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The Role of Geography in the Genesis and Evolution of Environmental Rights in Montana

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The Role of Geography in the Genesis and Evolution of Environmental Rights in Montana

by

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Abstract

A constitution is the repository of a society's most cherished values and future ambitions, and offers any right enumerated therein the highest amount of legal protection. In 1972, the citizens of the State of Montana entrenched within their State Constitution the right to a clean and healthful environment, as well as several additional environmental guarantees. This constitutionalization of environmental values signified a shift in Montana's identity from a historic natural resources colony, to a state with environmental consciousness. This case study utilized two qualitative research approaches, narrative history and document analysis, to conclude that Montanans' development of an environmental ethic, and the consequential enshrinement of environmental rights, resulted from a combination of distinct geographic, political, historical, and social phenomena. Although Montana courts have developed a relatively strong precedent for implementing these environmental provisions, the true strength of these rights remains tentative and depends on future judicial review and citizen involvement.

Preface

This thesis is original, unpublished, independent work by the author, Kathryn R. Owad. The interviews conducted and cited throughout this thesis were approved under Ethics Identification REB16-0081, issued by the University of Calgary Conjoint Health Ethics Board for the project "Montana and the Environment" on 2 February 2016.

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passed away during the writing of this thesis, and I regret that I will not be able to show him the finished product.

Strong morale is a powerful force, and an absolute requirement when pursuing what may sometimes feel like a never-ending task. Thank you, Anna and Christina, my childhood friends, anchors, and personal cheerleaders, for maintaining my morale, and for reminding me of my capabilities and that girl power extends into the world of academia.

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For *Mom* and *Dad*

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List of Abbreviations

AAUW- American Association of University Women

AFL-CIO- American Federation of Labor and Congress of Industrial Organization

ACM- Anaconda Copper Mining

BNSF- Burlington Northern Santa Fe

CECRA- Comprehensive Environmental Cleanup and Responsibility Act

ConCon- Constitutional Convention

DEQ- Department of Environmental Quality

DOL- Department of Livestock

DSL- Department of State Lands

EIS- Environmental Impact Statement

ENGO- Environmental Non-Governmental Organization

FWP- Fish, Wildlife, and Parks

IWW- International Workers of the World

LWV- League of Women Voters

MCA- Montana Code Annotated

MEIC- Montana Environmental Information Centre

MEPA- Montana Environmental Policy Act

MMRA- Metals Mine Reclamation Act

NCPS- North Central Power Study

NEPA-National Environmental Policy Act

NGO- Non-Governmental Organization

NPRC- Northern Plains Resource Council

NPL- Non-Partisan League

RIT- Resource Indemnity Trust

SPJV- Seven-Up Pete Joint Venture

WQA- Water Quality Act

WWI/WWII- World War I/II

US/USA- United States of America

USC- United States Code

Epigraph

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.

-Chief Justice T.N. Trieweiler, Montana Supreme Court, 1999-

CHAPTER 1: INTRODUCTION

In response to the sometimes willful, sometimes ignorant disregard of the global physical environment, the late 1960s and early 1970s played host to the modern environmental movement. From this movement emerged some of the first, and most famous, pieces of environmental legislation, the creation of agencies devoted to regulating the natural environment, and lastly, the legalization of a new human right: the right to a healthful environment. The State of Montana, although located in a nation that has chosen to eschew the federal entrenchment of environmental rights, independently ratified a new State Constitution in 1972 revolving around environmental protection and sustainability. Consequently, Montana is currently one of only a handful of American states with explicit environmental rights, and is identified as a place with a strong environmental conscience.

Given this, it is interesting to note that Montana is also dichotomously known as one of history's largest, most successful hard-rock mining economies. Since the discovery of gold in the 1860s, Montana has been the site of unparalleled natural resource extraction, landscape degradation, and perpetual soil and water pollution. Although Montana's rich geology yielded a plethora of highly valuable nonferrous metals, the state's history and development is largely credited to the mining of copper. Containing one of the world's richest supplies of copper, Montana was considered for decades a world leader in the production of copper. Due to this red metal, Montana became the hub of the Anaconda Copper Company, a mining company, which from the 1880s to the 1970s, ruled Montana with a copper fist and influenced virtually every aspect of Montanan society. Under the direction and protection of Anaconda, the state's mining industry exposed generations of Montanans to legalized environmental negligence, government collusion, and a propagandized media fully controlled by this corporation.

Before the international community can collectively staunch current and future environmental threats, all states should aim to suppress and regulate present and future environmental harm through legal action by enacting environmental laws and policies. By entrenching environmental rights and protections into their respective constitutions, citizens are guaranteed access to environmental information, the right to participate in governmental environmental decision making, and are granted the justiciable right to seek

remedies through litigation for past, current, or anticipated violations to their environmental rights.

This case study on the genesis and evolution of environmental rights in Montana provides an example of how such laws came to be entrenched, and how such laws evolve and are influenced by social, economic, legal, and political pressures from various geographic scales. The findings of this thesis depict how the event of entrenching environmental rights is a result of placed-based socio-environmental relationships, that is relationships among humans, and between humans and their surrounding environments.

1.1 An Introduction to Montana

> Colorado is high, having more peaks within its borders than any other state, Wyoming is wide with the breadth of the plains between the Big Horns and the Grand Tetons, California is handsome, with a splendor of success. It takes all three adjectives to describe Montana (Donald Culross Peattie, 1983, Preface)

Admitted as the forty-first state of the Union on 8 November 1889, the State of Montana is situated in the northwestern United States of America (USA), between 44º North and 49º North, latitude and 104º West and 116º West, longitude (Crutchfield, 2008; Holden, 2003). Montana is bordered by the Canadian provinces of British Columbia, Alberta, and Saskatchewan to the north, Idaho and Wyoming to the south, North Dakota and South Dakota to the east, and Idaho to the west (Figure 1.1).

Figure 1. 1 Montana, United States of America

With altitudes ranging from the 555 meters of the Great Plains to the 3901 meters high Granite mountain peak, the state is almost as wide as it is tall, covering nine official climate zones from east to west. Encompassing 381,086 square kilometers, Montana is the fourth largest state in the USA averaging 885 kilometers from east to west, and 443 kilometers north to south (Crutchfield, 2008; Malone et al., 1991).

Although Montana is Spanish for "mountainous," this moniker is unrepresentative of the state's geographically split personality (Holden et al., 2007; Malone, 1996). Montana is divided into two regions: the western third of the state, which is ruggedly mountainous, and the eastern two-thirds of the state, which are part of the Great Plains (Toole, 1984). "These two geographical provinces were joined into one community," wrote" Malone et al. (1991, p.6), "not by any geographical logic, but simply by the accidental occurrence of history." Montana is inaccurately considered by many as a desert state but to the west of the continental divide, which runs through Montana, is a large area with a cooler and wetter climate differentiating it from the other designated desert states (Webb, 1958; Wyckoff, 2002). Montana is unpredictable; home to frigid winters, hot summers, and to America's windiest metropolitan area, Great Falls. Montana is undeniably a state of extremes, categorized by geographers into "the bin of geographic miscellany" (Crutchfield, 2008; Malone et al., 1991; Wright, 2003).

The state is branded by two nicknames: The Treasure State and Big Sky Country (Crutchfield, 2008; Jensen, 2016, interview; Shovers, 2016, interview; Toole, 1984). One defining characteristic of the Montana experience is the "psychological and geographic scars" of its extractive industrial past (Wright, 2003, p. 226). Montana's infamous Butte Hill contains one of the nation's largest Superfund sites, an area so immense Glasscock (2002, p. 285) estimates "it would take the average motorist, travelling a city traffic rate of twenty-five miles an hour, thirty-five hours to drive through its workings" underground. Adopted in 1864, the state's motto "*Oro y Plata*," Spanish for "Gold and Silver" recognizes Montana's exploitive past, "an implicit acknowledgement of the mining industry's dominance" in the state's establishment and affairs (Howard, 1983, p. 244). Montana's physical evidence as a historic resource colony is overshadowed by its vast expanses of primordial nature. Outside of Alaska, Montana has the largest acreage of federally protected wilderness areas and national forests (Diamond, 2005; Wright, 2003). Despite

Montana's immense size, it is home to the nation's eighth smallest population, thus creating many examples of what Duncan (1993) would call "the contemporary frontier." Billings, the state's largest city, only has a current population of approximately 110, 300 residents (United States Census Bureau, 2016). Montana's "identity crisis" continues with the fact that Montana has "no dominant ethnic group, no singular cuisine, music, architecture, religion, land-platting pattern, urban form, rural folkway, dress, or political affiliation" (Flores, 2001, p. 227-228). Despite the schizophrenia, *"*among all the fifty states, this one consistently ranks among the handful that are most romanticized and most characterized as singular, if not unique*"* (Malone, 1996, p. 9).

1.2 Thesis Aim and Research Questions

This thesis traces the genesis and evolution of environmental rights within the 1972 Montana State Constitution. Numerous scholars have reviewed Montana's constitutional environmental provisions, analyzing their legal effect on Montana's society, its political institutions, its social institutions, their responses to the provisions, and the future of these mandates (Bourguignon, 2016; Elison & Snyder, 2001; Kemmis, 1978; Schmidt & Thompson, 1990; Tarr, 2003; Thompson, 2003; Tobias & McLean, 1980; Tuholske, 2015). Arguably, these scholars have not successfully interpreted Montana's legalization of environmental rights from a geographic lens. Because the literature is silent on the genesis of Montana's environmental rights, particularly the historic, socio-cultural, and geographic factors influencing the society's development, institutionalization, and legalization of environmental values and protections, this thesis attempts to simultaneously establish a new category of literature and bridge the disciplines of geography and law. This thesis answers the following two questions:

1) **What sociocultural features of Montana society led to the entrenchment of environmental rights in the 1972 Montana State Constitution?**

2) **How have the environmental rights provisions in the 1972 Montana State Constitution evolved, been interpreted, and been enforced since constitutional ratification?**

Through interpreting past and present Montanan society, this thesis demonstrates how environmental laws are influenced and transformed by a unique milieu of placed-

based societal characteristics and events. The twofold purpose of this case study is to identify the sociological aspects of Montana leading to the incorporation of environmental rights in the Montana State Constitution, and to assess the role of these environmental rights in Montana's current legal system from a geographic perspective.

1.3 Study Significance

Although particular nations embraced the right to a healthy environment in its entirety, others instead chose to forego its ratification. Nearly four decades have passed since the first formal articulation of environmental rights at the 1972 United Nations Conference on the Human Environment, and in addition to Australia, Canada, China, and, New Zealand, the USA is one of the 15 nations which has not yet recognized its citizens' right to a healthy environment in its federal Constitution (Boyd, 2012a; Kirk, 2011). Despite this fact, the citizens of several states in the United States of America have independently entrenched either explicit or implicit environmental guarantees within their state constitutions. As Montana is such a state, it provides academia with an opportunity to study how environmental rights emerge at different scales within overlapping jurisdictions; consequently, this study contributes a previously untapped research topic to the literature.

Although Montana's industrial history as a corporate colony is a popular topic of study, Montana's environmental rights are only discussed, albeit rarely, in legal forums. The history of Montanans' development of environmental sentiment, and Montana's own environmental movement, is a subject which is often only mentioned in passing, if at all. Furthermore, there is an extensive gap in the literature on interdisciplinary projects bridging the disciplines of geography and law (Blomley, 2004).

1.3.1.1 Opportunities for Comparative Legal Research

Case studies interpreting environmental rights tend to focus specifically on nations as a whole rather than their sub-national entities. There is a significant knowledge gap regarding the status of environmental rights in the United States of America, with scholars disagreeing on which states explicitly contain environmental rights within their state constitutions (Boyd, 2012a; Cusack, 1993; Czarnezki, 2007; Gellers, 2012; May, 2006; Mudd, 2011; Thompson, 2003; Zackin, 2013). Additionally, states with environment rights are often mentioned as a group in the literature and are seldom referred to by name or studied independently. Given this, it should not come as a surprise that no publication of

yet has attempted to identify how and which social interactions, events, and values influenced the enactment of environmental rights in the State of Montana.

As the literature lacks comprehensive analyses comparing and contrasting Montana's environmental rights with those of other American states, the results of thesis can be utilized to conduct various transnational comparative legal studies. Additionally, larger-scale comparative legal research can be pursued, comparing the environmental rights of other sub-national and nation-states with Montana's, thus extending the relevance of this study beyond the geographic confines of the United States. Furthermore, because comparative legal analyses may be conducted at local, regional, national, and international scales, once generalized this study's methodology can be applied to any legal system and jurisdiction in studying the placed-based emergence and evolution of environmental laws.

1.3.1.2 Limitations for Comparative Legal Research

Although the findings of this case study can be applied to comparing and contrasting states with environmental rights, limitations in comparative legal analysis arise when comparing places with *constitutionalized* environmental laws, such as Montana, to places where environmental protection is solely *statutory*, such as Canada; such a comparison would be akin to comparing apples to oranges.

For instance, although the 1872 *General Mining Act* was specifically enacted by the US Congress to encourage mining on American federal lands, similar policies of prioritizing free-entry for mineral development and exploration over public uses on public lands were also followed in Canada (DiSilvestro, 1993; Ingelson & Mitchell, 2011; Newell, 1986). As early Canadian mining was significantly influenced by American mining techniques, technologies, policies, and mineral pricing (Newell, 1986), the Canadian province of Ontario, which has a rich mining history as well as environmental protections within the 1993 *Ontario Environmental Bill of Rights*, could, in theory, serve as an excellent opportunity for a comparative case study with Montana. However, because constitutional provisions outweigh statutory policies (such as the *Ontario Environmental Bill of Rights*) in fundamentality, symbolism, enforceability, and amendability (Boyd, 2012a; Burnham, 2006), and increase the likelihood that "those who control and manage state power will be punished politically if the environment is damaged or not improved" (Czarnezki, 2007, p. 483), legal studies should be restricted to comparisons between

systems of similar environmental protections to avoid the introduction of confounding variables.

Although the difference between statutory and constitutional law is discussed in later chapters, to provide the reader with the reasoning for avoiding such comparisons, one need look no further than Section (27) of Alberta's *Special Areas Act*, which states that "If any conflict arises between this Act and any other Act, this Act prevails." This example shows that unlike constitutional laws, statutory laws can easily be superseded by any "notwithstanding" provisions embedded in other pieces of legislation. Thus, although the author is aware of the existence of environmental rights in other jurisdictions, this thesis refrains from, and advises against, comparative analyses between *statutory* environmental laws and Montana's *constitutional* environmental rights.

1.4 Why Study Montana's Environmental Rights?

The Montana State Constitution is a representation of the degree to which Montanans value their relationship with their surrounding environment. Montana's Constitution contains several sections emphasizing the importance of the state's environment and Montanans' environmental values: the constitutional Preamble, Article II, Section 3, the Declaration of Rights, and Article IX, Environment and Natural Resources (Appendix A). Montana is the only state to guarantee its citizens an inalienable right to a clean and healthful environment, is the first state which constitutionalized laws on reclamation, is one of three states which recognizes the environmental values of future citizens, and is argued by some to contain the strongest environmental rights in the nation (Cross, 1990; Czarneski, 2007; Snyder & Ellingson, 2011; Kirk, 2011; Mudd, 2011; Thompson, 1996; Thompson, 2003). Furthermore, Montana (along with Delaware) is only one of two American states where the citizenry and resources were historically controlled by a corporation.

Although all these reasons contributed to the choosing of Montana as the subject of this case study, the primary rationale for selecting Montana lies in Montana's evolution from a state initially identified by its industrial activity, to a state characterized by its enactment and enforcement of environmental rights. The polarization of Montana's identity, as exhibited by Montana's history and the values and actions of its civil society, provide academia with an example of how a society's relationship with its environment changes when threatened for extended periods of time. Through studying Montana's

history and the socio-cultural values contributing to the need for, and acceptance of environmental rights, one can better understand how the emergence of environment law is endemic: situated in place, and contingent upon sociological aspects such as culture, politics, economics, history, internal and external societal relationships, and time.

1.5 Operational Definitions

A *nation* is defined as a group of individuals that share a common identity through similar ideologies, language, and history. In comparison, a *state* is defined as "an independent political unit with recognized boundaries" (Knox et al., 2010, p. 396). Because each state is a sovereign entity, governed by its own laws and characterized by unique historical, physical, and ideological qualities, there should be no reason to avoid studying each state, regardless of its size or whether or not it belongs to a larger entity, when studying the topic of environmental rights.

Law is "composed of the rules and prohibitions that society prescribes through its recognized law-making institutions: the legislatures and the courts," with laws enforced by courts and administrative agencies (Muldoon et al., 2015, p. 12). A *Constitution* is the highest law of a nation or sovereign, sub-national entity. Constitutions establish rules and guidelines for governments with the express purpose of protecting a citizenry's rights and establishing societal and governmental order. Due to its fundamental importance as the supreme law of a state, the Constitution is often difficult to amend, and all laws, policies, and regulations in the respective jurisdiction must comply with the Constitution (Boyd, 2012b; Burnham, 2006; Cooley, 1871). In comparison, a *statute* is a codified law drafted and enacted by a local, state, or federal legislative body, which must comply with the Constitution, and is changeable by simple legislative action. Statutory laws in Montana are compiled into the Montana Code Annotated (MCA), with federal statutes compiled into the United States Code (USC) (Burnham, 2006; Muldoon et al., 2015).

A *right* is "the constitutionally protected ability to carry out an activity" (Muldoon et al., 2015, p. 399). Rights are expressly found in constitutions, and possess inviolable universal, moral, and essential characteristics (Boyd, 2012a). The *environment* is broadly defined as the air, land, water, and biotic organisms interacting in a shared space. Although the strength, applicability, and protection offered by an environmental right differs from state-to-state, this right generally ensures an individual is entitled to clean water, air, and

soil, satisfactory ecosystem operation, and the conservation of biodiversity (Boyd, 2012a; Muldoon et al., 2015). Environmental law is the complete body of common, statutory, and constitutional law dealing with the environment.

1.6 Thesis Outline

This thesis is divided into nine chapters. Chapter two describes this thesis' theoretical background by introducing how this research belongs to the discipline of geography, the theory behind the development of a citizenry's environmental values, and why Montana's Constitution has been chosen as the main study variable. Chapter three summarizes the data used and explains the methodology followed during data collection and extrapolation. By discussing the main events in Montana's history leading up to 1972, chapter four simultaneously develops a context for this thesis and aids in answering the first research question. Chapter five presents a detailed discussion of the proceedings of the 1972 Constitutional Convention and primarily focuses on the delegates' debates in drafting the Constitution's environmental rights. Chapter six reviews the events leading up to, and following, constitutional ratification, and hypothesizes why the vote for ratification revealed certain geographic patterns. Chapter seven answers the first research question by discussing each of the direct and indirect triggers influencing the entrenchment of the Constitution's environmental rights. Chapter eight answers the second research question by reviewing the legal literature and several environmental court cases. Chapter nine summarizes the research findings, contains concluding remarks and research contributions, and proposes recommendations for future studies to utilize this research, theoretical background, and methodology.

While this thesis delivers an exhaustive account of Montana's past, while also attempting to predict how Montana's environmental provisions will be interpreted and implemented in the future, it is acknowledged that this is by no means an absolute account of Montana's history, and that it may not identify all characteristics or events contributing to the citizens' enshrinement of environmental rights, and that only a brief, compulsory review of the American legal system and Montanan environmental jurisprudence is delivered. This multifaceted thesis nevertheless investigates an increasingly important and continuously evolving component of human society: the environmental ethic.

CHAPTER 2: ESTABLISHING THE RESEARCH FRAMEWORK

2.1 Theoretical Background

2.1.1 Introduction to the Human-Environment Subject

Geography is "an inherently spatial discipline," dedicated to studying "the tangible spatial manifestations of the continuing intercourse between [humans] and [their] habitable environment" (Chorley, 1973, p.158). Geography seeks to understand human-environment interactions at different locations on earth's surface (Peet, 1998). Geographers have traditionally focused on spatial-chorology, studying the particularities of places. However, the association between human activities and nature have also long dominated discussion. At the turn of the 20th century environmental determinism deduced that the physical environment creates society and is responsible for all social processes (Massey, 1984; Turner, 2002). Environmental determinism was replaced by environmental possibilism, which instead stressed that human processes affected the landscape (Grossman, 1977). Geographers rejected these narrow, unidirectional interpretations by the 1940s, resulting in the near dismissal of human-environment studies and the domination of geography's "quantitative revolution" (Grossman, 1977; Mikesell, 1974; Peet, 1998). For decades, geography portrayed space and nature dualistically, separating space into a distinct, artificial arena apart from nature (Cronon, 1996; Mikesell, 1974; Peet, 1998). This attention to regional, large-scale units hindered geographers from recognizing micro-scale processes occurring between humans and their natural surroundings (Grossman, 1977; Massey, 1984). Largely in response to the national environmental movement of the 1960s geographers once again welcomed "the unstated rationale that the underlying substance of a space-place geography is the human-environment condition" (Turner, 2002, p.55).

Compared to other disciplines, however, the return of the human-environment identity initially played a minor role in geography (Kates, 1987). The initial geographical focus on the relationship between humans and the environment can perhaps best be portrayed in *Man's Role in Changing the Face of the Earth*, a seminal collection of geographic papers espousing the importance of understanding this relationship (Thomas, 1956). Attempting to rid geography of its monistic reputation as a space-centered discipline, Pattison (1964) asserted geography encompasses four traditions: area studies, earth sciences, spatial, and man-land. As the discipline progressed, area studies and earth

sciences became minor topics of study- leading to geography's focus on "geography as a spatial-chorological approach, and geography as the human-environment subject" (Turner, 2002, p. 53). Pattison's "man-land" tradition preceded the current human-environment identity in geography, focusing on the interaction between humans and the environment and how human practices and the environment are mutually interdependent (Pattison, 1964). Geographers realized that to fully understand the interactions between society, space, and environment, geography's two identities should be merged. "The human environment, broadly defined," wrote Bednarz (2006, p. 238) "would be the subject of study, and the spatial approach the method of study." Human-environment studies in geography thus came to be defined by Turner (2002, p. 57) as "the total phenomena within a bounded unit on the earth's surface."

2.1.2 Environmental/ Land Ethic

Nature has stimulated a discourse which can be differentiated based on the cultural domain which produced it. "Culture evolves in places that societies develop within a geographical setting, filling an ecological niche" and "the boundaries between culture and nature are blurred" because "humans are undeniably part of nature" (Goble & Hirt, 2012, p. ix-x). Nature thus represents a context-dependent product of culture, and its production and perception reflect numerous cultural domains. The "natures" produced in these various socio-cultural domains are thus all unique, distinctive not only in how they are perceived by their respective inhabitants, but in how they are transformed through particular human practices (Delaney, 2001; Mikesell, 1974). Brian Shovers, a renowned historian at the Montana Historical Society in Helena, reiterated that "Montana has been labelled as 'the Last Best Place' because it has some really unique landscapes, and those landscapes have created some pretty unique towns and cultures" (Shovers, 2016, interview). Each society differs dramatically in how it conceptualizes the environment, and how adaptive it is to environmental change. When human communities directly address environmental issues, their responses can be seen as "adaptive packages of 'captured knowledge' about living in a particular place" (Flores, 2001, p.102). To understand one aspect of a society, all surrounding contingencies must also be contemplated and understood. Schmidt and Thompson (1990, p.411) state that:

> Montana is blessed with a rich and varied terrain that has attracted and shaped an equally rich and varied community of people. We cannot talk about Montana- her history, her character, her environment, her Constitution- without devoting considerable attention to the mountains, the rivers, the plains, the forests, and of course, the skies that form the land within the politically established boundaries of the state.

Likewise, Wyckoff (2006, p.22) argues that:

> First and foremost, the interaction between people and nature still matters a great deal when trying to understand Montana's landscape. Settings everywhere shape human activity, but settlements have also redefined and refashioned Montana's natural environment. The product of that interplay demonstrates the fragile nature of the Montana landscape and that landscapes, once altered by people, forever bear the imprint.

"Nature and society are all related," wrote Huckle, 2002, p. 65), "the one constitutes the other and there can be few grounds for knowledge that seeks to understand the one without reference to the other." The nature-society, human-environment dialectic seeks to explain the general laws and discourses governing lived spaces. Humans should be considered as a part of, and not apart from, nature- with their relationship with nature interpreted contextually (Odum, 1969).

In 1949, Leopold famously wrote that there are three ethics percolating through society. The first ethic deals with a person's relation with other individuals and the second ethic with a person's relation with society. The third ethic, however, had not been accepted by society at that time: "there is yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land relation is still strictly economic, entailing privileges but no obligations" (Leopold, 1949, p.203). When interpreting history from an ecological perspective, it is apparent that humans are members of a large biotic team, engaged in constant feedback processes with other sociocultural, biological, and physical variables at play (Grossman, 1977; Leopold, 1949). Historical events which are biasedly explained either as resulting from, or innovated by human action, are actually human-environment interactions and human responses to the surrounding environment (Goble & Hirt, 2012; Leopold, 1949). Humans are one with nature, we directly absorb our physical environment through the air we breathe, the water we drink, the food we eat (DiSilvestro, 1993; Goldstein, 1998).

Montana is "home to both herculean mismanagement of resources and enlightened stewardship. In Montana, to paraphrase Shakespeare- the land's the thing" (Wright, 2003, p. 233). Space and solitude are cultural values in Montana. Montana has always been known as the big state with few people, a designation residents have always been proud of and have identified with because it connected them with their land and produced feelings of nostalgia for the frontier past (Campbell, 2016, interview; Jensen, 2016, interview; McNeil, 2016, interview; Wright, 1998). Gus Chambers, a producer at Montana Public Broadcasting Services in Missoula, stated that "about anybody that lives in Montana spends anytime they have off, weekends, holidays, recreating in the great outdoors, fishing hiking, hunting, snow-mobiling. Montanans have a close relationship with their surrounding landscape" (Chambers, 2016b, interview).

As stated, environmental ethic is context dependent. Montanan ranchers embody a different type of land ethic compared to their urban counterparts, one which can only be learnt from personal experience; this ethic is fueled by an intimate relationship with the land, a trust in the land to sustain the ranchers and their families (Mecklenberg, 2000). Likewise, urbanites depend on the environmental systems beyond their city limits, however, they are more likely to see themselves as separate from nature (Flores, 2001). A land ethic will be fully recognized by humans when all actions taken, and decisions made, consider the ethical and aesthetic consequences of the entire biotic community. A "land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it" (Leopold, 1949, p. 204). For a land ethic to develop, humans must first establish an ethic of *place*, where a "subtle, intangible, but soul-deep mix of landscapes, smells, sounds, history, neighbors and friends" composes a place, a home (Wilkinson, 1992, p. 137).

2.1.3 What is Place?

Society is composed of numerous overlapping spatialities such as space, place, territory, region, and scale, to name a few. Each spatiality is dynamic and plays an integral role in the organization of society (Miller, 2013). The segregation of the spatial and social has long been argued as problematic, for the structuration and meaning attributed to place is entirely an outcome of social experience, transformation, and translation (Massey, 1984; Pred, 1984; Soja, 1989). Place is not merely a geographical or physical location, it is also

the product of human agency and the interactions between legal, economic, political, and social phenomena (Butler, 2009). Place is a combination of the people who participate in producing it, transforming it, and experiencing it, as well as the natural and artificial physical landscape features which identify it (Flores, 2001; Pred, 1984). Without human experience place is emotionless, absent feelings, memories, and the means to organize it (Lang, 2012). Space and place are both products of society and "essential precondition[s] for the reproduction of social relations" (Butler, 2009, p. 8). Spatiality is thus not merely a concept of geography, it is inherently social in practice and in theory (Cresswell, 1996; Jonas, 2012; Unwin, 2000).

Space and place are two very different phenomena. A location becomes a place in which individuals live, culturally and financially invest in, establish powerful emotional and spiritual ties with, and ultimately become symbolically attached to (Beynon & Hudson, 1993; Merrifield, 1993). Space, by contrast, is "the domain for capital - a domain across which capital is constantly searching in pursuit of greater profit" (Beynon & Hudson, 1993, p. 182). Space is thus largely *economic*, space is pursued. Place is *emotional*, the response which attributes meaning to a space. An individual's attachment to place is subjective and contextual (Agnew, 1987; Lang, 2012; Shelley, 2003). As individuals adapt to their dynamic spatial environments, their comprehension of place becomes "based on cultural values, needs, and abilities- though often not under conditions of their own making" (Offen, 2014, p. 479). These conditions develop an individual's "sense of place." Through discourse and shared experience, the meaning attributed to place eventually becomes a part of the collective identity, influencing "who they are by virtue of where they are" (Beynon & Hudson, 1993, p. 182). Each community collectively constructs a shared sense of place and the attitudes and institutions defining it (Offen, 2014; Shelley, 2003); Tuan (1974) labeled this shared meaning of and affection for place as "topophilia."

The creation of a placed-based identity can be compared to the process of geological stratification, where through a series of cumulative human actions and the accumulation of shared memories each place develops ideologies and its own set of learned and experienced histories (Milner, 1991; Wyckoff, 2006).

> The role of memory in creating tradition and the constant revision of tradition link time and place. What is retained about the past as connected

> to place and what is rejected directly shapes what 'the community memory' includes and means (Lang, 2012, p. 90).

Current residents may inherit memories of place, even when they themselves have not experienced them. Scholars refer to this as a "memoryscape" (Phillips & Reyes, 2011). The meanings attributed to a place and its social and physical characteristics can likewise be passed on to subsequent generations. This thesis assumes that the State of Montana is a place which, due to various internal and external contingencies, has developed and can be identified by a distinctive set of placed–based socio-cultural characteristics. Paul Zalis, co-producer of the documentary *For This and Future Generations,* claims that "Montana is a state of mind, it isn't where you were born and raised, it is whether or not you adopted the features of the state to become a Montanan" (Zalis, 2016, interview).

The functioning of society is influenced by innate spatial phenomena. Social relationships between individuals are spatial in that they differ depending on the scale of interaction and the political and economic mobilization of power at each of these scales (Miller, 2013; Unwin, 2000). Through the production of territorial boundaries and jurisdictions, space is politicized, legalized, and bounded to produce the anthropocentric demand for social order (Blomley, 2004). The creation of bounded areal units, such as territories or nation-states, allows for space to be conceptualized, for it to contain definable properties and characteristics differentiating it from other spaces (Cox, 1995; Turner, 2002). The production of space, however, is not uniform across societies. Space is a product of human agency, contingent to "historically constituted social contexts in which people live their lives-in a word, places" (Agnew, 1987, p.43). Context is a feature that is sensitive to the "when" and the "where," its understanding and explanation bound to unique characteristics of places produced by social phenomena (Agnew, 1987; Lang, 2012). "Each phenomenon reflects a contingent set of circumstances not found anywhere else," thus the "how" phenomena occur cannot be studied without the "where" they occur, "there is no single abstract 'geographic space,' but countless, heterogeneous places" (Warf, 1993, p. 167). The production and perception of place and the events and features which define it are thus dependent on a combination of geographical, temporal, and social characteristics. Because place is contextual, place cannot be generalized and must be studied singularly. The next section is an example of how perception of place is context dependent. The section

depicts how perceptions of the human relationship to environment are influenced by culture and change over time in response to shifting values. Place, when studied, must be analyzed in geographic, temporal, and social terms.

2.1.3.1 Wilderness: A Sociocultural Construct

In the past, certain religions regarded natural wilderness to be full of temptations and damnation. Greek and Roman mythology believed that wilderness was wrought with danger and that by being secluded from civilization an individual could be attacked by evil spirits (DiSilvestro, 1993). Early North American settlers viewed nature as a type of purgatory because of all the manual labor required to settle, to make a place habitable; it was the promise of capital accumulation which caused people to view the penetration of wild places as a necessary evil. Through plowing grasslands and dismantling forests, fortune was founded on the destruction of the natural environment and the exploitation of nature became a traditional signifier of wealth (DiSilvestro, 1993; Flores, 2001). "Linking of godliness with wilderness destruction was still in vogue as late as 1873," and the manipulation of nature was viewed as "Manifest destiny" (DiSilvestro, 1993, p. 38). The destruction of wilderness was justifiable because it symbolized the ordering of chaos, it was physically separated from the regularity, industry, and freedom of human settlement (Cronon, 1996; Peet, 1998; Van West, 1983).

Human history is tethered to the fall of nature. The first seventy years of the 19th century in Montana consisted of the fur trade, the Lewis and Clark Expedition, railroad construction, and the discovery of gold- all of which directly threatened the social order of the Native American communities (Calloway, 2002; Toole, 1984). In the 1870s, President Grant opened the traditional hunting grounds of the Crow to white men for farming, stock raising, and mining, thus restricting the Native communities to a reservation located south of the Yellowstone River (Calloway, 2002). Manipulating the natural resources, and destroying Native American culture became, for some, the most significant contribution of Montana's pioneers (Van West, 1983). The motivations for the Crow, and other tribes, to pledge their allegiance to the USA stemmed out of love for their homelands, seeking what they considered the best option to preserve the lands they loved. "We helped the white man, so we could own our land…we did not know they were going to take our land. That is what they gave us for our friendship" recalled a Crow warrior (Calloway, 2002, p. 40).

By the late 19th century some Americans became concerned about the reckless consumption of natural resources, and the establishment of National Parks helped institutionalize the concept of "wilderness," a concept which in reality is a very human creation. People chose to conserve the carved-up nature by putting up walls and fences, stimulating the commodification of nature (DiSilvestro, 1993; Harper, 2010). In 1872, US Congress passed the *Yellowstone Act*, setting the rules and regulations for maintaining the park's "natural conditions," the Yellowstone National park innovatively set the course for federal protection of wild lands (DiSilvestro, 1993). National forests, however, were not being protected for the sake of natural values because the Forest Service sold forest timber to private lumber companies. Early land protection was stimulated and supported out of commercial interest (DiSilvestro, 1993; Harper, 2010). The authors of the wilderness narrative are "usually privileged elites with access to power and patronage," their words developing popular ideologies (Merchant, 1996, p.153). With the support of the federal government, wilderness conservation achieved significant media attention. To draw the attention of American tourists away from the allure of Europe's mountain peaks, the Great Northern Railway vigorously urged Americans to "See America First!" (Harper, 2010).

"Americans have long celebrated the uninhabited landscapes preserved in large national parks like Glacier as remnants of *a priori* Nature…which they conflate with romantic visions of primordial America," a pristine wilderness which is preserved for the future (Spence, 2002, p. 105). The history of Glacier National Park, for instance, shows how "peoples with different cultural practices assign significance to the same piece of land," how wilderness is a relative term (Spence, 2002, p.103). The establishment and management of the park in the 1910s and 1920s reflected evolved notions of the American concept of wilderness as a scenic playground, a sacred remnant of Nature's original handiwork (Cronon, 1996; Spence, 2002). As American sentimentalism of wilderness grew, the *Glacier National Park Act* (1910) extinguished all Blackfeet land rights in the name of preservation, rendering the cultural and religious use of sacred Blackfeet backcountry as "illegal." To the Blackfeet, their use of the Glacier Park lands preserved their "connection to places and items that have been important to the tribe since time out of memory," the mountains a powerful place where spirits live (Spence, 2002, p. 104). To Native Americans, this northernmost region of Montana was the "backbone-of-the-world"

(Montana Historical Society, 1957, p. 3). To the American, Glacier wilderness also became a sacred place "where tourists combined an experience of sublime nature with a deep sense of patriotism" (Spence, 2002, p. 114). In reality, the manifestation of one cultural ideal regarding place led to the eradication of another, with programs for "Indian removal" continuing despite the efforts of the Blackfeet to restore their land rights. Both ideals reflect different socio-cultural constructs of the same place, of specific placed-based identity, differing simply in the meanings attributed and the experiences had.

Human societies are the products of material and representational practices having both spatial and temporal dimensions (Huckle, 2002). Nature and society are thus perceived differently in different times and different places, with perception subjective to social class, gender, and ethnicity (Peet, 1998). Inhabitants of the same space can exhibit different levels of environmental ethic depending on how nature is culturally perceived and changed by their community. "Socializing nature highlights its artificiality and the historical and political contingencies and effects of its construction" (Delaney, 2001, p. 490). "[F]ar from being the one place on earth that stands apart from humanity, [wilderness] is quite profoundly a human creation-indeed, the creation of very particular human cultures at very particular moments in human history" (Cronon, 1996, p. 69). The removal of Native Americans to create the perception of an "uninhabited wilderness" only depicts just how invented the American concept of wilderness is. This example reiterates how sense of place is contingent upon various social, temporal and geographic factors. This example also introduces the following section, which argues that a society's acknowledgement of the importance of the human-environment relationship is founded on an intrinsic, temporal shift in collective values and attitudes.

2.1.4 Shifting Attitudes and Values: Perceivable through Collective Action

Environmentalism is not a "new" concept and can be traced as far back as 1864 with George Marsh's *Man & Nature*, which cautioned against the unnecessary degradation of the environment (Marsh, 1864). Leopold (1949) regarded the conservation movement as the embryo to the evolving land ethic. We alone decide how and when to heal our landscapes, and such actions are often connected to healing ourselves (Wright, 1998). Because such actions result from shifts in society's sentiment, the physical landscape is at the mercy of constantly shifting human values.

Through fencing off lands as national parks, the establishment of limits and restraints from human activity was nevertheless the first step towards a revolutionary new way of acknowledging the existence of an environmental ethic: "participation is limited only by the constraint that human society has placed upon itself and the component of that restraint which is the environmental ethic" (Goldstein, 1998, p. 391). Although wilderness protection was initially viewed as a source of revenue, the wilderness concept was important in the evolution of an environmental ethic (Cronon, 1996; Nash, 2014). The idea of wilderness as a sublime representation of American morals combined with the historical idea of wilderness as a cultural remnant of a past, rugged individualism (Toole, 1984). The combination of cultural and moral values eventually resulted in humans recognizing their belonging to the system of nature, not demigods outside, or above it (Muir et al., 1967; Nash, 2014). Leopold's land ethic eventually came to fruition with the environmental movement of the 1960s. Advocates identifying themselves as environmentalists suddenly realized the extent of human vulnerability, as members of a delicate ecosystem where our survival depends on the health of the total environment. This modern movement defined issues in ethical rather than economic terms. Wilderness extended "ethics from man-man relationships to those involving man and the environment" (Nash, 2014, p. 256). This concept of wilderness aided in shifting society's values from a "shallow" utilitarian conservation movement, to a "deep" anthropocentric environmental ethic (Nash, 2014).

A sustainable environmental ethic accepts the "instrumental or economic value of nature but balances this against its scientific, aesthetic, spiritual and existence values" (Huckle, 2002, p. 67). In other words, to live sustainably humans must recognize nature must be cared for in its own right, and not just for satisfying human sustenance. Actions to preserve the environment arise when individuals "understand threats to their environment as intertwined with threats to their communities, health, and way of life" (Ferguson, 2015, p. 4). Values shift, and become assimilated into core values, when individuals understand that environmental issues must be dealt with using good governance and justice, not merely as matters of meaningful science and bare-minimum action (Goldstein, 1998). Studying a society's response to environmental change "allows us to examine the adaptive significance of human behavior "and "whether the behavior of a particular population enables it to maintain a visible [ethical] relationship with its environment" (Grossman,

1977, p. 135). For land ethic to carry the same weight as other traditional values, it must be institutionalized (Bednarz, 2006; Di Chiro, 1996; Kittredge, 1992).

Cultural communities often exhibit a shared system of beliefs which evoke distinct responses to change. Dowling (1990, p. 283) calls this "programming," where "the brain believes what it is told the most." Beliefs and values become "truths" and "facts," and are "little more than transient, socially constructed fictions" created in response to historical events and discourses (Warf, 1993, p.164). In addition to being a response to a certain event, each action taken is motivated by these respective beliefs and institutionalized truths. When new beliefs and values emerge, they result from the "reprogramming" of a society's attitudes and elicit new reactions to change. Accordingly, this thesis theorizes that most Montanans, due to their commonality of place and culture, have collectively programmed a particular set of values which they treat as truths. As a repository for a society's most cherished values, the Montana State Constitution contains what Montanans believe to be the truth. Dowling (1990, p. 284) argues that: "proposed constitutional amendments and proposed legislation reflect the 'programming' of the proponents. This programming changes from generation to generation and therefore is slow and imperceptible to the subconscious that is being reprogrammed." Programming is a temporal element, a change in routine that can only be visualized through social action. "For instance, civil rights legislation passed in Montana in the 1970s was a natural result of the reprogramming occurring nationally since the 1960s" (Dowling, 1990, p. 284). Because of the fundamental nature of constitutions, the addition of new subject matter suggests a society's acknowledgment of new values and symbolizes the result of decades of subconscious reprogramming (Howard, 1972). Montana's entrenchment of environmental rights in its State Constitution can ultimately be viewed as the institutionalization of an environmental ethic, the acknowledgement of a new societal value. Environmental rights were enacted in the last forty years as American civil society "began to recognize environmental protection as a legal and political norm" (Tuholske, 2015, p. 239). As soon as environmental protection became a normative value, a cultural ideal, and morphed into a routine, citizens realized it should be recognized as an inherent right and elevated it to constitutional status (Kotze, 2015; Tuholske, 2015). Fritz (1990) states that the ratification of the 1972 Montana Constitution represented significant social change, the radical alteration of Montana's

politics, economics, and ideology. Montana went from one of American West's best known and most successful hard-rock mining economies, to legalizing what Charles Wilkinson has deemed to be "the single strongest statement of conservation philosophy in the Constitution of any state, and likely any nation in the world" (Horwich, 1996, p. 323).

The rationale for constitutionalizing environmental rights is arguably rooted in the past, in response to old laws which lacked standards for environmental protection (Kotze, 2015). Past Montanans were pegged as shortsighted in their attitudes towards preservation of nature, exclusively supporting ventures which could increase economic standing (Harper, 2010; Malone & Dougherty, 1981). In comparison to other states with similar extractive histories, current Montanans are considerably more progressive in their adaptive responses to environmental issues, exhibiting an unparalleled "ecological awareness" to conserving biodiversity, wildlife and wildlands, and through legalizing a collection of legislative and constitutional environmental laws. Flores (2001, p.161) explains that in response to decades of corporate domination at the hands of two autocratic companies, Anaconda Company and Montana Power, Montana "entered the late twentieth century with the strongest anti-corporate zeitgeist- the most profound suspicions about capitalism's effect on nature -anywhere in the interior west" making Montana "a more fertile seedbed for secular environmentalist sentiments" than other northwestern mountain states. Montanans responded singularly because they have been "significantly shaped by their *place*, and the peculiarities of their *history*," leading them to embrace the idea that interaction between humans and nature works in a dialectic manner (Flores, 2001, p. 161). Montana's 1972 Constitution is riddled with "central and sometimes conflicting values of a rugged frontier individualism versus protection of the environment" (Schmidt & Thompson, 1990, p. 413-414). Desires for personal freedom have conflicted with concern over environmental preservation; these dichotomous values have to a large extent been produced and recreated by past and present responses to changing landscapes and historical events. Events in Montana's history can reveal the reasoning behind the production and transformation of these conflicting social values, because "the values and the history of Montanans inextricably form the framework for the central references to the environment in the Montana Constitution" (Schmidt & Thompson, 1990, p. 412). The motivation for the entrenchment of environment rights can thus best be identified through a holistic,

interdisciplinary analysis of Montana's environmental, social, and legal history.

2.2 How Is This Geography?

2.2.1 Legal Geography

The structure of society is composed of rules and power relations governing the regulation of the material and symbolic distribution of natural and artificial resources (Cox, 1995; Pred, 1984). These rules and relations are historically, culturally and geographically contingent, and can be codified and uncodified, formal and informal, and explicit or implicit depending on the social and legal context (Pred, 1984). In focusing on the localities debate, geographers have fallen short in acknowledging the significance of law in the functioning and ordering of society, most likely because of the common misconception that geographers (and non-lawyers in general) are unqualified to study legal theory (Blomley, 2004; Butler, 2009). "Study of the law," wrote Johnston (1981, p. 1189), "has tended to be isolated from other social sciences, particularly those concerned with spatial and environmental issues." Legal scholars have likewise underestimated the importance of geography as they have been dedicated to largely analyzing the law's temporal characteristics rather than its spatial characteristics (Blomey, 2004; Butler, 2009). "Space matters. Law matters. When Combined, interesting things happen" (Blomley, 2004, p. 92). Although the study of environmental law has been growing in geography, there is a paucity of literature bridging the gap between the disciplines of law and geography (Bednarz, 2006).

Laws are inherently spatial, "formed and interpreted by contextually situated agents…law itself acquires complexity and subtlety, becoming intrinsically geographical" (Blomley, 1989, p. 517). By establishing a geographic, normative area to which a person belongs, and within which that person has freedom to act either as a "Montanan" or an "American" citizen, *law creates space*. For instance, an individual cannot be a "citizen" without legally belonging to the spatial category of "state" (Blomey, 2003). The intended recipients of these laws, the citizens of a state, both "live 'in' a legal system" and "live 'in' space" (Manderson, 1996, p. 1061). Laws are spatial in that they have a characteristic shape, size, and content, which interact with and are influenced by other laws circulating in a given space. All American citizens are governed by federal laws, however, in belonging to one of the fifty states, each citizen

is additionally bounded by laws specific to their state, and at a smaller scale, laws specific to their locality (such as county ordinances and municipal by-laws). American citizens live in a system of numerous overlapping laws, each fulfilling a certain purpose at a certain spatial scale. These laws are structured within numerous legal boundaries and jurisdictions, spatial in scope: municipal laws, state laws, national laws, international laws, each interdependent, organized, enforced, and interpreted by people situated at particular scales. "While boundaries are established by legal authority, it is also the case that often physical features such as rivers and mountains influence the path taken by these boundaries. Clearly, law and geography interact in practice, if not in theory" (Economides et al., 1986, p. 167).

The relationship between law and space is contrarian in that despite being interdependent and mutual, laws depend on the context in which they are constructed and interpreted (Butler, 2009). Thus, laws are inherently social. Society is saturated with law, the spaces which define our lives are concentrated with legalities influencing our sense of self. Our ownership of properties and pets, the zoning of our municipalities, the structuring of our government, and the roads we travel on are all subject to laws. Laws regulate what societies consider to be normative behavior, and by establishing various prohibitions and duties, influence our interactions with others and with material objects (Blomley, 2003; Economides et al., 1986). If laws were solely created on a spatial basis absent social influence, laws would be uniform across great expanses, homogenous and undistinguishable from other places (Economides et al., 1986). Because law is social, law is necessarily a socio-political construct. Malone and Dougherty (1981, p. 44) define political culture as "the configuration of ideas, attitudes, biases, and emotional attachments which characterize a political community, whether that community is a city, a state, or a nation." Each of the fifty US states thus exhibits a political culture which, to an extent, is exclusively its own (Jonas, 2012). In addition to defining political territories using physical landmarks, the creation of legal space, of state boundaries is indirectly influenced by past and present political and economic events. Because law constructs spaces, and because spaces are social, law is both social and geographical. To understand place, one must understand law; to understand law, one must understand place (Blomley, 1989).

2.2.2 Constitutions as Repositories for Human- Environment Relations

In addition to containing a society's most cherished values, a constitution is the supreme or highest law of a nation, all other laws must be consistent with it (Boyd, 2012a). As previously stated, places are consequential for the production of identity, and identity is, among other things, a place-based concept. Designed to acknowledge decades of social experience, knowledge, and history, constitutions can act as an embodiment of a society's identity. Professor Charles F. Wilkinson stated that "constitutions are far more than interpretations in judicial proceedings. They are philosophical and moral statements; they embody the state of mind of a people" (Schmidt & Thompson, 1990, p. 444). Likewise, Kelly Kirk (2016, interview), history instructor at Black Hills State University in South Dakota, argues:

> Laws are definitely influenced by place and geography. People are products of their environment. People recognize where they are in the laws that they make. People like to think of themselves as Montanans, and that's a unique identity, and that has to be recognized in their Constitution.

Because environmental constitutionalism occurred in response to various social movements and employed numerous social constructs, it should be analyzed from a normative point of view (Kotze, 2015). Understanding law can help unearth how place is understood, and thus, how nature is understood by situated actors. "Legal texts are significant artifacts through which we can glimpse how conceptions of nature are contested, validated, repudiated, modified, and—more importantly— deployed by situated actors in countless ways" (Delaney, 2001, p. 489). To understand how people relate to nature in certain places, one need look no further than the laws that draw limits between humans and their environment, as laws are also sites of cultural production. Regardless of whether a constitution explicitly or implicitly contains statements of environmental protection, the composition of a constitution can undoubtedly reveal the extent of a society's environmental ethic. For instance, a constitution completely lacking in environmental rights reveals environmental values may be secondary to the importance of other traditional values. Delaney (2001, p. 488) supports this sentiment:

> To the extent that modern understandings of what it is to be human are dependent on particular conceptions of nature, it is reasonable to suggest

> that legal discourse cannot be 'neutral' with respect to competing conceptions of nature. If this is right, then looking at law as a cultural site within which nature is produced might reveal interesting aspects that would go unnoticed if we only looked at society more broadly or at other sites.

The processes of how dynamic natural and artificial environments influence our human laws, economies, values, and social order must be acknowledged (Economides et al., 1986; Goble & Hirt, 2012). "Popular conceptions of nature and of human relationships to nature are both deeply informed and given expression by legal concepts" such as rights (Delaney, 2001, p. 489). This "rights consciousness" reflects how surroundings, history, and experiences have been conceptualized and are an expression of a society's aspirations. Thus, constitutional laws can be an important reflection of a society's human-environment relationship since they reflect conceptions of nature and create dialect regulating a society's environmental interactions. By asking what role law plays both through the infliction of limits and responsibilities, one can understand how society perceives its relationship with the environment. The Montana State Constitution is a representation of the degree to which Montanans value their relationship with their surrounding environment.

2.3 Chapter Summary

Place is not purely physical, it is also "what takes place ceaselessly, what contributes to history in a specific context through the creation and utilization of a physical setting," a historically contingent "unbroken flow of events" (Pred, 1984, p. 279-280). Place is social, place is spatial, and place is contextual. Serving as an emblem of each society's most identifiable characteristics, a constitution can be utilized as an interdisciplinary tool for studying space and society. Constitutions are endemic; being place and time dependent they are differentiable based on their emphasis on various geographic, demographic, economic, historical, and social circumstances (Tarr, 2011). Because the doctrine of American federalism allows states to test legal principles "across a wide swath of the geographical and political spectrum," each state constitution reflects the place producing it, the people writing it, and the discourses influencing it (Tuholske, 2015, p. 245). A constitution depicts "how people understand, live in, and change their environment," and can be utilized to uncover a society's relationship with their environment (De Chiro, 1996, p. 299). Montana's 1972 Constitution was thus utilized to track Montanans' changing

perceptions of place, and the triggers behind the evolution of their environmental ethic.

Constitutions are temporal. "Scholars and jurists who have championed the independent interpretation of state constitutions have long argued for close attention to the specifics of the constitution's text and to its generating history" (Tarr, 2011, p. 8). Only by acknowledging the past, can a society understand the reasoning behind the laws governing their society. If Montana is to be understood by current and future Montanans, as well as by non-residents, Montana's environmental history as a cultural landscape abused by generations of claimers, must be acknowledged (Howard, 1983; Wright, 1998). Because of the adaptive qualities of laws, changing styles of litigation can reflect changes in social values, with continuities reflecting retained societal values (Goldstein, 1998; Tarr, 1992). Tarr (1992, p. 1184) claims that "a state constitutional scholar can study the various layers of provisions that have been incorporated into the document and the political movements that spawned them."

History, as stated by Fritz (2002, p. 341), "is the study of the past, but not for the past's own sake. Only if we use the past to comprehend the present and engage the future is its study worthwhile." History is not arbitrary; to be effective, meaningful, and understood, it must be analyzed within the context of the state, within the history of the lives that shaped and defined it (Toole, 1984; Wyckoff, 2006). Like places, constitutions result from the accumulation of decades worth of social knowledge, practice, and experience. Montana's entrenchment of environmental rights "represented a fundamental turning point, perhaps as symbolic as substantive in the history of Montana- the centerpiece of an era of reform that began well before 1972" (Fritz, 1990, p. 270). To identify the social and physical features of Montanan society resulting in the entrenchment of environmental rights in the Montana State Constitution, Montana's history must be studied thoroughly. As a vessel of a place's legal, geographic, and historical identity, Montana's State Constitution is the ideal unit for studying Montanans' relationship with their environment, and the placed-based evolution of Montana's singular environmental ethic. The entrenchment of Montana's environmental rights is the historical phenomena of interest.

The subsequent chapter outlines the methodological approaches and strategies employed in tracing the genesis and ensuing evolution of Montana's environmental laws.

CHAPTER 3: RESEARCH METHODOLOGY

3.1 Research Strategy

This thesis employs a case study research strategy and, in comparison with other strategies of inquiry, a case study is chosen based on the unit of analysis being studied and is often utilized when a researcher is analyzing a particular phenomenon (Creswell, 2007; Sabatier, 1973; Stake, 2000). There are three types of case study: intrinsic, instrumental, and collective. Here the instrumental case study is utilized wherein a case is "examined mainly to provide insight into an issue or to redraw a generalization…it plays a supportive role, and facilitates our understanding of something else" (Stake, 2005, p. 437). Case study research is particularly interested in exploring a system bounded in a setting or context, and is focused on understanding a certain event by identifying themes (Creswell, 2007). By focusing on bounded systems, case studies may be utilized to analyze the relationship between humans and their surrounding environment (Turner, 2002). Compared to other strategies, which oversimplify social systems bounded in place, case studies can portray the inherent complexity and uniqueness of specific places (Warf, 1993). Case studies are also versatile and can be paired with partial narrative approaches, which aid geographers in contextualizing the specificities of places, further removing the limitations of generalization (Massey, 1984; Sabatier, 1973; Warf, 1993). In this case, the bounded system being analyzed is the State of Montana, the phenomenon of interest is a particular event in Montanan history, the entrenchment of environmental rights in the State Constitution, and the themes of interest are the societal values and historical events influencing the enactment and enforcement of Montana's environmental laws. As case studies can be applied to assessing a society's response to particular environmental issues, the case study is the optimal strategy for answering these research questions (Kates, 1987).

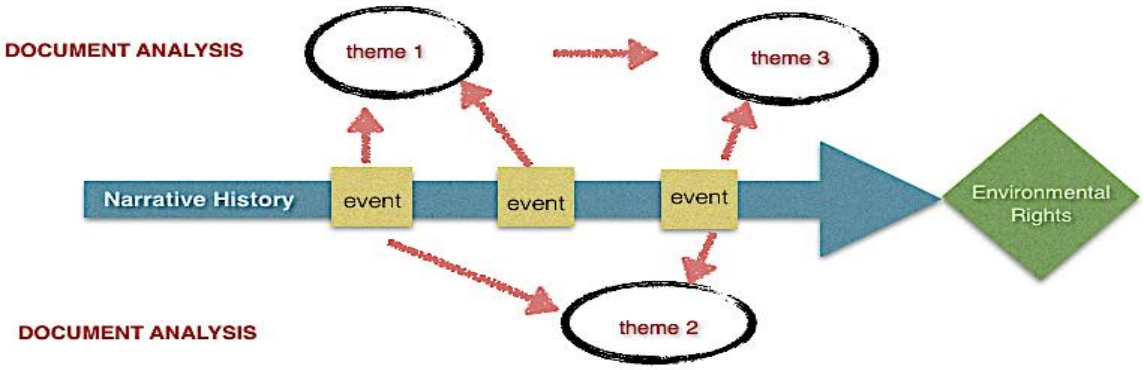
3.2 Analytical Approaches for Data Analysis

This case study utilized two analytical approaches, document analysis and narrative history, to interpret the collected data. According to Munz (1997, p. 834), "in order to do justice to time, it must be described in narrative form" as the "narrative is the only literary device available which will reflect the past's time structure." Through producing a narrative of historical events bound in place (Montana) and time (1880s to present day), the narrative history approach allowed data to be presented as a story with a beginning,

middle, and end (Green & Troup, 1999). It is important to note that the goal of conducting a narrative history is more than a simple chronology of events (Stiller, 2002), this approach produced a context for the economic, political, historic, and social triggers for Montana's constitutional reform and it also facilitated a description of the setting in Montana following constitutional ratification. Participant interviews personalized the narrative, aiding in understanding how past historical events, and Montana's constitutional environmental provisions, are perceived by modern-day Montanans. The "narrative" role of this approach aided in contextualizing the identified events, while the historical part of this approach organized the events in a manner suitable for conceptual document analysis (Stiller, 2002).

Document analysis is a versatile approach recommended for qualitative researchers performing a case study (Bowen, 2009). Because document analysis is geared towards cases that are interpreting a list of past processes leading to a certain event, this analytical approach proves optimal for the task at hand (Yin, 1994). Additionally, document analyses are ideal for interpreting large quantities of documents, triangulating data, and can also be applied to interpreting historical research (Bowen, 2009). Document analysis appraises and interprets the timeline, uncovering themes from relationships between the data sources (Bowen, 2009). The first set of themes were those integral in directly and indirectly influencing the entrenchment of the right to a clean and healthful environment, answering the first research question (Figure 3.1).

Figure 3. 1 Narrative History and Document Analysis Approaches



Source: Author

Case law and citizen actions were similarly organized to determine how Montanans, and their institutions, have interpreted and enforced the environmental rights, answering the second research question. Together the two analytical approaches helped to make sense of the data, to speculate which sociocultural characteristics and processes were involved in developing Montanans' demand for, and interpretation of, environmental rights and laws.

3.3 Summary of Data Sources

This thesis utilized various types of literature, audiovisual materials, and personally conducted interviews to answer the research questions (Table 3.1).

Table 3. 1 Overview of Data Sources

Data Category	Data Type	Data Source	Analytical Approach
Documents/ Literature	Books, Court Cases, State Constitutions (Montana, Other), 1972 Montana State Constitutional Convention Transcripts, Journal/ Newspaper Articles, Legislation, Maps, Theses, Government Reports	State/University Archives, Government or Institutional Websites, Libraries, Journals, Magazines	Narrative History, Document Analysis
Audiovisual Materials	Documentaries, Photographs, Movies, Press Releases	State/University Digital Archives, Government or Institutional Websites, Libraries	Narrative History, Document Analysis
In-person Interviews	Transcribed Text (Audi-Recorded, Transcribed)	Environmental/Mining Activists, ENGOs, Surviving Convention Delegates, Retired Justices, Professors, Book Authors, Politicians, Documentary Producers, Lawyers	Narrative History, Document Analysis

The primary sources of data were the 1972 Montana State Constitution, the transcripts of the 1972 Montana State Constitutional Convention, and environmental litigation from constitutional ratification to the present. Audio-visual materials, personally conducted interviews, and other forms of literature were supplementary in uncovering themes and contextualizing the data.

3.4 Qualitative Rigor

This case study utilized two separate purposeful sampling strategies during data collection: maximum variation and snowball sampling (Creswell, 2007; Merriam, 2009). A purposeful sample is a sampling strategy that screens data for their variability and applicability, ensuring an efficient data collection process (Creswell, 2007). Purposive sampling is especially appropriate when the research is distinctive in nature and few individuals have the knowledge to supply insightful data (Stiller, 2002). Snowball sampling was used during the interview process to recruit individuals as sources of reference to point to other potential participants that met the established inclusion criteria (Merriam, 2009).

To ensure maximum validity, it is recommended that a qualitative researcher draw from at least two sources of data as well as at least two analytical approaches (Yin, 1994). Sources of data normally fall into three distinct categories: documents, interviews, and physical artifacts (Yin, 1994). This case study met these criteria for internal validity, utilizing all three types of source data in addition to two analytical approaches (Table 3.1). Furthermore, because of the use of more than one data source, data triangulation was used in this case study as "a powerful technique to establish credibility in a research project" (Stiller, 2002, p. 94). A maximum variation strategy, which strives to collect multiple types of data from many diverse sources, results in multiple perspectives and is thus more likely to reveal numerous patterns and themes (Creswell, 2007). Because the interview portion of the study included participants from diverse professional and personal backgrounds, the data collected throughout the study is the result of multiple perspectives and of significant qualitative validity. "Any common patterns that emerge from great variation," wrote Patton (2002, p. 234), "are of particular interest and value in capturing the core experiences and central, shared dimensions of a setting."

3.5 Data Collection and Management

Data collection and analysis are often completed simultaneously (Merriam, 2009). All data collected throughout this research process were transcribed, with potential and recurring themes highlighted during data collection. This open coding aided in producing a narrative and constructing themes for document analysis (Merriam, 2009). Mendeley Reference Managing Software (Version 1. 17. 12) was utilized to organize literature, take notes, and compile references.

Fourteen interviews were conducted in August and September 2016 (Appendix B). The interviews consisted of semi-structured, open-ended questions, leaving enough flexibility to address unexpected lines of research that arose during the interviews. A preliminary interview guide was utilized in each interview, with certain questions tailored to specific participants, depending on their roles, experience and expertise. Participant eligibility and recruitment followed the methodologies of purposeful sampling mentioned above. Participants were individuals who attended, or are familiar with, the events of the 1972 Montana Constitutional Convention, as well as individuals well versed in Montanan history and current or past legal proceedings of Montana State Law (Table 3.2).

Table 3. 2 Interview Information

Participant	Professional Information	Interview Duration	Interview Location
Campbell, B.	1972 Montana Constitutional Convention delegate, Attorney	2 hours	Missoula, MT
Chambers, D.	Founder/President of the Center for Science in Public Participation	1.2 hours	Bozeman, MT
Chambers, G.	Montana PBS, Co-producer of *For This and Future Generations*	1 hour	Missoula, MT
Ellingson, M-N	1972 Montana Constitutional Convention delegate, Attorney	2.2 hours	Missoula, MT
Jensen, J.	Executive Director of Montana Environmental Information Center	2.2 hours	Helena, MT
Johnson, D.	Staff Attorney at the Montana Environmental Information Center	2.2 hours	Helena, MT
Johnstone, A.	State/Federal Law Professor, University of Montana	1.5 hours	Missoula, MT
Keane, J.	Politician (Butte Senator), past Anaconda employee	2 hours	Butte, MT
Kirk, K.	History Instructor, Black Hills State University, South Dakota	1.5 hours	Calgary, AB (Video Chat)
McNeil, C.B.	1972 Montana Constitutional Convention delegate, Retired Montana District Judge	2.5 hours	Polson, MT
Reichert, A.	1972 Montana Constitutional Convention delegate, League of Women Voters member	0.5 hour	Great Falls, MT
Shovers, B.	Author, historian at Montana Historical Society	1.5 hours	Helena, MT
Wray, W.	Author, Attorney, Mining Consultant, past Anaconda employee	1 hour	Butte MT
Zalis, P.	Co-producer *For This and Future Generations*	1 hour	Missoula, MT (Phone call)

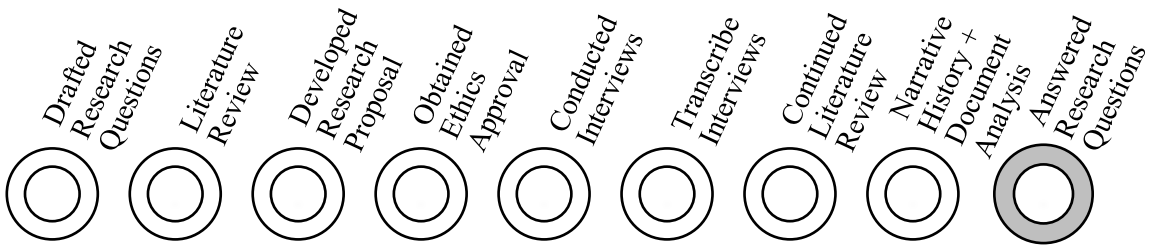
Due to their diverse identities and knowledge, the participants contributed numerous perspectives to this research. For instance, Senator Jim Keane, in addition to being an active politician in Butte, worked for Anaconda Company and is an advocate of regulated mining. Twelve of the interviews were in-person interviews occurring in the State of Montana, with the remaining two interviews conducted over the telephone and through video-chat. Thirteen interviews were audio-recorded with the consent of the interviewees, with one interviewee abstaining from being recorded but consenting to the taking of notes. All interviews were transcribed and imported into NVivo (Version 11.4.2), a qualitative computer software program. Each interview was thoroughly analyzed, and the responses coded to particular categories to aid in data organization, visualization, and the production of themes (Creswell, 2007; Merriam, 2009).

3.6 Ethics

Each interview participant was presented with a consent form which outlined the study and its purpose, and asked for consent to record the interview, for notes to be taken during the interview, and for the authorization to refer to the participant by name in this thesis when making direct or indirect quotes. To the best of the researcher's ability, leading questions were avoided, and all interviews were conducted with neutral, unbiased tones. Participants had the option to refrain from the interview at any given time, or to request the removal or edification of a response. This research study was approved by the Conjoint Faculties Research Ethics Board on 2 February 2016 (Ethics ID: REB16-0081).

Figure 3.2 depicts the research process conducted to answer the research questions.

Figure 3. 2 Schematic of Research Methodology



3.7 Chapter Summary

"We need theoretically-sophisticated case studies of the experimental efforts of various states and localities in solving environmental problems," a task which can be achieved by analyzing past and recent histories of states with environmental laws (Sabatier 1973, p. 223). The current literature on environmental rights is highly uneven, with most research invested in studying larger, sovereign states rather than subnational political entities. For instance, Ecuador and Sweden are popular cases in multiple studies while Montana and other subnational states are largely ignored. In focusing on Montana, this case study contributes to the literature a more representative scalar examination of places with constitutional environmental laws. The methods utilized in this study can be applied to researching the placed-based development of environmental laws in any legal system, thus also creating opportunities for comparative geographical and legal research between Montana and other jurisdictions.

The rationale for choosing Montana as the subject of this case study lies in Montana's evolution from a state initially identified by its industrial activity, to a state characterized by its enactment and enforcement of environmental rights. Laws evolve over time, however, "environmental law, has little if any history and custom in Montana" (Dowling, 1990, p. 286). Montana served as the optimal case for the narrative history approach as it provided an evident beginning (resources extraction) and end (environmental protection and sustainability) to Montana's narrative. The middle of the story was the process of interest, which through document analysis, identified the features of Montanan society involved in developing the state's current environmental identity. The triangulation of several types of data revealed the direct and indirect causes of the entrenchment of Montana's environmental laws, Montanans' perceptions of the environmental provisions, the provisions' role in Montana's participatory and governmental decision-making process, and successes, shortcomings and future projections of the state's enforcement of environmental laws.

The next chapter narrates Montana's history from its beginnings as a Territory, up to 1972, the year of Constitutional Convention and ratification, contextualizing Montana's dynamic political, economic, social and environmental climates throughout the century.

CHAPTER 4: MONTANA'S HISTORY, THE PLUNDERING OF A HIGH, WIDE, AND HANDSOME VIRGIN EMPIRE (1880s- 1971)

In describing Montana's whirlwind history, notable Montanan author Joseph Kinsey Howard wrote that "Montana has lived the life of America, on a reduced scale and at breakneck speed. Its history has been bewilderingly condensed, a kaleidoscope newsreel, unplotted and unplanned" (1983, p. 3-4). In order to answer the first research question and to contextualize Montanan society's development of an environmental ethic, this chapter condenses over a century's worth of complicated history, developing a rationale for the eventual entrenchment of environmental rights in 1972. This chapter largely focuses on the citizens' interactions with extractive industry at the hands of a dominant copper company, the Anaconda Company, which influenced the state's social, economic, and political development, and the quality of the past and present Montana environment. The events discussed in the following narrative were chosen based on their relevance in portraying the evolution of Montanan society and citizen attitudes throughout the decades (Table 4.1).

Table 4. 1 A Reader's Guide to Montana History: Timeline of Significant Events

Decade(s)	Description of Historic Events
1860s/1870s	Discovery of gold and silver result in establishment of Montana Territory. Arrival of copper kings Marcus Daly and W.A. Clark.
1880s	Anaconda Company established. Montana becomes world leader in copper production. Statehood achieved in 1889: Constitution written by/for mining interests; gives rural counties legislative power; facilitates unmitigated natural resources extraction.
1900s	Daly sells Anaconda Company to Standard Oil. Montanans experience the beginnings of corporate autonomy. Arrival of copper king, Heinze.
1910s	Homesteading collapse. Sedition Act fuels repressive atmosphere. Anaconda officials begin purchasing state newspapers, eradicating journalistic freedom. The Company expands into Chile, elsewhere.
1920s	WWI followed by depression of copper market, drought. Progressive Tax Reform results in Metals Mine Tax, requires mining companies pay higher state property taxes.
1930s	Anaconda Company suppresses flow of information, Montanans oblivious to state/local issues. Great Depression stimulates federal New Deal programs, strengthening state liberalism and civil society.

1940s	Post-WWII, federal government continues push for copper production to spur economic development, facilitating mass consumerism.
1950s	Open-pit mining/ post-war automation result in mine lay-offs, transience to other cities: attitude, demographic shifts. Butte communities destroyed to construct Berkeley Pit (historic symbol of consumerism and environmental abuse). Anaconda Company sells its newspapers.
1960s	Montana's new newspaper owners (Lee Enterprises) encourage publications on state environmental issues. Anaconda Company fully engrossed with its Chilean holdings/operations.
1970s	Chile's government expropriates Anaconda's Chilean assets; the Company loses millions of dollars; closes most Montana operations; leaves state. Montana Legislature embraces window of opportunity to pass landmark environmental legislation; electorate calls Constitutional Convention; outdated/restrictive 1889 Constitution replaced.

4.1 *Oro y Plata*, Statehood, and the War of the Copper Kings

Montana's lands were acquired by the United States in the Louisiana Purchase of 1803 (Holden et al., 2007). Between the 1840s and 1890s, the resource rich, labor poor, American West offered opportunities to foreign workers searching for financial aid and material security (Swartout, 1988). As California's gold rush waned, tenacious miners began exploring other states. Newcomers swarmed the state following Montana's first gold strike in 1862; mining camps and towns were formed and abandoned overnight as placer miners up and left at the whisper of a new discovery. The discovery of silver in Montana in 1864 contributed to the eventual collapse of Virginia City, Nevada's infamous silver mining frontier (Crutchfield, 2008; Glasscock, 2002; Montana Historical Society, 1959). By 1870 the new Territory was home to 28,000 people and with 500 gold bearing gulches being mined, was a leader in American gold production, second only to California (Crutchfield, 2008; Howard, 1983; Montana Historical Society, 1959).

In 1863, a former country school teacher from Missouri by the name of William Andrews Clark arrived in Bannack to mine gold (Glasscock, 2002; Marcosson, 1957). By 1869, Clark was an established entrepreneur, banker, and millionaire in Deer Lodge county. Clark invested in Montana's growing extractive industry by building a smelter in Butte and organizing the Colorado & Montana Smelting Company with his partners in Colorado. Clark would become an historical figure, politician, corporate magnate, and one of

Montana's renowned copper kings (Glasscock, 2002; Marcosson, 1957).

In 1876, Irishman Marcus Daly (soon to be known as one the world's greatest miners, and Clark's primary opponent) was sent by the Walker brothers of Salt Lake City to investigate the possibilities of establishing a silver camp in Silver Bow county, a significant event in Montana's history as it introduced rich out-of-state investors to the developing territory (Howard, 1983; Malone et al., 1991; Marcosson, 1957). Daly purchased the Alice silver mine, and urged his employers to authorize the purchase of a neighboring mine, the Anaconda. When the Walker Brothers refused to authorize the purchase, Daly sold his interest in the Alice, and independently purchased the Anaconda silver mine (Bakken, 2007; Howard, 1983). In need of funds to develop the mine, Daly approached his colleagues Hearst, Haggin and Tavis, whom he had recently aided in the establishment of the very successful Ontario Lake silver mine in Utah. With the support of his investors, in 1881 Daly founded "the world's largest nonferrous metals company for much of the twentieth century," the Anaconda Silver Mining Company (Swibold, 2006a, p.xiv). Hearst, Haggin and Tavis were rewarded generously for their trust in Daly, their investment resulting in a several hundred percent profit within the first few years of silver production (Glassock, 2002; Howard, 1983).

During the financial panic of 1873 a nationwide standstill of silver mining occurred (Chadwick, 1982; Malone et al., 1991; Walter, 2002). With silver prices dropping, and silver ore almost exhausted at a depth of 90 meters, Daly closed the Anaconda mine, but not before realizing the hill was supersaturated with copper (Howard, 1983). Areas ranging from 15 to 30 meters wide were up to 50 percent pure copper, and "that was merely the high-grade tip of a subterranean iceberg extending at least a mile below the surface and containing more than four billion tons of copper ore" (Dobb, 2002, p. 316). Daly's copper discovery coincided with Alexander Graham Bell's patenting of the telephone, an invention requiring copper wires (Crutchfield, 2008). The crash in the silver market provided Daly with an opportunity to affordably purchase surrounding claims. Now the majority owner of a hill impregnated with a metal high in demand, Daly reopened the mine and declared to the world that Butte, Montana was "the richest hill on earth" and held the world's future supply of copper (Dobb, 2002; Howard, 1983; Marcosson, 1957).

The magnitude of copper mining could be visualized through Butte's exponential population growth and development, the city doubled in size and greeted its first railroad within five years of Daly's arrival (Walter, 2002). In an effort to expand traffic to the west, railroad companies distributed pamphlets throughout the eastern United States and Northern European countries, urging settlers to homestead (Athearn, 1958; Wright, 1998). The pamphlets were distributed with samples of crops and pictures evidencing Montana, and other western states, as lands of milk and honey- veritable climatic paradises (Athearn, 1958; Howard, 1983). Scandinavian countries were intentionally targeted due to their culture of inheritance; as family lands were legally bequeathed to the eldest son, the remaining siblings often emigrated to the America's to establish themselves (McDonald, 2010). Butte's population doubled when the Utah Northern connected Butte to Salt Lake City, doubling twice more with the introduction of the Montana Union and Montana Central lines (Glasscock, 2002; Smith, 1964; White, 1988). When the Northern Pacific came to Butte, mine profits doubled, and Butte's payroll was among the highest in the nation. Some historians argue that the railroads "affected the new state even more profoundly because Montana was remote and heavily dependent on a handful of volatile, extractive industries, ones that required enormous infusions of capital that could only be obtained outside its borders" (White, 1988, p. 22).

In the 1880s, copper was the dominant mineral being mined and the Anaconda Company the dominant copper mining entity. Four square miles near Butte yielded at least 9 billion kilograms of copper, amounting to one third of the total used by the United States at that time, and one sixth of the world supply (Dobb, 2002; Holden et al., 2007; Keane, 2016, interview). Increased copper extraction and the influx of miners, however, also coincided with the production of opaque, arsenic-laced smog: "the deadly air of Butte, thick with fumes of sulfur, arsenic and smoke from the open roasting of its ores and from stacks of its smelters, killed every blade of grass, every flower, and every tree within a radius of miles" (Glasscock, 2002, p. 55). Trees reportedly lost needles and leaves, cats were poisoned from grime coating their whiskers, and cattle had copper plated teeth. The smog was viewed by burglars as a blessing, as they did not have to wait for night to act. The richest hill on earth was now called "the perch of the devil" (Glasscock, 2002, p. 71).

Southern European immigrants infiltrated Montana's industrial cities with their

rural values, with Butte acting as the state's political hub and the intermountain west's most ethnically diverse city due to the constant influx of immigrant miners (Murphy, 1998; Shovers, 1987). The territory's ethnic diversity was an important characteristic of early Montana society (Swartout, 1988). Politically, Butte was split between Daly's Irish, who traditionally swore Democratic fealty, and the "cousin jacks" from Cornwall, who were dedicated Republicans and were rumored to act and vote at Clark's command (Campbell, 2016, interview; Glassock, 2002; Keane, 2016, interview). Daly favored employing his Irish-Catholic kinsmen, bringing shiploads of Irishmen to work his operations. It was said that the doors of the Anaconda syndicates held signs reading that "no man of English birth need apply" (Emmons, 2002, p. 89). Religion was injected into political campaigns and election results heavily swung in the favor of the pro-Irish Catholic nominees: "the origins of the Clark-Daly feud are to be found not only in the rascality of a copper king, but in the abiding tensions between the [Protestant] orange and the [Catholic] green" (Emmons, 2002, p. 96). Clark, though of Irish descent himself, labelled Daly's followers as an "infamous gang…so despotic that it would not be tolerated … anywhere else in the civilized or uncivilized world" (Emmons, 2002, p. 80). Despite their ethnic backgrounds, Montana's pioneers shared one thing in common, they were emissaries of the global market economy, depleting Montana of its minerals, timbers, and furs (Flores, 2001). To visualize early Butte from a modern-day perspective, Jim Keane (2016, interview), state politician, past Anaconda employee, and 75-year resident of Butte described life in the mining center:

> The miner wasn't considered a laborer, the miner was considered as good as a doctor or lawyer in this town. Because everyone in this town understood that that's where it all came from, from mining. It was a town where everyone was equal.…it was like an industrial 'who's the best in town' kind of like 'who is the best football player, who is the best quarterback?' It was the same kind of a system. Why do you want to be best? Because you would get paid the most, just like in professional sports! These guys were professional workers in a high-risk game.…Butte was the Silicon Valley of the time, Clark the Mark Zuckerberg of the time.

As Montanan society evolved, the desire for statehood became extremely important to Montanans as "statehood marked the beginnings of modern government and the region's emergence to a status of political equality within the federal Union" (Owens, 1987, p. 2).

A state was permitted representation and voting power in Congress, was provided with grants to support education and government endeavors, and had the power to tax local corporations. To Montanans, statehood symbolized their official status as American citizens, the coming of age as an established community (Malone et al., 1991). As distrust of government was amplified in western states where legislatures were often captured by special interest groups, statehood also meant that Montanans would gain control of their local government and no longer be subject to federally appointed eastern politicians who lacked regional knowledge, and were known to utilize their official positions to burgle public treasuries (Howard, 1983; Malone et al., 1991; Roeder, 1990). Attempting to safeguard state governments from such influence, it was political fad in the late 19th century to write long, detailed state constitutions (Campbell, 2016, interview; Roeder, 1990; Tarr, 2011; Taylor, 2004). Statehood constitutions were generally laden with political details rather than the fundamentals of law, resulting in fragmented executive bodies, restricted state legislatures, and as a result, were difficult to amend (Elison & Snyder, 2001; Roeder, 1988; Tarr, 1992). Although Montana held two constitutional conventions (1866, 1884), both were unsuccessful in achieving statehood (Brown, 1970). When Congress passed an Enabling Act in February 1889, the territories of Montana, Washington and Dakota, were authorized to organize conventions to draft constitutions. Statehood could only be attained if and when the proposed constitutions were dually approved by the electorates and Congress (Malone et al., 1991; Waldron & Wilson, 1978).

On 7 May 1889, Montana appointed 75 delegates for a Constitutional Convention, three from each of the 25 districts. Partisanship was virtually absent from the 1889 Convention because the political platforms of both parties had similar goals: statehood and economic development (Roeder, 1988). As in 1884, copper king W.A. Clark presided over the Convention, which ran from 4 July to 17 August 1889. The delegates chose to retain 90 percent of the lengthy and detailed 1884 Constitution, and referred to the contemporaneous Constitutions of Colorado, Kansas, and California as guides (Elison & Snyder, 2001; Johnstone, 2015; Waldron & Wilson, 1978). Tarr (2011) argues that the framers of the 1889 Constitution attempted to restrict the powers of the corporate monopoly by forbidding the passage of laws favoring the railroads, by establishing a bribery ceiling for state officials, and by limiting the acceptance of benefits offered to state officials by

corporate interests. In an attempt to maintain the peace between discontented unions and mine owners, a provision was written allowing foreign ownership of mines and restricting mine owners' use of military force against labor unions (Elison & Snyder, 2001; Tarr, 2011). Despite these few exceptions, fear of offending the territory's greatest source of capital caused the framers of Montana's 1889 Constitution to provide corporations with more benefits than restrictions (Elison & Snyder, 2001). Afraid of diverting necessary foreign capital away from the developing state, the delegates rejected a proposal making corporate shareholders and company directors jointly liable for corporate debts (Tarr, 2003; Tarr, 2011; Smurr, 1955a). It was a theme among statehood contenders for the territory's elites and business interests to consolidate their powers and seek control during the admission process, with farmers and ranchers also utilizing statehood as a chance to gain government representation (Owens, 1987). In Montana, these two themes manifested themselves through two provisions which significantly affected the future state's economic, political, and social history: taxation and apportionment.

"Indicative of the strength of the mining industry," wrote Elison & Snyder (2001, p. 5), "was the constitutional exemption from taxation of minerals in place." This limited the mining industry to taxation on annual net proceeds and surface improvements. In addition to exempting certain mines and mining claims from taxation, the 1884 Constitution extended tax exemptions to places of worship, charities, for livestock under six months old, and crop growing (Brown, 1970; Smurr, 1955a). The 1884 Constitution, however, was nullified as the Congress denied Montana's bid for statehood (Brown, 1970). By comparison, in 1889 tax exemptions were reserved for mines and mining claims, and the idea of enforcing constitutional safeguards on one particular economic interest did not sit well with many, as constitutionalizing a mining tax exemption would make legislative intervention impossible, with any future tax levy increase requiring a majority vote by the electorate (Howard, 1983). Certain Montana newspapers opposed the exemption, stating that mining interests had made enough and should be equally taxed (Smurr, 1955a). Numerous Convention proposals suggested that gross proceeds rather than net proceeds of mines be taxed, proposed a levy on mines, and even demanded the deletion of the exemption, any of which would have significantly altered Montana's history. All proposals conflicting with the mining industry were vigorously defeated by special interest groups

(Gutfeld, 1970; Howard, 1983; Smurr, 1955b). Because of this exemption, the 1889 Constitutional Convention has been referred to as "a conspiracy of silence," a corporate scheme designed to protect mining interests at the expense of the rest of the state (McNeil, 2016, interview; Roeder, 1990; Smurr, 1955a).

Although most 19th century state constitutions contemplated apportionment of representation in both state legislative chambers to be done in proportion to population, Montana's rural Convention delegates demanded that each district be represented by no more than one senator (Waldron & Wilson, 1978). Because each county would receive one vote, the measure's supporters argued such an apportionment strategy would result in equal legislative representation, bridging the gulf between the populous mining counties of the west and the sparsely settled agricultural counties of the east (Brown, 1970). Supporters argued that if the legislative districts were apportioned by population, the three industrial counties of Silver Bow, Lewis and Clark, and Deer Lodge would control the Legislature, leaving the rural minority forever dictated to by the rest of the state and its non-agrarian interests (Smurr, 1955b).This measure was significantly opposed by delegates from urban mining counties, as it placed populous, industrial centers at a significant disadvantage in the State Legislature (Brown, 1970). Journalists at *The Daily Independent* argued that despite containing one third of the territory's population, the counties of Silver Bow and Lewis and Clark would be left with one eighth of the representation ("The State Senate," 1889). Compromise on apportionment was made necessary by "delegates from populous western mining centers but appeared to be the price of rural support for ratification and statehood" (Waldron & Wilson, 1978, p. 11). Despite opposition to the mining tax exemption, and to apportionment, the constituents were urged to ratify the Constitution for fear of losing statehood (Brown, 1970; Smurr, 1955b). Montana's electorate overwhelmingly approved the new Constitution, and on 8 November 1889 Montana was admitted as the forty-first state of the Union (Crutchfield, 2008).

The unamendable 1889 Constitution was outdated before the ink was even dry, "foisted upon the people-largely by mining interests who hobbled the processes of government while exempting their own properties from taxation" (Birnbaum, 1972, p. 272). Although the 1889 Constitution can arguably be credited with achieving the delegates' goals of prosperity and statehood, it nevertheless opened the door for control by

out-of-state interests, who used the tax exemption to support their economic ventures and to create an avowed dictatorship (Howard, 1983; Roeder, 1988; Roeder, 1990). As urban counties grew in number and size over the decades, they found themselves increasingly underrepresented in the rural dominant, copper affiliated State Legislature. Apportionment and taxation gave special interests the key to the state and its citizens.

In a private meeting Daly sold Anaconda for almost half of its estimated worth (Glasscock, 2002). Standard Oil group, headed by Henry H. Rogers and William Rockefeller, purchased Anaconda Copper Mining (ACM) Company from Daly in 1899, and organized a new holding company, Amalgamated Copper Company, which was tasked with controlling the ACM and other firms owned by Standard Oil (Howard, 1983; Malone et al., 1991).

Regardless of the numerous changes to Anaconda's formal name throughout history (Table 4.2), Montanans referred to the copper giant as nothing more than "The Company" (Finn, 1998; Howard, 1983; Malone et al., 1991).

Table 4. 2 Anaconda Company Name Changes, 1881- 1983

Formal Company Name	Year	Informal Company Name
Anaconda Silver Mining Company	1881-1891	"The Company"
Anaconda Mining Company	1891-1895	
Anaconda Copper Mining Company (Via Amalgamated Copper Co. 1889-1915)	1895-1955	
The Anaconda Company	1955-1983	

The year of statehood also marked the coming of Montana's third Copper King, F.A. Heinze, an engineer from the Columbia School of Mines (Glasscock, 2002; Marcosson, 1957). In New York, Heinze organized the Montana Ore Purchasing Company, which he used to market Butte's copper ore on the Atlantic Coast (Glasscock, 2002; Marcosson, 1957; Malone et al., 1991). The turn of the century marked the end of the Clark-Daly feud, opening the door to Heinze *versus* Amalgamated Copper (Malone et al., 1991). In addition to spending millions in lawsuits, politics, newspaper control, and the propagation of allied activities, the Amalgamated was also involved in underground warfare (Glassock, 2002; Keane, 2016, interview). When the Company found that Heinze's

miners were illegally mining in their Michael Davitt mine, Company miners drove Heinze's looters out with steam, high-pressure water hoses and dynamite sticks, while Heinze's men poured slacked lime into the ventilation pipes, smothering their rivals: "more powder was burned than in the Russo-Japanese war" (Glasscock, 2002, p. 241). Mining litigation plagued both state and federal courts in Silver Bow county, with 133 mining cases pending at one time, delaying private suits by seven years (Glasscock, 2002).

In October 1903, Heinze's second injunction against Amalgamated was aimed at preventing the official transfer of Company stocks. Amalgamated responded with a statewide shutdown of all company and subsidiary-owned mines, lumber mills and smelters, throwing 20,000 laborers out of work. With four-fifths of the state's wage earners jobless and threatened with starvation on the brink of winter, the extent of the Company's power became a harsh reality (Dobb, 2002; Finn, 2012; Howard, 1983; Swibold, 2006a). One third of the world's production of copper was suspended, resulting in price spikes in the international copper market. A reporter for the *San Francisco Examiner* estimated that "seventy-five million dollars were made today by the Rockefeller group of capitalists in the manipulation of Amalgamated copper stock" (Glasscock, 2002, p .254).

As large mobs of hungry, unemployed miners and their families gathered, petitions flowed into the Governor's office, demanding a special Legislative session be called to pass the necessary laws required to settle the controversy and put the workers back to work (Glasscock, 2002; Swibold, 2006a). Montanans and the nation wondered whether "a vast business organization, by starving perhaps one hundred thousand persons, men, women, and children, could coerce a great state into giving it laws to strengthen its power?" (Glasscock, 2002, p. 264-265). During the special session, the Legislature adhered to the Company's demands, passing a "fair trials bill" which allowed for either party involved in a suit to demand and obtain a change of venue if it had reason to believe the trial judge was prejudiced (Campbell, 2016, interview; Waldron & Wilson, 1978). Although this statute was, in theory, enacted by many states, outsiders to Montana viewed this action as a result of a submissive government. An article written in the *Idaho Tribune* read*:* "it took the Amalgamated just three weeks to coerce Montana into falling on her knees with promises of anything that big corporation might want," for the first time in US history a combination of capital forced the "unwilling governor of a sovereign state to call a Legislature to enact

laws for its benefit" (Glasscock, 2002, p. 266). The copper magnates did not hide their satisfaction, openly boasting that "we have demonstrated that the 70,000 voters of Montana who are dependent upon the Amalgamated for a living can be made to think through their stomachs better than through their brains" (Glasscock, 2002, p. 266).

"In contrast to the days when Marcus Daly seemed to manage the Company with the state's interests in mind," wrote Malone et al. (1991 p. 230), "Montanans found that they were locked in the grip of an insensitive corporation controlled from Wall Street." John D. Ryan took the reigns as president of the Amalgamated Copper Company, paying Heinze tens of millions of dollars to clear all 100 lawsuits. Ryan's purchase of Heinze's and Clark's holdings shaped the course of Montana's history (Malone & Dougherty, 1981; Ruetten, 1960). Anaconda now ruled the state, unchallenged, its tentacles reaching into the hill, smelters, Great Falls plants, the state's timber resources, a majority of water-power rights, the leading newspapers, the furniture and clothing stores, railways, and political organizations (Campbell, 2016, interview; Murphy, 1912).

In 1912, as Anaconda's needs for a larger, more reliable power supply grew, the Company purchased and combined several of Montana's hydroelectric companies creating its subsidiary, Montana Power (Malone, 1996; Malone & Dougherty, 1981). Anaconda Company and Montana Power quickly became known as the "terrible twins," interlinked through a shared board of directors (Fritz, 2002; Keane, 2016, interview; Malone et al., 1991; McNay, 1991). The Company negatively impacted the state by discouraging the development of numerous independent companies, driving any competition out of the state, and stemming diversification and development the state's economy (Dobb, 2002; Murphy, 1912; Reichert, 2016, interview). The fear-mongering of these absentee landlords was unrelenting, "there have been four complete or partial suspensions of operations in combined mines and smelters within a period of eight years for the various purposes of influencing state legislation, of intimidating or weakening wage-earners, or to secure higher prices for copper by curtailment of production" (Murphy, 1912, p. 299).With the cost of living disproportionately high, the Company was ruthless and pragmatic, looming over Montana's economic and political consciousness (Swibold, 2006a). Scholars studying corporate domination point to Anaconda in Montana and the DuPont corporation in Delaware, but the comprehensive hold of the Anaconda Company on Montana's

government, people, and natural resources has been regarded as more than any other corporation in any other US state (Dobb, 2002; Holden et al., 2007; Karlin, 1986; Murphy, 1912; Ruetten, 1960; Swartout et al., 2015; Swibold, 2006a).

4.2 Early Montanan Society: Environmental Circumstances and the Copper Press

4.2.1 Health and Environmental Conditions

At the 1889 Constitutional Convention, Clark commented on the state's air pollution:

> I must say that the ladies are very fond of this smoky city, as it is sometimes called, because there is just enough arsenic there to give them a beautiful complexion…. It has been believed by all the physicians of Butte that the smoke that sometimes prevails there is a disinfectant, and destroys the microbes that constitute the germs of disease….it would be a great advantage for other cities, to have a little more smoke and business activity and less disease (Malone et al.,1991, p. 198).

In addition to poor working conditions, miners frequently lost their lives in underground accidents, most of which resulted from questionable labor practices and inadequate supervision (Finn, 2012; Shovers, 1987). For instance, in 1896 the fatality rate was 8.3 deaths per 1000 workers, doubled from the decade prior due to the introduction of new technologies. "Even more alarming was the 100 percent increase in respiratory fatalities" associated with using the drills in poorly ventilated mine shafts; 675 miners died between 1907 and 1913 from respiratory illnesses (Shovers, 1987, p.26). Each year mine inspectors reported that the unsanitary, unventilated working conditions in underground shafts were deteriorating and extremely hazardous to human health, and each year the Legislature ignored the reports (Finn, 2012; Shovers, 1987). Child rearing was especially daunting in Butte due to the harsh environmental conditions.; the air was so concentrated with arsenic that 20 percent of Butte's children did not survive past age 5, and babies were reportedly born blue, their mortality rate 50 percent within the first year of life (Finn, 2012). Glasscock's (2002, p.71) rendition of early life in Montana's mining cities is as follows:

> Men and women will defy or connive with the devil for riches, and at times even for a livelihood. For profit they will live and labor literally in an atmosphere of hell, breathing brimstone, festooned with soot, surrounded by the imps of Satan, and, such is their heritage, find time and courage to laugh and to play.

As of 1919, both the US Public Health Service and the US Bureau of Mines found health and safety working conditions in Butte among the worst in the country (Toole, 1970). In the 1950s, the death rate in Deer Lodge County from lung cancer was thirteen times higher than the national average (Mercier, 2001). Such was the life in "poisonville" (Hammett, 1992).

4.2.2 The Copper Press

An entire thesis can be written on the Anaconda Company's newspaper ownership, with several scholars writing about the Copper Press (Larson, 1971; McNay, 1991; Murphy, 1912; Swibold, 2006a). The *Anaconda Standard*, founded in 1889 by Marcus Daly, was immediately considered a primary rival to the country's millionaire dailies in major metropolitan hubs (McNay, 1991; Swibold, 2006b). Employing the nation's top lithographers and cartoonists, the *Anaconda Standard* was so popular it could be purchased at newsstands throughout the nation (McNay, 1991). From the outset of their feud, the copper press was used as ammunition in battles among the copper kings. Daly used the newspaper as a voice for propaganda, hiring an editor, John Durston, who would tactically voice Daly's opinion in public affairs, and advocate against rival Clark's senatorial and economic pursuits (Glasscock, 2002; McNay, 1991; Swibold, 2006b). In Heinze's legal battles with Amalgamated officials, it was revealed that at least 41 newspapers in Montana were somehow affiliated with the Company (Glasscock, 2002).

The Company officially began purchasing the state's newspapers in 1913 with the acquisition of the *Anaconda Standard* from the Daly estate, also purchasing several additional dailies in the following years (McNay, 1991). No one knows exactly how or when several newspapers were bought, rented, or subsidized in the furious endings in Montana's copper wars, as newspapers were not required to publish statements of ownership in the United States at that time (Ruetten, 1960; Swibold, 2006a). The Company's newspaper ownership was so often used by politicians in anti-Company platforms that press allegations became gospel (Ruetten, 1960; Keane, 2016, interview). There was no free speech in Anaconda, wrote Murphy (1912, p. 311), "Anaconda is called the 'city of whispers' because there is hazard in using the vocal organs above an echo of the master's voice." As "the rest of the country's newspapers moved toward independence and objectivity, Anaconda's newspapers did not even engage in open partisanship and

controversial issues were simply ignored," serving Montanans when convenient (McNay, 1991, p. 7). Seldes (1947, p. 15) stated "the Company controls substantially all of the press of the state." Although journalism was a corporate venture in many American states, it was worse in Montana because it was out in the open, frank and crude, completely uncontrollable, an absolute monopoly (Seldes, 1947; Sinclair, 1919).

It is important to note that Anaconda was not unchallenged in its sensationalism. Several small-scale weeklies, such as the *Montana Free Press* and the *People's Voice*, were created to battle the Company's news suppression. Although these independent ventures were often short-lived due to lack of advertising revenue, they nevertheless provided platforms for liberal, pro-labor politicians and other opponents of the copper chorus (Keane, 2016, interview; McNay, 1991). The Great Depression and New Deal of the 1930s added new scope to anti-Company journalism, stimulating the end of the Company's historic collaboration with the state's Democratic Party. Gathering all newspaper stock under a subsidiary holding company, Fairmont Investment Co., the Company adopted a new set of tactics in the 1930s—suppression and silence (Shovers, 2016, interview; Swibold, 2006b). State journalism was referred to as "Afghanistanism," as readers knew more about the events in Afghanistan than in Montana itself (Swartout et al., 2015)!

Speeches of politicians and other government officials who spoke out against the Company received a small column in the back of the papers, albeit with any anti-Company sentiment edited out before print (Larson, 1971; Shovers, 2016, interview; Ruetten, 1960). The 1938 campaign for US representatives was completely avoided by the press, and Montanans were in the dark about local and state issues, unaware of political and labor reforms. Toole (1972, p.273) claimed "the Company simply dropped a great, gray blanket over Montana." Instead of newspaper propaganda, Company officials chose to control the state through paid lobbyists and its ubiquitous public relations officers, also financing various industrial espionage services (Larson, 1971; Ruetten, 1960; Seldes, 1947). Ruetten (1960, p. 10) assumed that the creation of various left-wing, anti-Company weeklies may have been responsible for news suppression as the weeklies accused the Company for interfering in the state's political campaigns, and urged Montanans not to submit to the "copper collar of serfdom." The silence could also be correlated with the Company's decreasing interest in Montana, as its international holdings yielded higher profits at lower

costs, Anaconda's focus shifted away from state local affairs (Malone & Dougherty, 1981).

With all but one of the dailies, the *Great Falls Tribune*, Company owned, the purchase of the KFBB radio station in Great Falls provided Anaconda with the chance to modernize while achieving statewide news control (Swibold, 2006a). Prior to purchasing the radio station in 1951, the Company was required by federal law to release a list of its holdings and the length of the list was shocking (Ruetten, 1960; Swibold, 2006b). Stories of Montana's veiled journalism achieved international attention, reporters from the *New York Times*, the *Denver Post* and Britain's *Economist* were dispatched to Montana to research the copper press ("Anaconda Country," 1959; Ruetten, 1960). In 1958, a study undertaken on the quality of local and state news coverage in 48 States ranked Montana 47th in coverage: Montana readers were among the nation's least informed citizens as newspaper editorials on state issues allocated an average 2.9 percent of the newspapers area, 0.34 percent on local issues, with no space allocated to public comment on controversial issues (McNay, 1991; Swartout et al., 2015). Swibold (2006b, p. 341) reiterated that the main consequence of Anaconda journalism was that it "provoked suspicion and further fueled a long-running anti-corporate response that proved remarkably resilient," the copper plated silence terminating the press' usefulness long before the Company sold its newspapers in 1959.

4.2.3 Early Attempts at Environmental Litigation

Montana's Clark Fork river sometimes ran red and orange through Missoula when heavy metals from mining operations flowed downstream (Wright, 1998). Early attempts at environmental regulation began in 1890 with the Butte Smoke Ordinance, which permitted tall smelter stacks and prohibited open-heap roasting within city limits (Morin, 2014). With certain smelters treating up to 700 tons of ore daily, in 1902 alone the Company paid $340,000 in settlements against farmer-brought pollution lawsuits (Bakken, 1991; Bakken, 2007; Morin, 2014). In 1903, the Company was forced to shut down a smelter amid allegations from the region's farmers who claimed their livestock were sick and crops were failing from arsenic poisoning (Bakken, 1991). Faced with constant charges of water and air pollution, Anaconda began buying out the interests of potential plaintiffs upstream and downstream of Company operations. This litigation strategy resulted in Anaconda becoming the most established landowner in Deer Lodge county (Bakken, 2007).

Although Anaconda built tailings ponds, claiming water pollution abatement, experts argue that the ponds were simply a means to impound tailings for future processing (Bakken, 2007; Morin, 2014). The Deer Lodge Valley Farmers' Association was formed in 1905 to collectively seek relief from Company-caused damages (Bakken, 1991). This led to the biggest common law nuisance battle in early Montanan society. In *Bliss v. Washoe Copper Co.* (1911), 107 Deer Lodge Valley farmers bravely sued the Company, claiming polluted air was contaminating their crops and poisoning cattle. Knowing that Montana's state courts were puppets of the Company, the farmers enlisted Deer Lodge farm owner Fred Bliss whose Idaho citizenship diverted the suit to the federal court (Bakken, 1991). The Judge found that arsenic was killing the cattle and surrounding vegetation but concluded that "the economic benefits of the company's operation outweighed the farmers' interests" (Bakken, 2007, p. 44). The Company was in the driver's seat as the legal system had ruled the Company more valuable than citizen interests. This case showed "how changing styles of litigation could sweep the challenge to air pollution aside for half a century," setting the stage for all future common law cases against the Company (Bakken, 1991, p. 41). Although the Department of Justice negotiated terms with Anaconda regarding the state's air pollution, the US Forest Service in 1922 identified 150,000 acres of forest, lumber, and grazing land that had been damaged from smelter-smoke (Morin, 2014). By the 1930s, the Company had all but legalized environmental harm operating with a pollution buffer surrounding its operations enabling it to operate without interference until the passage of federal regulations to control the transport and disposal of hazardous wastes in the 1970s (Morin, 2014).

4.2.4 Homesteading and Progressive Reform

Montana's progressive era coincided with the homesteading frontier of the 1909 *Enlarged Homestead Act*, the 1916 *Stock-Raising Homestead Act*, and the railroad's attempts at advertising dry-land farming propaganda (Roeder, 1970). The coming of 100,000 homesteaders caused agriculture to replace mining as the state's leading industry (Swibold, 2006a; Wright, 1998). The homesteaders brought with them the populist movement and progressive small-town news editors, advocating Jeffersonian principles of an equal, corruption-free society, campaigning for a government which responded to the peoples' popular will (Malone & Dougherty, 1981; Wright, 1998). The progressive homesteaders

also began advocating against the mining status quo, especially arguing against the state's unequal tax structure (Roeder, 1970; Malone & Dougherty,1981). The Progressive Party letterhead read "Put the Amalgamated out of Montana Politics" (Malone et al., 1991). Roeder (1970) argued that based on the passage and approval of certain statutes, such as women's suffrage, citizen initiative and referendum, and hours laws for industrial workers, that Montana saw certain waves of citizen power. In rebuttal, Toole (1984, p. 227) stated that although Montanans participated in reform measures, the successes of those measures were dependent on the extent of which such measures disrupted Company activities and discourse: "it is a gross oversimplification to say merely that the forces of liberalism and reform were checked by the arch-conservatism of the Anaconda Company." The prosperous wet years brought bountiful harvests, however, drought almost always crept in uninvited. Less than one decade after the homesteading programs, 65,000 homesteader's left Montana, driven out by its unpredictable cycles of boom and bust (Wright, 1998). The 1918 collapse of Montana homesteading "ended a cycle of spectacular economic growth and began an era of economic stagnation and population loss" (Malone et al., 1991, 284).

4.3 War, Hysteria and Tax Reform

4.3.1 World War I

During World War I annual copper production in Butte doubled, increasing copper output to supply the war effort (Glasscock, 2002; Wright, 1998). In the second year of war, the Company expanded into South America, seizing control of the Andes Copper Mining Company in Chile, and acquired International Smelting and Refining along with its smelters in Arizona, Indiana, Utah and New Jersey (Morin, 2014). Anaconda justified its expansion during the war as an act of nationalism and basically "wrapped itself in the flag and attempted to crush all opposition under the label of patriotism" (Gutfeld, 1970, p. 26). In 1915, the Amalgamated Copper Company was liquidated, and Anaconda Copper Mining (ACM) Company became an independent corporation no longer affiliated with Standard Oil (Malone & Dougherty, 1981; Malone et al., 1991). Anaconda Copper had refineries, smelters, and reduction works in Great Falls and in Anaconda, coal properties in Gallatin, Cascade, and Carbon counties, and timber mills throughout western Montana; ACM expanded its holdings by building a zinc plant in Great Falls in 1916, which by 1920 produced half of the world's zinc (Morin, 2014).

The war was also a time of government criticism and a fight for labor reform. Founded in Chicago in 1905, the Industrial Workers of the World (IWW), traditionally known as the "Wobblies," were considered by many a socialist, anti-war, militant labor group and radical syndicalist union (Green, 2010; Malone & Dougherty, 1981; Shovers, 2016, interview; Vivian, 1986). The IWW gained popularity amongst western miners and lumberjacks, influencing intense and sometimes violent labor strikes. Hysteria gripped the state when 178 men died in a fire at the adjoining Granite Mountain and Speculator mines while making copper for the American war effort, the worst mining disaster in US history (Dobb, 2002; Finn, 1998; Green, 2010). Thousands of miners gathered to protest hazardous underground working condition and wages decreased by wartime inflation. Strike paranoia increased after the murder of IWW supporter Frank little, whose corpse was found hanging from a railroad trestle (Dobb, 2002; Finn, 1998; Gutfeld, 1970; Swibold, 2006a).

Rebuked by the Company, the union called a strike that resulted in 15,000 workers walking off the job. Federal troops were called to maintain order in Butte, invoking martial law to control rioting laborers. Butte was patrolled by National Guard troops, Pinkerton detectives, and gun-wielding thugs (sponsored by Anaconda's officials) for sixteen months (Dobb, 2002; Finn, 1998; Finn, 2012; Green, 2010). In a special legislative session in 1918, the Montana Legislature passed the *Montana Sedition Act*, a repressive criminal syndicalism law banning "'disloyal, profane, or scurrilous' antigovernment writing and speech and legalized summary deportations" (Dobb, 2002, p. 325). This statute was sanctioned by Montana's Council of Defense, super-patriots who made it illegal to criticize the government or the war, fueling the already repressive atmosphere (Finn, 1998; Gutfeld, 1970; Malone & Dougherty, 1981; Shovers, 2016, interview). In perhaps "one of the most severe violations of civil rights in the history of the US", the federal government modeled its federal Sedition Act after Montana's (Malone & Dougherty, 1981, p. 50).

4.3.2 The Beginnings of Tax Reform

In 1916, a popular bipartisan issue was the inadequacy of the state's tax structure. Joseph Dixon, leader of the state's Progressive Party, revealed the state's mining companies were paying taxes on one-eighteenth of the real value of their properties (Gutfeld, 1970). A 1916 government report found that remedial tax legislation was needed and that Montana farmers were burdened with paying three times more in taxes than the mining industry,

which had nearly double the gross income. Agriculture paid 32 percent of the state's taxes compared to mining's 8.8 percent (Gutfeld, 1970). Mining interests denied these findings, and brazenly retained that they were being overtaxed. The Company's power even extended into the educational system. Each educational institution was a victim of the ACM and its twin, Montana Power, who utilized their unwavering political and economic power to influence educational campaigns and coerce personnel (Karlin, 1986). The extent of the Company's power can be portrayed through the Levine affair.

In 1916, Professor Louis Levine was an economics instructor at the University of Montana (Gutfeld, 1970). The University's Chancellor Elliot, urged Levine to study Montana's system of taxation, supporting Levine's proposal to publish *The Taxation of Mines in Montana*, a series of monographs outlining every aspect of Montana's tax system (Gutfeld, 1970; Howard, 1983). Upon returning from a stint with the federal War Labor Policies Board, however, Levine was suddenly blindsided by Chancellor Elliot, who warned Levine that publishing this essay would upset the "interests" and would result in a newspaper blitz on Levine, charges of Socialism, and no hopes of a fair court hearing (Gutfeld, 1970; Toole, 1984). Ignoring the Chancellor's concerns, Levine published the 141-page essay through a company in New York. Amidst a "backdrop of acute political and economic conflict in the state, exacerbated by war and hysteria," Levine was suspended by the University for insubordination and unprofessional conduct (Gutfeld, 1970, p. 25). "Levine was sacked for demonstrating that the mining industry paid a disproportionately smaller share of the state's taxes," a fact already suspected by Montanans (Swibold, 2006a, p. 233). Levine's discharge launched a national discussion on Academic Freedom, the professor's suppression of speech condemned by numerous liberal papers and educational institutions (Howard, 1983; Toole, 1984). The Board of Education condemned Levine's dismissal, and reinstated Levine as professor. The Company-owned press responded to Levine's reinstatement with a series of vicious campaigns against the University, demanding the institution be investigated for advocating socialism (Gutfeld, 1970). On behalf of the *New Republic* magazine in New York, Fuller (1919, p.171) wrote:

> Let economists in state universities take notice they must not meddle with state taxation, or labor legislation, banking or corporation problems. Let them give instruction on…. the professional standards of the

> lapidaries' guild in the age of Pericles. Thus will they serve fairly all the people of the state and they will serve the Anaconda better.

Although no one knows exactly why Levine was charged, suspended, then reinstated, this event shows that "everywhere the hand of the Anaconda Company left its nebulous mark, but nowhere its fingerprints" (Gutfeld, 1970, p. 36).

4.3.3 Vertical Integration and Continued Tax Reform

In 1921, ACM began its strategy for vertical integration, aiming to control the entire copper market from the smelter to the consumer, with ownership of Montana Power granting ACM control of its electricity supplier as well (Bakken, 2007; Mercier, 2001). Vertical integration began with the purchase of the assets of the American Brass Company in Connecticut and the remaining Montana assets of Senator Clark (Bakken, 2007; Finn, 1998; Glasscock, 2002; Marcosson, 1957; Morin, 2014). In addition to copper, the Company was also an integral producer and refiner of gold, silver, lead, zinc, chrome, manganese and molybdenum (Cotter, 1945). Altogether, the Company had investments in 15 American states, Canada, Chile, and Mexico (Gunther, 1947; Mercier, 2001). In 1926, Glasscock (2002, p. 285) wrote that the ACM:

> Exercised an option on the vast zinc deposits of the von Giesche properties in Upper Silesia, between East Prussia and Poland. It became the largest producing-fabricating copper mining enterprise in the world, mining twelve and one-half percent of the world's copper, smelting 18 percent, refining 22 percent, fabricating 20 percent.

Despite Anaconda's national and international expansion, after decades of intensive mining, Montana's mines were now being out produced by Kennecott's Bingham mine in Utah, and Arizona was the largest copper producing American state (Dobb, 2002; Morin, 2014). The Company's acquisitions of international holdings, such as the world's largest copper deposit in Chuquicamata, Chile kick-started a slow depression in the Company's interests in Montana (Finn, 1998; Malone & Dougherty, 1981; Marcosson, 1957).

Fueled by Levine's tax reform suggestions, the hottest issue in the 1920 gubernatorial campaign involved the taxation of mines (Malone et al.,1991; Toole, 1984). Both nominees for governor, Republican Joseph Dixon and Democrat Burton Wheeler, were adamant, unbuyable opponents of the Company and both campaigned for tax equalization. Because Wheeler was supported by the radical Non-Partisan League, which

frequently attacked the Company press and its political debauchery, the Company labelled Wheeler as "Bolshevik Burt," and supported Dixon in his landslide victory (Gutfeld, 1970; Howard, 1983; Malone et al., 1991; Toole, 1984). In Dixon's run for re-election in 1924, Dixon campaigned for Initiative No. 28, the Metals Mine Tax Initiative, calling for a revision to mining taxation (Waldron & Wilson, 1978). This measure provided that mines be taxed from 0.25 percent to one percent of their earnings. This initiative was estimated to bring an annual half a million dollars to the state in taxes, also shifting the burden of taxation to the western mining counties (Howard, 1983; Toole, 1984; Waldron & Wilson, 1978). The copper press threatened to shut down all mines and lumber mills should Dixon win (Toole, 1984). In focusing on campaigning against Dixon, the Company failed to campaign against the initiative. Although Dixon lost re-election, the Metals Mine Tax Initiative was carried by more than 20,000 votes, and ACM's tax revenue to the State of Montana increased 23-fold (Howard, 1983; Toole, 1984; Waldron & Wilson, 1978). "It took Montana more than thirty years to undo the work of Clark and his lackeys in [the 1889] Constitutional Convention, to force even the moderate additional taxation" upon the mining interests (Howard, 1983, p. 64). Historians claim that the 1924 general election marked a turning point in Montana politics, ending an era of progressive public reform, and the "beginning of unchallenged company domination of the state's public affairs," (Waldron & Wilson, 1978, p.97)

4.4 The Dirty Thirties and Post-War Consumerism

The New Deal marked the single greatest era of one-party rule in Montana's history, kick starting the state's long road towards the establishment of a modern government bureaucracy (Homstad, 2003). During the Great Depression of the 1930s, employment in Butte's mines dropped by 84 percent, and Butte was now a poor city which sat on the richest hill on earth (Finn, 2012). The need for work and wages during the Great Depression propelled Franklin Delano Roosevelt to the Presidency and Montana aided in his victory, electing a Democratic delegation to both houses of Congress (Malone, 1971; Waldron & Wilson, 1978). Roosevelt's New Deal partly alleviated the issues of bust and drought, welcomed the return of liberalism, and repaired agricultural issues caused by the collapse of homesteading (Athearn, 1958; Homstad, 2003; Murphy, 2003).

New Deal programs significantly aided Montana in its time of need, ranking

Montana the second of forty-eight states in federal per capita relief (Malone, 1971). Millions of dollars were directed to the state through regulatory programs, significantly increasing the federal government's role in state matters and stimulating state activism. The 1933 *National Industrial Recovery Act* allowed workers to organize and negotiate with their employers, culminating in the establishment of the Butte Miners' Union (Finn, 2012; Mercier, 2001; Murphy, 2003). A four-month long strike from against the Company by Butte's organized unions culminated in mine laborers achieving 40-hour work weeks, salary increases, and a closed shop policy (Finn, 1998; Finn, 2012; Wright, 1998). Congress' 1934 *Taylor Grazing Act* attempted to stymie detrimental effects caused to public lands by soil degradation and overgrazing, also allowing organized stockmen to affordably, cooperatively lease federal lands for grazing (DiSilvestro, 1993; Howard, 1983; Malone et al., 1991). By 1935, one quarter of Montanans were aided by federal relief agencies, with Montanan farmers receiving up to $40 million for crop adjustment, the state receiving more than $530 million in federal grants and loans (Malone, 1971; Malone & Dougherty, 1981; Murphy, 2003). The 1935 *National Labor Relations Act* mandated employers to collectively bargain with a certified union, further strengthening the 1930s-labor reform movement (Kelly et al., 1983). The greatest legacy of the New Deal in Montana was the organization of labor through unionization, and the strengthening and growth of the Democratic Party (Finn, 2012; Malone, 1971). Despite the aid of the New Deal, benefits for the state were short-term politically and economically (Malone, 1971).

Although miners were exempt from military service to produce copper for the war effort, Montana still contributed 10 percent of its population to World War II, the most of any state (Finn, 2012). For the first time in Montana's history, women were now being employed as industrial workers. Montana smelters were breaking social barriers to employ their own version of "Rosie the Riveter," mostly stimulated by the federal governments pressuring of ACM to employ non-traditional workers to increase copper production for the war ("Montana's 'Rosies,'" 2014). Veterans returned home to frozen wages and lack of jobs following the high paced war, thousands left Montana's extractive industry scene to seek higher wages and better working conditions on the West Coast (Finn, 2012; Furdell, 2002). This caused a misbalance in age groups as more conservative, older Montanans were now the majority, with a shortage of earning age citizens transforming the physical and

social conditions of the state's mining hubs (Finn, 2012; Howard ,1983).

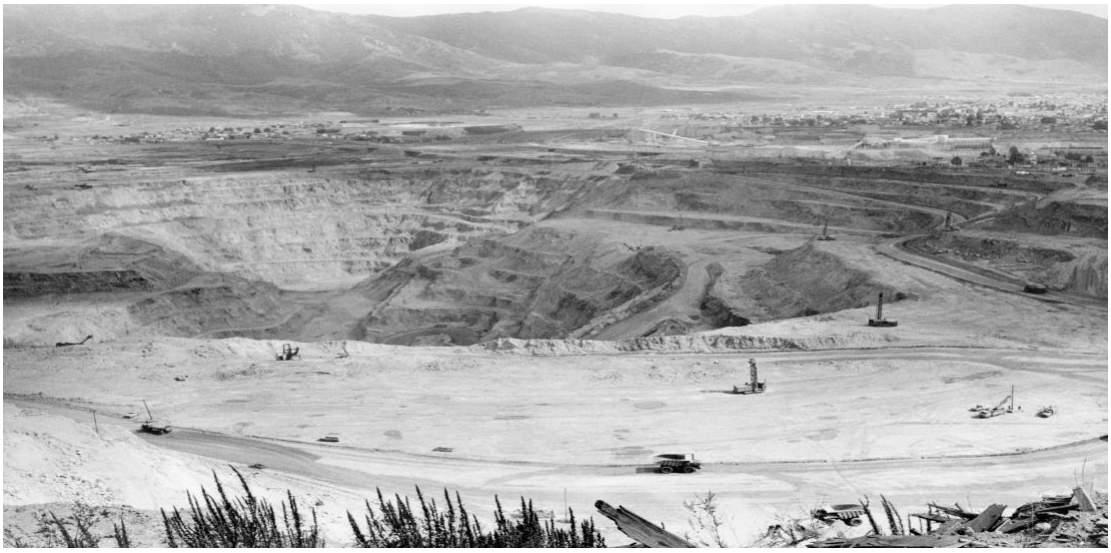
The war revived the copper market and "the domestic mineral industry was widely viewed as essential to the country's continued economic vitality and national security" (LeCain, 2006, p. 7). The increased production of copper for military uses also stimulated domestic copper consumption with copper becoming a consumer necessity. Refrigerators, cars, radiators, and copper-plated plumbing became symbols of wealth, all requiring the red metal. Policy makers viewed the maintenance of the copper industry as a chief responsibility of the federal government, and many progressive politicians renounced their platforms to instead focus on rapidly diversifying the consumer economy (LeCain, 2006). Following the intense post-war industrial mechanization, Butte's mines could no longer compete with massive open-pit productions in Utah and Arizona. Attempting to retain its competitive edge, in 1955, Anaconda announced to the residents of Butte that it would only continue operations and guarantee living wages if a large portion of the city and surrounding communities were destroyed for an open-pit mine, the Berkeley Pit (Dobb, 2002). In 1956, the Berkeley Pit contributed to the largest annual income in Anaconda history (Figure 4.1; Finn, 1998; Montana Historical Society, 1959). Famously dubbed "the black heart of Montana" the Berkeley Pit yielded 21 billion pounds of copper, 90 million pounds of molybdenum, 90 million ounces of silver, and 3 million ounces of gold before being abandoned in 1982 (Figure 4.2; Howard, 1983; Wright, 1998).

War also saw an increase in the recreational sector as visitation of national parks doubled, then tripled. National Park visitation was heightened by equalized prices for recreational materials, increased transportation technologies, and the social need to leave the chaos of war crazed cities (Yochim, 2005). This era in American history can be identified through its mass consumerism, which "became more central to the 'American way of life' than almost any other political or cultural ideal" (LeCain, 2006, p.7). Amidst this consumerism, while encouraging recreation citizens began to promote conservation by supporting the regulation of human activities in sensitive wilderness areas (Yochim, 2005).

Despite the Company's decreasing interest in Montana, through manipulating the culture of consumerism Anaconda nevertheless attempted to turn Butte into a tourist hot spot. In 1957, in the popular magazine *Saturday Review*, Anaconda advertised Butte as a potential vacation spot: "you can stand on a ledge 500 feet above the floor of the new

Berkeley canyon…your stay will give you a new pride and appreciation of your America the Bountiful" (LeCain, 2006, p. 5). By referring to the Pit as a "canyon," the Company "illuminated the essential links between consumerism and nature" (p. 7). As America could not live comfortably without copper, Swartout (2006, p. 4) explains that "with its effect upon both the urban landscape and the natural environment" the Pit was viewed by certain Montanans as "a way for the [Butte] community to contribute to the consumer products that largely defined postwar America."

Figure 4. 1 The Berkeley Pit in Butte, Montana (circa 1950s)



Source: Montana Historical Society (Appendix F, Catalog #PAc 97-61 MI-C-670-3).

Figure 4. 2 The Berkeley Pit in Butte, Montana (2016)

Source: Author

Before the environmental movement, consumerism represented "the miracle cure for all manner of economic and social ills," advertisements reflecting a shift "away from the utilitarian value of copper and toward its contribution to achieving and protecting American ideals" (LeCain, 2006, p. 8,10). The Liberty Bell, a national symbol of patriotism, was pictured with the words "copper helps freedom ring." Although wartime industries and New Deal programs benefited and economically and socially transformed most US states (Furdell, 2002), due to Anaconda's news suppression, vertical integration, the federal governments demands on the copper industry, and the nation's insatiable consumerism, Montana was unable to move out of the shadows of its Copper Giant.

4.5 Breaking the Copper Collar: Berkeley Pit, Chuquicamata and Referendum 67

The Company's encroachment on eminent domain with the Berkeley Pit resulted in the depopulation of one third of the hill, and the total or partial demolition of five of Butte's neighborhoods (Dobb, 2002; Leech, 2012; Morin, 2014). The International Union of Mine, Mill, and Smelter Workers lost jurisdiction when Anaconda switched to open-pit mining, contributing to the rift between union and non-union workers and organizations. Morin (2014, p.108-109) claims that "the opening of the Pit and loss of neighborhoods and mining jobs heralded the last significant decline in the mining district and the beginning of even greater changes to the landscape and the identity of the region." The Pit not only swallowed homes, it wiped out historic cultural communities, which for over half a century, acted as hubs of social life (Finn, 2012; Leech, 2012). As the open-pit mining came to Butte, highly skilled miners were left unemployed as low-grade ore removal could be achieved with more affordable, unskilled laborers and automated machines, also requiring fewer engineers and geologists. The closure of the underground mines resulted in a decrease in mine union memberships and a diminishing voice in labor matters. This coincided with the undervaluing of small-scale eastern Montana farmers and ranchers who also struggled to keep up with mechanization and aridity, losing out to modern, larger-scale operations (Athearn, 1958; Malone & Dougherty, 1981). Post war automation and the residuals of the Great Depression triggered large-scale migration either to Montana's urban centers or out of the state (Homstad, 2003).

Although the Company's authority was rarely challenged by Montana citizens, "Butte workers showed that they valued their social environment over jobs, and open-pit

mining was not simply accepted by all as the best method for extracting ore" (Leech, 2012, p. 26). When surface mining began on the Alice Pit in Walkerville in 1958, hundreds of complaints flooded the Company's Mining Engineering Department and the Walkerville City Council. Despite numerous accounts of basements cracking, kids dodging air-borne rock boulders, gas mains bursting, and clear evidence that the town's northern section was literally sliding into the pit, Anaconda officials claimed the complaints were over-exaggerated. Reviving its old strategies for litigation avoidance, the Company began purchasing Walkerville property, but residents banded together in solidarity, refusing to sell their subsiding properties in protest to the activities (Leech, 2012). When residents travelled to Helena to plead for government intervention, they found "it was difficult to get their voices heard by a State Legislature where Anaconda had long held sway" (Leech, 2012, p. 37). Instead of responding to the pleas of its citizens, in 1961 the State Legislature proposed and approved a bill which extended the right of eminent domain to the mining industry, allowing the condemnation of private property for open-pit operations. The government, the apparent representative of the people, would not intervene when the Company was involved, despite the gravity of the situation. The Alice Pit ran out of ore before a victor was announced (Leech, 2012).

Despite the new Berkeley project, Montana was significantly influenced by the Company's focus on its Chilean holdings. While the Company increased copper production near Chuquicamata, Chile the Butte Miners' Union turned to Anaconda officials to ask for wage and pension increases (Finn, 2012). As rumors spread that Anaconda was considering halting its Butte operations, salary and benefit negotiations with Anaconda were unsuccessful and a strike ensued. Finn (1998, p.33) states that "while the people of Butte endured half a year of uncertainty, Chuquicamata was enjoying favorite child status," a fact which was supported by Anaconda officials, who while negotiating an end to the 1959-1960 strike "argued that workers deserved little pay because they had failed to produce as efficiently as overseas operations" (Leech, 2012, p. 42). Montanans' worries were exacerbated when Anaconda closed it Anselmo and Emma mines, throwing 700 miners out of work (Finn, 2012). A turning point for Montanans came in 1959, "amid declining mineral output and population loss, that company divested itself of its newspapers," also breaking ties with its twin Montana Power in the 1960s (Morin, 2014).

By 1969, company profits were third highest in its history. The United States government continued to support Anaconda's international ventures by preventing the competition of Chilean copper in the domestic market, ensuring that Chilean copper was smelted in the United States and exported for domestic profit (Cotter, 1945). Aware of Anaconda's successes, Chile's government forced Anaconda to nationalize over half of its Chilean assets, also surrendering millions of dollars in future copper reserves by agreeing to sell their remaining Chilean holdings for cents on the dollar (Abel, 1997; Holden et al., 2007; Stiller, 2000; Stiller, 2002). When newly elected President Salvador Allende expropriated all of Anaconda's Chilean assets with no compensation, Anaconda lost $350 million, today's equivalent of $2.2 billion, in that year alone (Holden et al., 2007; Holmes et al., 2008; Morin, 2014)! By 1971, "Anaconda could no longer run itself, much less a state" (Abel, 1997, p. 7). This all culminated as a shock to Montanans as Anaconda seemingly fell from grace overnight, ultimately ending its reign over Montana.

The 1970s was a vital decade in Montana's history. Responding to a newfound sense of political freedom, triggered by the impending fall of the state's omnipotent Anaconda Company, the Montana State Legislature took immediate action, using this window of opportunity to elicit change (Zalis, 2016, interview). As their copper collar broke, "Montanans had become increasingly concerned about the declining quality of their environment" (Tobias & McLean, 1980, p. 234). The 1971 Legislature responded to these concerns by passing a series of environmental laws, amongst which were the *Montana Environmental Policy Act* (MEPA), crafted after the *National Environmental Policy Act* (NEPA), and the *Metal Mine Reclamation Act* (MMRA), the first of its kind among western mining states (Holden et al., 2007; Tobias & McLean, 1980).

In the late 1960s, a wave of constitutional revisionism swept the US, with 34 states taking some form of action to revise their outdated constitutions (Kirk, 2011; Shovers, 2014). Montana followed suit, in 1970, a bipartisan effort launched Referendum 67, which for the first time in the state's history provided Montanans with the chance to update their State Constitution (Kirk, 2011; Shovers, 2014; Stockton, 2016). Montanans were aware that their 1889 Constitution was written by a former generation, one that distrusted legislatures, believed in fixed, rigid laws, and was influenced by several special interest groups (Campbell, 2016, interview; Kirk, 2011; Tarr, 2011). Rather than being a body of

fundamental law, the 1889 Constitution acted more as a legislative code, a means to achieve statehood and based off of a failed constitution written in 1884 which itself replicated the provisions of other, even older states with different heritages, values, politics, and geographies (Elison & Snyder, 2001; Waldron & Wilson, 1978). Because of widespread recognition "that [the 1889 Constitution] didn't fit a Montana that was changing and growing as much as Montana was in the 1960s and 1970s," the citizens wanted "their voice, their perspective, and not Anaconda's" to be heard (Kirk, 2016, interview). Sixty-five percent of Montana's electorate, 51 of the state's 56 counties, approved the Referendum, permitting the Legislature to call a Constitutional Convention (Figure 4.3; Kirk, 2011; Waldron & Wilson, 1978). The only opposition to the Referendum came from five rural counties, four of which came within 3 percent of approving the Convention.

The 1972 Constitution was the culmination of nearly eight decades of mounting concern about the 1889 Constitution's inability to function as the fundamental document for future generations (Roeder, 1990). Montana's 1972 Constitution was a response to nearly a century's worth of social and environmental abuses. Although several states addressed environmental protection within their state constitutions during this era of constitutional revision, numerous states failed to ratify their new constitutions, and thus did not entrench environmental laws (Kirk, 2011; Zackin, 2013).

The proceedings of the 1972 Constitutional Convention acted as a primary source of information regarding Montanans' rationale for entrenching environmental rights, and the process of constitutional ratification. The next chapter discusses the 1972 Montana State Constitutional Convention and the entrenchment of Montana's right to a clean and healthful environment.

1970 Vote for a Constitutional Convention

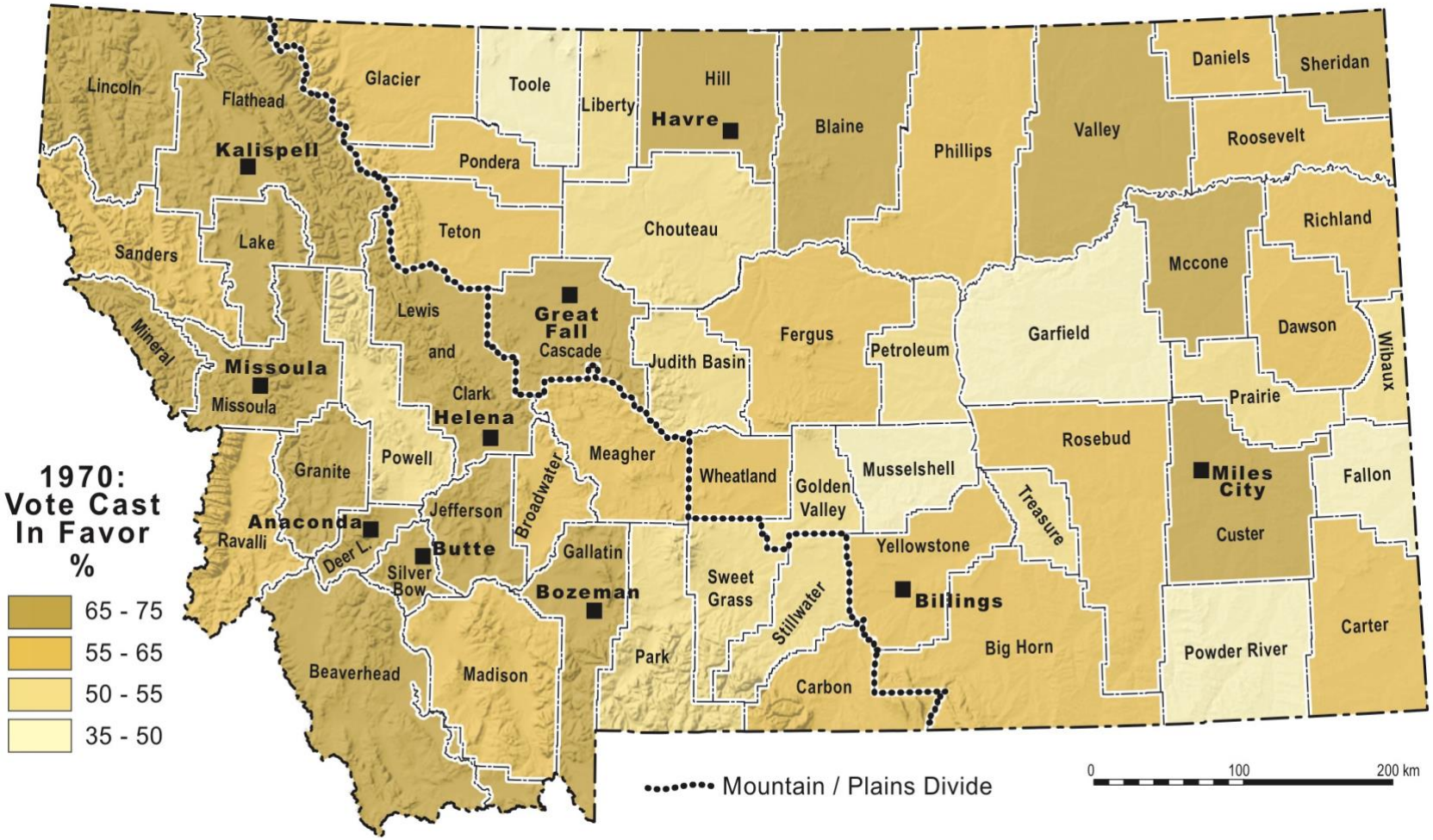


Figure 4. 3 By County 1970 Montana Call for Constitutional Convention Results
Data: Waldron & Wilson (1978)

CHAPTER 5: 1972 MONTANA STATE CONSTITUTIONAL CONVENTION

When addressing the Constitutional Convention on 29 November 1971, Governor Forrest Anderson stated:

> The Constitutional Convention will reestablish the foundation of law for the government in this state… The people of Montana called this Convention, they elected you as delegates…. You should not be afraid to include new and progressive ideas in the Constitution. Passage of the referendum calling for this Convention, executive reorganization, and the nineteen-year old vote are proof that *the people of Montana recognize the need for change*... this document must withstand the seasons of history, not just the climate of current opinion (Montana Constitutional Convention, Vol. 3, p. 3, emphasis added).

5.1 Constitutional Convention Overview

The 1972 Montana State Constitutional Convention (popularly referred to as "ConCon" by the media) has been labeled as the most important political event in the history of 20th century Montana (Chambers & Zalis, 2002). Due to numerous amendment limitations, Montana's 1889 Constitution was amended only 34 times and with minimal changes made to the fundamentals of Montana's state laws, the statehood Constitution was significantly outdated by the 1970s (Brown, 1970; Malone, 1996; McNeil, 2016, interview). The ConCon thus marked the first opportunity for significant constitutional change in the state's history (Brown, 1970). Montana's new Constitution was written by, and for, a new generation of Montanans, a generation that wanted fluid, modifiable state laws that would meet the changing needs of present and future citizens (Campbell, 2016, interview; Dowling, 1990; Ellingson, 2016, interview).

5.1.1 Selection of the ConCon Delegates

A provision in the 1889 Constitution stated that delegates should be selected for the Convention in the same place and manner as the elections held for state House Representatives (Shovers, 2014). To follow the "same place" stipulation the Legislature determined that delegates would be elected from newly defined legislative districts, which would be created utilizing the most recent 1970 United States Census. The census revealed that Montana's population would best be represented if partitioned into 100 legislative districts, with one delegate chosen from each newly defined district (McNeil, 2016,

interview; Waldron & Wilson, 1978). To meet the condition that delegates were to be elected in the "same manner," the Legislature organized a general election and the delegates ran in accordance with their partisan primaries, either as Democrats, Republicans, or Independents (Ellingson, 2016, interview; McNeil, 2016, interview; Shovers, 2014; Waldron & Wilson, 1978). Additionally, the Constitutional Convention Commission, created by the 1971 State Legislature in preparation for the Convention, established that delegates were required to have the same qualifications as members of the state Senate; delegates had to be a minimum of 24 years old, be United States citizens, and have lived in their district for at least one year (Kirk, 2011; Waldron & Wilson, 1978).

In further interpreting the 1889 Constitution, which prohibited anyone from simultaneously holding two public offices, the Montana Supreme Court ruled that all local and state officials who held public office at the time of the Convention could not serve as delegates (Campbell, 2016, interview; Holmes et al., 2008; Kirk, 2011). Former lawyer Bob Campbell, a delegate at the 1972 ConCon referred to the restriction of legislators and politicians from writing the Constitution as a "political thunderclap," a breath of fresh air for the state as this decision opened the door for the unconventional election of regular citizens (Campbell, 2016, interview). The replacement of authority figures and elected officials with regular citizens indicated the coming-to-power of civil society (a concept discussed in the following chapter), and resulted in *Time* magazine referring to this Constitutional Convention as "a people's crusade" (Birnbaum, 1972).

The chosen delegates of the 1972 ConCon consisted of 100 grassroots Montanans, tasked with representing the electorate and writing the legal framework for current and future life in the state (Birnbaum, 1972; Chambers & Zalis, 2002; Figure 5.1). The delegates, local civilians "some of the best and brightest young people under the 'big sky'" (Chambers & Zalis, 2002, scene 1) were elected in a special election by Montana's electorate on 2 November 1971 (Waldron & Wilson, 1978). The delegates were specifically chosen for their ability to best represent the citizenry and its collective identity. Montanans elected 58 Democrats, 36 Republicans, and 6 Independents to serve as delegates (Kirk, 2011). The chosen delegates represented a cross-section of Montanan society: among them were 24 attorneys, 20 farmers and ranchers, 17 business owners, 16 former legislators, 13 educators, 11 housewives, four clergy members, one beekeeper, and one graduate student

(Chambers & Zalis, 2002; Kirk, 2011; McNeil, 2016, interview; Shovers, 2014; Snyder & Ellingson, 2011). The majority were college educated, some were children of immigrants, others were fourth generation Montanans (Holmes et al., 2008; McNeil, 2016, interview; Shovers, 2014). They were as diverse in gender and age as their occupations, the youngest was 24, the oldest 73 (Birnbaum, 1972). Nineteen of the delegates were women, a revolutionary proportion given that in the early 1970s each legislative house contained only one female representative (Campbell, 2016, interview). In the ConCon documentary *For This and Future Generations* (Chambers & Zalis, 2002, scene 1) it was stated that "what [the delegates] all had in common was virtually complete ignorance of the art of constitution writing and a somewhat unfounded self-assurance."

Figure 5. 1 1972 Constitutional Convention Delegates

Source: Montana Historical Society (Appendix F, Catalog # PAc 86-15.72119-3).

All Convention delegates were Caucasian. The ConCon's youngest delegate, attorney and long- time resident of Missoula, Mae Nan Ellingson (2016, interview), stated that "to have fully represented Montana society, there should have been Native American representation" at the Convention, as Native Americans encompassed roughly 10 percent of the Montana population. The absence of Native American delegates was not intentional, it was rooted in United States history, which created hostility to Native Americans regarding their participation in county, state, and federal elections (Svingen, 2002). The federal government is the Native American community's primary contact, with the

Department of the Interior's Bureau of Indian Affairs acting as the agent in all community relations with the United States (McNeil, 2016, interview; Svingen, 2002). Furthermore, Native Americans could have purposely abstained from becoming delegates due to the topic of tribal sovereignty, where certain members "avoid confronting state and county voting rights issues because involvement with the state might be seen as inviting state jurisdiction over tribal politics," thus refraining from participating in state issues to ensure the maintenance of their own political culture (Svingen, 2002, p. 274). Despite there being no Native American delegates, the community still played a role in the Convention by attending committee meetings and voicing opinions on various provisions, especially the Bill of Rights (Campbell, 2016, interview; Ellingson, 2016, interview). Other cultural minorities did not participate in the Convention because of Montana's relatively homogeneous ethnic population. For instance, Montana's population was 0.4% African American at that time, and numbers of other ethnicities simply were not high enough to organize and get elected to the ConCon (McNeil, 2016, interview).

5.1.2 Convention Overview

The Montana State Constitutional Convention convened on 17 January 1972. It was presided over by Leo Graybill Jr., a Yale educated lawyer who opened the Convention by discussing the significance of this document, urging the delegates to consider future generations throughout the proceedings (Shovers, 2014; Snyder & Ellingson, 2011). In addition to their personal knowledge about Montana, the delegates were provided with the reports from the Montana Constitutional Convention Commission, the Constitutional Revision Commission, and the Legislative Council Committee (Stockton, 2016). For instance, the 1971 Constitutional Commission produced a set of 2,300 plus pages of research to aid the delegates throughout the Convention. This compendium contained information on the United States Constitution, an exhaustive analysis of various other state constitutions, the principles of constitutional law, Convention rules, and other miscellaneous topics (Ellingson, 2016, interview; Stockton, 2016).

The Convention was divided into ten substantive and four procedural committees. To the best of their ability, each committee was weighted equally with Republicans, Democrats, and Independents, with committee chair and vice chair positions held by delegates with opposing political affiliations to further avoid bias, balance the committees,

and establish a (small "d") democratic Convention climate (Montana Constitutional Convention Verbatim Transcripts, 1979, hereinafter referred to as "Trans."). Delegates insisted their meetings be open to the public and that all votes be recorded to ensure transparency and citizen participation, also permitting reporters entry to extensively cover the Convention (Holmes et al., 2008). Scheduled substantive committee hearings were announced five days in advance, providing Montanans with the opportunity to travel to the Convention to appear, testify, submit any desired citizen initiatives, and thus participate in the writing of the Constitution (Trans., Vol. I). To further ensure that the concerns and desires of Montanans were represented, the delegates also considered suggestions from roughly 1,500 unsolicited letters sent to them by the public (Elison & Snyder, 2001). Delegates were also encouraged to submit proposals, which were reviewed by the procedural committees and distributed to the proper substantive committee if deemed worthy for consideration. After five weeks of committee hearings, citizen meetings, and research, each committee drafted a majority report containing the sections and subsections of the proposed constitutional articles. The majority reports were submitted and presented to the Convention's Committee-of-the-Whole, where they were discussed section by section, and if necessary, further amended by majority vote and submitted to the Style and Drafting committee for editing. Once edited, the proposed articles were once again presented to the Committee-of-the-Whole for final consideration, where they were officially adopted into the Constitution (Trans., Vol. I).

5.2 Montana's Constitutional Environmental Provisions

Montana's statehood Constitution was exceptionally different from the Constitution drafted in 1972, greatly reflecting the dominance of Montana's mining industry, with industrial development and economic stability acting as its main goals (Birnbaum, 1972; Brown, 1970; Smurr, 1955a; Trans., Vol. I). For centuries, traditional private tort and property law were the primary avenue for dealing with domestic pollution and environmental issues. The 1960s, however, saw a shift in legal ideologies from private to public environmental law, a social awareness growing with the ratification of the first state and federal environmental statutes (Shelton, 2008; Wray, 2016, interview). Major concerns for Montanans in the 1960s and early 1970s reflected discourses occurring at the national level, and determined the key issues of the 1972 ConCon: a strong responsive government,

the public's right to freedom of information, the public's right to participate in government, improved education, environmental protection, and equal rights to all (Holmes et al., 2008; Kirk, 2011). Montana's Constitutional Convention Commission stressed that the right to a healthful environment should be a priority issue at the ConCon, with citizens also citing "the compelling need for stronger constitutional provisions to ensure environmental protection" (Schmidt & Thompson, 1990, p. 414). In fact, certain delegates were selected to the ConCon strictly because they supported the entrenchment of environmental provisions and promised to promote the state's amended identity as an environmental steward (Kirk, 2011; Zackin, 2013). When drafting the 1972 Constitution, the right to a healthy environment was suggested as an inalienable right because it contributes "to the goal towards which we try to grow as a society" (Trans., Vol. V, p. 1638). The acceptance of the right to a clean and healthful environment as an important human right defined an integral moment in Montana's history, portraying the extent to which Montanan societal values and goals had drastically changed since achieving statehood.

5.2.1 Preamble

The first statement in any state constitution is the constitutional Preamble, a sort of epigraph to the document. Constitutional Preambles simultaneously act as lofty, instructional guidelines that aid in establishing the constitution's purpose and goals, and introduce the citizens' aspirations (Campbell, 2016, interview; Ellingson, 2016, interview; Snyder, 2004). Since the Preamble introduces the entire document and is said to present the society's most cherished values, the Preamble reveals the scope of a society's relationship with their environment and the role this relationship plays as a variable in the state's identity. Montana's 55-word Preamble has been referred to as a poetic, ecclesiastical description of Montana, its citizens, and an extraordinary depiction of the citizens' appreciation for the state's natural resources (Echeverria, 2015; Ellingson, 2016, interview; Jensen, 2016, interview). The Preamble to the 1972 Montana State Constitution reads:

> We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this Constitution.

The Bill of Rights committee was tasked with drafting the Preamble and the Declaration of Rights. The Bill of Rights committee "felt that Montana is unique both in the beauty of the state, and the strength of the individuals who were dedicated to establishing a state from a rich wilderness," and drafted a Preamble signifying these characteristics (Trans., Vol. II, p. 620). The committee considered four delegate proposals when writing the Preamble, selecting the language in the proposals they believed best portrayed the State of Montana and its residents. The Preamble was written by two committee members, Mae Nan Robinson (Ellingson) and Bob Campbell. Delegate Campbell (2016, interview) claimed that in writing the Preamble, he attempted to best describe the state both in geographical and political terms, encompassing the physical and social qualities of all four corners of the state. Both delegates attempted to recognize all inherent characteristics of Montana the *place* (Ellingson et al., 2015a). By guaranteeing freedom, promising equality of opportunity and an improved quality of life, and emphasizing an attachment to the land, Montana's Preamble contains "four of humanity's most uplifting aspirations' (Elison & Snyder, 2001, p. 26).

First and foremost, the Bill of Rights committee was motivated by the paintings of the great western artist Charles M. Russell, which they believed simultaneously captured Montana's unmatched scenery and the rugged individualism characteristic of Montanans (Trans., Vol. II). Because numerous delegate proposals referred to John Steinbeck's description of these paintings of Montana as a depiction of western Montana's mountainous "grandeur" and eastern Montana's "rolling grasslands," the committee felt this language should be adopted to best describe Montana's physical environment. As the committee believed that in popular discourse Montana is often referred to as having plains and not grasslands, they instead adopted the language suggested in one delegate's proposal, the "vastness of our rolling plains." Additionally, the committee dedicated "the quiet beauty of our state" to Montana's waters, air, and lands, which also most eminently describes Montanans' relationship with the spirit of their Creator (Ellingson, 2016, interview; Trans., Vol. II).

Lastly, "the final two phrases represent the reason for living under a constitutional government, which is intended to improve the quality of life and equality of opportunity" (Trans., Vol. II, p. 620). These last phrases represent the delegates wishes that the state and

the people abide by the laws within the Constitution. Although the committee did not strictly state that their inclusion of "future generations" pays homage to environmental sustainability, by including "improve the quality of life," protection of the state's natural resources is indeed implied (Schmidt & Thompson, 1990). The justification of the committee's use of words and phrases was presented in the Bill of Rights majority proposal, with the report presented to each delegate at the meeting of the Committee-of-the-Whole where it was credited for being the only state constitutional Preamble to give such recognition to place and reverence to the land (Ellingson et al., 2015a; Kirk, 2011). The Convention's delegates unanimously adopted the Preamble into the Constitution on 22 March 1972, without debate (Trans., Vol. VII).

5.2.2 Article II, § 3: The Inalienable Right to a Clean and Healthful Environment

Montana's 1972 State Constitution "is a written instrument unparalleled in the measure of liberty recognized in its Declaration of Rights" (Collins, 1985, p. 1097). Montana's Declaration of Rights is considered to be more muscular than the Bill of Rights in the United States Constitution, in part because of its inalienable right to a clean and healthful environment (Chambers & Zalis, 2002). Article II, § 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 [emphasis added].

Montana's Constitution is the only state constitution that uses the term "inalienable," with most states not even employing the term "right" in their constitutional environmental policy provisions (Thompson, 1996). Utilization of the term "inalienable" in a constitution "indicates a belief that the right may neither be taken away by the government, nor by any other entity," that the right is considered a self-evident truth (Wilson, 2004, p. 649). Depending on the phrasing employed and the intent of the framers, inalienable rights can inhibit or prohibit the police power of a state, even more so than other enumerated rights within a constitution (Bourguignon, 2016; Johnstone, 2016, interview). The interpretation of this right is discussed in a subsequent chapter, but one fact can be stated in advance: the framers of Montana's Constitution, by listing the right to a clean and healthful environment as an inalienable right, undoubtedly indicated "the extreme

importance they placed on the right" (Wilson, 2004, p. 649).

The original section on inalienable rights as proposed by the Bill of Rights committee did not contain the right to a clean and healthful environment (Johnstone, 2016, interview; Schmidt & Thompson, 1990; Trans, Vol. II). According to delegate Eck, the Bill of Rights committee discussed environmental issues at length, with the rationale for the exclusion of environmental rights within the committee's initial article attributed to the fact that they assumed that the Natural Resources Committee would cover this topic. Although the Natural Resources committee did include a detailed article on the environment and natural resources, delegate Eck suspected that the Natural Resources Committee purposely avoided individual rights statements as such declarations belonged in the Bill of Rights, along with other enumerated rights (Trans., Vol. V). On 7 March 1972, during a meeting of the Committee-of-the-Whole, Delegate Hanson proposed an amendment to Article II, § 3 of the Declaration of Rights, proposing that the right to a clean and healthful environment should be added and listed first. Delegate Burkhardt supported this amendment, stating that because a clean and healthful environment was already adopted in another article in the Constitution, that the inclusion of this right in Montana's Declaration of Rights would strike "the other side of the balance" and that the right to a healthful environment is "for the time in which we're living and for the foreseeable future, one of the inalienable rights that we hope to assure for our posterity" (Trans., p.1637). Delegate Burkhardt stated that because the Declaration of Rights presents "the right of every person" and the "duties of persons," the inclusion of the right to a healthy environment completed the declaratory section and should thus be entrenched as a compulsory amendment (Trans., p. 1639). Certain delegates believed that if the right to a clean and healthful environment had not already been included and so thoroughly discussed in the debates regarding the Constitution's Article IX: Environment and Natural Resources, that it likely never would have been included as an inalienable right in the Declaration of Rights (Campbell, 2016, interview; Ellingson et al., 2015a; Ellingson, 2016, interview). This amendment was unanimously adopted into the Constitution on 16 March 1972 (Trans., Vol. VII).

5.2.3 Article IX: Environment and Natural Resources

The toughest and most emphatic debates flared in the Natural Resources and Agriculture committee, which was the only committee tasked with writing a constitutional article entirely from scratch (Chambers & Zalis, 2002; Kirk, 2011). Delegate Louise Cross, a staunch environmentalist, was known to the Convention as an advocate for the strictest environmental protection available. Cross was chosen as the committee's chairperson because of her known stand and her knowledge on environmental rights and natural resources (Campbell, 2016, interview; Cross, 1990; Ellingson, 2016, interview; McNeil, 2016, interview). Cross stated that "the issue of the environment is an issue of recent vintage. Constitutionally speaking, it is a new concept, and we must begin at point zero" (Trans., Vol. IV, p. 1199). Cross' statement was not taken lightly; in starting from scratch the committee took into consideration the testimony of 95 witnesses in 165 appearances (Trans., Vol. II). Of the 15 delegate proposals submitted, eight were accepted by the committee and incorporated into the proposed article on the environment. The committee's original Article IX: Environment and Natural Resources, contained four sections, each with multiple subsections. Of the 10 reports submitted by each of the substantive committees, the Natural Resources and Agriculture committee presented the Constitution's shortest article. Despite the article's length, the majority of the committee's members believed that their proposed report was of high quality: "your committee presents and recommends in its proposal the strongest constitutional environmental section of any existing state constitution" (Trans., Vol. II, p. 554). Despite the committee's pride in their proposed article, upon presenting the majority report on 1 March 1972, committee chairperson Cross declared her dislike for the submitted article stating, "I disagree with the statement that we are recommending the strongest constitutional environmental section.... I consider Sections two and three not only weak, but possibly restrictive in a direction which is not readily apparent" (Trans., Vol. IV, p. 1199). Delegate Cross pleaded with the Convention to instead "adopt language that will do the job," and in doing so, opened the floor to a hearing producing the Convention's longest and most heated debate (p. 1199). The environment has been referred to as being the Convention's most important topic. The rafters were packed with citizens and media when the environment was on the agenda because everyone wanted to know what the ConCon was going to do about Montana's environment

(Campbell, 2016, interview; Ellingson et al., 2015a; Holmes et al., 2008). Each section and its respective subsections is discussed separately in the sections that follow.

5.2.3.1 Article IX, § 1: Protection and Improvement

Subsection (1)

The Natural Resources and Agriculture committee proposed the following for § 1(1): "The state of Montana and each person must maintain and enhance the environment of the state for present and future generations" (Trans., Vol. VI, p. 1200). This subsection resulted in one of the Convention's longest debates (Table 5.1).

Table 5. 1 Proposed Amendments for Article IX, § 1(1)

Delegate	Proposed Amendment	Majority Vote Verdict
James	The State of Montana and each person must maintain and enhance a clean and healthful environment for the protection and enjoyment of present and future generations	Motion Lost (40 Aye, 44 No)
Smith	The State of Montana and each person must maintain and enhance the physical environment of the state for present and future generations	Motion Substituted
Cate	The State of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to protect and enforce it by appropriate legal proceedings against the trustee	Motion Lost (34 Aye, 58 No)
Robinson	The public policy of the State of Montana is to achieve and maintain a high-quality environment which is clean, healthful and pleasant, for the protection and enjoyment of its people and the protection of its natural beauty and natural resources, including wildlife and vegetation. Each person shall have the right to a high-quality environment which is clean, healthful, and pleasant and the duty is to act in accordance with this public policy. Each person may enforce such a right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as may be provided by law.	Motion Lost (43 Aye, 51 No)
Reichert	S(1): Public policy-legislative responsibility: The public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The general assembly shall provide by law for the implementation and enforcement of this public policy. S(2): Rights of Individuals: Each person has the right to a healthful environment. Each person may enrich this right against any party, governmental or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as the general assembly may provide by law.	Motion Lost (43 Aye, 47 No)

Campbell	The State of Montana and each person must maintain and enhance a clean and healthful environment in the state for the enjoyment and protection of present and future generations	Motion Substituted
McNeil	The State of Montana and each person must maintain and improve the Montana environment for present and future generations	Motion Accepted (68 Aye, 19 No)
Campbell	The State of Montana and each person must maintain and improve a clean and healthful environment in Montana for present and future generations	Motion Accepted (49 Aye, 38 No) **Adopted into Constitution**

In rebuttal to chairperson Cross' opposition to the committee's proposed article, delegate McNeil, also a member of the Natural Resources and Agriculture committee, claimed that the committee's article was the strongest because "there is no state constitution anywhere that requires the affirmative duty to enhance the environment" (Trans., p. 1200). The debate surrounding this article largely focused on the insertion of descriptive adjectives for the type and quality of environment protected. The first amendment aimed to solve this problem by proposing the insertion of the words "clean and healthful" environment, and "for the protection and enjoyment of present and future generations" (Table 5.1). The poem *Warning from Main Rivers* by Francis Hadge was used by delegate James for the justification of the additions: "man has kicked away his birthright now we find, to our despair, we have fouled our lakes and rivers, we have fouled our very air. It is time to face the music; it is time to be aware" (Trans., p.1202).

Many delegates found issue with defining the adjectives "clean" and "healthful," *The Helena Independent Record* quoted delegate Cross on 2 February 1972: "do people have to become ill or drop in their tracks before the word "healthful" can be defined?" (Cross, 1990, p. 455). Multiple delegates supported the inclusion of the adjectives, claiming that Subsection 1 as presented to the Convention was "worthless" because it did not contain a "type of standard whatsoever to define this environment," by stating that the state will maintain an environment "does not describe whether it is a good environment, bad environment, polluted environment" (Trans., p. 1204). Delegates in opposition to the first amendment argued that qualifying adjectives could be misinterpreted by the Legislature and Supreme Court, thus resulting in a parade of unreasonable restrictions and frivolous lawsuits. "Healthful" is a poor adjective because it can mean

many different things, for instance, as long as you're alive, if your lungs are filled with arsenic that can still be considered healthful (McNeil, 2001). In rebuttal to the opposition, lawyer-delegate Cate, claimed that in a court of law, legal proceedings would lack teeth without defining adjectives. Likewise, delegate Robinson proved that the courts would have no problems interpreting the adjectives by citing the *National Environmental Policy Act's* use of the words "clean and healthful" (Trans, Vol. IV). Despite the debates, the motion to amend was defeated, and several proposed amendments followed (Table 5.1). Delegate Smith proposed to define the environment as the "physical" environment to avoid confusion between political, cultural, and social environments (Snyder & Ellingson, 2011; Trans., Vol. IV). Smith's motion was quickly overturned as delegates believed cultural, economic, and other environments to be mutually inclusive with the surrounding physical environment: "if I smell the stench of the Waldorf-Horner mill in Missoula 47 miles away in Hamilton under proper atmospheric conditions, that is a cultural environment"; maintaining a physical environment would, in Montana's case, mean "that we're going to maintain the blemished and eroded hillside in western Montana" (Trans., p. 1213).

Delegate Cate's proposed third amendment was a controversial attempt to establish the environment as a public trust, with its beneficiaries being citizens of Montana and its trustees the state (Table. 5.1). The justification for this amendment was that it would provide citizens with the right to sue the state if the trust were not enforced by the government, and surmised it was the best way to truly protect the environment (Trans., Vol. V). The public trust concept, if properly understood and applied, has the power to "transform an ancient sovereign responsibility into a judicially enforceable right" (Tuholske, 2015, p. 248). Numerous individuals believe the concept could have strengthened Montana's constitutional provisions (Chambers, 2016b, interview; Cross, 1990; Jensen, 2016, interview; Johnson, 2016, interview). In fighting for the public trust doctrine, Delegate Cate (Trans., p.1227) referred to the mining activity in Montana's Beartooth Mountains to solidify his argument:

> We've got five mining companies that want to go in there and they want to take those mountains, they want to rip them wide open. They want to dig a pit five miles long and three miles wide. And once they've dug that pit and taken that soil and that land out of there and polluted the rivers down below it, it's not going to be there anymore, and you can't put it

> back...We've got one of the last vestiges in our country, one of the last places that can be saved; we shouldn't be satisfied with the standard that Illinois has, or the standard that Michigan has because they're already ruined…But we can save Montana. We can make Montana a paradise in this country, and that's what we ought to do.

Delegate Cate's passionate speech was met with applause from the gallery (Campbell, 2016, interview; Cross, 1990). The idea of the environment as a public trust proved to be unsettling during and after the ConCon, as many claimed it had the potential to conflict with private property rights and was an unconstitutional concept which could have given the courts unrestricted power (Campbell, 2016; Keane, 2016; McNeil, 2016; Trans., Vol. V; Wray, 2016). Others argued that the concept was too much of a "red herring"; dangerous because it was misunderstood and could have unintentionally weakened the provisions or impeded constitutional ratification (Ellingson, 2016, interview; Johnstone, 2016, interview; Reichert, 2016, interview; Trans., Vol. V). In fact, when drafting Article IX, the majority of the Natural Resources and Agriculture committee felt it "unnecessary to have the state hold in trust all land" and "unwise to experiment by incorporating into the Constitution a 'public trust' which was not clearly defined to the committee, which is not contained in the constitution of any other state, and which exists in its infancy in only two states by legislation" (Trans., Vol. II, p. 555). The biggest concern regarded the taxpayers having to pay for enforcement of the trust and an opposing delegate referred to the concept as a form of socialism (Cross, 1990; Trans., Vol. V). The public trust doctrine does not extend to the environment as a whole, and only encompasses natural resources that are viewed as a part of the trust. By contrast, a rights-based approach, as used in Montana, "potentially extends to all activities public and private that harmfully impact environmental quality, because the focus is on the actual or potential harm caused, not the place where it occurs" (Shelton, 2008, p. 42). Prior to losing the proposed public trust amendment, delegate Cate accused certain delegates of being "lobbied by the interests that are against the environment," and urged the delegates to "decide who's running the State of Montana-the people who elected us here or the companies" (Trans., Vol. V, p. 1227). Delegate Cate further argued "we came here to do something for the environment…. I think that we have to rise above our selfish interests and vote for the environment to save it for future generations" (p. 1227) After much debate

the amendment lost, and delegates Cates' and Cross' potentially revolutionary idea was deemed to be statutory in nature, the possible ramifications and benefits misunderstood, and the notion too radical to experiment with at the present time.

In 1971, Illinois passed a progressive environmental provision including a clause to maintain a "healthful environment" and to grant citizens the right to sue polluters (Kirk, 2011). When the delegates were presented with a questionnaire when running for Montana's ConCon, "the majority indicated that they would support an environmental provision similar to the Illinois Constitution" (Trans., p. 1229). Thus, delegate Robinson's proposed amendment closely resembled Illinois' environmental provisions, seeking to protect the environment by invoking the right to legally sue another person or agency for environmental injustices**.** Delegates who supported this amendment believed that because the amendment contained aspects of the concept of private property, that the environmental provisions could be enforceable in a court of law (Trans., Vol. V). Tarr (2011, p. 25) wrote that the "borrowing of constitutional language may occur because the sister states share a similar heritage and political outlook, or because they have developed solutions for problems that the constitution makers are facing." Montana's delegates, however, believed that the environmental provisions of other state constitutions were inadequate as they did not consider Montana's unique environment or environmental history, nor did they provide the level of protection the delegates believed to be necessary (Elison & Snyder, 2001; Thompson, 2003). The ConCon delegates wanted Montana's provisions to be "stronger than Illinois'" (Trans., p. 1244).

The adjective debate was resuscitated by delegate Campbell, once again proposing the insertion of "clean and healthful environment," however, the discussion was interrupted by delegate McNeil with a substitute amendment (Table 5.1) Although McNeil's amendment deleted Campbell's "clean and healthful" adjectives, it was the first amendment to be accepted by majority vote, and resulted in the inclusion of the terms to "maintain" and "improve" Montana's environment. An anonymous note urged delegate Campbell to again bring up the "clean and healthful" amendment (Campbell, 2016, interview; Chambers & Zalis, 2002). Campbell's unprepared speech was revolutionary, shifting 30 votes (Trans., p. 1247):

> [Y]ou can go to your hometown and walk down the street and someone will come up to you and say, "What did you do about the environment, finally, in the Constitutional Convention?... You went all the way over there for something that you agreed in and said you were too timid to put it in the Constitution like we all wanted to have it?" This certainly is the emperor's clothing again. If you can all convince yourself that not describing the type of environment you want is so strong and so important and going to give you this extra protection, then I submit to you that when you get home, some voter is going to ask you what it is and they're going to see right through it, that there's no description on the type of environment that you put on here at all. And there won't be any more North Dakota jokes, because the joke will be on Montana.

North Dakota had held its own Constitutional Convention one year prior to Montana's. However, North Dakota's proposed Constitution was rejected by its electorate and the state's Constitution was retained (Kirk, 2016, interview). Although delegates Campbell (2016, interview) and McNeil (2016, interview) were of the opinion that the North Dakota joke was not the deciding factor in passing the amendment, the proclamation could nevertheless have contributed to the amendment's success as the delegates did not want Montana's Constitution to meet the same fate. Campbell's amendment was accepted by the Convention and adopted into the Constitution on 16 March 1972 (Trans., Vol. VII). This subsection is especially significant because this discussion and adoption of the "clean and healthful environment" was utilized as justification for incorporating the inalienable right to a clean and healthful environment in the Declaration of Rights article later that week! Furthermore, this particular subsection and the delegates debates have been utilized in several environmental court cases, a topic which is discussed in a later chapter.

Subsection (2)

The Natural Resources and Agriculture committee proposed, and the Convention adopted, the following wording for Article IX, § 1(2): The Legislature must provide for the administration and enforcement of this duty. In contrast to the Convention's eight-amendment debate on §1(1) of the proposed Environment and Natural Resources Article, subsection 2 was presented with only one unsuccessful amendment (Table. 5.2). Cross' rationale behind this amendment was that subsection 2, as proposed by her own Natural Resources and Agriculture committee, did "not add anything positive in terms of environmental protection," with the biggest danger in subsection 2 being "that it can be construed to exclusively delegate such authority to the Legislature," excluding the courts

from matters relating to the environment (Trans., p. 1251).

Table 5. 2 Amendment Proposed for Article IX, § 1(2)

Delegate	Proposed amendment	Majority Vote Verdict
Cross	To replace subsections 2 and 3 with: To meet the obligation set forth in Section 1, each Montana resident may take appropriate legal proceedings against any party, governmental or private, subject to reasonable limitation and regulation as Legislative Assembly may provide by law	Motion Lost (44 Aye, 46 No)

Cross believed the Legislature should not be the only enforcing body (Snyder & Ellingson, 2011). Cross' amendment gave deference to Montana's past Legislatures, which were overly dedicated to following companies' industrial interests without seeking redress for environmental damage. This motion allowed individuals to sue government agencies if and when they did not respond with appropriate environmental mitigation strategies for harm caused. Cross' motion was narrowly defeated, and subsection 2 as proposed by the Natural Resource and Agriculture committee was adopted into the Constitution on 16 March 1972 (Trans., Vol. VII).

Subsection (3)

The Natural Resources and Agriculture committee proposed, and the Convention adopted, the following for § 1(3):

> The Legislature is directed to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources

In the committee's majority report, it was stated that "the committee intentionally avoided definitions to preclude being restrictive, and that the 'environmental life support system' is all encompassing, including (but not limited to) air, water, and land," that Subsection (3) "permits the Legislature to determine whether the resource is being unreasonably depleted and requires preventative remedies," and "whatever interpretation is afforded this phrase by the Legislature and courts, *there is no question that it cannot be degraded*" (Trans., Vol. II, p. 555, emphasis added). The subsection was accepted outright

by majority vote, and adopted into the Constitution on 16 March 1972 (Trans., Vol. VII).

Subsection (4)

Although the Natural Resources and Agriculture committee did not include a fourth subsection in their proposed Section 1 of the Environment and Natural Resources article, certain delegates motioned for its addition during the Convention's Committee-of-the-Whole hearing (Table 5.3). Despite pleas from environmental groups that citizens be permitted to litigate against polluters without providing damages, such a provision was rejected by the Natural Resources Committee (Elison & Snyder, 2001). In response, Cross and a few members of the committee drafted a minority report because they felt that the majority report did not "grant an individual a constitutionally guaranteed direct legal remedy to compel the performance by state agencies of the duty to implement and enforce the provisions of the environment section" (Trans., Vol. II, p. 562). However, because the minority report was rejected by the rest of the committee, it was not presented at the Convention (Ellingson et al., 2015a; Table 5.3).

Table 5. 3 Amendments Proposed for Article IX, § 1(4)

Delegate	Proposed Amendment	Majority Vote Verdict
Cross	To meet this obligation, each Montana resident may take appropriate legal proceedings against any party, government or private, subject to reasonable limitation and regulations as the Legislative Assembly may provide by law	Motion Lost (44 Aye, 54 No)
Harbaugh	Any Montana resident has the right to appropriate legal proceedings against any governmental agency charged by law with the implementation and enforcement of any provision of this Article	Motion Lost (37 Aye, 55 No)

Some delegates disagreed with this motion because they did not want to give citizens the right to sue the Legislature, and believed that it was similar to the previously proposed public trust theory and clashed with private property rights, while others opposed the motion because they felt that the right to sue the state and private agencies would bring about frivolous lawsuits (Trans., Vol. V). Delegates supporting the measure stated that the environment has no bounds and is unique in that it affects all entities, arguing that environmental issues differ from private property issues (Trans., p. 1260). Both motions

were defeated as certain delegates believed they threatened the state's economy. If a company could lose in court because of this proposed subsection, it would result in a rise in unemployment and corporate disinterest in investing in Montana. Thus, Section 1 does not have a subsection that explicitly allows for appropriate legal proceedings against environmental harm.

5.2.3.2 Article IX, § 2: Reclamation

The Natural Resources and Agriculture committee's proposed section on reclamation did not contain any respective subsections, stating:

> All lands disturbed by the taking of natural resources must be reclaimed to as good a condition or use as prior to the disturbance. The condition or use to which the land is to be reclaimed and the method of enforcement of the reclamation must be established by the Legislature (p.1275)

The committee's rationale for entrusting the Legislature with reclamation lay in Montana's 500,000 acres of strippable coal land and its priceless acres of other natural resources, stating "the responsibilities of protecting and restoring the surface conditions of those lands for unborn generations should not be left to men, but rather protected by fundamental law" (Trans., Vol. II, p. 556). Upon introducing the proposed reclamation section of the Environment Article to the Committee-of-the-Whole, chairperson Cross declared that the state's industries were strip-mining for coal at an incredible rate, and that without land reclamation the impact on Montana's environment, as well as Montana's leading industry, agriculture, would be disastrous: "if you do not do something about land reclamation, you might as well forget about the section on water and water rights and the section on Agriculture, because you won't need either one" (Trans., p. 1277).

The notion of requiring the reclamation of land after extractive activity was progressive at the time and surpassed any existing federal legislation (Cross, 1990). The first national land reclamation legislation was not put into effect until 1977 when the federal government enacted the *Surface Mining Control and Reclamation Act* (Kirk, 2011). By even discussing the entrenchment of reclamation as fundamental law Montana's delegates were making history (Table 5.4). Opponents of the section stated that reclamation was implied in the adopted § 1 (3). Butte's Berkeley Pit was brought up several times, mainly used as an example by those opposed to the reclamation section in

claiming that "there's no way that the Anaconda Company or any other mining company can ever reclaim that" to as good condition or use prior to its disturbance (Trans., p. 1278). In addition to claiming that reclamation is a statutory issue that should be handled by the Legislature, others in opposition disliked the section because they believed that the present wording would stop the removal of the state's natural resources, contributing to Montana's loss of business and employment opportunity, hindering economic development.

Table 5. 4 Amendments Proposed for Article IX, § 2

Delegate	Proposed Amendment	Majority Vote Verdict
Delaney	To delete Section (2) in its entirety	Motion Lost (33 Aye, 60 No)
Ask	All lands disturbed by the taking of natural resources must be reclaimed. The Legislature shall provide effective requirements and standards for the reclamation of lands disturbed by the taking of natural resources.	Motion Won (63 Aye, 29 No)
Romney (motion italicized)	All lands disturbed by the taking of natural resources must be reclaimed *to as good a condition or use as is possible*. The Legislature shall provide effective requirements and standards for the reclamation of lands disturbed by the taking of natural resources.	Motion Lost (29 Aye, 64 No)
Cate (motion italicized)	All lands disturbed by the taking of natural resources must be reclaimed *to a beneficial and productive us*e. The Legislature shall provide effective requirements and standards for the reclamation of lands disturbed by the taking of natural resources.	Motion Won (63 Aye, 29 No)
Kamhoot	Remove "to a beneficial and productive use"	Motion Substituted
Heliker	To substitute the adopted amendment No.2 with the original report of the committee substituted thereof	Motion Substituted
Davis (same as Ask's)	All lands disturbed by the taking of natural resources must be reclaimed. The Legislature shall provide effective requirements and standards for the reclamation of lands disturbed by the taking of natural resources.	Motion Won (63 Aye, 23 No)
Schiltz	All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.	Unanimously Accepted **Adopted into Constitution**

One delegate received a citizen telegram criticizing the previous day's voting on §1 of the Environment Article, which urged the delegates to "remember who you represent" and implied that a stronger stance on environmental protection was preferred (Trans., p. 1288). In response to this telegram, delegate Harlow stated that "if we want to protect our land, and protect it the way we want to protect it, let's not leave it up to the Legislature or to the retainer and the lobbied individual" (p. 1290). Two-thirds of the Committee-of-the-Whole opposed the section's deletion. Attempting compromise, delegate Ask proposed the Convention adopt his motion because it reclaimed the lands, but still required the Legislature to itself set effective standards (Table 5.4). Many delegates supported this amendment, preferring the language because of its broadness. Those opposed correctly stated this motion was unclear:

> What exactly is meant by "reclaim? We saw what the Legislature did when they gave the Anaconda Company the right of eminent domain. No other company had this right to go out and mine and take people's property on the right of eminent domain, and this was put through legislation (p. 1294)

As exhibited in Montana's history, the Legislature could easily be lobbied to change this broad wording to a law that better suits various interests. For this very reason, certain delegates called for a stronger reclamation section, one that could not be changed overnight. A third substitute motion suggested that lands be reclaimed to "as good a condition or use as is possible" (Table 5. 4). This wording was considered groundless because an entity could argue they reclaimed the terrain "as good as possible" without actually putting in an effort. The fourth amendment called for the lands to be reclaimed "to a beneficial and productive use," a motion that was accepted by the majority to be adopted into the Constitution with no deliberation or opposition at that time.

When the discussion on the reclamation section was later re-opened, delegate Kamhoot argued the phrase "to a beneficial and productive use" would stymie Montana's future economic growth, and motioned for its removal (Trans., Vol. V). The rationale for amendment was another case of the "state versus the Company," with multiple pro-industry delegates rising in support of the removal of these words. For instance, delegate Joyce (Trans., p. 1356-1357), after claiming that he represented the interests of the people, also admitted to being "an emissary of the Anaconda Company," stating that Anaconda:

> [H]ave advised me to tell this delegation that, so far, they have taken 725 million tons of material out of the Berkeley pit in Butte alone and if they are required by the Constitution of the State of Montana, before they can take any more material out of that ground, that they will not do it, and no power on earth can really force them to do it.

The industrial emissaries won this fight, the amendment to delete the stricter wording passed. Weeks later when revisiting each section prior to final adoption, the re-addition "of lands disturbed" was proposed with the intent of strengthening the reclamation section (Table 5.4). The amendment was unanimously accepted by Convention and adopted into the Constitution (Trans., Vol. VII).

5.2.3.3 Article IX, § 3: Water Rights

Water allocation disputes date back to the 19th century (MacIntyre, 1988; Stone, 1980). While western territories and states were busy mining gold, the federal government was distracted with the Civil War (Stone, 1980). In the absence of federal intervention, territories and new states developed their own fragmented systems of water administration, largely focusing on distributing water for gold mining (Stone, 1980). Prior to statehood in 1889, Montana's territorial Legislature based its system of water distribution on British common law, which granted landowners rights to waters on or adjacent to their properties, and the right to build canals and ditches for water access (Shovers, 2005). This primitive system did not take stream flow or water availability into account, and did not record the water rights claims. Later attempts at administering Montana's waters required water users to register the quantity and type of water use at their county courthouse, however, no restrictions were imposed on the amount of water which could be claimed. Following statehood in 1889, the state's rural dominated Legislature was reluctant to intervene in water disputes for fear of interfering with the citizens' public and private property rights (Shovers, 2005). The confusion surrounding this decentralized system of water-rights administration was exacerbated by drought, population growth, diminishing water quality, and the diversification of water uses (MacIntyre, 1988; Shovers, 2005). Because the 1889 Constitution failed to establish that Montana's waters were the property of the state and its citizens, water rights were considered the "single most important item" of the 1972 ConCon (Trans., p. 1301). Delegate Erdmann, the previous mayor of Great Falls, claimed that "no one had ever

appropriated for a drop of the water for the state" (p. 1302). This constitutional section was of particular significance because of the quickly approaching 1978 federal moratorium, where all unappropriated Montana waters would be assessed, divided and diverted into downstream watersheds by the federal government unless the state appropriated the waters themselves (Trans., Vol. V). The ultimate goal of this section was to lay claim to the state's waters giving Montanans "more opportunity to develop the use of this water and establish a just and legitimate claim," ensuring Montana's waters would be protected from federal attempts at interstate diversion (Trans., p. 1311) Water rights were also the subject of serious debate amongst the Convention's delegates.

Subsection (1)

The Natural Resources and Agriculture committee proposed, and the Convention adopted, the following for § 3(1): All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed. The committee's majority proposal explained that §3(1) "includes all adjudicated rights and non-adjudicated rights including water rights for which notice of appropriations has been filed as well as rights by use of which no filing is of record" (Trans., Vol. II, p. 557). In addition to protecting future adjudications, this section guaranteed that existing rights were grandfathered, so as not imply that vested water rights and uses were being rescinded (MacIntyre, 1988). The proposed subsection was unanimously accepted and adopted into the Constitution on 16 March 1972 (Trans., Vol. VII).

Subsection (2)

Subsection 2, as proposed by the committee, was a verbatim duplication of the 1889 Constitution's Article III, subsection 15 (Trans., Vol. II). Subsection (2) was also unanimously accepted, only slightly edited by the Style and Drafting committee, and adopted into the Constitution (Trans. Vol. VII). Article IX, §3(2) reads:

> The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

The committee retained the subsection in its entirety because they felt that it was necessary to preserve 80 or more years of water litigation and "the substantial number of

court decisions interpreting and incorporating the language of this section" (p.1301, 1303).

Subsection (3)

Article IX, §3(3) reads as follows:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

This subsection was a new provision that guaranteed the state "standing to claim all of its waters for use by the people of Montana in matters involving other states and the United States Government" (Trans., Vol. II, p. 557). In other words, this section was designed to protect all waters within Montana's borders, ensuring the waters would remain under Montana's jurisdiction and not subject to any future downstream appropriations (MacIntyre, 1988; Snyder & Ellingson, 2011). Multiple ranchers wrote to the delegates on the issues facing water rights, their biggest concerns stemming from past experiences with trespassing where "the public runs over their ranches to get to a river or stream, leave gates open, kill purebred cattle, and drive the cattle away from the water when they come to drink" (Trans., Vol. V, p. 1304). Foreshadowing these concerns, which have indeed played a significant role in water rights litigation since ratification, delegate Aronow introduced the section's only amendment proposing the deletion of the words "for the use of its people." Aronow feared that by declaring that Montana's waters belonged to the people, that the people would abuse private property rights and cross private lands to reach state waters (Trans., Vol. V). As many delegates felt that the proposed amendment dealt with issues of public domain and not of ownership it was verbally defeated on the floor, and the proposed subsection adopted into the Constitution (with minor grammatical changes).

Subsection (4)

The following subsection was intended to act as subsection (6) in the Water Rights section. However, in lieu of the delegates' rejection of the intended two subjections during convention debate, the following was adopted into the Constitution as Article IX, §3 (4):

> The Legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records in addition to the present system of local records.

In proposing this subsection, the Natural Resources and Agriculture committee intended to "provide a single location for water rights information and complete record of all water rights" (Vol. II, p. 557). Furthermore, in addition to centralizing all records, those records already present in the county courthouses and district courts should be retained for easy access to the people at the local level (Table 5.5; Trans., Vol V).

Table 5. 5 Amendments Proposed for Article IX, § 3(4)

Delegate	Proposed Amendment	Majority Vote Verdict
Bates (motion italicized)	The Legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records *in addition to the present system of local filing records*	Motion Won (46 Aye, 41 No) **Edited, Adopted in Constitution**
Berg	Deletion of Subsection 6 in its entirety	Motion Failed (42 Yes, 44 No)

Delegates supported this amendment as it prepared Montana for the upcoming moratorium on water appropriations. By placing the centralization of water records in the Constitution, the Legislature would have no choice but to "be able to present a well-documented need" for the state in upcoming cases and in the drafting of statutes and other environmental laws (p. 1349). Although there was a substitute motion on the table to delete the subsection in its entirety, it failed without any discussion or debate.

5.3 Other Provisions & Side Issues

Montana's new draft Constitution achieved national attention, with *Time* magazine labelling the proposed Constitution as populist in character due to its attention to cultural and political minorities, to voter participation in the political process, and its emphasis on the quality of the physical environment (Birnbaum, 1972; Malone, 1996). In addition to progressively acknowledging environmental rights, the new Constitution far surpassed its federal counterpart by explicitly guaranteeing the rights of juveniles, individual privacy, right to participate in government, and access to knowledge concerning the documents and deliberations of government bodies (Malone, 1996; Tuholske, 2011; Waldron & Wilson, 1978). The access to information, or "right to know" provisions, were referred to as "sunshine laws" because they "drew back the

curtains of secrecy that had cloaked state government since its earliest years and let in the sunshine of public observation" (Holmes et al., 2008, p. 427). The provisions supporting access to information and popular participation in government resulted in guaranteed transparency and accountability in government proceedings (Tarr, 2011). Montana's Constitution also significantly differed from other state constitutions in its length. With 30 state constitutions containing more than 20,000 words, by omitting statutory details Montana's delegates drafted one of the nation's shortest constitutions with fewer than 13,000 words (Johnstone, 2010; Tarr, 2011).

Adrian (1968) criticized that changes to state constitutions in the 1960s were still predominantly focused on preserving economic values and professionalizing the three branches of government, often overlooking "the responsiveness of state government to widespread popular demands and the major contemporary issues in society" (p. 341). Montana's ConCon responded to such shortcomings by increasing citizen power, giving citizens the right to pass and repeal laws by initiative and referenda, as well as the power to place proposed constitutional amendments on the ballot (Holmes et al., 2008). The former provision for proposing a statute via citizen initiative required petitioning from eight percent of the voters in two-fifths of the districts, meaning that 23 counties had to support a proposed statute for it to be included on the ballot (Waldron & Wilson, 1978). This gave rural counties the power to veto certain initiatives and referenda that they did not support, biasing Montana's "most common form of direct democracy" (Johnstone, 2010, p. 326). The new Constitution made it easier for urban voters to propose legislation, instead requiring five percent of the voters in one-third of the legislative districts (Malone, 1996).

Prior to 1972, only the Legislature could propose constitutional amendments. In contrast, the new Constitution allowed citizens to suggest constitutional amendments by petitioning fellow voters: "the power to amend the Constitution by petition and majority vote is a solution to the basic problem of inflexible and unresponsive state government that motivated the 1972 Constitutional Convention" (Johnstone, 2010, p. 381). Although this provided citizens with a new means to exact change, "the delegates felt it should be more difficult to amend the Constitution than to initiate changes in the statutes," thus, as opposed to the five

percent of registered electors required to propose legislation, the petitioning of a constitutional amendment required approval from at least ten percent of the registered electors within two-fifths of the legislative districts (Snyder & Elison, 2001; Waldron & Wilson, 1978). The delegates believed this ten percent minimum was low enough to stimulate change when necessary, but high enough to thwart frivolous changes (Trans., Vol. II). Montana's State Constitution is currently one of sixteen state constitutions that can be amended by the people (Browning, 2010). The Constitution also aimed to provide the Legislature with more flexibility in the constitutional amendment process. The Legislature could now place an amendment on the ballot with two-thirds support from the total membership of the Legislature, instead of requiring two-thirds support in each chamber (Johnstone, 2010; Waldron & Wilson, 1978).

To ensure the new Constitution would be ratified and replace the 1889 Constitution, the delegates decided that certain controversial decisions should be excluded from the document (Payne & Eastman, 1972; Snyder & Ellingson, 2011). Thus, in addition to voting on the new Constitution on 6 June 1972, the ballot also contained three side issues the voters were to decide on. The side issues of a unicameral legislature, the legalization of gambling, and retention of the death penalty could only become legally effective if the Constitution itself was ratified. For instance, for gambling to be written into law, the Constitution must also pass, if the Constitution failed, the side issues died with it (Ellingson, 2016, interview; Waldron & Wilson, 1978). The 1972 Constitutional Convention adjourned on 24 March 1972, with all 100 delegates unanimously signing the draft Constitution (Trans., Vol. VII).

5.4 Chapter Summary

Montana's 1972 Constitutional Convention drafted a Constitution with populist characteristics, with "power to the people, prosperity, and protection of the environment" acting as "the legacies of 1972" (Fritz, 1990, p. 274). Montana's environment was the most debated issue at the 1972 Constitutional Convention. The 100 grassroots delegates dedicated an entire article to Natural Resources and the Environment, portrayed the importance of the environment in the Constitution's Preamble, and with a significant leap of faith, declared the right to a clean and healthful environment as an inalienable right in the constitutional Declaration of Rights.

CHAPTER 6: CONSTITUTIONAL RATIFICATION AND VOTING TRENDS

6.1 Constitutional Opposition and Support

6.1.1 Opponents of Constitutional Ratification

Opponents of Montana's Constitution were mostly right-wing republicans, vehemently against the new Constitution's article on taxation (Ellingson, 2016, interview; McNeil, 2016, interview). The highway lobby, the Montana Contractors Association, and various oil companies disagreed with a relaxed provision allowing the diversion of earmarked highway funds to be used as determined by the Legislature (Stockton, 2016; Waldron & Wilson, 1978). Several revised provisions also clashed with tradition, particularly the new system of assessment of state property, which removed the two-mil limit on property tax levies and could potentially result in increased taxes (Chambers & Zalis, 2002; Elison & Snyder, 2001; Stockton, 2016; Waldron & Wilson, 1978). The Montana Farm Bureau acted as the Constitution's primary opponent; in league with the Tax Payers' Association, political conservatives, and numerous farmers and ranchers, the group disapproved of shifting the administration of property taxes to the state, away from trusted county officials (Elison & Snyder, 2001).

The water rights section within Article IX, Environment and Natural Resources, was significantly opposed by rural Montanans. Rural opposition to any attempts made at apportioning Montana's waters dates back decades before the 1972 Constitutional Convention. Prior to the ConCon, the most recent government attempt at organizing Montana's waters came with Montana's *Water Resources Act* of 1967, which mandated that all water rights holders must proclaim their appropriations to their county clerk, with water adjudication powers remaining with the local courts (Shovers, 2005). The 1969 and 1971 legislative sessions continued to push for centralization of water records to protect the diversion of Montana's Missouri and Columbia Rivers to southwestern states (MacIntrye, 1988; Shovers, 2005). The Montana Farm Bureau, joined by Montana Power and dozens of ranchers, successfully opposed the government's continued efforts at centralizing water rights records, as the they felt it would be costly, prevent local citizens from accessing water records, and unreasonably empower the state government in matters best kept local (Shovers, 2005). When the proposed 1972 Constitution challenged Montana's historic system of water

appropriation by authorizing the Legislature, and not the local county, to act as the sole regulator and administrator of Montana's water rights Montana ranchers and farmers rebutted (Cross, 1990; Elison & Snyder, 2001; Holmes et al., 2008). In discussing rural constitutional opposition, fourth generation Montanan, retired district judge, and 1972 ConCon delegate C.B. McNeil (2016, interview) stated:

> Oh the cowboys! Rural Montana didn't trust the Legislature to be in charge of assessing their land, and they were not concerned about the environmental article itself… they didn't want the state to be involved in telling them how to regulate their cattle industry...I think it was the revenue and finance article myself that scared them to death because they didn't want Helena assessing their wheat land instead of their local assessor that they play poker with.

Montana Taxpayers' Association, multiple ranchers, Citizens for Constitutional Government, and the Farm Bureau together spent $20,000 opposing the new Constitution (Ellingson, 2016, interview; Shovers, 2014). Although the environmental provisions were a leading issue at the ConCon, there is no evidence that any single group adamantly opposed the Constitution's environmental rights (McNeil, 2016, interview; Stockton, 2016).

6.1.2 Supporters of Constitutional Ratification

The ConCon delegates planned to spend the remaining $50,000 of their designated Convention funds on an initiative to educate the electorate about each provision within the new Constitution (Campbell, 2016, interview). In *State ex rel. Kvaalen v. Graybill*, (1972) the Montana Supreme Court banned this educational campaign on the grounds that the ConCon did not possess the power to expend public funds on voter education (Johnstone, 2010; Stockton, 2016). The Enabling Act permitted a government funded voter information pamphlet, which acted as the only official explanation of the new Constitution (Stockton, 2016). Supporters of the constitutional initiative, led by a group of the ConCon delegates, banded together to raise $10,000 towards campaigning for constitutional ratification (Shovers, 2014). Delegate Harper came up with the popular pro-Constitution motto "Praise the Lord and Pass the Constitution!" (Campbell, 2016, interview; Chambers & Zalis, 2002; Reichert, 2016, interview). Montana's Lee newspapers, the Associated Press and the Tribune State Bureau aided

in increasing awareness by extensively following the proceedings of the ConCon, and published hundreds of articles and editorials discussing the proposed Constitution, with TV stations providing endless coverage for voters (Stockton, 2016). Numerous groups openly supported the venture: the Montana League of Cities and towns, the Montana Association of County Commissioners, Montana Citizens' Committee, Montana Citizens for Court Improvements, the Montana League of Women Voters, as well as other organizations and most state newspapers (Brown, 1970; Elison & Snyder, 2001; Stockton, 2016). "Neither state political party expressed a formal position" however "most major democratic candidates and office holders, and a few prominent republicans supported ratification" (Waldron & Wilson, 1978, p. 259).

6.2 Constitutional Ratification

Despite the educational campaigns of the government, delegates, and other supporters, Montanans barely ratified the Constitution at 50.55 percent, with 116,515 voting in favor and 113,883 voting in opposition to the new Constitution (Johnstone, 2010; Malone, 1996; Tarr, 2003; Waldron & Wilson, 1978). Montana's counties greatly deviated in their support for constitutional ratification, with support ranging from as little as 18 percent in agricultural Powder River county, to an impressive 71 percent in industrial Deer Lodge county (Figure 6.1; Waldron & Wilson, 1978). Numerous counties came relatively close to ratifying the Constitution, with five counties voting from 46.7 percent to 49.99 percent in support of ratification (Waldron & Wilson, 1978).

As previously stated, constitutional ratification and the legalization of the side issues were mutually inclusive, meaning one could not occur without the other. Because the Constitution was approved the side issues of retaining the death penalty and legalizing gambling were also approved into law, with the unicameral legislature rejected by the voters (Campbell, 2016, interview; Snyder & Ellingson, 2011; Waldron & Wilson, 1978). Although only 47 percent of Butte's voters approved ratification, 73 percent voted in favor of approving gambling without voting for the Constitution, meaning that nearly 2,500 votes cast in Butte were nullified (Campbell, 2016, interview; Elison & Snyder, 2001; McNeil, 2016, interview).

1972 Vote to Ratify Montana Constitution

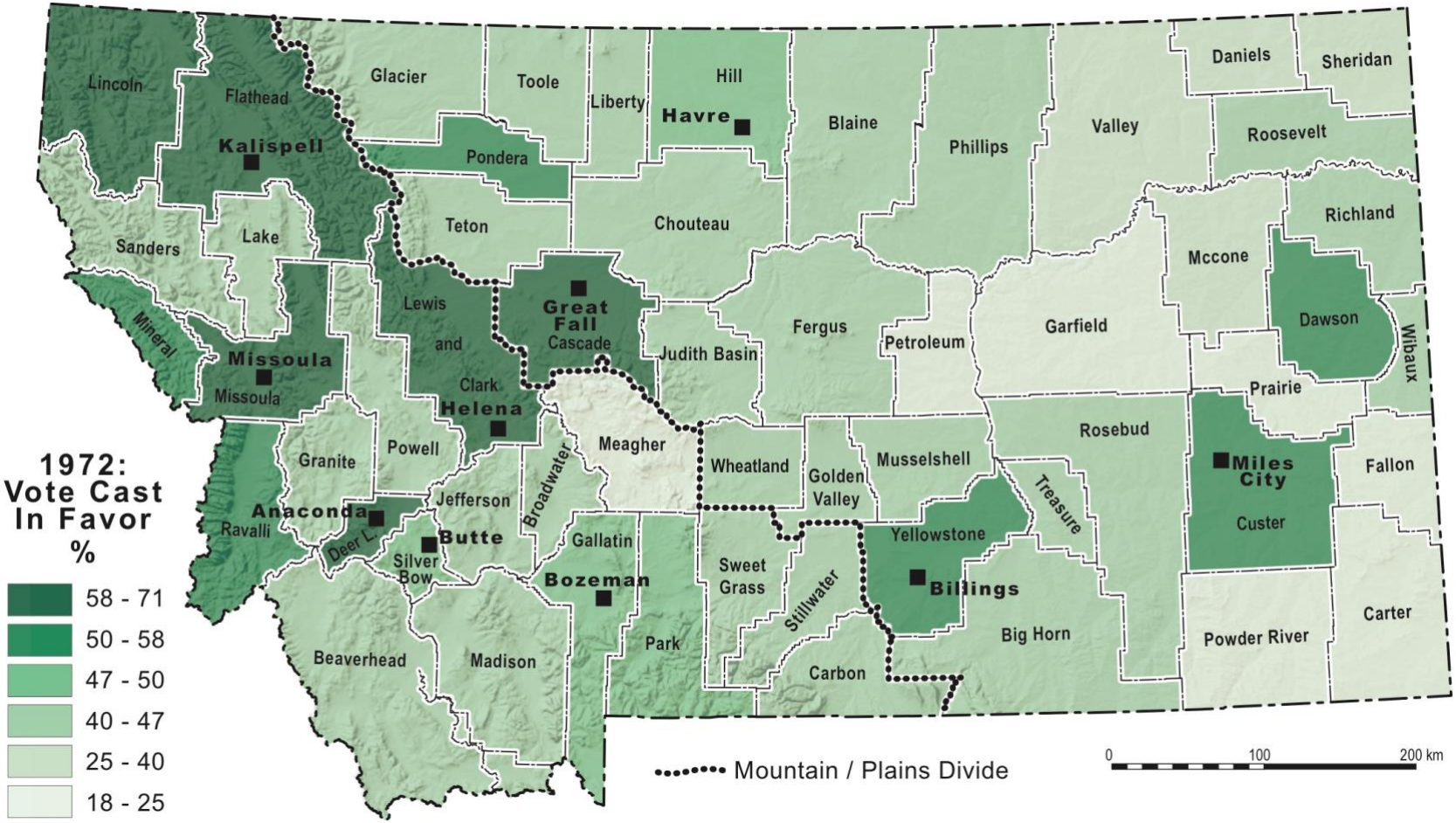


Figure 6. 1 By County 1972 Support for Constitutional Ratification Results

Data: Waldron & Wilson (1978)

Although it is likely that Butte's residents were ignorant of the voting rules (Campbell, 2016, interview), it has also been stated that some of the residents simply did not approve of the new Constitution and purposely voted for the gambling side issue and not the Constitution as their way of abstaining (McNeil, 2016, interview). Given that the delegates, the Legislature, various citizens' groups, and the media all focused their efforts on educating voters on election rules, Butte's vote is still considered an anomaly (Campbell, 2016, interview; McNeil, 2016, interview). In response to the narrow margin of ratification, the Montana Farm Bureau, in collaboration with Secretary of state Frank Murray, sought an injunction in the Montana Supreme Court on 18 August 1972, arguing that the narrow results implied that the Constitution was not approved by the majority of the electorate and thus it should not act as the governing document of the state (Tarr, 2003). The court ruled in favor of ratification in a 3-2 decision, assuming those 2,500 votes for gambling in Butte implied constitutional support, concluding that the majority voted in favor of the new Constitution (Campbell, 2016, interview; Kirk, 2011; McNeil, 2016, interview; Shovers, 2014). The 1972 Montana State Constitution was officially adopted by Governor Forrest Anderson on 20 June 1972 (Trans., Vol. I), and became effective on 1 July 1973 (*General Agriculture Corp. v. Moore*, 1975).

6.2.1 Ratification Voting Patterns

Montana was literally and figuratively divided in its support for the 1972 Constitution, and three specific dichotomies have been identified through analyzing Waldron and Wilson's *Atlas of Montana Elections* (1978) and the distribution of constitutional ratification (Figure 6.1). Firstly, there was an obvious polarization in demographic support of ratification, with western urban counties overwhelmingly supporting the measure, and eastern rural counties opposing it (Figure 6.1; Malone & Dougherty, 1981).

Montana is one of the most rural states in the United States, containing only three non-rural counties, with approximately 40 percent of Montana's population living in non-metropolitan areas (Wandler, 2015). Forty-four counties rejected the 1972 Constitution, with only twelve counties favoring ratification (Figure 6.1). Quantifiably, these numbers appear shocking, but considering that 20 of these 44 counties can be categorized as exhibiting extreme rurality, containing populations less than 5,000, the results seem less

shocking (Wandler, 2015). The approximate population of these 20 counties combined was just under 49,000 in 1970 (Census and Economic Information Center, 2013). From 21 extremely rural counties, only Mineral county (with a population of just under 3,000 residents) voted in favor of the Constitution (Figure 6.1). The six counties providing the most support for the measure contained a total of 246,523 residents and seven of Montana's ten largest cities (Kirk, 2011; Malone, 1996; Waldron & Wilson, 1978). Although only twelve counties favored ratification, due to their large populations they provided enough support to offset opposing votes in the remaining 44 counties. For instance, urban Cascade county alone housed 81, 804 residents, and voted in favor of ratification. All seven counties voting up to 75 percent in opposition of the Constitution, contained less than 6,000 residents. Seven of the nine delegates who opposed the Constitution after signing it hailed from these seven counties that were most opposed to ratification (Cross, 1990).

On election day, the Bureau of Government Research surveyed 1000 voters as they left the polls (Payne & Eastman, 1972). Their findings support the observation that constitutional ratification resulted in aggregate voting patterns. Only 44 percent of the survey's rural voters supported the new Constitution in comparison with 70 percent of urban respondents. Support did not appear to significantly differ based on gender, with 68 percent of the men, and 67 percent of the women surveyed supporting the measure. Although voters of all ages approved ratification, younger voters were more supportive than older voters: 75 percent of voters between the ages of 18 and 29 supported ratification, as opposed to the 62 percent of voters aged 60 years or more (Payne & Eastman, 1972).

The second dichotomy in voting patterns revealed a significant difference in partisan support for the Constitution (Kirk, 2011). Votes cast by traditional Democratic counties in the western third of the state supported the measure, conflicting with Republican counties in the eastern two-thirds who opposed it. This partisanship was evident even prior to the ConCon; in 1970, in a bipartisan effort to receive a new Constitution, four Democrat and four Republican legislators proposed a constitutional referendum but failed to secure the required two-thirds vote in each legislative chamber (Waldron & Wilson, 1978). When the issue was later reintroduced it passed, however, the vote revealed a striking difference among political parties: 60 percent of Republican State Senators and 34 percent of the Republican State Representatives opposed referendum, with

only 10 percent of Democratic State Senators and 18 percent of Democratic State Representatives opposing. Waldron and Wilson (1978, p.249) further assert that:

> Most of the legislators who voted against the call for Constitution Convention were from counties whose voters later would be among the third of voters least favorable to a Convention. The Democrats from western urban counties who opposed the call had constituents who would approve the measure more than two-to-one.

Voting patterns in 1970 mirrored the political divide for constitutional reform in 1972, with Republican opposition traditionally coming from conservative rural counties, and Democrat support from legislators representing counties containing the larger cities (Shovers, 2016, interview). The Bureau of Government Research likewise found that Democratic residents favored ratification more than their Republican counterparts, though only by 10 percent (Payne & Eastman, 1972). These two polarities "demonstrate[d] how divided the state had become not only between urban and rural constituencies; it also illuminate[d] the diverging interests of those living in the western half of the state versus those in the east" (Kirk, 2011, p. 31). Both trends share one commonality in that they divided the state geographically. Votes cast in western mountainous counties significantly conflicted with those of the eastern plains counties, thus the third obvious trend in Montana's polarized ratification results are geographic in nature.

6.3 Polarized Trends: Montana's Schizophrenic Identity

Montanans exhibit a unique identity crisis: there is no shared consensus on whether the state is pro-industry or pro-environment, more liberal or more conservative, with the west and the east acting as separate worlds topographically, demographically, economically, and politically (Wright, 2003). Montana's dual personality is characterized by an "overwhelming sense of power, spaciousness, incurable vitality, wealth and youth beyond computation," on one side, and "rawness, greed, lack of overall clarity and plan, lack of any sense of historical continuity, instinct to waste, and unpredictable errant political behavior" on the other (Gunther, 1947, p. 155). As mentioned, three voting trends became apparent in support for constitutional ratification: geographic, demographic, and political dichotomies were identified. By understanding how Montanans developed their unique state identity, one can better comprehend why Montanans were visibly divided in their constitutional support, the

politics behind the events leading up to ratification, and why an environmental ethic emerged separately at different scales and regions of Montanan society. This subsection develops an important context for answering the research questions.

6.3.1 Political Schizophrenia

On the national level, until 1992 Montana was apportioned into two congressional districts (Malone, 1996). Representatives from the two congressional districts routinely came from opposing parties, providing Montanans with bipartisan representation in the US House of Representatives (Malone & Dougherty, 1981). From 1912 to 1976, Montana's electorate only sent one Republican to the US Senate, and the Democrats, via support from recreationists and labor unions, represented Montanans in Congress' upper chamber (Kirk, 2001; Swanson, 2013a; Waldron & Wilson, 1978). Historically, Democrats and Republicans are virtually tied for control of state politics. Excluding Montanans' preference for Democratic senators, this lack of a political identity has led many political commentators to label Montana a politically schizophrenic state (Gunther, 1947; Kirk, 2011; Malone et al., 1991; Waldron & Wilson, 1978; Wright, 2003). "Like the other Mountain states," wrote Malone and Dougherty (1981, p. 52) "Montana seems to accommodate few liberal Republicans. Its Republican party is strongly rightist, and its Democratic party is usually visibly divided into liberal and conservative wings."

With liberals heading national politics, conservative sentiment dominated state and local levels leading into the 1970s: on the right side of the political spectrum, Montana conservatives consisted of organized stockmen and ranchers, large-acreage grain farmers, major railroads, as well as oil, lumber and coal companies. Large-scale stockgrowers and farmers customarily belonged to organizations such as the Montana Stockgrowers Association and the Farm Bureau, who held considerable power in the rural-dominated state Legislature, and consequently, led the opposition against constitutional ratification in 1972 (Kirk, 2011; Malone & Dougherty, 1981; Schweitzer & Barrett, 2015). Because Montana's statehood Constitution apportioned more legislative power to the "cowboys," urban western business interests, who often supported the Anaconda Company and Montana Power, often aligned with rural factions to influence state politics. "The alliance between western Montana corporations and eastern Montana ranchers is critically

important to understanding the state's political development," and any opposition to constitutional reform and environmental legislation (Malone & Dougherty, 1981, p. 52).

In addition to the large-scale, conservative farmer-ranchers, Montana's rural community was further divided politically. Rural Montanans were known for their rugged individualism, a cultural trait which often hampered their interjection in political and other, non-local matters (Ferguson, 2015). When involved in state politics, small-scale farmers and ranchers customarily aligned with unionized workers and urban organizations, characterizing the left side of Montana's political spectrum. The agrarian National Farmers Union frequently partnered with mine-mill unions and smaller rail lines, their collaboration fortified by the reform climate sparked under the New Deal, empowering Montana's progressive, liberal wing of the Democratic Party (Finn, 2012; Malone, 1971; Malone & Dougherty, 1981). This rural political sub-culture was also influenced by the homesteading programs of the 1910s, which welcomed thousands of progressive-minded agrarians from abroad and from other American states. Although many departed during the homesteading collapse of the 1920s, those who remained retained their populist roots, and supported Montana's Democratic Party and constitutional reform and ratification (Wright, 1998).

6.3.2 Why Divided? Topography, Culture and Industry

Montana's political schizophrenia can be attributed to numerous cultural, physical, and economic factors, many of which were the result of historic settlement patterns. An analysis of Montana's political and economic past, reveals that 1970s Montana was characterized by several polarities, which figuratively segregated the state's western third from the eastern two-thirds in support for constitutional ratification (Table 6.1).

Table 6. 1 Montana's Geographic Schizophrenia, Circa 1970s

Western Third	Eastern Two-thirds
Mountainous	Great Plains
Industry/Recreation	Agriculture
Predominantly Urban	Predominantly Rural
Democrat	Republican

The trends listed in Table 6.1 represent the average sentiment of the region, and do not suppose that the characteristics are absolute. Voting patterns are influenced by livelihoods, which in turn are impacted by the diversity of terrain, available resources, and climate of the surrounding area (Waldron & Wilson, 1978; Wright, 2003). An area's physical terrain influences the dominant industry in that area. Montana's western third is heavily laden with faults, major geologic features that generated the processes of mineralization, which yielded a region highly concentrated with precious mineral resources, and ultimately contributed to Montana becoming the epitome of "capitalism's Frankenstein" (Figure 6.2; Flores, 2001, p. 159). As previously discussed, the abundance of timber, gold, zinc, silver, and especially copper resulted in the establishment of successful extractive operations and metropolitan hubs across the western portion of the state, playing a key role in state development (Holden, 2003; Holden, et al., 2007; Stiller, 2000). Montana's geology inadvertently decided that timber, mining, and recreation would drive western Montana's economy through mostly industrial livelihoods, with the arid eastern climate and flatter topography similarly providing for the agriculture, stock growing and ranching-based livelihoods of the eastern plains. These livelihoods and industries settled each region, and helped establish Montana's characteristic *industrial* west, and *agricultural* east (Table 6.1).

Montana's western topography, with its national parks, wilderness areas, major rivers, and mountains also contributed to developing Montana's dichotomous demographic regions. Population growth in the late 1960s and early 1970s was restricted to eight western counties where habitants settled along valleys and mountain slopes, further splitting the state into the mostly *urban* west and *rural* east (Wright, 2003). Montana's schizophrenic political identity thus grew "out of its narrowly based economic order," which was indirectly influenced by its physical topography and by citizen desires to either settle in proximity to these natural landmarks or in areas which supported their occupational skills (Malone & Dougherty, 1981, p. 58).

Geologic Faults and Mining Activity in Montana

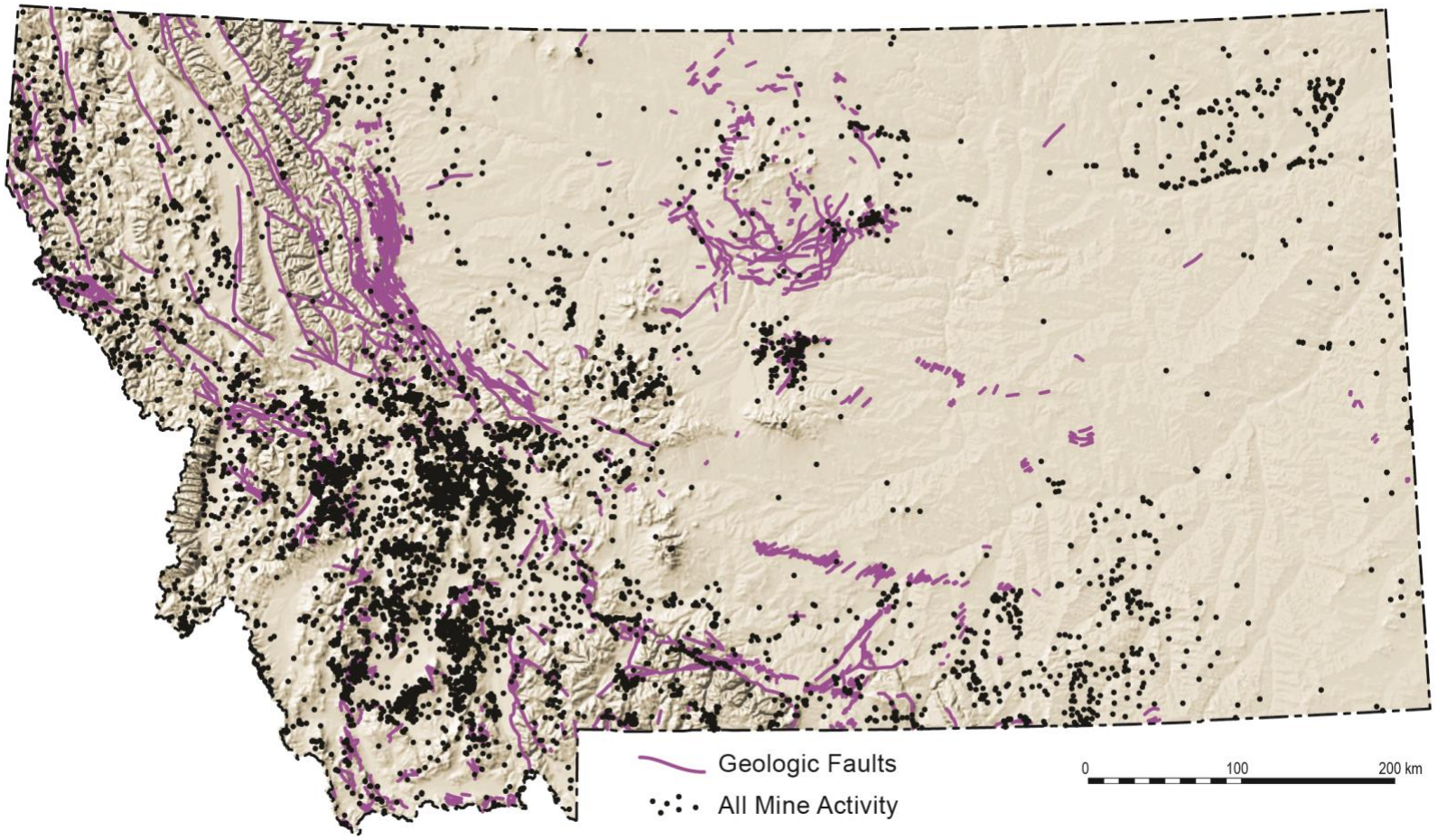


Figure 6. 2 Geologic Faults and Mining Activity in Montana

Data: US Geologic Survey: https://mrdata.usgs.gov/geology/state/state.php?state=MT

Montana's west-east divide can be visualized by categorizing the counties by their topography: western mountainous counties and eastern plains counties (Figure 6.3; Holden, 2003; Holden et al., 2007). This "mountains/plains" divide has resurfaced in several voting scenarios, geographically dividing the state in support for calling a Constitutional Convention (Figure 4.3), constitutional ratification (Figure 6.1), and numerous other measures which will soon be discussed.

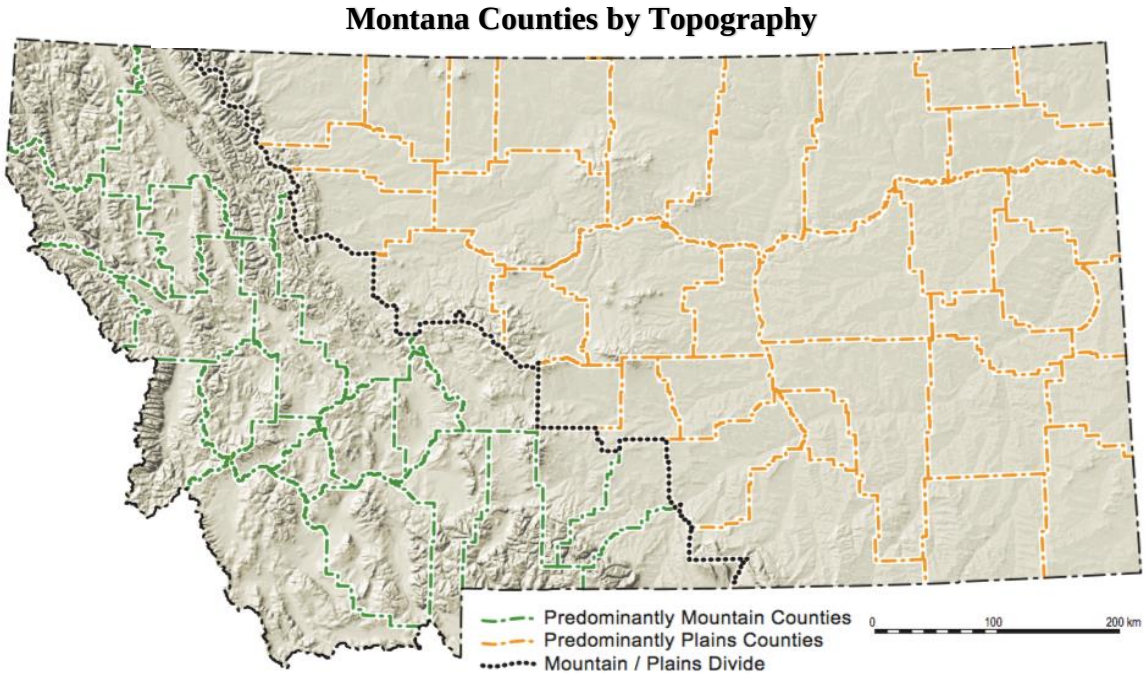


Figure 6. 3 Topography of Montana Counties

Montana's industrial and agricultural industries are further classified by their employment of specific cultural groups which influence politics as "voters may retain the political values of the places whence they came" (Waldron & Wilson, 1978, p. 1). Although a certain level of cultural assimilation occurs, subsequent generations to an extent retain the political opinions of their predecessors. County voting results on various life-style issues, such as prohibition, gambling, and marriage, remained relatively unchanged throughout the decades, with counties voting similarly on topics in 1914, and five decades later in 1972 (Waldron & Wilson, 1978). Montana's century of industrial supremacy attracted workers and families of different nationalities and

religions, who often congregated in cultural communities in and around urban centers. In the west, the timber industry was predominantly Scandinavian, railroad services were predominantly Asian, and miners hailed from the British Isles, with many of them being Irish Catholics. The rural sub-culture was heavily influenced by the continuous influx of Lutheran Scandinavians who became farmers, cattlemen and artisans with conservative cultural values, who settled in Montana's agricultural east (Glasscock, 2002; Mercier, 2002; Shovers, 1987; Swartout, 1988; Waldron & Wilson, 1978).

Differences in voting patterns across two generations portray substantial consistencies within and between various religious and cultural regions, supporting the notion that "ethnic-religious differences find expression in differential voting on questions of public policy affecting life style" (Waldron & Wilson, 1978, p.152). This theory that livelihoods and culture influenced Montana politics can be portrayed by observing the vote for the Metals Mine Tax in 1924 (Figure 6.4).

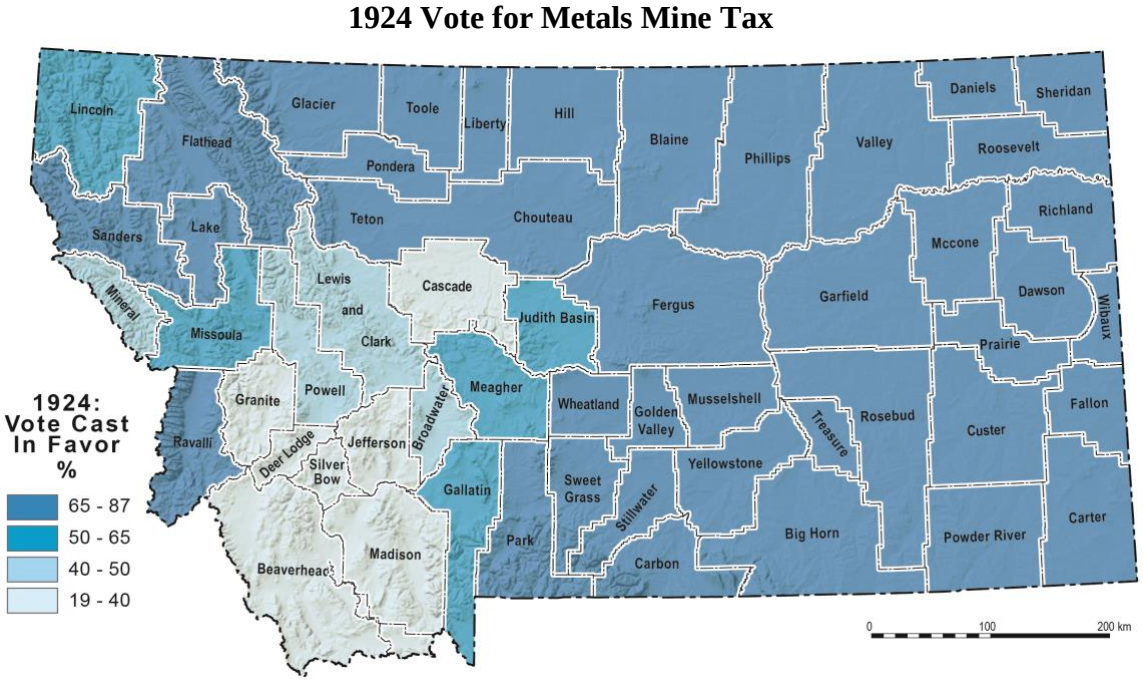


Figure 6. 4 By County 1924 Metals Mine Tax Vote Results

Data: Waldron & Wilson (1978)

Support for the Metals Mine tax was proportional to the distance away from the main urban centers surrounding industrial hot spots. Counties where livelihoods most depended on the mining and timber industries severely opposed the measure. Overwhelming support came from the eastern agricultural counties the furthest away from the mining cities, favoring the measure which shifted the tax burden to the industrial west (Waldron & Wilson, 1978). A clear urban-rural, industry-agriculture, west-east divide was apparent, similar to Montanans' voting on issues nearly half a century later.

Because it is assumed that voting patterns are inherited by an area's residents, Montana's history as an extractive colony likely contributed to the state's schizophrenic persona. Montanans' votes on state issues in the 1960s and 1970s were also influenced by the state's narrowly focused economy and the dependence on agricultural and extractive industries, which in part were determined by Montana's dichotomous western and eastern physical features. Montana's divergent topography played a role in developing the state's divided political culture and, consequently, dividing the state in its support for constitutional ratification in 1972.

6.4 Chapter Summary

On 6 June 1972 Montana's electorate narrowly ratified a new State Constitution, replacing the archaic document that had governed the state since 1889. Montana is the only state in the Rocky Mountain West with an entirely new second Constitution (Holmes et al., 2008). Montana's constitutional ratification revealed noticeable demographic, political, and geographic voting trends. As will be suggested in the following sections, the dichotomies discussed each manifested themselves throughout Montanans' efforts for constitutional reform, and the citizens' acceptance of entrenching environmental laws in the State Constitution.

Several events ultimately contributed to the polarization of constitutional support in 1972, and thus the entrenchment of the right to a clean and healthful environment in Montana's 1972 State Constitution. In identifying the direct and indirect triggers that resulted in Montana's entrenchment of environmental rights and provisions, the following chapter answers the first research question of this thesis and portrays how Montana's environmental rights resulted from a milieu of interconnected economic, social, political, and historic societal characteristics and events.

CHAPTER 7: THE DIRECT AND INDIRECT TRIGGERS OF MONTANA'S ENTRENCHMENT OF ENVIRONMENTAL RIGHTS

The first question of this thesis asks *which sociocultural features of Montanan society led to the entrenchment of environmental rights in the 1972 Montana State Constitution?* This chapter answers this question by explaining each of the indirect and direct triggers which contributed to the calling the Constitutional Convention and the entrenchment of the right to a clean and healthful environment in Montana's 1972 Constitution.

7.1 Indirect Trigger #1: Legislative Reapportionment

7.1.1 Montana's Malapportionment

Apportionment is an American political practice, which Dudis (1972, p.101) defines as "the determination by law of the number of representatives which a state…. or other political subdivision may send to a legislative body." In addition to being divided into counties, states are also partitioned into *legislative* and *congressional districts*. Voters in every legislative district elect legislators to each chamber of the state legislature according to the apportionment provisions outlined in their state constitution. Although state legislatures are responsible for drawing the congressional districts, from which the US House of Representatives are elected, laws governing congressional districts are dictated by provisions in the United States Constitution (Aarab & Regnier, 2015; Dudis, 1972). By redrawing the physical boundaries of congressional and legislative districts, reapportionment is the reorganization of the number and distribution of legislative seats (Aarab & Regnier, 2015; Dudis, 1972).

By 1960, many state legislatures were experiencing severe misrepresentation between their most and least populated legislative districts (Dudis, 1972). Malapportionment was widespread because several states were governed by outdated constitutions, which were written when those states were smaller, simpler, and mostly rural. Montana's statehood Constitution delegated one senator per legislative district, a system proving inefficient even to Montana's 16 counties in 1889 (Dudis, 1972; Waldron & Wilson, 1978). Montana's Constitution was written with short-term goals and failed to consider that new political subdivisions would need to be created to offset future population growth. The 1960 census revealed that Montana's system of

legislative apportionment had resulted in Montana being one of the most malapportioned states in the nation (Fritz, 1990). Furthermore, states were bound by the United States Constitution to reapportion their congressional districts every ten years in accordance with the decennial United States Census. Because federal reapportionment laws were inapplicable to state legislative districts, decennial redistricting further contributed to state malapportionment (Dudis, 1972; Ellingson, 2016, interview).

Malapportionment occurs when states undergo population growth, and it is exacerbated by political and legal factors (Dudis, 1972). In the 1960s, rural areas in most states were dominated by one political party, with the opposing party controlling the urban centers (Dudis, 1972). This phenomenon occurred in Montana, where eastern rural areas consisted mainly of Republicans, and western urban areas, Democrats. By allocating one seat to each legislative district, Montana's 1889 Constitution granted legislative power to the eastern rural republicans who were apportioned into twice as many legislative districts than their western urban counterparts. As Montana's population grew, the "cowboy" dominated Legislature refused to reapportion Montana for fear of losing seats and political power in the state Legislature. As a result, lightly populated areas were extremely over-represented with populous counties being underrepresented in Montana's Legislature (Aarab & Regnier, 2015; Dudis, 1972). For instance, Petroleum county's 800 people, and Yellowstone county's 80,000 people, were each represented by one Senator, resulting in a 100 to one disproportion of state power (Holmes et al., 2008; Robinson et al., 2015).

As Montana's population grew, and expanded into more isolated areas, new districts and counties were created to ensure citizens throughout the state were represented in local, state, and national matters. In the 1960s, "as rural Montanans gradually lost population to the slowly expanding urban or near urban areas, rural voters had an increasingly disproportionate quantum of political power" (Elison & Snyder, 2001, p. 7). Senators representing only 16 percent of the state population could make the majority in the Montana senate, with Representatives representing 37 percent of the population holding a majority in Montana's House of Representatives. In Montana, one cow received one vote (Fritz, 1990; Waldron & Wilson, 1978).

7.1.2 US Supreme Court Reapportions Montana

The United States Supreme Court saw an increase in the number of cases regarding issues of malapportionment. In *Baker v. Carr* (1962) voter misrepresentation was declared unconstitutional under the Equal Protection clause of the Fourteenth Amendment (Elison & Snyder, 2001). The issue resurfaced the following year in *Gray v. Sanders* (1963), where it was decided that political equality and the protection of minority voting rights could only be assured if each citizen received one vote in their state legislature (Aaarab & Regnier, 2015). In *Reynolds v. Sims* (1964, p. 562*)* the US Supreme Court held that:

> *Legislators represent people, not trees or acres*. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system [emphasis added].

The Court ruled that both houses in bicameral state legislatures had to be based on population and not area, calling for mandatory enforcement of the "one person, one vote" principle (Chambers & Zalis, 2002; Kirk, 2011; Elison & Snyder, 2001). In the most notable case regarding malapportionment, *Wesberry v. Sanders* (1964), the US Supreme Court held that state congressional districts are to be based on population and US Representatives elected to the house not by means of area. The court relied upon the above-mentioned cases to establish justiciability that the one-person one-vote principle is applicable for both congressional and state legislative districts. Because state constitutions are subordinate to valid federal law, this US Supreme Court ruling mandated that Montana's legislative and congressional districts be reapportioned according to population (Dudis, 1972; Johnstone, 2015; Kirk, 2011; Tarr, 2011). The court decided the task of reapportioning districts should be the responsibility of each state legislature, so that each state's historical, economic, geographic, and demographic characteristics could be considered (Dudis, 1972).

Montana's legislators failed to reapportion Montana's legislative districts, forcing the task upon the federal district court in *Roberts v. Babcock* (1965) (Campbell, 2016, interview; Dudis, 1972). The 39th Legislative assembly may forever be

remembered for ending up as a defendant in a federal district court case, for unconstitutionally failing to perform its legislative duties, and for discriminating against most of the electorate (Dudis, 1972; Tidball, 2008). The federal court devised an apportionment plan for Montana's legislative, and two congressional districts, for the upcoming 1966 state election (Elison & Snyder, 2001; Tidball, 2008). Counties with relatively low populations were grouped into single districts and granted one or more representative. In addition to splitting entire western counties into numerous state legislative districts, the court added seven eastern counties to the western congressional district, strengthening western Montana's influence in national politics (Waldron & Wilson, 1978). This shift in representation stripped 26 rangeland counties in south-eastern and south-central Montana of their state legislative control, instead presenting certain urban counties with up to seven representatives and six senators each (Elison & Snyder, 2001). This 1964 US Supreme Court decision "finally freed the Montana Legislature and others from the constitutional hammerlock of rural domination that had been created by the Constitution Convention of 1889" (Waldron & Wilson, 1978, p. 10).

In 1966, legislative reapportionment appeared on the voter ballot as a constitutional amendment. 70 percent of Montana's electorate attended the poles, approving the amendment by 53 percent (Figure 7.1; Waldron & Wilson, 1978). Western urban counties which contained the state's largest cities were the most supportive of reapportionment. Eastern counties, as expected, mostly opposed reapportionment as it stripped them of their power. Voting patterns for reapportionment displayed the urban-rural, mountains-plains trends discussed earlier, recreating Montana's western versus eastern geographic dichotomies.

7.1.3 Reapportionment for Constitutional Convention

In preparing for the 1972 Constitutional Convention, the Montana Supreme Court held that the delegates should be elected from newly defined legislative districts to be based on the most recent 1970 US Census, reapportioning the state's legislative districts for the second time in less than a decade (Fritz, 1990; Waldron & Wilson, 1978). Through a special legislative session in 1971, Montana's Legislature created 100 legislative districts based on population. The Legislature agreed on a reapportionment plan prohibiting districts to

surpass a 10 percent deviation in representation (Aarab & Regnier, 2015; Dudis, 1972). Because demographics had changed since reapportionment in 1966, counties with fewer residents were again combined, and counties with more residents further split to achieve satisfactory ratios of legislative representation per district (Waldron & Wilson, 1978).

1966 Vote on Legislative Reapportionment

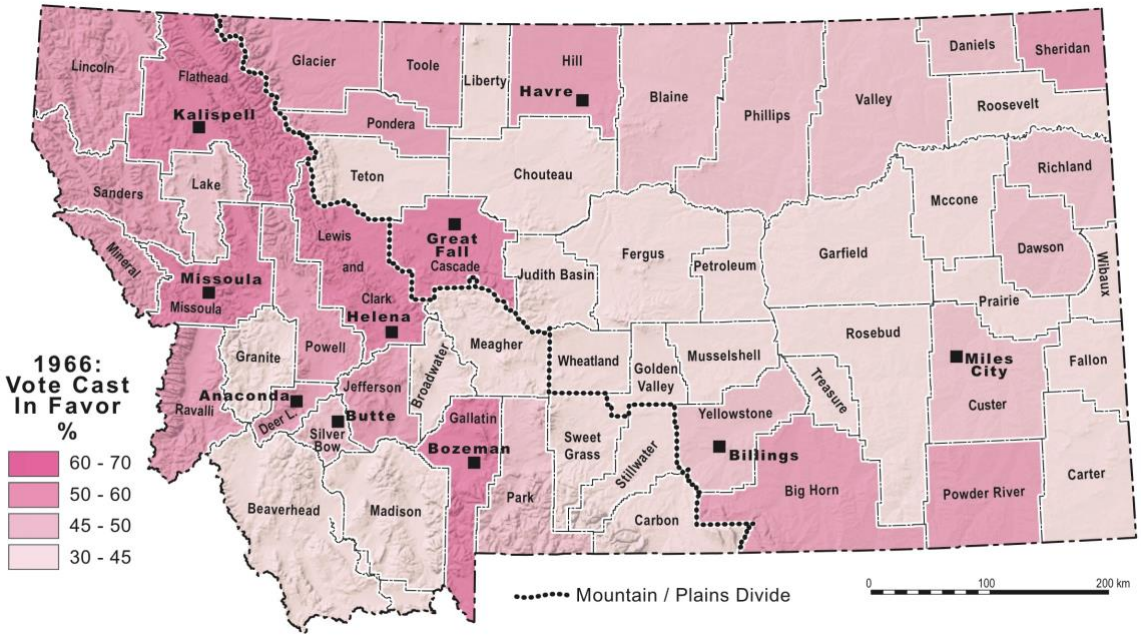


Figure 7. 1 By County 1966 Montana Vote on Reapportionment Results

Data: Waldron & Wilson (1978)

7.1.4 Reapportionment & Montana's Environmental Rights

The residuals of the Great Depression and WWII triggered a large-scale migration to Montana's urban centers (Homstad, 2003; Malone & Dougherty, 1981). Montana underwent a drastic decrease in the number of farms and ranches, with vacated properties being overtaken by larger operations. This demographic hemorrhage of the rural northern and eastern counties resulted in there being only 25,000 farms in Montana in 1969, dramatically less than the 41,000 farms in 1950 (Malone & Dougherty, 1981; Shovers, 2014). Small-scale agrarians, who sought a change in lifestyle and financial stability, moved to Montana's urban west and brought with them thoughts of state reform. Those farmers and ranchers who could afford to remain in Montana's eastern counties developed a stronger conservative attitude, one which viewed change as threatening. Led by the Farm

Bureau and Stockgrowers Association, these large-scale farmer-businessmen fortified their support of Montana's Republican Party and collaborated to oppose any significant measures of state reform (Malone & Dougherty, 1981). This transience recalibrated Montana's political identity.

The most fundamental political change occurred in Montana's right-wing politics. The Company's political influence in Montana decreased as Anaconda officials focused more on their international holdings. As Anaconda laid-off its Montana workers, it lost critical voter support in Republican political campaigns (Chambers, 2016a, interview). Malone and Dougherty (1981, p. 56) explain Montana's political transition as follows:

> As Anaconda's power waned, other corporations like the railroads and Montana Power maintained their grip, while new lumber, oil, coal, and banking companies arrived on the scene. All of this amounted to a healthy broadening and diversifying of the corporate community in the state…. the old farmer-labor alliance of the left and the seemingly monolithic Anaconda behemoth of the right both paled with time, the political spectrum seemed to narrow toward convergence upon the center.

As Montana's political scene shifted away from its historic corporate and agricultural conservative rule, residents continued their migration to mostly western urban counties. Prior to WWI, less than one third of the state's population was urban, living in cities and towns which on average contained only 2,500 people (Holmes et al., 2008; Waldron & Wilson, 1978; Wandler, 2015). In the 1960s, a steep decline in state rurality ensued, and for the first time in Montana history, the US census revealed that Montana was officially an urban state (Figure 7.2), with more than 700,000 people residing in suburban clusters exceeding 2,500 residents (Elison & Snyder, 2001; Fritz,1990; Homstad, 2003; Stockton, 2016). This mass migration also triggered an increase in the number of urban centers. Until WWII, Montana's urban population was concentrated in the three mining centers of Butte, Anaconda and Helena. As the prevalence of the mining industry declined, residents left these cities to pursue employment opportunities elsewhere. The post-war era resulted in the dispersion of political power to Billings, Bozeman, Great Falls and Missoula, and the growth of more isolated cities such as north-central Havre, northwestern Kalispell, and eastern Miles City (Figure 7.2; Waldron & Wilson, 1978).

1970 Montana Population Distribution

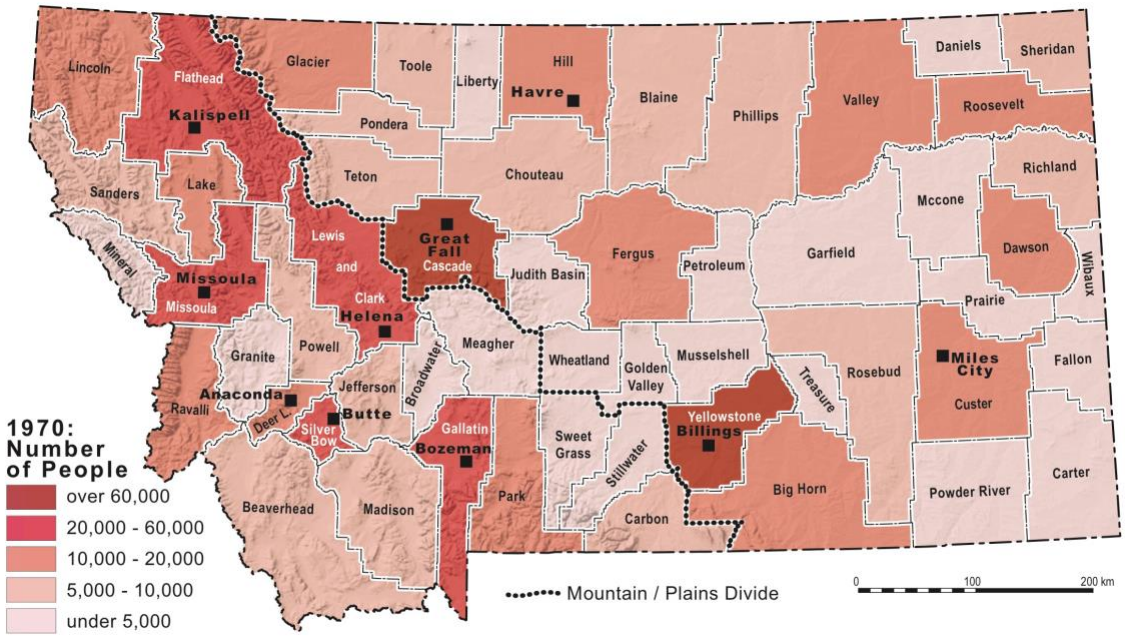


Figure 7. 2 By County 1970 Montana Population Distribution

Data: Census and Economic Information Centre (2013)

When the 1964 US Supreme Court ruled that reapportionment must now follow the one-person, one-vote principle, Montana's growing urban districts were allocated up to 12 representatives each and Montanans could now properly be represented in their state Legislature. The cumulative impact of equal-representation and two- rounds of reapportionment resulted in what Fritz (1990, p. 3) described as "a massive shift of political power and voter strength from rural areas to urban, from farms to cities, from cows to people." To Elison and Snyder (2001, p. 7), reapportionment "diminished the representation of ranchers and farmers in the Legislature, increasing the representation of the professions, and left traditionally conservative rural areas increasing opposed to any change."

When reapportionment occurred, Montana's enlarged urban counties not only had a *stronger* voice due to the influx of new resident's eager for change, these newly empowered urban centers also had a *progressive* voice. Montana governor Stan Stephens pointed out that 1960s Montanans felt "a determination—sometimes bordering on the reckless—to change the system" (Holmes et al., 2008, p. 421). Urban Montanans were more vocal in their desire for constitutional and state reform. They acted as the

centers of middle-class and consensus politics and were much more receptive to arguments for change than their mostly conservative, rural counterparts (Kirk, 2011; Malone et al, 1991; Tarr, 2003). The politics of these growing urban centers ultimately opened the door to the 1972 State Constitutional Convention and the resulting entrenchment of Montana's environmental rights. Anthony Johnstone, professor of state and federal constitutional law at the University of Montana School of Law, agrees that federally mandated reapportionment was an indirect trigger to Montana's entrenchment of environmental rights. As Johnstone (2016, interview) stated:

> Reapportionment of our State Legislature …. led to the reapportionment of political power from rural areas and the underrepresentation of the urban areas that most felt the environmental impacts of extractive industries. It reapportioned the power towards the people that would have had a greater stake in some of the environmental issues of that day. That political power shift opened the door to a vote on the Constitution and brought the Constitutional Convention into being.

Although the second wave of reapportionment in 1971 occurred to ensure that Montanans were properly represented by delegates in Montana's Constitutional Convention, the first wave of reapportionment in 1966 is the event which indirectly triggered Montana's constitutional reform, and it can be credited with indirectly triggering Montanans' path to the entrenchment of environmental rights. "The US Supreme Court's 'one person, one vote' ruling and Congress's enactment of the *Voting Rights Act* of 1965" wrote Tarr (2003, p. 22) "exemplify how changes in federal law may require a response from state constitutional drafters."

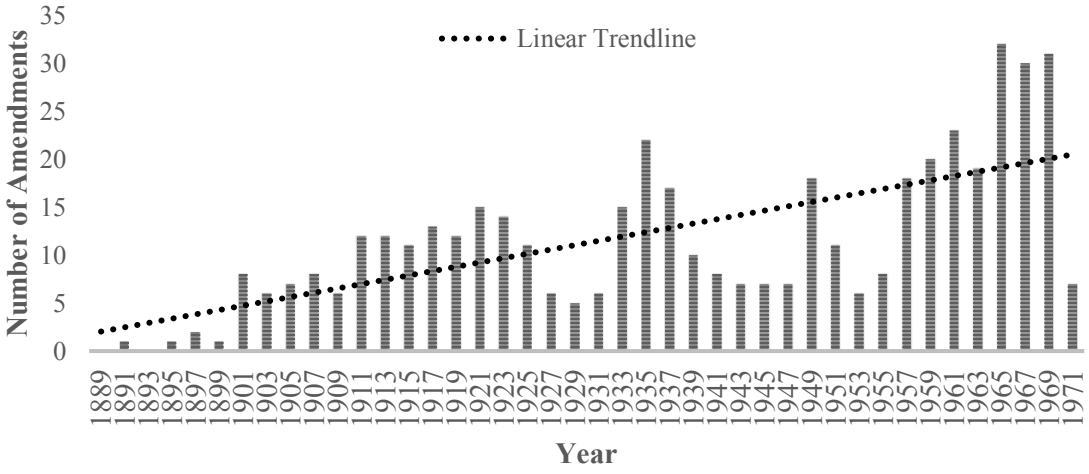
7.2 Indirect Trigger #2: A Restructured Government

Following the reapportionment of Montana's legislative districts, the state government was faced with a significantly altered political establishment. While the Legislature acclimatized to this new distribution of political representation, before settling into a new routine, all three branches of Montana's government utilized this window of opportunity to work together to exact overdue governmental and constitutional reform. This subsection explains the reasoning behind the government's willingness to promote a new constitution, and the role each branch played in indirectly entrenching Montana's environmental laws.

7.2.1 Legislature Breaks with Tradition

As previously mentioned, Montana's State Legislature was significantly restricted by the provisions of the unamendable 1889 State Constitution. Between 1889 and 1972, more than 500 constitutional amendments were introduced in the Legislature, further implying that Montana's Constitution was failing in meeting the changing needs of its citizenry (Johnstone, 2010; Waldron & Wilson, 1978). As years passed, the number of amendments proposed per legislative session significantly increased: 15 amendments were proposed in 1921, 22 in 1935, and a record 32 in 1965, the session where the Legislature failed to reapportion the state's government districts (Figure 7.3; Montana Constitutional Revision Commission, 1969).

Figure 7. 3 Constitutional Amendments Proposed by Legislature, 1889-1971

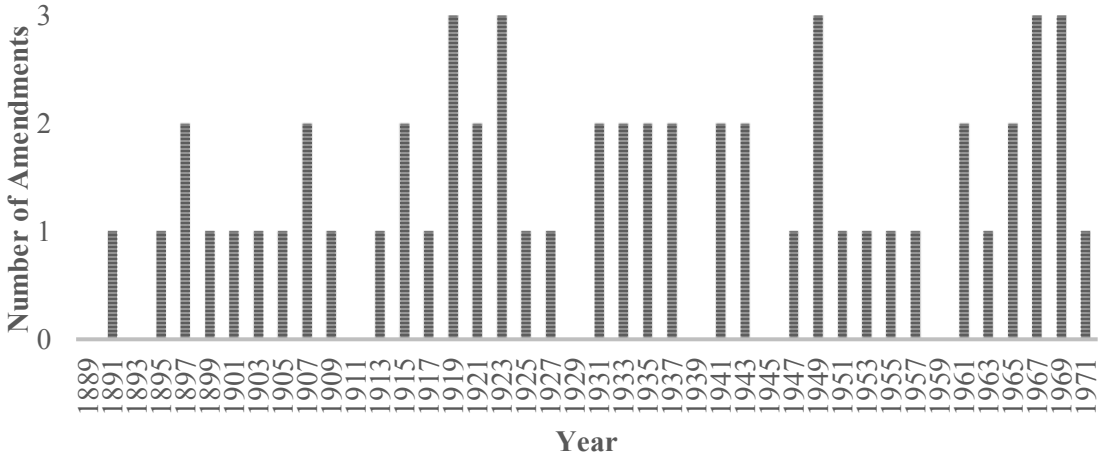


Source: Author. Data: Montana Constitutional Convention Commission, 1971

The number of amendments proposed during a legislative session corresponded to events occurring both statewide and nationwide; increasing during the New Deal programs of the 1930s, following WWII, and during legislative reapportionment and executive reorganization (Homstad, 2003; Roeder, 1990). Although legislators were diligent with proposing amendments, constitutional limitations interrupted any significant change, and the Legislature was widely regarded as the weakest branch of Montana's government (Ellingson, 2016, interview; Johnstone, 2010; McNeil, 2016, interview). In eight decades, the Legislature approved only 62 amendments, submitting 57 to the electorate of which 40

were approved (Figure 7.4). All in all, only 37 of these amendments were constitutionalized as three were invalidated by the Montana Supreme Court (Elison & Snyder, 2001; Johnstone, 2010).

Figure 7. 4 Constitutional Amendments Submitted to the Electorate, 1889-1970



Source: Author. Data: Montana Constitutional Convention Commission (1971)

With only 37 amendments applied to the 1889 Constitution, an insignificant eight percent of the proposed, required change was successful, leaving Montanans bounded by an unamendable document written by, and for, a society long since passed:

> [The 1889 Constitution] limited not more than three amendments at any one time and they could only be initiated by the Legislature, [which] met once every two years. As a result of that, by the time the Legislature would come into session, there might be 15-20 legislators that had constitutional amendment proposals. Well, they would get to bickering with each other as to who was going to get on the ballot. As a consequence, in most legislative sessions, none would get on the ballot. You do not vote for me, I am not voting for you kind of attitude, and that probably was a legitimate criticism of the 1889 Constitution, so the Legislature finally decided 'we have had enough of this, let's call a Constitutional Convention' (McNeil, 2016, interview).

The allocated 60-day biennial legislative session was too short to accommodate the scope of changes required by the Montanan society, and legislators "generally delayed passage of amendment bills until the end of the session in order to broker which three to pass" (Roeder, 1990, p. 266). With legislators scrambling to table amendments addressing

constituent and governmental concerns, the sessions were overwhelmed with propositions which could not be adequately discussed in the final hours of session (Johnstone, 2010; Roeder, 1990; Tarr, 2003). Proposals of urban legislators seldom passed the Legislature's rural majority, with recommended measures focusing on updating administrative and fiscal matters (Johnstone, 2010). The amendments most rejected by the Legislature and electorate focused on industry and economics, with the state's accumulating environmental issues being treated with avoidance (Elison & Snyder, 2001). The changes attempted by the Legislature did not cover a broad range of social needs and in the eight decades since statehood not once did the Legislature propose an amendment regarding environmental matters (Tarr, 2003). Citizen interests and values were impaired and ineffectively promoted.

In addition to legislative barriers to state reform, trust in the judiciary waned as both federal and state courts denied amendments proposing to deal with new social needs and concerns (Johnstone, 2010). Furthermore, the 37 ratified amendments added 24 sections to the already lengthy Constitution, contributing to the document's complexity (Johnstone, 2010). Over the decades these factors increased the urgency with which citizens demanded a more flexible Constitution responding to changing societal needs (Ellingson, 2016, interview; Johnstone, 2010).

Many assumptions can be made by analyzing Montana's amendment history. By approving 70 percent of the amendments balloted, the approval rate of the electorate was more than six times higher than that of the Legislature, which itself approved roughly 12 percent of the amendments proposed. This high citizen approval rate shows that, on average, the electorate was more open to change than the Legislature. The Legislature's inability to achieve state reform, and deny any types of environmental legislation, can be attributed to continued pressures from the mining industry, the corporate-affiliated, rural-dominated Legislature, and the residuals of an outdated statehood Constitution. Despite these barriers, the newly reapportioned state government broke free from its copper collar and itself decided that the most efficient path to exacting the level of change required was either piecemeal constitutional revision, or an outright Constitutional Convention.

Nationwide, the 1950s saw a growing popularity in the Legislative Council movement to stimulate fundamental government change (Roeder, 1990; Tidball, 2008).

Formed in 1957, Montana's Legislative Council provided lawmakers with objective information and decreased the government's susceptibility to the influences of powerful interest groups (Roeder, 1990; Shovers, 2014; Tidball, 2008). In 1967, as the 1889 Constitution continued to interfere with the efficient running of the state, this Legislative Council appointed a subcommittee to review the Constitution's effectivity (Waldron & Wilson, 1978). The Council concluded that the Constitution did not serve citizen needs, and that approximately half of the Constitution's 262 sections were "adequate," 20 percent required revision, and 30 percent were recommended for absolute repeal (Fritz, 1990; Shovers, 2014). Additionally, the Council held that piecemeal amendment would not accomplish such sweeping changes, urging the Legislature to act and create a revision committee to explore the feasibility of calling a Constitutional Convention (Waldron & Wilson, 1978).

7.2.2 Executive Reorganization

In addition to the legislature and judiciary, the executive is the third branch in a state government system. Headed by the Governor, and consisting of administrative offices, agencies, boards, bureaus and commissions, the executive is responsible for overseeing the enactment and enforcement of state laws, and functions absent legislative control or restriction (Holmes et al., 2008; Wray, 2016, interview). Most 19th century constitutions allowed for large, fragmented executive bodies, which were satisfactory for simpler, developing states (Roeder, 1990; Tarr, 2003). As Montanan society evolved, the executive branch became more disorganized, contributing to government inefficiency. The annual state budget in 1889 was the 2017 equivalent of $4.7 million with 38 state agencies overseeing a population of 142,224 people. By 1970 the annual state budget was the 2017 equivalent of $1.6 billion, managed by a disorderly *161 state agencies* overseeing Montana's relatively small population of 682,133 people (Holmes et al., 2008).

The first attempt to reorganize the state's executive occurred in 1919. In the 50 years that followed, there were an additional four failed attempts at executive branch reorganization (Shovers, 2014; Waldron & Wilson, 1978). These attempts were always quelled by "special interests trumping the interests of the whole" (Shovers, 2014, p. 48). Executive agencies were generally against reorganization because, despite their inefficiency, they had significant control over the running of the state. The combined

effects of a disorderly executive branch, and a constitutionally-restricted Legislature, resulted in a distracted government, allowing special interest groups to manipulate the unsupervised legal, political, and economic state order, thus wreaking unmitigated and unregulated environmental havoc (Johnson & Barrett, 2015).

After serving in both the judicial and legislative branches of government, Forrest Anderson was familiar with Montana's dysfunctional administration. Hoping to improve the government's effectiveness Anderson ran for governor in 1968 on a platform focused on reorganizing Montana's executive. Specifically, Anderson pledged to reduce the tangle of 161 agencies to a maximum of twenty in his "Twenty's Plenty" campaign (Malone et al., 1991; Robinson et al., 2015; Shovers, 2014; Shovers, 2016, interview).

Anderson's campaign for executive reorganization was well-timed. Nationwide, the 1960s were characterized by several powerful social movements which stoked the fires of reform. Anderson's campaign was also strengthened by the fact that 15 states had successfully reorganized their executive branches (Ferguson, 2015; Harrison et al., 2015; Rome, 2003; Shovers, 2016, interview). Montana itself was undergoing large-scale political, economic and demographic changes. Montanan society was reestablishing itself after a century of industry-led political control at the hands of Anaconda. Subsiding corporate pressures and the sale of the state's Company owned newspapers resulted in a newfound journalistic freedom which pulled Montanans out of the dark, gifting them with previously denied access to information (Larson, 1971; McNay, 1991). The decline of small-scale agriculture and the transformation to open-pit mining in Butte resulted in a drastic decrease in both agricultural and mining jobs. Rural Montanans were moving to urban areas, with jilted miners moving away from Montana's mining hubs (Malone & Dougherty, 1981; Shovers, 1998). Politically, 16 years under a Republican government, had given Montana almost nothing to show for and the state ranked 47th in the nation for economic growth (Sennett et al., 2015; Wright, 2003). Furthermore, the Republican Party was reeling from a significant loss in its campaign for the establishment of a sales tax, further prompting Montanans to deter from supporting conservative politicians (Fritz, 1990; Johnson & Barrett, 2015; Malone et al., 1991). As progressive baby boomers sought legislative positions, the newly reapportioned Legislature researched the feasibility of constitutional reform (Sennett et al., 2015). Overall, "it was a period of really drastic

political, social, cultural, economic change, and the people thought change was possible. There were rising expectations, things could happen, things could change, and they could make a difference" (Chambers, 2016b, interview).

Aided by the recent reapportionment of the state's legislative districts, the Democrats won a majority in both houses in the Legislature in the 1968 election. Montanans emphasized their support for change with 47 of the 56 counties voting for Anderson and his "Twenty's Plenty" campaign (Shovers, 2014; Waldron & Wilson, 1978). In his first address to the 1969 legislature, Anderson urged the legislators to "throw off the shackles imposed by the 19th century state government organization" (Shovers, 2014, p. 45) and the Legislative Assembly formed the bipartisan Montana Commission on Executive Reorganization, composed of four democrats and four republicans, tasked with reviewing Montana's executive branch.

The Commission found that for the executive to be condensed into 19 agencies, more than 22,000 state laws needed to be rewritten in less than 16 months, a substantial task which could be accelerated with a new Constitution (Shovers, 2014). Research efforts were aided by the Montana League of Women Voters, who researched the state's governing system in the early 1960s and published a booklet stating that reorganization would establish a flexible government, could encourage other necessary changes, and would promote citizen participation in government proceedings (Harrison et al., 2015; Shovers, 2014). The League's research concluded the state's industry-focused Constitution was responsible for restricting legislative control and diffusing executive power. The long-term educational efforts of the women significantly contributed to executive reform as they brought massive attention to the need for reorganization in populous urban, western counties, which later proved integral in the measure's passage (Harrison et al., 2015; Johnson & Barrett, 2015; Shovers, 2014). Because the women also injected Montana's constitutional issues into public discourse, executive reorganization contributed to educating voters on the need for a new Constitution.

7.2.3 Bipartisan Government Effort: A New State Constitution

Bipartisanship began in the legislature. With reapportionment politically reordering both legislative chambers and weeding out Company-sponsored lobbyists, legislators from rural and urban counties "joined forces to accomplish the next step towards

constitutional revision" (Elison & Snyder, 2001, p. 7). Further motivated by the Commission on Executive Reorganization's report on the Constitution, the Legislature created the Montana Constitution Revision Committee in 1969 which, to adequately represent the people and all levels of government, was composed of four senators, four representatives, four supreme court appointees, and four governor appointees (Brown, 1970; Shovers, 2014; Waldron & Wilson, 1978). The Committee found that, in addition to containing measures which purposely disempowered the government, the 1889 Constitution "contained protective measures for special interests" (Shovers, 2014, p. 50). The Commission reached the same conclusion as the Legislative Council, arguing that a Constitutional Convention was the most feasible method of accomplishing comprehensive, large-scale constitutional revision. Instead of proposing a series of constitutional amendments, the Legislature focused its efforts on educating voters on the need for calling a Convention (Waldron & Wilson, 1978).

Both the Montana Supreme Court and the Governor have the power to reject or veto amendments at any given time, prior to and following electorate approval. Historically, these government branches acted as additional barriers to required change (Johnson & Barrett, 2015; Johnstone, 2010). However, the Montana Supreme Court, in the late 1960s, early 1970s, appeared to be notably activist, supporting both constitutional and executive reform (Johnstone, 2015; Robinson et al., 2015; Shovers, 2014). By proposing an amendment in 1968 to increase the number of amendments permitted for submission at a state election from three to six, the court attempted to assist the other branches in achieving their reform goals (McNeil, 2016, interview; Johnstone, 2010; Waldron & Wilson, 1978). The court also voided several legislative attempts to revise certain provisions of the 1889 Constitution, as the justices felt such changes would further complicate current matters and could prolong the call for Convention Constitution. The court's interest in constitutional reform may also have been influenced by the decreasing efficiency of the state judiciary and its controversial and contested election of supreme court judges (Johnstone, 2015).

In addition to Referendum 67, which asked the electorate whether a Constitutional Convention should be called, the November 1970 general election contained two ballot issues regarding executive organization. Because the Legislature was constitutionally

restricted from proposing more than three amendments during any legislative session, the first ballot asked the electorate to approve the increase in the number of amendments proposed to the electorate during the next three legislative session, to provide the Legislature with the time and means to efficiently achieve executive reorganization (Waldron & Wilson, 1978). "Continuing executive reorganization" was approved by all but three counties. The second ballot issue, which proposed an amendment providing that all agencies and boards be allocated among no more than 20 departments by 1 July 1973, was unanimously approved by all 56 counties (Shovers, 2014; Waldron & Wilson, 1978).

The ballot issues were overwhelming endorsed by both political parties in both chambers of the Legislature. Additionally, Waldron & Wilson's (1978) statistical analysis showed that the reorganization ballot measures were highly correlated with county approval of calling a Constitutional Convention (r=0.92), meaning that 92 percent of the counties who approved reorganization simultaneously supported constitutional reform and endorsed societal change. Geographically, the highest support for all measures of change occurred in the western third of the state in the populous mountainous counties. The 42nd Legislature, also subsequently working on the passage of several environmental statutes, signed executive reorganization into law on 10 March 1971. A critical ingredient for successful reorganization was the bipartisan cooperation of the legislators. Additional "factors in the success were the lack of any organized opposition to the popular concept and the decline in the political power of the Anaconda Company and the railroads" (Shovers, 2014, p. 49). If not for their declining influence in state affairs, corporate officials would have likely opposed the measure as executive restructuring meant an increase in supervised environmental regulation and government-involvement in industrial operations.

The benefits of reorganization were instantaneous, "the changes instituted by Governor Anderson reshaped the political landscape in Montana," with the state government saving the 2017 equivalent of $8.4 million in the running of the executive in a matter of months (Shovers, 2014, p. 41). The immediate returns further convinced Montanans that organized change could be successful. If reorganization would not have resulted in such a quick turnover, Montanans' support for the progressive nature of the Constitution may have been diminished. "While no proposal for a Constitutional Convention was submitted prior to 1970, the work on executive reorganization," and the

increase in number of amendments allowed on the ballot, were "closely associated with the calling of a Constitutional Convention" (Elison & Snyder, 2001, p. 6). Furthermore, this general election gave proponents of state reform the chance to publicly criticize the Constitution's empowerment of special interest groups, and the government's constant rejection of specific economic and environmental policy changes (Elison & Snyder, 2001; Tidball, 2008).

In addition to the notable administrative and legislative restrictions on government power, the social and environmental activism of the 1960s and early 1970s likely aided in convincing all three branches of government of the need for constitutional reform (Bradley et al., 2015; Sennett et al., 2015; Zackin, 2013). The Legislature was characterized by a new activism and "the lawmakers of the 1970s tended to be younger, better educated, more environmentally aware, and more independent than their predecessors. They were less tied to party lines, harder to lobby and more difficult for party leaders to discipline" (Malone et al., 1991, p. 394). The newfound activism of the Montana government resulted in landmark environmental laws, executive reorganization, and ultimately implied that this was the time to inhibit change, a sentiment mimicked and continued by the 1972 Constitutional Convention's delegates (Malone et al., 1991; Shovers, 2014; Towe et al., 2015). During the ConCon, the bipartisan efforts of the government were praised: "I have to favor a type of government that passed nine major environmental bills just one year ago in this house, when nobody knew what the meaning of the word "ecology" was" (Trans. Vol. VI, p. 1223). Due to the government's willingness to work together, despite partisan differences, by creating the nation's most progressive pieces of environmental legislation, and successfully and efficiently upgrading the legal structuring of the state, Montana's early 1970s state government can be credited with triggering the call for Constitutional Convention, and indirectly motivating the entrenchment of Montana's right to a clean and healthful environment (Bradley et al., 2015; Sennett et al., 2015).

7.3 Indirect Trigger #3: Fall of Anaconda Company

As thoroughly discussed in previous chapters, Montana was the hub for the Anaconda Company, one of the world's largest and most successful hardrock mining empires for most of the 19th and 20th centuries. Anaconda acted as a primary producer and supplier of copper for several Wars and consumers everywhere. Although Company activities undoubtedly

made many positive contributions to the State of Montana throughout the decades, Anaconda's officials exerted unparalleled, "dramatic" and "monopolistic" political, economic, social, and environmental control on Montana's society and its natural resources (Jensen, 2016, interview; Keane, 2016, interview; Wray, 2016, interview). This section discusses several factors leading to the Company's eventual demise, empowering Montanans' with unfettered, objective information and the ability to initiate and exact constitutional change.

7.3.1 Sale of the Copper Press

Under the ownership of the Anaconda Company, the employees of Montana's largest newspapers were directed to purposely avoid the publication of state and local stories that did not benefit the Company. In the earlier days, Anaconda officials placed loyal miners, bankers, lawyers and engineers in important journalistic positions, denying trained journalists and reporters the right to make professional decisions regarding the newspapers' management (McNay, 1991). Citizen disinterest in Montana's mismanaged Company-owned newspapers, together with the increasing dependence on TV and radio as popular news sources, resulted in negligible newspaper profit (Swibold, 2006a). Despite the journalists' alleged attempts to provide Montanans with more enlightened journalism in later years, Montanans refused to revoke the Company's reputation as the source of all state woes (Swibold, 2006a; Wray, 2016, interview).

Anaconda's chairperson, Cornelius Kelley's death in 1957, heralded the end of the Company's interests in Montana journalism. Kelley's death signified the departure of one of the state's last copper kings, clearing the path for new company heads who unsentimentally viewed the Company's history and role in Montana, and its ownership of the state's newspapers, as mere anachronisms (Keane, 2016, interview; McNay, 1991). Despite more generous offers from several large-scale newspaper companies, Anaconda's management settled with Lee newspapers, an Iowa-based media chain (Campbell, 2016, interview; Chambers & Zalis, 2002; Swibold, 2006a). An editor for Lee, Don Anderson, a native Montanan well-versed in Montana's history of feudal journalism and politics, was tasked with negotiating the terms of the sale (Swibold, 2006a). To Anderson's surprise, Company officials did not demand favorable editorial treatment as a sale condition, their only conditions being that Lee's management keep all employees currently on staff,

purchase all papers in a package deal, and not sell any of the papers immediately following the sale (Swibold, 2006a; Swibold, 2006b).

The sale of Montana's newspapers in 1959 achieved national attention, with numerous businesses, public officials, and editors at smaller-scale newspapers publicly applauding the purchase (Ruetten, 1960). Journalists at the *People's Voice* greeted the new owners by writing that Montanans may now "dare dream that we can become an alert and argumentative public in the interest of local democracy," rejoicing in their freedom from the Copper press and its lack of "philosophy" (Swibold, 2006b, p. 8). To aid in improving community sentiment, and distance themselves from the previous owners' reputation, Lee's managers stated that each paper would be free to set its own tone, make independent editorial decisions, and begin focusing on a diverse swath of local and state concerns (McNay, 1991; Swibold, 2006b). Despite suspicion from many who claimed Montana simply swapped one form of absentee ownership for another, a study showed Lee's influence on Montana news was positive and instantaneous (Ruetten, 1960). In addition to the immediate increase in newspaper sales, Lee's Montana management increased editorials devoted to state and local matters. Swibold (2006b, p. 11) wrote the most significant change with the new ownership "was the freedom the former Anaconda journalists found to cover the news. Decades of self-censorship and the Company's penny pinching made them hesitant at first, but gradually with the encouragement of Anderson and others, the papers found their new legs." This newfound journalistic freedom stimulated investigative reporting as employees began researching the state's court system, Legislature, education, and other previously ignored topics, such as the state's environmental crisis (Swanson, 2013b; Swibold, 2006a). ConCon delegates Mae Nan Ellingson (2016, interview) and Arlyne Reichert (2016, interview) agreed that certain Montanans were oblivious to the extent of environmental harm caused by mining activities because of Anaconda's ownership of state newspapers.

On 23 March 1960, less than one year after the newspapers' sale, the *Missoulian*'s Lloyd Shermer reported that millions of gallons of highly contaminated wastewater from the Company's settling ponds had been introduced into Montana's Clark Fork River (McNay, 1991; Swibold, 2006b). In addition to killing fish and other aquatic life, nearly 120 miles of the river's sediment had absorbed the wastewater's heavy metals, branding

the Company responsible for literally turning the river red (McNay, 1991). McNeil (2016, interview) recalled that "it wasn't called the Clark Fork. We called it the red river because it ran red, solid red with mine waste and smelter waste!" When duck hunting McNeil accidently flipped a canoe, and dipped his watch into the river. Upon returning to pick up his watch from repairs:

> The jeweler told me 'your watch is totaled; the insides have all been dissolved by the acidity of the water in the river.' It was so caustic and so polluted that it destroyed my watch with one dunk in it. That's terrifying...but nobody really got too excited about the pollution in the water until the conservation and environmental movement got started and people were wondering in Missoula, 100 miles away, why are the headwaters of the Clark Fork River red?

Anaconda unsurprisingly denied all accusations. The first editorial in Montana's journalistic history demanding for the legalization of strict environmental legislations was published in the *Missoulian* later that month (McNay, 1991, p. 67):

> Montana needs more adequate legislation to protect its streams from pollution…In a brief 24 hours, years of work, planning and money to rehabilitate the Clark Fork River for recreation and swimming 'went down the river'…. action must be taken that will bar any future repetition of this irresponsible situation. Injunctions to stop the pollution once it is in the streams are not enough. What is needed are laws strong enough to take care of the situation *before* our streams are ruined.

Staff at other Montana newspapers followed suit with environmental investigations, resulting in constant face-offs with the Company and other polluters. Butte's *Montana Standard* reported on Silver Bow County's deteriorating water quality, with the *Billings Gazette* researching the consequences of eastern Montana's expanding strip mining operations. In addition to stories of government corruption and mismanagement, the papers now covered controversial stories on air quality, water pollution, and questionable forestry practices, with most findings leading to the doors of the Anaconda Company and its subsidiaries (Swibold, 2006a; Swibold, 2006b).

Montana Power regularly accused reporters of being too interested in matters of ecology (Shovers, 2016, interview; Swibold, 2006a; Swibold, 2006b). By the early 1970s, Anaconda and Montana Power regularly claimed they were being purposely mistreated by Montana's journalists, and even wrote to Lee's owners arguing that their employees were

publishing scurrilous stories of the Company's role in Montana's environmental problems. In a letter to Anaconda's CEO and President, Don Anderson (McNay, 1991, p. 84) wrote:

> I was inclined to dismiss much of this attitude as an evangelistic youth or left-wing movement. I feel differently today. Youth is in it up to the hilt and a few kooks are involved; but most of the muscle and force of the attack comes from a genuine citizen concern over the future of the state. Solid and conservative people, part of 'the establishment,' who would vote with you on most political and economic issues are saying 'to hell with them' on this question of ecology and environment. Our papers are largely reflecting, not creating, this citizen attitude.

This conflict between Anaconda Company and its previously owned newspapers nevertheless continued and was a key in the development of Montana's free press, simultaneously contributing to the Company's diminishing political, economic, and social powers over Montanan society (McNay, 1991). As the papers' employees were now granted journalistic freedom, for the first time in their history, Montanans trusted their dailies, and were provided with detailed, objective news on state issues. Montanans' awareness of the shocking extent of the state's industry-caused environmental harm was undoubtedly linked to the sale of Montana's Company-owned newspapers (Campbell, 2016, interview; Ellingson, 2016, interview; Keane, 2016, interview; Shovers, 2016, interview). The newspapers' sale also aided the state government in their efforts to educate citizens on the necessity of executive reorganization, the reapportionment of state legislative districts, and the need for constitutional reform, all of which further contributed to depleting Anaconda officials of their societal influence.

As newspaper stories during the early 1970s "demonstrated a heightened interest in the environmental costs of decades of mining, smelting, and timber cutting…their editorial endorsements would prove crucial to the passage of the new Constitution" (Swibold, 2006b, p. 14). The reporters of Lee newspapers, the Associated Press, and the Tribune State Bureau were tasked with extensively following the proceedings of the Constitutional Convention, publishing hundreds of articles and editorials discussing the proposed Constitution, educating voters on the new provisions, and advocating for the Constitution's passage (Stockton, 2016). Constitutional reform, and thus the entrenchment of Montana's environmental rights and provisions, likely would not have occurred if not for the sale of the Anaconda Company press, and the "very important part played by the

fleeting vitality of the Lee chain newspapers" (Roeder, 1990, p. 269).

7.3.2 Allende's Expropriation of Anaconda's Chilean Assets

Anaconda had dedicated hundreds of millions of dollars in expansion efforts following WWI, particularly investing in three Chilean subsidiary companies (McNay, 1991; Morin, 2014). Two-thirds of Anaconda's net income in the 1960s came from copper extracted from its two Chilean mines, with Chuquicamata's open-pit mine alone yielding over half of the Company's copper supply (Finn, 1998; McNay, 1991).

Because American copper prices were low, Anaconda ceased Butte's underground mining operations to instead fund the opening and maintenance of its Chilean El Salvador mine (Finn, 1998). While Chuquicamata enjoyed favorite child status, Butte's miners faced continuous unemployment, fought for higher wages and pensions, and participated in long, bitter, strikes which lasted up to six months, cost Anaconda millions of dollars in lost profits, and stymied the production of copper critical for the Vietnam War effort (Fritz, 1990; McNay, 1991; Stiller, 2000). As Montana's economy and citizens suffered from Company neglect, Anaconda relied on its Chilean holdings to satisfy American demand for copper (Finn, 1998). Many Montanans resented (and still resent) Chilean miners for costing them their livelihoods, as the focus and investment in Chilean copper robbed them of their employers' attention and financial support (Finn, 1998; Keane, 2016, interview).

Chilean copper production resulted in the third highest profit in the Company's history in 1969. Chile's government, at the hands of President Eduardo Frei, increased control on the country's natural resources and gave Anaconda two stark choices: "assent to nationalization by agreement or endure outright expropriation" (Stiller 2000, p. 13). Agreeing to nationalization, Anaconda placed its Chilean assets into two new Chilean companies, selling 51 percent of its stock to Codelco, Chile's government owned copper mining company in exchange for promissory notes (Stiller, 2002). Anaconda also further agreed to sell the remaining 49 percent of these two new companies after 1972, surrendering millions of dollars in copper reserves to the Chilean government in exchange for continued operations (Abel, 1997; Holden et al., 2007; Stiller, 2000). Anaconda's attempts to protect its Chilean assets backfired in 1970, when the pro-Anaconda, pro-American Chilean government was forced out by the election of President Salvador Allende, who used a constitutional amendment to nationalize all foreign owned copper

mines, expropriating Anaconda's Chilean assets without compensation (Finn, 1998; Morin, 2014; Stiller, 2000). This caused Anaconda to lose, in today's prices, *the equivalent of $2.2 billion in a single year* (Holden et al., 2007; Holmes et al., 2008; Morin, 2014)!

The United States government invoked economic and diplomatic sanctions on Chile, seeking compensation for all American companies affected by the expropriation. Although Anaconda officials were eventually compensated for their Chilean investments, the Company's losses were not exclusively financial in scope (Finn, 1998). Despite occurring thousands of miles away from Montana, Allende's actions triggered the end of Anaconda's influence over Montanan society. As Holden et al., (2007, p. 271) wrote:

> In one of history's great ironies, the ill-fated reform efforts of Chile's President, Salvador Allende, mortally wounded Anaconda Copper and freed the people of Montana from its dominion. Allende may have heard of Montana, but he probably never thought about it; nevertheless, it is a place where he had a profound effect.

Senator Keane (2016, interview) echoed this opinion stating that "the spread of more copper in more places, in more mines around the world all resulted in Anaconda losing state control…when they kicked the Anaconda Company out of Chile, that was the death nail for them."

Anaconda turned to bankers at the Chase Manhattan Bank in New York for loans, which granted the bankers a say in the running of the Company and eventually led to the instatement of the bank's Vice President as Anaconda's new Chief Executive Officer in 1971 (McNay, 1991). In a last-ditch effort to salvage money, Anaconda's new management threw hundreds of employees out of work by selling all Montana lumber operations, thousands of acres of timber lands, and the zinc plants in Great Falls and Anaconda (Holmes et al. 2008; McNay, 1991; Morin, 2014; Stiller, 2000). By 1972, when Anaconda's finances were further threatened by federal controls on copper prices and wages, decreasing supplies of high-grade ores, and the replacement of copper by fiber optic cables, PVC pipes and other non-ferrous materials, the Company's headquarters were moved from Butte to Arizona, officially ending Anaconda's presence in Montana (Keane, 2016, interview; Kirk, 2016, interview; Leech, 2012; Stiller, 2000; Wright, 1998). In 1976, Anaconda Company was purchased by Atlantic Richfield Company, and "the once-mighty

company, which at one point in time virtually owned Montana, was now owned by someone else" (Holden et al., 2007, p.271).

7.4 Indirect Trigger #4: Social & Environmental Movements

Discourse in the United States during the 1960s and 1970s was largely characterized by a series of large-scale, politically charged social movements, from which emerged the modern environmental movement. These movements occurred both on the national stage, and at smaller scales throughout many states and their local communities. These movements contributed to strengthening Montanans' rationalization for state government reform, and indirectly influenced the writing of the 1972 Montana State Constitution and the justification of and need for constitutional environmental rights and provisions. To create a context for the social sentiment of this era, a handful of social movements will briefly be discussed, followed by a more in-depth explanation of the culmination of the national and Montanan environmental movements.

7.4.1 National Social Movements

Throughout the 1960s and into the early 1970s, demonstrations filled the streets, resulted in the amendment of numerous laws, and led to the entrenchment of new rights in many state constitutions. The movements and campaigns of this era knew no bounds, the propagation of knowledge and sentiment was stimulated by innovations in modern communication and transportation, which allowed for citizen interaction and advocacy to be less constrained by geographic location (Shelley, 2003).

Anti-Vietnam War protests predominantly began on college campuses, with students leading the charge against the United States' military presence in Vietnam, the spraying of the Vietnamese countryside with agent orange, and the War's increasing financial cost and number of casualties (Campbell, 2016, interview; Ellingson, 2016, interview; Sennett et al., 2015; Shovers, 2016, interview; Wray, 2016, interview; Zalis, 2016, interview). On 4 May 1970, four students were killed at Ohio's Kent State University at anti-Vietnam war protests. The brutality accompanying the Vietnam War, together with the citizens' discovery that their government had suppressed its role in the bombing of Cambodia, divided the nation, resulting in growing distrust of the government and increasing protests for change (Harrison et al., 2015; Holmes et al., 2008; May & Romanowicz, 2011; Tarr, 2011; Wray, 2016, interview).

7.4.2 National Environmental Movement

The modern environmental movement was largely a post-war phenomenon evolved from popular critique of American affluence and resource consumption at the expense of the physical environment (Ferguson, 2015; Rome, 2003). The increasing uses of atomic energy, new power generation technologies, and the application of chemicals on agricultural products further contributed to substantiated concerns about the known, and unknown, ecological consequences of anthropogenic activities (Boyd, 2012b; Rome, 2003). The movement was characterized by a sense of urgency for immediate action, irrevocable guilt, and the sense that present issues were foreshadowing a frightening future (Chambers, 2016a, interview; Mikesell, 1974; Wray, 2016, interview).

This environmental ethic was an outgrowth of a series of social movements, all of which contributed to the emergence of the 1960s and early 1970s environmental revolution (Ferguson, 2015; Wray, 2016, interview). Intersecting between popular politics and governance, the environmental movement was not characterized by public marches or street-level demonstrations; it mostly panned out in government institutions where legislatures, councils, commissions and government agencies struggled to respond to growing citizen concern regarding the nation's ability to sustain itself. The environmental movement "moved slowly and was not as obvious or sexy as the other resolutions of the 1960s, but it was just as significant" (Ferguson, 2015, p. 7). The environmental movement had many of the similar underpinnings of the other social movements of that era: at the root was increased citizen power, access to knowledge, and participation in government decision-making regarding lands, air, water, human health, and a demand for regulation in the environmental arena (Ferguson, 2015; Kirk, 2016, interview; Rome, 2003).

The exact beginnings of this movement are unclear as the movement was the result of decades of local, national, and international environmental events. In the 1920s and 1930s, industry-funded research findings on the causes of asbestos miner deaths and the neurological impacts of lead exposure were willingly suppressed by political officials and industrial executives, knowingly subjecting thousands to severe illness and death in the pursuit of profit (Boyd, 2015). Rachel Carson, author of the renowned environmental advocacy book, *Silent Spring*, first suggested the environmental rights concept in the early 1960s (Boyd, 2012a; Carson, 1962; Kirk, 2011). When testifying

before president Kennedy's scientific advisory committee, Carson urged the government to consider the regulation of pesticides and other poisons and argued that environmental rights should be treated as a basic human right (Boyd, 2012a). After decades of denial and excuses, by 1968, Ford, Chrysler, General Motors, and the Automobile Manufacturers Association were charged by the United States Department of Justice for failing to take responsibility for smog caused by vehicle exhaust. These and other air quality issues pushed environmental activists to persuade the federal government to pass the *Clean Air Act* in 1970 (Ferguson, 2015; Kirk, 2011).

By the mid-1960s, countless water bodies were contaminated and degraded from industrial activities, resulting in the enactment of the 1965 *Water Quality Act* and the 1965 *Solid Waste Disposal Act* (Appendix, C; Swanson, 2013a). Despite this legislation, in 1969 the Cuyahoga River in Ohio caught fire, as pollutants were being disposed of in water sources at every scale. As dead fish were routinely found floating in western rivers, and serious events, such as the 1969 Santa Barbara Oil Spill, were increasing in severity and frequency, the quality of the nation's waters, as well as the standards enforced to maintain them, were questioned by concerned citizens nationwide (Boyd, 2015; Shovers, 2016, interview; Swanson, 2013b; Wray, 2016, interview). The 1972 *Clean Water Act* and the 1974 *Safe Drinking Water Act* were enacted to improve and maintain water quality (Bloomquist, 2001; Boyd, 2015).

The 1964 *Wilderness Act* prohibited the construction of permanent facilities and roads in wilderness areas and banned certain activities in highly sensitive areas (DiSilvestro, 1993; Ewert, 2001). The Act was co-sponsored by Montana Senator, Lee Metcalf, who was disheartened by the excessive deforestation occurring in Montana (Swanson, 2013a). The passage of the *Wilderness Act* was integral to the modern environmental movement, symbolizing the development and acknowledgment of an American land ethic (Schulte, 2005; Swanson, 2013a; Wilkinson, 1980). Although many argue that the Act was a compromise between those who wanted land preservation and those who wanted land development, it was nevertheless significant as it allowed for public involvement in the decision-making process and triggered the enactment of other pieces of legislation aimed at preserving the nation's parks, such as the 1968 *Wild and Scenic Rivers Act* (Ewert, 2001; Schulte, 2005; Swanson, 2013;

Wilkinson, 1980). For the first time in history, this "great industrial nation took stock of itself and decided to keep a portion of its lands free and undeveloped" (Schulte, 2005, p. 273).

The legislative process to create the *National Environmental Policy Act* (NEPA) began in the early 1960s, when Congress concluded that federal agencies were not substantively authorized to consider environmental values when making decisions (Tobias & McLean, 1980). As "understanding and concern about the environment increased substantially while evidence of ecological abuse and degradation mounted," NEPA, enacted in 1970, was created to compensate for environmental regulatory inaction (Tobias & McLean, 1980, p. 180). Sec. 2 [42 USC § 4321] of NEPA outlines the Act's purposes:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

In 1970, Senator Gaylord Nelson founded the first Earth Day, a national celebration supported by millions of Americans nationwide advocating for a healthy, sustainable physical environment. Jim Jensen (2016, interview), the Executive Director of the Montana Environmental Information Centre in Helena, recalled the era's environmental sentiment:

> Earth day was the single largest public engagement and protest movement in the history of the US. More people participated in Earth Day than participated in the march on Washington's civil rights movement.... the fact that there was simply this emergence of our society, an awareness of problems and the desire to prevent them, to deal with them, that sort of caused all these things to happen- including Earth Day.… Wilderness advocacy organizations and so forth were driven by the chemical exposures of the Cuyahoga River on fire, or the Los Angeles basin choking to death on smoke and pollution. Throughout the country, this public health and quality of life threat resulted in a number of organizations organizing, incorporating, realizing that in order for this to change we had to be involved in the legislative process.

In 1970, Senator Nelson proposed that the United States Constitution be amended to guarantee the inalienable right to a decent environment, arguing that "if we have any right that is more important than any other right, it is the right to live in a clean and decent

environment" (Howard, 1972, p. 194). The enshrinement of such a right would have required each state, by law, to guarantee its citizens a healthy environment. Nelson's rejected proposal was followed by similar proposals from other members of Congress, all of which failed because of the extreme difficulty of amending the United States Constitution (Boyd, 2012a; Howard, 1972).

The first formal articulation of the right to a healthy environment is found in the 1972 Stockholm Declaration, which emerged from the inaugural United Nations Conference on the Human Environment in Sweden (Boyd, 2012a; Kirk, 2011). Principle 1 of the Stockholm Declaration (United Nations, 1972, p. 4) developed a legal premise for linking human rights and environmental protection, declaring that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."

7.4.3 The Environmental Movement in Montana

7.4.3.1 The Residuals of 140 Years of Extractive Activities

As explained earlier, environmental destruction was legalized by Montana's extractive industries, which dumped and discharged contaminated mining wastes into local environments absent legal repercussions (Morin, 2014). In the 1960s, the environmental consequences from Montana's industrial past were increasing in frequency and severity, and the state's current industries were exhibiting no signs of environmental restraint.

The Company's Washoe smelter in the town of Anaconda was Montana's largest polluter, pumping 1000 tons of sulfur-dioxide into the air on a daily basis (Bakken, 1991; Mercier, 2001; Shovers, 2014). The area between Butte and Anaconda was virtually devoid of vegetation as decades of smelter fallout had depleted trees of the chlorophyll necessary for nutrient production and the soils were laced with arsenic and lead from tailings ponds as well as from acid mine drainage (Dobb, 2002; Finn, 1998; Mercier, 2001; Morin, 2014). In the Bitterroot Valley citizens were scrutinizing the United States Forest Service's timber management practices, advocating against the consequences of continued clearcutting activities in the state's national forests and wilderness areas (Shovers, 2014). In 1968, Hoerner Waldorf, a pulp paper mill in Missoula, received the attention of the media and concerned citizens for multiple water and air pollution infractions, (Shovers, 2014). Mae Nan Ellingson (2016, interview) claimed this mill motivated her to join the group "Gals

Against Smog and Pollution," because the air pollution was so horrible she couldn't see Mount Sentinel from her home window, 100 yards away.

Settling ponds, were scattered across Montana, containing "enough hazardous waste to fill a bumper to bumper line of dump trucks stretching from Valdez, Alaska to Miami, Florida" (DiSilvestro, 1993, p. 125). With at least 1,174 hazardous mining structures and 26,000 mine sites covering over 60,700 hectares, mining was (and continues to be) responsible for irreversible landscape degradation, and the impairment of over 25 percent of Montana's streams, and 60 percent of Montana's lakes (Abel, 1997; Stiller, 2000; Thompson, 2003; Wright, 1998). To put this into perspective, in 1966, 900 water bodies were listed as impaired or exhibiting limited water quality, with at least 2,090 kilometers of streams significantly contaminated from point and non-point sources (Abel, 1997; Bloomquist, 2001). To Montanans, "proof that mining had written its own rules for a century scarred the state" (Abel, 1997, p. 7).

The pH of most waters ranges between 5.5 and 8, however, in the presence of acids, metals, and certain bacteria, Stiller (2000, p. 97) explains that water pH can drop below 3:

> Mining compresses the natural geochemical reactions of tens of thousands of years into hours…. the amount of acids and metals released by past mining and minerals processing is hundreds of times greater than that which would have been produced by the same rocks had they been left undisturbed.

For instance, the 30 billion gallons of Butte's Berkeley Pit are "acidic enough to liquefy a motorboats steel propeller," the Pit's environmental aftereffects projected to "be felt for hundreds of generations, until the next ice age or geologic cataclysm, a perpetual problem in need of a perpetual solution" (Dobb, 2002, p. 312, 331). Acid mine drainage, once it has started is practically impossible to stop, the water must be treated in perpetuity, the bill virtually unpayable (Chambers, 2016a, interview; Johnson, 2016, interview).

In 1964, the Company purchased an ore body in Montana's Heddleston District, which the Montana Bureau of Mines and Geology reported still contained significant amounts of gold, silver, low grade copper, lead and zinc (Stiller, 2000; Wright, 1998). In addition to the proposed massive, open-pit Mike Horse Mine, the preliminary mining proposal revealed plans for the construction of numerous plants, mills, tailings ponds and the diversion of the Blackfoot River (Stiller, 2000; Wright, 1998). The first citizen-induced

environmental challenge to the Company occurred in the Spring of 1970, when concerned Montanans attempted to stop the project by protesting the intended easement along Alice Creek. Motivated by anti-mining editorials and the advocacy of numerous organizations, such as Trout Unlimited, the Sierra Club, the National Wildlife Federation, and the League of Women Voters, Montana's Department of State Lands approved the easement under the condition that Anaconda agreed to eleven environmental stipulations. Designed with the intention to satisfy the citizens' environmental concerns, these stipulations were "the most stringent that had ever been applied to [Montana's] mining industry" (Stiller, 2000, p. 139).

Although numerous non-environmental factors contributed to the project's termination, Anaconda withdrew from the easement, ardently disagreeing with the stipulation requiring the reclamation to the "best beneficial land use" of all lands disturbed. Stiller (2000, p. 137) wrote that "knowledgeable Montanans insist that the fight against Anaconda's Heddleston plans spawned the state's environmental movement," while others argue "Anaconda's plan only 'crystalized' a movement already in existence and provided a focus of the young crusade to influence state law and policy." This Heddleston case "threatened to make ecological responsibility a required part of doing business," and is but one example of many in Montana which led to the passage of various environmental laws and stricter permitting processes in the late 1960s and early 1970s (Wright, 1998, p. 113). Earth Day, wrote Schmidt and Thompson (1990, p.412), "clearly shaped the environmental provisions of Montana's 1972 Constitution"; 1970 marked the point from which the Anaconda Company no longer controlled Montana's natural resources (Stiller, 2000).

7.4.3.2 North Central Power Study

As America's population boomed following WWII, demand for abundant, inexpensive energy skyrocketed. When compared to the 1920s, this increased reliance on electricity resulted in a jump in energy consumption by a factor of 10, with oil consumption surpassing 300 percent (Ferguson, 2015). Similar to copper, coal was initially mined mostly in western Montana. Although Montana's sub-bituminous, eastern coal was of lower-heating quality, it could be surface-mined at a lower cost. Despite coal's slight decline following the second War, Montana's coal industry was rejuvenated by the 1970s to further develop thermoelectric power (Ferguson, 2015; Malone et al., 1991).

In a paradox, Montana's exponential coal mining was triggered by new

environmental laws and regulations. Environmental protection "resulted in greater restrictions on emission of sulfurous gases from power plant stacks, thus, the rapid rise in Montana coal production in 1968-1973 was due to the increased demand for low-sulfur coal by mid-western utilities" (Chadwick, 1973, p. 22). In the early 1970s, as the rest of the state suffered from unemployment, Montana's eastern plains boomed with coal mining. In 1967, 364,509 tons of coal were produced, with one mine at Colstrip yielding an impressive 5.1. million tons in 1971 alone; by 1972, production had increased 23-fold, yielding 8, 264, 405 tons (Fritz, 1990; Chadwick, 1973)

The early 1970s also marked the first time that energy conservation and efficiency became topics of daily discourse (Boyd, 2015; Ferguson, 2015). In lieu of the anticipated national energy crisis brought on by the 1973 OPEC oil shock, President Nixon directed the Department of the Interior to produce a comprehensive plan for increasing domestic energy production. "In October 1971," wrote Malone et al. (1991, p. 339), "Montanans suddenly realized the full impact that a corporate coal boom might have on them. When the Bureau of Reclamation, in cooperation with a number of energy and mineral companies, released the North Central Power Study." The North Central Power Study (NCPS) projected the construction of 42 coal-powered generating plants, each designed to produce 10,000 megawatts annually, 21 of which were to be in just three eastern Montana counties (Ferguson, 2015; Malone et al., 1991; Malone, 1996; US Bureau of Reclamation, 1971). Additionally, an estimated 3.2 billion cubic-meters of water from the Yellowstone River system would be required annually to cool the coal plants, consuming around 43 percent of the region's waters (Ferguson, 2015; Malone et al., 1991).

This project would turn the eastern Montana Plains into an industrialized landscape of coal mines and power plants (Holmes et al., 2008). Because the plants would be in scarcely populated areas, the plants would be immense in size and include smokestacks hundreds of feet tall, designed to maximize pollutant dispersion (US Bureau of Reclamation, 1971). As the resulting acid rain would conveniently fall on open spaces, agricultural fields, cattle and wildlife, it wasn't viewed as an immediate threat to human life (Ferguson, 2015; Malone et al. 1991; Malone, 1996).

The NCPS "fueled the environmental crusade that had been mounting for several years. Fearful of scarred landscape, damaged river systems, air pollution, and social

dislocations that such massive development might bring, many Montanans reacted with alarm" (Malone et al., 1991, p. 339). Montanans did not want to become the "boiler room of the nation," and "after nearly a century of domination by the Anaconda and Montana Power Companies many people deeply distrusted big business - and government that supported business more than it did the citizens" (Holmes et al., 2008, p. 421). The rampant strip-mining proposed by the NCPS was one of several factors influencing Montana's Constitutional Convention the following year, particularly influencing the Constitution's reclamation provision (Ellingson, 2016, interview; Keane, 2016, interview; Kirk, 2016, interview; Reichert, 2016, interview; Shovers, 2016, interview).

7.4.3.3 Montana's First Environmental Statutes

In 1971, Montana was at the forefront of the trending national environmental movement when the Legislature passed the *Montana Environmental Policy Act* (MEPA)(Tobias & McLean, 1980). Intended to act as preventative measure to environmental harm, MEPA requires the completion of a mandatory Environmental Impact Statement (EIS) for any major activities with the potential to cause substantial environmental harm (Holden et al., 2007; Perlmutter, 1976). The requirement for an EIS is "a basic reform in state decision-making that opens to public scrutiny and participation a wide range of state activities with significant environmental consequences (Environmental Quality Council, 1972, p. iv). A 13-member Environmental Quality Council was established in 1971 to direct state agencies, commissions, and institutions in analyzing environmental impacts. Montana's MEPA is generally a verbatim duplicate of the federal NEPA, with one, significant exception: MCA §75-1-103(3), explicitly ensures that "each person shall be entitled to a healthful environment," language which is considerably stronger than NEPAs (Tobias & McLean, 1980, p. 235).

Also, in 1971, Montana's legislators passed the *Metals Mines Reclamation Act* (MMRA). Dubbed the "hardrock act," this statute was the first of its sort among the western states (Holden et al., 2007). The MMRA requires the applicant to receive a permit from Montana's Department of Environmental Quality (DEQ) prior to the commencement of any large-scale mining operation. Additionally, as a permit precondition the statute also requires the applicant to post a reclamation bond in the form of a predetermined monetary amount, which becomes available to the state in the event that the company, for whatever

reason, cannot itself cover the reclamation cost of its activities (Holden et al., 2007)

7.4.3.4 National Movements and Montana's Environmental Rights

With the historic influences of the Anaconda Company still fresh in the minds of Montanans, and rampant strip mining threatening agricultural values in the east, Montanans were more perceptive to the influence of the rising environmental movement and the necessity for legal environmental redress (Fritz, 1990). Shovers (2016, interview) attributed Montanans' entrenchment of environmental rights to national events:

> It is pretty unlikely that Montana could have established environmental policies prior to 1972. It was part of this national movement that was going on. It was just this confluence of issues and energy and all the turmoil that was going on nationally, which was elevated and precipitated by the Vietnam war, and then the civil rights movement, the beginning of the women's movement, and these environmental changes that happened…. the establishment of Earth Day and the Environmental Protection Agency in 1970…. Montanans were looking at that from afar, and thinking that they wanted to preserve their small-town way of life, and were more amenable to a new Constitution.

Paul Zalis (2016, interview) reiterated that "all these major cultural, historical, political forces were exploding. The '60s had definitely moved into the early '70s, and what wasn't accomplished in the 60s, they were putting into the Constitution here in 1972!" Major concerns for Montanans reflected the discussions occurring at the national level and determined the key issues of the 1972 Constitutional Convention: a strong responsive government, a public right to information, and a right to participate in government decision- making, improved education, environmental protection, and equal rights for all (Kirk, 2011; Elison & Snyder, 2001; Johnstone, 2016). Wilkinson (1980, p. 6) argues that "we are guilty of understatement if we fail to recognize the scope of the revolution of the 1970s," a variable which undoubtedly indirectly influenced the entrenchment of Montana's environmental rights.

7.5 Indirect Trigger #5: Strong Civil Society

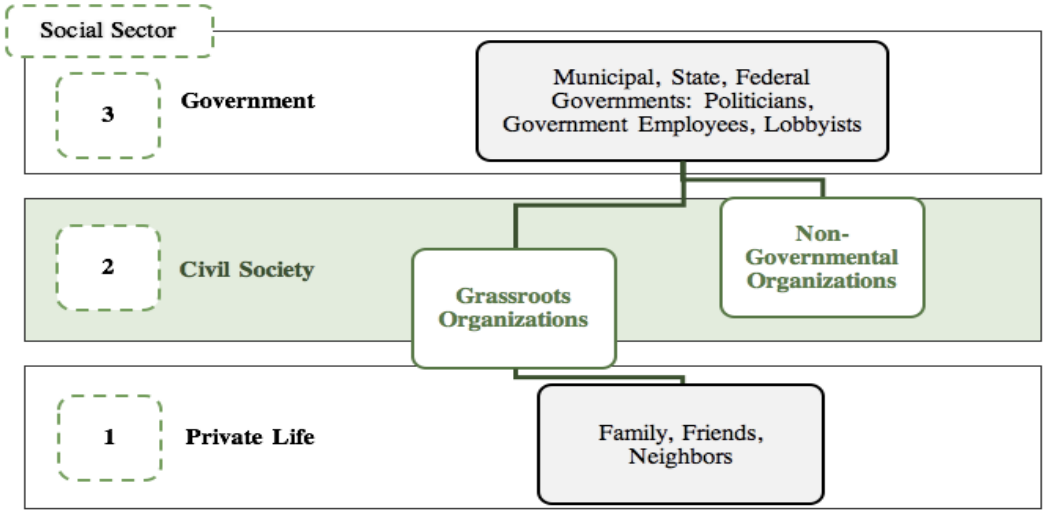
Montana's history as an oppressed mining empire aided in assembling its scattered rural and urban communities in the late 1960s and early 1970s to form a civil society with a strong environmental conscience and drive for significant governmental and legal reform. The entrenchment of the right to a clean and healthful environment would likely never have

occurred if the Montanan civil society had not shared a common interest in constitutional reform, and had not taken collective action to ensure constitutional ratification.

7.5.1 The Concept of Civil Society

Civil society is mainly composed of two organizational types: grassroots organizations, and Non-Governmental Organizations (NGOs) (Figure 7.5; Florini, 2004; Holden, 2010). Grassroots organizations mainly differ from NGOs in the scale at which their members operate. Grassroots organizations are composed of individuals with shared local interests such as rural communities, religious or ethnic groups, and urban neighborhoods, located closer to the "private life" social sector of society (Figure 7.5; Ferguson, 2015; Uphoff, 1993). In contrast, NGOs, "think global, act local," advocating at urban, state, or national scales. Because NGOs often boast large memberships, these organizations are generally funded by external sources and have the means to advocate at the political level, located closer to the governmental social sector of society (Figure 7.5; Ferguson, 2015; Hall, 1998; Holden, 2010).

Figure 7. 5 The Basic Organization of Human Society



Source: Author

As members of grassroots organizations can simultaneously belong to NGOs, and *vice versa*, and because grassroots and NGOs often collaborate to campaign for a common cause, civil society is built on trust, communication, and strengthening community ties (Blair, 2000). Through collective action, civil society is the sphere in which agents organize

social movements, knowledge is mobilized, and where discussions surrounding the needs for social, political, and environmental change are most powerful (Cox, 1995; Cox & Mair, 1989; Mittleman, 1998). As the goals of civil society are to promote the democratic desires of the people through voluntarily participating in state and national political processes, civil societies are an integral bedrock to the stable functioning of a democracy (Boulding, 2014; Cox, 1995).

Collective action is not a random agglomeration of individual participants, it is the product of a dynamic and intricate combination of various social relationships within a geographically, politically or collectively predetermined spatial setting, such as a nation, state, city, or urban community hall (Beynon & Hudson, 1993; Sampson et al., 2005). As Montana's grassroots communities and NGOs function within shared geographic and political boundaries, they will hereinafter be referred to as the "Montanan civil society."

7.5.2 The Establishment of an Environmental Civil Society

American society's evolution of environmental ethic did not occur incidentally or by chance, but due to distinctive citizen participation in the regulation, governance, and litigation of potentially harmful environmental activities (Nolon, 2006). Nationwide, participation in environmental decision-making came to be considered as the primary method of regulating the extraction and consumption of natural resources, "grassroots environmental activism was an integral component of evolving American political culture" (Ferguson, 2015, p. 6). The propagation of environmental sentiment in Montana was aided by the fact that Montanans who came of age in the 1950s were "the last generation for whom mining defined reality" (Finn, 2012, p. 45). By no longer measuring the state's natural resources in logs and kilowatts, this change in attitude championed environmental preservation, an interest in improving government, and renewed trust in collective action (Malone et al., 1991; Swanson, 2013a). For the first time in Montana's history, local sportsmen's, fisherman's and wildlife associations in the 1950s barred the development of federal dams and other power projects in Montana's wilderness areas; their support of environmental measures propelled Lee Metcalf, a co-sponsor of the first federal environmental statutes, to Congress (McNeil, 2016, interview; Swanson, 2013a; Shovers, 2016, interview).

The social and environmental reforms of the late 20th century coincided with the creation of hundreds of grassroots environmental organizations in Montana and throughout the country, with the growth and vitality of these environmental NGOs (ENGOs) increasing since the 1970s (Kirk, 2016, interview; Percival & Huiyu, 2013). Many Montana ENGOs trace their genesis to the national environmental movement, particularly motivated by their concerns for the state's physical environment and the continued exploitation of Montana's natural resources by out-of-state corporations and utilities (Holden et al., 2007; Jensen, 2016, interview). The 1966 *Freedom of Information Act* acted as a vital tool for organizations fighting environmental threats as members now had access to environmental information (Ferguson, 2015). Several highly successful ENGOs were established to respond to the accumulating environmental issues occurring on public lands, including the Natural Resources Defense Council (1969), Environmental Defense Fund (1969), Sierra Club Legal Defense Fund (1971), and the National Wildlife Federation's Resources Defense Division (1971) (Wilkinson, 1980). These ENGOs especially targeted local and state governments regarding pollution control programs, partly because of the significant roles these "lower level" institutions play in implementing federal and state environmental policy standards (Sax, 1970; Sabatier, 1973).

Montana's grassroots atmosphere has been declared as one of Montana's most refreshing characteristics (Ellingson, 2016, interview; Reichert, 2016, interview). The city of Missoula is home to more than 1, 200 nonprofit organizations and is considered one of the foremost places for tax exempt citizens' organizations in the United States (Brooks, 2012). Montana's increased degree of democracy emanates from Montanan's relatively small population, which provides citizens and citizens' groups ready access to political leaders and increased responsiveness to social issues and needs (Malone et al., 1991; McNeil, 2016; Reichert, 2016, interview).

7.5.3 Civil Society and the ConCon

In a similar light, constitutional reform in Montana was also not a chance encounter, but the result of the coming together of groups and individuals from different backgrounds, concerns, and interests, all of whom were seeking effective self-government (Kirk, 2011; Roeder, 1990). In the late 1960s, citizens groups who had personally experienced the shortfalls of Montana's government system believed government inefficiency would be

solved with a new constitution (Stockton, 2016). The Montana Citizens Committee on the State Legislature collaborated with local legislators advocating to improve the functioning of the state's restricted legislative branch (Roeder, 1990). The Montana Citizen's for Court Improvement, the American Judicial Society, the University of Montana School of Law, and the Montana Bar Association, each supported constitutional reform in the hopes that a new constitution would yield a more efficient judicial system (Roeder, 1990; Stockton, 2016). Government organizations such as the Montana League of Cities and Towns, the Montana Chamber of Commerce, and the Montana Association of County Commissioners collaborated with the Farmers Union to support the referendum, aspiring for limited legislative control on local governments and local issues (Brown, 1970; Elison & Snyder, 2001; Stockton, 2016).

Once the Convention was called, the Montana League of Conservation Voters distributed a questionnaire to all ConCon delegate candidates, inquiring about their position on the potential inclusion of environmental rights (Trans., Vol. V, p. 1229; Zackin, 2013). Likewise, the Montana Conservation Council dedicated time and effort to ensuring that environmentally conscious delegates would be elected to the Convention. Once elected, the Council aimed to educate delegates on issues they believed should be addressed in the Constitution, such as strict environmental provisions. The Council dedicated funds to hire a Convention lobbyist on their behalf, which would act as a watchdog guarding against environmental inroads by industry during the drafting of the environmental article (Zackin, 2013). Members of Montana's civil society contacted delegates when they felt that unsatisfactory environmental provisions were being written. Delegate Eck declared that "I've been hearing from environmental groups around the state, from students who have looked at this, and I have not yet found one who thought that this was a satisfactory article. In fact, they've ridiculed it" (Trans, Vol. V, p. 1248).

The Montana American Federation of Labor and Congress of Industrial Organization (AFL-CIO), the largest union federation in the United States, released a flyer debunking false rumors circulating about the Constitution from its opponents (Shovers, 2014; Stockton, 2016). The AFL-CIO had also previously supported state environmental legislation which regulated air, water, and land pollution in industrial areas (Mercier,

2001). According to Malone, Roeder, and Lang (1991, p. 301) "never, at least not since the Progressive era, had Montana seen such a widespread population participating in politics."

7.5.3.1 Eastern-Rural Environmental Crusade

As discussed earlier, the North Central Power Study projected the construction of 21 coal-fired power plants in eastern Montana, providing millions of Americans with cheap electricity at the expense of Montana's environment. Although the Study claimed that environmental impacts, mitigation and pollution control strategies would be considered throughout the project, many farmers, ranchers, and students, formed grassroots organizations to oppose the project (Ferguson, 2015; US Bureau of Reclamation, 1971).

Formed in 1972, the Northern Plains Resource Council (NPRC) is once such organization, established by ranchers and farmers to oppose strip mining (Ferguson, 2015; Malone et al., 1991; Shovers, 2016, interview). This organization was among the first of many rural organizations formed to protect environmental, and not agricultural, political or religious interests. (Ferguson, 2015). The NPRC served as a model for civil society action as it showed that "ranchers and environmentalists and reservation activists can work together" (Kittredge, 1992, p. 10). Although environmentalism was considered to be a dirty word in many parts of rural eastern Montana, citizen participation in local grassroots groups was critically important in "the greening of the rednecks" as members championed environmental values throughout the Plains (Bradley et al., 2015b; Matthews, 2000).

The goal of the NPRC was to give residents the chance to partake in decision-making concerning land, water and air and to influence governance where the law and government were failing (Brooks, 2000; Ferguson, 2015; Holmes et al., 2008). The NPRC grew through word of mouth and regional meetings, attracting members from other local-organizations who had similarly organized to oppose the effects of unregulated, irreclaimable strip mining. Reporters at the *Billings Gazette* published various articles titled "Strip Mining versus Landownership," "Environmentalists Arise! Battle's Only Half Done," and "Ranchers Fight Strip Mining" (Ferguson, 2015). Because the advocative scope of the NPRC extended beyond the traditional rural "not in my backyard" approach, member activism significantly contributed to environmental and constitutional reform (Jensen, 2016, interview; Matthews, 2000). Mae Nan Ellingson (2016, interview) stated the agricultural community's advocacy against strip mining significantly influenced the

Constitution's reclamation provisions, with Fritz (1990, p. 274) claiming Montanans' reaction to the NCPS "single-handedly inspired the constitutional provisions for a clean and healthful environment."

7.5.3.2 Colleges and Women's Organizations: Environmental Stewards

Colleges broke enrollment records in the 1960s with the coming of age of the baby boomers and between 1945 and 1968 enrollment in Montana's state university in Bozeman mushroomed by 600 percent (Shovers, 2014). Montana's young adults were simultaneously influenced by Montana's extractive past and the current environmental movement and interpreted the threats of the coal boom through Montana's historical lens, with the "Anaconda Mining Company's exploitation of the land and people of Montana as influencing how they understood the present threat" (Ferguson, 2015, p. 43). Campuses dually functioned as sites of education and advocacy, acting as catalysts for anti-Vietnam war sentiment, and civil and environmental rights movements (Ellingson, 2016, interview; Ferguson, 2015; Shovers, 2014). In fact, the campaign efforts of student reformers significantly contributed to fulfilling Forrest Anderson's government reform agenda, including the call for Constitutional Convention. The students can be credited for educating Montanans on the environmental consequences of various activities, and promoting constitutional reform and ratification (Shovers, 2016, interview).

The role and contributions of women have largely been overlooked in western frontier history. Women's associations were integral in grassroots, local-level community building and cohesion, (Armitage, 1982; Ferguson, 2015; Harrison et al., 2015; Reichert, 2016, interview; Rome, 2003). Launching in the 1920s, Montana's branch of the League of Women Voters (LWV) mainly consisted of urban, middle class women, mostly the stay-at-home wives of businessmen, professors, and doctors ("The Power of Strong, Able Women", 2014). These women would only advocate and lobby for certain positions after extensively researching the matter of interest, and were integral in providing the public with information which had previously been stifled by the inefficient government administration and copper collar (Kirk, 2016, interview; Reichert, 2016, interview; Robinson et al., 2015). When Montana's Governor vetoed the Clean Air Bill in 1965, these "irate housewives" responded by "protesting local pollution and specific construction proposals across the state" (Fritz, 1990, p. 273-274).

The American Association of University Women (AAUW) also played in integral role in social, political, and economic activism in the 1960s and 1970s (Ellingson, 2016, interview; Robinson et al., 2015). Together, the LWV and AAUW encouraged women to participate in public policy making, to run for state offices, and become involved in various community-level projects ("Things to be Done," 2014). Nine of the 19 female delegates at the ConCon were LWV members, who ensured that all league concerns were thoroughly discussed and considered at the Convention (Holmes et al., 2008; Horwich, 1996; Kirk, 2011; Shovers, 2014). Three AAUW members also served as delegates, with member Mae Nan Robinson ultimately co-authoring the eloquent, environmental Preamble, and Louise Cross chairing the Natural Resources and Agriculture Committee which produced Montana's progressive environmental provisions.

When the Legislature proposed calling a Constitutional Convention, Montana's women's organizations promoted the measure as a critical step in achieving efficient, open, democratic state government (Kirk, 2011; Stockton, 2016; "Things to be Done", 2014). The LWV established its own Constitutional Action Committee, which studied the strengths and weaknesses of the 1889 Constitution and researched the benefits and logistics of large-scale constitutional reform. The women documented their findings in a two-part study on constitutional change, which they presented to the public along with a detailed list of the need for a Constitutional Convention (Kirk, 2011; Kirk, 2016, interview). The Legislature's Constitutional Revision Commission contacted the LWV to spearhead a public education campaign to educate voters on the need for calling a Constitutional Convention. By printing flyers, writing newspaper articles, speaking at college campuses, and appearing on radio and TV, these women creatively promoted constitutional reform (Kirk, 2016, interview; Reichert, 2016, interview). ConCon delegate Daphne Bugbee recalled wearing red velvet vests that read "Vote YES for Constitutional Convention, Give Montana a Chance!" and "Vote for Better Government!" (Kirk, 2011, p.13). The Women were crucial to the calling of a Constitutional Convention (Chambers & Zalis, 2002; Kirk, 2011; Harrison et al., 2015; Robinson et al., 2015; Shovers, 2016, interview).

The women's' presence was felt during and after Convention proceedings, as members campaigned for constitutional ratification and the environmental article. Kelly Kirk (2016, interview), who wrote a thesis on Gender at the ConCon, stated:

> The women were very influential in gaining the citizens support of the environment article, because it was something that they had that talked about for so long before the Convention and during the Convention…. the fact that Louise Cross was the only female on the natural resources committee…. she made a powerful statement about women's feelings about the natural resources of Montana.

Arlyne Reichert (2016, interview) delegate of the 1972 ConCon, and past secretary of the Montana LWV likewise declared:

> The LWV was very instrumental in advertising the environmental article! We publicized it in booklets, pamphlets, really influenced the whole…. educational aspect of it through the university system. The LWV were really leaders in this whole environmental area. As a result, a lot of the delegates leaned in that direction, doing something about the environmental issues [at the Constitutional Convention].

The female civil society believed the Constitution should be limited to fundamental law, and the Bill of Rights include "a statement regarding an individual's right to a clean and healthful environment" (Kirk, 2011, p.15). Shovers (2016, interview) contended:

> There is a real possibility that if the LWV weren't as involved with the Constitutional Convention, that environmental rights might not have been in the Constitution…. there is a large possibility that there wouldn't be as strong of an environmental tone to it, and I can't see that it would have passed if it hadn't been for the league. They seemed to be critical.

Women's associations were integral in ensuring the clean and healthful environments, as well as Montana's sunshine laws and equal rights provisions were enshrined in the Constitution (Campbell, 2016, interview; Elison & Snyder, 2001).

7.5.3.3 Civil Society & Montana's Environmental Rights

Protecting the environment was important to Montana's civil society, which is why it campaigned for the citizens' right to a clean and healthful environmental to be elevated to constitutional status (Tuholske, 2015). Montanans assembled into a cohesive, collective unit when they approved the call for a Constitutional Convention and ratified a Constitution that protected all basic human rights, including the newest right of all, the right to a healthful environment. By progressively demanding for the entrenchment of environmental rights and provisions, the civil society chose to reprimand any extractive activity which

degraded the state's physical environment without redress. Montana's civil society irrefutably indirectly influenced the entrenchment of the right to a clean and healthful environment, the Constitution's other environmental provisions, as well as several pieces of statutory environmental legislation.

7.6 Direct Trigger: Constitutional Convention Delegates

In answering the first research question, this chapter has thus far only focused on characteristics and events that *indirectly* triggered constitutional reform and the resulting entrenchment of environmental rights. Only one trigger has been identified as *directly* influencing the enshrinement of environmental provisions and is perhaps the primary reason why Montanans successfully ratified the 1972 Constitution: The Constitutional Convention delegates.

7.6.1 Delegate Election and Selection

Three key factors influenced the election and selection of Montana's 100 Constitutional Convention delegates, and by default affected the contents of the resulting Constitution. The first factor was the cumulative impact of double reapportionment, which shifted voter strength and political power from rural to urban legislative districts, empowering a "fully enfranchised electorate [which] tended to be more urban and more environmentally aware," and less inclined to support the measures proposed by the executives of corporations, such as Montana Power, and their corporate and rural affiliates (Ferguson, 2015, p. 43). If a Convention had occurred prior to population-based legislative reapportionment, the resulting Constitution would have undoubtedly been significantly different than the Constitution ratified in 1972, because the Constitution would have been written by a completely different delegation. The majority of the delegates would have been elected from rural legislative districts, and Montana's ConCon delegation would not have been composed of as many staunch environmentalists, as progressive, environmental sentiment was primarily a characteristic of western, urban Montanans (Elison & Snyder, 2001; Johnstone, 2016, interview).

If written by a rural-majority delegation, Montana's Constitution would not have contained the inalienable right to a clean and healthy environment in the Declaration of Rights, could have completely lacked environmental provisions, or at the most would have contained a severely diluted section on the environment and

natural resources (Campbell, 2016, interview; Johnstone, 2016, interview; Keane, 2016, interview; Shovers, 2016, interview). Furthermore, such a constitution may not have been approved by the electorate, as it is unlikely that it would contain the reform goals desired by Montanans, who vied for social, economic, and governmental change. Kelly Kirk (2016, interview) upheld this theory:

> If the Constitution did pass, it would have been by an even smaller margin if reapportionment didn't occur. On the other hand, if reapportionment wouldn't have happened, I'm not sure the Constitution would have been written the way it was, because you would have had different representatives.

This theory is further supported by the delegate voting trends during the ConCon, which reveal that issues of reform were evenly divided amongst rural and urban delegates. On average, delegates who lived in and around the state's largest seven cities approved reform measures 58 percent of the time compared to delegates from small towns and rural areas who opposed reform 64 percent (Elison & Snyder, 2001).

The second factor which influenced the selection of the ConCon delegates was the 1971 vote on a sales tax referendum. In addition to a new two-percent sales tax, the Republican sponsored measure aimed to reduce the 40 percent surtax on income taxes to 10 percent (Johnston & Barrett, 2015). Despite Montana being only one of five states without a sales tax, Montana's electorate disliked the measure and supported the Democratic legislators' "Pay More? What For!" campaign against the proposed tax structure (Malone & Dougherty, 1981; Malone et al., 1991; Shovers, 2014). The vote on a sales tax referendum, which was opposed by 70 percent of the voters, negatively impacted citizen support of Republican legislators (Fritz, 1990; Elison & Snyder, 2001; Waldron & Wilson, 1978). This referendum caused "an anti- Republican backlash that helped explain the election of an exceptionally liberal-minded group of delegates to the Constitutional Convention" (Malone et al., 1991, p. 395). Together, these two independent events explain why the majority of delegates elected were mostly Democrats, and why 80 percent of elected delegates were from western urban counties (Fritz, 1990; Johnson & Barrett, 2015; Schweitzer & Barrett, 2015).

In order for citizens to accept, be influenced by, and participate in a progressive movement of any sorts, De Witt (1915, p.189) argues that "corrupt special influence must

be removed; the structure of government must be modified so as to allowed a greater and more direct participation by the people in the conduct of public affairs." ConCon delegates Bob Campbell, Mae Nan Ellingson, C.B. McNeil, and Arlyne Reichert (2016, interviews) each stated that the Montana Supreme Court's ruling to prohibit sitting local and state officials from running as delegates significantly influenced the Convention's proceedings. Because siting legislators were barred from writing the Constitution, regular Montanans were instead elected as delegates, and the ConCon became a "people's crusade" (Campbell, 2016, interview; Birnbaum, 1972; Holmes et al., 2008; Kirk, 2011). This diverse group of delegates is one of the many reasons why Montana's Constitution is considered so progressive (Kirk, 2011; Tuholske, 2011). Since 1971, Montana is the only state to have successfully passed a Constitution written entirely by elected delegates, absent the influence of sitting legislators and public officials (Dinan, 2010).

7.6.2 ConCon's Bipartisan Sentiment

The absence of siting legislators created a unique atmosphere in the Convention hall, as it greatly reduced the possibility of delegates being influenced by political or corporate affiliations; "few of the delegates were indebted to special interests or to other delegates" with "little history of antagonism among the delegates" allowing the delegates the luxury to objectively discuss and vote on the provisions, and develop apolitical relationships (Elison & Snyder, 2001, p. 10). Delegate Reichert (2016, interview) recalled:

> We were not going to let [Anaconda] tell us what to do, the lobbyists couldn't touch us, we were above that! There were *100 free thinkers* there …. We wanted a Constitution that was good for the people, not the Company! Past extractive activities certainly influenced the writing of the Constitution.…so many aspects of the old Constitution were influenced by the mining industry, and we wanted to be free of that, it was like a vice. We wanted to give the people their freedom!

Recent Convention's which had let party politics interfere with the drafting of their constitution had produced constitutions which were later rejected by their constituents. During their candidacy speeches when running for Constitutional Convention president, Montana's delegates spoke of their desire for a nonpartisan Convention (Kirk, 2011). As a result, despite being elected in a partisan manner, on the first day of Convention the delegates decided to seat themselves alphabetically rather than by political affiliation, a

move which most delegates believe contributed to the production of a successful, well-rounded Constitution (Campbell, 2016, interview; Elison & Snyder, 2001; Ellingson, 2016, interview)**.** Delegate Bob Campbell (2016, interview) described the ConCon setting:

> In the organizational meeting, Dale Harris came up with the idea to seat us alphabetically, which was the best thing that ever happened, because we were not Republicans on one side of the isle and Democrats on the other, like the Legislature always has been and still is. Alphabetically, you have everybody sitting there equally. We dropped the 'R's and 'D's' and we put an 'M' behind our names, because we were all Montanans.

By choosing to sit alphabetically, delegates were distributed randomly, seated next to someone with potentially differing views, and were forced to integrate, compromise, and empathize with their colleagues (Campbell, 2016, interview; Chambers & Zalis, 2002; Chambers, 2016, interview). Delegate McNeil (2016, interview) claimed alphabetical seating resulted in non-adversarial relationships stating:

> We worked very diligently to keep politics out of it so that each individual provision was examined and debated for its merits without much, if any, influence exerted by hardened political positions. That made our Constitutional Convention different from other Constitutional Conventions occurring in other US states.

Despite alphabetical seating, partisanship was not completely absent from the Convention, as Democratic delegates usually opted for reform while Republican delegates opposed it (Elison & Snyder, 2001; Ellingson, 2016, interview; Shovers, 2016, interview). To ensure the Convention ran productively, delegates organized informal, non-partisan meetings providing them with opportunities to meet, strategize, and discuss the following days' topics (Ellingson, 2016, interview; Campbell, 2016, interview; Kirk, 2011). Delegate McNeil (2011; 2016, interview) stated that if a Constitutional Convention occurred today, it would not produce a constitution with such strong environmental provisions because the delegation could contain legislators, would likely seat themselves according to their political affiliation, and would likely be influenced by powerful lobbyist groups. "No way would the Constitution have included environmental rights if the Convention were not bipartisan," the delegates understood they only had one chance to write this Constitution, and they did not wish to botch their opportunity by focusing on ideological differences (Ellingson, 2016, interview).

7.6.3 Delegates' Support of Environmental Measures

Influenced by the social activism of the era, the delegates believed the new Constitution should be a direct reflection of everything distinctly Montanan, including Montana's history, geography, environment, natural and artificial resources, and a reflection of Montanan and Native American culture (Campbell, 2016, interview; Kirk, 2011; Tarr, 2003; Tuholske, 2011). To avoid the influences of special interests, delegates turned to the Convention's research analysts for advice concerning issues, purposely avoiding "the lobbyists roaming the capitol halls" (Elison & Snyder, 2001, p. 12). Prompted by a bourgeoning environmental movement, the enactment of numerous state and federal environmental statutes, and a century of mining-related land, air, and water pollution, Montana's ConCon delegates single-handedly ensured the Constitution was committed to environmental quality by drafting an environment-focused Preamble, and dedicating an entire article to the state's environment and natural resources (Shovers, 2014; Tarr, 2011). Montana's delegates largely avoided constitutional borrowing, and believed that "environmental provisions in other states were insufficient to provide the type of protection that the delegates believed was necessary," establishing their own, strict precedent for Montana's environmental laws (Thompson, 2003, p. 165).

The success of Montana's environmental rights and provisions can be credited to delegate Louise Cross, who chaired the Natural Resources and Agriculture Committee and dedicated 2.5 years at the AAUW researching the effects of strip mining on human health and land degradation (Campbell, 2016, interview; Cross, 1990; Ellingson, 2016, interview; Kirk, 2011; McNeil, 2016, interview; Reichert, 2016, interview). Acknowledging the relationship between humans and their surrounding environment, Delegate Cross wrote that all beings, humans, birds, fish, beasts, are connected, and that the "awareness of this connection between all organisms prompted the drafting of Montana's environmental provisions" (Cross, 1990, p. 449). Certain delegates on the Bill of Rights committee were very dedicated to environmental values and assured Cross that environmental rights would be written into the Declaration of Rights, regardless of their enshrinement in the Natural Resources article (Cross, 1990). Years after the ConCon, Cross (1990, p.450) wrote:

> These constitutional environmental provisions did not come easily.... from the vantage of 19 years and my memory of what happened in the

> committee, I seriously question whether if any other person had been chairperson, a separate article on the environment and natural resources would now exist. My commitment to the preservation of land, water, and air gave me the necessary tenacity to bring these provisions to fruition.

The environmental article produced the Convention's longest debates, with delegates passionately speaking about their duty as Montanans' representatives "to take a stand to make sure the people have some teeth in environmental law" (Trans, Vol. V, p. 1218). The Natural Resources article "was a sign of the times in 1972 of the significance that the delegates placed upon the environment in the state of Montana," McNeil (2001, p. 84). The reclamation section in particular was both a response to Montana's century of destructive mining, and a precaution against the strip mining already occurring and proposed by the NCPS in eastern Montana counties:

> The strip mining of coal was in its heyday, and in terms of reclamation and the reclamation provision, for most of us that was what was an issue, that these lands that were being strip mined over in the eastern part of this state could not be left open, could not be this eyesore for somebody else to have to cleanup later on (Ellingson, 2016, interview).

By broadly protecting "all lands disturbed by the taking of natural resources," the delegates ensured that reclamation encompassed all types of extractive activity impacting all types of natural resources (Ellingson, 2016, interview; McNeil, 2001; Schmidt & Thompson, 1990). Montana's delegates "saw their state as different- they saw it as a place where a right to a clean and healthful environment did not mean giving anything to the people; rather, it meant not taking something away" (Wilson, 2004, p. 640).

Lastly, in entrenching such strict environmental provisions, Montana's delegates were likely buttressing the Legislature's recently enacted environmental statutes (Schmidt & Thompson, 1990). In the 1970s many states "have resorted to their constitutions for environmental protection because agencies have failed to properly enforce environmental statutes" (Tobias & McLean, 1980, p. 253). Similar to federal agencies' initial recalcitrance to cooperate with NEPA, many Montana agencies were reluctant to implement MEPA, stating that agency operations should be exempt from the MEPA environmental review process (Tobias & McLean, 1980). The first EQC report (1972) concluded that Montana's state agencies were failing to comply with MEPA, and attributed agency reluctance to a lack of environmentally trained personnel and devotion to old decision-making routine.

Although MEPA had only recently been enacted, the "delegates were well aware of MEPA and sought to reinforce the duties imposed by the statute," and likely utilized MEPA as a model for drafting environmental provisions (Tobias & McLean, 1980, p. 253). During Convention debate, delegate Robinson (Trans, Vol. V, p. 1229) stated "the present problems we have with our environment are the product of the inability or unwillingness of legislatures to recognize environmental problems and to take proper corrective action." By declaring environmental protection as a duty of "the government and all persons," and by declaring the right to a clean and healthful environmental an inalienable right, the delegates mandated MEPA implementation to be a constitutional duty of all state agencies. The delegates ensured that the Constitution's environmental provisions worked in accordance with other environmental legislation to achieve the same environmental goals (Tobias & McLean, 1980).

7.6.4 Delegates' Role in Constitutional Ratification

When the Montana Supreme Court prohibited the use of Convention funds to educate voters on the new Constitution, certain delegates reacted by spearheading their own grassroots group, the "Concerned Citizens for Constitutional Improvement." By collaborating with other supporters of the Constitution, such as the LWV, the delegates raised $10,000 to fund a 24-page educational pamphlet which was distributed to voters as newspaper inserts, discussing the differences between the 1889 and 1972 Constitution, and explicitly explaining each section of the proposed Constitution (Ellingson et al., 2015b; Shovers, 2014; Stockton, 2016). Delegate Ellingson voluntarily gave at least 42 talks at Missoula schools, banquets, and other public gatherings, urging voters to approve the Constitution (Ellingson et al., 2015b; Holmes et al., 2008). Numerous delegates travelled the state campaigning for constitutional ratification, dedicating themselves to ensuring this Constitution was not only understood by the electorate, but successfully ratified and thus recognized as the supreme law of the state (Ellingson et al., 2015b). The fact that delegates maintained their bipartisan sentiment during the ratification process likely contributed to the Constitution's approval. For instance, delegate Harper later recalled that "if it hadn't been for the help of strong Republicans like Betty Babcock and John Toole," who travelled with the Democratic delegates, "that Constitution never would have passed" (Holmes et al., 2008, p. 430-431). A government survey taken at the polls during ratification revealed

that "confidence in work of delegates" was the number one reason the surveyed citizens supported ratification (Payne & Eastman, 1972).

7.7 Chapter Summary

The call for Constitutional Convention and the entrenchment of Montana's environmental rights and laws, was the direct result of 100 progressive-minded Montanan citizens, and the indirect result of a combination of citizen action, and demographic, political, corporate, national, and environmental events (Table 7.1).

Table 7. 1 Overview of Direct and Indirect Triggers to the 1972 Montana State Constitution and the Entrenchment of Environmental Rights

Trigger (Indirect/Direct)	**Influence**
Reapportionment (*Indirect*)	Shifted political power from rural to urban districts, whose legislators and citizens were more supportive of state and constitutional reform, and constitutional environmental protection. Influenced the selection and election of 100 progressive, grassroots Constitutional Convention delegates.
Activist State Government (*Indirect*)	Reviewed effectiveness of 1889 Constitution, launched Referendum 67, and urged the electorate to authorize the calling of a Constitutional Convention. Enacted several environmental statutes prior to Convention. Prohibited sitting government officials from running as ConCon delegates.
Fall of Anaconda (*Indirect*)	Declining influence over Montana's government officials, citizens, and natural resources granted Montanans with an unfettered opportunity to exact overdue societal change.
Social and Environmental Movements (*Indirect*)	Fueled Montanans' desires for constitutionalized change. Consequences of past, current, and prospective natural resources extraction and pollution strengthened environmental ethic and civil society sentiment statewide.
Civil Society (*Indirect*)	Spread environmental information, studied the 1889 Constitution, campaigned for a Constitutional Convention and constitutional ratification, and pushed for the entrenchment of environmental rights and provisions.
ConCon Delegates (*Direct)*	Progressive, bipartisan sentiment resulted in transparent Convention proceedings and an exhaustive discussion on environmental rights and protections. Entrenched within the Constitution an environmental Preamble, the inalienable right to a clean and healthful environment, and an entire Article (IX) devoted to the environment and natural resources. Voluntarily educated voters on the new Constitution and advocated for constitutional ratification.

"The events at the national level would have a profound influence on the transformation of Montana's political culture," with Montana's Constitutional Convention indirectly triggered by federally mandated legislative reapportionment (Kirk, 2011, p. 4). Reapportionment allowed Montana's rural legislators to support constitutional reform, as their prior motives for rejecting constitutional referendum's (to risk losing legislative power), were now eliminated (Tarr, 2003). Reapportionment provided Montanans with the chance to enforce necessary state change, as urban legislators now had the means to meet the demands of their progressive constituents. Constitutional reform did not only occur as a response to wide-scale citizen effort and concern, it was also the result of the state government's willingness to exact legal, political, economic, environmental, and governmental change after decades of constitutional and political restrictions (Zackin, 2013). By shifting political power towards Montana's urban centers, reapportionment also stripped Anaconda's executives of their political affiliation with, and influence over, Montana's bureaucracy, allowing Montanan legislators and government officials to restructure the government and campaign for constitutional reform absent corporate-influence.

Reapportionment also resulted in increased bipartisan collaboration between Montana's Democratic and Republican Parties, who were now no-longer bounded by the conservative, corporate-rural administration which had run the state for decades. Legislative, executive, and judicial problems were not unique to Montana, but prevalent in many constitutions written during the late 1800s. Many of Montana's problematic provisions were borrowed from other state constitutions, and borrowing was one reason why multiple states exhibited similar problems: "what is extraordinary is not that those problems existed but that Montana responded so energetically to them in the early 1970s" (Tarr, 2003, p. 5). State legislators nationwide pursued environmental legislation by "piggybacking" on existing processes of constitutional and executive reform. "State Legislatures' willingness to amend their constitutions," wrote Zackin (2013, p. 152), "suggests that environmental rights were not merely afterthoughts, shoehorned into constitutions during unrelated moments of major revision, but the product of popular concerns about salient issues." Faced with continuous roadblocks of the creaky, statehood system, Montana's newly reapportionment government cooperated to reorganize the state's

executive branch, educate the public on the weaknesses of their governing document, and was one of the parties directly responsible for convincing the electorate to call a Constitutional Convention. Thus, it can be argued that federally-mandated legislative reapportionment, and a bipartisan effort for constitutional reform from the legislative, executive, and judicial branches of Montana's government, both indirectly contributed to the entrenchment of Montana's right to a clean and healthful environment.

In addition to struggling to maintain their corporate and social power in Montana, Anaconda Company officials were faced with a rising, politically charged environmental movement, which further complicated matters for the Company's executives (Stiller, 2000; Zalis, 2016, interview). "The people of Montana and developing environmental law shifted the emphasis of public policy" away from the Company's century-long vision of the state as a corporate colony (Bakken, 2007, p. 48). As jobs in extractive industry declined, Montanans became less reliant on extractive industry as a stable source of income. This increasing objectivity, led by the editors of Montana's newly owned newspapers, resulted in the removal of the rose-colored glasses Montanans had been wearing where environmental matters were concerned. The 1970s generation did not live by the "industry can do no harm" doctrine followed by their parents and grandparents (Keane, 2016, interview; Chambers & Zalis, 2002). Continuously berated by Montana's newly managed newspaper staff, nearly bankrupt by the expropriation of their Chilean holdings, and directed by their new management to sell most Montana mining and timber operations, the infamous Anaconda Company fell from power in Montana just as the Montanan citizenry and government were in the midst of a state environmental movement, and government and constitutional reform. Thus, it can be argued that the fall of the Anaconda Company and its influential officials contributed to calling the 1972 Constitutional Convention, and indirectly influenced Montanans' entrenchment of environmental laws.

The enshrinement of environmental rights in the early 1970s was a deliberate choice by concerned citizens who understood the role that environmental protection played in the functioning and sustainability of human society (Tuholske, 2015). Howard (1972, p. 193) asserted that "it is inherent in Americans' attitudes toward their constitutional system that when a sufficient number of them care deeply enough about a problem they seek to give it constitutional dimensions." Montana successfully ratified an entirely new Constitution

because the citizenry tirelessly campaigned for one (Tarr, 2003). “Constitutional revision is not for the faint of heart” it requires “the cooperation of all” to be effective (Busbee, 1983, p. 1). If not for the support of Montanan civil society, constitutional reform, and the entrenchment of Montana’s right to a clean and healthful environment, would likely never have occurred.

In a 1999 survey, Montana’s 1972 ConCon delegates were voted as the second most influential group of citizens in Montana’s 20th century, a well-deserved ode to the 100 people who spent months tediously debating each and every detail of this document (Snyder & Ellingson, 2011). Overall, the 1972 Montana Constitution was *directly* influenced by the populist inclination of its delegates (Elison & Snyder, 2001). The floor debates of the Constitutional Convention are indicative of the delegates’ awareness of Montana’s conflicting values and ethics, all of which were considered in creating the environmental provisions. Johnstone (2016, interview) stated that compared to politicians and sitting legislators, the delegates directly influenced the entrenchment of environmental rights because “the delegates elected were generally more progressive than the political establishment of that time” and “had a direct concern for the environment.” By declaring the right to clean and healthful environment as a fundamental, inalienable right, Montana’s delegates granted the right the same level of importance as other traditional human rights, such as the right to freedom of speech (Thompson, 2003; Tobias & McLean, 1980). By demanding the maintenance and improvement of Montana’s environment, the delegates recognized the environmental needs of current and future generations. Tuholske (2011, p. 237) argues that “the enumeration of these rights [was not] accidental or ill considered; the rights reflect the overriding desire of the delegates of the 1972 Montana Constitutional Convention to develop a civil society responsive to the needs of its citizens.” Thus, it is argued herein that without their spirited, statewide educational campaign, urging the electorate to approve the proposed Constitution, Montana likely would never have entrenched what is widely considered as the strongest environmental provisions of any American state (Czarnezki, 2007; Tarr, 2003).

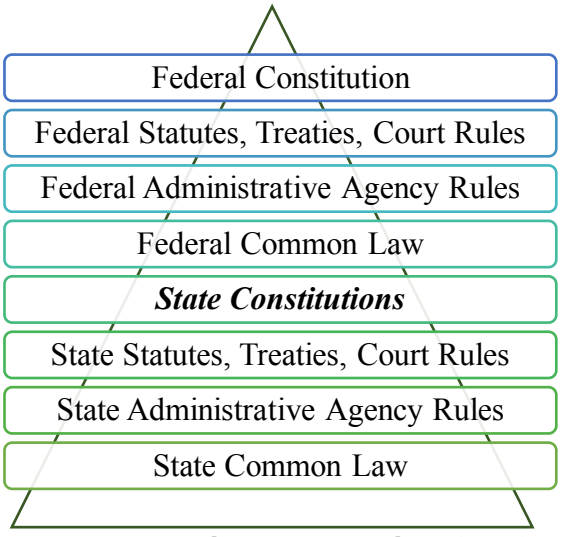
CHAPTER 8: MONTANA'S ENVIRONMENTAL JURISPRUDENCE, 1972-2017

The second research question of this thesis asks *how the environmental rights provisions in the 1972 Montana State Constitution have evolved, been interpreted, and been enforced since constitutional ratification?* To answer this research question, a selection of environmental court cases will be discussed, and the strength and enforceability of these rights is interpreted through a review of the legal literature and jurisprudence.

8.1 An Overview of American Constitutional Law

A Constitution "is the ultimate repository of a peoples considered judgement about basic matters of public policy" (Howard, 1972, p. 229). In the "thin" sense, by establishing rules, guidelines, and restricted powers, constitutions seek to maintain social order and protect individual rights by regulating the horizontal interactions of individuals, and the vertical interactions between governments and their citizens. In the "thick" sense, constitutions are expressive, value-laden assertions of the collective will, representing a society's most cherished values and a map towards the fulfillment of future societal aspirations (Boyd, 2012a; Kotze, 2015). In the United States, each state is dually governed by its own state constitution, as well as by the United States Constitution (Figure 8.1).

Figure 8. 1 Hierarchy of American Legal System



Source: Author. Data: Burnham (2006)

Each state constitution is specifically tailored to protect the traditional and emerging values of the citizens of that state. State constitutions are often riddled with politically-

motivated provisions and specific governmental and citizens obligations. By comparison, the federal Constitution is a rigid repository of *national* values, restricted to fundamental law, and is virtually unamendable because of the difficulty in securing two-thirds approval from each Congressional chamber, as well as approval from three-quarters of the states (Howard, 1972; Johnstone, 2012; Wilson, 2004). Of roughly 10, 000 amendments proposed to the United States Constitution since 1789, only 27 have survived ratification- a success rate of 0.27 percent (Boyd, 2012a; Stockton, 2016)!

A state constitution organizes and regulates society by delegating plenary powers and duties among several executive departments, the legislature, and the judiciary (Boyd, 2012b; Cooley, 1871; Tarr, 1992). The resulting government is granted, by the citizenry, the power to control the state, however, the responsibilities and membership of each branch are still amendable by the popular will of the people, which "can only be of legal force when expressed in the times and under the conditions which they themselves have prescribed and pointed out by the Constitution" (Cooley, 1871, p. 598). Although state constitutions delegate certain authorities to each governmental branch, to preserve the citizens' liberty all three branches are equally powerful and no one branch is subordinate to the others, a principle known as the "separation of powers" (Brooks, 1992; Cooley, 1871; Horwich, 1996; Kelly et al., 1983; Sabatier, 1973; Tarr, 2003; Wilson, 2004).

Because of their representative nature, most citizens are more familiar with constitutions than they are with specific statutes. Boyd (2012a) compares constitutional laws and statutory laws to Siberian tigers and Siamese cats, although related, they significantly differ in strength. "A constitutional right to a healthy environment is likely to have far greater legal, symbolic and practical importance than a legislated right" (Boyd, 2012a, p. 55). Compared to a constitutional law, the fundamental law of a sovereign body to which all other laws must comply (revisable only through constitutional amendment), a statute is a law enacted by a local, state, or federal legislative body, which holds less authoritative power and is modifiable by simple action of the legislature (Figure 8.1; Burnham, 2006). This last point must not be understated; statutes can be amended or repealed by a simple majority vote in the legislature creating them. This means that they can come, and go, as governments change over time and are highly fluid and transitory. Constitutions, in contrast, can only be changed through the laborious process of

constitutional amendment, a process requiring extensive political and citizen support.

8.1.1 American Federalism and the Supremacy Clause

The Supremacy Clause of the United States Constitution (Article VI, Clause II) reads:

> This Constitution and the Laws of the United States …. shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause "dictates that state constitutions are subordinate to valid federal law, whether constitutional, statutory, or administrative" (Tarr, 2011, p. 21). Although state legislative and executive branches function independently from federal legislative and executive branches, if any state law conflicts with a federal law, judicial officials are bound by the Supremacy Clause to declare the disputing state law unconstitutional and void (Berman, 2011; Ryan, 2015; Wilkinson, 1980). Through the doctrine of American federalism, the United States Constitution grants each state with the freedom and ability to function sovereignly and beyond the confines of federal law, reserving all non-enumerated rights and any additional, unmentioned assurances to the states (Brooks, 1992; Howard, 1972; Johnstone, 2015; Ryan, 2015). The Tenth Amendment to the United States Constitution declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." American federalism is a practical arrangement dividing governmental powers and responsibilities between the federal government and the state governments (Johnstone, 2015; Kelly et al., 1983; Ryan, 2015).

Until the passage of the *Clean Air Act* and *Clean Water Act* in the 1960s, the federal government played a negligible role in environmental regulation. Congress had yet to pass legislation on groundwater regulation, biodiversity management, and hazardous waste clean-up, with existing federal statutes silent on non-point source pollution caused by agricultural or mining activities (Bloomquist, 2001; Thompson, 2003). Although the federal government oversees the enforcement of federal statutes, the states are responsible with implementing the federal pollution standards, a concept known as "cooperative federalism" (Johnstone, 2015; Ryan, 2015; Sabatier, 1973; Thompson, 2003; Zackin, 2013). In implementing these federal laws, so long as federal standards are met, states are

not required to enact additional environmental legislation (Tarr, 1992; Thompson, 2003). As a result, states are left to their own devices regarding important environmental issues, which many state governments in the 1960s conveniently chose to ignore (Bloomquist, 2001; Thompson, 2003). As certain states responded more diligently to environmental issues by responsibly passing their own stricter environmental statutes, while other states instead resolved to implement the federal minima, the resulting system of environmental legislation and implementation across the United States was fundamentally inconsistent.

From 1967 to 1970, several members of Congress attempted to pass stricter federal environmental statutes and unsuccessfully proposed to amend the United States Constitution to include the inalienable right to a decent environment (Brooks, 1992; Howard, 1972). In several US Supreme Court cases, Plaintiffs argued that environmental rights are unenumerated rights implied by the Fifth and Fourteenth Amendments protections of life, and by the Ninth amendment's rights "retained by the people" (Cusack, 1993; Howard, 1972; Johnstone, 2016; Kemmis, 1978). For instance, in the 1970 Montana district court case *Environmental Defense Fund v. Hoerner Waldorf*, it became clear that citizens would only be minimally protected by the federal Constitution in environmental cases, when the court ruled that the Fifth and Fourteenth Amendments protected citizens "only from the threat of intrusive governmental action but not the action of third parties or market forces" (Zackin, 2013, p. 161). Due to the courts' positivist approach in interpreting and enforcing only rights explicitly enumerated within the constitutional text, and the difficulty of amending the United States Constitution, few believe that environmental rights will ever be protected by, or entrenched in, the national document (Campbell, 2016, interview; Chambers, 2016a, interview; Chambers, 2016b, interview; Ellingson, 2016, interview; Jensen, 2016, interview ; Johnson, 2016, interview; Johnstone, 2016, interview; Keane, 2016, interview; McNeil, 2016, interview; Shovers, 2016, interview; Wray, 2016, interview).

The passage of NEPA single-handedly stimulated the enactment of environmental state statutes across the nation (Tobias & McLean, 1980). It can be argued that the states that passed environmental statutes did so to better protect their state environments as the federal government cannot focus on the case-specific environmental issues of each state, and "Congress did not establish environmental protection as an exclusive goal; rather it

desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations" (*Calvert Cliffs. v. AEC*, 1971, p. 1112). In response to the constitutional strides achieved by the human rights movements, it became apparent that "constitutionalization of environmental protection could be equally useful in providing a higher level of environmental protection" while acting as "a solution for regulatory deficits" at both state and federal levels (Kotze, 2015, p. 189).

By 1969, at least 26 states were operating under constitutions passed before 1900 and constitutional revision swept the nation, with more than half of the states taking some form of action to revise their aging state constitutions (Howard, 1972; Kirk, 2011; Tarr, 2011). In response to this "new judicial federalism," the growing belief that states can more efficiently address issues than the federal government, several states passed constitutional laws which better protected the traditional and emerging rights of their citizens (Cusack, 1993; Brooks, 1992; Griffing, 2010; McLaren, 1990; Tarr, 2003; Thompson, 1996; Sabatier, 1973). For instance, the ConCon delegates included 17 provisions in Montana's Declaration of Rights that have no parallel in their federal counterpart, such as the right to a clean and healthful environment (Goetz, 1990; Johnstone et al., 2015; Tarr, 2011; Tuholske, 2011). Adhering to the minima standards of federal laws, and the freedoms granted by the Tenth Amendment, constitutional reformers enacted their own, stricter environmental laws and regulations, and customized environmental protections to their state environments, citizen desires, and state histories (Brooks, 1992; Horwich, 1996; Jensen, 2016; Johnstone, 2016; McLaren, 1990; Thompson, 2003).

8.1.2 Theory of Constitutional Interpretation

An essential ingredient of a society based on the rule of law is the role of the courts as the final arbiters of the law (Tuholske, 2015). As arbiters of the law, the courts have the final say in how each constitutional law is enforced and the meaning attributed to it (Taylor, 2004; Tuholske, 2011; Thompson, 1996). State courts are divided into three separate jurisdictions: local cases are overseen by local courts with limited jurisdiction, district trial courts have general jurisdiction, and the Supreme Court, which in Montana consists of the Chief Justice and six associate Judges, oversees cases from across the state and holds authority over the local and district courts (Echeverria, 2015; Waldron & Wilson, 1978). Despite the separation of powers, the courts must "enforce the [State] Constitution as the

paramount law whenever a legislative enactment comes into conflict with it" (Cooley, 1871, p. 160). Although the courts have the power to nullify legislative acts, such rulings are controversial and often avoided by courts because the state Legislature serves as the voice of the people (Taylor, 2004). Interpretation of a constitutional law only occurs when necessary, when alternate means of trying a case have been exhausted and referring to the Constitution is unavoidable.

Judicial interpretation is an underlying tenet of American law, its origins can be traced back to cases tried in the early 1800s (Tuholske, 2011). Constitutional interpretation occurs by studying the framers' intent, the plain meaning of the text, and the moral and political philosophies of the place in question (Elison & Snyder, 2001; Tarr, 1992). Once interpreted, provisions may than be adequately enforced. Enforceability is an integral aspect of the constitutional process as enforceability determines who is accountable when responsibilities are neglected, and rights violated. Enforceability may be defined as "the ability of an individual, group, or other organization to access the legal system to resolve a constitutional complaint" (Boyd, 2012a, p. 84). Without enforceability, environmental rights become "toothless tigers" in the court room, prohibiting impacted individuals from seeking adequate remedies, and allowing accountable parties to elude their constitutional duties. Relative to other types of litigation, environmental cases occur much less often, and any case which interprets a constitution's environmental provisions automatically contributes to the body of precedents referred to and followed by all future court cases (Boyd, 2012a; Echeverria, 2015; Tuholske, 2015; Sax, 1970).

8.1.2.1 State Constitutions as Discrete Units

State constitutions "differ from their federal counterpart in their language, basic character, generating history, place in the state's constitutional history, and underlying political philosophy," and are interpreted independently as discrete units (Tarr, 2011, p. 8). Although state courts are bound by the Supremacy Clause to ensure that all state laws comply with federal standards, state courts are the authoritative interpreters of state constitutions and are not required to reach the same conclusions as similar cases tried at the federal level (Tarr, 2011; Stockton, 2016). Lopach (1987, p. 293) states:

> Where the State Constitution explicitly contains fundamental rights that are not found in the United States Constitution, the State Supreme Court

> should feel free to develop its own jurisprudence for those guarantees. Where the State Constitution contains the same explicit fundamental rights as found in the United States Constitution, the State Supreme Court should feel free to develop a jurisprudence more protective of those freedoms than formulated by the United States Supreme Court.

Because the United States Constitution does not contain a textual counterpart to Montana's environmental rights, the constitutional interpretation of Montana's environmental provisions has taken place in a standalone fashion, uninfluenced by any other body of federal jurisprudence (Tuholske, 2011). "The Montana environmental provisions will only acquire significance to the extent that Montana lawyers and judges give appropriate weight to their constitutional status," a task which can only be achieved through judicial interpretation (Kemmis, 1978, p. 224).

8.1.2.2 Generating History and Framers' Intent

Because laws are sites of cultural, political, and social production, to be understood they must be studied in reference to the people and place that produced them (Blomley, 1989; Tarr, 2004). State constitutions are layered with the political opinions and values of framers from different eras and cannot be interpreted as a cohesive unit. "A constitutional theorist cannot look to the whole to illuminate the meaning of its various parts," however, each layer may be analyzed, and the political movement and historical event which inspired each provision identified (Tarr, 1992, p. 1185). The legislative and judicial processes are directed by the state's history and a mixture of changing philosophies, customs and social mores; as Dowling (1990, p. 283) wrote, "there are vogues and fashions in legislation just as there are in literature, art and dress." The issue with strictly focusing on textual analysis is it often provides a narrow reading of a constitutional provision ignoring the context within which it was produced (Berman, 2011; Stockton, 2016). When interpreting an enumerated right or provision, the state's constitutional generating history should also considered (Cooley, 1871; Stockton, 2016; Tarr, 2004; Tarr, 2011).

When interpreting the constitutional text, courts should consider the framers' intentions in drafting each provision and how the provisions were understood by the citizens who ratified the Constitution (Taylor, 2004). For example, as authors of the 1972 Montana Constitution, the ConCon delegates intentionally chose to avoid borrowing environmental provisions from the constitutions of other states as they found their

provisions to be insufficient for the level of environmental protection required in Montana by the citizens. By avoiding borrowing other states' environmental provisions, this act by Montana's delegates can be utilized by courts to interpret Montana's constitutional provisions, specifically to contextualize the framers' intended importance of Montana's environmental rights (Tarr, 1992; Thompson, 2003). The verbatim transcripts of the 1972 Montana Constitutional Convention clearly explain the framers' intent and have been utilized as a primary means of interpretation by the Montana courts and legal scholars (Lopach, 1987; McNeil, 2016, interview; Stockton, 2016; Tuholske, 2011; Tarr, 1992). Although the ConCon delegates created a flexible, amendable Constitution to take into consideration changing social values and circumstances, the environmental provisions have remained unchanged and thus today carry the same meaning as when the Constitution was ratified, justifying the use of the transcripts as a primary source of data for interpreting the intended application and weight of Montana's environmental rights (Adrian, 1968; Cooley, 1871; Taylor, 2004).

By reviewing the ConCon transcripts (Chapter 5), ratification process (Chapter 6), and by answering question one of this thesis (Chapter 7), the Constitution's generating history, the framers' intent, and the citizens' understanding of Montana's constitutional environmental rights were extensively analyzed. With Montana's 1889 and 1972 Constitutions adopted under differing economic, political, and social conditions, each Constitution contains features reflecting characteristics of the society and period in which they were ratified (Brown, 1970; Elison & Snyder, 2001; Tarr, 2011). Provisions removed during revision represent changing values, with retained provisions representing continuing values. As added provisions depict the institutionalization of new values the entrenchment of the right to a clean and healthful environment symbolizes the genesis of Montanans' environmental ethic (Dowling, 1990; Tarr, 1992; Tobias & McLean, 1980). The evolution of this environmental value can and will be traced by analyzing how the environmental rights have been interpreted by courts and legal scholars since ratification.

8.2 Evolution of Montana Environmental Law

Pursuant to the auspices of Article XI, §1(2), which calls upon the Legislature to provide adequate remedies and enforcement for the right to a clean and healthful environment, the 1973 Legislature passed several environmental statutes. The *Montana Water Use Act*

oversees citizen and state water rights, the *Major Facility Siting Act* analyses environmental impacts of power plants and transmission lines, the *Sanitation and Subdivisions Act* regulates waters utilized by solid-waste disposal, agricultural, industrial and recreational activities, and the *Montana Strip and Underground Mine Reclamation Act* ensures mining companies restore lands to their original contours after mining (Appendix C; Dowling, 1990; Holmes et al., 2008; Malone, 1996; Tobias & McLean, 1980; Schmidt & Thompson, 1990). Since 1973, the Legislature has passed a temporary moratorium on the extraction of uranium, the *Nongame and Endangered Species Act,* and the *Clean Air* and *Agricultural Chemical Groundwater Protection Acts.* Montana's regulations surpassed federal standards regarding open burning, a non-degradation policy for state water sources has been established, several counties have ordinances prohibiting the sale and circulation of phosphorous compounds, and the *Comprehensive Environmental Cleanup and Responsibility Act* (CECRA) authorizes the state to remediate hazardous waste sites not covered by federal Superfund law (Dowling, 1990; Schmidt & Thompson, 1990). Montana's landmark environmental laws initially placed Montana into a position of national leadership concerning state-level environmental protection (Malone et al., 1991). Additionally, since ratification, several citizen initiatives regarding the protection of Montana's environment, wildlife, and natural resources have been proposed and approved by the electorate (Appendix E).

More recently, Montana's legislators have created various incentives for clean energy programs and practices, such as: providing 75 percent property tax incentives for carbon sequestration pipelines and technologies; up to 75 percent tax incentives for transmission lines that transport hydro, biomass and wind powers; and 50 percent incentives for eco-friendly research and renewable energy manufacturers. Montana has adopted carbon dioxide emissions performance standards for electricity generating units, with the state's Public Service Commission authorized to reject coal-fueled power projects unless a minimum 50 percent of the carbon dioxide produced is captured and sequestered (Western Governors' Association, 2007).

8.2.1 Resource Indemnity Trust

In 1973, the Legislature introduced a statute establishing a trust to "provide security against loss to our environment from the extraction of nonrenewable resources" (Waldron &

Wilson, 1978, p. 271). The purpose of the fund was to improve and rectify any damages caused to Montana's total environmental, defined as "air, water, soil, flora and fauna and the social, economic, and cultural conditions that influence communities and individual citizens" (MCA 15-38-103(4)). A 0.5 percent tax was levied on nonrenewable resources exceeding a gross annual value of $5000. Gem stones, copper, silver, gold, coal, lead, petroleum, natural gas, uranium, oil, or other nonrenewable merchantable resources extracted from the state were all subject to the fund and its conditions. In 1974, in a bipartisan effort to protect the trust fund, the Legislature agreed to entrench this statute in the Constitution (Bradley et al, 2015b; Waldron & Wilson, 1978). On 5 November 1974, Montanans' overwhelmingly approved the constitutional amendment, establishing the Montana Resource Indemnity Trust (RIT). The amendment, added to Article IX, §2, Reclamation, of the 1972 Constitution reads:

> (2) The Legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as the legislature may from time to time impose for that purpose.
> (3) The principal of the resource indemnity trust shall forever remain inviolate in an amount of one hundred million dollars ($100,000,000), guaranteed by the state against loss or diversion.

The measure was overwhelmingly approved by all but three Montana counties (Waldron & Wilson, 1978). Voters in eight of the top ten counties which most supported the entrenchment of the RIT came from eastern counties, sites of past and proposed large-scale strip-mining. As the three opposing counties contained a combined population of around 10,000 residents, it can be stated that the expansion of Montana's environmental article achieved statewide support (Census and Economic Information Center, 2013). The 1985 legislature tapped into the RIT to fund the state's general operating expenses, triggering a court case which held that the Legislature is entitled to appropriate the RIT fund as it so chooses so long as the $100 million principal is maintained (Elison & Snyder, 2001). In *Butte Silver-Bow Local Gov. v. State of Montana* (1989) the Montana Supreme Court ruled that interest collected from the trust should be dedicated to a broad variety of state programs, and not solely towards the reclamation of lands disturbed by the taking of natural resources (Schmidt & Thompson, 1990). Despite allocating a portion of the fund

away from environment-related activities, the state has done a decent job in ensuring that reclamation projects are financially supported by the fund (Elison & Snyder, 2001). Currently, interest from the RIT is allocated into several sub-funds dedicated to the protection and improvement of the Montana environment, such as projects and operations planning or impacting future fisheries, groundwater assessment, hazardous waste, oil and gas mitigation, and water storage (Montana Legislative Fiscal Division, 2015).

8.2.2 Coal Tax Trust Fund

In 1975, a bipartisan group of senators proposed yet another addition to Article IX of the Constitution, this time in the form of a Coal Tax Trust Fund. The amendment proposed a 30 percent coal severance tax, the highest severance tax in the nation, be assigned to a permanent trust fund (Malone et al., 1991; Malone, 1996). Upon introducing the amendment, the senators stated that "we have very little to show for our once fabulous copper resource," insisting the trust would ensure that Montanans' benefitted from coal mining activities (Waldron & Wilson, 1978, p. 278). The measure was both economic and environmental in scope, arming the state with the funds to recover from any post coal-boom cycle that may arise in the event that the coal reserves are depleted (Elison & Snyder, 2001; Towe et al., 2015). The amendment added a fifth section to Article IX**:**

> The Legislature shall dedicate not less than one-fourth (1/4) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths (3/4) of the members of each house of the Legislature. After December 31, 1979, at least fifty percent (50%) of the severance tax shall be dedicated to the trust fund.

When introduced to Montana's electorate on 2 November 1976, the measure received even more support than the previous RIT (Malone et al., 1991; Waldron & Wilson, 1978). The measure was rejected by two extremely rural counties, with some of the measure's most avid supporters coming from Montana's easterly most counties bordering the coal-rich mining states of North and South Dakota (Waldron & Wilson, 1978).

Although the coal tax fund successfully accumulated over half a billion dollars within its first 20 years of implementation, the effectivity of the coal tax fund has since been weakened by political and corporate opponents who argue the constitutional provision has deterred out-of-state companies from mining Montana's coal and contributing to the

creation of jobs and the state's economic growth. In *Commonwealth Edison Co. v. Montana* (1981) the US Supreme Court upheld the amendments constitutionality, that the severance tax does not violate the Commerce or Supremacy Clauses of the federal Constitution (Elison & Snyder, 2001). The fund was vigorously opposed by coal mining interests which launched several multi-million campaigns and successfully convinced the 1987 Legislature to lower the severance tax (Bradley et al., 2015b; Elison & Snyder, 2001; Wright, 2003). Currently, the trust is divided amongst several sub-bonds which fund renewable resource and infrastructure projects (Elison & Snyder, 2001; Montana Legislative Fiscal Division, 2014). In 2017, a Butte Senator unsuccessfully proposed to the Legislature the creation of a sub-fund which would have diverted 75 percent of the coal tax funds to pay for public works, and allocated less to renewable resource projects (Johnson, 2017).

Despite the mentioned shortcomings, the 1974 Resource Indemnity Trust and the 1978 Coal Tax are still considered among the most significant constitutional amendments in Montana's history (Elison & Snyder, 2001). Support of these environmental measures did not follow the trends discussed in previous chapters. Voting was not divided between urban and rural, Democratic and Republican, and western and eastern voters. On the contrary, some of Montana's most eastern and rural counties, who most opposed constitutional ratification, showed the greatest support for the expansion of the Constitution's environmental section. Greatest rural support for the measures came from the counties which either had a history of coal mining or were the subjects of the mining proposed by the NCPS and other ventures. Because coal tax and RIT were overwhelmingly supported by Montanans so soon after the 1972 Constitutional Convention and did not exhibit any of the previously discussed political and geographic dichotomies appearing throughout Montana's voter history and during constitutional ratification, it is safe to assume that the small margins of constitutional ratification were attributed to opposition of other constitutional provisions, and not against environmental rights and measures.

8.2.3 Environmental Court Cases: 1972- Present

In the immediate years following constitutional ratification, Montana courts referred to the constitutional environmental provisions to commend dutiful state environmental action, altogether avoiding implementation and interpretation in cases where the state was accused of environmental negligence or inaction (Thompson, 2003). Although there were

environmental cases in the 1970s and 1980s, the Justices mostly referred to the environmental provisions to aid in interpreting Montana statutes, specifically questioning whether Montana legislation conflicted with the laws dictated by the new Constitution (Table 8.1). Until Montana's activist court in the late 1990s, more than two decades passed since the adoption of the new Constitution before Montana courts truly attempted to interpret Montana's constitutional environmental rights (Table 8.1; Echeverria, 2015; Elison & Snyder, 2001; Johnstone et al., 2015). Although the cases listed in Table 8.1 were identified during an exhaustive review of Montana's legal literature and case law, the list may not be comprehensive. A select few cases where Montana's environmental rights were either enforced or referred to during the proceedings will be discussed (Appendix D).

Table 8. 1 Summary of Montana Environmental Court Cases

Court Enforced* or Cited Environmental Rights During Proceedings	**Court Declined to Enforce Environmental Rights**
General Agriculture Corp v. Moore (1975)	Kadillak v. Anaconda Co. (1979)
Montana Wildlife Association v. Board of Health (1976)	Merlin Meyers v. Yellowstone County (2002)
State v. Bernhard (1977)	Orr v. State of Montana (2002)
State ex rel. Dept. of Health v. Green (1987)	Lohmeier v. Gallatin County (2006)
Butte Silver-Bow Local Gov. v. State of Montana (1989)	Sunburst School District v. Texaco (2007)
NWF et al. v. Montana DSL and Golden Sunlight Mines Inc. (1994-2002)*	Shammel v. Canyon Resources Corp. (2007)
MEIC et al. v. DEQ and Seven-Up Pete Joint Ventures (1999)*	Clark Fork Coalition v. Montana DEQ (2008)
Cape-France Enterprises v. Estate of Peed (2001)*	Flathead Citizens for Quality Growth, Inc. v. Flathead County Board of Adjustment (2008)
State of Montana v. Boyer (2002)*	Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch (2010)
Hagener v. Wallace (2002)*	Williamson v. Montana Public Services Commission (2012)
Seven Up Pete Joint Venture v. State of Montana (2005)*	NPRC v. Montana Board of Land Commissioners (2012)
State ex rel., DEQ v. BNSF Railway Co.(2010)	--

***Montana Wildlife Association v. Board of Health and Environmental Sciences* (1976)**

The developer of a subdivision argued that MEPA does not apply to the review process of the *Sanitation and Subdivisions Act* (Tobias & McLean, 1980). In July 1976, the Montana Supreme Court decided that MEPA requires rigorous application, that all state agencies should consider any potential environmental consequences of their decisions. In the first attempt at interpreting Montana's constitutional environmental provisions the court also stated Article IX, §1(2) requires legislative action and that if the Legislature fails to fulfil its duty the remainder of the section can and should be enforced by the courts, and that Article II, §3 allows all persons to bring an action in the event that their *fundamental* inalienable rights are violated (Goetz, 1990; Kemmis, 1978; Tobias & McLean, 1980). However, upon rehearing in December 1976, the court reversed its initial opinion, ruling that MEPA conflicts with other statutes and is merely a procedural statement with no regulatory authority over agency decision-making (Tobias & McLean, 1980). Justice Haswell argued that such an interpretation weakened the applicability and enforceability of MEPA, stripped the EIS process and other environmental legislation of their intended ability to provide Montanans with environmental protection, and incorrectly implied that citizens could not seek legal remedies or bring actions for the infringement of their environmental rights (Goetz, 1990; Schmidt & Thompson, 1990; Tobias & McLean, 1980). Although the first opinion of this case was withdrawn and does not provide courts with precedent, this case is often cited in the legal literature because "the court came as near as any court in the nation to giving a constitutional guarantee of environmental rights the respect and the weight which its constitutional status requires" and "serves as an excellent example of how the constitutional guarantee of environmental rights should be applied and interpreted" by future courts (Kemmis, 1978, p. 224, 225).

***State of Montana v. Cecil Bernhard* (1977)**

The Defendant was convicted of misdemeanor for operating a motor vehicle wrecking facility without a valid license. On appeal to the Supreme Court, the Defendant challenged the constitutionality of statutes that the Defendant claimed allowed for the taking of his private property without due process. In addition to referencing other case law to support the statute's constitutionality, Justice Haswell stated that because the Legislature is bound by Article II, §3 of the Montana Constitution to ensure each citizens' inalienable right to a

clean and healthful environment, that the state's police powers include considering and upholding the preservation and enhancement of aesthetic values (Bourguignon, 2016; Horwich, 1996; Kemmis, 1978; *State v. Bernhard*, 1977; Wyatt- Shaw, 1994). A similar verdict was reached in *State of Montana, ex rel. Department of Health v. Green* (1987), where the court decided that that the environmental rights of the public must be balanced with individual rights to acquire and possess personal and real property.

***NWF et al. v. Montana DSL and Golden Sunlight Mines Inc.* (1994-2002)**

Multiple mega-mining projects plagued the state in the 1990s and one such project was the Golden Sunlight mine near Whitehall, Montana (Holden et al., 2007; Schmidt & Thompson, 1990). In terms of lands disturbed and residual mine waste produced, this gold mine was the largest in Montana's history, expected to yield 50 million tons of tailings and 300 tons of waste rock (Holden et al., 2007; Wyatt-Shaw, 1994). In 1992, a consortium of ENGOs sued Golden Sunlight Mines and the Department of State Lands (DSL) for failing to complete a reclamation plan prior to accepting the mine's expansion (Holden et al., 2007; Wyatt-Shaw, 1994), violating Article IX, §2 of the Montana Constitution, which requires "all lands disturbed by the taking of natural resources shall be reclaimed." In rebuttal, the Defendants' claimed the Constitution's reclamation provisions are not self-executing and require specific statutory legislation to be implemented (*NWF et al., v. DSL and Golden Sunlight Mines Inc.* (hereinafter *NWF v. DSL*)). Judge Honzel rejected the Defendants' plea, stating "reclamation is directly tied with a clean and healthful and environment" and ordered for the completion of an adequate reclamation plan which upholds the Constitution's requirements (Wyatt-Shaw, 1994, p. 220).

In response to this ruling, the legislature amended Section 336(7) of the MMRA to exempt open pit mines from reclamation (Holden et al., 2007). When the case reappeared before him, Judge Honzel (*NWF v. DSL*, p. 4, emphasis added) stated:

> The state of Montana not only has its own environmental policy act, but it has specific constitutional guarantees respecting the environment as well…. That the people's right to a clean and healthy environment has been elevated to constitutional status in this state indicates a strong public policy in favor of environmental protection. As this Court has said previously, *these constitutional provisions mean something*.

Honzel consequently declared the amended MMRA section unconstitutional. The DSL completed an EIS, and the mine's expansion continued, however, the Plaintiffs' now claimed the new expansion permit was invalid as the plan to not partially backfill the pit accorded only mediocre environmental reclamation. The DSL refused to enforce a stronger, alternative method of reclamation as it would result in a lower rate of financial return for Golden Sunlight Inc. (Holden et al. 2007; *NWF v. DSL*). Judge Honzel again sided with the ENGOs, stating "there is nothing in the Constitution, or the MMRA, which allows a reclamation decision to be based on a threshold determination of whether a mine operator will make a profit" (Holden et al., 2007, p. 281). The legislature again amended the MMRA, this time prohibiting backfilling, eliminating the method of mine reclamation the ENGOs viewed as most suitable for this case. The amended MMRA section was deemed unconstitutional for violating Article IX, §2 of the Constitution (*NWF v. DSL*).

***MEIC et al. v. DEQ and SPJV* (1999)**

This is the most cited case in Montana's environmental jurisprudence. The McDonald Gold Mine was a Seven-Up Pete Joint Venture (SPJV) project between two American mining companies (Holden et al. 2007; Horwich, 1996). The McDonald Mine was to be built near the Mikehorse Mine Superfund Site, on state and private lands near the headwaters of the famous Blackfoot River, a state gem and recreational hot spot near Lincoln, Montana (Holden et al., 2007). As Wright (1998, p. 118), wrote, "the sick mystery is this: the McDonald Mine would be built within view of its toxic outcome." The gold mine would apply cyanide-heap leaching, a dangerous extractive process utilizing a highly toxic cyanide solution to extract gold (Chambers, 2016b, interview; Holden et al. 2007; Jensen, 2016, interview; Johnson, 2016, interview; Wright, 1998). In addition to its location and proposed gold extraction methods, the controversy surrounding the mine was exacerbated by "a perception among many in Montana that the state government had become 'captured' by the mining industry and that the mining industry was controlling the agencies that were entrusted with its regulation" (Holden et al., 2007, p. 275)

In June 1995, SPJV applied to Montana's Department of Environmental Quality (DEQ) to revise their license to allow for extensive groundwater pumping, which would discharge arsenic-contaminated waters into the Blackfoot and Landers Fork Rivers aquifers (Holden et al., 2007; Horwich, 2001). The legislature controversially amended Section 2(j)

of the *Water Quality Act* (WQA) deeming "certain activities including water well and monitoring well tests 'nonsignificant,'" and allowed to proceed without a degradation review (*MEIC et al., v. DEQ and SPJV*, 1999 (hereinafter *MEIC*), p. 1239). This amendment permitted the DEQ to accept SPJV's license (Carter & Karmen, 2001; Eurick, 1999; Horwich, 1972; Thompson, 2003). In response to these actions, the Plaintiffs' sought a declaratory judgement against the DEQ, stating that both the amended statute, and the permitted discharge of contaminated test waters into high-quality waters, violated Articles II, §3 and IX, §1(1, 3) of the Montana Constitution, as well as state non-degradation policy (MCA §75-5-303). The Plaintiffs, sought an injunction against the DEQ and the suspension of the SPJV license. The District Court held that no constitutional rights had been violated as the Plaintiffs could neither prove that the river's water quality, nor the public's health, would be adversely affected by the proposed groundwater pumping (*MEIC*).

On appeal to the Montana Supreme Court, the Plaintiffs' claimed that the "District Court erred by refusing to apply strict scrutiny absent a demonstration of risk to human or environment health because Montana's Constitution, in particular, Article IX, Section 1, *is intended to prevent pollution before it occurs*" (*MEIC*, p. 1241, emphasis added). Furthermore, SPJV activities should not have been exempt from a non-degradation review because the discharged waters contained carcinogenic components. The Court admitted that because this was the first occasion requiring the interpretation of the Constitution's environmental provisions, they would refer to past court cases discussing Montana's other constitutional provisions, as well as the transcribed delegate debates of the 1972 Constitutional Convention, for guidance (*MEIC*). After an extensive judicial review of the case law and Convention transcripts, Justice Trieweiler delivered the Court's opinion:

> The right to a 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 implicated that right must be *strictly scrutinized* and can only survive scrutiny if the state established 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….the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the Constitution's framers to be interrelated and interdependent and that *state or private action which implicates either,* must be scrutinized

consistently (*MEIC*, p.1246, emphasis added).

Additionally, the Court decided that the Constitution's Preamble must also be read in tandem with the environmental provisions (*MEIC*). The Court unanimously concluded that the District Court erred when claiming that the environmental rights within the Montana Constitution were not implicated by the Defendants' actions to discharge contaminated waters into the state's rivers, that the amendment of the WQA violated Montana's fundamental right to a clean and healthful environment, and Article IX, §1(3), which directs the state to "prevent unreasonable depletion and degradation of natural resources." The District Court's opinion was reversed, and the District Court remanded to strictly scrutinize the amended statutory provision in question, which had administratively relaxed Montana's water quality laws.

By establishing a strong precedent for future litigation, this court decision "represented a profound change in Montana environmental law," influencing Montana's political and legal landscape in the realm of environmental protection (Tuholske, 2015, p. 244). Additionally, the court established a precedent for future interpretations of environmental provisions by determining what constitutes an infringement of the inalienable environmental right and the requirement of strict scrutiny (Czarnezski, 2007; Natelson, 2002). By applying all three methods of interpretation (textual analysis, framers' intent, and prior case law), the *MEIC* decision is considered to be the strongest interpretation of the Constitution's environmental rights to date (Carter & Karmen, 2001; McNeil, 2001; Tuholske, 2011). This interpretation will forever influence agency decisions, create a platform for seeking redress against harmful private or governmental actions, stimulate discourse regarding environmental issues, and impede the legislature from any attempts to bend the laws for developers and polluters (Natelson, 2002; Thompson, 2003; Tuholske, 2015). *MEIC* is likely to be the easiest reading as subsequent cases will be required to develop standards, determine whether the provisions are self-executing, and what constitutes a compelling state interest (Thompson, 2003).

The deregulation of American gold prices in 1971 resulted in an exponential increase in gold mining and the use of sodium cyanide as a reagent to profitably mine low grade gold deposits (Wright, 1998). During the *MEIC* case, a consortium of 16 environmental groups initiated a ballot measure (I-122), which required all point-source

discharges to meet water quality standards prior to discharge into state waters (Appendix E; Brooks, 2012; Thompson, 2003; Wright, 1998). The mining industry successfully poured millions of dollars into an anti I-122 campaign, defeating the measure which would have made the extraction of gold by using cyanide illegal (Brooks, 2012; Jensen, 2016, interview; Johnson, 2016, interview; Holden et al., 2007). The civil society's second attempt to stop the McDonald Mine and cyanide-use, was approved by voters in 1998. I-137 banned cyanide-heap leaching, the only feasible method of mining most gold deposits in Montana (Carter & Karmen, 2001; Jensen, 2016, interview; Johnstone, 2016, interview; Thompson, 2003). Seven Up Pete Joint Venture unsuccessfully filed suit to overturn I-137, later challenging the constitutionality of the initiative in *SPJV v. State* (2005) (Carter & Karmen, 2001). Jim Jensen of the MEIC (2016, interview) stated:

> [I-137] was more directly limited and tailored to the real concerns…. the risk to our waters from cyanide heap leaching…. I think the industry would look back and say that they would have been better off if they had just allowed themselves to be regulated, because now they're banned!

In 2005, an initiative seeking to rescind the cyanide ban (I-147) was rejected by Montanans (Appendix E; Jensen, 2016, interview; Johnson, 2016, interview; Johnstone, 2016, interview).

***Cape-France Enterprises v. Estate of Peed* (2001)**

The Defendants intended to build a motel on a five-acre tract of land owned by the Plaintiff (*Cape-France Enterprises v. Estate of Peed*, 2001, hereinafter *Cape-France*). After the parties signed a land-sale agreement, the DEQ informed the landowner, Cape-France, of the presence of an existing pollution plume within the area's groundwater system (Naber, 2003; Wilson, 2004). Groundwater wells would need to be drilled and tested for contaminants, with any signs of pollution requiring extensive treatment prior to subdivision approval. Furthermore, if testing activities resulted in the propagation of the pollutants, Cape-France would be liable under several state and federal environmental laws and responsible for all clean-up costs. The Plaintiff brought proceedings against the Defendants, demanding the land-sale agreement be rescinded due to the potential liabilities involved and the District Court ruled in favor of the Plaintiff (Naber, 2003).

Because the pollutant in question, perchloroethylene, is a dangerous substance that

disrupts human health and results in adverse environmental effects, the risks of drilling the wells could simultaneously financially burden the Plaintiff and expose the public and surrounding biota to avoidable harm. On appeal the Defendants argued there was an absence of proof that drilling would reveal contamination and result in drastic expenses to the Plaintiff (May & Romanowicz, 2011; Naber, 2003; Wilson, 2004). The Supreme Court extended the ruling in *MEIC*, stating that "Montana's Constitution, Article II, Section 3, guarantees all persons in this state the right to a clean and healthful environment. This guarantee is a fundamental right that may be infringed only by demonstrating a compelling state interest" (*Cape-France*, p. 1016). Moreover, the court held that "while MEIC involved state action, we, nonetheless recognize that the test of Article IX, §1 applies the protections and mandates of this provision to *private action*-and thus to *private parties*- as well" (*Cape-France*, p.1017, emphasis added). As groundwater drilling had the potential to infringe the constitutional right to a clean and healthful environment, the Court rescinded the contract (May & Romanowicz, 2011; Naber, 2003; Thompson, 2003; Wilson, 2004).

***State of Montana v. Boyer* (2002)**

When inspecting the Defendant's boat for an illegal fish catch, a government official found the Defendant possessed fish in excess of the legal statutory limit. The District Court denied the Defendant's motion to suppress evidence (Thompson, 2003). On appeal, the Defendant argued the government official illegally searched the boat without just cause. Referencing Article IX, §1(1) of the Constitution, Justice Regnier defended the government's actions in searching the boat, stating that the Legislature, in acting on its constitutional duties, employs game wardens to enforce the constitutional and statutory laws of Montana "to assure that our wild places and the creatures that inhabit them are preserved for future generations" (*State v. Boyer*, p. 776). Furthermore, by balancing environmental and property rights, the Court upheld the District Court's ruling that the Defendant's reasonable expectation of privacy did not apply to game fish as "he or she has a constitutional duty to maintain and improve a clean and healthful environment" (p. 779).

***Hagener v. Wallace* (2002)**

The Defendants' ranch, a licensed alternative game farm, had recently been influenced by citizen initiative I-143 prohibiting the shooting of alternative livestock for profit. In response to this prohibition, the Defendants planned to transfer 500 elk to the Crow Indian

Tribe to release into the wild (*Hagener v. Wallace*, 2002). The Defendants contacted the Plaintiff, Jeff Hagener, the director of Montana's Department of Fish, Wildlife and Parks (FWP) to inquire about any conditions that such a transfer entailed. Although Hagener advised against the transfer as it would violate two Montana statutes, the Defendants nevertheless transferred 68 elk from their facility to the Crow Indian Reservation, accepted payment from the Tribe for the elk, and released the elk into the wild.

The First Judicial District Court permanently enjoined the continued transfer of the game elk (Echeverria, 2015). On appeal, the Defendants argued that blocking the transfer of elk to a registered Tribe violated the federal Commerce Clause (*Hagener v.Wallace,* 2002). The Defendants argued the elk had been tested by a veterinarian who concluded that the herd were healthy, genetically pure, and posed no risk to humans or wildlife. The Defendants also claimed the Court erred in granting FWP jurisdiction over the case, that the Department of Livestock (DOL), which permitted the transfer, held jurisdiction. Justice Trieweiler upheld the constitutionality of the District Court's action, and by referring to *MEIC,* stated that the statutes at issue in this case imply that "being proactive rather than reactive is necessary to ensure that future generations enjoy both a healthy environment and the wildlife it supports" (*Hagener v. Wallace*, p. 854). Concurring, and referencing the recent ruling in *State v. Boyer* (2002*),* Justice Nelson (p. 857) stated:

> The statutes governing FWP's jurisdiction and authority to ensure the health, safety and integrity of Montana's native wildlife population are ultimately grounded in the State's obligation under Article IX, Section 1, of Montana's Constitution to 'maintain and improve,' for the benefit of 'present and future generations,' Montana's Article II, Section 3, fundamental constitutional right to a 'clean and healthful environment.'

Although the Court ruled in favor of the Plaintiff, in closing the Court held that the DOL erred by failing to conduct an EIS under MEPA, and that both FWP and DOL should have considered their constitutional environmental obligations in this situation.

***State ex rel. DEQ v. BNSF Railway Co.* (2010)**

The Montana DEQ sued Burlington Northern Santa Fe Railway Company (BNSF) for failing to comply with Montana's CECRA at three of its former industrial sites designated as Superfund sites (*State ex rel. DEQ v. BNSF*, 2010). Under CECRA, The DEQ obtained two abatement orders requiring BNSF to alleviate any current and impending threats to the

citizens and the environment. BNSF appealed to the Supreme Court, claiming that the District Court erred by allowing the DEQ to obtain judicial and administrative remedies under CECRA, and by concluding that BNSF was liable for contamination as an "arranger" for treatment and disposal under the statute.

Although the Supreme Court initially referred to federal case law as "arranger" is not defined under CECRA, upon reviewing the Montana Constitution the court held:

> Montana's unique governing body of laws reflects the value that Montanans place on protection, promotion, and restoration of the environment. The Montana Constitution provides that all persons have a 'right to a clean and healthful environment'.... the right to a clean and healthful environment constitutes a fundamental right.

In citing Montana's constitutional right to a clean and healthful environment the Court decided it was more appropriate to apply the state's CECRA to state processes than to interpret arranger liability by referring to federal Superfund laws (Echeverria, 2015).

8.3 Interpretation of Montana's Environmental Rights

8.3.1 Preamble

A Preamble presents the reader with a glimpse of a society's most cherished values and aspirations (Fritz, 2004). Montana's Preamble is an extraordinary depiction of the citizens' appreciation for Montana's environment and natural resources (Echeverria, 2015; Ellingson et al., 2015a; Ellingson, 2016, interview; Jensen, 2016, interview). The Preamble is "chock-full of hope and pride and love of land" and acts as "a sort of moral and spiritual mooring for the Constitution," and the rugged individuals who call Montana home (Racicot, 2001, p.xv). By alluding to the citizens' relationship with their surrounding environment, the Preamble acknowledges Montanans' placed-based identity. Preamble co-author, Mae Nan Ellingson (2016, interview) discussed how the Constitution reveals Montanans' dedication to place:

> Constitutions are influenced by place and geographical location. Our Preamble really represents this and says, 'we are influenced in this Constitution by the beauty of this state,' and I think that the strong environmental protection that is in both the Natural Resources Article and in the Bill of Rights section is greatly influenced by Montana's physical environment.

It is interesting to note that the Natural Resources and Agriculture Committee stated that the Preamble represents the "highest ideals of improving the quality of our lives in a *free society*" (Trans., Vol. II, p. 620, emphasis added). By expressing Montanans' wishes to live in a "free society," the Committee may potentially be referring to Montana's past as a state politically and socially controlled by the tenacious mining industry. The Preamble is not merely a description of the physical and societal characteristics of Montana, but by desiring a free, libertarian future can be interpreted as containing a nod to the state's past.

Referring to the 1972 ConCon transcripts, in *MEIC* (p.1249) the court held that:

> [T]o give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together, and consideration given to all of the provisions of Article IX, Section 1 *as well as the Preamble* to the Montana Constitution.

The court's interpretation of the Preamble, the introduction to the repository of Montanan values, as a bulwark for the inalienable right to a clean and healthful environment and the Constitution's section on environmental protection and improvement suggests that Montana's Constitution is written with an underlying environmental theme. By connecting the Preamble to Article II, §3, the court implies that a clean and healthful environment is essential for assuring all inalienable rights listed. Schmidt & Thompson (1990, p. 412) support this notion and claim Montana's "Preamble demonstrates the preeminent concern for the environment, as represented by statements concerning the quality of life" are referenced alongside citizen desires for liberty and equal opportunity. By embedding environmental values into the Preamble, Montanans recognize they are members of what Leopold (1949, p. 204) referred to as the "land-community," that a place's physical landscape, and its biotic and abiotic features, contribute to and are influenced by the functioning of Montanan society and all its components.

8.3.2 Article II, § 3: Inalienable Rights

The rights and liberties declared in a Constitution's Bill of Rights are inherent, "the best of what society has determined, through centuries of struggle and refinement, as essential to the well-being of human kind" (Elison & Snyder, 2001, p. 19-20). Environmental rights have evolved from the basic principles of the *Magna Carta*, which by legalizing the rights of shore access for fishing and navigation, was the first attempt at entrenching natural,

environmental laws (Bourguignon, 2016 ; Howard, 1972). Certain legal theorists believe inalienable rights and natural rights are one in the same, universal laws which do not require codification to prove their existence, to litigate or be enforced (Brooks, 1992). The deniers argue that the notion of natural rights is itself contradictory; if such rights existed, why codify them at all? Bourguignon (2016, p. 10) argues Montana's ConCon delegates "viewed inalienable rights as universal, natural rights that were merely being recognized (not created) in the constitutional text." Regardless of the hypotheses surrounding the existence of universal laws, and whether the right to a clean and healthful environment belongs to this category, one thing remains certain: by constitutionalizing a right, natural or otherwise, an individual is granted peremptory protection of that right, and the ability to litigate and seek remedies if that right is violated (Boyd, 2012b). As "litigation is a means of access for the ordinary citizen to the process of governmental decision making," the enumeration of a right, such as the right to a clean and healthful environment, is necessary for citizens to protect their health and sustain their environments in a court of law (Sax, 1970, p. 57).

Montana is the only state which declares the right to a clean and healthful environmental as an inalienable right (Thompson, 1996; Thompson, 2003). In interpreting the text of Article II, §3, the first sentence "all persons are born free and have inalienable rights," is a general statement, which arguably acknowledges the existence of natural, universal laws. The verb "include" in the following sentence admits the rights that follow is "not comprehensive but merely several specific examples of inalienable rights" most valued by Montanans (Bourguignon, 2016, p. 14). Montana's traditionally positivist court will likely only refer to rights enumerated.

The Constitutional Convention Commission defined an inalienable right as "held to be prior to government and not subject to any governmental power" (Applegate, 1972, p. 80). Because inalienable rights conventionally prohibit the exercise of police power by protecting against state action, they are usually elevated and enforced to a higher standing than other, non-inalienable rights, which clearly dictate government duties and authorities (Johnstone, 2016, interview; Natelson, 2002). Article II, §3 demands equal protection by declaring that *all persons* have certain inalienable rights, implicitly authorizing the state government to ensure that such rights are guaranteed to each citizen (Elison & Snyder,

2001; Tarr, 1992). The right to a clean and healthful environment, claim Elison and Snyder (2001, p. 31), is the only right *guaranteed* in Article II, §3, "all other phrases in this section alluding to 'inalienable rights' are temporalizing; that is, the right to pursue, to enjoy and to seek." Arguably, the remaining inalienable rights listed are based on an individual's autonomy, with each person responsible to fulfill such rights relative to their abilities. The delegates felt that stating "all persons recognize corresponding responsibilities" does "not infringe or impair the rights granted in the declaration of rights" but simply declares a "responsibility in their exercise" (Trans., Vol. V., p. 1637). By acknowledging these rights, citizens must accept that while independently pursuing the right to a clean and healthful environment, they are responsible to ensure their actions do not infringe the rights of other individuals (Schmidt & Thompson, 1990).

A right is often characterized and distinguished as either a positive right or a negative right. Positive rights encourage government intervention, direct governments "to give the people something they do not already have" and can be referred to as "entitlement rights" such as welfare or healthcare (Wilson, 2004, p. 635). By contrast, most rights included in the United States Constitution are negative rights, that protect individuals *from* government, such as governments taking away something which already belongs to the individual (Wilson, 2004; Zackin, 2013). Montana's Constitution is ambiguous in that it does not define the scope of intervention required in ensuring that the inalienable right to a clean and healthful environment is guaranteed (Zackin, 2013). Ambiguity is increased with the placement of the right in the Declaration of Rights, which implies the delegates deemed the right as essential to the well-being of Montanans. Furthermore, by designating the right as an inalienable right, the framers intended it to be treated as more than just a positive rule of law and not something restricted to purely texutal interpretation (Bourguignon, 2016). The sentence ending "in all lawful ways," further complicates interpretation, as it implies all rights are subject to government intervention as these rights must be pursued within the scope of the law (Bourguignon, 2016; Elison & Snyder, 2001). Although environmental rights are mostly considered to be positive rights, it can be argued that Montana's environmental rights encompass both positive and negative qualities (Boyd, 2012a; Wilson, 2004)

When entrenched into Montana's Constitution, the right to a clean and healthful environment became an inherent right, "a precondition to the enjoyment of some internationally guaranteed rights, especially the rights to life, health, private and home life, and cultural rights" (Shelton, 2008, p. 42). In addition to the text, history, and the framers' intent, a provision's placement within the Constitution may influence how it is interpreted and the weight attributed to it when balanced against other rights. Some interpreters believe that by placing the inalienable right to a healthful environment ahead of rights such as "acquiring, possessing and protecting property," Montana's Constitution prioritizes environmental sustenance ahead of other inalienable rights (Mudd, 2011). In fact, the Montana Supreme Court in *State v. Bernhard* (1977) and *State ex rel. Dept. of Health v. Green* (1987) weighted aesthetic, environmental values higher than property rights (Mudd, 2011). Delegates Campbell, Ellingson, McNeil, and Reichert (2016, interviews) stated that the right to a clean and healthful environment was not listed first with the intention of being interpreted as more important than the subsequent inalienable rights but meant to be read in accordance with all other inalienable rights listed. For instance, Kotze (2015, p. 198) claims that the fulfilment of all human aspirations depends on the quality of the environment, that "a sound environment that is conclusive to health and well-being is crucial for fostering conditions where these values could be realized, enhanced and protected." University of Montana professor of constitutional law, Anthony Johnstone (2016, interview), discussed the ordering of the inalienable rights from a legal perspective:

> The structure of that section builds from the very basic necessities of life to higher values such as liberty and property, and then to even higher value such as health and happiness…. If you didn't have a clean and healthful environment we wouldn't have people, we wouldn't live. That allows us to pursue life's basic necessities, which comes second, once we are able to breathe the air and drink the water and have basic food and shelter, then we can start to enjoy life and acquire property, and then once we have basic life and liberty and property in this environment, then we can start to seek safety, health and happiness.

Because several court cases (*Cape-Frances; DEQ v. BNSF; Hagener v. Wallace; MEIC; Sunburst v. Texaco)* have decided the right to be a fundamental right, "without which other constitutionally guaranteed rights would have little meaning" (*MEIC*, p. 1245), it can be concluded that the placement of the right to a clean and healthful environment

within the Constitution's Declaration of Rights provides Montanans with an enforceable, justiciable means of seeking remedies and upholding all environmental values.

8.3.3 Article IX: Environment and Natural Resources

There are three types of constitutional provisions: explicit, detailed rules which are rarely challenged; broad public policy statements; and general principles (Wyatt-Shaw, 1994). Nearly half of the state constitutions in the United States have some form of a policy statement protecting the state's natural resources or environment, with fewer states entrenching environmental rights explicitly or authorizing legislative duties and citizen suits (Howard, 1972; May & Romanowicz, 2011; Shelton, 2008; Tuholske, 2015). As state constitutions usually begin with a Preamble, followed by explicit or implicit rights, and end with policy provisions, by this logic Montana's Article IX falls into the category of policy statements (Tarr, 1992). Montana's environmental provisions can be further narrowed into two broad groups: those overseeing how particular environmental issues should be managed, and those addressing environmental quality standards (Elison & Snyder, 2001; Horwich, 1996). For instance, Article IX contains directives for the state to create adequate legislation for land degradation, and by imposing a duty on the state and all people, ensures the environment is sustained and managed by all (Tarr, 1992).

The most important environmental guarantees in Article IX are all contained in §1, protection and improvement (Kemmis, 1978). Article IX, §1 can be viewed as a combination of the Preamble's "desire to improve the quality of life" and the Declaration of Rights' inalienable environmental rights (Elison & Snyder, 2001). Montana is one of three states recognizing the environmental interests of future generations, a feature contributing to the Constitution's amenability, and due to Article IX, §1(1), "Montana is one of only two states to impose a duty on each and every citizen to protect the environment" (Thompson, 2003, p. 166). Regarding Subsection 3, the extent and type of "adequate remedies" for environmental degradation are undefined within the Constitution as the delegates chose to instead grant the Legislature the ability to decide remedies relative to the activity or scope of harm inflicted. Delegates Campbell and Ellingson claimed that mandating the Legislature to determine remedies was the delegates' way of providing citizens with standing to sue when environmental rights were infringed (Ellingson et al., 2015a). Furthermore, because no modifying adjective precedes the word "degradation" in

subsection (3), degradation of *any* kind is subject to the law and the duty of the Legislature. In this case, a defining adjective would have prevented degradation from being defined as absolute, limiting the Legislature from providing adequate remedies to certain degradation types, and limiting the courts in their enforcement of the law (Trans, Vol. IV, p. 1201; Elison & Snyder, 2001). This statement of environmental protection is thus a legislative mandate, and not a mere statement of unenforceable environmental policy (Zackin, 2013).

Legal scholars and jurists have largely refrained from discussing Montana's sections on reclamation and water rights, focusing instead on interpreting Article II, §3 and Article IX, §1 of the Constitution. Article IX, § 2 on Reclamation "points to the checkered history of mining in Montana and some of the problems caused by it," also acting as a precautionary response to the increase in the strip mining of coal in eastern Montana during the writing of the Constitution (Schmidt & Thompson, 1990, p. 413). Recall that during the ConCon, a proposed amendment called for lands to be reclaimed to a beneficial and productive use. Derf Johnson (2016, interview), member and resident lawyer for the MEIC, argued that the reclamation section would have been stronger if that amendment had passed and the extent of reclamation defined. Others argue that the absence of a definition prohibits restrictive interpretation (Elison & Snyder, 2001; McNeil, 2016, interview). In *Butte Local Gov. v. State of Montana* (1989), the constitutionality of the Resource Indemnity Trust was questioned, and an interpretation of § 2(1) avoided. In *NWF v. DSL*, the court used the separation of powers doctrine to strike down a legislative act as unconstitutional when the legislature amended a statute exempting a type of mining from reclamation and non-degradation review (Horwich, 1996). These are the only known court cases to date citing Montana's reclamation section, however, reclamation was not interpreted or enforced by the courts as the Constitution delegates that duty to the Legislature. Judicial interpretation of the Constitution's reclamation section will be determined by future cases.

"The water-rights section did not achieve a clear balance on private property rights and public values," it focuses less on water quality, and more on traditional values of ownership and protection of the state's waters from downstream appropriation, the protection of pre-existing and future water rights, and public use (Schmidt & Thompson, 1990, p. 421). Article IX, §3(1) is intended to maintain vested, existing rights (a nod to the laws already in place), §3(2) is intended for property owners, §3(3) ensures the state owns

the waters for the people, and §3(4) establishes a centralized system of water records (Schmidt & Thompson, 1990; Shovers, 2005; Snyder & Ellingson, 2011; Trans., Vol. V). Although only one case (discussed shortly) has explicitly interpreted Montana's water rights provisions, Subsection 3 has been cited in *Montana Coalition for Stream Access v. Curran* (1984) and *Montana Coalition for Stream Access v. Hildreth* (1984), where the courts held that private ownership of stream beds is irrelevant as the state owns the waters in trust for access and use by the citizens (Goetz, 1990).

Both drafted in the early 1970s, the Constitutions of Montana and Illinois mandate that citizens are duty bound to protect the environment, however, constitutional interpretation by their state courts has taken diverging paths (Tuholske, 2015). Although Montana's Constitution is not explicit on whether this duty extends beyond the state and citizens, Montana courts in *MEIC* and *Cape-France* have gone so far as to apply environmental duties to private parties (Cusack, 1993; May & Romanowicz, 2011; Natelson, 2002; Thompson, 2003; Tuholske, 2015; Wilson, 2004). This interpretation was intended by the delegates: "Subsection 1 requires the state and each person, which of course includes corporations and all legal entities as well as individuals, to maintain and enhance the Montana environment for present and future generations" (Trans., Vol. II., p. 554). In contrast to this, the Illinois courts have stripped the environmental provisions of their substantive effect, deciding the rights are not fundamental, and precluding their provisions from regulating private actions; Montana's provisions have been interpreted on a much stricter basis, and hold more teeth in a court of law (Cusack, 1993; Natelson, 2002; Thompson, 2003; Tuholske, 2015; Wilson, 2004). Although the courts have interpreted the duties as extending to private parties, in *Sunburst v. Texaco* (2007) and *Shammel v. Canyon Resources Corp.* (2007), the court held that Montana's constitutional environmental rights should not be applied in tort cases between private parties, as monetary damages could be sought through common or statutory laws (Griffing, 2010; Nelson, 2008; Tuholske, 2011).

8.4 The Doctrine of Self-Execution

Tobias & McLean (1980) define a self-executing environmental provision as being "immediately effective without the necessity of ancillary legislation," it declares a rule by which a "right given may be enjoyed or a duty imposed may be enforced" (p. 255). In other words, self-executing rights are irrevocable, permanent, and absolute, and offer the strictest

amount of legal protection when violated. When interpreted by a court as self-executing, an individual does not need to refer to legislation to have standing to litigate, and the provision automatically has substantive and enforceable meaning (May & Romanowicz, 2011; McLaren, 1990; Tobias & McLean, 1980; Wyatt-Shaw, 1994). If a right is deemed self-executing "you can go to court and ask it to protect you from the government, without any other action, meaning that it's primarily a legal right that is enforceable by individuals against their government" (Johnstone, 2016, interview). By merely setting forth principles which have no impact until the legislature enacts supplemental legislation, a constitutional provision is not self-executing, and has substantially less power (Johnstone, 2016, interview; McLaren, 1990). "Rights contained in provisions which are not self-executing lie dormant until a statute implements the right," and only have "moral force" until the legislature acts (Wyatt-Shaw, 1994, p. 222).

Horwich (1996, p. 339) argues the doctrine of self-execution is "logically inconsistent." If deemed not to be self-executing, a right should not 'lie dormant' until that legislature acts, such would defeat the purpose of law and the purpose of a constitution (Horwich, 1996; Wyatt-Shaw, 1994). Categorizing a constitutional right, or provision, as not self-executing disregards the popular will of the people who ratified the constitution with the intent of securing the protections entrenched (Horwich, 1996; McLaren, 1990; Wyatt-Shaw,1994). Self-execution does not serve the public interest, "when an environmental right is part of a constitution, rather than statutory or common law, judicial balancing should weigh heavily in protecting that right," and focus less on whether it meets certain criteria (McLaren, 1990, p. 137). Although these arguments introduce valid points, because the doctrine of self-execution plays such an integral role in discerning the strength and enforceability of a constitutional right, it warrants discussion. As Montana courts have not yet determined whether Montana's environmental rights are self-executing, to fully interpret Montana's environmental rights and hypothesize on what the future holds for Montana's environmental provisions, this section relies on the legal literature. Three criteria must be met for a right to be deemed self-executing: it must be a limitation on government, it must provide a standard for judicial review, and it must not depend on statutory legislation to be effective (Tobias & McLean, 1980).

8.4.1 Limitation on Government

Self-execution of a right may be gauged with the doctrinal approach, which categorizes provisions based on the extent to which they direct legislative action (Table 8.2). Only mandatory provisions can be considered for self-execution, after which the court decides if they are prohibitory or non-prohibitory. Although both mandatory-prohibitory, and mandatory non-prohibitory provisions grant rights, courts often avoid interpreting and enforcing provisions which do not specifically prohibit certain legislative acts for fear of disrespecting the separation of powers (Lopach, 1987; Wyatt-Shaw, 1994). Provisions with mandatory-prohibitory legislative restrictions are most likely to be considered as self-executing and any impugned legislation struck down as unconstitutional (Wyatt-Shaw, 1994).

Table 8. 2 Doctrinal Approach to Self-Execution

Provision Type	Extent of Legislative Direction
Non-mandatory	Legislature is not directed, a right is not granted, duties and obligations are not imposed
Mandatory	Legislature is directed, a right is granted, duties and obligations are imposed
Mandatory-Prohibitory	Certain legislative acts are prohibited, and limits are stated
Mandatory Non-Prohibitory	Does not specify if certain legislative acts are prohibited and no legislative limitations are stated

Montana's constitutional provisions are mandatory because the right to a healthful environment is guaranteed in Article II, and a legislative duty declared in Article IX. Controversy arises in questioning Article IX's prohibitory or non-prohibitory status, as the scope of legislative authority in carrying out the duties is debated. The inalienable right to a clean and healthful environment in Article II, §3 is considered to be self-executing due to its placement within the Declaration of Rights (Carter & Karmen, 2001; Johnstone, 2016, interview). The delegates considered Article II as mandatory-prohibitory, and intended for the entirety of Article II to be self-executing:

> Constitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights. If the language appears

> to be prohibitory and mandatory …. the courts interpreting the particular section are bound by that particular presumption and they must assume, in that situation, that it is self-executing (Trans, Vol. V, p. 1644).

Although the first decision was withdrawn upon rehearing, the court in *Montana Wildlife Association v. Board of Health* (1976) was the first to interpret Montana's constitutional environmental provisions. The court acknowledged that Article IX, §1 required legislative action (Kemmis, 1978). Many argue that by requiring legislative action to ensure the environment is improved and maintained, Article IX, §1 falls into the category of a non-self-executing provision (Johnstone, 2016, interview; Zackin, 2013). Delegate Cross (Trans., Vol. V, p. 1251, emphasis added) expressed concerns about the courts interpreting Subsections 2 and 3 as solely entrusting the enforcement of the environment to the Legislature, and implied that such an interpretation would incorrectly strip the environmental provisions of their self-executing power, and create a system where litigation was groundless and remedies not pursuable:

> The Legislature does have inherent power to act regarding environmental matters…. [but] there is no way to force such a direction, and no one, including the courts, can require the Legislature to act in any particular way with regard to the environment…. *The danger in [sub]section 2 is that it can be construed to exclusively delegate such authority to the Legislature*, and this would even exclude the courts. [Sub]section 3 also gives further credence to the position that matters relating to the environment are exclusively within the control of the Legislature. *If there is such an interpretation and if the Legislature did not act, there would be no remedy*.

The delegates specifically included legislative directives in Subsections 2 and 3, not as a means of granting the Legislature absolute, unfettered environmental control, but with the intent to grant citizens and courts with the chance to litigate in case the legislature did not fulfil its duties to maintain and improve a clean and healthful environment. As the Convention transcripts state, "in doing this we direct [the Legislature] to [implement subsection 1] and give anybody that wants to take any action more force for the action," prohibiting the Legislature from shirking its duties (p. 1252). Policy provisions can still be self-executing if they explicitly or implicitly affirm that action can be taken against governments who forsake constitutional responsibilities (Tarr, 1992; Zackin, 2013). As argued by Cooley (1927, p. 170), "a constitutional provision does not lose its self-executing

quality merely because it provides that the Legislature shall by appropriate legislation provide for carrying it into effect."

8.4.2 Standard for Judicial Review

Courts often refrain from interpreting constitutional guarantees because they do not want to challenge a statute's constitutionality and question the abilities of the legislative and executive branches in maintaining the democratic process (Lopach, 1987; Kemmis, 1978; Tuholske, 2011). Additionally, compared to other, more traditional rights, there is no body of robust environmental jurisprudence and it is often not considered a prerequisite for a stable democracy (Bourguignon, 2016; Thompson, 2003; Tuholske, 2011; Wyatt-Shaw,1994). For instance, Tuholske (2015, p. 250) claims "the strongest statements of constitutional environmental rights have come from cases with a strong factual predicate," cases where "the public interest, rather than someone's private property, is at issue," where human health and well-being are at risk. Judicial review occurs only under rare circumstances as it "should be exercised only when the constitution is clearly violated" (Taylor, 2004, p. 367). Due to the difficulties of judicial review, any right which implies or contains explicit standards for the courts is considered self-executing (McLaren, 1990; Tobias & McLean, 1980).

Courts eventually create a standard for each constitutional right, first deciding what constitutes an abridgement of that right, then (if necessary), "weighing the severity of the infringement against other societal interests" (Tuholske, 2011, p. 242). Balancing occurs when two or more constitutional rights are at risk of conflicting. To ensure both rights achieve equal consideration the court balances the interests protected by both rights (Tuholske, 2011). A right's "weight" is measured by its capacity to "outcompete" other constitutional rights and principles of social policy. Courts however, often choose to settle for a "non-balancing standard," refusing to balance certain rights against social circumstances or other prized rights (Boyd, 2012b; Howard, 1972; Kemmis, 1978; Tarr, 1992). In *State v. Boyer* (2002), Justice Trieweiler argued that the court erred in balancing environmental rights with private property rights as there was no factual basis to do so and in the future Montana courts should balance such precious rights only in special cases after careful consideration, so as not to "denigrate respect for this court's future enforcement of the vital protection provided in our Constitution by Article IX" (p. 790). By avoiding

balancing, Montana courts must apply alternative measures to decide a case and each environmental statement in the Constitution must eventually be defined and boundaries for violations established. For instance, both "clean" and "healthful" must be defined, and the type and amount of proof required to depict an infringement determined. Under a non-balancing standard, once defined "any impairment of the cleanliness or healthfulness of a person's environment would be an infringement of his rights" (Kemmis, 1978, p. 236).

By requiring a *clean* and *healthful* environment both in Article IX and as an inalienable right, the Constitution mandates that action must be taken when these standards are violated (Campbell, 2016, interview; Cross, 1990; Thompson, 2003). During the ConCon, the delegates added defining adjectives, such as clean and healthful, to aid in judicial review: "what we felt we have done in our wording, is to make sure that there is no judicial interpretation that can come along that can say that the environment, as we have it at the present time.…can go downhill from time to time" (Trans., Vol. V, p. 1248). Such language acts to encourage judicial review, thus providing the courts with a judicial standard, and meeting one of the criteria of self-execution (Kemmis, 1978; May & Romanowicz, 2011; Tobias & McLean, 1980). By declaring that the environment should not only be maintained, but also improved, Article IX, §1(1) "demands more than the mere preservation of the current level of environmental quality," it sets a minimum standard and requires review (Thompson, 2003, p. 166). Article IX, §1(3) orders the prevention of "unreasonable depletion and degradation of natural resources," thereby establishing a broad standard for protecting *all* natural resources, regardless of their necessity towards sustaining human life, and requiring adequate remedies for any respective violations. By stating that "all lands disturbed by the taking of natural resources shall be reclaimed" Article IX, §2(1) dictates that lands disturbed cannot be left as is and implies the need for judicial review when the Legislature fails to "provide effective requirements and standards for the reclamation of lands disturbed." Although the Legislature is tasked with setting the reclamation standards, the court is tasked with ensuring the standards are reviewed and upheld during litigation.

The courts have created their own standards for reviewing Montana's environmental guarantees, by declaring that Article II, §3 and Article IX, be interpreted simultaneously under strict scrutiny, with any violation of the environmental rights and

provisions requiring a compelling state interest for justification (*Cape-France*, *MEIC*). The Montana Supreme Court has a three-tier approach to strict scrutiny:

> First, if any right is included in the Declaration of Rights in the Montana Constitution, a law infringing that right will be reviewed under *strict* scrutiny. If a right is included in any other part of the Montana Constitution, the law infringing that right will be reviewed under *intermediate* scrutiny. If neither strict scrutiny nor intermediate scrutiny applies, courts will review the law under *rational basis* review, the most deferential standard (Bourguignon, 2016, p. 15).

Strict scrutiny has traditionally been reserved for the Declaration of Rights and government actions which violate other fundamental rights. For a provision to survive strict scrutiny, the state or private entity must establish a compelling state interest, prove the measure chosen was the least onerous option, and show how the action taken accomplished the identified state interest (Bourguignon, 2016; Elison & Snyder, 2001; Natelson, 2002; *MEIC*). A right declared to be analyzed under strict scrutiny often renders a competing law unconstitutional: "strict in scrutiny, fatal in fact" (Tuholske, 2011, p. 241). If environmental rights were decided under traditional judicial review and not under auspices of strict scrutiny, an individual or environmental group suing for environmental violations would likely lose (Czarnezski, 2007; Jensen, 2016, interview; Johnson, 2016, interview; Thompson, 2003). If not for bootstrapping Article IX to Article II, §3 in *MEIC*, the environmental provisions outlined in Article IX would have been reviewed under intermediate scrutiny at the most. Because of the *MEIC* ruling, Montana's environmental rights and provisions stand a chance in court. Although the courts in *MEIC* and *Cape-France* decided that a claimant need only prove that state action is anticipated to cause harm, as regulation costs and feasibility are unforeseeable, with a significant level of uncertainty surrounding how activities or certain substances can affect the environment, Plaintiffs will likely struggle in proving that a state entity may potentially violate Montana's environmental rights (Thompson, 2003)

In Montana and elsewhere, constitutional interpretation is inconsistent, changing on average every 25 years in response to court membership turnover, a trend displayed in Table 8.1. The judiciary is elected by the citizens, with jurist philosophies influencing the nature of a court's decisions (Elison & Snyder, 2001; Johnstone, 2015). A philosophically

divided court may compromise interpretational integrity, with interpretation also succumbing to the biases of jurists if a judge decides a case based on personal or prior case experience. The strength of certain constitutional rights may skew as court majorities shift, the extent of review also depending on a court's case load (Tuholske, 2015). Despite the successes achieved by Montana courts in the late 1990s and early 2000s, Echeverria (2015, p. 376) claims that "in the last several years, environmental advocates have suffered several important losses in the [Montana] Supreme Court, suggesting a shift in attitudes on the Court toward environmental cases." In *Clark Fork Coalition v. Montana DEQ*, (2008), several environmental organizations sued the DEQ for permitting a silver mining company to discharge contaminated waters into the Clark Fork River, claiming the department violated the WQA and the Montana Constitution by exposing Montanans to the perpetual environmental and financial consequences of acid mine drainage (*Clark Fork Coalition v. DEQ*, 2008). The Plaintiffs' cited the anticipatory language in *MEIC* and urged the courts to apply strict scrutiny (Echeverria, 2015; Tuholske, 2011). Although the Montana Supreme Court held that the DEQ had capriciously issued a permit before comprehensively reviewing all anticipatory environmental consequences, the court refused to apply strict scrutiny on the grounds that agencies are capable of interpreting their own rules (Echeverria, 2015; Tuholske, 2011) A deferential standard of review usually only occurs in the absence of constitutional protections, by refusing to try the case with strict scrutiny, the court disregarded the precedent set by previous courts (Echeverria, 2015).

A similar ruling was reached in *NPRC v. Montana Board of Health and Land Commissioners* (2012) when several environmental groups sued the state for exempting the leasing of half a billion tons of coal on state lands from environmental review under MEPA (Echeverria, 2015; Tuholske, 2015). The Plaintiffs, referencing *MEIC*, argued such actions infringed Montanans' fundamental right to a clean and healthful environment by ignoring the future side-effects of coal burning (namely climate change) and that the state must provide compelling state interest before proceeding. The Montana Supreme Court held that rights were not infringed as an environmental review would nevertheless occur before the project commenced, and that MEPA is merely a procedural statement. All statutes under discussion were reviewed under a rational standard (Echeverria, 2015; Tuholske, 2015). In this case the court failed to recognize that "once the state enters into

leasing arrangements and makes budget plans based on the anticipated receipt of millions of dollars in coal royalties, state regulators will be hard pressed to impose meaningful environmental limits on future coal operations"(Echeverria, 2015, p.377) The future enforceability of Montana's constitutional environmental provisions depends on the membership of the courts, and the involvement of civil society in battling for both the protection of the environment and the citizen's environmental rights.

8.4.3 Effective Without Supplementary Legislation

Although several states have either explicitly or implicitly entrenched environmental rights, "Montana is the only state to recognize that right as fundamental, on par with other fundamental rights such as freedom of speech" (Tuholske, 2011, p. 245). In *State ex rel. Palagi v. Regan* (1942) the Montana Supreme court stated that "'a declaration of a fundamental right may be the equivalent of a prohibition against legislation impairing the right'" (Tobias & McLean, 1980, p.256). By this logic, regardless of whether a constitution contains prohibitory or non-prohibitory legislative directives, if a right is deemed fundamental, that right inherits self-executing status.

Standing alone, Article IX, §1 is silent regarding limits on legislative authority, and does not provide the citizens with any environmental protections absent legislative action or the support of other constitutional subsections and provisions. Because Article IX, §1 does not specify any limitations for regulating water, land, or air pollution, the establishment of environmental legislation falls to the Legislature. Courts have conventionally deemed such provisions as hortatory and not self- executing (Elison & Snyder, 2001; Johnstone, 2016, interview; Tarr, 2003). However, certain scholars argue that constitutional provisions do not lose their self-executing standing simply because the Legislature may be directed to pass ancillary legislation which penalizes violations and establishes standards (Kemmis,1978; Tobias & McLean, 1980; Wyatt-Shaw, 1994). Furthermore, "the other portions of Article IX, §1 do not lose their capacity for self-executive merely by the addition of the legislative duty" (Kemmis, 1978, p. 233).

Regarding Montana's environmental provisions, the self-executing question has only been directly answered once: in *General Agriculture Corp. v. Moore* (1975), the court ruled that all subsections in the water rights section, except for Subsection 4, are self-executing (Elison & Snyder, 2001; Tobias & McLean, 1980). Subsection 4 is not self-

executing because it is just a supplementary duty for the Legislature to ensure the other subsections are implemented by means of a centralized records system (Ellison & Snyder, 2001; Schmidt & Thompson, 1990; Wyatt-Shaw, 1994). By stating that the appropriation for beneficial uses is "provided by law," Subsection 3 implies government intervention. As this subsection was deemed self-executing despite implying legislative direction and being absent legislative prohibitions, it can be assumed that the remaining sections in Article IX, which likewise require legislative directive, may also be interpreted as self-executing. By concluding that Article IX contains self-executing affirmations, it can be stated that Article IX is more than a mere statement of environmental policy, it contains justiciable, enforceable commands.

Tobias and McLean (1980) argue that "there can be little doubt that the Montana Constitution's declaration of an inalienable right to a clean and healthful environment is self-executing…it satisfies all the traditional criteria for self-execution" (p. 255-256). The inalienable right to a clean and healthful environment is self-executing because it provides a basis for judicial review, prohibits government activity by being guaranteed, and does not require legislation to be implemented and enforced (Ellingson, 2016, interview; Jensen, 2016, interview; Johnson, 2016, interview; Johnstone, 2016, interview; Kemmis, 1978; Thompson, 2003). The right is located among the rights to pursue life's necessities and acquire and possess property, neither of which require legislation to be effective. By this logic, the right to a clean and healthful environment should receive the same enforceable status. Furthermore, because Montana's delegates expressly intended the right to a clean and a healthful environment (along with all environmental provisions) to be self-executing regardless of the courts' reading, the environmental guarantees are thus enforceable by law absent legislation and any private citizen or state actions interfering with the framers' intent are unconstitutional (Wyatt-Shaw, 1994).

Despite the delegates' intentions, courts have displayed interpretational restraint, not activism, where constitutional environmental jurisprudence is concerned (Echeverria, 2015; Griffing, 2010; Nelson, 2008; Tuholske, 2011). In *Sunburst v. Texaco* (2007), when faced with the chance to decide whether the Constitution's environmental rights are self-executing, the court decided to "avoid constitutional issues whenever possible' (p. 1093). Wyatt-Shaw (1994, p. 238) believes that "by awaiting legislative action to enforce a

constitutional duty, or define a right, the court allows other branches of government to function in disregard of fundamental law." Although certain scholars criticize the judiciary's interpretational avoidance, it is better in the long run to have the inalienable right to a clean and healthful environment and the environmental provisions in Article IX scrutinized strictly, under rigorous conditions of judicial review, than under intermediate scrutiny, interpreted in multiple cases to no avail, and diluted to weightlessness. Where environmental rights are concerned, quality of interpretation trumps quantity of interpretation. Careful, considerate judicial review is necessary to establish a strong environmental precedent for Montana's future environmental cases!

8.5 Montana's Environmental Future

Montana's mining history is reflected in the 18 federal Superfund sites scattering the territory (United States Environmental Protection Agency, 2018). Sites in need of extensive reclamation include the Anaconda Company's aluminum plants in Great Falls and Columbia Falls, and a lead smelter in East Helena (Dobb, 2002). The nation's largest Superfund site is composed of four separate locations surrounding the Clark Fork River in Silver Bow County and includes the Anaconda smelter area, the Milltown Dam, at the confluence of the Clark Fork and Blackfoot Rivers, the Montana Pole Treatment site, in the Butte valley, and the Silver Bow Creek project, which includes the Berkeley Pit and 225 kilometers of polluted Clark Fork River (Dobb, 2002; Wright, 1998). This gargantuan Superfund site encompasses the hill's entire floodplain, a constant threat to the surrounding alluvial aquifers and a potential biohazard for the area's 33,500 residents. The estimated cost of attempting to control the migration of clean groundwater through the arsenic, lead, copper, and cadmium contaminated bedrock aquifer of the upper Clark Fork River basin, is $12.5 billion in 2017 dollars, with Montana taxpayers likely to foot at least $2 billion of that bill (DiSilvestro, 1993; Dobb, 2002; Keane, 2016, interview). In November 1995, the Pit made headlines when a flock of 342 snow-geese were instantly killed after landing in the waters, the media canonized them as "martyrs of copper mining" (Dobb, 2002, p. 313). In December 2016 the event repeated itself, this time thousands of snow geese were killed ("Thousands of Geese Die," 2016). For this and other reasons, the Butte area is considered among the most environmentally damaged sites in the country.

Given these environmental horror stories, it is a surprise to learn that wedged in

between the Berkeley Pit and the adjacent mountain range, is a second, currently active mine: East Continental Pit, owned by modern-day copper king Dennis Washington (Campbell, 2016, interview; Keane, 2016, interview). The Butte local government gifted the company, Montana Resources, a three-year tax break, reduced freight and power costs, and even excluded the Yankee Doodle Tailings Pond and the East Pit from state Superfund designation (Dobb, 2002). Similar to the Berkeley Pit, when East Pit operations conclude, the pit will begin to fill with groundwater, albeit not as acidic as that of its sister mine and sporting half of the ecological footprint, but requiring perpetual treatment nonetheless:

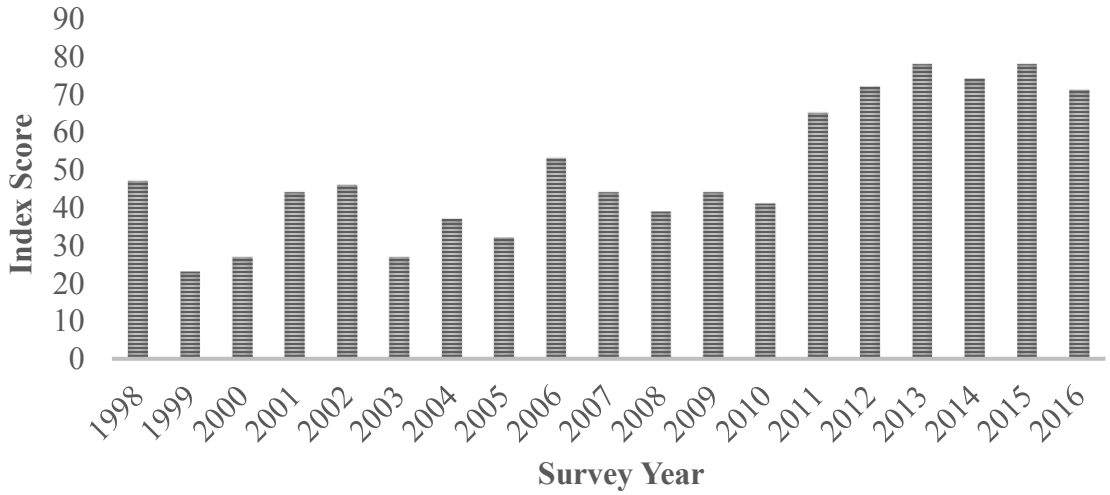
> The juxtaposition of these two holes, one the uppermost section of the largest Superfund site in the country, the other a productive mine whose fruits…. are today enjoyed by the residents of Missoula and Manhattan no less than by those of Butte, reflects the schizophrenic attitude the United States has adopted toward an appetite whose consequences it cannot yet face forthrightly (Dobb, 2002, p. 323).

Montana's mineral policy potential index "considers the effect of government policies including taxation, [environmental] regulation, and land use on attracting new exploration investment," and is annually rated on a scale of 100 based on responses from mining company personnel (Fraser Institute, 1999, p. 39). Immediately following the courts' enforcement of Montana's constitutional environmental provisions in the late 1990s, Montana was rated by mining companies as an "unattractive" place for mining investment due to its various environmental and financial policies (Figure 8.2). Most recently, companies have rated Montana slightly higher for industrial attractiveness, and although the index scores are higher than those of the 1990s, compared to the other 12 states surveyed Montana is still among the most deterred states for mining in the United States, second only to California and Washington (Fraser Institute, 2016).

In 2011, a consulting company president stated, "the regulatory environment in Montana is getting too strict in what it is demanding from natural resource developers, and regulations and legislation is meant to diminish natural resource development in the state" (Fraser Institute, 2011, p. 31). Furthermore, if Montana lacked its current statutory and constitutional environmental regulations, mining companies would be twice as willing to invest in establishing mining operations in Montana (Figure 8.3). Mining and timber industries together contribute less than 4 percent towards the state's economy, and have

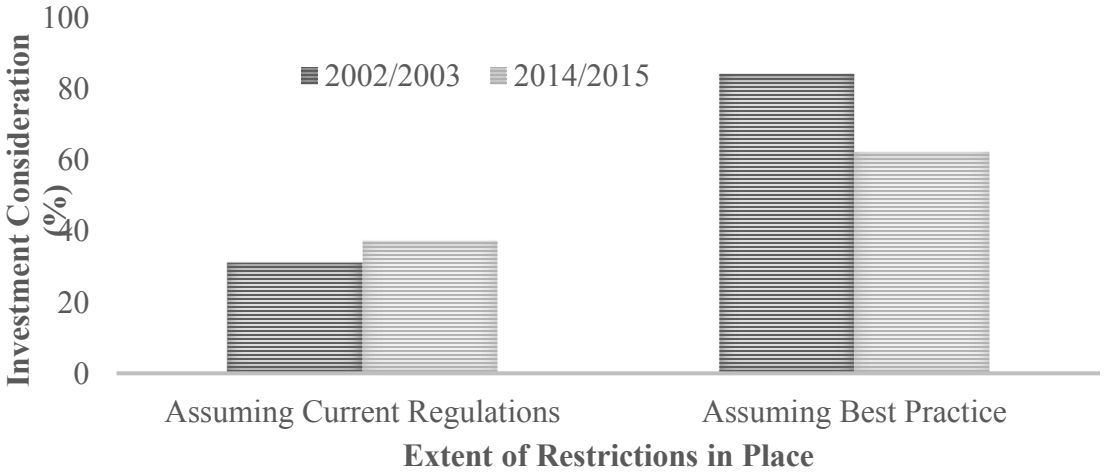
been replaced by tourism, recreation, retirement living, and health care sectors (Diamond, 2005; Wright, 1998). From 1997 to 2007, recreation has risen over 150 percent, and mining and timber patents have dropped 90 and 50 percent, respectively (Holden et al., 2007).

Figure 8. 2 Policy Potential Index, Montana, USA



Source: Author. Data: Fraser Institute (1998-2016)

Figure 8. 3 Mining Investment in Montana



Source: Author. Data: Fraser Institute (2003, 2015)

Montana's rugged frontier individualism has historically conflicted with the maintenance and improvement of the environment, a reality which has impeded the complete implementation of the Constitution's environmental mandates. Although

Montana is a leader in the regulation of natural resources extraction and major facility siting, "its overall regulation of land-use practices lags far beyond many states" (Schmidt & Thompson, 1990, p. 437). This is in part due to the fact that individuals engaging in land subdivision, agricultural, and silvicultural practices are less regulated than corporations and industries involved in large-scale projects. The cumulative environmental impacts of these, and other, isolated, non-point source activities can rival smokestack industries in the degree of environmental harm caused (Schmidt & Thompson, 1990; Wright, 2003). Although the environmental rights are protected in the Constitution, "the people of Montana have failed to realize the *individual* commitment necessary to fulfill the resounding promises of 1972" (Schmidt & Thompson, 1990, p. 414, emphasis added). This ignorance may be influenced by traditional American norms.

Opponents of environmental rights argue that environmental values are "un-American" when environmental enforcement cancels out the potential for socio-economic development. Anti-environmentalist sentiment is particularly common in right-wing circles, where any action seeking to regulate business activity is denounced as a threat to democracy and environmental regulation is politicized as socialism (Tuholske, 2015). Despite this, Malone (1996, p. 151) stated that "nearly all folks here, whether of the right or left, consider themselves environmentalists, regardless of whether or not they actually favor depleting the states resources," that a "fervid environmentalism" has taken the place of declining blue-collar, agrarian liberalism. In some instances, the actions of the Montanan civil society have been described as "environmental-radicalism," pushing industry out of the state regardless of the regulations promised (Ellingson, 2016, interview; McNeil, 2016, interview; & Shovers, 2016, interview). Dr. Dave Chambers (2016, interview), founder and president of the Center for Science in Public Participation in Bozeman, stated:

> I am a local board member of the Montana Conservation Voters, and we find ourselves almost always endorsing Democratic candidates. But we try to work very hard to look at Republicans and try to instill some of those values in Republicans too, because quite frankly, if the environment becomes politicized or partisanized, then it is going to lose.

Compared to the more traditional constitutional rights, a superficial analysis indicates that environmental rights tend to conflict with free market capitalism, and can be criticized as an assault on economic prosperity (Tuholske, 2015;). This supposed trade-off

between economic prosperity and environmental protection is a blatant myth, as nine of the world's most economically prosperous countries are also ranked top 15 in environmental performance (Boyd, 2012a). Many citizens blame the state's environmental laws for Montana's poor economic performance, however, Montana's impoverishment is not solely caused by the deterrence of the mining industry, but due to falling commodity prices and drought (Holden et al., 2007; Howard, 1972; Malone et al., 1991). For instance, of the 75 waning west counties, 28 are found in Montana, 22 of which are in Montana's eastern plains (Wyckoff, 2002). Thus, "the impoverishment of the plains counties region of Montana is arguably the fundamental cause of Montana's alleged poverty, not the departure of the hardrock mining industry" (Holden et al., 2007, p. 287).

By pitting environmental protection against economic development, the notion of "economy versus ecology," where you can have one but not the other, has permeated the American culture and the legal and political arenas (Chambers, 2016b, interview; Diamond, 2005; Ellingson, 2016, interview; Jensen, 2016, interview; McNeil, 2016, interview; Wray, 2016, interview). Although Montana's Constitution offers governmental guidance, "what it does not do is to give the courage to some legislators to stand up for what is right, or to protect us from our own avarice" (Cross, 1990, p. 457). The greatest challenge of the 21st century is the stimulation of economic development while sustaining the environment and its resources (Bednarz, 2006; Boyd, 2015; Diamond, 2005). In Montana and elsewhere, the politicization of environmentalism will ultimately further contribute to dividing Democrats from Republicans in their support of environmental values, and potentially inhibit courts and other governmental branches from promoting environmental laws and eco-friendly projects. As a repository for Montanan values, the constitutional environmental rights may contribute to further developing Montana's environmental ethic and can be utilized as a shield by the citizens and government for protecting and implementing environmental morals (Czarnezki, 2007).

Environmental rights cannot be fully recognized, or enforced, without the participation of local governments, however, local governments have not yet realized the extent of their environmental authority (Mudd, 2011; Nolon, 2006). State and federal governments are "ill-equipped to handle the scientifically complex, polycentric problems of each community," and thus rely on local governments to address and regulate smaller

scale environmental issues (Mudd, 2011, p. 4). Local governments have authorization from the state to adopt laws addressing the protection of ecologically sensitive lands, stream and watercourse protection, timber harvesting, soil erosion, and the prevention of non-point source pollutions, to name a few (Mudd, 2011; Nolon, 2006). Local officials can aid in providing more isolated communities and grassroots citizens with a voice in environmental decision making, ensuring that environmental rights are protected at every scale across the state. If local action continues at a stalemate, Montanans will not enjoy the full scope of environmental protection guaranteed by their Constitution (Mudd, 2011; Schmidt & Thompson, 1990; Wright, 2003).

In Montana, "the growing number and sophistication of interest groups plus rising partisanship in American political parties have complicated the task of constitutional revision while stoking the fires of amendment" (Cain & Noll, 2009, p. 1525). Montana's Republican-majority Legislature has continuously attempted to amend or appeal the environmental provisions in Montana's Constitution. Most recently, in 2011, a group of legislators proposed to amend the Constitution to insert the words "economically productive" after "clean and healthful environment," however, the amendment was vetoed by Governor Brian Schweitzer, and did not appear on the ballot (Tuholske, 2011). State governments are increasingly divided by partisan disagreements, resulting in the inability to reach a consensus on important issues of state policy. Although partisanship plays an integral role in state governance, a complete lack of unanimity between political groups during state constitutional reform will not generate solutions and is best avoided (Dinan, 2010).

Montanans appear to be content with the 1972 Montana State Constitution. Every 20 years Montanans are faced with the opportunity to call a Constitutional Convention, and have rejected calling another Convention twice since constitutional ratification (Appendix E). The cost of holding a Convention in 2017 would be almost $3 million, reflective of the administrative tasks required to ensure existing laws comply with the new Constitution, in addition to the litigation necessary to interpret it (Browning, 2010). State Constitutional Conventions have lately been avoided by most governments, with the last one convening in 1992 (Dinan, 2010). The 1970s were a different era, one where citizens trusted each other, trusted the state government, and truly believed constitutional reform would be

beneficial in achieving the amount of change required for Montanan society (Kirk, 2011; McNeil, 2016, interview). There is a consensus among Montanans that holding another ConCon is unnecessary as the current document successfully fulfills the aspirations of the state and its citizens (Campbell, 2016, interview; Chambers, 2016a, interview; Chambers, 2016b, interview; Ellingson, 2016, interview; Jensen, 2016, interview; Johnson, 2016, interview; Johnstone,2016, interview; Keane, 2016, interview; McNeil, 2016, interview; Reichert, 2016, interview; Shovers, 2016, interview). As Article IX of the Constitution has been amended since 1972 to add the resource indemnity trust, coal tax trust fund, and more recently, the noxious weed management trust fund in 2004, the expansion of the environmental article exhibits Montanans' continued support of sustaining the environment for present and future generations. If change is necessary, an amendment should suffice, as significant reform after only a few decades would defeat the purpose of having a Constitution in the first place (Johnstone, 2016, interview; Tuholske, 2011).

CHAPTER 9: CONCLUSION, RESEARCH CONTRIBUTIONS AND FUTURE RECOMMENDATIONS

9.1 Conclusion

9.1.1 What Influenced the Entrenchment of Montana's Environmental Rights?

The entrenchment of Montana's environmental rights is the result of several coincidentally occurring events culminating in the ratification of some the strongest environmental rights in the nation (and arguably in the world). The case of Montana portrays how environmental knowledge, experience, sentiment, and law are both temporally and spatially situated. The entrenchment of environmental rights in the 1972 Montana State Constitution occurred in response to several interrelated historical events, changing citizen attitudes, and various characteristics of Montanan society, ultimately depicting how law is not only a site of cultural production, but an element of society that can be studied to understand how citizens relate with, and value, their environment. Six triggers were identified as facilitating the enshrinement of Montana's landmark environmental rights, five of which were *indirect* influences (legislative reapportionment, the bipartisan efforts of the state government, the fall of the Anaconda Company, state and national social and environmental movements, and the research and advocacy of Montana's civil society) while Montana's environmental rights were only *directly* influenced by the 1972 Constitutional Convention's 100 grassroots delegates.

Montana officially became an urban state in the 1960s, when farmers and ranchers moved west and settled in and around the metropolitan areas of the state resulting in the expansion of several Montanan cities, and coincided with the relocation of mine laborers, smelter workers, and loggers, who were leaving Montana's industrial centers to seek employment opportunities in other cities. When the US Supreme Court ruled that citizens should be represented in state legislatures by population, federally-mandated legislative reapportionment shifted political power away from Montana's rural-eastern legislators. Consequently, the newly empowered western-urban legislators initiated overdue governmental reform by activating, and supporting, the calling of a Constitutional Convention. The second round of legislative reapportionment allocated even-more power to the urban-west, from which were elected the majority of the 100 progressive Constitutional Convention delegates who were integral in drafting and ratifying the

Constitution and including within the Constitution strict environmental rights.

Written during a time when citizens distrusted government officials, the framers entrenched within the 1889 Constitution various government limitations, consequentially establishing a state government restricted by an unamendable Constitution, perceptible to special interest groups, and whose inefficiency grew as decades passed. When legislative reapportionment recalibrated the political composition of the Montana State Legislature, and the Anaconda Company was distracted by threats to its international holdings, all three branches of Montana's government utilized this window of opportunity to restructure the state government. Realizing that exhaustive governmental reform could only be attained by significant constitutional revision, the activist state government collaborated with grassroots citizens groups to advocate for and successfully call a Constitutional Convention, indirectly triggering the entrenchment of Montana's constitutional environmental provisions.

Montanans' adoption of a new Constitution, focused on the environment, is unequivocally related to Montana's history as a corporate colony, a primary reason why Montana is distinguishable from other states in environmental protection. The Anaconda Company, in collaboration with the rural-dominated state Legislature and various other corporations, controlled every aspect of Montanan society. In addition to owning the state's largest mines, smelters, and timber operations, the Company's influence extended into Montana's educational system, the energy, transportation, and service sectors, and (most notably) the state government and multiple newspapers. The historic dealings of Anaconda established in Montana a status-quo for environmental negligence, exposing generations of citizens to the residuals of unparalleled environmental harm, and eventually stimulated the development of a unique, placed-based environmental ethic. Although the depletion of high-grade copper ores, combined with high labor costs, played a role in the Company's decreasing interests in Montana over the decades, it is argued herein that three events contributed to the fall of Anaconda's monopoly over Montana, providing Montanans with an opportunity to draft and approve a new Constitution without corporate influence. First, the sale of the Company-owned state newspapers, second the expropriation of the Company's sizeable Chilean assets, and third the propagation of environmental knowledge and sentiment. In addition to the right to a clean and healthful environment, Montana's

mining heritage motivated the delegates to include within the Constitution an entire section on reclamation, which fortified the entrenchment of Montana's environmental rights provisions.

While Montanan journalists published stories exposing Anaconda as a chief culprit of state ecocide, the events of the politically charged national environmental movement further educated Montanans of the consequences of unmitigated, unregulated human activities. As Anaconda fell from power, with Montanans reeling from the residuals of a century's worth of extensive hardrock mining, the eastern counties were threatened with strip-mining ventures. This rampant strip-mining inspired grassroots environmentalism among conservative, rural-eastern Montanans, who became primary participants in Montana's own environmental crusade. In addition to stimulating environmental discourse, Montana's civil society studied the restrictions of the statehood Constitution and campaigned for comprehensive constitutional revision. Motivated by the advocative efforts of civil society, and the passage of human rights and environmental legislation at the federal and state levels, Montanans realized that environmental protection and state reform could best be achieved through legal action. As civil society played a significant role in calling a Constitutional Convention, petitioning the delegates to include within the new Constitution environmental guarantees, and relentlessly advocating for ratification, the entrenchment of constitutional environmental rights thus indirectly resulted from the demands for change from grassroots citizens.

When Montana's Supreme Court ruled that sitting government officials could not participate in the writing of the new Constitution, Montanans instead elected 100 ordinary citizens as delegates to the 1972 Constitutional Convention. The ConCon delegates opened Montana's Convention proceedings to the public, acknowledged the constitutional recommendations and desires of Montanan citizens, and convened in a largely bipartisan manner. Inspired by the social and environmental activism occurring across the nation, the delegates ensured the new Constitution championed the socio-cultural values of all Montanans, remained politically unbiased, was restricted to fundamental law, and was amendable by citizen and legislative initiative to reflect the changing needs of future Montanans. The delegates clearly influenced the entrenchment of Montana's environmental rights in several different ways: the delegates fervently debated the

environmental sections during the Convention to ensure the Constitution contained the strongest environmental protections possible, secured within the Constitution's Declaration of Rights the inalienable right to a clean and healthful environment, dedicated an entire Article to Montana's environment and natural resources, depicted Montanans' love of place through an environment-inspired Preamble, and tirelessly campaigned for the successful ratification of the Constitution. If not for the dedication, careful research, and promotional efforts of these 100 delegates, it is unlikely that Montanans would have adopted a new Constitution (and even less likely that Montanans would currently be guaranteed the right to a clean and healthful environment).

9.1.2 How the Environmental Rights Have Evolved, Been Interpreted and Enforced

Law and geography are intertwined. The laws governing a place are restricted to geographic borders and are subjected to the confines of geographic scale. For instance, municipalities, districts, states, and nations are each governed by a hierarchy of laws which order the internal interactions of citizens, with international laws guiding the transboundary interactions between nations. Law is therefore internally and externally contingent to geography, and the human-environmental relationships within these borders are influenced by past and present social and physical characteristics of the place in question.

"The passage of strong federal and state environmental laws beginning in the early 1970s," wrote Thompson (2003, p. 158), "has reduced the potential importance of the constitutional provisions in most contexts." Consequently, a Plaintiff's constitutional arguments often take a back-seat to statutory claims (Thompson, 2003). This view of constitutional provisions being considered by courts and citizens as less important is not accepted herein and it is argued that jurists (in Montana at least) have avoided interpreting the Constitution because of its importance, and for fear of misinterpreting a right and establishing a misguided precedent. It is, however, true that the enactment of environmental statutes has resulted in constitutional provisions playing a marginal role in American court rooms, making it difficult for organizations and citizens in Montana and elsewhere to influence environmental policy by means of their constitutional guarantees. By holding that environmental provisions are not self-executing, by not establishing strict standards for meeting constitutional commands, and by denying standing to private groups and individuals, courts in states with environmental rights have obscured the strength of their

citizens' environmental rights (Thompson, 2003; Tuholske, 2015). Despite these drawbacks, Elison and Snyder (2001, p. 168) maintain that "at the time it was written, Montana's Constitution contained the strongest statement of conservation philosophy of any state Constitution." Furthermore, the Montana courts, by initially taking an activist approach to interpreting and enforcing the environmental guarantees, have detached themselves from following the interpretational strategies of other states and have mostly sustained the strength of Montanans' environmental rights.

Due to American federalism, each state is a sovereign unit, entitled to create its own laws according to the needs and aspirations of its citizens, and according to its unique political, economic, and physical characteristics. Montanans are thus permitted to implement their own, stricter environmental laws, and the Montana courts are free to establish their own environmental jurisprudence as long as federal environmental standards are maintained. Montana courts have conventionally avoided reviewing the constitutional environmental mandates, mostly for fear of disrespecting the separation of powers. Montana courts have not yet decided whether or not the environmental rights provisions are self-executing and have not thoroughly interpreted several Subsections of Article IX or established what constitutes a compelling state interest for an abridgement of these rights and duties. Because of this interpretational avoidance, the true power of Montana's constitutional environmental rights has yet to be determined and is disputed among scholars and jurists. Overall, there is a consensus that the inalienable right to a clean and healthful environment is considered self-executing due to its placement in the Declaration of Rights in Article II, although there is significant debate on whether Article IX in its entirety is self-executing as it contains legislative guidelines without explicit prohibitions. The courts have mostly agreed that Article II, §3 and Article IX, along with the Preamble, are interdependent and fundamental, so it is possible that Montana's environmental provisions may be deemed self-executing by future courts. Notwithstanding the fact that many questions remain unanswered where Montana's environmental rights are concerned, Montana's Constitution nevertheless contains some of the nation's strongest environmental rights, comparable only to the Constitutions of Hawaii, Illinois, and Pennsylvania, which contain explicit environmental rights (Cusack, 1993; Czarnezki, 2007; Mudd, 2011; *Robinson v. Commonwealth*, 2013; Thompson, 2003).

Although constitutional guarantees should only be reviewed by courts when absolutely necessary to avoid misinterpreting or misbalancing their provisions, Montana's most recent environmental cases have depicted a troublesome trend. There were a few cases where the Plaintiffs sought constitutional protection for what they believed to be violations of their environmental rights and the courts avoided enforcement and deferred interpretation of the statutes in question. Although Montana's courts are avoiding constitutional review to maintain the separation of powers and the importance of the Constitution as the fundamental law of the land, constant avoidance can, over time, dilute claimants' standing to seek remedies for an abridgement of their environmental rights, and can unintentionally result in the citizens' devaluation of environmental rights, diminish the degree which citizens litigate against environmental violations, and lead to a shirking of environmental duties.

As only a handful of cases have enforced and interpreted Montana's environmental provisions (with no recent cases being available to gauge how the current courts may enforce the rights if faced with a clear and unavoidable abridgement) it is difficult to draw a concise prediction on the future role of environmental rights in Montanan society. The hypothesis articulated herein on the prospective enforcement of Montana's environmental rights is admittedly entirely speculative and is based on an understanding of the likewise speculative interpretations and opinions of legal scholars. The future of Montana's environmental rights depends on state court membership, and whether the citizens continue to politicize and partisanize the environment, or place economic values above, and not equivalent to, environmental values. Although courts conventionally decide a case based on the precedents of previous court decisions, one weak or misguided interpretation, or continued constitutional avoidance, may strip the provisions of their teeth. In conclusion, it is asserted that the implementation of the Constitution's inalienable right to a clean and healthful environment, and the entirety of Article IX, ultimately falls to the citizens. As government membership depends on citizen support, if courts and representatives are not fulfilling the environmental aspirations and needs of their citizens, Montanans may at any time petition for an amendment of the Constitution to enact stricter environmental protections and fortify governmental duties, or elect a new Governor, legislators and jurists (Ellingson, 2016, interview; Chambers, 2016a, interview; Jensen, 2016, interview;

Johnson, 2016, interview; Johnstone, 2016, interview; Keane, 2016, interview; McNeil, 2016, interview; Wray, 2016, interview).

Given the current political climate in the United States, with the continuous weakening of federal environmental statutes, standards, and agency authorizations, Montanans may need to refer to their Constitution and their own environmental statutes more readily to supplement any future environmental roll-backs at the federal level. Because of the difficulty of amending the United States Constitution, it is unlikely that environmental rights will be entrenched into the federal document. Furthermore, federal courts have concluded that the rights guaranteed in the federal Constitution do not extend to protecting environmental values. Each state should instead take responsibility and tailor environmental protection to their own, unique social and physical environments, and not rely on the instability of the federal statutory system. Although many states have strong environmental legislation, the fundamental power and enforceability of a constitution enhances the role of citizens in environmental decision making and trumps any easily amendable policy statement. If citizens in other states wish to fully ensure that their environments are protected, improved, and sustained for current and future generations, they should follow in Montana's footsteps and amend their constitutions to explicitly include environmental rights. Montana's Constitution serves as an excellent template for other states to reference in entrenching similar, or even stronger, environmental guarantees.

9.2 Research Contributions

By drawing from geographic, historic, social, legal, and environmental studies, this thesis contributes to depicting the versatility of the discipline of geography. The role of geography in influencing the production, dispersion, and application of law has largely been overlooked by both geographers and legal scholars. This thesis contributes to bridging the knowledge gap between legal and geographic studies, proving that geographers can apply geographic theory and methodology to studying law and legal systems.

By understanding the complicated relationship between humans and the environment, these findings add to the human-environment tradition in geography. The research findings herein contribute to understanding how the emergence of a strong anthropocentric relationship with the environment is grounded in place, and contingent upon socio-cultural aspects, politics, economics, history, internal and external societal

relationships, and time. By showing that several societal aspects play a role in the development of an environmental ethic, future researchers studying human- environmental interactions can expand their theoretical frameworks to include additional, potentially unconsidered variables.

Methodologically, this multifaceted project meets the criteria of external validity as it provides a conceptual framework that, once generalized, can be applied to any case at any scale looking to study the need for or evolution of environmental rights. The methods utilized to answer these research questions can be applied to studying endemic environmental laws and human-environment relations at a range of scales. This methodology can be applied to any place with environmental rights, or equivalent environmental regulations, and by reviewing the applicability and enforceability of current policies, can encourage stricter environmental laws and regulatory frameworks. Additionally, this methodology is not restricted to studying environmental rights, it can be applied to studying the development of other traditional and emerging laws and values.

This research educates readers on the history, geography, and culture of the State of Montana. As the placed-based, socio-cultural genesis of Montana's environmental laws has not yet been extensively studied, this research creates a new, previously untapped category of literature. As the applicability and enforceability of Montana's environmental provisions are conventionally reviewed by American scholars and jurists often well-versed in American legal-theory, this research contributes to the legal literature a unique, objective interpretation of Montana's environmental rights. It is hoped that this research will educate Montanans on their environmental rights, re-inject the right to a clean and healthful environment into Montanan discourse, inspire citizens and groups to litigate if environmental abridgement is anticipated or has occurred, and to monitor the environmental agendas of their state and federal government representatives. Lastly, the findings from this study will hopefully help convince citizens of other jurisdictions that have thus far avoided the implementation of environmental rights to follow suit!

9.3 Recommendations for Future Research

Although this thesis has answered several academic questions, it has also unearthed numerous avenues for future research. This thesis provides future researchers with an

optimal opportunity to pursue various comparative legal case study analyses between Montana and other American or non-American states.

In terms of research specifically focusing on the United States, the characteristics and events leading to the entrenchment of environmental laws in states with environmental rights (Illinois, Pennsylvania and Hawaii (explicit); Massachusetts, Rhode Island and New York (implicit)) can be traced and compared with Montana's to reveal if there are any underlying themes. A future study could exhaustively compare Montana's rights with the environmental rights and provisions of these states to concretely rank them in the strength and enforceability of their environmental guarantees. A truly comprehensive comparative legal study could review and rank each of the 50 states on their constitutional environmental protections, also determining if any geographic patterns emerge on the extent of protection offered. Alternatively, the states without environmental rights can be studied to hypothesize why they avoided such assurances, and if they instead supplement constitutional protections with statutory policies. Lastly, states with strong environmental legislation, absent constitutional protections, can be compared to states with constitutional safeguards to surmise whether constitutional provisions are in fact more efficient in achieving a high level of environmental protection and citizen participation in environmental decision-making.

It would be particularly interesting to compare Montana with Delaware, the only other American state whose citizenry and resources were historically dominated by a corporation (DuPont). As Delaware does not contain environmental rights within its Constitution, a future study could speculate why a state with a similar historical background did not likewise constitutionalize environmental values.

Similar to American federalism, Canada is composed of sovereign, sub-national entities, in the form of provinces. Similar to the United States, Canada's Constitution lacks any explicit environmental rights and has instead chosen "to rely on unenforceable guidelines that are enshrined in law by some provinces but not others" (Boyd, 2012a, p. 9). Canada and the United States can be studied, along with the remaining 13 countries without environmental rights, to discover if there are any reasons for avoiding entrenchment. Furthermore, although it has been noted that Montana's environmental rights cannot be compared to provincial environmental laws as statutory and constitutional laws are not on

parity, the research methodology utilized in this thesis can nevertheless be generalized and applied to study Canada's environmental jurisprudence. As Canada's provinces are each characterized by differing histories, economies, politics, and cultures, scholars studying Canada's environmental legal system can identify the various events and characteristics influencing the enactment of statutory environmental laws throughout the nation.

As the Native American community shares lands and resources with Canada and the USA, and largely functions as a separate legal and cultural entity which does not historically acknowledge state, provincial, or territorial borders, the environmental values, opinions, and regulations of this community could constitute a unique potential study. Because Native American culture is spiritually rooted in Nature, geographers should consider studying how different tribes contextualize their relationship with the environment.

Lastly, future researchers can review how courts and citizens adapt to the residuals of global warming by studying how Montana's constitutional environmental provisions will be applied to the various, unpredictable, and no doubt harsh, effects of climate change. As humanity progresses further into the Anthropocene this may become the most important avenue for further research emanating from this thesis.

REFERENCES

Aarab, C. B., & Regnier, J. (2015). Mapping the Treasure State: What States Can Learn from Redistricting in Montana. *Montana Law Review, 76*(2), 257- 280.

Abel, H. (1997). Montana on the Edge: A Fight Over Gold Forces the Treasure State To Confront Its Future. *High Country News*, *29*(24), 6-12.

Adrian, C.R. (1968). Trends in State Constitutions. *Harvard Journal on Legislation, 5*(3), 311.

Agnew, J. A. (1987). *Place and Politics: The Geographical Mediation of State and Society*. Boston and London: Allen and Unwin

Anaconda Country. (1959, September 7). *The Economist*, p.765-766

Applegate, R. (1972). *Bill of Rights: Montana Constitutional Convention Commission, Constitutional Convention* (Study No. 10). Retrieved from https://archive.org/stream/billofrights00applrich/billofrights00applrich_djvu.txt

Armitage, S. (1982). Western Women: Beginning to Come into Focus. *Montana: The Magazine of Western History*, *32*(3), 2–9.

Athearn, B. R. G. (1958). The Great Plains in Historical Perspective. *Montana: The Magazine of Western History*, *8*(1), 13–29.

Bakken, G. M. (1991). Was There Arsenic in the Air? Anaconda Versus the Farmers of Deer Lodge Valley. *Montana: The Magazine of Western History, 41*(3), 30–41.

Bakken, G. M. (2007). Montana, Anaconda, and the Price of Pollution. *The Historian, 69*(1), 36-48.

Bednarz, R. S. (2006). Environmental Research and Education in US Geography. *Journal of Geography in Higher Education*, *30*(2), 237–250.

Berman, M. N. (2011). Constitutional Interpretation: Non-originalism. *Philosophy Compass*, *6*(6), 408-420.

Beynon, H., & Hudson, R. (1993). Place and Space in Contemporary Europe: Some Lessons and Reflections. *Antipode*, *25*(3), 177–190.

Birnbaum, J. (1972). Montana: Fresh Chance Gulch. *Time. 99* (15), 22.

Blair, H. (2000). Participation and Accountability at the Periphery: Democratic Local Governments in Six Countries. *World Development, 28*(1), 21-39.

Blomley, N. K. (1989). Text and Context : Rethinking the Law-Space Nexus. *Progress in Human Geography*, *13*(4), 512–534.

Blomley, N. K. (2003). From "What?" to "So What?": Law and Geography in Retrospect. In J. Holder & C. Harrison (Eds.), *Law and Geography*. Oxford: Oxford University Press.

Blomley, N. K. (2004). The Boundaries of Property: Lessons from Beatrix Potter. *The Canadian Geographer*, *48*(2), 91-100.

Bloomquist, J. (2001). The Agricultural Perspective : TMDLs in the Context of a Clean and Healthful Environment. *Public Land and Resources Law Review*, *22*, 19–29.

Boulding, C. (2014). NGOs, Political Protest, and Civil Society. *Cambridge University Press.*

Bourguignon, T. J. (2016). The Poacher , the Sovereign Citizen, the Moonlighter, and the Denturist: A Practical Guide to Inalienable Rights in Montana. *Montana Law Review*, *77*(1), 5–40.

Bowen, G. A. (2009). Document Analysis as a Qualitative Research Method. *Qualitative Research Journal*, *9*(2), 27.

Boyd, D. R. (2012a). *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. Vancouver: UBC Press.

Boyd, D. R. (2012b). *The Environmental Rights Revolution: a Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: UBC Press.

Boyd, D. R. (2015). *The Optimistic Environmentalist: Progressing Towards a Greener Future*. Toronto: ECW Press.

Bradley, D., Brown, B., & Barrett, E (Executive producer). (2015a). High, Wide & Handsome: Environmental Legacy of 1970s Legislature" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Bradley, D., Wessel, M., Jelinski, J. & Barrett, E. (Executive producer). (2015b). Montana's Historic Women's Movement Re-emerges in Progressive 1970s [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Brooks, R. O. (1992). A Constitutional Right to a Healthful Environment. *Vermont Law Review*, *16*, 1063-1110.

Brooks, D. J. (2012). Restoring the "Shining Waters:" Milltown, Montana and the History of Superfund Implementation. (Doctoral Dissertation). University of Montana.

Brown, M. H. (1970). Metamorphosis and Revision: A Sketch of Constitution Writing in Montana. *Montana: The Magazine of Western History*, *20*(4), 2–17.

Browning, S. (2010, October 6). Bob Brown Says No-No To "ConCon." *Missoula Independent*. Missoula.

Burnham, W. (2006). *Introduction to the Law and Legal System of the United States* (4th ed), St. Paul, MN: Thomson/West.

Busbee, G. (1983). An Overview of the New Georgia Constitution. *Mercer Law Review, 35*(1), 1-17.

Butler, C. (2009). Critical Legal Studies and the Politics of Space. *Social & Legal Studies*, *18*(3), 1-29.

Cain, B. E., & Noll, R. G. (2009). Malleable Constitutions: Reflections on State Constitutional Reform. *Texas Law Review, 87*(7), 1517-1544.

Calloway, C. G. (2002). Army Allies or Tribal Survival?: The "Other Indians" in the 1876 Campaign. In H. W. Fritz, M. Murphy, & R.R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 27-44). Helena: Montana Historical Society Press.

Campbell, B. (2016). 1972 Constitutional Convention Delegate, Attorney. Personal Interview. Missoula, Montana, 29 August 2016.

Carson, R. (1962). *Silent Spring*. Boston: Houghton Mifflin.

Carter, C., & Karmen, K. (2001). A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision, *Public Land and Resources Law Review, 22*, 97-132.

Census and Economic Information Center. (2013). Population of Counties in Montana, 1890–2010. Montana Department of Commerce. Retrieved from: www.ceic.mt.gov

Chadwick, R. A. (1973). Coal: Montana's Prosaic Future, *Montana: The Magazine of Western History, 23*(4), 18-31.

Chadwick, R. A. (1982). Montana's Silver Mining Era: Great Boom and Great Bust. *Montana: The Magazine of Western History*, *32*(2), 16–31.

Chambers, D. M. (2016a). Founder and President, Center for Science in Public

Participation. Personal Interview. Bozeman, Montana, 11 August 2016.

Chambers, G. (2016b). Co-producer, *For This and Future Generations*. Personal Interview. Missoula, Montana, 29 August 2016.

Chambers, G. (Producer). & Zalis. P. (Producer) (2002). *For This and Future Generations* [DVD]. KUFM-TV Montana PBS, The University of Montana.

Chorley, R. J. (1973). Geography as Human Ecology. In R.J. Chorley (Ed.), *Directions in Geography* (pp.155-169). London: Methuen.

Collins, R. K. L. (1985). Reliance on State Constitutions-The Montana Disaster. *Texas Law Review*, *1*, 1097.

Cooley, T. M. (1871). *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union.* Boston: Little Brown & Co.

Cooley, T. M. (1927). *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*.(8TH ed.*)* Boston: Little Brown & Co.

Cotter, A. (1945, September 10). Anaconda Copper Mining Co.: World 's Largest Producer of Copper is in the Strongest Financial Condition in Its History. *Wall Street Journal*, p.7

Cox, K. R. (1995). Concepts of Space, Understanding in Human Geography, and Spatial Analysis. *Urban Geography*, *16*(4), 304-326.

Cox, K., & Mair, A. (1989). Levels of Abstraction in Locality Studies. *Antipode*, *21*(2), 121–132.

Cresswell, T. (1996). *In Place/Out of Place: Geography, Ideology, and Transgression.* Minneapolis: University of Minnesota Press.

Creswell, J.W. (2007). *Qualitative Inquiry and Research Design: Choosing Among Five Approaches.* (2nd ed.), Thousand Oaks, CA: Sage.

Cronon, W. (1996). The Trouble with Wilderness; or, Getting Back to the Wrong Nature. In W. Cronon (Ed.), *Uncommon Ground: Rethinking the Human Place in Nature* (pp.69-90). New York: W.W. Norton.

Cross, C. L. (1990). The Battle for the Environmental Provisions in Montana's 1972 Constitution. *Montana Law Review*, *51*(2), 449–491.

Crutchfield, J. A. (2008). *It Happened in Montana* (2nd ed.). Helena: TwoDot.

Cusack, M. E. (1993). Judicial Interpretation of State Constitutional Rights to a Healthful Environment. *Boston College Environmental Affairs Law Review, 20*(1), 173–201.

Czarnezki, J. J. (2007). Environmentalism and the Wisonsin Constitution. *Marquette Law Review, 90*: 465–495.

Delaney, D. (2001). Making Nature/Marking Humans: Law as a Site of (Cultural) Production. *Annals of the Association of American Geographers, 91*(3), 487-503.

De Witt, B. P. (1915). *The Progressive Movement: A Non-Partisan, Comprehensive, Discussion of Current Tendencies in American Politics*. New York: Macmillan.

Diamond, J. M. (2005). *Collapse: How Societies Choose to Fail or Succeed*. New York: Toronto; Viking.

Di Chiro, G. (1996). Nature as Community: the Convergence of Environment and Social Justice. In W. Cronon (Ed.). *Uncommon Ground: Rethinking the Human Place in Nature* (pp.153). New York: W.W. Norton.

Dinan, J. (2010). The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage. *Montana Law Review, 71*, 395–432.

DiSilvestro, R. L. (1993). *Reclaiming the Last Wild Places: A New Agenda for Biodiversity*. New York, Toronto: John Wiley & Sons, Inc.

Dobb, E. (2002). Pennies from Hell: In Montana, the Bill for American's Copper Comes Due. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays On History, People, and Place* (pp. 311-340). Helena: Montana Historical Society Press.

Dowling, D. S. (1990). Implementation and Amendment of the 1972 Constitution. *Montana Law Review, 51*(2), 282-288.

Dudis, J. (1972). Apportionment: Past to Future. *Montana Law Review, 33*(1),101-125.

Duncan, D. (1993). *Miles from Nowhere: Tales from America's Contemporary Frontier*. Lincoln: University of Nebraska Press.

Echeverria, J. D. (2015). State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington, and Wisconsin. *Vermont Journal of Environmental Law, 16*, 363–481.

Economides, K., Blacksell, M., & Watkins, C. (1986). The Spatial Analysis of Legal Systems: Towards a Geography of Law? *Journal of Law and Society*, *13*(2), 161–181.

Elison, L., & Snyder, F. (2001). *The Montana State Constitution: A Reference Guide.* Westport: Greenwood Press.

Ellingson, M. N. (2016). 1972 Constitutional Convention Delegate, Attorney, past member of the American Association of University Women. Personal Interview. Missoula, Montana, 29 August 2016.

Ellingson, M. N., Campbell, B., & Barrett, E. (Executive producer). (2015a). For Future Generations: Preamble & Environmental Provisions of 1972 Montana Constitution" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Ellingson, M. N., McKeon, M., & Barrett, E. (Executive producer). (2015b). Razor Thin Win: ConCon Ballot, Campaign, Ratification Vote & Court Fight [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Emmons, D. (2002). The Orange and the Green in Montana: a Reconsideration of the Clark-Daly Feud. In H.W.Fritz, M.Murphy, & R.R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 79-102). Helena: Montana Historical Society Press.

Environmental Quality Council. (1972). *First Annual Report* (October, 1972). Retrieved from: http://leg.mt.gov/content/Publications/Environmental/1972annualreport.pdf

Eurich, J. P. (1999). The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions. *International Legal Perspectives*, *11*(2), 185-222.

Ewert, S. (2001). Evolution of an Environmentalist: Senator Frank Church and the Hells Canyon Controversy. *Montana: The Magazine of Western History*, *51*(1), 36–51.

Ferguson, C. (2015). *This is Our Land: Grassroots Environmentalism in the Late Twentieth Century.* New Brunswick: Rutgers University Press.

Finn, J. L. (1998). Intimate Strangers : The Interlocking Histories of Butte, Montana , and

Chuquicamata, Chile. *Montana: The Magazine of Western History*, *48*(3), 22–39.

Finn, J. L. (2012). Children of the Hill: Situating Children in Butte's History. *Montana: The Magazine of Western History*, *62*(4), 23–46.

Flores, D. L. (2001). *The Natural West: Environmental History in the Great Plains and Rocky Mountains*. Norman: University of Oklahoma Press.

Florini, A. (2004). Is Global Civil Society A Good Thing? *New Perspectives Quarterly, 21*(2), 72-76.

Fraser Institute. (1999). *Fraser Institute Annual Survey of Mining Companies, 1998/1999.* Vancouver: Fraser Institute.

Fraser Institute. (2001). *Fraser Institute Annual Survey of Mining Companies, 2000/2001*. Vancouver: Fraser Institute.

Fraser Institute. (2002). *Fraser Institute Annual Survey of Mining Companies, 2001/2002.* Vancouver: Fraser Institute.

Fraser Institute. (2003). *Fraser Institute Annual Survey of Mining Companies, 2002/2003.* Vancouver: Fraser Institute.

Fraser Institute. (2007). *Fraser Institute Annual Survey of Mining Companies, 2007/2008.* Vancouver: Fraser Institute.

Fraser Institute. (2011). *Fraser Institute Annual Survey of Mining Companies, 2010/2011*. Vancouver: Fraser Institute.

Fraser Institute. (2015). *Fraser Institute Annual Survey of Mining Companies, 2014/2015.* Vancouver: Fraser Institute.

Fraser Institute. (2016). *Fraser Institute Annual Survey of Mining Companies, 2015.* Vancouver: Fraser Institute.

Fritz, H. W. (1990). The 1972 Montana Constitution in a Contemporary Context. *Montana Law Review, 51*(2), 270-274.

Fritz, H. W. (2002). Montana in the Twenty-first Century. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 341-357). Helena: Montana Historical Society Press

Fritz, H. W. (2004). Fundamental Human Rights Compared in Two Progressive Constitutions: Japan and Montana. *International Legal Perspectives, 14,* 30-57.

Fuller, H. (1919). The Professor and the Anaconda. *New Repulic, 18*(227),171.

Furdell, W. J. (2002). The Great Falls Home Front During World War II. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 201-220). Helena: Montana Historical Society Press.

Gellers, J. (2012). Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis. *Review of Policy Research*, *29*(4), 523-543.

Glasscock, C.B. (2002). *The War of the Copper Kings: The Builders of Butte and the Wolves of Wall Street.* Helena: Riverbend Publishing.

Green, A., & Troup. K. (1999). *The Houses of History: A Critical Reader in Twentieth-Century History and Theory*. New York: New York University Press.

Green, H. (2010). *The Company Town: The Industrial Edens and Satanic Mills that Shaped the American Economy*. New York: Basic Books.

Griffing, B. (2010). The Rise and Fall of the New Judicial Federalism Under the Montana Constitution. *Montana Law Review*, *71*, 383-393.

Goble, D. D., & Hirt, P. W. (2012). *Northwest Lands, Northwest Peoples: Readings in Environmental History.* Seattle: University of Washington Press.

Goetz, J. H. (1990). Interpretations of the Montana Constitution: Sometime Socratic, Sometimes Erratic. *Montana Law Review, 51,* 289-355.

Goldstein, R. J. (1998). Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law. *Boston College Environmental Affairs Law Review*, *25*, 347-430.

Grossman, L. (1977). Man-Environment Relationships in Anthropology and Geography, *Annals of the Association of American Geographers*, *67*(1), 126-144.

Gunther, J. (1947). *Inside U.S.A.* New York: Harper & Brothers.

Gutfeld, A. (1970). The Levine Affair : A Case Study in Academic Freedom. *Pacific Historical Review*, *39*(1), 19–37.

Hall, J. A. (1998). The Nature of Civil Society. *Social science and modern society, 35*(4), 32-41.

Hammett, D. (1992). *Red Harvest.* New York: Vintage Books.

Harper, A. C. (2010). Conceiving Nature: The Creation of Montana's Glacier National Park. *Montana: The Magazine of Western History*, *60*(2), 3–24.

Harrison, T., Dowling, D., Wilson, S., & Barrett, E. (Executive producer). (2015).

Executive Reorganization: Forrest Anderson Builds State Government to Work for People" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Holden, W. N. (2003). The Role of Environmental Protection as a Locational Determinant of the Nonferrous Metals Mining Industry: a Synecdochical Investigation of a Stylized Fact. (Doctoral Dissertation). University of Calgary.

Holden, W. N. (2010). Civil Society. In B. Warf (Ed.), *Encyclopedia of Human Geography* (pp. 414–416). Thousand Oaks, California: Sage.

Holden, W. N., Jacobson, R. D., & Moran, K. (2007). Civil Society Opposition to Nonferrous Metals Mining in Montana. *Voluntas*, *18*(3), 266–292.

Holmes, K., Dailey, S. & Walter, D. (2008). *Montana: Stories of the Land.* (pp. 418- 438). Helena: Montana Historical Society Press. Retrieved from: http://svcalt.mt.gov/education/textbook/Chapter21/Chapter21.asp

Homstad, C. (2003). Two Roads Diverged: A Look Back at the Montana Study. *Montana: The Magazine of Western History*, *53*(3),16–29.

Horwich, J. L. (1996). Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion? *Montana Law Review*, *57*(2), 323-374.

Horwich, J. L. (2001). MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions. *Montana Law Review*, *62* (2), 269-299.

Howard, A. E. D. (1972). State Constitutions and the Environment. *Virginia Law Review*, *58*(2), 193–229.

Howard, J. K. (1983). *Montana: High, Wide, and Handsome.* Lincoln: University of Nebraska Press.

Huckle, J. (2002). Reconstructing Nature: Towards a Geographical Education for Sustainable Development. *Geography*, *87*(1), 64–72.

Ingelson, A., & Mitchell, L. (2011). NAFTA, the Mining Law of 1872, and Environmental Protection. *Natural Resources Journal*, *51*(2), 261-285.

Jensen, J. (2016). Executive Director, Montana Environmental Information Center. Personal Interview. Helena, Montana, 10 August 2016.

Johnson, C. & Barrett, E. (Executive producer). (2015). Through a Reporter's Eyes: A First-hand Look at 1970s Montana Government & Politics"[Video Episode]. In the Crucible of Change, Digital Commons Network. Butte, MT: Montana Tech.

Johnson, C. S. (2017, January 17). Butte Senator's Bill Would Create New Montana Coal Trust Fund. *Bozeman Daily Chronicle.*

Johnson, D. (2016). Staff attorney and Water Program Director, Montana Environmental Information Center. Personal Interview, Helena, Montana, 10 August 2016.

Johnston, R. J. (1981). Editorial. *Environment and Planning A, 13*(10).1189.

Johnstone, A. (2010). The Constitutional Initiative In Montana. *Montana Law Review, 71*(2), 325–382.

Johnstone, A. (2015). The Future of Federalism, From the Bottom Up. *Montana Law Review, 76*, 1-20.

Johnstone, A. (2016). State and Federal Constitutional Law Professor, University of Montana. Personal Interview. Missoula, Montana, 30 August 2016.

Johnstone, A., Griffing, B., & Barrett, E. (Executive Producer, Writer). (2015). Last Best Constitution: Looking Back 43 Year on the 1972 Constitution. [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Jonas, A. E. G. (2012). Region and Place: Regionalism in Questions. *Progress in Human Geography*, *36*(2), 263-272.

Karlin, J. A. (1986). Conflict and Crisis in University Politics: the Firing of President E.B. Craighead, 1915. *Montana: The Magazine of Western History*, *36*(3), 48–61.

Kates, R. W. (1987). The Human Environment: The Road Not Taken, The Road Still Beckoning. *Annals of the Association of American Geographers*, *77*(4), 525–534.

Keane, J. (2016). Butte Senator, former Anaconda Company employee, Personal Interview, Butte, Montana, 12 August 2016.

Kelly, A. H., Harbison, W. A., & Belz, H. (1983). *The American Constitution: its Origins and Development* (6th ed.), New York; London: W.W. Norton & Co.

Kemmis, D. (1978). Environmental Rights. Montana Law Review, *39* (2), 224-237.

Kirk, K. (2011). State of Change: Gender and the 1972 Montana Constitutional Convention. (Master's Thesis). Montana State University.

Kirk, K. (2016). History instructor, Black Hills State University, South Dakota. Personal

Interview, Calgary, Alberta, 20 September 2016.

Kittredge, W. (1992). Desire and Pursuit of the Whole: The Politics of Storytelling. *Montana: The Magazine of Western History*, *42*(1), 2–13.

Knox, P. L., Marston, J. J. & Nash, A. E. (2010). *Human Geography: Places and Regions in Global Context* (3rd ed.), (pp. 396 -397). Parsons Canada.

Kotze, L. J. (2015). The Conceptual Contours of Environmental Constitutionalism. *Widener Law Review*, *21*: 187–200.

Lang, W. L. (2012). From Where We are Standing: The Sense of Place and Environmental History. In D.D. Goble, P.W.Hirt. (Eds.), *Northwest Lands, Northwest Peoples: Readings in Environmental History.* Seattle: University of Washington Press.

Larson, W. E. (1971). News Management in the Company Press: The Anaconda Copper Mining Company's "Missoulian" "Billings Gazette" and "Helena Independent" Independent - Record 1938-1944. (Master's Thesis), University of Montana.

LeCain, T. J. (2006). "See America the Bountiful": Butte's Berkeley Pit and the American Culture of Consumption. *Montana: The Magazine of Western History*, *56*(4), 5–17.

Leech, B. (2012). Protest, Power, and the Pit: Fighting Open-Pit Mining in Butte, Montana. *Montana: The Magazine of Western History*, *62*(2), 24-43.

Leopold, A. (1949*). A Sand County Almanac: and Sketches Here and There.* London: Oxford University Press.

Lopach, J. J. (1987). The Montana Supreme Court in Politics. *Montana Law Review*, *48* (2), 265-296.

MacIntyre, D. (1988). The Adjudication of Montana's Waters - A Blueprint for Improving the Judicial Structure. *Montana Law Review*, *49*(2), 211-265.

Malone, M. P. (1971). Montana Politics and the New Deal. *Montana: The Magazine of Western History*, *21*(1), 2–11.

Malone, M. P. (1996). *Montana: A Contemporary Profile*. Helena: American & World Geographic Publishing.

Malone, M. P., & Dougherty, D. G. (1981). Montana's Political Culture: A Century of Evolution. *Montana: The Magazine of Western History*, *31*(1), 44–58.

Malone, M. P., Roeder, R. B., & Lang, W. L. (1991). *Montana: a History of Two*

Centuries. (Rev. ed.). Seattle: Univesrity of Washington Press.

Manderson, D. (1996). Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory. *Melbourne University Law Review*, *20*(4), 1048-1071.

Marcosson, I. F. (1957). *Anaconda*. New York: Dodd, Mead & Company Inc.

Marsh, G. P. (1864). *Man and Nature, Or, Physical Geography as Modified by Human Action.* New York: C. Scribner & Co.

Massey, D. B. (1984). Introduction: Geography Matters. In Massey, D.B. & Allen, J. (Eds.), *Geogprahy Matters: A Reader*, (p.1-11) Cambridge: Cambridge University Press.

Matthews, M. (2000). The Greening of the Rednecks. In *Living in the Runaway West: Partisan Views From Writers on the Range*, (pp. 99-100). Colorado: High Country News.

May, J. R. (2006). Constituting Fundamental Environmental Rights Worldwide. *Pace Environmental Law Review, 23*, 113-182.

May, J., & Romanowicz, W. (2011). *Environmental Rights in State Constitutions*. (J. R. May, Ed.), *Principles of Constitutional Environmental Law*. Chicago: American Bar Association.

McDonald, V. S. (2010). *The Red Corner: the Rise and Fall of Communism in Northeastern Montana.* Helena: Montana Historical Society Press

McLaren, R. A. (1990). Environmental Protection Based on State Constitutional Law: a Call for Reinterpretation. *University of Hawaii Law Review*, *12*, 123-152.

McNay, J. T. (1991). Breaking the Copper Collar: The Sale of the Anaconda Newspapers and the Professionalization of Journalism in Montana. *(*Masters Thesis). University of Montana.

McNeil, C.B. (2001). A Clean And Healthful Environment and Original Intent. *Public Land and Resources Law Review,* 22.

McNeil, C. B. (2016). 1972 Constitutional Convention Delegate, Montana District Court Judge. Personal Interview. Polson, Montana. 8 August 2016.

Mecklenberg, M. (2000). My Grandpa, the Eco-Rancher. *Living in the Runaway West: Partisan Views From Writers on the Range*, (p.99-100). Colorado: High Country News.

Mercier, L. (2001*). Anaconda: Labor, Community, and Culture in Montana's Smelter City*. Urbana: University of Illinois Press.

Mercier, L. (2002). Creating a New Community in the North: Mexican Americans of the Yellowstone Valley. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (p. 221-245). Helena: Montana Historical Society Press.

Merchant, C. (1996). Reinventing Eden: Western Culture as a Recovery Narrative. In W. Cronon (Ed.), *Uncommon Ground: Rethinking the Human Place in Nature* (p.153). New York: W.W. Norton.

Merriam, S. B. (2009). *Qualitative Research: A Guide to Design and Implementation*. Jossey-Bass.

Merrifield, A. (1993). Place and Space: A Lefebvrian Reconciliation. *Transactions of the Institute of British Geographers,* 18(4), 516-531.

Mikesell, M. W. (1974). Geography as the Study of Environment: An Assessment of Some Old and New Commitments. In I.R. Manners, & M.W. Mikesell (Eds.), *Perspectives on Environment: Essays Requested by the Panel on Environmental Education, Commission on College Geography* (pp.1-23). Washington: Association of American Geographers.

Miller, B. A. (2013). Spatialities of Mobilization: Building and Breaking Relationships. In W. Nicholls, J. Beaumont, & B.A. Miller. (Eds.), *Spaces of Contention: Spatialities and Social Movements.* Surrey: Ashgate.

Milner, C. A. (1991). The View from Wisdom: Region and Identity in the Minds of Four Westerners. *Montana: The Magazine of Western History*, *41*(3), 2–17.

Mittleman, J. H. (1998). Globalisation and Environmental Resistance Politics. *Third World Quarterly, 19*(5), 847-872.

Montana Constitutional Convention Commission. (1971). *Constitutional Convention Memorandums: Constitutional Amendments 1889-1971*. Retrieved from: https://archive.org/details/memorandumoncons00montrich

Montana Constitutional Convention Verbatim Transcripts. (1979-1981). Volumes 1-7. Helena: Montana Legislature, Montana Legislative Council, and the Constitutional Convention Editing and Publishing Committee.

Montana Constitutional Revision Commission. (1969). *Constitutional Amendments Introduced in the Legislative Assembly, 1889-1969*. Helena. Retreived from https://archive.org/details/constitutionalammontrich

Montana Legislative Fiscal Division. (2014). Montana Coal Severance Tax Distribution Detail. Retrieved from :http://leg.mt.gov/content/Publications/fiscal/leg_reference/Brochures/2014-Coal-Severance.pdf

Montana Legislative Fiscal Dicision. (2015). Resource Indemnity Trust. Retrieved: http://leg.mt.gov/content/publications/fiscal/leg_reference/Brochures/RIT.pdf

Montana Historical Society. (1957). Glorious Glacier. *Montana: The Magazine of Western History*, *7*(3), 2–3.

Montana Historical Society. (1959). See It Now, Historic Montana : A Present Day Tourist Paradise. *Montana: The Magazine of Western History*, *9*(3),34–51.

Montana's "Rosies": Female Smelter Workers During World War II. (2014). Womens History Matters. Retrieved from: http://montanawomenshistory.org/things-to-be-done-which-money-and-men-will-never-provide-the-activism-of-montanas-aauw/

Morin, B. J. (2014). *The Legacy of American Copper Smelting: Industrial Heritage Versus Environmental Policy*. University of Tennessee Press.

Mudd, M. B. (2011). A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment. *Ecology Law Quarterly*, *38*(1), 1–62.

Muir, J., Kauffman, R., & Brower, D.R. (1967). *Gentle Wilderness: The Sierra Nevada* (Rev.ed.), San Francisco: Sierra Club Books.

Muldoon, P., Lucas, A., Gibson, R. B., Pickfield, P., & Williams, J. (2015). *An Introduction to Environmental Law and Policy in Canada*. (2nd ed.), Toronto: Emond Montgomery Publications.

Munz, P. (1997). The Historical Narrative. In M. Bentley (Ed.), *Companion to Historiography*. London: Routledge.

Murphy, J. C. (1912). *The Comical History of Montana: A Serious Story For Free People: Being an Account of the Conquest of America's Treasure State by Alien Corporate Combine, The Confiscation Of Its Resources, The Subjugation of its People, and the Corruption Of Free Government to the Uses of Lawless,*

Enterprise and Organized Greed Employed in "Big Business." San Diego: E.L. Scofield.

Murphy, M. (1998). Butte: Resilient City with an Unforgettable Past. *Montana: The Magazine of Western History*, *48*(3). 2–3.

Murphy, M. (2003). *Hope in Hard Times: New Deal Photographs of Montana, 1936-1942*. Helena: Montana Historical Press.

Naber, C. (2003). Murky Waters: Private Action and the Right to a Clean and Healthful Environment. *Montana Law Review, 64*(1), 357-375.

Nash, R. (2014). *Wilderness and the American Mind.* (5th ed.). London; New Haven: Yale University Press.

Natelson, R. G. (2002). "No Armed Bodies of Men"- Montanans' Forgotten Constitutional Right (With Some Passing Notes on Environmental Rights Cases). *Montana Law Review, 63*(1), 1-24.

Nelson, J. C. (2010). Keeping Faith with the Vision: Interpreting a Constitution For This and Future Generations. *Montana Law Review, 71,* 299–323.

Newell, D. (1986). *Technology on the Frontier: Mining in Old Ontario.* Vancounver: University of British Columbia Press.

Nolon, J. R. (2006). In Praise of Parochialism: The Advent of Local Environmental Law. *Pace Environmental Law Review, 23*(3), 705-755.

Odum, E. P. (1969). The Strategy of Ecosystem Development. *Science, 164*(3877), 262–270.

Offen, K. (2014). Historical Geography III: Climate Matters. *Progress in Human Geography, 38*(3), 476-489.

Owens, K. N. (1987). The Prizes of Statehood. *Montana: The Magazine of Western, 37*(4), 2-9.

Pattison, W. D. (1964). Four traditions of Geography. *Journal of Geography, 63*, 211-216.

Patton, M. Q. (2002). *Qualitative Research and Evaluation Methods*. (3rd ed.). Thousand Oaks, CA: Sage.

Payne, T., & Eastman, E. (1972). *Montana Public Affairs: The Montana Voter and the 1972 Constitutional Election. (*Report No. 13, December 1972*)*. Missoula.

Peattie, D. C. (1983). In J.K. Howard (Ed.), *Montana: High, Wide, and Handsome*.

Lincoln: University of Nebraska Press.

Peet, R. (1998). *Modern Geographical Thought*. Malden;Oxford: Blackwell Publishers.

Percival, R. V., & Huiyu, Z. (2013). The Role of Civil Society in Environmental Governance in The United States And China. *Duke Environmental Law and Policy Forum, 24* (1), 141-182.

Perlmutter, S. J. (1976). The Montana Environmental Policy Act: The First Five Years. EQC Staff Report: Helena, MT. Retrieved from: http://leg.mt.gov/content/publications/environmental/1976mepa5years.pdf

Phillips, K. R. & Reyes, G. M. (2011). *Global Memoryscapes: Contesting Remembrance in a Transnational Age*. Tuscaloosa: The University of Alabama Press.

Pred, A. (1984). Place as Historically Contingent Process : Structuration and the Time-Geography of Becoming Places. *Annals of the Association of American Geographers*, *74*(2), 279–297.

Racicot, M. (2001). Series Foreword. In L. Elison, & F. Snyder (Eds.), *The Montana State Constitution: A Reference Guide*. Westport: Greenwood Press.

Reichert, A. (2016). 1972 Constitutional Convention Delegate, previous League of Women Voters Secretary. Personal Interview. Great Falls, Montana, 30 August 2016.

Robinson, T., Bowman, J., Hagener, T., & Barrett, E. (Executive producer). (2015). Paving the Way: The Path to Calling Montana's 1972 Constitutional Convention" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte, MT: Montana Tech.

Rome, A. (2003). "Give Earth a Chance":The Environmental Movement and the Sixties. *The Journal of American History*, *90*(2), 525-554.

Roeder, R. B. (1970). Montana Progressivism Sound and Fury--and One Small Tax Reform. *Montana: The Magazine of Western History*, *20*(4), 18–26.

Roeder, R. B. (1988). Electing Montana's Territorial Delegates: The Beginnings of a Political System. *Montana: The Magazine of Western History*, *38* (3), 58-68.

Roeder, R. B. (1990). The 1972 Montana Constitution in Historical Context. *Montana Law Review*, *51*(2), 260–269.

Ruetten, R. T. (1960). Anaconda Jouranlism: The End of an Era. *Journalism Quarterly*, *37*, 3-13.

Ryan, E. (2015). Environmental Federalism's Tug of War Within. In K. Robins (Ed.), *The Law and Policy of Environmental Federalism: A Comparative Analysis* (pp. 355–418). Cheltenham; Northampton: Edward Elgar Publishing.

Sabatier, P. A. (1973). State and Local Environmental Policy. *Policy Studies Journal, 1*(4), 217–226.

Sampson, J., McAdam, D., MacIndoe, H., & Weffer-Elizondo, S. (2005). Civil Society Reconsidered: The Durable Natural and Community Structure of Collective Civic Action. *American Journal of Sociology, 111*(3), 673-714.

Sax, J. (1970). *Defending the Environment: A Strategy for Citizen Action.* New York: Knopf.

Seldes, G. (1947). *One Thousand Americans*. New York: Boni and Gaer.

Sennett, F., Wicks, G., Fitzgerald, M., & Barrett, E. (Executive producer). (2015). New Kids on the Block: Forrest Anderson Brings Baby Boomers into Montana Government" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Schmidt, D. B., & Thompson, R. J. (1990). The Montana Constitution and the Right to Clean and Healthful Environment. *Montana Law Review, 51*, 411–448.

Schulte, S. C. (2005). "Where Man is a Visitor": The Wilderness Act as a Case Study in Western Public History, In A. Gulliford (Ed.), *Preserving Western History* (pp. 272-281). Albuquerque: University of New Mexico Press.

Schweitzer, B., & Barrett, E. (Executive producer). (2015). Prairie Populism: Being Raised a Progressive in Montana Farm & Ranch Country - Governor Brian Schweitzer" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Shelley, F. M. (2003). Classics in Human Geography Revisited: Commentary 1. *Progress in Human Geography, 27*(5), 605-607.

Shelton, D. (2008). Human Rights and the Environment : Problems and Possibilities. *Environmental Policy and Law, 38*, 41–50.

Shovers, B. (1987). The Perils of Working in the Butte Underground: Industrial Fatalities in the Copper Mines, 1880-1920. *Montana: The Magazine of Western History , 37*(2), 26-39.

Shovers, B. (1998). Remaking the Wide-Open Town: Butte at the End of the Twentieth Century. Montana: The Magazine of Western History, *48*(3), 40-53.

Shovers, B. (2005). Diversions, Ditches , & District Courts: Montana's Struggle to Allocate Water. *Montana: The Magazine of Western History*, *55*(1), 2–15.

Shovers, B. (2014). Forrest Anderson, the 1972 Constitution, and the Reshaping of Montana. *Montana: The Magazine of Western History, 64*(1), 41-61.

Shovers, B. (2016). Author, resident historian for the Montana Historical Society. Personal Interview. Helena, Montana, 9 August 2016.

Sinclair, U. (1919). *The Brass Check: A Study of American Journalism.* Pasadena: The Author.

Smith, D. A. (1964). The Golden West. *Montana: The Magazine of Western History*, *14*(3), 2–19.

Smurr, J.W. (1955a). The Montana Tax ' Conspiracy ' of 1889. *Montana: The Magazine of Western History*, *5*(2), 46–53.

Smurr, J. W. (1955b). The Montana Tax ' Conspiracy ' of 1889. *Montana: The Magazine of Western History*, *5*(3), 47–57.

Snyder, F. (2004). Fundamental Human Rights Compared in Two Progressive Constitutions: Japan and Montana. *International Legal Perspectives*, *14*, 30–57.

Snyder, F., & Ellingson, M. N. (2011). The Lawyer-Delegates of the 1972 Montana Constitutional Convention : Their Influence and Importance. *Montana Law Review*, *72*, 53–110.

Soja, E. W. (1989) *Postmodern Geographies: the Reassertion of Space in Critical Social Theory*. London: Verso.

Spence, M. D. (2002). Crown of the Continent, Backbone of the World: The American Wilderness Ideal and Blackfeet Exclusion from Glacier National Park. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 103-132). Helena : Montana Historical Society Press.

Stake, R. E. (2000). Qualitative case studies. In N.K. Denzin and Y.S. Lincoln (Eds.), *The Sage Handbook of Qualitative Research* (2nd ed.). Thousand Oaks: Sage.

Stake, R. E. (2005). Qualitative Case Studies. In N.K. Denzin and Y.S. Lincoln (Eds.), *The*

Sage Handbook of Qualitative Research (3rd ed.), Thousand Oaks: Sage.

Stiller, D. (2000). *Wounding the West: Montana, Mining, and the Environment*. Lincoln: University of Nebraska Press.

Stiller, D. M. (2002). The Evolution of Federal and Montana Policies Toward Abandoned Hard Rock Mines as Interpreted from Legislation, Regulatory Programs, and Selected Interviews. (Doctoral Dissertation). University of Calgary.

Stockton, T. M. (2016). Originalism and the Montana Constitution. *Montana Law Review, 77*(1), 117–149.

Stone, A. W. (1980). Impliedly Reserved Federal Water Rights: A Status Report. *Public Land Law Review, 1*, 39-55.

Svingen, O. J. (2002). Jim Crow, Indian Style. In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (p. 267-281). Helena: Montana Historical Society Press.

Swanson, F. H. (2013a). Lee Metcalf and the Politics of Preservation: Part 1—Conflict, Compromise, and the Art of Leadership. *Montana: The Magazine of Western History, 63*(1), 3- 23, 89-91.

Swanson, F. H. (2013b). Lee Metcalf and the Politics of Preservation: Part 2—Conflict, Compromise, and the Art of Leadership. *Montana: The Magazine of Western History, 63*(2), 58- 75, 94-96.

Swartout, R. R. (1988). From Kwangtung to the Big Sky: The Chinese Experience in Frontier Montana. In H.W.Fritz, M.Murphy, & R.R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 45-64). Helena: Montana Historical Society Press.

Swartout, R, R. (2006). Entering Butte. *Montana: The Magazine of Western History*, *56*(4), 3–4, 97.

Swartout, R. R., Fritz, H., & Barrett, E. (Executive producer). (2015). Montana's 75 Years as a Corporate Colony [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Swibold, D. L. (2006a). *Copper Chorus: Mining, Politics, and the Montana Press, 1889-1959.* Guilford; Helena: Montana Historical Press.

Swibold, D. (2006b). Anaconda Sheds Its Press: The Story behind the Company's Decision

to Sell Its Newspapers. *Montana: The Magazine of Western History*, *56*(2), 2–15.

Tarr, G. A. (1992). Understanding State Constitutions. *Temple Law Review*, *65*, 1169–1195.

Tarr, G. A. (2003). The Montana Constitution: A National Perspective. *Montana Law Review*, *64*, 1–21.

Tarr, G. A. (2004). State Constitutional Interpretation. *Texas Law Review and Politcs*, *8*(2), 357- 364.

Tarr, G. A. (2011). State Constitutional Design and State Constitutional Interpretation. *Montana Law Review*, *72*(1), 7-26.

Taylor, C. W. (2004). Construing the Text of Constitutions and Statutes. *Texas Review of Law and* Politics, 8(2), 365–371.

The Power of Strong, Able Women : The League of Women Voters of Montana and Constitutional Reform. (2014, December 9). *Women's History Matters*. Retrieved http://montanawomenshistory.org/the-power-of-strong-able-women-the-league-of-women-voters-of-montana-and-constitutional-reform/

The State Senate. (1889, August 4). *The Daily Independent*, p. 1. Retrieved from https://chroniclingamerica.loc.gov/search/pages/results/?state=Montana

Things To Be Done Which Money And Men Will Never Provide : The Activism of Montana's AAUW. (2014, December 23). *Women's History Matters*. Retrieved from http://montanawomenshistory.org/things-to-be-done-which-money-and-men-will-never-provide-the-activism-of-montanas-aauw/

Thomas, W. L. (1956). *Man's Role in Changing the Face of the Earth*. Chicago: University of Chicago Press.

Thompson, B. H. (1996). Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance. *Rutgers Law Journal*, *27*(4), 863-925.

Thompson, B. H. (2003). Constitutionalizing the Environment: the History and Future of Montana's Environmental Provisions. *Montana Law Review*, *64*, 157–198.

'Thousands' of Geese Die in Toxic Montana Pit Mine (2016, December 7). *BBC News*. Retrieved from: http://www.bbc.com/news/world-us-canada-38239879

Tidball, E. C. (2008). The Seminal Years of the Montana Legislative Council 1957-1965. *Montana: The Magazine of Western History*, *58*(1), 35-54.

Tobias, C. W., & McLean, D. N. (1980). Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority. *Montana Law Review, 41*, 177–267.

Toole, K. R. (1970). Rebuttal: When is a Reform a Reform. *Montana: The Magazine of Western History*, *20*(4), 27.

Toole, K. R. (1972). *Twentieth Century Montana: A State of Extremes.* Norman: University of Oklahoma Press.

Toole, K. R. ([1959]1984). *Montana: An Uncommon Land.* Norman: University of Oklahoma Press.

Towe, T., Fagg, H., & Barrett, E. (Executive producer). (2015). Ending Exploitation: Natural Resource Extraction and 1970s Legislature" [Video Episode]. In the Crucible of Change, Digital Commons Network. Butte: Montana Tech.

Tuan, Y-F. (1974). *Topophilia: A Study of Environmental Perception, Attitudes and Values.* Englewood Cliffs, NJ: Prentice-Hall.

Tuholske, J. R. (2011). Going with the Flow: the Montana Court's Conservative Approach to Constitutional Interpretation. *Montana Law Review, 72*, 237–260.

Tuholske, J. R. (2015). U.S. State Constitutions And Environmental Protection: Diamonds In The Rough. *Widener Law Review, 21,* 239- 255.

Turner, B. L. (2002). Contested Identities: Human-Environment Geography and Disciplinary Implications in a Restructuring Academy. *Annals of the Association of American Geographers, 92*(1), 52-74.

United Nations. (1972). Report of the United Nations Conference on the Human Environment. (Report No. A/ CONF, 48/14/Rev.1). Retrieved from: http://www.un-documents.net/aconf48-14r1.pdf

United States Bureau of Reclamation. (1971). *North Central Power Study: Report on Phase I.* Retrieved from: https://archive.org/details/northcentralpowe1971unit

United States Census Bureau. (2016). Population Estimates, July 1, 2016. Retrieved from: https://www.census.gov/quickfacts/fact/table/billingscitymontana/PST045216

United States Environmental Protection Agency. (2018). Superfund Sites in Region 8. Retrieved from: https://www.epa.gov/region8/superfund-sites-region-8

Unwin, T. (2000). A Waste of Space? Towards a Critique of the Social Production of

Space. *Source: Transactions of the Institute of British Geographers*, *25*(1), 11–29.

Uphoff, N. (1993). Grassroots Organizations And Ngos In Rural Development: Opportunities With Diminishing States And Expanding Markets. *World Development, 21*(4), 607-622.

Van West, C. (1983). Montana's Self-Confessed Elite: The Progressive Men of Montana. *Montana: The Magazine of Western History*, 36–45.

Vivian, J. F. (1986). The Last Round-Up : Theodore Roosevelt Confronts the Nonpartisan League , October 1918. *Montana: The Magazine of Western History*, *36*(1), 36–49.

Waldron, E., & Wilson, P. B. (1978). *Atlas of Montana Elections 1889-1976*. University of Montana.

Walter, D. (2002). Hogan's Army "A Petition With Boots On." In H. W. Fritz, M. Murphy, & R. R. Swartout, Jr. (Eds.), *Montana Legacy: Essays on History, People, and Place* (pp. 65-78). Helena : Montana Historical Society Press.

Wandler, H. (2015). Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana. *Montana Law Review, 76*(2), 225-255.

Warf, B. (1993). Postmodernism and the Localities Debate: Ontological Questions and Epistemological Implications. *Tijdschrift Voor Economische En Sociale* Geografie, *84*(3), 162-168.

Webb, W. P. (1958). The West and the Desert. Montana: *The Magazine of Western History, 8*(1), 2-12.

Western Governors' Association. (2007). Western Governors' Association Clean and Diversified Energy Initiative (2005-2007 Progress Report). Retrieved from https://wrdc.usu.edu/files-ou/publications/pub__7546237.pdf

White, T. W. (1988). Commonwealth or Colony? Montana and the Railroads in the First Decade of Statehood. *Montana: The Magazine of Western History*, *38*(4), 12–23.

Wilkinson, C. F. (1980). The Field of Public Land Law: Some Connecting Threads and Future Directions. *Public Land Law Review*, *1*, 1–38.

Wilkinson, C.F. (1992). *The Eagle Bird: Mapping a New West*. New York: Pantheon

Wilson, B. P. (2004). State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling? *Emory Law Journal, 53*, 627–656.

Wray, W. B. (2016). Author, previous geologist for the Anaconda Company, private mining consultant and attorney. Personal Interview. Butte, Montana, 12 August 2016.

Wright, J. B. (1998). *Montana Ghost Dance: Essays on Land and Life*. Austin: University of Texas Press.

Wright, J. B. (2003). Montana's Emerging Montane Homeland. In R. L. Nostrand & L. E. Estaville (Eds.), *A Geography of Culture and Place Across America* (p. 225–237). Baltimore: John Hopkins University Press

Wyatt-Shaw, T. (1994). The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution:' They Mean Something ". *Public Land and Resources Law Review, 15,* 219–247.

Wyckoff, W. (2002). Life on the Margin : The Evolution of the Waning West. *Montana: The Magazine of Western History, 52(*3), 30–43.

Wyckoff, W. (2006). Second Views of the Treasure State. *Montana: The Magazine of Western History, 56*(1), 20–29.

Yin, R. K. (1994). *Case Study Research: Design and Methods* (Rev. 2nd ed,), Newbury Park: Sage.

Yochim, M. J. (2005). Kayaking Playground or Nature Preserve ? Whitewater Boating Conflicts in Yellowstone National Park. *Montana: The Magazine of Western History, 55*(1), 52–64.

Zackin, E. (2013). *Looking for Rights in All the Wrong Places : Why State Constitutions Contain America's Positive Rights*. Princeton: Princeton University Press.

Zalis, P. (2016). Co-producer, *For This and Future Generations.* Personal Interview. Missoula, Montana, 29 August 2016.

APPENDIX A: ENVIRONMENTAL PROVISIONS REFERENCED

PREAMBLE

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

Article II, DECLARATION OF RIGHTS

Section 3. Inalienable Rights. 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.

Article IX, ENVIRONMENT AND NATURAL RESOURCES

Section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Section 2. Reclamation. (1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed. (2) The legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as the legislature may from time to time impose for that purpose. (3) The principal of the resource indemnity trust shall forever remain inviolate in an amount of one hundred million dollars ($100,000,000), guaranteed by the state against loss or diversion.

Section 3. Water Rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use. (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

Section 5. Severance Tax on Coal. The legislature shall dedicate not less than one-fourth (1/4) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths of the members of each house of the legislature. After December 31, 1979, at least fifty percent of the severance tax shall be dedicated to the trust fund.

APPENDIX B: INTERVIEW PARTICIPANTS

Campbell, B. (2016). 1972 Constitutional Convention Delegate, Attorney. Personal Interview. Missoula, Montana, 29 August 2016.

Chambers, D. M. (2016). Founder and President, Center for Science in Public Participation. Personal Interview. Bozeman, Montana, 11 August 2016.

Chambers, G. (2016). Co-producer, *For This and Future Generations*. Personal Interview. Missoula, Montana, 29 August 2016.

Ellingson, M. N. (2016). 1972 Constitutional Convention Delegate, Attorney, past member of the American Association of University Women. Personal Interview. Missoula, Montana, 29 August 2016.

Jensen, J. (2016). Executive Director, Montana Environmental Information Center. Personal Interview. Helena, Montana, 10 August 2016.

Johnson, D. (2016). Staff attorney and Water Program Director, Montana Environmental Information Center. Personal Interview. Helena, Montana, 10 August 2016.

Johnstone, A. (2016). State and Federal Constitutional Law Professor, University of Montana. Personal Interview. Missoula, Montana, 30 August 2016.

Keane, J. (2016). Butte Senator, past Anaconda Company employee. Personal Interview. Butte, Montana, 12 August 2016.

Kirk, K. (2016). History instructor, Black Hills State University, South Dakota. Personal Interview. Calgary, Alberta, 20 September 2016.

McNeil, C. B. (2016). 1972 Constitutional Convention Delegate, Montana District Court Judge. Personal Interview. Polson, Montana, 8 August 2016.

Reichert, A. (2016). 1972 Constitutional Convention Delegate, previous League of Women Voters Secretary. Personal Interview. Great Falls, Montana, 30 August 2016.

Shovers, B. (2016). Author, resident historian for the Montana Historical Society. Personal Interview. Helena, Montana, 9 August 2016.

Wray, W. B. (2016). Author, previous geologist for the Anaconda Company, private mining consultant, and attorney. Personal Interview. Butte, Montana, 12 August 2016.

Zalis, P. (2016). Co-producer, *For This and Future Generations* Personal Interview. Missoula, Montana, 29 August 2016.

APPENDIX C: CONSTITUTIONS AND STATUTES REFERENCED

Constitutions

Montana State Constitution (1889, 1972)

United States Constitution

Montana State Statutes Referenced

Agricultural Chemical Groundwater Protection Act (MCA §80-15-101)

Clean Air Act (MCA §50-40-101)

Comprehensive Environmental Cleanup and Responsibility Act (MCA §75-10-705).

Metal Mine Reclamation Act (MCA § 82-4-301)

Montana Environmental Policy Act (MCA § 75-1-101

Major Facility Siting Act (MCA § 75-20-101)

Nongame and Endangered Species Act (MCA § 87-5-101)

Strip and Underground Mine Reclamation Act (MCA § 82-4-201)

Water Resources Act (MCA § 75-5-201)

Water Use Act (MCA § 85-2-101)

United States Statutes Referenced

Clean Air Act of 1970 (42 USC § 7401)

Clean Water Act of 1972 (42 USC § 1251)

Enlarged Homestead Act of 1909 (43 USC § 218)

General Mining Act of 1872 (30 USC § 22)

Glacier National Park Act of 1910 (16 USC § 161)

Freedom of Information Act of 1966 (5 USC § 552)

National Environmental Policy Act of 1969 (42 USC § 4321)

National Industrial Recovery Act of 1933 (15 USC §703)

National Labor Relations Act of 1935 (29 USC § 151)

Safe Drinking Water Act of 1974(42 USC § 300f)

Solid Waste Disposal Act of 1965 (42 USC § 6901)

Stock-Raising Homestead Act of 1916 (43 USC § 291)

Surface Mining Control and Reclamation Act of 1977 (30 USC § 1201)

Taylor Grazing Act of 1934 (43 USC §315)

Voting Rights Act of 1965 (52 USC § 10101)

Water Quality Act of 1965 (33 USC § 1151)

Wild and Scenic Rivers Act of 1968 (16 USC § 1271)

Wilderness Act of 1964 (16 USC § 1131)

Yellowstone Act of 1872 (16 USC § 21)

Canadian Statutes Referenced

Ontario Environmental Bill of Rights (S.O. 1993, c. 28)

Alberta Special Areas Act (R.S.A. 2000, c. S-16).

APPENDIX D: COURT CASES REFERENCED

US Supreme Court

Baker v. Carr, 369 US 186 (1962)

Commonwealth Edison Co. v. Montana, 453 US 609 (1981)

Gray v. Sanders, 372 US 368 (1963)

Reynolds v. Sims, 377 US 533 (1964)

Wesberry v. Sanders, 376 US 1 (1964)

Montana Supreme Court

Butte Silver-Bow Local Gov. v. State of Montana 768 P.2d 327 (1989)

Cape-France Enterprises v. Estate of Peed, 29 P. 3d 1011 (2001)

Clark Fork Coalition v. Department of Environmental Quality, 197 P. 3d 482 (2008)

*Flathead Citizens for Quality Growth Inc., v. Flathead County Board of Adjustment,*175 P 3d. 282 (2008)

General Agriculture Corp. v. Moore, 534 P. 2d 859 (1975)

Hagener v. Wallace, 47 P. 3d 847 (2002)

Kadillak v. Anaconda Co., 602 P. 2d 147 (1979)

Lohmeier v. Gallatin County, 135 P.3d 775, 777 (2006)

Merlin Myers Revocable Trust v. Yellowstone County, 53 P. 3d 1268 (2002)

Montana Coalition for Stream Access v. Curran, 682 P 2d. 163 (1984)

Montana Environmental Information Centre et al. v. Department of Environmental Quality and Seven-Up Pete Joint Ventures, 988 P. 2d 1236 (1999)

Montana Wildlife Association v. Board of Health and Environmental Sciences, 559 P. 2d 1157(1976)

Northern Plains Resource Council et al. v. Board of Land Commissioners et al., 288 P. 3d 169 (2012)

Seven Up Pete Joint Venture et al. v. State of Montana et al., 114 P. 3d. 1009 (2005)

Shammel et al. v. Canyon Resources Corp., 167 P. 3d 886 (2007)

State of Montana v. Bernhard, 568 P. 2d 136 (1977)

State of Montana v. Boyer, 42 P. 3d 771 (2002)

State of Montana, ex rel. Department of Environmental Quality v. BNSF Railway Co.- 246 P. 3d 1037(2010)

State of Montana, ex rel. Department of Health v. Green, 739 P. 2d 469 (1987)

State of Montana, ex rel. Kvaalen v. Graybill, 496 P. 2d 1127 (1972).

State of Montana, ex rel. Palagi v. Regan, 126 P. 2d 818 (1942)

Sunburst School Dist. No. 2. v. Texaco, Inc., 165 P. 3d 1079 (2007)

Tally Bissell Neighbors Inc. v. Eyrie Shotgun Ranch, 228 P. 3d 1134 (2010)

Williamson v. Montana Public Service Commission, 272 P. 3d 71 (2012)

Pennsylvania Supreme Court

Robinson Township et al. v. Commonwealth of Pennsylvania et al., 83 A. 3d 901(2013).

Federal Courts

Bliss v. Washoe Copper Co., 186 F. 789 (9th Cir., 1911)

Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir., 1971).

Environmental Defense Fund v. Hoerner Waldorf, 1 E.R.C. 1640 (D. Mont., 1970)

National Wildlife Federation et al. v. Montana Department of State Lands and Golden Sunlight Mines Inc. No. CDV-92-486 (1st Dist. Ct., 1994-2002)

Roberts v. Babcock, 246 F. Supp. 396- Dist. Court, (D. Mont., 1965)

Orr v. State of Montana, No. BDV-201-423 (1st Dist. Ct., 2002)

APPENDIX E: MONTANA BALLOT MEASURES (1974- 2017)

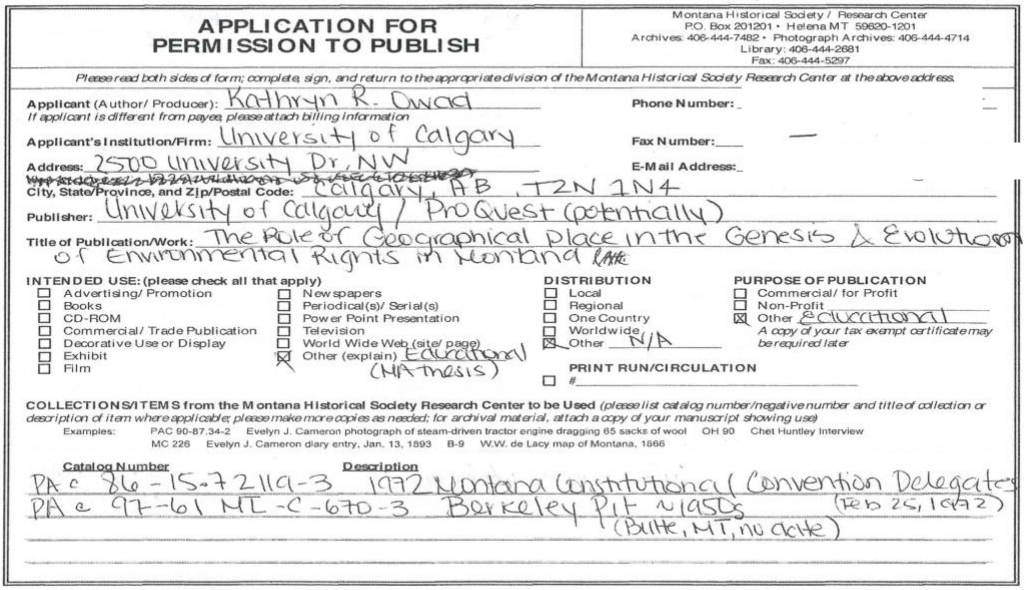
Table A. 1 Ballot Results Concerning Environment, Resources, Wildlife, and Constitutional Convention Measures

Date	Initiative	Result
November 1974	Legislature referred constitutional amendment (C-1): Create a Resource Indemnity Trust funded by taxes on the extraction of natural resources	Approved (61%)
November 1976	Legislature referred constitutional amendment (C-3): Create a Montana Coal Trust Fund, dedicating a portion of the coal severance tax to a permanent trust fund	Approved (63%)
-	Legislature referred statute (I-71): Requires Legislative approval of any nuclear facility	Rejected (59%)
November 1978	Legislature referred statute (I-80): Allows voters to approve/reject any proposed nuclear facility	Approved (65%)
November 1980	Legislature referred statute (I-84): Forbids disposal of radioactive waste within state	Approved (50%)
-	Citizen Initiated statute (I-87): Establishes a voluntary recycling program, prohibits sale of non-refillable glass or plastic beverage bottles	Rejected (71%)
November 1982	Legislature referred statute (LR-89): Removes prohibition on the prohibition of disposal of radioactive nuclear waste within state	Rejected (76%)
November 1988	Citizen initiated statute (I-113): refundable deposits on beverage containers	Rejected (79%)
November 1990	Legislature referred constitutional amendment (CC-1): whether to call a Constitutional Convention	Rejected (82%)
June 1992	Legislature referred statute (I-110): Create a 20-year Treasure State Endowment Fund from within the Coal Trust fund to finance local infrastructure projects	Approved (63%)
November 1996	Citizen initiated statute (I-122): Increases requirement for treatment of water discharged from mines, prohibited issuance of new metals mines permits, exploratory licenses, or significant amendments to cyanide heap leaching permits also requiring water treatment to remove 80% of each carcinogen, toxin and nutrient prior to discharge	Rejected (57%)
November 1998	Citizen initiated state statute (I-137): Prohibits cyanide process open pit gold and silver mining	Accepted (52%)
November 1998	Citizen initiated statute (I-136): eliminate the requirement that nonresident hunters use an outfitter to obtain hunting licenses	Rejected (56%)
November 2004	Legislature referred constitutional amendment (C-40): Establishes a trust fund for the management of noxious weeds	Approved (76%)
-	Legislature referred constitutional amendment (C-41): Preserves heritage of Montana's opportunity to harvest wild fish and game	Approved (81%)
-	Citizen Initiated State Statute (I-147): Allows cyanide leach	Rejected

	processing	(58%)
November 2010	Legislature referred constitutional amendment (CC-2): whether to call a Constitutional Convention	Rejected (58%)
-	Citizen initiated statutes (I- 161): Increased nonresident big game license fees, abolished outfitter-sponsored licenses	Approved54%)
November 2016	Citizen initiated statutes (I-177): Prohibiting individuals from using animal traps and snares on state public lands	Rejected (63%)
Potential ballot measure (2018)	Citizen initiated statute: Requiring investor-owned electric utilities to increase procurement of renewable sources (i.e. wind/solar)	TBD

Data retrieved from: Ballotopedia.org/Montana_1974_ballot_measures

APPENDIX F: PERMISSION TO PUBLISH PICTURES



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Catalog Number	Description
PA c 86-15.72 119-3	1972 Montana Constitutional Convention Delegates (Feb 25, 1972)
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