



## Kyle Gray

Of Counsel

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**Kyle Gray specializes in complex civil litigation and appellate advocacy with an emphasis on environmental litigation, including environmental insurance coverage litigation.**

### PRACTICES

Environmental and Natural Resources  
Litigation  
Appellate  
Commercial Litigation  
Environmental and Natural Resources

### EDUCATION

University of Michigan Law School, J.D.,  
1984

*cum laude*

Michigan State University, B.A., 1981

*summa cum laude*

### BAR ADMISSIONS

Montana  
Wyoming

### COURT ADMISSIONS

U.S. Supreme Court  
U.S. Court of Appeals for the Eleventh  
Circuit  
U.S. Court of Appeals for the Fifth Circuit  
U.S. Court of Appeals for the Tenth  
Circuit  
U.S. Court of Appeals for the Ninth  
Circuit

She has participated in Superfund trial litigation and has trial experience in a variety of environmental, property, and business matters. Kyle has extensive appellate experience, including a wide array of cases briefed or argued to the United States Supreme Court, the Ninth and Tenth Circuit Federal Courts of Appeals, and the Montana and Wyoming Supreme Courts.

Prior to joining Holland & Hart, Kyle clerked for United States District Court Chief Judge Clarence A. Brimmer.

### EXPERIENCE

- Environmental and natural resources litigation
- Appellate practice
- Superfund trial litigation
- Tribal Treaty litigation
- Environmental insurance coverage litigation
- Other insurance coverage and bad faith litigation
- Navigable waters title disputes
- Natural resource property tax disputes
- Bank bad faith litigation
- Products liability litigation
- Constitutional disputes

### CLIENT RESULTS

*Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). In a dispute over the continuing validity and effect of the off-reservation hunting clause in the 1868 Treaty of Fort Laramie between the Crow Tribe of Indians and the United States, the United States Supreme Court vacated the judgment against our client in the Wyoming courts, and held the Treaty hunting right is valid and continuing, and was not abrogated by either Wyoming's statehood or the establishment of a national forest.

*PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012). In a title dispute between a power company and the State of Montana over ownership of the beds and banks of the upper Missouri, Madison, and Clark Fork rivers,

the United States Supreme Court reversed a \$41 million judgment for back rent to Montana against our client ruled that the State does not own the lands under five hydroelectric power sites along the Great Falls reach of the Missouri River, and reversed and remanded for further proceedings on the issue of navigability at the time of Montana's statehood in 1889 and corresponding title to the riverbeds under five other hydroelectric dams.

*Montana Environmental Information Center v. Department of Environmental Quality*, 451 P. 3d 493 (Mont. 2019). In a dispute over renewal of a mining permit, the Montana Supreme Court reversed summary judgment against the agency and our mining company client, and remanded for trial on disputed issues of fact.

*City of Missoula v. Mountain Water Co.*, 419 P.3d 685 (Mont. 2018). The Montana Supreme Court, en banc, ruled in a case involving the condemnation by the City of Missoula of a privately-owned water system, that a statute limiting recovery of attorney fees, as applied against our client, violated the Montana Constitution.

*State of Montana v. Talen Montana, LLC*, 2018 WL 3649606 (D. Mont. 2018). On remand from United States Supreme Court, the U.S. District Court upheld removal from state court, and applying the "mandate rule" determined that 8.2 miles of the Missouri River between Black Eagle Falls and the Great Falls, as a matter of law, were not navigable for title purposes at time of statehood, and Montana may not seek back rent from our client for hydroelectric dams in that stretch of the river. In a subsequent ruling, 2019 WL 568967 (D. Mont. 2019), the Court granted our client's joint motion for joinder of the United States as a necessary party under the Federal Quiet Title Act.

*Montana Association of Counties, et al. v. State of Montana*, 404 P.3d 733 (Mont. 2017). The Montana Supreme Court, en banc, granting a petition for declaratory and injunctive relief under its original jurisdiction, declared invalid a Constitutional Initiative (CI-116, commonly known as Marsy's Law) that had amended Montana's Constitution to extend far-reaching rights to alleged crime victims and their relatives. The Court ruled for our coalition of challenging clients, agreeing that contrary to the requirements of the Montana Constitution for how it may be amended by initiative, Marsy's Law improperly amended multiple pre-existing constitutional provisions, including provisions involving Due Process, bail and other rights of accuseds, and provisions on, the Right to Know and Right of Privacy governing all Montanans. The Court, therefore, held Marsy's Law void in its entirety.

*United States v. Atlantic Richfield Co.*, 2016 WL 7165882 (D. Mont. 2016). In decades-long federal environmental litigation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), the Court ruled for our client (and the United States) that newspaper petitioners were barred from intervening in the case and could not attend on-going consent decree negotiations held subject to a confidentiality order entered under the inherent Article III powers of the Court.

*Cloud Peak Resources, LLC v. Montana Department of Revenue*, 340 P.3d 1258 (Mont. 2015). In a dispute regarding the appropriate methodology for determining the market value of coal shipped by rail, the Montana Supreme Court disagreed with the Montana Department of Revenue and held that it had incorrectly imputed revenue from non-arms' length sales contracts in a manner that had improperly increased the amount of property tax assessed against the coal company, and ordered a refund in favor of our client.

*Pacific Hide & Fur Depot v. Great American Ins. Co.*, 2013 WL 5652045 (D.Mont. 2013). In a dispute over insurance coverage at a site containing asbestos wastes, the court denied summary judgment motions filed by three insurers against our client seeking an early trigger date for their statute of limitations defenses, and ruled instead in our client's favor that Montana's breach of contract limitations period does not commence at notice of the existence of the contamination, but at the earliest on the date our client's defense demand was denied by its insurers.

Over the course of her career, Kyle has been involved in the litigation and settlement of a wide variety of complex disputes between private citizens and their governments. Along with the decisions noted above, these include:

- *Disability Rights Montana, Inc. v. Batista*, 930 F. 3d 1090 (9th Cir. 2019). Reversing dismissal by the district court, the Ninth Circuit Court of Appeals reinstated claims under 42 U.S.C. § 1983 contending that treatment of prisoners with serious mental illness in the Montana State Prison violates the Eighth Amendment's ban on cruel and unusual punishment. The case was remanded for review of such practices as extended periods of solitary confinement.
- *Bresnan Communications, LLC v. State of Montana*, 315 P.3d 921 (Mont. 2014). In a dispute regarding state and federal communications taxes and fees appealed by the Department of Revenue to the Montana Supreme Court, after filing a petition for writ of certiorari in the United States Supreme Court (with co-counsel Bancroft PLLC), and preparing a Citizens Initiative (I-172) for the 2014 Montana ballot, this matter was settled to the mutual satisfaction of the parties.
- *State of Montana v. Atlantic Richfield Company*, No. CV-89-39-BU (D. Mont.). In decades-long federal litigation regarding the environmental consequences of the activities of the Anaconda Company and its century-long development of the copper and other natural resources from "the richest hill on earth," this Superfund litigation involving the State of Montana, the United States and the corporate successors of the Anaconda Company was settled to the mutual satisfaction of the parties in a Consent Decree entered by the federal district court in 2008.
- *Marshall v. State of Montana*, 975 P.2d 325 (Mont. 1999). In a dispute over the constitutionality of an initiative (CI-75) on the 1998 Montana ballot requiring a super-majority legislative vote for raising taxes, Kyle represented the ACLU of Montana and presented argument, along with the Governor of Montana and the Montana

Solicitor, to the Montana Supreme Court. The Court later agreed with the Petitioners and declared the initiative unconstitutional under several provisions of the Montana Constitution.

- *Many Horses v. State of Montana*, No. CV-93-37-BU (D. Mont.). In a class action dispute between women inmates incarcerated in the Montana Women's Correctional Center and the State of Montana filed by the ACLU National Prison Project, after years of litigation the matter was settled to the mutual satisfaction of the parties, including agreement by the State of Montana to construct a new women's correctional facility in Billings. Kyle was Montana counsel for the women inmates in the early 1990's litigation, and again represented women inmates in the late 2000's in federal court litigation alleging gender discrimination. This latter matter also settled, with the State of Montana agreeing in 2013 to allow qualifying female inmates to attend the prison-avoidance "boot camp" program that the Department of Corrections had earlier limited to male inmates only. *Fish v. Montana*, No. CV 11-0099-BLG (D. Mont.).

## PUBLICATIONS

"When is a Forest Open for Hunting? Indian Treaty Hunting Rights on National Forests and Other Public Lands," *ABA Section of Environmental, Energy, and Resources, Public Land Committee Newsletter*, Vol. 14, No. 2, Co-Author, June 2017

"Is Campaign Finance Reform Still a Thing? ," *Montana Lawyer*, Vol. 41, No. 5, May 2016

## RECOGNITION

- American Academy of Appellate Lawyers, Fellow
- Mountain States Super Lawyers®, Appellate, 2019
- *The Best Lawyers in America*® Lawyer of the Year, Appellate Practice- Billings, 2018, 2020
- *The Best Lawyers in America*® Appellate Practice, 2011-2020; Insurance Law, 2016-2020
- *Bar Register of Preeminent Women Lawyers* based on Martindale-Hubbell®, AV Preeminent® Rating, 2013
- *Chambers USA: America's Leading Lawyers for Business*, Natural Resources & Environment
- Neil Haight Pro Bono Award, State Bar of Montana, 2019
- Frank I. Haswell Award for Outstanding Contribution to Montana Lawyer Magazine, Honorable Mention, 2016

## PROFESSIONAL AND CIVIC AFFILIATIONS

- ACLU of Montana, Litigation Committee, Member
- American Bar Association, Environment, Energy and Resources Section, Member
- Montana Bar Association, Women's Law Section, Member

- Wyoming Bar Association, Member