



Green Amendment Victories
How Green Amendments Are
Recognizing & Protecting
Environmental Rights in PA & MT



**GREEN AMENDMENTS
FOR THE GENERATIONS**
Pure Water, Clean Air, Healthy Environment.

Pennsylvania and Montana are the only two states in the U.S. that currently promise, protect and respect constitutional environmental rights protected on par with other fundamental human, civil and political rights we hold as inviolate inherent, inalienable and indefeasible rights protected from government infringement and transgression. In this series we share the varied ways that constitutional recognition is providing meaningful and transformative protection in these two states, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

Montana Environmental Information Center v. Department of Environmental Quality 988 P.2d 1236 (Mont. 1999)

In 1992, Seven-Up Pete Joint Venture (a mining company) applied for, and received, an exploration license from the state Department of Environmental Quality (DEQ) that would support its gold mining operations. In 1995, Seven-Up Pete submitted a new work plan for a massive open-pit gold mine operation in the upper Blackfoot River valley which was near the junction of the Landers Fork and Blackfoot River. This new plan sought approval for pumping underground water at the proposed mine site.

The Montana Environmental Information Center (MEIC), Clark Fork-Pend Oreille Coalition, and Women's Voices for the Earth challenged the exploration license. The groups alleged DEQ had illegally amended Seven Up Pete's mineral exploration license to allow groundwater, surface water, and the aquifers of the Blackfoot River and Landers Fork River to be contaminated with arsenic

(a known carcinogen) and zinc. The environmental groups argued that the agency failed in its obligation pursuant to state law to demonstrate there would be no degradation of the high quality waters of the State and instead illegally amended the license to allow for the discharge of high levels of dangerous contaminants (arsenic and zinc) into River aquifers in the absence of such a demonstration. The environmental groups argued this threat of pollution and the failure to demonstrate non-degradation of water quality was a violation of state law.

The groups argued in the alternative that to the extent the 1995 Montana Water Quality Act allowed for a waiver of the nondegradation review with regards to the activities at issue here, it did so in violation of Article II, Section 3 and Article IX, Section 1 of Montana's Constitution. Plaintiffs sought a ruling that if the state law allowed for the waiver of the nondegradation review it should be declared void for violating the state constitution and they sought suspension of the Seven-Up Pete license.

The District Court dismissed the case, deciding the organizations had demonstrated no significant changes in the quality of the water, no violation of water quality standards, no actual injury, and that no right protected by the constitution had been violated. The organizations appealed to the Montana Supreme Court.

The Montana Supreme Court opined that this 1999 case was the first to explore the level of legal scrutiny or the "showing" necessary to determine when the environmental rights protected in Article II, Section 3 and Article IX, Section 1 are implicated.

The Montana Supreme court reflected on the constitution's legislative history and associated case law which clearly establish, among other things, that:

- ⇒ Rights enumerated in the state constitutional Declaration of Rights are fundamental rights;
- ⇒ If the state infringes on a fundamental right it must demonstrate a "compelling state interest";
- ⇒ Strict scrutiny applies when the action complained of interferes with the exercise of a fundamental right;

⇒ In order to support government infringement on a fundamental right, strict scrutiny, requires demonstration of a compelling state interest, the chosen course of action taken must be closely tailored to effectuate only that compelling state interest, and that the action is the least onerous path taken to achieve the state objective.

Given these findings the court determined that:

“the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.”

As discussed by the Court, the rights found in Article IX, Section 1 are not normally subject to strict scrutiny because they are not in the constitution's Declaration of Rights. However, it was “intended by the constitution's framers to be interrelated and interdependent” with the environmental rights under Article II, Section 3 “and that state or private action which implicates either, must be scrutinized consistently.” According to the Court, because of this intent by the framers the court should and would “apply strict scrutiny to state or private action which implicates either constitutional provision.”

The Court looked to the discussion at the constitutional convention when the provisions were first decided and discovered “the nature of the environmental rights provided by Articles II and IX cannot be interpreted separately, but that it was the delegates' intention that the two provisions compliment each other and be applied in tandem”. This information allowed the Court to determine what showing was needed to implicate those rights and apply strict scrutiny review.

Based on this legislative history the court pulled the following additional principles:

- ⇒ Article II, Section 3 and Article IX, Section 1 of the Montana Constitution must be read together, and the preamble to the Montana Constitution must also be considered.
- ⇒ The language and their protections are intended to be both anticipatory and preventative.
- ⇒ The provisions are not limited to “environmental degradation which can be conclusively linked to ill health or physical endangerment.”
- ⇒ The rights provided for in Article IX, Section 1 subparagraph (1) and the obligations in subparagraph (3) require the legislature to “provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.”

Stressing the preventive, anticipatory, and protective nature of the constitutional provisions the Court explained, “Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.”

Quoting the legislative history the Court further emphasized: “it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed.”

The Court reversed the District Court's dismissal. Stating the District Court had erred when it required a demonstration of threat to public health or violation of water quality standards showing a significant impact on the affected Rivers for the constitutional environmental rights to be implicated.

According to the Court, “the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment” was implicated by the demonstration that the mining company's activities would have “added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water”. Furthermore, that agency officials violated this constitutional right when, after studies and hearings, it concluded such discharges would not have a “significant impact” in need of non-degradation review.

The Court made clear that the constitutional right to a healthy environment is not limited to state statutes, but applies to agency rules as well.

The Court determined that the nondegradation review included in the state law was a reasonable mandate to ensure protection of the rights protected in Article IX, Section 1; and that to the extent the law then arbitrarily excluded activities at issue in this case from non-degradation review “without regard to the nature or volume of the substances being discharged”, (i.e. the failure to consider the facts, the science and the impacts) it violated the environmental rights guaranteed and protected by Article II, Section 3 and Article IX, Section 1. Therefore, as applied to the Seven Up Pete license, there was an unconstitutional violation of environmental rights and the license could not be upheld.