



TREASURE STATE RESOURCES ASSOCIATION OF MONTANA

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A New Environment for Climate Change Litigation

Source: Marten Law

July 18, 2017

By: Marina Cassio

With the federal executive branch backtracking from Obama-era climate change programs, the judicial branch may be increasingly receptive to novel forms of climate change litigation. In *Juliana v. United States*, Case No. 6:15-cv-01517-TC (D.Or.), a small group of young people and a climate change scientist representing future generations are suing the federal government for violating their asserted constitutional rights to a stable climate system. In November of last year, U.S. District of Oregon Judge Ann Aiken denied a motion to dismiss that complaint...Last month, Judge Aiken fully adopted the recommendation of Magistrate Judge Thomas Coffin to deny a related motion for interlocutory appeal...Judge Coffin had found that the merits of the *Juliana* admittedly groundbreaking claims were so strong that the denial of the motion to dismiss was not subject to reasonable difference of opinion. Both the denial of the motion to dismiss and the interlocutory appeal represents an unusual judicial receptiveness to climate change litigation. The fate of *Juliana* and other cases like it is worth watching closely as the federal judiciary reacts to the new administration...

Juliana represents a new type of climate change litigation, in which claims are brought against the federal government grounded in constitutional rights and/or the **public trust doctrine** ...the key allegations the plaintiffs will seek to substantiate through discovery are (1) that the U.S. federal government has known for decades that climate change is caused by human GHG emissions and presents serious risks to the American people, and yet (2) that it has deliberately disregarded that risk while not just failing to regulate but indeed promoting and subsidizing GHG emissions all the while...

In *Juliana*, Judge Aiken accepted plaintiff's allegations at face value, finding that such alleged injuries as algae blooms harming the local drinking water supply, heat waves damaging a family orchard, and decreased snowpack shortening the local ski season all constituted fairly pleaded and personalized injuries resulting from climate change... The advantage of *Juliana* is that it does not challenge any particular government regulation or lack thereof, but rather the whole of U.S. government's actions and inactions taken together over the past many decades... Whether causation will ultimately be factually demonstrated in the case, and at a level significant enough to trigger the plaintiffs' alleged constitutional rights, cannot yet be determined.

Lawsuit halted fire mitigation work in area now burning near Lincoln

Source: [Helena Independent Record](#) July 27, 2017 By: Tom Kuglin, Helena IR

Two Lincoln-area wildfires are burning within an area the Forest Service approved for fire mitigation work starting this year, but is currently under federal court injunction. Now a coalition of groups and individuals will get to weigh in on the court case and urge a federal judge to allow the project to proceed.

Late last summer the Helena-Lewis and Clark National Forest greenlighted a timber and prescribed burning project called the Stonewall Vegetation project north and northwest of Lincoln. Within a 24,000-acre project area the agency approved commercial logging and thinning on 2,100 acres and prescribed fire on 2,700 acres.

"It was about creating resilient forest conditions, and part of that being protection for the community of Lincoln," said Bill Avey, forest supervisor. "There's fuel loading with high mortality and there's a history of fire starts in that area that've been increasingly hard to catch."

Earlier this month lightning sparked the Park Creek and Arrastra Creek wildfires in the project area, burning more than 6,000 acres to date and still largely uncontained. Last winter, environmental watchdogs Alliance for the Wild Rockies and Native Ecosystems Council filed a lawsuit challenging the project. The groups contended it would negatively impact elk and grizzly bears while exemptions allowing logging in Canada lynx habitat were misapplied.

With the first timber sale sold to a contractor, this spring a federal judge granted a preliminary injunction temporarily halting the project. Judge Dana Christensen ruled that an injunction only temporarily postpones the potential benefits of the project and found the risk of fire was not imminent and did not outweigh the Forest Service's obligation to follow the Endangered Species Act.

"The Court acknowledges that Defendants have presented evidence that the Project area is susceptible to severe and intense wildfires due to elevated fuel levels caused by 'heavy accumulations of dead and down timber.' **However, though there is the possibility of serious**

fire activity within the boundaries of the Project, there is no indication that this area is at risk of imminent fire activity,” Christensen wrote.

In issuing the injunction, Christensen also cited the well-known “Cottonwood” decision. In that case, the Forest Service was ordered to re-initiate consultation with the U.S. Fish and Wildlife Service after the latter re-evaluated and greatly expanded designated critical lynx habitat. With the consultation ongoing, the results could impact the Stonewall Project and activities in lynx habitat.

This week, Christensen agreed to allow multiple parties to write a brief in support of the Forest Service and Stonewall. Among those filing the brief are the Lincoln Restoration Committee, Lewis and Clark and Powell counties, Lincoln Volunteer Fire Department, the Montana Logging Association and other timber interests, the Rocky Mountain Elk Foundation, the National Wildlife Federation and several Lincoln-area residents.

KD Feedback, the attorney filing the brief and co-chair of the Lincoln Restoration Committee, says the goal of entering the lawsuit is to sway the judge to allow the project to go forward “for the simple reason it would prevent exactly what we’re looking at, “ in regard to the fires... “There’s literally thousands of acres of dead standing lodgepole that’s begging for a fire and very close to Lincoln,” he said. I think it’s fair to say that it’s the pervasive belief of not only the Lincoln Restoration Committee but the rest of the people that **these giant wildfires are an environmental disaster**...I think the plaintiffs are crazy and they’re wrapped around lynx habitat and hiding cover, but it’s all on fire now so it’s counterproductive.” ...

As firefighters carve fire breaks amid hot, dry and windy conditions, logs pile high and are moved out. Along Beaver Creek Road northwest of Lincoln, feller bunchers cut a 100-foot wide swatch “to make a defensible line and protect structures, “ Avey said. Under the emergency order with the fire, those logs can be cut and will eventually go to sale, he added. While the project would not have been completed by the time the fires started, Avey says some timber harvest would have commenced and crews may have also conducted prescribed burns...

Of Note: Montana Senators Daines and Tester are working to statutorily reverse the Cottonwood ruling by passing S. 605. Four additional projects in Montana have been enjoined under that decision.

Lodgepole Fire Complex – What Really Happened

Another perspective on land use management/designations and fire comes from MT. Rep. Bill Harris. His recent Letter to the Editor reads as follows:

I think this is a good time to share the obvious reality concerning the Lodgepole fire complex.

First of all, lightning started the fire in Sandage Coulee, not in Lodgepole Creek. Sandage Coulee is located in the center of a Wilderness Study Area. This Wilderness Study Area only includes a few thousand acres of very rugged Musselshell river breaks.

These areas have very strict rules as to how they can be used, including no roads, no motorized use, no improvements or such installments as water pipelines or fire suppression other than what firefighters can do on foot with whatever they're able to carry in. Local BLM and volunteer firefighters push the limits, but only so far. The Lodgepole fire was allowed to grow in the beginning because of these rules, and the fact that there was no vehicle access allowed to fight the fires.

Then, because of the dry conditions and winds, the fire grew out of control as it expanded and consumed thousands of acres heading South, and spreading East and West. At the same time, the fire smoldered and burned in Sandage Coulee for several days, slowly creeping north.

I practically begged the BLM and firefighters passing through, telling them it was crucial that they attend to the fire in Sandage Coulee. I couldn't understand why my warnings fell on deaf ears. But finally, they sent a crew as the fire exploded, coming up Sandage Coulee rapidly and devouring Smith Coulee as it burned out of the proposed wilderness area.

It was then that they arrived with pumper trucks and a small crew. They tried to make a stand but by then the fire had grown so fierce they couldn't stop it. It then burned to Lodgepole Creek with the help of a hard wind. The fire had already reached upper Lodgepole by that point, but the fires burned together, then spread to the North and to the East.

I am describing all of this to help everyone understand what part the proposed wilderness area played in this horrible disaster. Those involved will probably dispute what I'm telling, but it is exactly what happened. I'm not blaming anyone for anything, I'm just pointing out what the responders have to deal with.

I believe it is time for all of us to make it clear to Representative Gianforte and Senators Daines and Tester that we insist they retire this ridiculous designation of Wilderness Study Areas. The designation serves no purpose and has contributed a great deal to this disaster in particular. I think the most effective way to make the changes needed is to flood Interior Secretary Ryan Zinke with our concerns and urge a change in federal lands management.

Rep. Bill Harris (HD37)

Winnett, Montana

Rancher and owner of Fort Musselshell Outfitters

Opportunity to Provide Input on Wilderness and Wild and Scenic River Recommendations in the Custer Gallatin Forest Plan Revision – Weigh in by August 12

TSRA members can provide input to the Custer Gallatin Forest Plan Revision process by offering comments on the Forest's initial identification of rivers that might be eligible for Wild and Scenic Designation or areas that might be recommended for Wilderness designation. Maps and other information are available for review. While this is only an initial step, note that 30 rivers have been identified as "potentially eligible". While only Congress can officially create wilderness areas or wild and scenic rivers, once those recommendations are adopted in the final forest plan, **they will be managed in accordance with the requirements for those designations.** Those with knowledge of the areas or stream reaches being considered – and particularly knowledge of features or uses that might be impacted -- should take time to weigh in now before the process becomes more formalized.

The Custer Gallatin Forest has held two webinars on the Wild and Scenic River and Wilderness Inventory. Those were recorded and are available on their website. Those webinars include information about the features that must be considered. Comments can be directed to each individual area or stream reach, or more general comments can also be offered. While this is not a formal NEPA process at this point, the Forest Service has advised the public that comments would be most helpful if received by August 12. There will be additional opportunities to comment as the process moves forward. To learn more about the Custer Gallatin Forest planning efforts, visit: <http://www.fs.usda.gov/custergallatin>

Republicans target Endangered Species Act as protections lifted

Source: [Helena Independent Record](#) July 20, 2017 By: Matthew Daly, Associated Press

Congressional Republicans are moving forward with legislation to roll back the Endangered Species Act, amid complaints that the landmark 44-year old law hinders drilling, logging and other activities.

At simultaneous hearings Wednesday (July 19), House and Senate committees considered bills to review the law and limit lengthy and costly litigation associated with it.

The bills came as a federal court lifted federal protections for gray wolves in Wyoming and the Trump administration moved to lift protections for grizzly bears in and around Yellowstone National Park. Interior Secretary Ryan Zinke also is reviewing federal efforts to conserve the imperiled sage grouse in 11 Western states.

House Natural Resources Chairman Rob Bishop said the bills would curb excessive litigation and allow officials to focus on actual species conservation.

All too often, the endangered species law “has been misused to control land, block a host of economic activities important for jobs...proliferate costly litigation that drains taxpayer resources away from actual conservation efforts,” said Bishop, a Utah Republican.

Arizona Rep. Paul Grijalva, the panel’s senior Democrat, said the law “does not need congressional meddling to work better. What it needs is congressional support.”...

Grizzlies off threatened species list

Source: [Helena Independent Record](#) August 1, 2017 By: Matt Volz, AP

The U.S. government lifted protections for grizzly bears in the Yellowstone Region on Monday (July 31), though it will be up to the courts to decide whether the revered and fearsome icon of the West stays off the threatened species list.

More than a month after announcing grizzlies in and around Yellowstone National Park are no longer threatened, the U.S. Fish and Wildlife Service officially handed over management of the approximately 700 bears living across 19,000 square miles in Montana, Idaho, and Wyoming to wildlife officials in those states.

The ruling does not apply to the approximately 1,000 bears living farther north in the Northern Continental Divide area that includes Glacier National Park and the Bob Marshall Wilderness.

Not much is expected to change as a result of the handover. State wildlife officials have been working for decades to protect the bears as their population grows and their range expands farther away from the oldest U.S. national park and they said they will continue to do so.

Federal wildlife officials also will monitor the states for five years and re-impose restrictions if the population drops below 500 bears...

“There are a lot of safeguards in the conservation strategy to ensure the grizzly population will remain,” said Kevin Frey, a wildlife management specialist for the Montana Department of Fish, Wildlife and Parks...Encounters with ranchers protecting livestock and hunters competing for elk and deer have become common as the bears’ population has swelled and they wander back into areas where they haven’t been seen in a century.

“We see bears going to areas where they have little chance of remaining conflict-free,” Frey said. “It’s becoming more challenging”...

Progress Being Made on Federal Appointments

Source: U.S. Department of the Interior

Deputy Secretary of the Interior David Bernhardt Confirmed:

While progress is slower than some might like, the new Trump Administration is getting their “team” in place in key agencies. On July 24th, David Bernhardt was confirmed as Deputy Secretary of the Interior by the U.S. Senate. Bernhardt is an avid hunter and fisherman and recently served on the Board of Game and Inland Fisheries for the Commonwealth of Virginia. He has previously served as the United States Commissioner to the International Boundary Commission, U.S. and Canada.

Mr. Bernhardt held several positions within the Department of Interior between 2001 and 2009, including serving as Solicitor. Previously he served then-Secretary Norton as deputy solicitor, deputy chief of staff and counselor to the Secretary, and as director of congressional and legislative affairs and counselor to the Secretary. He was strongly endorsed by Secretary of the Interior Ryan Zinke and former Secretary of the Interior Dirk Kempthorne. The position of Deputy Secretary of the Interior is the Chief Operating Officer of the Department.

Assistant Secretary of the Interior for Land and Minerals Management Joe Balash To Be Nominated:

President Trump has announced his intention to nominate Alaska’s Joe Balash to serve as the DOI’s Assistant Secretary for Land and Minerals Management on July 20th. A native of North Pole, Alaska, living in Washington D.C., Balash bring more than 19 years experience in land and natural resource management.

Mr. Balash currently serves as the Chief of Staff to Alaska’s Senator Dan Sullivan. He is the former Commissioner of the Alaska Department of Natural Resources, which has management responsibility for one of the largest single portfolios of land and water resources in the world. He received strong endorsements from the Alaska Congressional Delegation as well as diverse interest groups. Senator Sullivan stated “ His (Mr. Balash) advice and counsel on natural resource matters will be invaluable as Secretary Zinke and the Trump Administration chart a new path toward American energy dominance.”

As the Assistant Secretary for Land and Minerals Management, Balash will advise and oversee the Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Safety and Environmental Enforcement and the Office of Surface Mining Reclamation and Enforcement. The Assistant Secretary heads the Department of Interior’s management of all federal lands and waters, and their associated mineral and non-mineral resources as well as the appropriate regulation of surface coal mining.

Millennium Bulk Terminals Receives First Permit, Enters New Phase of Project Development

Source: Millennium Bulk Terminals July 20, 2017

Millennium Bulk Terminals – Longview (MBTL) obtained its first permit needed for the Coal Export Terminal from the Cowlitz County Department of Building and Planning. The Critical Areas Permit was issued Wednesday (July 19, 2017), signaling the Coal Export Terminal project has entered a new phase after more than five-years of evaluation by regulatory agencies.

“Millennium Bulk Terminals-Longview has entered a new and exciting phase with the receipt of our Critical Areas Permit,” said MBTL President and CEO Bill Chapman. “Today this project took another significant step forward. We are absolutely delighted to see the agencies begin permit issuance based on their extensive Environmental Impact Statement.”

“Our goal of building a state-of-the-art export terminal in Cowlitz County, creating thousands of family-wage jobs and pumping millions in tax revenue into the Washington economy is now closer than ever,” Chapman continued. “There is more work to do before construction can begin but this is a strong start.”

The Critical Areas Permit program has been designed to protect critical areas. These critical areas include wetlands and fish habitat areas. The issuance of this Critical Areas Permit indicates that Cowlitz County has approved Millennium’s plans to protect these critical areas. More information can be found at: <http://www.MillenniumBulk.com> .

About Millennium Bulk Terminals-Longview

Millennium Bulk Terminals-Longview is an operating bulk materials port on the Columbia River which was initially home to an aluminum smelter. Millennium is committed to the environmental cleanup and redevelopment of this 1940’s era industrial site into a vibrant, world-class port facility that will create family-wage jobs and help keep Longview and Cowlitz County working. In addition to the coal export facility, Millennium is actively seeking development of the site for other bulk commodity import and export opportunities.

Editor’s Note: The Millennium Bulk Terminals – Longview is considered critical to the future of Montana’s coal industry in terms of accessing the global marketplace.

DEQ Oks Drilling Near YNP

Source: [Helena Independent Record](#) July 30, 2017 By: David McCumber, MT Standard

The state Department of Environmental Quality has approved exploratory drilling in a controversial gold-mining project in Emigrant Gulch, just north of Yellowstone Park. Lucky Minerals, a Canadian company, has been interested in gold mining around Paradise Valley for several years. The company has bought up old claims and staked new ones covering a total of more than 2,500 acres. It says the acreage holds a “large-scale porphyry copper-gold-molybdenum system that could potentially host a multi-million ounce gold deposit”.

DEQ Director Tom Livers said Friday (July 28) that Lucky Minerals had actually agreed to mitigations associated with the exploration that were above and beyond what the DEQ had the statutory authority to require. “There are things we can require under the Metal Mines Act and other things we can’t,” he said. “But once further mitigations are agreed to, we can enforce them.”

One of the things the company agreed to was to use the Old Cemetery Road rather than driving trucks and equipment past Chico Hot Springs.

Also, the company agreed to monitoring water quality on Emigrant Creek. Lucky Minerals must also come up with a garbage-disposal plan to minimize impacts on wildlife.

Livers stressed that the approval is for exploratory drilling only and any expansion of mining activities would require a far more comprehensive environmental review and permitting process.

Local opposition to the project has been fierce.

Montana’s two Senators have also expressed concern with the project. Sen. Tester has introduced legislation, the Yellowstone Gateway Protection Act, to permanently halt mining on federal land surrounding Paradise Valley. Their positions are referenced in the article as follows:

(Senator) Tester said, “ It makes no sense to mine at the headwaters of the Yellowstone River and on the doorstep of our nation’s first national park. These mines will do irreversible damage to Montana’s outdoor economy and the jobs it supports.”

A Daines spokesman said, “Sen. Daines opposes mining in this area, but he is still weighing the best way to address the withdrawal.”

In a related matter, public comment on the Custer Gallatin National Forest’s proposed Emigrant Crevice Locatable Mineral Withdrawal were due in July. The following is an excerpt from TSRA’s comments:

The State of Montana, the U.S. Forest Service and other federal agencies have a well-established regulatory framework for managing development of our natural resources. Those laws and regulatory requirements were established to guide ALL regulated activities, not just those that are “popular with the neighbors”. Withdrawal of this area would be a reactionary response, fueled by, at best, the general public’s lack of understanding of modern mining exploration. The stringent legal and regulatory process that guides all mining activity from the exploration phase to project development must be allowed to do its job, For that reason, we oppose the Emigrant Crevice Locatable Mineral Withdrawal...

Energy and Telecommunications Interim Committee Holds First Meeting

The MT Energy and Telecommunications Interim Committee (ETIC) held its initial meeting on July 31st. Committee members took care of several administrative matters, including election of a Chair and Vice Chair. Senator Mary McNally will serve as Chair and Representative Derek Skees will be the Vice Chair for the interim.

ETIC members were briefed on the role and activities of the Public Service Commission, including its recent controversial decision concerning the length of QF (renewable) contracts.

The Committee reviewed the proposed Work Plan for the interim and settled on priorities for their work in the coming months. Highest priority was given to the SJ 31 Study of Utility Decoupling. According to the language in the resolution, decoupling is a policy that separates a regulated utility’s profits from its total electric or gas sales so a utility isn’t incentivized to sell more electricity or gas. Decoupling is not a tool for increasing energy efficiency but is instead a ratemaking function that removes what may be viewed as a utility incentive to discourage energy efficiency and distributive generation. Again, according to the language in the resolution, decoupling ensures that utilities have a reasonable opportunity to collect roughly the same revenue as they would under conventional regulation. In October of 2016, the Public Service Commission held a roundtable discussion on this topic and is expected to be actively involved in the study process. Information from other states will also be included in this review. ETIC expects to spend 40 percent of their allotted staff time on this study.

Another study assigned to the committee was HJ 28, a look at the issue of natural gas utility customer choice. Information provided by committee staff outlined the history of the issue leading up to passage of the resolution. During the 2017 session, House Bill 269 was introduced to deregulate all natural gas utilities in Montana. Questions were raised about the impacts to ratepayers and utilities. Currently, the “Natural Gas Utility Restructuring and Customer Choice Act” in Title 69, chapter 3, part 14 allows natural gas utilities to voluntarily offer customer choice. The study is intended to review natural gas utilities in Montana that currently do not allow

customer choice and to provide an overview of perspectives on deregulation. Again, the Public Service Commission is expected to be involved with the study as it progresses. ETIC allotted 20 percent of their staff time to this effort and is expected to hold a panel discussion on the subject at a future meeting. Input from Northwestern Energy -- which voluntarily allows customer choice -- and other states will be solicited.

Members added an additional study topic for consideration. Loosely titled "The Regulatory Climate for Energy Resources", this activity will involve gathering input from various stakeholders in the energy resource development arena – from renewables to coal – as to what roadblocks exist in Montana for expanded investment and development and what an "ideal" regulatory and investment climate might look like.

ETIC will also review requirements for renewable energy requirements and reporting options as set forth in SJ 2. The Committee will also monitor the net metering study being undertaken by Northwestern Energy in accordance with HB 219, and stay abreast of developments with Colstrip and other energy concerns. Their next meeting will be held on September 29, 2017.

Water Policy Interim Committee Meets In Helena

The Water Policy Interim Committee (WPIC) met in Helena July 31-August 1st for its initial meeting. Sen. Pat Connell, Hamilton was elected Chair and Rep. Zach Brown from Bozeman the Vice Chair. Unlike other interim committees, there were no specific study resolutions assigned to WPIC so they are open to consider their issue priorities using their statutory and program oversight duties as a guide.

Water being a topic of keen interest to many, WPIC has a wide range of duties including oversight of the Water Resources Division of DNRC and the Water Quality Division of the Department of Environmental Quality. They also work with the Department of Fish, Wildlife and Parks and the Department of Agriculture. WPIC heard reports from representatives of each of those entities. They also heard from the Montana Water Court. Judge McElyea offered some suggestions as to potential statutory changes to consider that would clarify or streamline the water adjudication process. More detailed information will be provided by the Judge and an advisory group for consideration at future meetings.

DNRC noted they are considering initiating rulemaking for regulation of exempt water wells following the recent court decision. Legislation to address ongoing concerns with exempt wells was not successful in the 2017 Session. The Director assured WPIC members they would be informed of any rulemaking activity in the coming months.

WPIC members held a general discussion concerning when bill sponsors should be notified of any rulemaking concerning legislative they carried. Staff advised it was still a requirement that

the sponsor be contacted, but what is considered “initiation” of rulemaking may need clarification, particularly when it involves creation of stakeholder groups.

The Committee’s next meeting is October 9 – 10th.

Upcoming Events/Dates

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| August 29 – 30, 2017 | Montana Petroleum Association Annual Meeting DoubleTree by Hilton, Billings, MT |
| August 31, 2101 | MT. Sage Grouse Oversight Team Meeting State Capitol, Helena |
| September 14, 2017 | Revenue and Transportation Interim Committee State Capitol, Helena, MT |
| September 19-21, 2017 | Montana Wood Products Association/Forest Resource Association Convention Grouse Mountain Lodge, Whitefish, MT |
| September 27 – 28, 2017 | Environmental Quality Council State Capitol, Helena, MT |
| September 29, 2017 | Energy & Telecommunications Committee (ETIC) State Capitol, Helena MT |
| October 5, 2017 | MT. Sage Grouse Oversight Team Meeting State Capitol, Helena, MT |
| October 9 -10, 2017 | Water Policy Interim Committee (WPIC) State Capitol, Helena, MT |
| December 6, 2017 | Montana Taxpayers Association Annual Meeting Helena, MT |
| December 12-14, 2017 | MT. Stockgrowers Association Annual Convention & Trade Show Double Tree & Northern Hotels, Billings, MT |
| January 10-11, 2018 | MT Chamber of Commerce Business Days at the Capitol Great Northern Hotel, Helena, MT |

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| January 16, 2018 | Energy & Telecommunications Committee (ETIC) State Capitol, Helena, MT |
| January 17-18, 2018 | Environmental Quality Council State Capitol, Helena, MT |
| March 21-22, 2018 | Environmental Quality Council State Capitol, Helena, MT |

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