IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs and Appellees,

vs.

STATE OF MONTANA, et al.,

Defendants and Appellants.

On appeal from the First Judicial District Court, Lewis and Clark County
Cause No. CDV 2020-307, the Honorable Kathy Seeley, Presiding

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AMICUS CURIAE BRIEF OF NORTHWESTERN CORPORATION

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INTRODUCTION

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") respectfully submits this amicus brief for the Court's consideration. NorthWestern addresses the district court's holdings on jurisdiction and the constitutionality of the 2023 amendments to the Montana Environmental Protection Act, Mont. Code. Ann. §75-1-201(2)(a) ("MEPA Limitation").

NorthWestern is the largest electric utility in Montana, currently servicing over 300,000 residential electric accounts, comprising the great majority of residential electricity demand in the state. NorthWestern is also the largest supplier of electricity to the commercial, industrial, and public sectors in the state. NorthWestern is committed to responsible transition to clean energy sources, and over 60% of its nameplate electrical generation capacity in Montana is carbon-free. This is one of the highest percentages for any utility in any state.

NorthWestern has many projects that are subject to environmental review under MEPA, and owns facilities that were specifically named by the district court as implicated by the MEPA Limitation. *See, e.g.,* Findings of Fact ("F.o.F.") 265(g)(Colstrip Steam Electric Station); 265(i)(Laurel Generating Station).[1] To the extent that the district court's factual findings on a vision for future Montana

[1] All references to the Findings of Fact or Conclusions of Law are to Doc. 405 in the district court docket.

energy generation take root, *see* F.o.F. 271-283, NorthWestern will be one of the critical entities tasked with bringing it to fruition.

NorthWestern is committed to taking aggressive action to reduce the greenhouse gas ("GHG") emissions from its operations, consistent with its statutory obligations to provide on-demand, reasonable cost energy for vital heating, cooling, lighting and other services. To that end, NorthWestern has adopted its "NetZero by 2050" commitment, which sets forth a path for substantially reducing NorthWestern's emissions.[2] NorthWestern also addresses in detail the options and tradeoffs associated with various degrees of GHG reductions in its publicly filed Integrated Resource Plan, most recently updated in May 2023.[3] Although NorthWestern identifies errors by the district court, it is not because NorthWestern opposes the objective of combating climate change or is failing to take action on the issue, but rather because the district court's findings and holdings materially misapply the law or misstate the facts.

SUMMARY OF ARGUMENT

The MEPA Limitation provides important and needed clarity to the regulated community and the public on when GHG analysis in MEPA documents is useful and not. Against that backdrop, the district court erred in at least four

[2] Net Zero by 2050 (northwesternenergy.com).

[3] Montana Integrated Resource Plan 2023 (northwesternenergy.com).

respects:

First, there are unique standing requirements applicable to claims based on alleged inadequate environmental review under the National Environmental Policy Act ("NEPA") and MEPA. In the climate change context, these require plaintiffs to show a concrete, particularized interest in a specific project for which environmental review has been or will be conducted. Plaintiffs did not meet this requirement; consequently, they lacked standing to sue.

Second, the district court erred in applying strict scrutiny to the MEPA Limitation on a facial challenge. Because the MEPA Limitation implicates other fundamental rights, the court should have applied a balancing test. Further, because the scope of MEPA is highly variable and closely tied to specific projects and permitting authorities, facial review is not the appropriate mechanism regardless of the degree of scrutiny applied.

Third, the district court erroneously concluded that Montana's substantive permitting statutes uniformly convey discretion to deny or modify permits based on GHG emissions, and if they do not, they are unconstitutional. This issue was not jurisdictionally before the court, the court violated the constitutional avoidance doctrine in reaching the issue, it only considered a handful of statutes, and it erroneously described the few example statutes it cited.

Fourth, the district court's factual findings on the viability of future energy

scenarios were unnecessary to any issue in the case, and were grossly oversimplified. To the extent this Court affirms any of these findings, it should strictly limit their preclusive effect in other contexts.

ARGUMENT

I. The MEPA Limitation Provides Needed and Reasonable Clarity To the Regulated Community and the Public

Although the district court's findings and judgment are solely directed at agencies of the State, it is important to consider the perspective of the regulated community and public. When NorthWestern plans a project and seeks required State authorizations, it reviews the statutory and regulatory requirements applicable to the specific project at its specific location and time. NorthWestern then collects or assists the State in collecting the information needed for the State to make its decision(s).

NorthWestern (and other regulated entities) do not as a rule collect information that is not required for the decision, because collecting and processing extraneous information is expensive, time-consuming, and by definition neither assists NorthWestern or the respective agencies' decision-making. Collecting unneeded information also increases costs for consumers, creates public confusion over permitting standards, and fosters delay.

Extraneous information includes information about GHGs, when the emissions of a project are outside the scope of the regulatory criteria for the

proposed decision. Identifying the GHG consequences of a project is often complicated and usually contentious. It is typically straightforward to compute the GHG emissions from running a given piece of equipment over a specified period of time. However, other GHG dimensions of a project, including emission controls or a project's "upstream" and "downstream" emissions, i.e., those generated in supplying the project or precipitated by the project, and potential alternatives, can be extremely challenging to assess.[4] The feasibility and effectiveness of GHG emission controls are hotly disputed, as are the environmental, social, and economic consequences of any given level of emissions.[5]

Notably, the threshold of "significance" that would trigger a full environmental impact statement is especially be-deviling, in that the emissions from any individual project, even the largest fossil fuel operations, are insignificant in a global sense. Due to uncertainty alone, the practical GHG threshold for

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[4] See, e.g., *WildEarth Guardians v. Bernhardt*, 2021 U.S. Dist. LEXIS 20792 (discussing how far coal shipments from a mine must be assessed in environmental review); *350 Montana v. Haaland*, 50 F.4th 1254, 1270-1272, 1281-1290 (9th Cir. 2022) (divided panel opinion discussing the requirements for putting an economic figure on GHG emissions from a project). Critically, these NEPA cases were predicated on a judicial finding that the federal agency at issue had the regulatory authority to factor the GHG emissions of the proposed actions into its decision. *See, e.g., Montana Env't Info. Ctr. v. Haaland*, 2022 U.S. Dist. LEXIS 128280 *29-30.

[5] *350 Montana*, 50 F.4th at 1281-82 (Nelson, J., dissenting, cataloging the degree of controversy over GHG impact assessment).

conducting a federal EIS has crept ever lower.[6] Conducting an EIS in turn causes major delays for infrastructure projects, and has become such a widely recognized problem that Congress recently passed amendments to NEPA in the Fiscal Responsibility Act of 2023, 137 Stat. 39, to attempt to streamline and speed NEPA reviews.[7]

All of which is simply to say that from a regulated entity's perspective, including GHG emissions in a MEPA analysis is a Pandora's Box of technical challenges, points of contention, and litigation risks. This does not mean it is not worth doing under the right circumstances, but rather that it should only be undertaken where it is legally required for the permitting of a project.

In the Court's denial of the State's Motion to Stay, the Court correctly observed that the Department of Environmental Quality ("DEQ") has acknowledged historically estimating project GHG emissions and that it could do so in the future, January 16, 2024 Order at 4, but that is not the same as finding such analyses are complete, accepted, cost-effective, or useful for many agency decisions. By way of comparison, federal agencies have regularly performed GHG analyses under NEPA for a wide array of federal decisions for the past 15 years.

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[6] *Id.* at 1281-90.

[7] *See, e.g.,* 42 U.S.C. §§4332(C)(2023) (focusing analyses on reasonable ranges of effects and alternatives); 4336(a)-(b)(streamlining agency roles and documents); 4336(a)(2)(promoting increased use of categorical exclusions).

Yet these NEPA analyses are *frequently* overturned on judicial review, in decisions spanning several Administrations.[8] This is not because federal agency personnel are incompetent or act in bad faith, but because such analyses are difficult and the protocols and expectations are continually evolving, even when subject to the nominally deferential review afforded federal agency actions.

In that context, the MEPA Limitation aids regulated entity planning and allocation of agency resources. It informs the regulated entity where climate change analysis will be necessary. The MEPA Limitation also leverages the federal government's deeper experience and expertise in conducting environmental review of GHG emissions, and minimizes duplication. This was a reasonable line for the Legislature to draw for the vast majority of projects. Most of the major "fossil fuel activities" (in the district court's parlance) in the State are subject to federal regulation, and the MEPA Limitation expressly authorizes State agencies to coordinate with their federal counterparts in analyzing project GHG emissions. *Id.*

[8] By way of example, federal NEPA analyses of GHG impacts for every one of the active Montana coal mines cited by the district court in F.o.F. ¶265 have been invalidated on judicial review, sometimes repeatedly. *See, e.g., 350 Montana v. Haaland*, 50 F.4th 1254 (9th Cir. 2022) (Bull Mountain Mine); *WildEarth Guardians v. Bernhardt*, 2021 U.S. Dist. LEXIS 20792 (Spring Creek Mine)*; Montana Env't Info. Ctr. v. Haaland*, 2022 U.S. Dist. LEXIS 179417 (Rosebud Mine). The fourth mine referenced in F.o.F. ¶265 – the Decker Mine (265e) – closed in early 2021.

Conversely, GHG analysis is not useful for the vast majority of State actions subject to MEPA, because the emissions are small, there are no effective or required controls for the emissions associated with the project, and/or the subject agenc(ies) cannot presently regulate them through the lawful exercise of their authority. *See Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222 ¶¶33-34, 388 Mont. 453, 401 P.3d 712. Such Legislative advance line-drawing is beneficial to state agencies, the regulated community, and the public, conserving resources for those permitting scenarios where GHG analysis is most likely to be useful.

As discussed further below, there is a limited set of closer questions. Where a State agency has been delegated very broad discretion to approve, deny, or condition a permit on the basis of GHG emissions, there exist practical technological, design, or operational means to reduce the quantity of emissions, and the quantity at issue is large, there is a constitutional argument to be made that the MEPA Limitation cuts too broadly. Under those very specific circumstances, a constitutional claim could be raised by a plaintiff with standing. That is not the case on appeal.

II. The District Court Erred in Issuing a Facial Ruling

The central error of the district court lay in adjudicating the constitutionality of the MEPA Limitation in the abstract as a "facial" challenge, divorced from the

specific facts of Plaintiffs in relation to specific projects and applicable regulatory authorities. This resulted in errors related to standing, the degree of scrutiny applied to the MEPA Limitation, the constitutionality of the MEPA Limitation in specific contexts, and the discretion afforded to State agencies in those contexts. Because of these errors, the Court should dismiss the Complaint, without prejudice as to future "as-applied" challenges.

A. Facial Versus As-Applied Challenges in the Context of the MEPA Limitation

NorthWestern is mindful of the Court's admonition that there is no bright line boundary between "facial" and "as-applied" challenges. *Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303 ¶¶85-87, 402 Mont. 168, 477 P.3d 288. NorthWestern nevertheless uses the terms as shorthand in this brief, and observes that there are important distinctions between the MEPA Limitation and the subset of "2011 Amendments", struck down facially in *Park Cty. Id.* ¶79.

First, unlike the 2011 Amendments, the MEPA Limitation is not categorical, but rather includes important exceptions for projects for which federal review of GHG emissions is required, or in the event the federal Clean Air Act is amended. Mont. Code. Ann. §75-1-201(2)(b). These exceptions encompass the largest GHG-emitting projects in the State.

Second, the 2011 Amendments applied uniformly. The 2011 Amendments were only triggered where there was a judicial finding that a MEPA analysis was

inadequate; the specific facts or statutory authorities underlying the agency action were irrelevant. *Id.* ¶87. This is not true of the MEPA Limitation. The MEPA Limitation prescribes *initial* scoping boundaries for MEPA analyses, and its significance depends critically on the facts of particular projects and the agencies' authority to regulate GHG emissions. As discussed below, the great variation in projects and legal authorities subject to the MEPA Limitation warrants case-by-case, as-applied review rather than facial review.

B. Plaintiffs Did Not Satisfy the Requirements of Standing to Challenge the MEPA Limitation

Other filers addressed the standing and justiciability issues associated with claims based on a changing climate, observing that standing is essentially impossible for non-state plaintiffs to establish for direct climate change claims. Independently of those arguments, the parties and the district court did not focus sufficiently on the unique standing dimensions of *environmental review* of the alleged climate change effects of proposed actions.

Federal courts have recognized that because NEPA (like MEPA) is a purely procedural, informational statute, the redressability and imminence elements of standing are relaxed. *See, e.g., WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148, 1254 (9th Cir. 2015); *WildEarth Guardians v. Jewell,* 738 F. 298, 305-308 (D.C. Cir. 2013). However, concrete, particularized injury remains a "hard floor" on standing. *Id.* at 305.

Consequently, federal courts have held that if a NEPA plaintiff can show a concrete, individualized injury from a proposed action *distinct from* any alleged climate-based injuries, there is a path to standing. If they satisfy the traditional standing test based on a *localized* injury alleged caused by a project and distinctive to them, such plaintiffs can then point to alleged deficiencies in the NEPA analysis of the climate change consequences of the proposed action. *Id.* at 306-307; *WildEarth Guardians*, 795 F.3d at 1254 (requiring a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact").

Here, the district court found the wrong facts. As disclosed in the court's findings, Plaintiffs submitted extensive testimony that climate change is a problem that will harm them (as it will harm essentially everyone in Montana), *see* F.o.F. 194-208, and these harms would be abated to some unspecified degree if the State adopts a different substantive energy policy. *See* Conclusions of Law ("C.o.L.") ¶¶4-29. Setting aside the validity of these findings, Plaintiffs were not required to show the State would actually adopt any different policies if State agencies analyzed climate issues in their MEPA documents, or that such a policy would ameliorate climate change. Plaintiffs thus attempted to prove too much.

Conversely, the district court did not make any findings that there are specific proposed projects or actions that would injure Plaintiffs in the traditional,

individualized sense of standing, apart from the action's GHG emissions incrementally contributing to global climate change. All their injuries trace to the climate generally. There are no findings that Plaintiffs recreate on lands in the vicinity of a coal mine, or live within sight of a proposed oilfield, such if the relevant state actors undertook a climate change analysis in their MEPA documents, the agencies might select a different course and Plaintiffs' individualized injuries might be mitigated. There are no findings that Plaintiffs would participate in any future environmental review proceedings for any proposed action. They proved too little. Because Plaintiffs failed to distinguish their harms from generalized global climate impacts, they failed to satisfy the requirements of standing to challenge environmental review provisions, and their claims should be dismissed.

C. The District Court Erred in Applying Strict Scrutiny to the MEPA Limitation

The district court correctly observed that a clean and healthful environment is a fundamental right. But it erred in proceeding directly to strict scrutiny of the MEPA Limitation, because GHG emissions implicate the remaining fundamental rights guaranteed by the Montana Constitution. As demonstrated by the district court's factual findings, GHG emissions are in large measure tied to energy generation and use. *See, e.g.,* F.o.F. 212-237. Energy, in turn, is a foundation for "pursuing life's basic necessities, enjoying and defending [life and liberty],

acquiring, possessing and protecting property, and seeking [] safety, health and happiness in all lawful ways." Mont. Const. Art. II, §3. Life's basic necessities undeniably include heating, cooling, light, mobility, and food production – all of which are presently provided to a significant degree by the combustion and other uses of fossil fuels. Ensuring the availability of reliable, affordable energy is a constitutional duty as much as protecting the Montana environment,

This is compounded by the fact that nearly all modern human activity generates GHG emissions to some degree, and therefore virtually every proposed action subject to MEPA will have a "carbon footprint." The district court's reasoning in invalidating the MEPA Limitation implies a constitutional duty to analyze GHG emissions for all projects that emit GHGs, absent a compelling, narrowly tailored justification not to.

In this context, any rule will be over-or-under inclusive. The MEPA Limitation, even with its capacious exemptions, carries the potential that a GHG analysis will not be conducted for a small set of projects for which such analysis would be useful. Conversely, facially invalidating the MEPA Limitation means that regulated agencies and the regulated will have to confront the GHG emissions issue for essentially every proposed action, including the vast majority of projects for which GHG emissions are not significant or there is no authority or ability to regulate them. While this can physically be done project-by-project at cost and

delay, the issue is whether the public interest is better advanced by a rule that exempts most MEPA reviews from climate analysis, subject to key exemptions and a residual right to bring an as-applied constitutional challenge, or one that forces agencies and the regulated to grind through GHG analysis in every case. This is precisely the scenario where a balancing of administrative and constitutional burdens and benefits is warranted. *Park Cty.* ¶80.[9]

Consequently, the district court erred in applying strict scrutiny in a facial review of the MEPA Limitation. If Plaintiffs had standing to even bring a facial challenge, the MEPA Limitation should have been reviewed under a balancing test.

D. The Constitutionality of the MEPA Limitation Cannot be Adjudicated Divorced from the Specific Statutory Authorities Governing Categories of Proposed Actions

MEPA is a very elastic statute. Its scope expands or contracts based on the specific facts of a proposed action, and the governmental authorizations that are required to implement the project. This Court has previously determined that an agency is not required to analyze environmental effects in a MEPA document that exceed the agency's ability to regulate through "the lawful exercise of its independent authority." *Bitterrooters,* ¶¶33-34. The Court has further recognized

[9] The district court's scrutiny of Mont. Code. Ann. §75-1-201(2)(a) functionally equates MEPA with the constitutional provision MEPA was designed to implement. But MEPA is "only" a statute, and the Legislature must have discretion to adjust the scope of the statute to meet the practical needs of the implementing agencies, as it would any other statute.

that the extent of a required MEPA analysis may depend on where the proposed action falls in a sequence of related proposed actions. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234 ¶19, 366 Mont. 399, 288 P.3d 169. Consequently, one cannot make broad generalizations about the relevance, importance, or legal duty to analyze GHG emissions; one must understand the scale of emissions and the specific regulatory regime under which approval is sought.

The district erred jurisdictionally by opining on the substance of permitting statutes that were not before it. In their Complaint, Plaintiffs did not challenge the constitutionality of any individual permitting statute. They did not rely on the text of any statute other than MEPA as a basis for their claims. Instead, they expressly and consciously challenged *only* the constitutionality of the MEPA Limitation, independently of any other statute. For this reason, the district court did not have jurisdiction to opine on the requirements of any statute other than MEPA, much less opine as to their constitutionality. As the Court articulated in *Park Cty.,* "Courts seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns." 2020 MT 303, ¶86 (internal quotations omitted). This is even truer with regard to the constitutionality of statutory provisions not before the court.

In addition, the district court violated the constitutional avoidance doctrine. The Court has stressed that courts should avoid constitutional issues whenever possible. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183 ¶62, 338 Mont. 259, 165 P.3d 1079. Although a properly brought as-applied challenge to the MEPA Limitation would necessitate a constitutional analysis of that provision in that context, it was not necessary for the district court to opine on the constitutionality of Montana's "permitting statutes" generically. *See* C.o.L. ¶¶22-23. As noted, those statutes were not before the district court, and the only reason the district court discussed them was to buttress plaintiffs' facial challenge by deeming that the statutes afford the relevant agencies the discretion to deny permits. In declaring that permitting statutes must, as a constitutional matter, afford the agencies discretion to deny permits, or else the permitting statutes themselves would be unconstitutional, *id.* ¶23, the district court was unnecessarily *seeking out* constitutional adjudication, rather than avoiding it. This is another reason why a facial challenge was the wrong mechanism to challenge the constitutionality of the MEPA Limitation, and the district court's judgment should be reversed.

The district court's relief is also overbroad. The district court did not expressly state that the discretion to deny permits must include denial or limitation of terms *on the basis of* the project's GHG emissions, but that is the clear holding of *Bitterrooters. Id.* ¶¶34-35. To address this foundational requirement, the district

court identified ten specific example statutes related to "fossil fuel activities," which the court concluded afford agencies the discretion to deny permits based on a project's GHG emissions. *See* C.o.L. ¶22. But MEPA applies to a vast array of other permitting actions and authorizations. The district court did not examine the text of any permitting statutes other than the ten examples, and therefore had no basis to opine on their requirements. At most, the district court's relief should have been limited to the ten cited statutes, if the district court's analysis of their terms was correct.

But it was not correct. In fact, six of the 10 cited statutory provisions simply provide the agencies with the authority to *enact rules* governing the issuance of permits.[10] The district court did not examine whether any rules have been enacted to date under these statutes that actually provide the agency the ability to deny or limit issuance of permits based on the GHG emissions of the proposed action. In the case of each of these six statutes, no such rules exist. Until such rules are lawfully promulgated, the agency does *not* have discretion to deny permits on the basis of a facility's GHG emissions. Another of the statutes, Mont. Code. Ann. §82-4-227, provides a detailed list of factors DEQ shall consider in evaluating mine permits. The statute does *not* authorize DEQ to consider air emissions of any

[10] Mont. Code. Ann. §§75-2-203, 204; 211(2)(a), 217(1), 218(2) and 82-4-102(3)(a).

kind in this inquiry, much less GHG emissions. Rather than confirming agency discretion, the statute restricts it.[11]

The district court also erred in failing to consider the statutory exceptions to the MEPA Limitation, and how these interact with agency practice and statutory authority. As noted, Mont. Code. Ann. §75-1-201(2)(b) provides express authorization for agencies to consider GHG emissions when performed in conjunction with federal reviews, or when the Clean Air Act is amended to provide express regulatory authority over GHGs. The district court recited a list of 10 specific example GHG-emitting projects for which it claimed that the MEPA Limitation has or would preclude meaningful GHG review. F.o.F ¶265(a)-(j). Yet *every one* of the active projects is either subject to federal GHG reviews under NEPA (265(a)-(d), (f), (h), (j)) or is regulated under the federal Clean Air Act. (265(g), (i)). Collectively, in every cited facility and statutory example provided in F.o.F. ¶265 and C.o.L. ¶22, the district court either misstated the facts or the law, or ignored important nuances that undercut its sweeping assertion that "[p]ermitting statutes give the State and its agents discretion to deny permits for fossil fuel activities." *Id.*

[11] The State Agencies' brief provides further discussion of the limits of agency substantive permitting authority in relation to GHGs. *See id.* at 14-16.

Overall, these erroneous and overbroad findings illustrate that the district court and Plaintiffs have their legal sequencing backwards. The district court determined that climate change is a problem, that the Montana Constitution should be construed to require the Legislature to address climate change through *substantive* permitting requirements, and that the failure of the Legislature to do so would be a dereliction of the Legislature's constitutional duties. C.o.L. ¶23. Those constitutional theories are weighty issues that were not alleged in the Complaint or before the district court. And rather than analyze in what contexts and to what extent substantive authority currently exists, the district court simply assumed that it does, uniformly throughout the Montana Code. *See* C.o.L. ¶22. The entire justification for the district court's facial invalidation of the MEPA limitation rested on a false legal premise, and consequently the district court's judgment should be reversed.

III. The District Court's Factual Findings About Montana's Energy Future are Speculative, Unnecessary, and Oversimplified

To the extent that the Court determines that the district court's judgment should be not be reversed on jurisdictional or purely legal grounds, NorthWestern urges caution by the Court in its assessment of, reliance on, or potential affirmance of the district court's factual findings on Montana's energy future, set forth at F.o.F. ¶¶271-283. It is not clear why the district court felt the need to take testimony and make these twelve factual findings ("Findings") on potential state

energy portfolios in 2035 or 2050. To the extent the testimony was offered to establish causation and redressability for purposes of standing, it only served to demonstrate the speculative and conjectural character of Plaintiffs' theories. The extended chain of assumptions and guesswork regarding future technology, science, public investment, and the actions of numerous independent third parties necessary to effectuate the Findings vividly illustrates why federal courts have uniformly concluded that private plaintiffs lack standing to bring direct climate change causes of action.

Aside from their speculative nature, the Findings are dicta, because they were not necessary to establish standing in the context of statutory provisions related to environmental review. *See* Argument Section II.B., *supra*.

The Findings also contain numerous oversimplifications and omissions. For example, the Findings adopt plaintiffs' contentions that Montana can achieve a carbon-free "wind, water, solar" ("WWS") fueled energy supply, including full electrification of "all energy sectors," sometime between 2035 and 2050. *See* F.o.F. 272-73. This is allegedly achievable "in one scenario" through the installation of 4.5 Gigawatts (GW) of wind power and 5.9 GW of solar. F.o.F. 274.[12] For perspective, the State of Montana presently has an installed nameplate

[12] The 5.9 GW solar total is comprised of 3.0 GW of rooftop solar power and 2.9 GW of utility-scale facilities. *Id.*

base of 1.12 GW of wind and 28 Megawatts of solar (i.e., less than one half of one percent of the 5.9 GW solar target).[13] The Findings also do not address that wind and solar energy are highly variable, such that the "accredited" (i.e., reliable) capacity of a wind or solar facility is a small fraction of the "nameplate" (maximum) capacity.[14] Moreover, there are no findings or discussion on the transmission needs associated with a WWS energy sector. Electricity, for example, is only usable to the extent that it can be available, when needed, from the point of generation to the point of consumption. The WWS scenario would require many billions of dollars in new transmission lines, which are notoriously difficult and time consuming to permit and construct.

The district court found, in a single two-sentence Finding of Fact, that the extraordinary costs associated with wholesale transformation of Montana's energy infrastructure is justified by large combined "energy, health, and climate cost savings." F.o.F. ¶275. "Climate costs" is shorthand for the Social Cost of Carbon, *id.* (*citing* MJ 1061:20-1063:24; *see also* MJ 1066:18-1069:9), a highly contested economic metric involving assumptions about the world economy and climate

[13] The installed based totals are from Understanding Energy in Montana 2023 (mt.gov) (wind total at p. 31, solar total at p. 35, Table 1.8).

[14] The wind facilities in NorthWestern's portfolio have an accredited capacity of 24% of the nameplate capacity, and the solar facilities have an accredited capacity of only 6% of nameplate capacity.

extending for the next 300+ years, coupled with purely philosophical judgments about the relative valuation of benefits and burdens experienced by current and future generations. These "facts" were established by the testimony of a single expert witness. F.o.F. ¶269.

NorthWestern raises these concerns not to re-litigate the trial or to minimize the difficult issues posed by climate change, but rather to highlight the breathtaking scope and frequently thin basis for the district court's Findings of Fact. NorthWestern recognizes that to the extent the district court's judgment is upheld, the findings are binding upon the State within the confines of this specific litigation. But NorthWestern was not a party to the litigation, and the State is a party in every permitting and resource planning exercise NorthWestern undertakes. To the extent that the Complaint is not dismissed, Court should make clear the limited reach to other proceedings of the district court's factual findings.

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CONCLUSION

For the foregoing reasons, the Court should reverse the district court and dismiss the Complaint.

DATED: February 23, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief of NorthWestern Corporation complies with Montana Rule of Appellate Procedure 11(4) because it is proportionally spaced using Microsoft Word 2016 in 14-point Times New Roman font and contains 4,983 words, excluding its table of contents, table of citations, certification of compliance, and certificate of service.

/s/ F. Matthew Ralph
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CERTIFICATE OF SERVICE

I, F. Matthew Ralph, hereby certify that on February 23, 2024 I caused to be served true and accurate copies of the foregoing Amicus Curiae Brief of NorthWestern Corporation on the parties below via the methods specified:

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Dated: 02-23-2024