



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

Pennsylvania, Montana, New York, are the only three 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 inalienable 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 the states where they exist, thereby making the case for constitutional Green Amendments in states across our nation and ultimately at the federal level.

## **Cape-France Enterprises**

**v.**

## **Estate of Peed**

### **29 P.3d 1011 (Mont. 2001)**

Cape-France Enterprises (Cape-France) was the owner of a tract of land in Bozeman, Montana. Lola Peed and her granddaughter wanted to buy part of the land to build a motel/hotel. For the land to be sold it needed state approval to be re-zoned and sub-divided into a five-acre tract. Subdivision required the site to have a demonstrated water source which would require drilling a new water well. However, a pollution plume spreading in groundwater was found unexpectedly close to the property and was believed to potentially flow underneath the tract itself. Drilling the well could cause the pollution plume to expand and contaminate additional groundwater aquifers.

Among the chemicals in the pollution plume was perchloroethylene or PCE. Contact with PCE is linked to health risks like “developmental toxicity, cancer, liver and kidney dysfunction, as well as short and long term effects on the nervous system. Its adverse environmental effects include toxicity to aquatic life such as fish and algae.

The Department of Environmental Quality (DEQ) warned Cape-France, then still owner of the property, that subdividing the property could not be approved unless the well was first drilled and tested. DEQ warned that if there was in fact water contamination the treatment costs could be significant. In addition, DEQ warned that if drilling the well caused an expansion of the groundwater pollution plume, Cape-France, as the property owner, would be liable for any clean up costs. At the time the contract for the property and project was drafted between the private parties, both Cape-France and the Peeds knew of the pollution plume but did not believe their property was going to be affected.

The District Court, agreeing with Cape France, determined that the potential liability, expense, injury and costs of performance of the contract and the drilling of the well would be so extreme and unreasonable that performance was deemed impossible and the court would not order the contract be enforced or performed (i.e. that the well be drilled). The Peeds appealed to the Montana Supreme Court asking for the contract to be enforced.

The Peeds argued that it was not in fact impossible for Cape France to drill the well and that the “potential” for the pollution to spread was not reason enough for Cape-France to be relieved of its contractual obligation, an act that was essential for approval of the subdivision and ultimately sale of the property to the Peeds.

After acknowledging the significant potential economic consequences of drilling the well if contamination were found and/or helped to spread, the Montana Supreme Court noted that in this case “the potential for substantial and unbargained-for damage involved in performing the contract is not only of an economic nature. Just as importantly, environmental degradation with consequences extending well beyond the parties' land sale is also a real possibility,” and that among the consequences are serious potential health risks to the public as well as environmental degradation.

The Court then turned to Article II, Section 3 of the Montana Constitution which guarantees all persons in the state the right to a clean and healthful environment. Noting that placement in the Bill of Rights of the constitution raises these rights to the status of fundamental rights, the court notes that they can only be infringed upon when there is a compelling state interest.

Quoting Article IX, Section 1 of the Constitution, that “the State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations”, the Court confirms that this constitutional mandate applies to both state action and private action, and affirms it applies to private parties as well.

In light of the the environmental rights and mandates articulated in Article II, Section 3 and Article IX, Section 1, the court determines “it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks.”

The Court goes on to make clear that it (the Court) also cannot mandate specific performance of the contract because doing so would also implicate the state in an unconstitutional violation of rights both directly and/or by mandating others to do so which would itself be an unconstitutional act:

“for a court to mandate specific performance of the contract at issue on the record here, would not only be to require a private party to violate the Constitution—a remedy that no court can provide—but, as well, would involve the state itself in violating the public's Article II, Section 3 fundamental rights to a clean and healthful environment, and in failing to maintain and improve a clean and healthful environment as required by Article IX, Section 1.”

In short, the court determined that it could not order specific performance of the contract because doing so would necessarily lead to an unconstitutional outcome by, contrary to its own legal authority:

- ⇒ Requiring the State to violate people's fundamental environmental rights to a clean and healthful environment found in Article II, Section 3, with no compelling state interest to support such a violation;
- ⇒ Requiring the state to violate the constitutional mandates in Article IX, Section 1;
- ⇒ Requiring a private party to violate the Constitutional mandates in Article IX, Section 1;

The Court ultimately ruled that “causing a party to go forward with the performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for clean up is not in the public interest . . . and is, most importantly, not in accord with the guarantees and mandates of Montana's Constitution Article II, Section 3 and Article IX, Section 1”.