

MEIC and the Sierra Club. v. Board of Land Commissioners, et al.  
Cause No. DV-38-2010-2481, 16th Judicial District, Powder River County  
Judge Hegel

On appeal to the Montana Supreme Court. Combined cases: DA 12-0184 and DA 12-0185

MEPA Issue Litigated: Challenge to MEPA exemption granted by section 77-1-121, MCA, and the issuance of 14 coal leases by the State Board of Land Commissioners.

Douglas L. Honnold  
Jenny K. Harbine  
Earthjustice  
209 South Willson Avenue  
Bozeman, MT 59715  
(406) 586-9699  
Fax: (406) 596-9695  
dhonnold@earthjustice.org  
jharbine@earthjustice.org

*Counsel for Plaintiffs*

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT  
POWDER RIVER COUNTY

_____	)	
MONTANA ENVIRONMENTAL	)	Case No. DV-38-2010-2481
INFORMATION CENTER,	)	Judge Joe L. Hegel
and SIERRA CLUB,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>FIRST AMENDED COMPLAINT FOR</b>
	)	<b>DECLARATORY AND INJUNCTIVE</b>
	)	<b>RELIEF</b>
MONTANA BOARD OF LAND	)	
COMMISSIONERS, ARK LAND COMPANY,	)	
and ARCH COAL, INC.	)	
	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

1. This case challenges the decision by the Montana Board of Land Commissioners (“Land Board”) to lease the State-owned Otter Creek coal reserves in the northern Powder River basin in southeast Montana without first examining the potentially devastating environmental consequences and economic impacts of its decision.
2. The Otter Creek coal tracts are located near Ashland, Montana, where Otter Creek

flows into the Tongue River. The Custer National Forest surrounds the Otter Creek tracts to the north, east, and south, and the Northern Cheyenne Reservation is approximately 10 miles west of the tracts' eastern boundary. The Tongue River Valley in the vicinity of the Otter Creek coal tracts is a rich agricultural production area and home to abundant wildlife species.

3. If constructed, the Otter Creek strip mine would exploit a 1.3 billion-ton coal reserve, almost half of which is owned by the State. In total, Otter Creek coal will emit 2.4 billion tons of carbon dioxide (“CO<sub>2</sub>”). These significant CO<sub>2</sub> emissions will spur global warming and its potentially disastrous impacts globally and in Montana. As Nobel Laureate and University of Montana Professor Dr. Steven Running stated, “[f]rom a state carbon emissions point of view, [leasing the Otter Creek coal tracts] is the single most important decision in the history of Montana. ... Indeed, the ability of the global community to avert the worst-case climate change scenarios comes down to decisions like this one at the local level in each country.” Steven W. Running, Op-Ed: Montana at carbon emissions crossroads, Billings Gazette (Feb. 16, 2010) (emphasis added), at [http://billingsgazette.com/news/opinion/guest/article\\_99b47ee8-1aae-11df-b4c8-001cc4c002e0.html](http://billingsgazette.com/news/opinion/guest/article_99b47ee8-1aae-11df-b4c8-001cc4c002e0.html) (last visited May 12, 2010).

4. The strip mine also has significant potential to degrade the quality of surface water and groundwater, destroy hydrologic functions essential to agricultural production, and degrade or destroy wildlife habitat.

5. The principle legal mechanism to examine these types of environmental consequences is the Montana Environmental Policy Act (“MEPA”), Mont. Code Ann. § 75-1-101, et seq. One of MEPA’s primary purposes is “to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” Id. § 75-1-102(2). MEPA does so by requiring State decisionmakers to fully examine

the impacts of proposed actions and to evaluate alternatives that may reduce or avoid those impacts. Id. § 75-1-201. This environmental analysis is an important component of the State’s constitutional obligation to prevent unreasonable environmental degradation. See Mont. Const., Art. II, sec. 3; id. Art. IX, sec. 1; see also Mont. Code Ann. § 75-1-102 (MEPA intended to implement State’s constitutional obligations with respect to environmental protection).

6. No MEPA analysis has been conducted for the Otter Creek coal lease.

Notwithstanding the significant environmental consequences of leasing state land for coal mining and a constitutional mandate to prevent environmental degradation, the 2003 Montana Legislature adopted a statute to exempt coal leases from MEPA when the activities authorized by such leases will undergo further environmental permitting. See Mont. Code Ann. § 77-1-121(2). This exemption—for which the Legislature demonstrated no compelling state interest—unconstitutionally impinges on the right of Montanans to a clean and healthful environment. See Mont. Const., Art. II, sec. 3.

7. Under the authority of this exemption, the State failed to consider options at the time of leasing that could avoid the most serious environmental impacts of coal mining, in particular, the option of not leasing the coal at all. Further, it is at the lease stage that the State has the ability to impose conditions that could protect water resources, preserve private property rights, and avoid global warming impacts, for example by restricting the lessee’s ability to sell coal to end users that do not capture and store their CO<sub>2</sub>. Meaningful consideration of alternatives at the lease stage could also reveal options for increasing state revenue, such as leasing the Otter Creek tracts in stages. As a result of the MEPA exemption, the Land Board leased the Otter Creek coal tracts for strip mining without full knowledge and disclosure of the environmental and economic consequences of both the action it took and potential alternatives to

it.

8. Likewise, the failure of the Land Board to give weight to the unexamined, but potentially destructive, environmental consequences of the Otter Creek coal lease violated the Land Board's public trust obligation to manage state lands in the best interests of the people of Montana.

9. For these reasons, Plaintiffs Montana Environmental Information Center ("MEIC") and Sierra Club respectfully request that this Court set aside the Otter Creek coal lease and direct the Land Board to examine the environmental consequences of its decision.

### **JURISDICTION AND VENUE**

10. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202, Montana Constitution Article II, section 3 and Article IX, section 1, and MEPA, Mont. Code Ann. § 75-1-101, et seq.

11. This Court has jurisdiction over Plaintiffs' claims pursuant to Mont. Code Ann. § 3-5-302(1)(b), (c). See also Mont. Env'l Info. Ctr. v. DEQ, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (exercising jurisdiction over claim that statutory provision was unconstitutional); Ravalli County Fish & Game Ass'n v. Dep't of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995) (exercising jurisdiction over claim that agency failed to comply with MEPA); Friends of the Wild Swan v. Dep't of Natural Res. and Conservation, 2005 MT 351, 330 Mont. 186, 127 P.3d 394 (exercising jurisdiction over claim that state agency decision violated public trust).

12. Venue is proper in this District under Mont. Code Ann. § 75-1-108 because the Otter Creek tracts that are the subject of this action are in Powder River County.

### **PARTIES**

13. Plaintiff MEIC is a member-supported advocacy and public education

organization based in Helena, Montana, that works to protect and restore Montana's natural environment. Since its founding in 1973, MEIC has lobbied and litigated both at the state and federal level to prevent degradation of air and water quality and natural resources. Recent MEIC advocacy efforts have focused on curbing activities that contribute to global warming, including coal combustion at power plants. With respect to the Otter Creek coal lease, MEIC has led efforts to inform the public, elected officials, and responsible agencies about the global warming and environmental effects of strip mining coal. At every opportunity for public involvement in the leasing process, MEIC has submitted comments aimed at promoting alternatives to the State's leasing of the Otter Creek coal tracts, and thereby avoiding environmental degradation and greenhouse gas emissions from the coal's combustion that contribute to global warming and balancing the long term interest of the trust against short term revenue.

14. Plaintiff Sierra Club is a nationwide conservation organization with more than 1.3 million members and supporters, 2,000 of whom belong to the Montana Chapter. The Sierra Club is America's oldest and largest grassroots environmental organization. The mission of the Sierra Club is: "To explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments." Sierra Club is engaged in a nationwide campaign to champion clean energy in the face of an unprecedented rush to promote coal mining and construct new coal-fired power plants. With respect to the Otter Creek coal lease, the Sierra Club has engaged in organizing efforts aimed at educating the public about how combustion of Otter Creek coal would significantly contribute to global warming. The Sierra Club has provided written and oral testimony to the Land Board to urge it not to lease the Otter Creek tracts.

15. The Land Board's decision to lease the State-owned Otter Creek coal tracts for strip mining adversely affects Plaintiffs' organizational interests in protecting air and water quality, protecting landscapes from the ravages of strip mining, and averting a global warming disaster. The Land Board's leasing decision adversely impacts Plaintiffs' members and their shared interest in clean and healthy air and water quality, landscape conservation, and a healthy climate. Plaintiffs' members include landowners who live and work in and near Ashland, Montana and individuals who fish, hunt, and recreate in and around the area that will be adversely affected by the proposed coal mine.

16. The Land Board's leasing decision particularly injures the interests and property of MEIC member Art Hayes, Jr., who resides at 208 Hanging Woman Creek Road in Birney, Montana. Art Hayes is a cattle rancher and president of the Tongue River Water Users Association. Mr. Hayes would be harmed by mining at Otter Creek due to its adverse air quality and socio-economics impacts to the region. Mr. Hayes will also be harmed by the Tongue River Railroad, which would be constructed to transport Otter Creek coal. If the railroad runs from Decker to Miles City, as planned, five miles of track would traverse Mr. Hayes' property. Further, Mr. Hayes depends on precipitation to maintain rangeland productivity of his property. Global warming, spurred by coal mining, may injure Mr. Hayes' cattle operation due to diminished precipitation.

17. Defendant Board of Land Commissioners was established pursuant to Article X, section 4, of the Montana constitution, and consists of the governor, superintendent of public instruction, auditor, secretary of state, and attorney general. The Land Board exercises "general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the

leasing, use, sale, and disposition of those lands or otherwise coming under its administration.”  
Mont. Code Ann. § 77-1-202. Its offices are located in Lewis and Clark County.

18. Defendant Ark Land Company is a wholly owned subsidiary of Arch Coal, Inc., and is incorporated in Delaware.

19. Defendant Arch Coal, Inc. is a publicly traded coal mining and processing corporation incorporated in Delaware and headquartered in St. Louis, Missouri.

## **FACTUAL BACKGROUND**

### **I. THE LAND BOARD’S DECISION TO LEASE THE OTTER CREEK COAL TRACTS**

#### **A. The State’s Acquisition of the Otter Creek Coal Tracts**

20. The State of Montana acquired the Otter Creek coal tracts (referred to as Otter Creek tracts 1, 2, and 3) from the federal government as part of the federal government’s purchase and retirement of hard-rock mining claims in the New World Mining District, northeast of Yellowstone National Park. In 1997, Congress offered Montana a choice: the State could take federal mineral rights valued at \$10 million, or the Otter Creek tracts. See Dep’t of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 503, 111 Stat. 1, 75 (1997). Although the Otter Creek tracts were recognized as an ecologically and hydrologically sensitive area with no existing transportation infrastructure to service a major coal mining operation, then-Governor Marc Racicot was insistent that the State should be given the Otter Creek tracts.

21. The federal conveyance was approved by the Land Board on May 20, 2002 and certified by Governor Judy Martz in Executive Order 12-02. See [http://dnrc.mt.gov/trust/MMB/otter\\_creek/2.%20General/Transfer%20Documents/Otter%20Creek%20Transfer%20Documents.pdf](http://dnrc.mt.gov/trust/MMB/otter_creek/2.%20General/Transfer%20Documents/Otter%20Creek%20Transfer%20Documents.pdf) (last visited May 12, 2010). Pursuant to Article X, Section 11 of the Montana



Constitution and the Enabling Act, 25 Stat. 676 (1889), the tracts became part of the public trust for the benefit of common schools.

22. The Otter Creek coal tracts have a checkerboard ownership pattern. According to a State-commissioned appraisal, Otter Creek tracts 1, 2, and 3 hold approximately 572 million tons of recoverable coal. 2009 Norwest Appraisal, p. 3-11. Great Northern Properties is the majority owner of the privately held land in the Otter Creek area. The privately and State-owned parcels together contain approximately 1.3 billion tons of coal. Id. The checkerboard ownership makes it unlikely that the privately owned coal tracts could be developed unless the State leased its coal for development.

## **B. The Leasing Process**

### **1. Norwest Appraisal**

23. In preparation for leasing the Otter Creek tracts, Montana's Department of Natural Resources and Conservation ("DNRC") commissioned a "Coal Valuation" report from Norwest Corporation to determine the fair market value of the State's reserves. The fair market value is used to determine the bonus bid—an upfront payment to the State based on the estimated value and amount of recoverable coal. Lessees also pay the State a royalty on each ton of coal that is mined.

24. The Norwest appraisal was completed in January 2009. Norwest employed two methodologies for determining the value of Montana's Otter Creek coal holdings. Using the "comparable lease sales approach," Norwest concluded that the State's 572 million tons of recoverable coal is worth approximately \$30.8 million, or approximately \$0.05/ton. 2009 Norwest Appraisal, p. E-2. Using the "income approach," Norwest estimated the coal's value at \$37.3 million, or \$0.07/ton. Id. Accordingly, "Norwest conclude[d] that a bonus bid between

\$0.05 and \$0.07/ton of recoverable coal, as determined through the Comparable Lease Sales and Income approaches, represents the fair market value range for the Otter Creek Tracts 1 through 3.”

25. Other recent coal lease sales in the Powder River Basin have garnered exponentially higher upfront bonus bids. Bonus bids for Wyoming coal over the last decade averaged \$0.79/ton. BLM leased coal for Montana’s West Roundup mine in 2005 for a bonus bid of \$0.97/ton.

26. According to the Norwest appraisal, the cost to develop the Tongue River Railroad is the primary factor deflating the value of the Otter Creek tracts. Norwest estimated that the lack of a railroad reduced the value of Otter Creek coal by up to \$187 million.

27. Norwest further devalued Otter Creek coal based upon its relatively high sodium content, which is less desirable for burning at power plants due to slagging problems it causes in most electric generating plant boilers. See 2009 Norwest Appraisal, p. 2-9.

28. In comments on the Norwest appraisal, members of the public, including MEIC and Sierra Club, strongly urged the Land Board not to lease the Otter Creek coal tracts. MEIC and Sierra Club notified the Land Board of its obligation to first undertake an analysis under MEPA to evaluate the significance of the environmental effects of leasing the coal tracts. They also argued that leasing the Otter Creek tracts for strip mining would violate the Land Board’s public trust and constitutional duties to prevent unreasonable environmental degradation.

29. In November 2009, just before the Board was supposed to vote on whether to lease its coal and on what minimum bid price to set, Great Northern Properties announced that it had leased its Otter Creek coal parcels to Arch Coal for a bonus bid of \$0.10 per ton.

///

## **2. December 21, 2009 Land Board Meeting**

30. On December 21, 2009, after MEIC, Sierra Club, and many others urged it not to do so, the Land Board voted 4-1 to seek bids from coal companies interested in mining the Otter Creek tracts. At that meeting, Secretary of State Linda McCulloch made a motion to set the minimum acceptable bonus bid amount at \$0.25 per ton. Attorney General Steve Bullock sought to amend the motion, arguing that the coal lease should garner a higher bonus bid than \$0.25 per ton, but the amendment failed.

31. Only Superintendent of Public Instruction Denise Juneau voted against the decision to solicit bids. Superintendent Juneau cited the Board's obligation to consider the well-being of future as well as present generations, and stated that Montana's landscape and environmental health are part of that consideration.

32. Governor Brian Schweitzer offered a lengthy justification for his vote to solicit bids for the Otter Creek coal tracts, notwithstanding his acknowledgment of global warming's harmful impacts. Governor Schweitzer argued that while coal combustion results in CO<sub>2</sub> emissions that contribute to global warming, it is the federal government, not Montana, that should lead the way in reducing those emissions.

33. The Land Board set a deadline of February 8, 2010 for companies to submit bids for the Otter Creek coal lease, with a minimum bonus bid of \$0.25 per ton.

## **3. February 16, 2010 Land Board Meeting**

34. No bids were received before the February 16, 2010 Land Board meeting. The only response to the lease offering came from Ark Land, which sent a single paragraph letter to the Land Board stating, without support, that the minimum price was set too high. Within days, DNRC recommended that the Land Board lower the minimum bonus bid amount.

35. The overwhelming majority of public comments the Land Board received at the February 16, 2010 Land Board meeting were opposed to mining Otter Creek.

36. Nevertheless, Secretary of State McCulloch again made a motion to offer the Otter Creek coal tracts for lease, this time lowering the minimum bonus bid by 40 percent, to \$0.15 per ton.

37. Attorney General Bullock argued that the Board was required to obtain full market value for the coal and that a lower bid amount would violate that duty. He joined Superintendent Juneau in voting against offering the Otter Creek tracts for lease at \$0.15 per ton.

38. On March 16, 2010, Ark Land Company, a wholly owned subsidiary of Arch Coal, offered the minimum bonus bid of \$0.15 per ton.

#### **4. March 18, 2010 Land Board Meeting**

39. On March 18, 2010, the Land Board voted 3-2 to accept Ark Land's bid.

40. Never at any point of the leasing process did the Land Board formally consider the alternative of partial or staged leasing of Otter Creek Tracts 1, 2, and 3. The Land Board was not restricted as a practical matter from considering or adopting this alternative. Nor was the Land Board legally prohibited from considering or adopting this alternative.

41. Never at any point of the leasing process did the Land Board formally consider the alternative of imposing lease conditions to adequately protect water quality and private property rights. The Land Board was not restricted as a practical matter from considering or imposing such a lease condition. Nor was the Land Board legally prohibited from considering or imposing such a lease condition.

42. Never at any point of the leasing process did the Land Board formally consider the alternative of requiring the lessee to condition sales of Otter Creek coal on avoiding or

mitigating CO<sub>2</sub> emissions. The Land Board was not restricted as a practical matter from considering or imposing such a lease condition. Nor was the Land Board legally prohibited from considering or imposing such a lease condition.

43. Never at any point of the leasing process did the Land Board formally consider the alternative of preventing export of Otter Creek coal to out of the United States or to countries with lax clean air laws. The Land Board was not restricted as a practical matter from considering or imposing such a lease condition. Nor was the Land Board legally prohibited from considering or imposing such a lease condition.

44. Never at any point of the leasing process did the Land Board formally consider the alternative of requiring the lessee to avoid or mitigate CO<sub>2</sub> and methane emissions in mine operations. The Land Board was not restricted as a practical matter from considering or imposing such a lease condition. Nor was the Land Board legally prohibited from considering or imposing such a lease condition.

45. Never at any point of the leasing process did the Land Board formally consider the alternative of delaying leasing until technology to allow boilers to handle high-sodium coal is more widely available. The Land Board was not restricted as a practical matter from considering or imposing such a lease condition. Nor was the Land Board legally prohibited from considering or imposing such a lease condition.

46. Never at any point of the leasing process did the Land Board formally consider the value to the public of maintaining existing uses of the Otter Creek tracts for rangeland, recreation, watershed protection, open space, wildlife habitat, and other ecological functions. The Land Board was not restricted as a practical matter from such considering or adopting this alternative. Nor was the Land Board legally prohibited from considering or adopting this

alternative.

47. Never at any point of the leasing process did the Land Board direct DNRC to determine whether all or a portion of the Otter Creek tracts or adjacent parcels are “alluvial valley floors.” Nor did the Land Board request the Montana Department of Environmental Quality or any other state agency to make such a determination.

## 5. The Lease

48. Sixteen leases between Montana and Ark Land—for a total of approximately 8,264 acres and 572 million tons of recoverable coal—were executed on April 20, 2010.

49. Ark Land paid Montana a bonus bid of \$85,845,110 (\$0.15/ton) to acquire rights to the State’s Otter Creek coal reserves. In addition, Ark Land will pay the State a 12.5 percent royalty on every ton of coal mined.

50. The leases grant to Ark Land the Otter Creek tracts “for the purpose of mining and disposing of coal and constructing all such works, buildings, plants, structures and appliances as may be necessary and convenient to produce, save, care for, dispose of and remove said coal, and for the reclamation thereafter” for a term of ten years. Lease, ¶ 1.

51. The Otter Creek leases grant Ark Land an irrevocable property right in the coal that is subject to the lease, as long as Ark Land is in compliance with the terms and conditions of the leases.

52. The Otter Creek leases are made subject to Ark Land’s “compliance with the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act (Title 82, Chapter 4, Parts 1 and 2, MCA).” Id. Further, Ark Land’s mining rights are subject to the Land Board’s “review and approval of [Ark Land’s] mine operation and reclamation plan” and compliance with MEPA. Id.

53. There are no provisions of the Otter Creek leases that reserve to the Land Board the ability to deny Ark Land the ability to exercise the mining rights granted by the lease altogether. The leases do not allow the Land Board to alter or add lease conditions, or to modify the size or boundaries of the leased parcels.

## **II. THE ENVIRONMENTAL IMPACTS OF THE OTTER CREEK COAL MINE**

54. Strip mining Otter Creek coal has the potential to significantly degrade the environment and human welfare.

### **A. Global Warming**

55. Global warming is the result of a buildup of greenhouse gases—primarily CO<sub>2</sub>—in the atmosphere, which reduces the reflection of solar radiation back out into space.

56. Many of the impacts of global warming are already being felt in Montana. As of 1997, annual precipitation had decreased by up to 20 percent in many parts of the State, and over the last decade, precipitation has declined much further, triggering drought conditions. See U.S. EPA, Climate Change and Montana, EPA 230-F-97-008z (1997). Climate models for the northern Rocky Mountains project an average annual temperature increase of between 3.6 and 7.2 °F by the end of this century, based on a range of CO<sub>2</sub> emissions scenarios. Steven M. Running, Impacts of Climate Change on Forests of the Northern Rocky Mountains, at 3 (Sept. 29, 2009), available at <http://bipartisanpolicy.org/sites/default/files/RockyClimate-pages-Proof150.pdf> (last visited May 12, 2010). If greenhouse gas emissions continue to grow, the region will likely experience warming at the high end of this range. See id.

57. Along with higher temperatures, the northern Rockies will see less water stored in snowpack, earlier spring snowmelt, and lower stream flows in the summer. Id. at 1. As a result, Montana will have longer summer droughts, less water availability, more insect infestations, and

more intense wildfires. Id. Further, based on current warming trends, scientists estimate that glaciers could entirely disappear from Glacier National Park by 2020. Anne Minard, No More Glaciers in Glacier National Park by 2020?, National Geographic News (Mar. 2, 2009), available at <http://news.nationalgeographic.com/news/2009/03/090302-glaciers-melting.html> (last visited May 12, 2010).

58. Nationwide, approximately 36.5 percent of global warming-causing CO<sub>2</sub> emissions stem from the burning of fossil fuels—primarily coal—for the purpose of electricity generation. See U.S. Energy Info. Admin., Emissions of Greenhouse Gases in the U.S. 2008, Overview, DOE/EIA-0573 (Dec. 3, 2009), at <http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html> (last visited May 12, 2010).

59. The Land Board's decision to lease 572 million tons of coal at Otter Creek will allow Ark Land Company to strip mine 1.3 billion tons of coal. In 2008, Montana mines produced a total of 44.8 million tons of coal. See <http://www.eia.doe.gov/cneaf/coal/page/acr/tables2.pdf> (last visited May 12, 2010). At its peak, the Otter Creek mine could almost double Montana's coal production—independently producing 33.2 million tons of coal annually. See 2009 Norwest Appraisal, App. C.

60. Nearly all of this coal is destined for combustion at coal-fired power plants, which will result in significant emissions of greenhouse gases, including approximately 2.4 billion tons of CO<sub>2</sub>. In a study commissioned by DNRC, Norwest Corporation projected that the Otter Creek coal deposit—including privately and State-owned coal—would produce for sale to power plants 33.2 million tons of coal each year by year six of mine operations. 2009 Norwest Appraisal, App. C. At this production rate, combustion of Otter Creek coal would result in approximately 60.4 million tons of CO<sub>2</sub> emissions annually, or 1 % of annual U.S. CO<sub>2</sub> emissions based on



2008 emission levels.<sup>1</sup>

61. The Land Board did not prepare and/or publicly disclose any scientific analysis of the climate change impacts from the development of more than 1.3 billion tons of coal.

**B. Other Environmental Impacts**

62. In addition to global warming, the Otter Creek coal lease will result in direct adverse effects on land, surface waters, groundwater, and air quality.

63. Strip mining requires the use of explosives to break through the surface and expose the coal seam. Strip mining eliminates vegetation, displaces wildlife, destroys wildlife habitat, and alters—sometimes permanently—the general topography and hydrology of the mined area.

64. When underground coal seams are exposed, they react with air and water to form sulfuric acid. As water drains from the mine, the acid mine drainage leaches into ground water and discharges into surface waters. Ground water contaminated by acid mine drainage injures crops if used for irrigation. Contaminated surface waters can destroy aquatic ecosystems, killing sensitive plants, fish, and other wildlife. Other pollution runoff and siltation from the mine site may reach surface waters—including the Tongue River and Yellowstone River—impairing their suitability for agricultural use and ability to support aquatic life.

---

<sup>1</sup> In 2008, U.S. CO<sub>2</sub> emissions totaled 5,839 million tons. See Energy Info. Admin., DOE, Dep't of Energy and EPA, Emissions of Greenhouse Gases in the U.S. 2008, Overview, DOE/EIA-0573 (Dec. 3, 2009), at <http://www.eia.doe.gov/oiaf/1605/ggrpt/index.html> (last visited May 11, 2010). Montana sub-bituminous coal has an average carbon dioxide emissions factor of 213.4 pounds of carbon dioxide per million BTUs. See Energy Info. Admin., DOE, Carbon Dioxide Emission Factors for Coal, DOE/EIA-0121, Table FE4 (Aug. 1994), at [http://www/eia.doe.gov/cneaf/coal/quarterly/co2\\_article/co2.html](http://www/eia.doe.gov/cneaf/coal/quarterly/co2_article/co2.html) (last visited May 11, 2010). Otter Creek coal heating values average 8,500 to 8,600 BTU/lb on an as-received basis. 2009 Norwest Valuation at E-3. Taking the median of 8,550 BTU/lb, one ton of Otter Creek coal will emit 1.82 tons CO<sub>2</sub> when combusted (3649.1 lbs CO<sub>2</sub>/2000 lbs coal = 1.82). Therefore, combustion of 33.2 million tons of coal would result in approximately 60.4 million tons of CO<sub>2</sub>.

65. Strip mining at Otter Creek may also impact the hydrologic function of the aquifer, which is vital to region's agricultural productivity. While reclamation may eventually restore the surface and appearance of mined areas, aquifers are often permanently damaged.

66. Coal mining at Otter Creek will degrade air quality from the use of heavy equipment, from the drilling, blasting, and transportation of the coal, and fugitive dust from the mining site. In addition, Otter Creek coal may be burned for on-site power production, creating local air quality impacts.

67. Major coal mines often create a "boom and bust" cycle that can result in significant socio-economic impacts in the communities surrounding the mine.

68. To be economically viable, mining the Otter Creek coal tracts will require development of rail transport. The U.S. Surface Transportation Board has already approved construction of the Tongue River Railroad from Decker to Miles City, Montana. Ark Land's acquisition of the Otter Creek coal tracts has made construction of the railroad appreciably more likely. Construction and operation of the railroad will have significant environmental impacts and will adversely affect landowners, including MEIC and Sierra Club members, through whose property the railroad will run.

69. The Land Board deferred consideration of all of these impacts. The Land Board did not conduct and/or publicly disclose any formal analysis of the environmental and socio-economic impacts of leasing and developing the Otter Creek coal tracts.

70. In failing to consider the environmental and socio-economic impacts of the Otter Creek coal leases, the Land Board relegated Montanans' right to a clean and healthful environment to an afterthought—foreclosing the opportunity to avoid or reduce environmental degradation through lease conditions and eliminating the State's ability to decide, after

environmental impacts are examined and disclosed, that the Otter Creek tracts should not be leased at all.

## LEGAL BACKGROUND

### I. THE PUBLIC TRUST AND CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

71. The Land Board's actions are governed by a constitutional and statutory public trust duty and the common law public trust doctrine. To comply with its public trust mandate, the Land Board is required to manage State resources, including the Otter Creek coal tracts, in a manner that is not detrimental to public welfare or the environment.

72. Under the common law public trust doctrine, it is firmly established that state lands acquired from the federal government are held in trust for the people of the state. The public trust doctrine not only authorizes states to enact legislation pertaining to state trust lands; it also serves as a limitation on the state's activities on those lands. Specifically, the state may not dispose of an interest in trust lands except when it is in the best interests of the public welfare. See Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 455-56 (1892) (submerged lands are "held by the whole people for purposes in which the whole people are interested"); Ravalli County Fish & Game Ass'n, 273 Mont. at 379, 903 P.2d at 1368 (duty to manage trust lands in the best interests of the state "necessarily includes considering consequences to wildlife and the environment").

73. The Land Board is further subject to a constitutional and statutory trust mandate to manage trust lands in a manner that will "best meet[] the needs of the people and the beneficiaries of the trust." Mont. Code Ann. § 77-1-203(1)(a); see also id. § 77-3-301 (lease of State lands for coal mining must be in the "best interests of the state"); Mont. Const., Art. X, sec. 11 ("All lands of the state that have been or may be granted by congress ... shall be held in trust

for the people.”).

74. In carrying out this duty, the Board is bound by “the guiding principle” that:

these lands ... are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

Mont. Code Ann. § 77-1-202. This duty embodies more than economic factors. See Friends of the Wild Swan v. Dep’t of Natural Res. and Conservation, 2005 MT 351, ¶ 21, 330 Mont. 186, ¶ 21, 127 P.3d 394, ¶ 21 (“Although the statutory directive to ‘secure the largest measure of legitimate and reasonable advantage’ certainly includes economics, the phrase is not limited in purpose to financial return.”). “[T]he duty to manage ... surface leased land to protect the best interests of the state ... necessarily includes considering consequences to wildlife and the environment.” Ravalli County Fish and Game Ass’n v. Mont. Dep’t of State Lands, 273 Mont. 371, 379, 903 P.2d 1362, 1368 (Mont. 1995).

75. In Montana, the Land Board’s public trust duties are animated by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Article II, Section 3 guarantees Montanans “the right to a clean and healthful environment.” Mont. Const., Art. II, sec. 3. Article IX, Section 1 provides that “[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Id., Art. IX, sec. 1. These constitutional provisions are intended to not “merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment.” Mont. Env’l Info. Ctr., ¶77. Read together, they provide environmental “protections which are both anticipatory and preventative.” Id.

## **II. MEPA**

76. The Montana legislature identified the Montana Environmental Policy Act

(“MEPA”) as an important vehicle for implementing the State’s constitutional obligation to prevent unreasonable environmental degradation. See Mont. Code Ann. § 75-1-102. Modeled after the National Environmental Policy Act, MEPA requires “the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment.” Id. § 75-1-201(1)(b)(i)(A) (emphasis added). MEPA directs that “it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may ... fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” Id. § 75-1-103(2).

77. “MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands.” Ravalli County Fish and Game Ass’n v. Dep’t of State Lands, 273 Mont. 371, 384, 903 P.2d 1362, 1371 (1995). Thus, state decisionmakers are prohibited from “reach[ing] a decision without first engaging in the requisite significant impacts analysis.” Id.

78. MEPA also requires that decisions “lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing decline in the quality of the world environment.” Mont. Code Ann. § 75-1-201(1)(B)(vi).

79. Notwithstanding MEPA’s vital role in ensuring that State decisions do not unreasonably degrade the environment, the 2003 Montana Legislature adopted a blanket exception to MEPA’s review requirements for leases of State-owned resources for activities that are subject to further permitting, without regard to the environmental consequences of any

particular lease. Mont. Code Ann. § 77-1-121(2) (“The department and board are exempt from the provisions of [MEPA] when issuing any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82.”). The exemption is not within MEPA itself, but rather the title of the Montana Code pertaining to the administration of state lands.

80. The legislative record for the MEPA exception does not demonstrate a compelling state purpose for shielding from environmental review an entire category of state actions that normally have significant environmental impacts.

81. Under the authority of the MEPA exemption in section 77-1-121(2), the Land Board leased the Otter Creek coal tracts without first analyzing the significant potential environmental effects of the leases.

**FIRST CAUSE OF ACTION**  
**(Unconstitutionality of MEPA Exemption)**

82. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 81.

83. In leasing the Otter Creek tracts, the Land Board applied a MEPA exemption, Mont. Code § 77-1-121(2), that violates the public’s constitutional right to a clean and healthful environment. See Mont. Const., Art. II, sec. 3, Art. IX, sec. 1

84. Section 77-1-121(2) of the Montana Code purports to exempt from MEPA review “any lease or license that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82.” Mont. Code Ann. § 77-1-121(2).

85. The State’s constitutional obligation to prevent unreasonable environmental degradation under Article II, section 3 and Article IX, section 1 of Montana’s Constitution is expressly implemented by MEPA. Mont. Code Ann. § 75-1-102.

86. Because it allowed the Land Board to lease the Otter Creek coal tracts without

first conducting any review of the environmental consequences of its action, the blanket exception to MEPA in section 77-1-121(2) implicates Montanans’ “constitutional right to a clean and healthy environment and to be free from unreasonable degradation.” Mont. Env’l Info. Ctr., ¶ 79.

87. This impingement of a fundamental constitutional right is subject to strict judicial scrutiny. Id. ¶ 64. To survive judicial review, the Land Board’s action “must be closely tailored to effectuate [a] compelling state interest.” Id. ¶ 61 (quotation and citation omitted).

88. Because the record before the Legislature did not demonstrate any compelling state interest for the blanket MEPA exception, it is unconstitutional as applied to the Land Board’s decision to lease the Otter Creek coal tracts. See id. ¶ 80 (Where nondegradation policy for high quality waters “is a reasonable legislative implementation of the mandate” to prevent unreasonable environmental degradation, a statutory provision that “arbitrarily excludes certain ‘activities’ from nondegradation review without regard to the nature or volume of the substances being discharged ... violates those environmental rights guaranteed by ... the Montana Constitution.”). Id. ¶ 80.

89. Because it would allow the Land Board to side-step its constitutional mandate, section 77-1-121(1) is unconstitutional as applied to the Land Board’s decision to lease the Otter Creek coal tracts.

**SECOND CAUSE OF ACTION**  
**(Montana Environmental Policy Act)**

90. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 89.

91. The Land Board’s decision to lease Otter Creek without first determining whether it must prepare an environmental impact statement and considering alternatives to the proposed action violated MEPA, Mont. Code Ann. § 75-1-101, et seq.

92. The Land Board's leasing decision is subject to MEPA because it "may have an impact on the human environment." Id. § 75-1-201(1)(b)(i)(A).

93. Ark Land paid nearly \$86 million to acquire rights to State-owned Otter Creek coal. Provided Ark Land complies with Montana law and the terms of its leases, neither the Department of Environmental Quality nor the Land Board may lawfully deny Ark Land the ability to mine Otter Creek.

94. The Otter Creek coal lease grants Ark Land the right to strip mine all or some of the 572.3 million tons of State-owned coal. The State lease will further enable mining of adjacent, privately owned coal that has also been leased by Arch Coal, for a combined total of 1.3 billion tons of coal. This massive strip mine will result in significant hydrological, water quality, and air quality impacts. In addition, combustion of the coal produced from the mine will spur global warming by releasing 2.4 billion tons of CO<sub>2</sub> into the atmosphere.

95. Prior to leasing the Otter Creek coal tracts, the Land Board was required to consider whether these and other environmental impacts required the preparation of an environmental impact statement and to analyze alternatives to the proposed lease. See id. Mont. Code Ann. § 75-1-201(1)(b)(iv). Because the Land Board failed to do so, issuing the Otter Creek coal lease violated MEPA.

### **THIRD CAUSE OF ACTION (Public Trust)**

96. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 95.

97. The Land Board breached its public trust obligations by facilitating a massive new strip mine without first meaningfully considering the global warming, environmental, and socio-economic impacts of mining and coal combustion. See Mont. Const., Art. X, sec. 11; Mont. Code Ann. §§ 77-1-202, 77-1-203(1)(a), 77-3-301; Illinois Cent. R. Co., 146 U.S. at 455-56.



98. The Land Board is bound by the public trust to permit only those activities on state land that are in the best interests of the state. See Mont. Code Ann. §§ 77-1-202, 77-1-203(1)(a), 77-3-301; Mont. Const., Art. X, sec. 11 (“All lands of the state that have been or may be granted by congress ... shall be held in trust for the people.”).

99. As directed by the Montana Supreme Court and Montana’s Constitution, the Land Board’s must determine whether leasing the Otter Creek Tracts for coal mining is in the best interests of Montanans, and that determination must take into account the substantial threats posed by global warming and environmental degradation. See Ravalli County Fish and Game Ass’n, 273 Mont. at 384, 903 P.2d at 1371; Mont. Const., Art. II, sec. 3 and Art. IX, sec. 1.

100. Because the Land Board failed to consider whether the significant environmental degradation caused by strip mining 1.3 billion tons of coal in the Tongue River watershed satisfied the “best interests” requirement of the Land Board’s public trust obligation, the Otter Creek coal lease is unlawful.

### **REQUEST FOR RELIEF**

THEREFORE, Plaintiffs respectfully request that this Court:


1. Declare that Montana Code section 77-1-121(2) violates Article II, section 3 and Article IX, section 1 of Montana’s Constitution;
2. Declare that the Otter Creek coal leases, executed between the Land Board and Ark Land on April 20, 2010, violate MEPA;
3. Declare that the Land Board violated its public trust obligation by failing to consider whether the Otter Creek coal leases are in the best interest of Montanans in light of potential adverse environmental impacts;
4. Set aside and remand the Otter Creek coal leases to the Land Board with direction

to comply with MEPA and the Land Board's public trust obligations;

5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and

6. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted on this 2nd day of July, 2010,



---

Douglas L. Honnold  
Jenny K. Harbine  
Earthjustice  
209 South Willson Avenue  
Bozeman, MT 59715  
(406) 586-9699  
Fax: (406) 596-9695  
dhonnold@earthjustice.org  
jharbine@earthjustice.org

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a complete and accurate copy of the foregoing "First Amended Complaint" to be served on the following persons this 2nd day of July, 2010, by electronic mail, in compliance with the parties' agreement reflected in Plaintiffs' June 24, 2010

Unopposed Motion:

Jack R. Tuholske, tuholske@centric.net  
TUHOLSKE LAW OFFICE, P.C.  
PO Box 7458  
234 East Pine Street  
Missoula, MT 59807

Mark Stermitz,  
mstermitz@crowleyfleck.com  
Crowley Fleck PLLP  
P.O. Box 7099  
Missoula, MT 59807-7099

Patrick Parenteau,  
pparenteau@vermontlaw.edu  
Vermont Law School  
South Royalton, VT 05068

Jeff Oven, joven@crowleyfleck.com  
Crowley Fleck PLLP  
P.O. Box 2529  
Billings, MT 59103-2529

*Attorneys for Plaintiffs Northern Plains  
Resource Council, Inc. and  
National Wildlife Federation*

*Attorneys for Defendants Ark Land  
Company and Arch Coal, Inc.*

Anthony Johnstone, ajohnstone@mt.gov  
Jennifer Anders, janders@mt.gov  
Department of Justice  
215 North Sanders  
Helena, MT 59620

Candace West, cwest@mt.gov  
Tom Butler, tbutler@mt.gov  
Department of Natural Resources and  
Conservation  
State of Montana  
1625 Eleventh Ave.  
Helena, MT 59620-1601

*Attorneys for Defendant Montana Board of  
Land Commissioners*

  
\_\_\_\_\_  
Jenny K. Harbine