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15 IN THE MUNICIPAL COURT OF THE CITY OF HELENA  
16 COUNTY OF LEWIS & CLARK, STATE OF MONTANA  
17

CITY OF HELENA, MONTANA,  
  
Plaintiff,  
  
vs.  
  
BONNIE McKINLAY, et al.  
  
Defendants.

Nos. 2012-NT-4385, et seq.  
  
**DEFENDANTS' NOTICE OF  
INTENDED DEFENSES**

18  
19 Defendants hereby notify the court and the City Prosecutor of their intent to use the  
20 following Defenses:

21 1) The Defense of Necessity-that is that they reasonably believed that their actions were  
22 necessary to prevent the commission of a greater evil. This is an accepted trial  
23 Defense in every state.

24 The Defense appears and is allowed under the Model Penal Code, which also  
25 has a jury instruction for its use. It has been used in trial courts in at least 28 states

1 including Washington, New York, Illinois, California, Massachusetts, Vermont, New  
2 Hampshire, Pennsylvania, and Wisconsin. The original Federal case is U.S. v.  
3 Berrigan, which recognized the Defense and established the prongs for its use. The  
4 prongs are generally that: A Defendant is not guilty of an offense that they are otherwise  
5 guilty of if: 1) They reasonably believed that their actions were necessary; 2) to prevent  
6 the occurrence of a greater harm; and 3) They believed that no lawful action would  
7 produce the necessary results.

8 There is a question as to whether the third prong is objective or subjective. Note: it is  
9 not necessary that the action in question be successful in preventing the harm in  
10 question, only that there be a reasonable causal link between the action and the evil.  
11 This is a doctrine going back to the earliest days of English Common Law, and before  
12 that to religious court that predated secular courts in Medieval Europe.

13 The elements that most are at issue are: 1) No legal alternatives, and 2) the link  
14 between the action of the Defendant(s) and the harm sought to be prevented. As to the  
15 first one, the law is clear that Defendants are not required to show that no legal  
16 alternative means of protesting exists, but rather that such means are ineffective, futile,  
17 or not rapid enough to prevent the harm, in other words, a futility argument applies like  
18 that applicable to any exhaustion of remedies issue:

19 In Montana, the Defense has been discussed and cited repeatedly by the  
20 Montana Supreme Court which adopted the Defenses as defined in the common law as  
21 a Montana Defense.

1           The necessity defense was most recently discussed, albeit under the  
2           guise of “compulsion,” by the MT Supreme Court in State of Montana v.  
3           Leprowse, 2009 MT 387, 353 Mont. 312, 221 P.3d 648 (2009). In Leprowse the  
4           MT Supreme Court remanded to allow a Defendant, in the context of driving  
5           drunk to avoid a fight, to put on evidence in support of the affirmative defense of  
6           compulsion. Under Montana law, the defenses of compulsion, necessity, and  
7           duress are discussed and grouped together.

8  
9           In State of Montana v. Nelson, 2001 MT 236, 307 Mont. 34, 36 P.3d 405.

10          the Court stated:

11                   “[T]his court has repeatedly stated that the statutory defense of  
12                   compulsion merges with the common law defenses of necessity,  
13                   justification, compulsion, duress and “choice of two evils. “State v. Cox  
14                   (1994), 266 Mont. 110, 117, 879 P.2d 662, 666. Cited in State of Montana  
15                   v. Nelson, 2001 MT 236, 307 Mont. 34, 36 P.3d 405.

16  
17           In Nelson the Court reaffirmed that the necessity defense is codified in Montana  
18          at MCA § 45-2-212, recognizing that the statute represents a statutory amalgamation.  
19          MCA § 45-2-212 states:

20                   “A person is not guilty of an offense, other than an offense punishable with death,  
21                   by reason of conduct which he performs under the compulsion of threat or  
22                   menace of the imminent infliction of death or serious bodily harm if he reasonably

1 believes that death or serious bodily harm will be inflicted upon him if he does not  
2 perform such conduct.”

3

4 In Nelson, the Court favorably cited State v. Shotton, 458 A2d 1105 (VT 1983), setting  
5 out the elements of the necessity defense as follows:

6 (1) there must be a situation of emergency arising without fault on the part of the  
7 actor concerned;

8 (2) the emergency must be so imminent and compelling as to raise a reasonable  
9 expectation of harm, either to the actor or to those whom the actor was  
10 protecting;

11 (3) the emergency must present no reasonable opportunity to avoid the  
12 emergency without doing the criminal act; and

13 (4) the injury impending from the emergency must be of sufficient seriousness to  
14 outmeasure the criminal wrong. Shotton, 458 A.2d at 1106.

15

16

17 “In order to show that a Defendant had no reasonable legal alternative to  
18 avoid the emergency (element 3),, (t)he(y) must show that "he had actually tried  
19 the alternative or had no time to try it, or that a history of futile attempts revealed  
20 the illusory benefits of the alternative." United States v. Harper, 802 F.2d 115,  
21 118 (5th Cir. 1986).

1           Here, numerous persons involved with these Demonstrations, including these  
2 Defendants had sought through peaceful protest, lobbying, electoral work, letters,  
3 petitions, and many other means to persuade the Land Board and the companies and  
4 railroad involved in granting additional permits for industrial scale strip mining of the  
5 Otter Creek and Signal Peak areas of pristine wilderness and the strip mining and  
6 shipping of coal from the Powder River Basin to current and future ports to be shipped  
7 overseas where it will be burned and greatly contribute to global climate change and cause  
8 lethal pollution back here.

9           Defendants will testify that the Land Board rescheduled a meeting to avoid  
10 allowing them to publically comment on the permit applications, and that Governor  
11 Schweitzer, who chairs the Land Board, responded to them by stating, "It's a done  
12 deal." "Is what they are asking me, is to give Arch Coal their \$86 million back?" said  
13 Schweitzer, who chairs the Land Board and leaves office at year's end. "The Land  
14 Board has made its decision." Daily Missoulian August 19, 2012.

15           Defendants will argue that climate change has progressed to a point where  
16 urgent action is needed immediately, and that the mining, shipment, and burning of coal  
17 is drastically and disproportionately responsible for global climate change, and that if  
18 immediate and repeated action is not taken to stop the mining, shipment, and  
19 processing of coal, irreversible and catastrophic harm will and is occurring and will  
20 accelerate geometrically in the immediate future, and that great loss of life, human and  
21 otherwise will result imminently and is already occurring. Defendants will present

1 testimony to all of this as well as their sincerely held belief that the destruction of these  
2 wilderness areas, and the mining of this coal, the shipment of this coal to the present  
3 and future coal shipment ports in the Pacific Northwest, and the use of state and local  
4 resources to carry out these acts to be immensely immoral, a betrayal of public trust  
5 and responsibility and all far outweigh the minor harm, if any caused by remaining in the  
6 rotunda of the Capitol after its designated closing hour.

7 Defendants will testify that they and others took all reasonable lawful steps under  
8 the circumstances to stop the mining, shipment, and burning of coal and to persuade  
9 the government of Montana and the United States government to cease allowing and  
10 drastically contributing to global climate change and have that such actions have been  
11 futile and, in fact, the U.S. has acted to delay and prevent reasonable restrictions from  
12 being enacted that would have curbed and reduced mining and shipment of coal and  
13 global climate change, and Montana continues to grant permits to allow the destruction  
14 of wilderness for the mining of that coal, which then gets burned in China and India,  
15 drastically raises the carbon dioxide level in the atmosphere, and comes back in the  
16 form of unsafe levels of mercury and other toxic metals and materials contained in the  
17 rain that falls on the West Coast and beyond..

18

19 2) Additionally, Defendants intend to use a First Amendment Defense that their  
20 actions were protected by the First Amendment, which provides a defense to peaceful  
21 acts of dissent. “The First Amendment may make individual criminal Defendants

1 immune from defending actions for having exercised their right to petition the  
2 government.” Cate v. Oldham 707 F.2d 1176 (11<sup>th</sup> Circuit, 1983),

3 The U.S. Constitution outweighs and takes precedence over local traffic and  
4 other ordinances. Hague v. CIO, 307 U.S. 496, 515-16 (1939).

5 “Streets and parks are considered to be the pre-eminent public forum  
6 since time immemorial, and are to be held in trust for the use of the public, and  
7 for the purpose of assembly, communicating thoughts between citizens, and  
8 discussing public questions. These uses are given great priority and have rights  
9 significantly greater than that of public or private traffic or commerce. Such use  
10 of the streets and public places has, from ancient times, been a part of the  
11 privileges, immunities, rights, and liberties of national citizenship, and is  
12 protected by and guaranteed by the United States.” Hague v. CIO, 307 U.S. 496,  
13 515-16 (1939).

14 “Public places such as sidewalks, streets, and parks historically associated with  
15 the free exercise of expressive activity are considered to be “public forums”; in such  
16 places the government’s ability to permissibly restrict expressive conduct is very  
17 limited.” Cannon v. City and County of Denver 998 F.2d 867 (10<sup>th</sup> Circuit 1993).

18  
19 This act occurred in the seat of government for the State of Montana, a site  
20 guaranteed to the people for expressing their views and petitioning the government for  
21 redress of grievances, and specifically involved so petitioning the government.

1 Defendants further notify this court and the prosecutor that they intend to call  
2 experts such are needed for Defenses 1-2 above.

3

4 Dated this 19th Day of November, 2012,

5 \_\_\_\_\_  
6 LAWRENCE A. HILDES WSBA #35035

7 Of Attorneys for Defendants, Admitted Pro-hac Vice to this court for this case

8



1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 19<sup>th</sup> Day of November, 2012, I served a true and  
3 correct copy of Defendants' Set One of Discovery Requests by first class mail on the  
4 following and addressed as follows:

5 City Attorney Jeffrey M. Hindolien  
6 Helena City Attorney's Office  
7 316 North Park Avenue  
8 Helena, MT 59623  
9

10 \_\_\_\_\_  
11 LAWRENCE A. HILDES,

12 Of Attorneys for Defendants