



## Oregon State Bar Sustainable Future Section

Friday, May 21, 2010 from 8:00 am to 9:30 am

University of Oregon's White Stag Location  
70 NW Couch Street in Portland (Entrance on Couch)  
First Floor Conference Room

# Should the Oregon Constitution be Amended to Protect the Environmental Rights of Future Generations?

### **Program:**

Stoel Rives lawyers Jim Westwood and Steve Griffith will engage in a lively debate moderated by The Honorable Jack Landau on whether the Oregon Constitution should be amended to include the following provision based on Article 9, Section 1 of the Montana Constitution:

- “(1) The state and each person shall maintain and improve a clean and healthful environment in Oregon 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.”

### **Panel:**

**James N. Westwood**, a graduate of Columbia Law School (1974), is a partner in the Portland office of Stoel Rives LLP. Jim specializes in appellate practice and constitutional law. He has served as Chair of the Appellate Practice and the Constitutional Law Sections of the Oregon State Bar and as President of the City Club of Portland. For nine years, Jim has coached the Grant High School constitution law team.

**Stephen L. Griffith**, a graduate of Stanford Law School (1977), is a partner in the Portland office of Stoel Rives LLP. Steve heads the Probate Litigation practice group at the firm. He has served as Chair of the Portland School Board and Counsel to the Oregon House Judiciary Committee, and has been a director of The Wilderness Society and Oregon League of Conservation Voters. For 10 years, Steve has coached the Lincoln High School constitution law team.

**The Honorable Jack L. Landau** received his law degree from Northwestern School of Law of Lewis & Clark College (1980) and an LLM from the University of Virginia School of Law (2001). Since 1993, he has served as a judge on the Oregon Court of Appeals and as an adjunct professor of law at the Willamette University College of Law.

**SHOULD THE OREGON CONSTITUTION BE AMENDED TO PROTECT THE ENVIRONMENTAL RIGHTS OF FUTURE GENERATIONS?**

The Honorable Jack L. Landau will moderate a debate between Stephen L. Griffith and James N. Westwood over whether to amend the Oregon Constitution to include the following provisions:

“(1) The state and each person shall maintain and improve a clean and healthful environment in Oregon 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.”

The proposed amendment to the Oregon Constitution debated in this CLE is modeled on Article IX of the Constitution of the State of Montana. Several other states have constitutional provisions addressing sustainability. There are handful of cases addressing those provisions of the state constitutions, with the most prolific being in Hawai’i, likely for the reason that natural resources are a larger part of the economy and life of a remote tropical island. Below are a sampling of the constitutional provisions of several states and provisions from other nations as well as a list of some cases interpreting the state constitutional provisions. This list and the case descriptions in it do not purport to be authoritative. Also, the translations from foreign languages for the non-U.S. constitutional provisions are not official.

**MONTANA**

Article 2, Section 3, of the Montana Constitution provides:

## OREGON STATE BAR SUSTAINABLE FUTURE SECTION

“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 9, Section 1, provides:

“(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.”

Cases interpreting those provisions:

*Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. The Montana Supreme Court, after a lengthy review of the 1972 Constitutional Convention, held that a state statute, to the extent that it “arbitrarily excludes certain ‘activities’ from nondegradation review . . . violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.” The court also concluded that those provisions of the constitution “are both anticipatory and preventative.” Further, the court stated that it “will apply strict scrutiny to state or private action which implicates either constitutional provision.” A concurring opinion opined that the statute at issue was facially unconstitutional and that applying a strict scrutiny test to private action “is dicta which, I submit, may well prove unworkable in the future.”

*Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011. In this case, the Montana Supreme Court allowed a party to rescind a contract where performance would likely harm the environment. In *Cape-France*, a vendor of real estate rescinded the sales contract on the property after subdivision became impractical because it was suspected the groundwater under the property was contaminated. The court concluded that the

## OREGON STATE BAR SUSTAINABLE FUTURE SECTION

contract could be rescinded on the basis of impracticability and illegality. Prior to creating a subdivision, the owners would be required to drill a test well and the test well itself could exacerbate the ground water pollution. The court stated that the “decisive point” is that “In light of these two provisions of Montana’s Constitution, it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks. As already noted, a contract may be rescinded where the object of the contract is unlawful.”

*Sunburst v. Texaco*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079. The court concluded that, where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment under Article II, Section 3 and Article IX, Section 1, of the Montana Constitution does not support a cause of action for money damages between two private parties.

*Shammel v. Canyon Resources Corp.*, 2007 MT 206, 338 Mont. 541, 167 P.3d 886. The Montana Supreme Court affirmed a district court ruling that a “proven violation of the constitutional right to a clean and healthful environment does not authorize a distinct, constitutionally based cause of action in tort between two private parties for money damages.” The court held that “Where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties.”

Treatise: Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History And Future of Montana’s Environmental Provisions*, 64 Mont. L. Rev. 157 (2003).

### **HAWAII**

Article XI of the Constitution of Hawai’i provides, in part:

“Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and

## OREGON STATE BAR SUSTAINABLE FUTURE SECTION

utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

“All public natural resources are held in trust by the State for the benefit of the people.

.....

“Section 9. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”

All eleven sections concerning Article XI’s provisions on Conservation, Control and Development of Resources can be found at <http://hawaii.gov/lrb/con/conart11.html> .

### ILLINOIS

Article XI, Section 2, of the Constitution of the State of Illinois provides:

“Each person has the right to a healthful environment. Each person may enforce 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.”

*City of Elgin v. County of Cook*, 169 Ill. 2d 53, 85-86, 660 N.E.2d 875, 891 (1995). In that case, the Illinois Supreme Court stated, “Section 2 of article XI does not create any new causes of action but, rather, does away with the ‘special injury’ requirement typically employed in environmental nuisance cases. (ILCS Ann., 1970 Const., art. XI, §§ 1, 2, Constitutional Commentary, at 812-13 (Smith-Hurd 1993).) Thus, while a plaintiff need not allege a special injury to bring an environmental claim, there must nevertheless still exist a cognizable cause of action.”

**ECUADOR**

The 2008 Ecuadorean constitution provides in Title 2, Chapter 7, articles 71 to 74, rights for the environment itself. A rough translation, from Wikipedia, is pasted below. There are other chapters giving people rights to a clean environment (Title II, Chapter 2, section 2, articles 14 & 15) and giving protection to biodiversity and natural resources (Title VII, Chapter 2, sections 1-7, articles 395-415).

“Art. 71. Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before public institutions. The application and interpretation of these rights will follow the related principles established in the Constitution. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.

“Art. 72. Nature has the right to an integral restoration. This integral restoration is independent of the obligation of natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems. In case of severe or permanent environmental impact, including that caused by the exploitation of non renewable natural resources, the State will establish the most efficient mechanisms for restoration, and will adopt adequate measures to eliminate or mitigate the harmful environmental consequences.

“Art. 73. The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles. The introduction of organisms and organic and inorganic material that can alter the national genetic heritage in a definitive way is prohibited.

“Art. 74. The persons, people, communities and nationalities will have the right to benefit from the environment and from natural wealth that will allow wellbeing. The environmental services cannot be appropriated; their production, provision, use and exploitation, will be regulated by the State.”

**GERMANY**

Article 20a (amended 2002)

“The state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations.”

**THE KINGDOM OF NEPAL**

The 1990 constitution, Article 26 clause (4)

“The state shall give priority to the protection of environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about arrangement for the special protection of the rare wildlife, the forest and the vegetation.”

**POLAND**

Constitution of 1997, Article 5

“The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.”

**SOUTH AFRICA**

Constitution of 1996, Chapter 2, Section 24

“Everyone has the right -

- “a. to an environment that is not harmful to their health or well-being; and
- “b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
  - “i. prevent pollution and ecological degradation;
  - “ii. promote conservation; and
  - “iii secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

