GT GreenbergTraurig

The Montana 'Youth Climate Case' and the Pa. Environmental Rights Amendment

By David G. Mandelbaum | September 14, 2023 | The Legal Intelligencer

On Aug. 14, a trial judge in Montana issued findings of fact and conclusions of law after a bench trial in what has been called the Montana "Youth Climate Case." See *Held v. Montana*, No. CDV-2020-307 (Mont. D. Ct., Lewis & Clark Cty, Aug. 14, 2023). The case has received some serious attention in the weeks since because Judge Kathey Seely found that the plaintiffs—16 young residents of Montana—had suffered and would suffer injury on account of climate change caused by greenhouse gas emissions in Montana and combustion of fossil fuels extracted from Montana. Those injuries gave the plaintiffs standing to mount a challenge under the environmental rights provision of the Montana constitution to amendments to the Montana Environmental Policy Act that prohibited Montana officials from considering climate change as part of the pre-decisional environmental review required by that statute.

The court concluded that the MEPA amendments violated the right to a "clean and healthful environment" assured by Article II, Section 3 of the Montana Constitution. Section 3 reads: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

One can immediately see the parallels with the first sentence of Pennsylvania's Environmental Rights Amendment: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." See Pa. Const., Art. I, Section 27. Even though the

two states' constitutional provisions have some differences, one can expect that *Held* will get more than its share of citation in Pennsylvania cases involving our Section 27. What implications does it hold for our practice?

The Pennsylvania cases in the decade since *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), seem agreed that the first sentence of Section 27 calls on the commonwealth to consider in some way the environmental impacts—positive and negative—of a governmental action before the government agency takes the action. For example, earlier this year the Pennsylvania Commonwealth Court vacated a decision of the Public Utility Commission granting an exception from local land use approval for a "gas reliability station"—a component of the distribution network for natural gas—because the PUC had excluded consideration of climate change from its hearings. See *Township of Marple v. Pennsylvania Public Utility Commission*, 294 A.3d 965 (Pa. Commw. Ct. 2023).

Marple involved a proceeding under Section 619 of the Municipalities Planning Code. Section 619 creates an exemption from the general rule that a municipality may regulate the location (but not the operation) of buildings used by a public utility corporation when the PUC "shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." See 53 Pa. Stat. Ann. Section 10619 (emphasis added). That hearing must include an opportunity for cross-examination, so it is more than just an opportunity for public comment.

Given the requirement that the decision of the PUC follow a hearing, the PUC was not at liberty under Section 27 to exclude evidence of environmental impacts of the proposed station. But *Marple* does not consider the situation where the governing statute or regulations do not provide an opportunity to offer or to consider evidence of environmental impacts to satisfy Section 27. We do not know if in that circumstance the Pennsylvania agency must graft an environmental review procedure onto its existing processes or whether it is precluded by ordinary operation of administrative law from doing so. To the extent that *Marple* turns on the availability of a hearing under the commission procedures, *Held* reinforces the implication that Section 27 does not call for new process crafted from whole cloth. In the Montana case, MEPA called for a pre-decisional environmental review for significant actions and the state constitution invalidated a statutory exclusion of climate change from that review.

In Pennsylvania, we do not have a clear answer as to whether one government agency may rely on the environmental consideration of another, more expert agency. So, for example, if the Department of Environmental Protection must issue a permit whose issuance requires assessment of the environmental impacts of the proposed activity, does every other agency— state and local—that must approve or fund the project have to review those environmental impacts without regard to what DEP has done? Precluding reliance might seem hopelessly cumbersome, but *Robinson Township*, for example, holds that the legislature could not make statewide judgments about land use regulation of natural gas facilities; that is,

the legislature could not dictate that its judgment (or DEP's judgment) governs. So, too, in *Held*, the legislature could not decide that the economic implications of restricting fossil fuel development in Montana overbalanced climate change injuries. Thus, we have authority for the proposition that each government actor must have some latitude to make an individual environmental assessment in order to satisfy its constitutional duty.

But it also cannot be the case that every agency on every decision must operate under a statutory and regulatory scheme that calls for a pre-decisional environmental assessment. The Department of Transportation does not have to provide a hearing to allow for objections to the issuance of driver's licenses on the ground of potential climate impacts of driving. We do not have clear guidance on when a statute is unconstitutional because it does not allow the required latitude, and when it is not.

Held also suggests that in Montana the constitutional provision has a substantive component. The court explicitly found that the plaintiffs had suffered injury and would suffer more from greenhouse gas emissions. The court issued a declaratory judgment and tied that judgment to redressing those injuries: "This judgment will influence the state's conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts, alleviating the youth plaintiffs' injuries and preventing further injury." That is, the *Held* court—driven, perhaps by Montana's justiciability rules—found that the environmental review would result in substantive reductions in greenhouse gas emissions, alleviating the plaintiffs' injuries. If that principle applies in Pennsylvania, then what happens when conditions fall below the constitutionally guaranteed condition of "clean air and pure water"? If that guarantee has a substantive component, then the commonwealth has an obligation not only to consider the environmental impacts of a new proposal, but to take steps to redress the shortfall from the guaranteed minimum environmental quality. What is the minimum? What counts as redressing it? How fast does the relief have to arrive? We do not have any of these answers. *Held* does not either. If we are going to take these constitutional provisions seriously, we ought to come up with a way of answering those questions, and perhaps not exclusively by long trial in front of a generalist judge.

About the Author:

David G. Mandelbaum is a shareholder in the Environmental Practice of Greenberg Traurig. He maintains offices in Philadelphia and Boston. Mandelbaum teaches "Environmental Litigation: Superfund" and "Oil and Gas Law" in rotation at Temple Law School, and the Superfund course at Suffolk Law School in Boston. He is a Fellow of the American College of Environmental Lawyers and was educated at Harvard College and Harvard Law School. Contact him at mandelbaumd@gtlaw.com.