IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0225

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB.,

Plaintiffs/Appellees/Cross-Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and NORTHWESTERN ENERGY,

Defendants/Appellants/Cross-Appellees,

STATE OF MONTANA, by and through the OFFICE OF THE ATTORNEY GENERAL,

Intervenor Defendant/Appellant.

STATE OF MONTANA'S RESPONSE BRIEF

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 21-1307 The Honorable Michael G. Moses, Presiding

APPEARANCES:

Austin Knudsen
Montana Attorney General
Michael D. Russell
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
PO Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
michael.russell@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Intervenor Defendant/Appellant

Harlan B. Krogh
John G. Crist
CRIST, KROGH, ALKE & NORD, PLLC
2708 1st Avenue North, Suite 300
Billings, MT 59101
Phone: (406) 255-0400
hkrogh@cristlaw.com
jcrist@cristlaw.com

Shannon Heim
John Tabaracci
NORTHWESTERN ENERGY
208 N. Montana Ave., Ste. 200
Helena, MT 59601
Phone: (406) 443-8996
shannon.heim@northwestern.com
john.tabaracci@northwestern.com

Attorneys for Defendant/Appellant/
Cross-Appellee Northwestern Corporation
d/b/a Northwestern Energy

Jeremiah Langston
Samuel J. King
MONTANA DEQ
PO Box 200901
Helena, MT 59620-0901
Phone: 406-444-2544
jeremiah.langston2@mt.gov
samuel.king@mt.gov

Attorneys for Defendant/Appellant/Cross-
Appellee Montana Department of
Environmental Quality

Amanda D. Galvan
Jenny K. Harbine
EARTHJUSTICE
313 East Main Street
PO Box 4743
Bozeman, MT 59772-4743
Phone 406-586-9699
Fax: (406) 586-9695
agalvan@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs/
Appellees/Cross-Appellants

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STATEMENT OF ISSUES

1. Did MEIC waive its constitutional challenge to Mont. Code Ann. § 75-1-201(2)(a) in failing to appeal the District Court's determination that the constitutional issues were not ripe for consideration?

2. If this Court finds that MEIC did not waive its constitutional challenge, should it remand that issue for decision by the District Court?

3. Alternatively, assuming the Court reaches the issue on appeal here, is Mont. Code Ann. § 75-1-201(2)(a) (2011) constitutional?

STATEMENT OF THE CASE[1]

Plaintiff-Appellees/Cross-Appellants Montana Environmental Information Center and Sierra Club (collectively, "MEIC") initiated the lawsuit underlying this appeal in a Complaint for Declaratory Relief (District Court Document ("Doc.") 1) filed on October 21, 2021. MEIC later filed an Amended Complaint for Declaratory Relief (Doc. 4) on October 25, 2021. MEIC challenged Defendant-Appellant/Cross-Appellee Montana Department of Environmental Quality's ("DEQ") decision to grant Defendant-Appellant/Cross-Appellee NorthWestern Corporation's ("NorthWestern") application for an air quality permit seeking permission to construct and operate air emissions units for a 175-megawat natural-gas-fueled

[1] Pursuant to Mont. R. App. P. 12(1)(c) and (d), this Brief sets forth only the procedural history and facts relevant to the State's response to MEIC's alternative constitutional challenge.

power plant at the proposed Laurel Generating Station ("LGS") south of Laurel, Montana. (*See* Doc. 4.)

MEIC asserted two causes of action: (1) the alleged violation of the Montana Environmental Policy Act ("MEPA") based on the alleged inadequacy of DEQ's Final Environmental Assessment ("EA"), (Doc. 4 at 11-16); and (2) in the alternative, the alleged unconstitutionality of Mont. Code Ann. § 75-1-201(2)(a) (the "MEPA Provision"). (Doc. 4 at 16-18.) On December 13, 2021, the State of Montana (the "State") moved to intervene to address MEIC's alternative constitutional challenge to the MEPA Provision (Doc. 10), and the District Court entered its Order allowing the State to intervene on December 28, 2021. (Doc. 12.)

Each party subsequently filed cross-motions for summary judgment, supporting briefs, responses, and replies. (Docs. 13, 14, 22, 23, 24, 25, 26, 27, 31, 34, 35, 36.) The District Court heard oral arguments on all motions on June 20, 2022. (*See* Doc 49 at 7.) On April 6, 2023, the District Court entered its Order granting partial summary judgment in favor of MEIC and partial summary judgment in favor of DEQ and Northwestern. (Doc. 49.) On April 7, 2023, MEIC filed its Request for Entry of Judgment (Doc. 50) and Proposed Judgment (Doc. 50.1), and NorthWestern submitted its Notice of Filing Proposed Judgment (Doc. 51) on April 11, 2023. The District Court entered its Judgement (Doc. 52) on April 14, 2023.

NorthWestern filed its Notice of Appeal (Doc. 56) on April 17, 2023, MEIC filed its Notice of Cross-Appeal on June 5, 2023 (Doc. 76), and DEQ filed its Notice of Appeal on June 8, 2023 (Doc. 74). On June 16, 2023, MEIC filed its Notice of Constitutional Challenge pursuant to Mont. R. App. P. 27. On June 19, 2023, this Court consolidated the appeals in Cause Nos. DA 23-0225 and DA 23-0320 under Cause No. DA 22-0225. On July 7, 2023, the State submitted its Notice of Intervention, informing the Court and the parties of the State's intervention in this appeal to address MEIC's constitutional challenge.

STATEMENT OF RELEVANT FACTS

MEIC's first cause of action alleges that the final EA violated MEPA by inadequately addressing pipeline impacts, water quality impacts, cumulative sulfur dioxide emissions; aesthetic impacts, and greenhouse gas ("GHG") emissions. (Doc. 4 at 11-16.) MEIC's second cause of action alleges, in the alternative, that the MEPA Provision is unconstitutional to the extent that it prohibits DEQ's consideration of climate change impacts caused by GHG emissions. (*Id.* at 16-18.) In other words, MEIC challenges the constitutionality of only if DEQ is correct in its interpretation of the MEPA Provision. (*Id.*) The MEPA Provision at issue states:

> Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

Mont. Code Ann. § 75-1-201(2)(a) (2021).

In its Order on the parties' cross-motions for summary judgment, the District Court found that DEQ misinterpreted the plain language MEPA Provision and therefore ruled in MEIC's favor on its claim that DEQ violated MEPA by failing to analyze the LGS's greenhouse gas emissions. (Doc. 49 at 29, 32.) The District Court accordingly ruled that MEIC's constitutional challenge was not yet ripe for consideration and that it need not address the same. (*Id.* at 29, 34.) The District Court likewise found that it need not yet address the prerequisite jurisdictional issue of MEIC's standing related to its constitutional challenge. (*Id.* at 17.) The District Court's Judgment reflects these determinations. (Doc. 52 at 2 ("The remaining issues raised by the Parties are either not ripe for review or need not be reached.").) Thus, the District Court effectively ruled against MEIC with respect to its constitutional challenge on justiciability grounds, and this was the only ruling it made on that claim. (Doc. 49 at 9, 17, 29, 34; Doc. 52 at 2).

However, nowhere in its Notice of Cross-Appeal (*see* MEIC's 6/5/23 Notice), its Notice of Constitutional Challenge (*see* MEIC's 6/16/23 Notice), or its Opening Brief (*see* MEIC's 10/11/23 Brief/"MEIC Brief") does MEIC identify the District Court's ripeness determination as an issue on appeal, directly or indirectly challenge that determination, or otherwise argue that the District Court erred in this regard.

MEIC merely notes that the District Court did not reach the constitutional question. (MEIC's 6/16/23 Notice at 2; MEIC Brief at 14.)

STANDARDS OF REVIEW

This Court reviews summary judgment rulings de novo for correctness. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712. This Court reviews a district court's conclusions of law to determine whether they are correct and its findings of fact to determine whether they are clearly erroneous. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. "Issues of justiciability—such as standing, mootness, ripeness, and political question—are questions of law that we also review de novo." *Advocates for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 5, 408 Mont. 39, 505 P.3d 825 (quoting *Carbon Cty. Res. Council v. Mont. Bd. of Oil & Gas Conserv.*, 2016 MT 240, ¶ 9, 385 Mont. 51, 380 P.3d 798).

The Court's review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88. "A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which we review to determine whether the conclusion is correct." *Krakauer v. State*, 2016 MT 230, ¶ 10, 384 Mont. 527, 381 P.3d 524 (quoting *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 16, 312 Mont. 257, 60 P.3d 381).

Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. This is not a meaningless presumption: "[t]he constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶¶ 73–74. The question for a reviewing court is not whether it is possible to condemn, but whether it is possible to uphold the statutes. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566. Plaintiffs must prove unconstitutionality beyond a reasonable doubt. *Id.*

Montana courts have power only to decide "justiciable controversies." *BNSF Ry. Co.*, 2020 MT 59, ¶ 54 (citation omitted). The justiciability doctrine is especially crucial in constitutional cases, because of the doctrine of constitutional avoidance: the "deeply rooted commitment not to pass on questions of constitutionality unless … necessary." *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (cleaned up). Montana precedent honors this "deeply rooted commitment" in the presumption that statutes are constitutional, and in the rule that courts must avoid constitutional issues wherever possible. *See Wing v. State*, 2007 MT 72, ¶ 12, 363 Mont. 423, 155 P.3d 1224.

SUMMARY OF THE ARGUMENT

MEIC has waived its alternative constitutional challenge to the MEPA Provision in failing to address or ascribe error to the District Court's determination that the constitutional challenge was not ripe for review. This was the District Court's *only* decision with respect to that claim. MEIC nonetheless argues, without legal or logical basis, that this Court should rule on the merits of its constitutional challenge. However, the reality is that MEIC failed to advance any argument pertaining to the District Court's decision that is actually subject to this Court's appellate review. MEIC therefore waived its alternative constitutional challenge to the MEPA provision, and this Court should accordingly reject MEIC's cross-appeal on that basis alone.

In the event this Court decides the issue has not been waived, and to the extent it deems a decision on the same is necessary and appropriate, it should remand MEIC's alternative constitutional challenge to the MEPA Provision for the District Court's consideration on the merits. This would both ensure that the requisite factual findings are made in the appropriate forum and that the State's due process rights related to appellate review are protected.

Lastly, if the Court determines that resolution of MEIC's constitutional challenge is appropriate on appeal here, MEIC still cannot satisfy its burden to prove its claim beyond a reasonable doubt based on the evidence and arguments presented

here and below. The MEPA Provision comports with applicable constitutional requirements and amounts to a proper exercise of the Legislature's police power. MEIC cannot overcome the strong presumption of constitutionality of legislative enactments. MEIC's alternative constitutional challenge therefore fails as a matter of law on the merits, and this Court should rule accordingly.

ARGUMENT

I. MEIC WAIVED ITS CONSTITUTIONAL CHALLENGE TO THE MEPA PROVISION ON APPEAL.

If this Court agrees with DEQ's interpretation of the MEPA Provision, MEIC points to its constitutional challenge as an alternative basis for this Court to affirm the District Court's ruling invalidating the LGS permit. However, MEIC completely ignores the District Court's actual ruling on that issue—the constitutional challenge was not ripe for consideration. (Doc. 49 at 34; Doc. 52 at 2.) MEIC simply states that the District Court did not reach the constitutional question, without identifying any error in its ruling or making any argument to that end. To be sure, MEIC blows completely past this threshold issue of justiciability (in addition to constitutional standing) and effectively asks this Court to review a determination on the merits that the District Court never made. This falls far short of properly presenting an issue and argument for appellate review as contemplated by Mont. R. App. P. 12(1).

Indeed, this Court is exercising its appellate jurisdiction in this case, meaning that it has the power to review and revise the District Court's decision. *See* Mont.

Const. art. VII, § 2(1); Mont. R. App. P. 14(1); *Black's Law Dictionary*, 7th ed. (1999) ("appellate jurisdiction" is [t]he power of a court to review and revise a lower court's decision.") It therefore stands to reason that this Court's appellate review is properly limited to the District Court's ripeness determination—the only decision it made on MEIC's constitutional challenge. However, MEIC failed to identify or argue any error underlying that determination, and this Court is under no obligation to locate authorities or formulate arguments for MEIC's position in this appeal. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 37 n. 8, 329 Mont. 129, 122 P.3d 1220.[2]

Moreover, MEIC's reliance on inapplicable precedent for proposition that this Court can and should decide the merits of its constitutional challenge for the first time on appeal is unavailing. (*See* MSC No. 25 at 44.) MEIC first cites *Braulick v. State*, 2019 MT 234N, ¶ 8, 398 Mont. 443, 459 P.3d 214, in asserting that it is not uncommon for this Court to consider an alternative basis for affirming a district court's judgment. However, in addition the fact that this Court expressly stated that *Braulick* "shall not be cited and does not serve as precedent[,]" *id.*, ¶ 1, it did not

[2] The State also cannot fairly be asked to guess at what arguments might be made on reply and preemptively respond to them. *See State v. Makarchuk*, 2009 MT 82, ¶ 19, 349 Mont. 507, 204 P.3d 1213 (the Court must not consider any arguments made for the first time in reply).

affirm the district court on alternative grounds—the district court determined that the plaintiff's claims were procedurally barred, and this Court agreed. *Id.*, ¶¶ 4, 11.

Plaintiffs' citation *Payne v. Berry's Auto* similarly fails. As this Court determined, "[i]n the Justice Court's judgment in favor of Berry's, the District Court reached the correct result. We will not reverse the district court when it reaches the right result, 'even if it reached that result for the wrong reason.'" *Payne*, 2013 MT 102, ¶ 26 (citation omitted). While this Court did affirm on alternative grounds, it was only able to do so because the district court *reached a result* to affirm. *Payne*, ¶ 1. In stark contrast here, the District Court did not reach a result either on MEIC's standing or the merits of its constitutional challenge.

Ultimately, it would be improper for this Court to consider the merits of MEIC's alternative constitutional challenge in the absence of an underlying decision from the District Court on that issue.[3] This matter also does not involve the exercise of this Court's original jurisdiction. *Contrast* Mont. R. App. P. 14(4) (allowing for an original proceeding in the form of a declaratory judgment action under limited circumstances not present here). The reality is that MEIC did not appeal or address the District Court's ripeness determination—the only ruling it made on MEIC's constitutional challenge. MEIC is not entitled to the resolution on the merits of that

[3] *See Marcatante v. City of Chicago*, 657 F.3d 433, 438 (7th Cir. 2011) ("It is improper to file a cross-appeal to merely assert an alternative ground of affirmance.")

challenge for the first time on appeal here, and this Court should deem MEIC's constitutional challenge waived accordingly.

II. IF THIS COURT FINDS THAT MEIC DID NOT WAIVE ITS CONSTITUTIONAL CHALLENGE, IT SHOULD REMAND THAT ISSUE FOR THE DISTRICT COURT TO DECIDE.

In the event this Court finds that MEIC did not waive its constitutional challenge and that resolution of that alternative issue is warranted, it should remand that issue for the District Court's determination. Resolution of this issue will require the District Court to make the factual findings it avoided in light of its conclusion that it "need not yet address the constitutional issues and the prerequisite issue of standing as it relates to constitutional challenges…." (Doc. 49 at 17.) For example, determining whether MEIC has standing will require factual findings regarding its alleged injuries, the traceability of those injuries to the MEPA Provision, and whether those injuries are redressable through the exercise of judicial power. (*See Id.*)[4] Ruling on the merits of the constitutional challenge will also involve findings of fact (*e.g.* whether the MEPA Provision is constitutional as applied to the facts of this case). The District Court, as a trial court, is far better suited to decide the facts in any given case. *See Byrum v. Andren*, 2007 MT 107, ¶ 52, 337 Mont. 167, 159 P.3d 1062 ("It is not this Court's task…to review the record with the purpose of

[4] *See also In re Estate of Glennie*, 2011 MT 291, ¶ 15, 362 Mont. 508, 265 P.3d 654 (acknowledging that whether a party has standing may present a mixed question of law and fact).

making [its] own findings.") (quoting *Snavely v. St. John ex rel. Est. of Snavely*, 2006 MT 175, ¶ 11, 333 Mont. 16, 140 P.3d 492); *Hammer v. Justice Court*, 222 Mont. 35, 41, 720 P.2d 281 (1986) ("Appellate courts are not allowed to make independent factual determinations.")[5]

A remand to the District Court will also protect the State's due process right to appeal in this case. Indeed, if this Court were to decide the merits of MEIC's constitutional challenge, it would be the first and only court to do so. This would effectively deprive the State of the opportunity to appeal to a higher court not involved in the decision at issue.

Accordingly, the Court should remand this matter to the District Court if it deems resolution of MEIC's constitutional challenge necessary and appropriate.

III. ALTERNATIVELY, IF THE COURT REACHES THE ISSUE ON APPEAL HERE, MEIC'S CONSTITUTIONAL CHALLENGE FAILS ON THE MERITS.

In the alternative, the Court should uphold the constitutionality of the MEPA Provision if it agrees that it can and should rule on the merits of MEIC's alternative constitutional challenge in this appeal. This would ostensibly require the Court to accept MEIC's argument that substantive consideration of its constitutional challenge would be appropriate since it "was fully briefed and argued by all parties

[5] Remand to the appropriate fact finder would also help ensure that MEIC properly satisfies its heavy burden to overcome the presumption of constitutionality and prove its claim beyond a reasonable doubt. *See Powder River*, ¶¶ 73–74; *Satterlee*, ¶ 10.

in the district court[.]" (MEIC Br. at 44.) The State therefore adopts and incorporates by reference all arguments and authorities it relied on in briefing below. (*See generally* Docs. 24, 36.) Nevertheless, some points bear repeating:

The Montana Constitution guarantees the right to a clean and healthful environment *in Montana*, and it directs the Legislature to administer, enforce, and provide adequate remedies for the violation of that right. Mont. Const. Art. IX, § 1. The Legislature has fulfilled those duties by considering and balancing competing rights and interests in the proper exercise of its general police powers. It is the Legislature—not the courts, and not these litigants—who balances the competing interests to determine how best to serve the public interest. *See Berman v. Parker*, 348 U.S. 26, 32–33 (1954) "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power…" *Billings Properties v. Yellowstone Cnty.*, 144 Mont. 25, 31, 394 P.2d 182 (1964)(quoting *Berman*, 348 U.S. at 32).

Additionally, by limiting a MEPA review to "actual or potential" impacts in Montana, not impacts that are "regional, national, or global in nature[,]" the Legislature reasonably advanced Montanans' right to a clean and healthful environment. Mont. Code Ann. § 75-1-201(2)(a). MEIC has not demonstrated any scientifically trustworthy method that would allow the State to measure accurately how any discrete agency action in Montana affects the infinitely complex global

climate. Montana's government, moreover, doesn't have power to regulate the environment beyond Montana's borders. The State of Montana lacks power—in both legal and practical terms—to regulate the environment of Beijing, Mumbai, Los Angeles, or Wyoming, for example. The 1972 Constitutional Convention Delegates enacted the Constitution's environmental provisions to protect *Montana*'s unique environment, not to create a panacea that would cure all national and global climate ills. Montana simply lacks the authority to regulate the environments of other sovereign entities like other states and countries. The environmental provisions in Montana's Constitution do not—and cannot—empower state agencies to cure all perceived global environmental problems. Montana has sovereign power only within its own borders.

When interpreting constitutional provisions, this Court must "apply the same rules as those used in construing statutes." *Nelson*, 2018 MT 36, ¶ 14. This Court must determine the meaning of a constitutional provision "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Id.* (citations omitted). In this case, the plain language of the Constitution's environmental provisions and the historical and surrounding circumstances under which the Framers drafted these provisions, all point clearly in one direction: the Montana

Constitution's environmental provisions protect *Montana*'s environment. Article IX, section 1, approved by the Constitutional Convention before Article II, § 3, provides that "[t]he state and each person shall maintain and improve a clean and healthful environment *in Montana* for present and future generations." Mont. Const., art. IX, § 1(1) (emphasis added). This plain language makes clear that the Constitution's environmental provisions apply only to Montana's environment. To the extent MEIC seeks declaratory relief that the Legislature should have exercised its exclusive Article IX, § 1 authority in a different way, that presents a nonjusticiable political question. MEIC's constitutional challenge to the MEPA Provision fails as a matter of law.[6]

CONCLUSION

MEIC has waived its alternative constitutional challenge by failing to even acknowledge, no less address, the District Court's determination that the constitutional challenge was not ripe for review. This Court should reject MEIC's alternative argument on appeal for this reason alone. If the Court determines MEIC has not waived this challenge, it should remand the same for the District Court's consideration. Lastly, if this Court finds it appropriate to resolve MEIC's

[6] MEIC's constitutional challenge to Mont. Code Ann. § 75-1-201(2)(a) (2021) is also moot following the Legislature's enactment of House Bill 971 (2023). (*See* NorthWestern's 7/12/23 Brief at 47.)

constitutional challenge on the merits in this appeal, that challenge fails as a matter of law for all of the reasons set forth herein.

DATED this 13th day of December, 2023.

Austin Knudsen
MONTANA ATTORNEY GENERAL

/s/Michael D. Russell
Michael D. Russell
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101

ATTORNEYS FOR INTERVENOR
DEFENDANT/APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,599 words, excluding certificate of service and certificate of compliance.

/s/ Michael D. Russell
Michael D. Russell

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 12-13-2023:

Samuel James King (Govt Attorney)
1520 E 6TH AVE
HELENA MT 59601-4541
Representing: Environmental Quality, Montana Department of
Service Method: eService

Jeremiah Radford Langston (Govt Attorney)
1520 E 6th Ave.
Helena MT 59601
Representing: Environmental Quality, Montana Department of
Service Method: eService

Amanda D. Galvan (Attorney)
313 East Main Street
Bozeman MT 59715
Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

Jenny Kay Harbine (Attorney)
313 E Main St
Bozeman MT 59715
Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

John Gregory Crist (Attorney)
2708 1st Avenue North
Suite 300
Billings MT 59101
Representing: NorthWestern Energy
Service Method: eService

Harlan B. Krogh (Attorney)
2708 1st Avenue North
Suite 300
Billings MT 59101
Representing: NorthWestern Energy

Service Method: eService

John Kent Tabaracci (Attorney)
208 N. Montana Ave. #200
Helena MT 59601
Representing: NorthWestern Energy
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Henandez, Badge B., Eva L., Mica K., Jeffrey K., Nathaniel K., Ruby D., Lilian D.
Service Method: eService

Barbara L Chillcott (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Henandez, Badge B., Eva L., Mica K., Jeffrey K., Nathaniel K., Ruby D., Lilian D.
Service Method: eService

Melissa Anne Hornbein (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Henandez, Badge B., Eva L., Mica K., Jeffrey K., Nathaniel K., Ruby D., Lilian D.
Service Method: eService

Shannon M. Heim (Attorney)
2898 Alpine View Loop
Helena MT 59601-9760
Representing: NorthWestern Energy
Service Method: E-mail Delivery

Electronically signed by Deborah Bungay on behalf of Michael D. Russell
Dated: 12-13-2023