfires, and severe negative effects on Montana's rivers, lakes, wildlife, and forests, and that these impacts "result[ed] in hardship to every sector of Montana's economy."[33] Thus, the court recognized that harms alleged by the youth plaintiffs were attributable to Montana's policies.

Next, the court arrived at its legal conclusions. First, it ruled that the youth plaintiffs had sufficiently established standing to bring their case.[34] The *Held* court explained that section 75-1-201(6)(a)(ii) of the Montana Code, which eliminated the possibility of injunctive relief for MEPA litigants, unconstitutionally limited the ability to obtain preventative equitable remedies, and, therefore, was not a barrier to the youth plaintiffs' standing before the court.[35] It determined that the testimony provided before the court established a "fairly traceable connection" between the MEPA limitation and increased GHG emissions, which ultimately resulted in the youth plaintiffs' injuries.[36] The court determined that these injuries — which could be alleviated if the State were able to

---

[24] *Id.* at 8–9. The Montana Supreme Court reached this conclusion after the State filed an emergency petition for reconsideration of the trial court's earlier denial of summary judgment. *Id.* This emergency petition was denied upon the court's review of the substance of the amended MEPA limitation. *Id.*

[25] *See id.* at 9.

[26] *Id.* at 100.

[27] *Id.* at 17–26.

[28] *Id.* at 19.

[29] *See id.* at 19–21.

[30] *See id.* at 46–64.

[31] *Id.* at 29.

[32] *See id.* at 28–34.

[33] *Id.* at 35; *see also id.* at 35–46.

[34] *Id.* at 86.

[35] *Id.* at 86–90.

[36] *Id.* at 87.

deny certain permits for fossil fuel activities after taking into consideration that the permit may facilitate GHG levels "inconsistent with protecting Plaintiffs' constitutional rights" — connected back to the State's policies.[37] To that end, the court ruled that a GHG emission reduction could redress the youth plaintiffs' injuries.[38]

Once standing was established, the court determined that the MEPA limitation infringed upon the constitutionally guaranteed rights of the youth plaintiffs, as it prevented the State from making "fully informed"[39] and "scientifically supported" decisions in their environmental analyses.[40] The opinion emphasized that both versions of the MEPA limitation prevented the State from considering the impacts of GHG emissions — impacts of which the State was informed and aware.[41] This prohibition prevented the State from "comply[ing] with the Montana Constitution and prevent[ing] the infringement of Plaintiffs' rights,"[42] the court reasoned, and if declared unconstitutional, the State would be permitted to consider climate change outcomes once again in their decisionmaking.[43] Critically, the court found that Montana's GHG emissions had been increased by the lack of sound environmental review and that Montana had significantly contributed to climate change and its impacts as testified by the youth plaintiffs.[44]

The court then analyzed the youth plaintiffs' claims under article II, section 3 and article IX, section 1 of the Montana Constitution.[45] The court analyzed the MEPA limitation under strict scrutiny, as it implicated a constitutionally established fundamental right to a clean and healthful environment.[46] First, the court established, based on plain language and legislative history, that Montana's constitution was intended to afford strong environmental protections preserving Montanans' right to access both reactive and preventative relief.[47] Second, the court determined that, as a result of the MEPA limitation, Montana's climate suffered an unconstitutional degradation.[48] Finally, the court established that the State has a constitutional, affirmative duty to "protect

---

[37] *Id.* at 89.

[38] *Id.*

[39] *Id.* at 74.

[40] *Id.* at 75.

[41] *Id.* at 72–74. The court noted that "State government and scientists have known about the . . . dangers posed by climate change since at least the 1990s," *id.* at 72, and "were again informed by the 2017 Montana Climate Assessment," *id.* at 73. "[T]he State knew how climate change was already harming Montana and its residents . . . ." *Id.*

[42] *Id.* at 75.

[43] *See id.* at 74. The court also outlined prior projects and approvals between 2011 and 2023 that were conducted without a process "consistent with the standards the Montana Constitution imposes on the State to protect people's rights." *Id.* at 75; *see also id.* at 76–79.

[44] *Id.* at 79–80.

[45] *Id.* at 94.

[46] *Id.*

[47] *Id.* at 94–97.

[48] *Id.* at 98.

Plaintiffs' right to a clean and healthful environment, and to protect Montana's natural resources from unreasonable depletion."[49] The court ruled that the MEPA limitation was a facial violation of the Montana Constitution that neither furthered a compelling state interest[50] nor was narrowly tailored, thus failing strict scrutiny.[51] It concluded by ordering the youth plaintiffs' requested remedies, declaring the MEPA limitation and Montana Code section 75-1-201(6)(a)(ii) unconstitutional and ordering both as permanently enjoined.[52]

The conclusions in *Held* are, without doubt, historic. The decision marked the first time in which an American court decided on the merits that a law promoting the use and consumption of fossil fuels infringed upon constitutional rights.[53] In providing affirmative relief, Montana's First District has granted necessary and long-sought relief for the youth plaintiffs, as well as a path forward for future litigants seeking accountability for a harm that transcends borders and individual businesses alike: GHG-driven climate change. Plaintiffs increasingly employ state law,[54] including common law claims of tort and nuisance, when attempting to obtain accountability and judicial relief for climate change and its impacts.[55] These suits have often faced seemingly insurmountable doctrinal barriers, wherein courts find common law claims preempted by federal statute[56] or are wary to recognize wrongdoing. In contrast, *Held* demonstrates how affirmative environmental rights afforded by some state constitutions may provide workarounds to certain traditional roadblocks faced by climate litigants and, in doing so, epitomizes an attractive new frontier for climate litigation.

Climate change litigation has evolved rapidly in recent decades, with litigants bringing claims of tort and nuisance liability to demonstrate harms of climate change. The prospect of bringing state tort and nuisance claims has become more appealing as the Supreme Court maintains that federal common law claims are preempted by broader

---

[49] *Id.* at 99.

[50] No evidence to support a compelling state interest was put forth in support of the MEPA limitation. *See id.* at 101.

[51] *Id.*

[52] *Id.* at 102.

[53] Press Release, Our Child.'s Tr., *supra* note 7, at 2.

[54] State law has been increasingly employed as a mechanism for climate accountability as federal courts have held that legislative efforts, such as the Clean Air Act, preempt and displace any federal tort claims. *See* Jack Wold-McGimsey, Comment, *Climate Change and Modern State Common Law Nuisance and Trespass Tort Claims*, 94 U. COLO. L. REV. 815, 817 (2023); *see also* Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENV'T L.J. 49, 76 (2012) (noting that federal courts lack jurisdiction to hear public nuisance claims). *But see* Wold-McGimsey, *supra*, at 854 (explaining that state common law may face similar preemption issues).

[55] *See* Czarnezki & Thomsen, *supra* note 4, at 2–3.

[56] *See* Wold-McGimsey, *supra* note 54, at 854.

regulatory schemes such as the Clean Air Act[57] (CAA).[58] In determining that Congress has spoken "directly"[59] on the issue of certain types of pollution, the Supreme Court has substantially limited the viability of federal tort claims aimed at curtailing GHG emissions.[60] The viability of state common law claims, however, has also recently been complicated by the potential for federal law to preempt state common law. In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,[61] for example, the Fourth Circuit reasoned that state tort claims with interstate implications must bow to the federal regulatory scheme, citing a need for legal uniformity.[62] More recently, the Second Circuit held that even federal common law can preempt state common law climate change claims due to the global nature of GHG-driven climate change.[63] The implications of this network of preemption are concerning — federal courts very well may determine that state common law is preempted by federal common law, which in turn is preempted by federal statute.[64]

In contrast, a constitutional approach may offer a solution mitigating the "federalization" of climate change litigation. First, state constitutional disputes are generally limited to the confines of state court, as state courts alone are tasked with the interpretation of their state's constitution.[65] Principles of federalism lend credence to this structure and support the independent grant of affirmative rights to state citizens regardless of federal constitutional grants.[66] As such, the Supreme Court has demonstrated that it will defer to state decisionmaking unless there are concerns of violating the Federal Constitution.[67] This practice is demonstrated by the court's ruling in *Held*, which derives squarely from Montana's affirmative constitutional grant of environmental rights.[68] A constitutional holding moves differently than a regulatory or tort claim; it seeks to establish a "liberty interest[]"[69] rather than to promulgate

---

57 42 U.S.C. §§ 7401–7671q.

58 Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 429 (2011).

59 City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)) (discussing federal preemption of common law claims under the Clean Water Act).

60 *See id.* at 332.

61 615 F.3d 291 (4th Cir. 2010).

62 *Id.* at 301; *see also* Samuel Ford, Note, North Carolina ex rel. Cooper v. Tennessee Valley Authority*: The Problem with State Nuisance Law in the Regulation of Out-of-State Emissions Standards*, 24 TUL. ENV'T L.J. 147, 155–56 (2010); *cf.* City of Oakland v. BP PLC, 969 F.3d 895, 908 (9th Cir. 2020) (holding that the CAA does not preempt state common law claims).

63 *See* City of New York v. Chevron Corp., 993 F.3d 81, 91–92 (2d Cir. 2021).

64 *See* Wold-McGimsey, *supra* note 54, at 817 & nn.6–7 (citing *Chevron*, 993 F.3d at 95–96).

65 *See* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115, 135 (2022).

66 *See id.*; *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135–36 (1999) (discussing other affirmative constitutional grants by states).

67 *See* Kafker, *supra* note 65, at 136 & n.109 (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)).

68 *Held*, slip op. at 94–95.

69 *See* Kafker, *supra* note 65, at 136 (quoting *Cruzan*, 497 U.S. at 292 (O'Connor, J., concurring)).

additional regulatory standards on top of those to which Congress has clearly spoken.[70] In this way, it offers a new pocket of law separate from federal regulatory schema. While the Supremacy Clause still looms as a threat to any state constitution, the rights-granting language is dissimilar from circumstances where courts have employed the Supremacy Clause against state constitutions (wherein those constitutions reduced, rather than supplemented, federal constitutional rights).[71] Likewise, the *Held* court's analysis combats federalization by squarely arguing that while GHG emissions have clear global harms,[72] climate change can be addressed and mitigated through local efforts and under state constitutional mandates.[73] By dedicating nearly pages[74] to an extensive analysis of how the MEPA limitation has specifically implicated Montana in climate change and how it has violated the state constitutional rights of the youth plaintiffs,[75] the *Held* court contravened the emerging themes of federalization found throughout common law approaches.

A constitutional solution also serves litigants by providing a preestablished duty of care. Remedy-seekers under tort at common law must establish a preexisting duty, the breach of which results in a particular and cognizable injury caused by the named defendant's actions.[76] Both duty[77] and causation[78] can be particularly difficult to prove in environmental cases given the overwhelming number of polluters and the manner by which environmental harms create widespread impact in their amalgamation.[79] The *Held* court demonstrated how constitutional protections may override these challenges. First, the court recognized that constitutional language establishes a duty to realize the "right to a

---

[70] *See, e.g.*, Erin Ryan, *The Twin Environmental Law Problems of Preemption and Political Scale*, *in* ENVIRONMENTAL LAW, DISRUPTED 149, 151–52 (Keith Hirokawa & Jessica Owley eds., 2021).

[71] *See, e.g.*, Kerns v. Bucklew, 357 S.E.2d 750 (W. Va. 1987).

[72] For examples of these harms, see *Causes and Effects of Climate Change*, UNITED NATIONS, https://www.un.org/en/climatechange/science/causes-effects-climate-change [https://perma.cc/V9GP-C7MA].

[73] *See* Maggie Astor, *As Federal Climate-Fighting Tools Are Taken Away, Cities and States Step Up*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/07/01/climate/climate-policies-cities-states-local.html [https://perma.cc/JRN4-UDZK].

[74] *See Held*, slip op. at 17–86 (linking Montana's role in increased GHG emissions and the harms suffered by the youth plaintiffs).

[75] *Id.* at 28, 35.

[76] *See* Ronald Ross, Note, *The Proximate Cause-Duty Enigma in the Tort of Negligence*, 31 S. CAL. L. REV. 99, 100 (1957) (noting that tort cases may not proceed without an established duty of care).

[77] *See id.* at 101 (discussing challenges with limiting liability and how the "modern trend [of duty] limits liability to the extent that defendant is the insurer only of those persons and against only those precise consequences which could have been reasonably foreseen").

[78] *See* Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L. REV. 875, 878 (2002) ("[T]he only clear observation in toxic tort litigation is the unparalleled dilemma of establishing a cause and effect relationship between a toxin and a plaintiff's injury.").

[79] *See* David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1744–45 (2007).

clean and healthful environment."[80] While tort claims may struggle to demonstrate this duty between plaintiff and defendant,[81] Montana's constitutional provision makes this duty explicit and the State's duties affirmative, removing a burden from potential plaintiffs seeking redress. Second, by starting with the presumption that the State has an affirmative duty to protect environmental rights, the *Held* court was able to shift the analysis from a focus on causation to a focus on duty.[82] With the constitutionally established duty to a quality environment anchoring the court's analysis, the court tersely established causation by concluding on the facts that a "fairly traceable connection" existed between the youth plaintiffs' harms and the State's actions.[83] It proceeded to analyze the MEPA limitation with the presumption that the constitution "affirmatively require[s] enhancement" of the environment by the legislature.[84] These explicit obligations added an additional layer of protection in the form of strict scrutiny. Because Montanans were deemed to hold a "fundamental right to a clean and healthful environment," the MEPA limitation did not receive any deference from the court.[85] Thus, the ruling in *Held* not only demonstrates a path forward despite difficulties in accurately measuring and attributing GHG emissions to particular sources;[86] so too it shows exactly how that path may be built by states: state constitutions guaranteeing environmental rights may improve prospects for future litigants challenging the impacts of climate change.

These developments present exciting opportunities for the future of climate change litigation. Importantly, in overruling the revised MEPA limitation, the *Held* court demonstrated that state environmental claims can address global issues like climate change — a groundbreaking expansion of the powers of state and local actions.[87] States such as Hawai'i, Massachusetts, New York, and Pennsylvania have all included some level of explicit environmental protections in their constitutions.[88] While these constitutional amendments are not universal, the *Held* decision explicates the importance of adding these protections to state constitutions and lays groundwork for future climate litigation.

---

[80] *Held*, slip op. at 96.

[81] *See* Hunter & Salzman, *supra* note 79, at 1791.

[82] *Cf. id.* at 1789 (elaborating that establishing a duty to others to desist from engaging in environmentally harmful conduct would make tort claims more straightforward).

[83] *Held*, slip op. at 87.

[84] *Id.* at 96.

[85] *Id.* at 94 ("Any statute, policy, or rule which implicates a fundamental right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that the action is narrowly tailored to effectuate that interest.").

[86] *See, e.g.*, Chelsea Harvey & E&E News, *U.S. Cities Are Underestimating Their Greenhouse Gas Emissions*, SCI. AM. (Feb. 3, 2021), https://www.scientificamerican.com/article/u-s-cities-are-underestimating-their-greenhouse-gas-emissions [https://perma.cc/7DQQ-P3SS] (describing the difficulty of measuring and assessing GHG emissions).

[87] *See* Jack Buckley DiSorbo, Note, *The Limitations of State and Local Climate Policies*, 57 HOUS. L. REV. 1169, 1198 (2020) (discussing the limits of state climate policies).

[88] Dernbach, *supra* note 5, at 36.