MEIC'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Douglas L. Honnold
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
dhonnold@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs Montana Environmental Information Center and Sierra Club

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT,
POWDER RIVER COUNTY

NORTHERN PLAINS RESOURCE COUNCIL, INC., and NATIONAL WILDLIFE FEDERATION, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC. Defendants.	Cause No. DV-38-2010-2480 Judge Joe L. Hegel
MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, INC. and ARCH COAL, INC. Defendants.	Cause No. DV-38-2010-2481 Judge Joe L. Hegel **MEIC'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The Montana Board of Land Commissioners ("Land Board") leased 572 million tons of coal for a massive new strip mine in the Otter Creek valley without first considering the environmental consequences of its action or options to minimize or avoid such consequences. If the Otter Creek leases are upheld, harmful impacts of coal leasing—including grave threats to our climate—will forever escape environmental review and mitigation. Montana's Constitution, the Montana Environmental Policy Act ("MEPA"), and the public trust prohibit this result.

This Court resolved the primary questions pertaining to the state's constitutional and MEPA violation when it rejected Defendants' motions to dismiss. The question that remains for this Court's resolution is whether the environmental consequences of the Otter Creek coal leases are "sufficient to implicate the constitutional protection of the clean and healthful environment." Mem. and Order re Motions to Dismiss (Jan. 7, 2011). That question must be answered in the affirmative. Once the Land Board issued the challenged leases, it lost its only opportunity to mitigate the threat of climate change from Otter Creek coal and to consider the option of not leasing the Otter Creek coal tracts at all. Accordingly, the leases—and the statute that exempts them from MEPA's environmental review requirements, MCA § 77-1-121(2)—implicate Plaintiffs' constitutional right to be free of unreasonable environmental degradation. See Mont. Const., art. II, § 3, art. IX, § 1. Because the MEPA exemption in section 77-1-121(2) cannot withstand strict scrutiny, it is unconstitutional as applied to this case.

The same pre-leasing consideration of environmental consequences required by the Constitution is required by the Land Board's public trust obligation to ensure that coal leases are "in the best interests of the state." MCA § 77-3-301. The Land Board's violation of this public trust duty provides an independent reason that the Otter Creek leases are invalid.

For these reasons, Plaintiffs Montana Environmental Information Center and Sierra Club (collectively, "MEIC") respectfully request that judgment be entered declaring that the Otter Creek coal leases were issued in violation of the Constitution and the Land Board's public trust obligations, and cancelling the challenged leases.

STANDARD OF REVIEW

This case is presented on cross-motions for summary judgment. All parties agree that summary judgment is proper because "no genuine issue of material fact exists," and the issues in dispute are entirely legal. Mont. R. Civ. P. 56(c); see Unopposed Motion for Scheduling Order

(Apr. 25, 2011). "In the usual summary judgment case, [courts] first determine whether the moving party met its burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." Deserly v. Dep't of Corr., 2000 MT 42, ¶ 11, 298 Mont. 328, 995 P.2d 972 (citation and quotation omitted). However, when "the parties agree that there are no material facts in dispute and that th[e] matter should be decided on the basis of cross-motions for summary judgment," the court properly determines which party is entitled to judgment as a matter of law. Id. MEIC bases this motion on the statement of undisputed facts jointly submitted by all parties and on May 13, 2011, and on MEIC's supplemental statement of undisputed material facts, which in turn relies solely on statements in state and federal government documents beyond dispute.

ARGUMENT

The Land Board's failure to analyze the environmental consequences of the Otter Creek coal leases and options for avoiding or mitigating those consequences violates the Montana Constitution's environmental provisions and the Land Board's public trust mandate.[1]

I. SECTION 77-1-121(2) IS UNCONSTITUTIONAL AS APPLIED TO THE OTTER CREEK COAL LEASES

This Court has already ruled on the primary legal principles bearing on the constitutionality of the MEPA exemption set forth in section 77-1-121(2) as follows:

> 1) MEPA would apply to the Land Board's decision to lease the Otter Creek coal tracts in the absence of the statutory exemption, Order re: Motions to Dismiss, at 5;
>
> 2) MEPA implements the state's constitutional obligation "to prevent unreasonable depletion and degradation of natural resources," Mont. Const. art. IX, § 1(3); see Order re: Motions to Dismiss, at 5; and
>
> 3) By leasing Otter Creek coal without first conducting MEPA review, the Land Board foreclosed the opportunity to address certain environmental impacts of coal mining, thereby "convert[ing] public property rights to private property rights, stripping away [the public's] special protections before even considering possible environmental consequences," Order re: Motions to Dismiss, at 6.

[1] This Court concluded that Plaintiffs have standing in its ruling on the motions to dismiss. See Order re: Motions to Dismiss at 4. Plaintiffs' standing is confirmed by the affidavits of MEIC members Art Hayes, Jr. and Steve Gilbert, and Sierra Club member Dawn Sample, filed herewith. See Heffernan v. Missoula City Council, 2011 MT 91, ¶ 38-39, 41, 360 Mont. 207.

In this Court's words, the only questions left to decide with respect to the constitutionality of section 77-1-121 are "whether this state action is sufficient to implicate the constitutional protection of the clean and healthful environment," and, if so, whether it survives strict scrutiny. Id. at 7.

The answer to the Court's first question is yes: As applied to the Otter Creek coal leases, the Montana statutory exemption from MEPA in Montana Code Annotated section 77-1-121(2) implicates Plaintiffs' fundamental constitutional right to a clean and healthful environment because it allows significant environmental degradation to forever escape environmental review. The prospect of regulatory review at the coal mine permitting stage —which has been touted by Defendants—is no substitute for pre-leasing review because there are substantial impacts for which mitigation or avoidance will never be an option now that the leases have issued. First, the Land Board has eliminated its opportunity to mitigate significant, secondary impacts of coal mining, particularly the climate change impacts caused by coal combustion. Second, the Land Board eliminated any realistic opportunity to entirely prevent development of the Otter Creek strip mine based on policy considerations that could be revealed through environmental analysis. As described further below, the Land Board's omission commits the state to environmental degradation that is "significant enough to implicate the constitutional environmental protections implemented by MEPA." Order re: Motions to Dismiss, at 6.

The answer to the Court's second question is no: Section 77-1-121(2) is unconstitutional as applied to this case because it fails the strict scrutiny standard requiring the state to demonstrate that it had a compelling interest for impairing Plaintiffs' constitutional rights and that it chose the "least onerous path" for satisfying that interest. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality ("MEIC"), 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236.

A. The Constitutional Guarantee of a Clean and Healthful Environment

Montana's Constitution guarantees "the right to a clean and healthful environment" and provides that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const., art. II, § 3, art. IX, § 1. The Montana Supreme Court has determined that the right to a clean and healthful environment is "linked to the legislature's [constitutional] obligation … to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources." MEIC, ¶ 77.

The environmental protection provided by Montana's constitution was thought by its drafters "to be the strongest environmental protection provision found in any state constitution." MEIC, ¶ 66 (citing Montana Constitutional Convention, Vol. IV at 1200, Mar. 1, 1972). Montana Constitution Article II, section 3 and Article IX, section 1 do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." MEIC, ¶ 77. Together, they provide environmental "protections which are both anticipatory and preventative." Id.

The Montana Supreme Court has found these far-reaching constitutional protections to be implicated even when the extent of environmental harm threatened by a challenged action is limited. In MEIC, plaintiffs challenged the constitutionality of a statutory exemption from the requirement to review the potential for activities to degrade high-quality waters, as it applied to discharges of arsenic-contaminated water from a proposed gold mine. See MEIC, ¶ 6. The court found that the exemption implicated the plaintiffs' constitutional rights even though "a short distance from the points of discharge there were no changes from background levels of arsenic." MEIC, ¶ 26. Likewise, in Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, the Court found that drilling a well on private property with contaminated groundwater would result in "potential health risks and possible environmental degradation," such that the drilling would violate the Constitution's environmental provisions. Id. ¶¶ 29, 33.

Given these holdings, the environmental consequences at issue here are more than sufficient to trigger the Montana Constitution's environmental guarantees. Defendants concede for purposes of this case that "[c]oal mining by its very nature significantly impacts the environment." Joint SOF, ¶ 35. The certain, significant, and enduring impacts from mining and burning Otter Creek coal far exceed the environmental degradation that was deemed to have crossed the constitutional threshold in MEIC and Cape-France. As discussed below, these impacts implicate the Constitution's environmental protections.

B. The Devastating Impacts of Climate Change in Montana Implicate Plaintiffs' Constitutional Right

By deferring environmental review of the Otter Creek leases, the Land Board has foregone its only opportunity to consider alternatives that may avoid or reduce climate change impacts resulting from coal mining. MEPA review must include an assessment of an action's "primary, secondary, and cumulative impacts." Admin. R. Mont. 36.2.529(4)(b). In cases

arising under MEPA's federal analogue, the National Environmental Policy Act ("NEPA"), federal courts have required agencies to analyze the secondary "effects on air quality that an increase in the supply of low-sulfur coal to power plants would produce" due to the construction of a rail line to transport coal, see Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 548-49 (8th Cir. 2003), and the global warming impacts of federal fuel efficiency standards that were not as stringent as considered alternatives, see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1225 (9th Cir. 2008).[2] MEPA requires no less. If the Land Board's failure to undertake pre-leasing MEPA review of the Otter Creek mine's climate change impacts is upheld, then these impacts will never be the subject of meaningful consideration and potential mitigation. Accordingly, the Land Board's omission opens the door to climate change impacts sufficient to implicate the Montana Constitution's environmental protections.

1. Climate change degrades Montana's environment

A host of federal and state expert analyses make clear that climate change threatens severe environmental impacts in Montana. In 2007, the Intergovernmental Panel on Climate Change (IPCC) released its Fourth Assessment Report, stating that "warming of the climate system is unequivocal," and it is human caused. MEIC SOF ¶ 5.

Climate change is the result of a buildup of greenhouse gases—primarily carbon dioxide ("CO_2")—in the atmosphere. MEIC SOF, ¶ 6. 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_2 emissions scenarios. Id. If CO_2 emissions continue to grow unabated, the region will likely experience warming at the high end of this range. Id.

According to the U.S. Global Change Research Program (GCRP), climate change could affect the Great Plains region, including eastern Montana, by causing "more frequent extreme events such as heat waves, droughts, and heavy rainfall, [jeopardizing] the region's already threatened water resources, essential agricultural and ranching activities, unique natural and protected areas, and the health and prosperity of its inhabitants." MEIC SOF ¶ 11.

[2] The Montana Supreme Court finds NEPA case "persuasive" when interpreting MEPA. Ravalli County Fish and Game Ass'n v. Mont. Dep't of State Lands, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995).

The Final Environmental Impact Statement ("EIS") for a proposed—but aborted—new coal-fired power plant near Great Falls, Montana, echoes these findings. The EIS, which was co-authored by the U.S. Department of Agriculture's Rural Utility Service and DEQ, stated that:

> While climate change is the ultimate global issue—with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another—it does manifest itself in particular ways in specific locales like Montana. During the past century, the average temperature in Helena increased 1.3°F and precipitation has decreased by up to 20 percent in many parts of the state.

MEIC SOF, ¶ 12. Further, "[o]ver the next century, Montana's climate may change even more." MEIC SOF, ¶ 13. 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. As a result, Montana will have longer summer droughts, less water availability, more insect infestations, more intense wildfires, and decreased water availability for irrigation and crop production. Id. Based on current warming trends, scientists estimate that glaciers will entirely disappear from Glacier National Park, perhaps by 2020. See MEIC SOF ¶ 14. Further, climate change "could profoundly affect the distribution and abundance of many fishes." Montana's native Bull trout are especially at risk because of their dependence on cold water for spawning and early rearing." MEIC SOF ¶ 15.

These conditions, "and ultimately the effect they will have on Montana's short and long-term future," motivated Montana Governor Brian Schweitzer to form a Climate Change Advisory Committee (CCAC) in December 2005. MEIC SOF, ¶ 16. The CCAC produced a Climate Change Action Plan, which recommended "that Montana establish a statewide, economy-wide GHG reduction goal to reduce gross GHG emissions to 1990 levels by 2020, for both consumption-based and production-based emissions, and to further reduce emissions to 80% below 1990 levels by 2050." MEIC SOF ¶ 18. The CCAC recognized the "likely increase in fossil fuel production that will occur in Montana," but that "[k]ey choices in technology and infrastructure can have a significant impact on emissions growth." MEIC SOF ¶ 19.

The threat to our climate and its devastating consequences in Montana fall squarely within the ambit of the Montana Constitution's guarantee against environmental degradation. As explained by the Constitution's drafters:

> [Mont. Const. art. IX, § 1,] [s]ubsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support

> system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded.

MEIC, ¶ 67 (quoting Montana Constitutional Convention, Vol. IV at 1201, March 1, 1972) (emphasis added). Climate change threatens nearly every aspect of the "environmental life-support system." Its human causes therefore implicate Montanan's constitutional right to be free from unreasonable environmental degradation.

2. Carbon dioxide emissions from Otter Creek coal contribute to climate change

Combustion of Otter Creek coal will constitute a significant source of greenhouse gas emissions. Climate change is primarily human caused. MEIC SOF ¶ 5. Although the worst-case climate change scenarios may be prevented by sharply reducing carbon dioxide emissions to the atmosphere, climate change likely cannot be reversed once it has occurred. MEIC SOF ¶ 10. If constructed, the Otter Creek mine will be one of the nation's largest single sources of carbon dioxide, contributing to climate change and its potentially disastrous impacts globally and in Montana. See MEIC SOF ¶¶ 27-29. Together with Arch Coal's leases of privately owned coal, which is interspersed with the 572 million tons of state-owned coal, the Otter Creek mine will exploit a 1.3-billion-ton coal reserve. MEIC SOF ¶ 1.[3] At its peak, the Otter Creek mine could almost double Montana's current coal production—independently producing 33.2 million tons of coal annually. MEIC SOF ¶ 24. Id. Nearly all of this coal is destined for combustion at coal-fired power plants. MEIC SOF ¶ 27. Nationwide, approximately 36.5 percent of CO_2 emissions stem from the burning of fossil fuels—primarily coal—for the purpose of electricity generation. MEIC SOF ¶ 22. Otter Creek coal alone will result in emissions of approximately 2.4 billion tons of CO_2. MEIC SOF ¶ 27. By year six of mine operations, combustion of Otter Creek coal will result in 60.4 million tons of annual CO_2 emissions. MEIC SOF ¶ 28. These emissions would amount to nearly twice all of Montana's yearly consumption-based CO_2-equivalent emissions generated (37 million tons in 2005). MEIC SOF ¶ 29.

[3] Due to the checkerboard pattern of ownership, the privately and state-owned coal must be developed concurrently. MEIC SOF ¶ 1.

Concentrations of CO_2 in the atmosphere "are projected to continue increasing unless the major emitters take action to reduce emissions." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,539 (Dec. 15, 2009). The U.S. Environmental Protection Agency ("EPA") recognized the cumulative nature of both the climate change problem and the strategies needed to combat it:

> [N]o single greenhouse gas source category dominates on the global scale, and many (if not all) individual greenhouse gas source categories could appear small in comparison to the total, when, in fact, they could be very important contributors in terms of both absolute emissions or in comparison to other source categories, globally or within the United States. If the United States and the rest of the world are to combat the risks associated with global climate change, contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues.

Id. at 66,543 (emphasis added).

Further, Montana's Governor (a Land Board member) and the Montana CCAC have recognized that economy-wide reductions in carbon dioxide emissions are necessary to achieve emissions reductions essential to averting the worst-case climate change scenarios. MEIC SOF ¶¶ 16-18, 21. As the Supreme Court stated in the seminal case of Massachusetts v. EPA, the state "would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming." 549 U.S. 497, 526 (2007) (quotations and citation omitted) (referencing statements by the President and EPA).

As the foregoing demonstrates, emissions from Otter Creek coal are significant relative to other individual sources. If decisionmakers do not address emissions from large-scale projects such as Otter Creek, then we have no hope of averting a climate catastrophe. As EPA cautioned, ignoring emissions reductions from such sources "would effectively lead to a tragedy of the commons, whereby no country or source category would be accountable for contributing to the global problem of climate change, and nobody would take action as the problem persists and worsens." 74 Fed. Reg. at 66,543. With respect to such sources in Montana, our constitution prohibits this result.

3. Environmental review of the Otter Creek coal lease is required to consider whether threats to the climate may be reduced or avoided

Notwithstanding the threats that the Otter Creek coal mine poses to the global climate and

Montana's environment, the Land Board leased the Otter Creek coal tracts without first conducting any environmental review under MEPA. The Land Board's options for avoiding or limiting the threat to our climate due to Otter Creek coal mining are available only at the leasing stage, not the permitting stage, of coal development. At the lease stage, the Land Board should have considered lease stipulations that, for example, would require Arch Coal to condition coal sales to power plants on the receiving plant's avoidance or mitigation of CO_2 emissions through CO_2 sequestration or other technologies, prevent the export of Otter Creek coal to countries with lax clean air laws, or require Arch Coal to contribute to a fund that would be used to help mitigate climate change impacts in Montana.

Although Defendants have argued that Otter Creek's climate change impacts may be mitigated following environmental review at the mine-permitting stage, this Court correctly observed that the state's authority at that point "would appear to be restricted to its purely regulatory functions." Order re: Motions to Dismiss, at 7; see also MCA § 75-1-201(5)(a) ("The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on [the environmental review provisions of MEPA]."). [4] Mitigation of climate change impacts due to coal combustion is outside of the state's regulatory purview under the Montana Strip and Underground Mine Reclamation Act, MCA § 82-4-201, et seq. See MCA §§ 82-4-205(1)(b) (DEQ approval required "for the method of operation, subsidence stabilization, water control, backfilling, grading, highwall reduction, and topsoiling and for the reclamation of the area of land affected by the operator's operation"), 82-4-227 (permit issuance criteria); see also Joint SOF, ¶ 31 (mining permit requirements). Accordingly, neither DEQ nor the Land Board has authority at the mine permitting stage to require measures to minimize the project's climate change impacts. Furthermore, now that the leases have been issued, the Land Board is without authority to determine that, because of the climate change threat, mining should not occur at Otter Creek at all.

If the Land Board's failure to evaluate its leasing decision under MEPA is upheld, options for alleviating the threat to our climate due to Otter Creek coal will never receive meaningful consideration. Otter Creek's contribution to the significant threat of climate change will be a foregone conclusion—a situation that runs afoul of the Constitution's "anticipatory and preventative" guarantee of a clean and healthy environment. MEIC, ¶ 77. The climate change

[4] All MEPA citations refer to the law in effect in 2010, when the Otter Creek leases were issued.

impacts of the Otter Creek coal leases implicate Plaintiffs' constitutional rights.

C. The Direct Impacts of Coal Mining Also Implicate Plaintiffs' Constitutional Right

In addition to the significant climate threat, Plaintiffs' constitutional rights are implicated by the direct impacts of coal mining on the local environment that are facilitated by the Otter Creek leases.

1. Coal mining has significant direct environmental effects

Defendants concede for purposes of this case that, unmitigated, Otter Creek coal mining would have significant environmental effects. Joint SOF, ¶ 11. Their concession is well-founded: Montana DEQ has found that mining has substantial environmental consequences, some enduring even after a mine is reclaimed. See MEIC SOF ¶¶ 34-43. In DEQ's words, "[a]s … coal is mined, almost all components of the present ecological system in the area, which have developed over a long period of time, are modified." MEIC SOF ¶ 34. Strip mining results in complete removal of the coal aquifer and any overburden. MEIC SOF ¶ 35. As the mining area is "reclaimed," the aquifer is replaced with backfilled overburden material. MEIC SOF ¶ 36. While reclamation attempts to restore natural conditions, the landscape of the mined area is forever changed. Id.

DEQ's past assessment of surface coal mining concluded that mining degrades groundwater quality, impairing its use for household and irrigation purposes even after reclamation has taken place. MEIC SOF ¶ 38; see also MEIC SOF ¶¶ 37, 39-41. Further, mining displaces wildlife, which may not "be completely restored [in the mined area] for an estimated 50 years after the initiation of [mining]." MEIC SOF ¶ 42.

These significant and enduring impacts are "sufficient to implicate the constitutional protection of the clean and healthful environment." Order re: Motions to Dismiss, at 7.

2. Coal leasing opens the door to mining and its significant environmental consequences

Moreover, the challenged leases opened the door to such coal-mining impacts. Without examining the environmental consequences of mining Otter Creek or considering leasing alternatives, the Land Board issued leases that mark the first of several administrative stages that will lead to coal mine development. See Joint SOF, ¶¶ 22, 24-25. In the analogous federal oil and gas leasing context, which, like Montana coal leasing, is a staged process in which leases are

followed by site-specific development approvals, courts have determined that the issuance of a lease "opens the door to potentially harmful post-leasing activity." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1988). By leasing the Otter Creek coal tracts, the Land Board has eliminated its opportunity to prohibit coal mining on policy grounds, even if it determines at a later date that the environmental consequences of coal mining are too great. Furthermore, the leases are the first "link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues," thereby creating a practical impediment to any future decision to prohibit or significantly limit coal mining at Otter Creek pursuant to the state's regulatory powers. Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983). For both reasons, the leases consign Montanans to the significant environmental impacts of coal mining. This lost opportunity is "significant enough to implicate the constitutional environmental protections implemented by MEPA." Order re: Motions to Dismiss, at 6.

Once the leases are issued, there is no provision of state law that would authorize DEQ, let alone the Land Board, to prevent mining if, notwithstanding compliance with mining laws, DEQ determined as a policy matter that mining should not take place. Although the Otter Creek leases are conditioned on Arch Coal's compliance with state mining laws, see Joint SOF, ¶ 24, those laws establish standards only for localized mining impacts to the land and water quality, not authority for the state simply to decide that mining should not occur. See MCA §§ 82-4-205(1)(b), 82-4-227; see also Joint SOF, ¶ 31. Likewise, the leases are conditioned on Land Board "review and approval of Lessee's mine operation and reclamation plan" under the Montana Strip and Underground Mine Reclamation Act. See Joint SOF, ¶ 24. However, this provision gives the Land Board no greater authority to deny Arch Coal the right to mine than DEQ already possesses, i.e., the authority to deny mining that does not comply with state mining law. See Order re: Motions to Dismiss at 7. These lease provisions do not reserve the right to the Land Board to prohibit mining on any other ground, including a determination that the irreversible impacts of mining are too great. See MEIC SOF ¶54.

Indeed, MEPA prohibits the denial of a permit—or even the imposition of mitigation measures—based upon the results of environmental review if the agency does not have the independent statutory authority to take such action under another statute. MCA § 75-1-201(5)(a). Because the Land Board's underlying authority to condition or prohibit the Otter Creek project stems from its leasing power, and not its right to review Arch Coal's mining plan,

the Land Board must conduct MEPA review at the leasing stage to fulfill its duty to prevent unreasonable environmental degradation and protect the public's constitutional right to a clean and healthful environment.

In addition, even apart from the statutory limits on the state's post-leasing regulatory authority, the Otter Creek leases triggered events that create substantial momentum toward eventual coal mining, effectively taking the "no-action alternative" off the table as a practical matter. This Court has already identified this problem, stating that the leases "convert public property rights to private property rights" and "further review by the Land Board and other state agencies would appear to be restricted to its purely regulatory functions, with the need to treat the now private property rights with deference." Order re: Motions to Dismiss, at 6-7; see also MEIC SOF ¶ 54 (Department of Natural Resources staff stating that terminating leases "in practice … would be an inappropriate measure" even if Arch Coal violated lease conditions).

Once a lease issues, a developer will "commit[] time and effort to planning the development of the blocks they had leased, and the [federal and] state agencies [will] beg[i]n to make plans based upon the leased tracts." Watt, 716 F.2d at 952. Here, Arch Coal has already $86 million for the Otter Creek leases. Joint SOF, ¶¶ 19, 21. Further, Arch Coal and DEQ have already begun work on a prospecting permit for Otter Creek. Id. ¶ 29.

> Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'

Watt, 716 F.2d at 952-53; see also D.C. Fed'n of Civic Assns. v. Adams, 571 F.2d 1310, 1312 (4th Cir. 1978) (An EIS must be prepared "before such substantial inertia develops that a proposal cannot be rejected or reevaluated.").

In the oil and gas leasing context, federal courts have determined that post-leasing environmental review does not negate the legal infirmity caused by an agency's failure to conduct NEPA review before issuing leases, even though oil and gas development would only be authorized by further permitting. "By definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or [NEPA's] statutory mandate becomes ineffective." Bob Marshall Alliance, 852 F.2d at 1229 n.4. Accordingly, "full and meaningful consideration of the no-action alternative can be achieved

only if all alternatives available … are developed and studied on a clean slate." Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992).

Because the Land Board issued leases that both opened the door to future mining and triggered commitments by both Arch Coal and the State, the Land Board should have conducted environmental review of the impacts of mining and its alternatives, including a "no-action alternative," prior to issuing the leases. The failure to do so effectively removes the "no-action alternative" from meaningful consideration at any stage of the mine's development and consigns the state to suffer the impacts of strip mining at Otter Creek.

D. Section 77-1-121(2) Fails Strict Scrutiny

While MEPA review is a key component of the state's implementation of its constitutional mandate to prevent unreasonable environmental degradation, including the degradation from coal mining discussed above, here the Land Board failed to conduct environmental review on the assumption that the Otter Creek leases were exempt from MEPA under Montana Code Annotated section 77-1-121(2). "[T]he right to a clean and healthful environment" found in Article II, section 3, of Montana's Constitution "is a fundamental right because it is guaranteed by the Declaration of Rights." MEIC, ¶ 63. Accordingly, "any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes 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." Id. (emphasis omitted). Section 77-1-121(2), as applied to the Otter Creek coal leases, is unconstitutional because it fails strict scrutiny.

No compelling interest is evident in the legislative record for section 77-1-121(2) and the Land Board proffered none when applying section 77-1-121(2) to the Otter Creek leases. To demonstrate a compelling state interest, a state must show, "at a minimum, some interest 'of the highest order and ... not otherwise served' or 'the gravest abuse[ ], endangering [a] paramount [government] interest.'" Armstrong v. State, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) and Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Legislators and public proponents justified the 2003 law that added section 77-1-121(2) only on grounds that the MEPA exemption would save time and money, enabling coal and gas extraction on state land to proceed more expeditiously. MEIC SOF ¶¶ 56-57. Even if section

77-1-121(2) was intended to save state resources, such frugality is not an interest "of the highest order." Armstrong, ¶ 41 n.6 (alterations omitted). While "[t]he government has a valid interest in protecting its treasury," there is no indication that environmental review of coal leases "would impair the State's ability to function as a governmental entity or create a financial crisis." White v. State, 203 Mont. 363, 369, 661 P.2d 1272, 1275 (1983), overruled on other grounds by Meech v. Hillhaven W., Inc. (1989), 238 Mont. 21, 776 P.2d 488; see also Pfost v. State, 219 Mont. 206, 221,713 P.2d 495, 504 (1985), overruled on other grounds by Meech, 238 Mont. 21. (holding that the state's interest in avoiding a tax increase was not "an acceptable or a compelling state interest"). The legislative record is devoid of any compelling interest to justify the blanket MEPA exemption in section 77-1-121(2).

Compounding the legislature's failure to articulate a compelling reason for section 77-1-121(2), the Land Board asserted no justification, other than its "reliance on Mont. Code Ann. § 77-1-121(2)," for failing to conduct pre-leasing MEPA review. See Joint SOF ¶ 22.

Even if the state could demonstrate a compelling interest in avoiding MEPA review for a category of state actions—which it cannot do—the blanket exemption in section 77-1-121(2) is not "the least onerous path" to achieving the state's objective. MEIC, ¶ 63. Section 77-1-121(2)'s infringement on plaintiff's constitutional rights "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997). The legislature could have adopted a general MEPA exclusion for Land Board leases while providing an exception for leases that, due to unusual circumstances, have significant environmental effects. For example, regulations implementing MEPA provide for "categorical exclusion[s]" from otherwise required environmental analysis, but requires the agency to "identify any extraordinary circumstances in which a normally excluded action requires an [environmental assessment] or EIS." Admin. R. Mont. 36.2.523(5)(a). Because a similar exception in section 77-1-121 "would be at least as effective" in serving Montana's financial interests in streamlining MEPA review, section 77-1-121, as written, fails strict scrutiny as applied to the Otter Creek leases. Reno, 521 U.S. at 874.

II. THE LAND BOARD VIOLATED THE PUBLIC TRUST

In addition to violating the Montana Constitution and MEPA, the Land Board breached its public trust obligations by leasing coal for a massive new strip mine without first considering

whether the public's best interests required stipulations to minimize the action's climate change, environmental, and socio-economic impacts.[5] See Mont. Const., art. X, § 11; MCA §§ 77-1-202, 77-3-301. The Land Board may lease state coal resources only in a manner that is "in the best interests of the state." MCA § 77-3-301.

In carrying out this public trust mandate, 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 …. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

MCA § 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, 127 P.3d 394 ("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."). The Land Board's obligation "to protect the best interests of the state ... necessarily includes considering consequences to … the environment." Ravalli County Fish and Game Ass'n, 273 Mont. at 379. The Land Board's "duty to avoid environmental harm is mandatory." Id. at 387.

The Land Board's public trust duties are animated by Article IX, section 1 of the Montana Constitution, which provides that "[t]he State … shall maintain and improve a clean and healthful environment in Montana for present and future generations." As discussed supra, MEPA is one important vehicle for discharging that obligation. Indeed, MEPA directs that "it is the continuing responsibility of the state of Montana to … fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." MCA § 75-1-103(2) (emphasis added). However, the Board's public trust obligation is independent of MEPA, and applies even if, as Defendants argue, the Otter Creek coal leases are properly exempt from MEPA.

The Land Board violated the public trust by failing to evaluate the climate change, environmental, and socio-economic impacts of the Otter Creek coal mine, whether leasing Otter Creek coal is in the public's best interest in light of these impacts, and whether the public's best

[5] This Court's Order regarding Defendants' motions to dismiss did not address MEIC's public trust claim.

interest required lease conditions to minimize the Otter Creek mine's contribution to climate change and its impacts in Montana.

III. THIS COURT SHOULD CANCEL THE OTTER CREEK COAL LEASES

The only adequate remedy for the Otter Creek leases' legal infirmities—and the remedy strongly favored by equitable considerations—is to cancel the leases and require the Land Board to comply with the constitutional protections implemented by MEPA and the Land Board's public trust duties on a clean slate. This remedy is available to cure the Land Board's public trust violations notwithstanding newly enacted MEPA legislation that would severely restrict this Court's remedial options. See Mont. Sess. Laws 2011, ch. 396, § 6(6)(d) (SB 233). However, should the Court determine that MEPA's new remedial restrictions would eliminate the option of cancelling the leases in this case, it should declare that legislation unconstitutional as applied

A. Cancelling the Leases is the Only Adequate Remedy for the State's Constitutional and Public Trust Violations

To remedy both the constitutional and the public trust violations effected by the Land Board's failure to take into account environmental considerations prior to leasing Otter Creek coal, this Court should set aside the unlawful leases. Cancelling the leases is necessary to ensure that environmental review of the Otter Creek leases is not a futile exercise that merely ratifies a decision that has already been made.

The Court should declare the Otter Creek leases void and set them aside because they were issued in violation of the Constitution, MEPA, and the Land Board's public trust obligations. See Cape-France Enter., ¶¶ 32-34 (object of a contract is unlawful and unenforceable when its performance would cause a party to the contract to violate the constitutional requirement to "maintain and improve a clean and healthful environment in Montana"); McManus v. Fulton, 85 Mont. 170, 278 P. 126, 130 (1929) ("whenever a statute is made for the protection of the public, a contract in violation of its provisions is void"). In cases arising under the Montana Subdivision and Platting Act, the Montana Supreme Court has held that inadequate compliance with that statute's environmental review requirement, which is similar to MEPA's, renders a county's subdivision approval unlawful and therefore "requires reversal" of the county's decision. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, ¶ 26, 351 Mont. 40, 208 P.3d 876; see also Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, ¶ 58, 356 Mont. 41, 230 P.3d 808. In those cases, the developers could submit new

subdivision applications, but those applications would have to be reviewed anew in accordance with the Montana Subdivision and Platting Act. See Citizens for Responsible Dev., ¶ 26. This Court should similarly declare the Otter Creek leases void, and allow the Land Board to reconsider new lease applications from Arch Coal only in a manner that complies with the Constitution, MEPA, and its public trust duties.

The leases should be set aside not only because they are void, but also to prevent the irreparable harm to Plaintiffs' constitutional rights, the environment and the public interest. Because the Otter Creek leases violate Plaintiffs' constitutional right to a clean and healthful environment, the equities in this case require the Court to set aside the unconstitutional action. A "presumption of irreparable injury … flows from a violation of constitutional rights." Jolly v. Coughlin, 76 F.3d 468, 482 (2nd Cir. 1996) (citations omitted). In addition to the irreparable injury to Plaintiffs, the public interest favors canceling the leases "because all citizens have a stake in upholding the Constitution." Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005).

Additionally, the environmental harms resulting from the Otter Creek leases weigh strongly in favor of their cancellation. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). As described above, irreparable environmental harm in this case will flow from the Land Board's decision to issue the Otter Creek leases without considering the environmental consequences of its action and possible alternatives, including the no action alternative. "MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands. The [state decisionmaker] may not, as here, reach a decision without first engaging in the requisite significant impacts analysis." Ravalli County Fish and Game Ass'n, 273 Mont. at 384 (emphasis added). Cancelling the Otter Creek leases is the only remedy that will restore the Land Board's ability to conduct a meaningful MEPA review. See Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (finding that if decisions are made before an EIS is complete, "the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it").

In analogous circumstances to those here, the federal district court for the District of Montana held that cancellation of certain federal oil and gas leases was "the only remedy which

will effectively foster NEPA's mandate requiring informed and meaningful consideration of alternatives to leasing … , including the no-leasing option." Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992).[6] As in that case, the Otter Creek leases must be cancelled to allow the Land Board to meaningfully consider the full range of leasing alternatives, including not leasing the Otter Creek tracts at all.

The equities also favor cancelling the Otter Creek leases to remedy the Land Board's violation of the public trust. The Land Board's public trust obligation to lease coal reserves in a manner that "best meet[s] the needs of the people and the beneficiaries of the trust" necessarily requires a prospective analysis of the public interest, including environmental considerations. MCA § 77-1-203(1)(a). Unless the leases are set aside, the Land Board cannot effectively comply with its public trust obligation.

Lease cancellation serves the public interest. MEPA implements a state policy "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." MCA § 75-1-102(2). The public interest in "prevent[ing] or eliminate[ing]" environmental damage, id., would be undermined by leaving leases in place that eliminate the state's opportunity to consider a "no leasing" alternative. This is particularly true in light of the constitutional violations in this case. The intent of the constitution's framers "'was to permit no degradation from the present environment and affirmatively require enhancement of what we have now.'" MEIC, ¶ 69 (emphasis omitted; quoting Mont. Const. Convention, Vol. IV at 1205, Mar. 1, 1972). The public's right to a clean and healthful environment is "inalienable." MEIC, ¶ 76. "[I]t is always in the public interest to protect constitutional rights." Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008); see also Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir.2002) ("upholding constitutional rights surely serves the public interest").

This Court should cancel the Otter Creek leases to prevent irreparable environmental harm and vindicate the public interest.

[6] The court distinguished cases in which mineral leases were not cancelled, including Conner v. Burford, 836 F.2d 1521 (9th Cir.1988), on grounds that the decisionmaker's failure to consider a no-action alternative "compels the utilization of a more comprehensive remedy." Bob Marshall Alliance, 804 F. Supp. at 1297 n.8.

B. Newly Enacted MEPA Legislation Does Not Prevent the Court from Canceling Unlawful Leases

Finally, MEPA legislation enacted in the 2011 legislative session does not prevent this Court from cancelling the Otter Creek leases. Montana Senate Bill 233 (SB 233) states that, "[a] permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court." Mont. Sess. Laws 2011, ch. 396, § 6(6)(d) (SB 233). This Court may nevertheless cancel the Otter Creek leases because the legislation does not apply to the Land Board's public trust violation and the legislation, to the extent it would eliminate lease cancellation as a remedy in this case, is unconstitutional.

The Land Board's public trust violation provides this Court with grounds for cancelling the Otter Creek leases independent of the state's MEPA violation. The Land Board's failure to consider whether the leases are in the public's best interest in light of their environmental consequences renders the leases invalid and unenforceable. See supra; MCA § 77-3-301. SB 233 does nothing to abridge this Court's discretion to remedy the Land Board's public trust violation.

Nevertheless, should this Court determine that it must apply the remedial provision of SB 233 to this case, the Court should declare the provision is unconstitutional as applied. Without the availability of a remedy to prevent environmental harm, MEPA, and the constitutional rights it implements, are rendered meaningless. See State v. Mott, 29 Mont. 292, 74 P. 728, 731 (1903) ("[I]t is a maxim of general application, 'Ubi jus, ibi remedium' ['where there is a right there is a remedy']. And, when the wrong is the violation of constitutional rights, the Legislature has no power to prohibit or substantially impair all remedies, as to do so would be a violation of the Constitution.") (citations omitted); see also Sierra Forest Legacy v. Sherman, No. 09-17796, 2011 WL 2041149, *17 (9th Cir. May 26, 2011) ("If courts could not stop the federal government from applying a substantive rule promulgated without adherence to required procedures, regardless of the equities, … NEPA … would be toothless."); c.f. Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶¶ 62-64, 338 Mont. 259, 165 P.3d 1079 (recognizing in dicta the need for an adequate remedy for a violation of the constitutional right to a clean and healthful environment, but finding such a remedy existed at common law in that case).

SB 233 implicates Plaintiffs' constitutional rights by eliminating their most basic remedies for the state's constitutional violation. Not only would SB 233 restrict the Court's ability to set aside leases that caused Plaintiffs' constitutional rights to be violated, it would restrict the Court's ability even to declare the leases invalid. Mont. Sess. Laws 2011, ch. 396, § 6(6)(d) (a "lease ... is valid and may not be enjoined). If an unconstitutional action cannot be set aside, or even declared unlawful, then the Legislature has "prohibit[ed] or substantially impair[ed] all remedies," Mott, 74 P. at 731, and Plaintiffs' rights are violated a second time.

Because it implicates Plaintiffs' fundamental right to a clean and healthful environment, SB 233, section 6(6)(d), is subject to strict scrutiny. MEIC, ¶ 63. SB 233 does not promote a compelling state interest. The rationale articulated for SB 233 generally was that it would streamline permitting; the available legislative record contains no rationale for the remedial restrictions in section 6(6)(d). See MEIC SOF, ¶ 58. As with the similar justification for section 77-1-201(2), expediting development projects is not an "interest 'of the highest order'" that justifies impairing the citizens' right to a clean and healthful environment. See Armstrong, ¶ 41 n.6. Accordingly, SB 233 poses no obstacle to a full exercise of this Court's remedial authority in this case.

CONCLUSION

The Land Board's failure to analyze the environmental consequences of the Otter Creek leases and options to minimize or avoid those consequences violated Plaintiffs' constitutional right to a clean and healthful environment and the Land Board's public trust obligation. Accordingly, Plaintiffs respectfully request an Order declaring the Otter Creek leases unlawful and setting them aside.

Respectfully submitted on this 29th day of June, 2011,

Douglas L. Honnold
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695

Attorneys for Plaintiffs Montana Environmental Information Center and Sierra Club

PLAINTIFFS' NORTHERN PLAINS RESOURCE COUNCIL
AND NATIONAL WILDLIFE FEDERATION BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Jack R. Tuholske
TUHOLSKE LAW OFFICE, P.C.
PO Box 7458
Missoula, Montana 59807
Telephone: (406) 396-6415
Fax: (406) 728-8445
tuholske@centric.net

Patrick Parenteau, Esq
VERMONT LAW SCHOOL
South Royalton, VT 05068
Telephone: (802) 831-1305
pparenteau@vermontlaw.edu

Attorneys for the Defendants

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
POWDER RIVER COUNTY

NORTHERN PLAIN RESOURCE COUNCIL INC., NATIONAL WILDLIFE FEDERATION, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, ARCH COAL INC. Defendants.	Cause No. DV-38-2010-2480 Cause No. DV-38-2010-2481 Judge Joe L. Hegel PLAINTIFFS' NORTHERN PLAINS RESOURCE COUNCIL AND NATIONAL WILDLIFE FEDERATION BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, ARCH COAL INC., Defendants.	

INTRODUCTION

Though the stakes in this case are high, the issue is simple – is Mont. Code Ann. § 77-1-121, the statute that exempts the State Land Board's (Board) Otter Creek leasing decision from the Montana Environmental Policy Act (MEPA), unconstitutional as applied? The Montana Legislature has proclaimed that MEPA implements fundamental constitutional rights. As this Court has recognized, the Legislature knew that coal leasing, like other leases of state land, is subject to MEPA; that is why it passed a special statute exempting leases from MEPA compliance. Memorandum and Order Re Motions to Dismiss, 5, Dec. 29, 2010. The remaining issue before this Court is "whether this state action [granting the coal leases without conducting environmental review] is sufficient to implicate the constitutional protection of the clean and healthful environment." *Id.* at 7.

Under the landmark *MEIC* case, this Court must review the statutory exemption using strict scrutiny because Mont. Code Ann. § 77-1-121(2) implicates and infringes upon the fundamental right to a clean and healthful environment held by the ranchers, sportsmen, and landowners, who are plaintiffs herein. Defendants offer no compelling State interest to support their infringement upon this fundamental right, nor do they explain how the blanket exemption from MEPA is the least onerous path to achieve the State's objectives.

While Defendants will continue to argue that MEPA compliance at the permitting stage will adequately address environmental impacts, such review is not the same as a review before leasing. As noted by this Court, "[o]nce converted from public property to private property, further review by the Land Board and other state agencies would appear to be restricted to its purely regulatory functions, with the need to treat the now private property rights with deference." *Id.* at 6-7. The leases grant irrevocable property interests to the nation's second largest coal company.

Once the Board issues a lease without undertaking environmental analysis, the Department of Environmental Quality (DEQ) may no longer consider a host of alternatives in its later environmental review. Post-leasing review cannot truly consider "no action," nor change the terms of the lease. Post-leasing review does not allow for sufficient public input, and fails to provide the Board with adequate information about impacts before a leasing decision is made. Though the State has owned the Otter Creek mineral rights for years – plenty of time to undertake such analyses – the Board chose to forego those options by availing itself of the MEPA exemption.

Because Defendants are unable to meet their burden under strict scrutiny, Mont. Code Ann. § 77-1-121(2) must be declared unconstitutional. Since the conveyance of the Otter Creek leases to Ark Land Company (Ark) without environmental review was in violation of the Montana Constitution and public policy, the leases are void as a matter of law. Alternatively, the leases are voidable and the Court should exercise its equitable authority to invalidate them. The Board's failure to conduct any environmental review of coal mining in Otter Creek prior to granting the leases renders the leases illegal and unenforceable. At this point, the only way that the State can meaningfully consider the impacts of and alternatives to the leases issued – the only way the State can meet its constitutional and statutory burden – is if the leases are voided and the process begins anew without the significant heft of the leases on one side of the scale.

STATEMENT OF FACTS

This case concerns the Board's failure to conduct any form of environmental review before leasing 9,543 acres of school trust land (Otter Creek tracts) to Ark for the purpose of coal mining. Joint Statement of Agreed Facts ("Joint Statement") ¶¶ 1-2, 22. Located in western Powder River County, the Otter Creek tracts are interspersed in a checkerboard fashion with privately owned tracts, also leased to Ark or its parent, Arch Coal Company (Arch). Joint Statement ¶ 1. Together,

these tracts contain over 1.2 billion tons of recoverable coal reserves. Joint Statement ¶ 2. Farming and ranching occur in the vicinity of the Otter Creek tracts, wildlife frequent the area, and the tracts are located near other lands held in trust for the Northern Cheyenne Tribe. Plaintiffs' Statement of Undisputed Material Facts ("Pl's SOMF") ¶ 20. The State has acknowledged that surface coal mining modifies "almost all components of the present ecological system in [an] area." Joint Statement ¶ 35. Additionally, mining and combustion of Otter Creek coal would significantly contribute to climate change and exacerbate its detrimental effects in Montana. Pl's SOMF ¶¶ 28, 54, 58-61, 64, 75-82.

Plaintiffs

Plaintiff Northern Plains Resource Council (Northern Plains) is a Montana non-profit public benefit corporation whose goal is to promote family farming and ranching, and environmental stewardship. Joint Statement ¶ 40. Members of Northern Plains are ranchers, landowners, and recreationists who live in, and regularly use and enjoy the aesthetic qualities, wildlife, and lifestyle opportunities in southeastern Montana, and who have been actively involved in the conservation of these resources for over three decades. Pl's SOMF ¶ 22; *See generally* Fix Aff.; Morris Aff.; Dunning Aff. Members also use and enjoy the waters of southeastern Montana, including Otter Creek and the Tongue River, for irrigation, stock water, and recreational pursuits. Pl's SOMF ¶ 22; Fix Aff. ¶¶ 9-12, 15; Morris Aff. ¶¶ 12-13; Dunning Aff. ¶¶ 6-8.

Plaintiff National Wildlife Federation (NWF) is a nationwide conservation advocacy and education organization with over 5,000 members in Montana. Joint Statement ¶ 41. Individual NWF members hunt, fish, and recreate throughout Montana, including in the Otter Creek drainage, and intend to continue to do so in the future. Pl's SOMF ¶ 23.

History of Otter Creek Lease Proceedings

Montana acquired the Otter Creek tracts from the U.S. Government as part of a settlement agreement over the Crown Butte Mine located near Yellowstone National Park. Joint Statement ¶ 4. Montana settled for $10 million worth of federal mineral tracts at Otter Creek and rejected the option of receiving $10 million in cash from the Federal Government. Joint Statement ¶ 4.

In 2008, the Board authorized the Montana Department of Natural Resources and Conservation (DNRC) to perform an economic valuation of the coal reserves at Otter Creek. Joint Statement ¶ 8. DNRC contracted with Norwest Corporation to produce the Montana Otter Creek State Coal Valuation (the appraisal), which was submitted to the Board in April, 2009. Joint Statement ¶¶ 10-12. Plaintiffs urged the Board to reject the appraisal and not proceed with the lease process. Joint Statement ¶ 20. In their comments, Plaintiffs raised issues regarding the lack of any environmental review under MEPA; violations of the constitutional right to a healthy environment; and the Board's failure to properly consider the immediate and long term environmental, economic, and social consequences of leasing Otter Creek for coal development, including climate change impacts from the development and combustion of the coal. Pl's SOMF ¶ 7; Fix Aff. ¶ 5. A majority of the comments submitted to the Board opposed the leases. Pl's SOMF ¶ 7. Despite this, the Board approved the appraisal, and subsequently released a draft lease and a bonus bid package. Pl's SOMF ¶¶ 7–8. The Board did not instruct the DNRC to prepare any environmental review. Joint Statement ¶ 22.

The Board set a minimum bid price of $0.25 per ton and a 45-day limit on the bid. Joint Statement ¶ 17. No bids were received during the initial bidding period. Joint Statement ¶ 18. However, Ark submitted a letter of interest proposing a lower bonus bid and different royalty payment. *Id.* The majority of the Board then conceded to Ark's request and voted 3-2 to lower the

minimum bid price to $0.15 per ton and reopen the bidding process. Pl's SOMF ¶ 10; Joint Statement ¶ 18. Ark was the lone bidder. Joint Statement ¶ 19. The Board approved the lease of the Otter Creek tracts to Ark for $85,845,110 by a vote of 3-2 (Attorney General Bullock and Superintendent Juneau dissenting). *Id.*; Pl's SOMF ¶ 11. The Board entered into fourteen separate leases with Ark on April 20, 2010. Joint Statement ¶ 21. The State of Montana has received payment of the bonus bid amount. *Id.*

The Board never formally considered alternatives to leasing the Otter Creek tracts for mining, or the value to the public of maintaining existing uses of the Otter Creek tracts for rangeland, recreation, watershed protection, open space, and other ecological functions. Pl's SOMF ¶ 13. The Board also failed to formally consider leasing only some of the state lands, or delaying the lease of the Otter Creek tracts, rather than lowering the bid price as requested by Ark. Pl's SOMF ¶¶ 14-15. Neither the DNRC nor the Montana Department of Environmental Quality (MDEQ) has determined what portion of the Otter Creek tracts qualify as "alluvial valley floors." Pl's SOMF ¶ 16. Additionally, the Board did not consider the cumulative impacts of constructing the Tongue River Railroad. Pl's SOMF ¶ 19. As the appraisal acknowledges, a rail line is necessary to transport coal from the Otter Creek tracts. Pl's SOMF ¶ 17.

The Board also failed to consider the climate change impacts of leasing over 500 million tons of coal on current and future generations of Montanans. Pl's SOMF ¶ 18. The Board did not consider developing lease stipulations that would mitigate the climate change impacts of surface mining and combustion of Otter Creek coal. Pl's SOMF ¶¶ 19, 65-67.

Environmental Impacts of Leasing Otter Creek Coal

A. Direct Impacts of Surface Coal Mining

All parties agree that strip mining coal significantly impacts the environment. Joint

Statement ¶ 35. Strip mining affects all aspects of the natural and human environment – soil, plants and wildlife, air and water quality, and the socio-economic fabric of local communities. Pl's SOMF ¶¶ 26, 30, 48, 50; *See generally* Fix Aff., Dunning Aff., Morris Aff.

Surface coal mining permanently alters topography by removing the overburden and coal, and then replacing the overburden. Pl's SOMF ¶ 30. The Draft Environmental Impact Statement (DEIS) for the Absaloka Mine, authored in part by MDEQ, stated that "[a]s coal is mined, almost all components of the present ecological system in the area, which have developed over a long period of time, are modified." Pl's SOMF ¶ 28. Notably, the Absaloka Mine DEIS was prepared in response to "an application received by the BIA [U.S. Bureau of Indian Affairs] to *lease* a tract of Indian owned coal. . . " Pl's SOMF ¶ 29.

Surface coal mining at Otter Creek has the potential to affect air quality. Pl's SOMF ¶ 31. According to MDEQ, surface coal mining impacts air quality by generating fugitive dust, particulate matter, gaseous pollutants, and nitrogen oxide emissions. Pl's SOMF ¶¶ 32–33. Nitrogen oxide emissions can cause serious adverse health effects, and even death. Pl's SOMF ¶ 34. Northern Plains member, Hannah Eileen Morris, an asthmatic, has particular concerns about the effects of mining at Otter Creek on air quality. Morris Aff. ¶ 11. She worries that she may have to limit the amount of time she spends visiting her ranch, and that the air there could trigger severe asthma attacks for her. *Id.*

Furthermore, the Northern Cheyenne Indian Reservation, which is located near the Otter Creek tracts, is designated as a non-mandatory Class I area under the Clean Air Act. Pl's SOMF ¶ 35. In its comprehensive review of the Powder River Basin, which includes Otter Creek, the Bureau of Land Management (BLM) indicated that surface coal mining at the Otter Creek tracts had the potential to affect the air quality at the Reservation. Pl's SOMF ¶ 37.

Surface coal mining at Otter Creek also has the potential to affect ground and surface water resources. Pl's SOMF ¶ 38. The Otter Creek tracts are located over the Knobloch coal aquifer, which is an important source of water for Otter Creek. Pl's SOMF ¶ 39. According to MDEQ, surface coal mining can impact groundwater by removing the coal aquifer, lowering static water levels, increasing evaporative losses, changing recharge-discharge conditions, increasing salinity and altering groundwater flow patterns. Pl's SOMF ¶¶ 40-41. Northern Plains' member and local rancher Denny Dunning, whose family has 1906 and 1910 priority water rights in the Otter Creek drainage, is concerned about impacts to both his family's surface water rights and coal seam aquifer wells used for domestic and stock purposes. Dunning Aff. ¶¶ 6-7. Northern Plains member and rancher, Mark Fix is also concerned that his water quality and quantity, which he uses to irrigate his ranch from the Tongue River will be affected and diminished by mining at the Otter Creek tracts. Fix Aff. ¶¶ 9-12. He fears having to defend his water right in the Montana Water Court. *Id.* ¶ 12.

Coal mining will also likely negatively impact surface water causing disruption of the surface drainage system; changes in stream flow patterns, runoff rates, precipitation infiltration rates, erosion rates, and sedimentation rates; vegetation removal; hydromodification; and changes in surface water quality. Pl's SOMF ¶ 42. Moreover, from its headwaters to its confluence with the Tongue River, Otter Creek is listed as impaired on the Clean Water Act's § 303(d)(1) list for violations of state water quality standards, including standards for salinity. Pl's SOMF ¶ 43. Similarly, the portions of the Tongue River into which Otter Creek flows are listed as impaired for various pollutants, including salinity. Pl's SOMF ¶ 44. Plaintiffs' livelihoods depend on the ability to use the Tongue River for ranching and household purposes. Despite the fact that Otter Creek and the Tongue River are impaired, as of January 6, 2011, Montana has not developed a

Total Maximum Daily Load (TMDL) for Otter Creek or the Tongue River. Pl's SOMF ¶¶ 45-46. The Board failed to assess water quality or quantity impacts caused by mining at Otter Creek before leasing. Joint Statement ¶ 22.

Surface coal mining at Otter Creek is likely to adversely affect native species of fish, wildlife, and plants, as well as the ecological conditions that support them. Pl's SOMF ¶ 48. According to MDEQ, surface coal mining destroys vegetation, alters vegetative communities, and allows for the introduction of invasive weed species. Pl's SOMF ¶ 49. Furthermore, surface coal mining directly impacts local wildlife populations through road kills by mine-related traffic, restrictions on wildlife movement created by noise, human activity, fences, spoil piles, and pits. Pl's SOMF ¶ 50. Displaced animals may suffer from increased competition with other animals, reducing their chances to survive and reproduce. *Id.* Indirect impacts are longer term and may include a reduction in wildlife carrying capacity and microhabitats. *Id.* Northern Plains member Mark Fix, describes in detail how these changes will adversely affect his use and enjoyment of these natural resources. Fix Aff. ¶¶ 24-26.

B. Climate Change Impacts of Coal Mining and Combustion

In 2007, the Intergovernmental Panel on Climate Change (IPCC) released its Fourth Assessment Report, stating that "warming of the climate system is unequivocal" and that "[w]arming in western mountains [of the United States] is projected to cause decreased snowpack, more winter flooding and reduced summer flows, exacerbating competition for over-allocated water resources." Pl's SOMF ¶ 74. The U.S. Environmental Protection Agency (EPA) has also published formal endangerment findings under the Clean Air Act, concluding that "greenhouse gases [(GHGs)] taken in combination endanger both the public health and the public welfare of current and future generations." Joint Statement ¶ 36. The 2007 Montana GHG Inventory and

Reference Case Projection also concluded that anthropogenic activities can cause additional quantities of carbon dioxide, methane, nitrous oxide and other greenhouse gases to be emitted or sequestered, thereby changing their global average atmospheric concentrations. Pl's SOMF ¶ 57.

Releases of GHGs would occur first at the exploration/development stage of coal mining from related vehicles and equipment, and then from any methane found in exposed coal seams. Pl's SOMF ¶ 61. Methane is a very significant GHG as the emission of one ton of methane equals the emission of 24.5 tons of carbon dioxide. Pl's SOMF ¶ 58. The energy sector, which includes coal mining, is the largest source of U.S. methane emissions. *Id.* Once mined, Otter Creek coal will be sold to generate electricity in coal-fired power plants. Joint Statement ¶ 35. Coal combustion produces carbon dioxide and other greenhouse gases. Pl's SOMF ¶ 54. The U.S. Energy Information Administration (EIA) estimated that 36.5% of all anthropogenic GHG emissions in the United States were from coal-fired power plants. Pl's SOMF ¶ 69. Due to the cumulative nature of GHG emissions, the combustion of Otter Creek coal, wherever it is burned, will increase the concentration of GHGs in the atmosphere, and contribute to global climate change and climate change in Montana. Pl's SOMF ¶ 59.

In addition to greenhouse gas emissions, coal combustion releases toxic mercury into the air which bioaccumulates in fish. Pl's SOMF ¶ 52. Human consumption of contaminated fish and shellfish can lead to adverse health effects. *Id.* Plaintiffs' interests in fishing, as well as their personal health would be greatly affected by increased mercury contamination. *See* Fix Aff. ¶ 15. Furthermore, mercury emissions from coal combustion can travel thousands of miles before deposition occurs. Pl's SOMF ¶ 53.

Climate change is already affecting Montana and the significant impacts of mining and burning Otter Creek coal would significantly affect Plaintiffs as well as the greater Montana

environment. *See* Morris Aff. ¶ 19; Fix Aff. ¶¶ 14, 30. Glacier National Park has only 27 glaciers today, down from an estimated 150 glaciers in 1850. Pl's SOMF ¶ 78. Furthermore, the largest glaciers in the park are, on average, only 28 percent of their previous size. *Id.* Additionally, climate change has been linked to extensive outbreaks of pine bark beetles in western forests. Pl's SOMF ¶ 79; Morris Aff. ¶ 19. Pine bark beetle outbreaks have already decimated millions of acres of Montana's forests, and are doing so at a rate of 800,000 acres per year. Pl's SOMF ¶ 80. Research also indicates that pine bark beetles are successfully reproducing at higher altitudes and extending attacks into upper elevation species such as Whitebark Pine, a tree long thought to be nearly immune from pine bark beetle infestation. *Id.* Finally, climate change is threatening Montana's remaining bull trout populations. Pl's SOMF ¶ 81. According to Forest Service scientist Bruce Reiman, bull trout may be especially vulnerable to climate change given that spawning and early rearing are constrained by cold water temperatures creating a patchwork of natal headwater habitats across river networks leading to an accelerated decline of this species. *Id.* These climate change effects will adversely affect Plaintiffs' members' use and enjoyment of their property as well as their recreational and financial interests.

Future impacts of climate change are projected to be more widespread and more severe. The U.S. Global Change Research Program (GCRP) has reported that climate change could affect the Great Plains region, including Montana, by causing "more frequent extreme events such as heat waves, droughts, and heavy rainfall, [jeopardizing] the region's already threatened water resources, essential agricultural and ranching activities, unique natural and protected areas, and the health and prosperity of its inhabitants." Pl's SOMF ¶ 75. In Dr. Steven W. Running's presentation to Board members Juneau and Bullock on December 8, 2009, he stated that "[b]y 2050 global climate models project Montana to be 5 deg F. warmer in summer, but receive 10% less rainfall." Pl's

SOMF ¶ 76. These effects will negatively impact Plaintiffs' particular interests in continuing to ranch and enjoy the quality of life in their communities. Northern Plains member Mark Fix is particularly worried about how increases in droughts, wildfires, and pests, as a result of climate change, could affect his ranching operations. Fix Aff. ¶ 14. He is already experiencing extreme weather, such as lowland flooding and mudslides. *Id.*

The Final Environmental Impact Statement (EIS) for the Highwood Generating Station, authored in part by MDEQ, stated that:

> While climate change is the ultimate global issue—with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another—it does manifest itself in particular ways in specific locales like Montana. During the past century, the average temperature in Helena increased 1.3°F and precipitation has decreased by up to 20 percent in many parts of the state . . . .

Pl's SOMF ¶ 82. The Highwood EIS further elaborated that, "[o]ver the next century, Montana's climate may change even more," causing "a range of potential impacts," such as melting glaciers, a decline in snowpack, stressed water supplies, drying of prairie potholes, increased wildfires, conversion of existing forests to shrub and grasslands, loss of wildlife habitat, extreme heat waves, expanding diseases, and decreased water availability for irrigation and crop production. Pl's SOMF ¶ 83.

In light of the mounting evidence of climate change, Montana has committed to reducing GHG emissions. Pl's SOMF ¶ 62. In Governor Schweitzer's December 13, 2005 letter requesting that MDEQ establish a Climate Change Advisory Committee (CCAC) to make recommendations for reducing the state's GHG emissions, he stated:

> Montana has been locked in the grip of a drought for most of the past two decades. During that time, we have seen some of the lowest precipitation levels in the state's recorded history, and Montana is not alone in this suffering. Most Western states find themselves in the same situation. Chronic drought has severely impacted our

> lake levels, and our tourism industry. I am very concerned about the connection these conditions have to global climate change, and ultimately the effect they will have on Montana's short and long-term future.

Id.

In response, the CCAC produced a Climate Change Action Plan (CCAP), which recommended "that Montana establish a statewide, economy-wide GHG reduction goal to reduce gross GHG emissions to 1990 levels by 2020, for both consumption-based and production-based emissions, and to further reduce emissions to 80% below 1990 levels by 2050." Pl's SOMF ¶ 63. In conclusion, the CCAC recommended that "the state implement GHG Emission Performance Standards" for new and existing sources of carbon dioxide in the energy supply sector. Pl's SOMF ¶ 67. The CCAC acknowledged that "[o]ther studies of the effects of climate change on the Rocky Mountain West cite the potential for prolonged drought, earlier snowmelt, reduced snow pack, more severe forest fires, and other harmful effects." *Id.* Plaintiffs are personally concerned about the significant effects these changes will have on their lives and livelihoods, and argue that the State must assess the impacts mining at Otter Creek and the subsequent burning of coal will have on the Montana climate. Fix Aff. ¶ 14, Morris Aff. ¶ 19.

Procedural History

Defendants filed motions to dismiss arguing that Plaintiffs lacked standing, that their claims were unripe for review, that MEPA does not apply to coal leasing by its own terms, and that Mont. Code Ann. § 77-1-121(2) does not violate the constitutional right to a clean and healthful environment. Motion to Dismiss at 10, 12–13, 18. On December 20, 2010, this Court rejected Defendants' arguments and denied their motions to dismiss. Memorandum and Order Re Motions to Dismiss at 7. This Court held that Plaintiffs had standing, noting that "Arch Coal got something for its money," which in turn gave rise to allegations of injuries "sufficient to satisfy the

requirement that Plaintiffs allege [their] existing and genuine rights" have been infringed upon. *Id.* at 4. This Court also concluded that, but for the intervention of Mont. Code Ann. § 77-1-121(2), MEPA would apply at the lease stage. *Id.* at 5 (stating "if it were so clear [that as Defendants' argued MEPA does not apply to leasing then] why would it be necessary for the Legislature to pass special legislation to clarify such well-established law?"). Finally, this Court stated that Plaintiffs "made at least a cognizable claim that Mont. Code Ann. § 77-1-121(2) is not constitutional," and "[t]o adopt the Defendants' reasoning . . . would allow the Land Board to convert public property rights to private property rights, stripping away its special protections before even considering possible environmental consequences." *Id.* at 6–7. This Court then ordered the parties to submit cross motions for summary judgment to answer the remaining question – "whether this state action [granting the coal leases without conducting environmental review] is sufficient to implicate the constitutional protection of the clean and healthful environment." *Id.* at 7.

LEGAL STANDARD

Under Rule 56(c) of the Montana Rules of Civil Procedure this Court must grant Plaintiffs' motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The issues in this case are fit for judgment as a matter of law, because they are purely legal and there is no need for further development of the facts. All parties agree that summary judgment is the appropriate means to resolve the legal issue as defined by this Court. The central fact in this case – that no MEPA document was prepared – is not in dispute. Based on the record which consists of documents generated by the State and affidavits from Plaintiffs, this Court has all it needs to consider the legal questions – whether, absent the statutory exemption in § 77-1-121(2), MEPA

would have been triggered by the lease approval; whether the statutory exemption implicates the fundamental right; whether there is a compelling state interest in exempting coal leasing from MEPA; and, if so, whether the Montana legislature pursued the least restrictive approach.

ARGUMENT

I. THE *HEFFERNAN* DECISION CONFIRMS THAT PLAINTIFFS HAVE STANDING TO CHALLENGE THE BOARD'S UNCONSTITUTIONAL ACTION.

This Court has already ruled "that the Plaintiffs have standing." Memorandum and Order Re Motions to Dismiss at 4. Standing need not be revisited; however a recent Supreme Court decision confirms the wisdom of this Court's earlier ruling. The Supreme Court of Montana recently held that parties could establish constitutional standing by asserting threatened injuries to their property (resulting from a planned subdivision), including: increased traffic, dust, and noise; and adverse impacts to water, soils, and wildlife. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 38-39, 41, 360 Mont. 207. Plaintiffs assert similar injuries resulting from a planned coal mine at the Otter Creek tract.

Hannah Eileen Morris, Mark Fix, and Dennis Dunning have submitted affidavits declaring threatened injuries to their properties, and their use and enjoyment of those properties, as a result of the proposed mine. These affidavits further establish standing and also define how the Board's failure to conduct an environmental review implicates their constitutional environmental rights. All three affiants are highly concerned about the affects mining would have on their water quality and quantity. Morris Aff. ¶¶ 12, 13; Fix Aff. ¶¶ 9-12; Dunning Aff. ¶¶ 6-8. Mark Fix expressed one of the major threats the mine poses to his water rights:

> Strip mining is devastating to the groundwater and actually removes the aquifer. I have a water right on the Tongue River for irrigation and I also have a water contract for 750 acre feet of stored water in the Tongue River Reservoir from the Tongue River Water Users. If the base flow from Otter Creek that feeds the Tongue

is disrupted, it could affect my water rights.

Fix Aff. ¶ 9.

All three affiants have also expressed concerns about air quality due to the coal dust that the proposed mine would generate. Morris Aff. ¶ 11; Fix Aff. ¶ 13; Dunning Aff. ¶ 9. Hannah Eileen Morris, an asthmatic, is particularly worried about the effects the coal dust could have on her ability to visit her ranch. Morris Aff. ¶ 11. She stated, "I am very concerned that coal mining at the Otter Creek tract would put air quality at risk... The coal dust that would be generated at the Otter Creek mine concerns me greatly. Air polluted by significant coal dust would result in limiting the amount of time I could spend visiting the ranch." *Id.* In addition, the affiants are concerned about the traffic and noise related to the proposed mine, and the affects to wildlife. Morris Aff. ¶¶ 14-15; Fix Aff. ¶ 15; Dunning Aff. ¶ 9. Based on the foregoing, Plaintiffs meet the constitutional standing requirements stated in *Heffernan.*

II. THIS COURT MUST APPLY STRICT SCRUTINY TO THE UNCONSTITUTIONAL MEPA EXEMPTION IN MONT. CODE ANN. § 77-1-121 BECAUSE IT IMPLICATES AND INFRINGES PLAINTIFFS' FUNDAMENTAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT.

A. Plaintiffs' Right to a Clean and Healthful Environment is a Fundamental Right Under the Montana Constitution.

The Montana Constitution states that all persons have the inalienable right "to a clean and healthful environment." Mont. Const. art. II, § 3. The Montana Constitution also mandates that the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations," and that "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." Mont. Const. art. IX, § 1(1), (3). "The right to a clean and 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." *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236 (emphasis added). Article IX, Section 1 is entitled "Protection and Improvement" and requires that both the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." It further mandates that the Legislature provide "adequate remedies" for the *prevention* of environmental degradation. *Id.* ¶ 77; *Shammel v. Canyon Res. Corp.*, 2005 WL 5455028 (Mont. Dist. 2005).

The Montana Supreme Court has declared that the rights contained in Article IX, Section I are read in tandem with those in Article II, Section 3: "the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section I 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, supra* ¶ 64. This Court's decision as to whether leasing Otter Creek without environmental review implicates the constitutional rights must be informed by the rights and duties in both Article II and IX. The rights contained in Sections II and IX – the constitutional environmental rights – stand on par with the more traditional constitutional guarantees of liberty and protection against arbitrary governmental action that form the core of our civil society.

B. Mont. Code Ann. § 77-1-121(2) Implicates and Infringes Plaintiffs' Fundamental Right to a Clean and Healthful Environment.

In 2003, the Legislature adopted a statutory provision designating MEPA as a vehicle for implementing the State's constitutional obligation to prevent unreasonable environmental degradation. *See* Mont. Code Ann. § 75-1-102; Mont. Sess. Laws 2003, ch. 361, § 5 (HB 437) (amending MEPA to state "providing that the enactment of certain legislation is the legislative

implementation of Article II, section 3 and Article IX of the Montana Constitution and providing that compliance with the requirements of the legislative implementation constitutes adequate remedies as required by the Constitution"). Mont. Code Ann. § 77-1-121(2) purports to exempt all leases, including coal leases, from MEPA review simply because they are subject to future permitting and assessment obligations by other agencies with limited authority to change the project. This statutory exemption implicates Plaintiffs' fundamental right to a clean and healthful environment by authorizing the Board to issue coal leases without any form of environmental review, thereby creating irresistible momentum toward mining. The fact that there are consequences to such mining that will affect Plaintiffs' air, water, land, recreation and so forth cannot be disputed. Signing leases with Arch negated consideration of alternatives to coal leasing that would better protect Montana's priceless natural resources. Furthermore, despite numerous government policy pronouncements about the adverse affects of climate change in Montana the Board entered into these leases without any consideration of the consequences of creating a major new source of carbon and methane emissions.

Montana Environmental Information Center v. Department of Environmental Quality (MEIC), the keystone case finding a fundamental right to a clean and healthful environment, is similar to the case at hand. In *MEIC*, the plaintiffs also challenged a *statutory exemption* which excluded certain water discharges from nondegradation review. *MEIC, supra* ¶ 1. The challenged statutory provision deemed certain activities categorically "nonsignificant" and "allow[ed] them to proceed without the form of review which would otherwise be required for degradation of the State's waters." *Id.* ¶ 19. The Montana Supreme Court determined that the exemption was unconstitutional, and that the nondegradation review requirement was "a reasonable legislative implementation of the mandate" to provide a "clean and healthful environment." *Id.* ¶ 80. By

creating a blanket exemption from nondegradation review for potentially polluting activities "without regard to the nature or volume of the substances being discharged," the Legislature "violate[d] those environmental rights guaranteed by ... the Montana Constitution." *Id.* Just like the categorical exemption of certain water discharges from nondegradation review in *MEIC*, the categorical exemption of the Board's leasing of Otter Creek from any pre-leasing environmental review implicates and infringes on Plaintiffs' fundamental environmental rights by depriving both the public and the Board from making an environmentally-informed decision before entering into the leases.

The Montana Supreme Court has found that the fundamental right to a clean and healthful environment is implicated when there is "substantial evidence" that taking certain actions "may cause significant degradation" to the environment. *Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 33, 305 Mont. 513, 29 P.3d 1011. In *Cape-France*, two parties had entered into a buy-sell agreement for a five acre portion of land. *Id.* ¶ 5. Prior to completion of the sale, the DEQ became aware of a groundwater pollution plume that could affect the property. *Id.* ¶ 7. The DEQ ordered the seller to drill a well, test the water, and treat the water if necessary. *Id.* ¶ 8. The DEQ warned the seller that it would be held liable for any clean-up costs. *Id.* The seller sought to rescind the contract, and the Montana Supreme Court upheld the rescission because the substantial risk of degrading the environment that drilling a well imposed implicated the fundamental right to a clean and healthful environment. *Id.* ¶ 37.

Just as in *Cape-France*, the fundamental right to a clean and healthful environment is implicated by the substantial evidence that coal leases, which inevitably lead to coal mining, pose significant risks of environmental degradation, not only from the mining itself, but from the climate change impacts of coal combustion. As stated by the MDEQ, "[a]s coal is mined, almost

all components of the present ecological system in the area, which have developed over a long period of time, are modified." Pl's SOMF ¶ 28. Surface coal mining impacts air quality and causes serious degradation to surface and groundwater quality and quantity, within and beyond the area that is being mined, by doing such things as removing the coal aquifer and increasing the salinity of the water. Pl's SOMF ¶¶ 32-24, ¶¶ 40-42. Coal development activities also destroy vegetation, alter vegetative communities, and can kill, displace, and generally harm wildlife and their communities. Pl's SOMF ¶¶ 49-50. These impacts will directly affect Plaintiffs' abilities to ranch, farm, hunt, fish, and generally use and enjoy their properties. *See* Fix Aff.; Dunning Aff.; Morris Aff. The lack of MEPA review means that the environmental degradation that will affect these Plaintiffs was not addressed before the leases were granted. Plaintiffs' constitutional environmental rights are implicated not in the abstract, but in a concrete and particularized manner. Absent the leases, no mining could occur, and the harms to Plaintiffs would not exist; with the leases, impacts to their property, water aesthetics and health are quite likely. new standard

Additionally, coal development activities and mining lead to the release of greenhouse gases, which cause global warming. Pl's SOMF ¶ 54. The MDEQ, citing the IPCC, states that possible effects of climate change on Montana include: decreased water availability; increased risk of wildfire; increased risk of species extinction; increased damage from floods and storms; changes in disease vectors; increased mortality due to heat waves, floods, and droughts; decreased snowpack in Western mountains; increased disturbances to forests from pests, diseases, and fire; and challenges for crops near the warm end of their suitable range. Pl's SOMF ¶ 77. The Board failed to consider how its actions might accelerate and compound climate change problems in Montana, including those impacts that will ultimately affect Plaintiffs' lives and livelihoods. The Board should have assessed climate change impacts before entering into a leasing agreement;

Mont. Code Ann. § 77-1-121(2) foreclosed that option.

The Montana legislature recognized much of the foregoing evidence that coal development activities pose significant risks of environmental degradation by requiring that lease applications, prior to 2003, undergo MEPA analysis. *See e.g. N. Fork Pres. Ass'n v. Dep't of State Lands* (1989), 238 Mont. 451, 455, 778 P.2d 862, 865; *Ravalli Cnty. Fish and Game Ass'n v. Montana Dep't of State Lands* (1995), 273 Mont. 371, 379, 903 P.2d 1362, 1367. As this Court stated, "[t]here would be no reason to enact the statute if it were clear that MEPA did not apply at the lease stage." Memorandum and Order Re Motions to Dismiss at 5. The MEPA exemption was not enacted because the Legislature no longer felt that coal leases posed a serious threat to the environment and public health, but rather, legislative history indicates that it was enacted to save "money, time and effort." HB 436 Legislative Session (Mar. 5, 2003) (statement of Jim Mockler, Executive Director, Montana Coal Council).

Furthermore, federal National Environmental Policy Act (NEPA) cases, which the Montana Supreme Court finds persuasive, *Ravalli*, 273 Mont. at 377, 903 P.2d at 1366 (quoting *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 137, 602 P.2d 147, 153), also demand environmental analysis prior to leasing. *Cady v. Morton*, 527 F.2d 786, 793-94 (9th Cir. 1975); *See also Massachusetts v. Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983) (requiring that an EIS must be completed *prior* to the issuance of the leases because "leasing sets in motion the entire chain of events which culminates in...development"); *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 707-08 (10th Cir. 2009) (finding that under 40 C.F.R. § 1501.2, "[a]ll environmental analyses required by NEPA must be conducted at 'the earliest possible time'"); *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) (explaining that NEPA "is designed to require such [environmental] analysis as soon as it can reasonably be done."). In *Cady v. Morton*, several

related coal leases had been approved prior to doing environmental impact statements. 527 F.2d at 789. The court found that coal lease approval prior to completing an EIS violated NEPA because the approval of coal leases constitutes a "major federal action," and under NEPA "major federal actions significantly affecting the quality of the human environment" require an EIS. *Id.* at 793. The court explained that "the Secretary's approval of the [coal] leases require[s] the type of comprehensive study that NEPA mandates [to] adequately . . . inform the Secretary of the possible environmental consequences of his approval." *Id.* at 795.

The fundamental right to a clean and healthful environment is implicated by the statutory exemption because there are legal consequences of the State granting a coal lease. As stated by this Court, "Arch Coal got something for its money." Memorandum and Order Re Motions to Dismiss at 4. When the Otter Creek tract was converted from public to private property through a contract, the rights of the parties changed. The change in rights created the threatened harms to Plaintiffs. The harms to Plaintiffs and their properties are not only the result of their inability to participate in an environmental assessment process and review of alternatives, but also from the significant affects that coal mining, related transport, and combustion will have on their properties, health, and livelihoods. *See* Morris Aff.; Fix Aff.; Dunning Aff. The Board and other state agencies no longer have the full range of alternatives available to them when conducting an environmental assessment of the site, but rather "appear to be restricted to [their] purely regulatory functions." Memorandum and Order Re Motions to Dismiss at 7. For example, the Board can no longer consider not leasing the property, only leasing a portion of it, or imposing mitigation measures of its own. The Board abdicated its constitutional duty to maintain and improve the environment. MEPA is the vehicle by which the Board could have carried forth its constitutional obligations. Relying on the exemption, MEPA review now occurs after the die has already been cast. Plaintiffs' "inalienable"

rights have not only been implicated – they have been ignored. The environmental rights in the 1972 Constitution were designed to avoid such a result; those rights are "anticipatory and preventative." *MEIC, supra* ¶ 77.

C. This Court Must Apply Strict Scrutiny to Mont. Code Ann. § 77-1-121(2), Because it Implicates Plaintiffs' Fundamental Right to a Clean and Healthful Environment.

Statutes infringing on fundamental rights are presumed unconstitutional, and the burden of showing constitutionality lies with the State. *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 15, 21, 314 Mont. 314, 65 P.3d 567 (holding that a law infringing upon the fundamental right to vote must be presumed unconstitutional, unless the State met the burdens of strict scrutiny) (citing *Johnson v. Killingsworth* (1995), 271 Mont. 1, 4, 894 P.2d 272, 273); *Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating that if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.") (citing *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76 (1980) (plurality opinion)). Therefore, Mont. Code Ann. § 77-1-121(2), which implicates and infringes on the fundamental right to a clean and healthful environment must be presumed unconstitutional, and held to the highest degree of scrutiny. In *MEIC*, the Montana Supreme Court stated that:

> *[A]ny statute or rule* which implicates [the right to a clean and healthful environment] must be strictly scrutinized and can only survive scrutiny if the State establishes 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.

MEIC, supra ¶ 63 (emphasis added). Unless the State is capable of establishing all the elements of strict scrutiny, this Court must deem the statute unconstitutional.

1. The State Does Not Have a Compelling Interest in Exempting Applications for Coal Leases from MEPA Review.

A compelling interest is an interest "of the highest order" that is "not otherwise served" by

any other state policy or action. *Armstrong v. State*, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). *Armstrong* looked to federal cases to define "compelling interest." *Id.* Compelling state interests are those of the "highest order," traditionally reserved for interests like national security. *Korematsu v. U.S.*, 323 U.S. 214 (1943) (upholding internment of Japanese during World War II) and promoting societal diversity and ending discrimination. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action because it serves the compelling interest of promoting racial diversity in legal education). Strict scrutiny burdens the State with demonstrating that a compelling State interest is furthered by the legislation in question. *Wadsworth v. State*, (1996) 275 Mont. 287, 302, 911 P.2d 1165, 1174 (holding that a Department of Revenue rule prohibiting state employees from seeking outside employment unconstitutionally infringed on the fundamental right to the opportunity to pursue employment; the State's interest in preventing possible conflicts of interest was not compelling). To do so, the State must first "demonstrate the existence of a sufficient public need for the restraint or the denial." *Id.* (citing *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973)).

No compelling interest justifies Mont. Code Ann. § 77-1-121(2). Legislative history indicates that the exemption was created to avoid spending "money, time and effort." HB 436 Legislative Session (Mar. 5, 2003) (statement of Jim Mockler, Executive Director, Montana Coal Council). However, saving money, time, and effort, while laudable goals, hardly qualify as a governmental interest "of the highest order." *Armstrong, supra* ¶ 41 n.6. The Montana Supreme Court has repeatedly held that expediting financial interests is not a compelling state interest. *White v. State* (1983), 203 Mont. 363, 369, 661 P.2d 1272, 1275, *overruled on other grounds by Meech v. Hillhaven W., Inc.* (1989), 238 Mont. 21, 776 P.2d 488; *Pfost v. State* (1985), 219 Mont. 206, 221,713 P.2d 495, 504, *overruled on other grounds by Meech v. Hillhaven W., Inc.* (1989),

238 Mont. 21,776 P.2d 488. Other jurisdictions agree; "[t]he exercise of fundamental rights cannot be conditioned upon financial expense." *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006); *see also Tucker v. Toia*, 390 N.Y.S.2d 794 (N.Y. Sup. 1977) ("the State may not . . . justify such action solely on the ground of fiscal responsibility"); *Montgomery v. Bd. of Ret. of Kern Co. Employees' Ret. Assn.*, 33 Ca.App.3d 447,453 (Cal. App. 1973) ("in a constitutional context involving basic rights, the preservation of moneys is not of primary significance"). Moreover, the Montana Supreme Court has held that the "goal of maximizing income derived from school trust lands" does not exempt state actors from fulfilling their environmental obligations. *Ravalli*, 273 Mont. at 383, 903 P.2d at 1370. While the Board's financial trustee duties are important, nothing advanced in this case interferes with the Board's trustee duties or prevents the State from eventually receiving income from these lands.

Finally, notwithstanding that saving money, time, and effort are not interests of the "highest order," Mont. Code Ann. § 77-1-121(2) does not even further those stated goals. Montana still has to conduct an environmental review; it's just postponed. Environmental review would actually be more efficient if the State had done a pre-leasing review and imposed conditions to minimize impacts or decided not to lease the most environmentally sensitive areas. By postponing any environmental assessment, or consideration of alternatives, until after a coal lease is approved, the State is not only putting a heavy thumb on the scales, but is risking wasting money, time, and effort should it later come to light in the permitting stage that some environmental impacts are actually unacceptable, thus eliminating the time and money-saving goals that are the basis for enacting Mont. Code Ann. § 77-1-121(2). Because Montana has no compelling interest for passing Mont. Code Ann. § 77-1-121(2), the statute is unconstitutional.

2. Exempting Leases from MEPA Analysis is not the "Least Onerous Path" to Achieve the State's Objective of Improving the Mineral Leasing Process.

In addition to a compelling governmental interest, the State must also show that the "choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174. If a plausible, less restrictive alternative exists, the burden is placed on the State to prove that the alternative would be ineffective. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S, 803, 823 (2000).

If the Legislature wishes to improve efficiency and avoid spending money on a full EIS prior to leasing mineral rights, it does not need to abandon environmental review entirely. Instead of creating a blanket exemption for leases, the Legislature could instead require agencies to conduct a preliminary environmental assessment (EA) at the leasing stage to determine whether an EIS should be done. The requirement of an EA is a "less restrictive" alternative to MEPA's current blanket exemption, because it would provide some degree of environmental analysis before commitments are made. This would also allow for a broad assessment of the need for coal mining and affects of coal mining (as well as subsequent combustion, railroads...etc.) on the Montana environment and climate. The Legislature could have also required the Board to conduct a programmatic EIS looking at the long range consequences of leasing Otter Creek for development. *See N. Fork Pres. Ass'n v. Dep't of State Lands*, 238 Mont. at 463, 778 P.2d at 870 (finding that if a department "is contemplating a series of agency-initiated actions [which] will constitute a major state action significantly affecting the human environment, the department *may* prepare a programmatic review"). Development of subsequent leases could be "tiered" back to the analysis in the programmatic EIS. The State has had eight years since the Otter Creek conveyance was approved to complete such a MEPA document, but the Legislature, with the Board's acquiescence,

↓

but no willing lessee

has foreclosed that option.

Nothing in this record indicates that the Board or the Legislature considered a less onerous path to expediting MEPA review, assuming there is a compelling reason to do so. The Legislature could have devised some means to ensure that the Board made an environmentally-informed decision about the leases, rather than take the extreme measure of eliminating *all* pre-leasing environmental review.

Montana law requires that for a statute to survive strict scrutiny the State must demonstrate a "compelling state interest," show "that its action is closely tailored to effectuate that interest," *and* show that it "is the least onerous path that can be taken to achieve the State's objective." *MEIC, supra* ¶ 63. Because the State is unable to meet these prongs of strict scrutiny, Mont. Code Ann. § 77-1-121(2) is unconstitutional. Therefore, the State acted unconstitutionally when it executed the coal leases for the Otter Creek tract before doing any environmental assessment.

III. THE LEASES ARE VOID AB INITIO BECAUSE THEY WERE ISSUED IN VIOLATION OF THE MONTANA CONSTITUTION.

The coal leases, which the Board granted to Ark Land Company pursuant to Mont. Code Ann. § 77-1-121(2), violate the fundamental right to a clean and healthful environmental guaranteed by the Montana Constitution. The State acted unlawfully when it issued the leases without first considering the potential environmental impacts of such a significant action. As such, the leases are void ab initio. Alternatively the leases are voidable and this Court should exercise its equitable authority to invalidate them.

A. The Otter Creek Leases are Illegal Contracts.

The Montana Supreme Court and the Ninth Circuit have affirmatively held that a lease is a contract. *See Seven Up Pete Venture v. State*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009

(applying Montana contract law to assess whether the State permissibly impaired plaintiff's lease contracts through the enactment of a state statute). *See also F.D.I.C. v. Mahoney*, 141 F.3d 913, 915 (9th Cir. 1998) (affirming "[a]ll leases, however, are a species of contract") (citing *RTC v. Diamond,* 45 F.3d 665, 672 (2d Cir.1995); and *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988) (applying contract law and analysis to the requirement of NEPA review on oil and gas leases in Montana). Under Mont. Code Ann. § 28-2-707 "any provision in a contract which is unlawful is void." *Belgrade Educ. Assn v. Belgrade Sch. Dist. No. 44,* 2004 MT 318, ¶17, 324 Mont. 50, 102 P.3d 517 (finding the mutual consent provision in an employment contract contrary to Montana law, and therefore void).

B. Under Montana Law, the Otter Creek Leases are Void and Unenforceable.

Mont. Code Ann. § 28-2-701 states that anything in a contract which is "(1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals" is unlawful. The Montana Supreme Court long ago adopted the view that "whenever a statute is made for the protection of the public, a contract in violation of its provisions is void." *McManus v. Fulton* (1929), 85 Mont. 170, 278 P. 126, 130 (quoting Judge Kerrigan in *Brandenburg v. Miley Petroleum Exploration Co.,* 16 F.2d 933, 933 (S.D. Cal. 1926)). The Montana Supreme Court further stated in *McManus* that "[c]ourts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land." *Id.* More recently, the Montana Supreme Court applied these established precedents and held that "[c]ourts will not enforce an illegal contract or contract provision." *Montana Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶56, 341 Mont. 33, 174 P.3d. 948 (citing *MPH Co. v. Imagineering, Inc.* (1990), 243 Mont. 342, 349-50, 792 P.2d 1081, 1086). Furthermore, "[b]y 'refusing to enforce such contracts the court does not act for the benefit, or for

the preservation of the alleged rights, of either party, but in the maintenance of its own dignity, the public good, and the laws of the state.'" *Id.* (citing *McManus,* 85 Mont. at 182, 278 P. at 131).

The Montana Supreme Court recently applied this reasoning, finding preliminary subdivision plats void based on procedural failings. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, 356 Mont. 41, 230 P.3d 808; *Citizens for Responsible Dev. v. Bd. of Cnty. Comm'rs of Sanders Cnty.*, 2009 MT 182, 351 Mont. 40, 208 P.3d 876. In *Aspen Trails Ranch,* the Montana Supreme Court upheld a lower court's decision to void a preliminary subdivision plat based on an insufficient environmental assessment. *Aspen Trails Ranch* ¶ 17. The court agreed with the plaintiffs that the Montana Subdivision and Platting Act did "not confer a 'right' on Aspen Trails [the developer] to go back to the Commission and propose new mitigation measures." *Id.* ¶ 52. Therefore, the court concluded that the only appropriate remedy was to void the preliminary subdivision plats. *Id.* ¶ 58. This holding affirmed the court's decision in *Citizens for Responsible Development*, in which the Montana Supreme Court voided the decision of a county board of commissioners, which had approved a preliminary subdivision plat based on an inadequate environmental assessment. *Citizens for Responsible Dev., supra* ¶ 25. The court concluded that, "the Board acted unlawfully. . . These statutory violations *require* reversal of the Board's decision to approve the preliminary plat. Any future consideration of the subdivision application must, of course, be undertaken in accordance with state statute and local regulations." *Id.* ¶ 26 (emphasis added).

The grant of a preliminary plat creates conditional development rights for real estate developers creating subdivisions that are quite similar to the conditional rights granted in the Otter Creek leases. *See generally* Mont. Code Ann. § 76-3-601 et. seq. (defining preliminary plat process and providing that upon completion of conditions in preliminary plat, the governing body

"shall" grant final plat under Mont. Code Ann. § 76-3-610(1)). The Montana Supreme Court's voiding of the preliminary plat in *Aspen Trails Ranch* for lack of an adequate review, instead of simply allowing the developer to "fix" the problems, is good precedent for voiding the leases here as a matter of law.

Similar applicable precedent can be found around the country. For example, California courts have held that "[a] contract entered into by a local government without legal authority is 'wholly void,' ultra vires, and unenforceable." *G.L. Mezzetta, Inc. v. City of Am. Canyon*, 78 Cal. App. 4th 1087, 1092 (Cal. Ct. App. 1st Dist. 2000) (quoting *Midway Orchards v. Cnty. of Butte*, 220 Cal. App. 3d 765 (Cal. Ct. App. 3rd Dist. 1990)). Similar to the Montana Constitution and MEPA, the court in *G.L. Mezzetta* stated that the purpose of procedural requirements is "to protect the public, not those who contract with the [government]." 78 Cal. App. 4th at 1093.

In the present case, the Board's failure to conduct any environmental review of coal mining in Otter Creek renders the leases illegal and unenforceable. Since the leases are void as a matter of law, there is no need to consider additional, equitable factors in fashioning a remedy. The "[l]aw leaves the parties to an illegal contract where it finds them; neither court of law nor a court of equity will aid the one in enforcing it, give damages for a breach of it, set it aside at the suit of the other or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back." *McPartlin v. Fransen* (1982), 199 Mont. 143, 146-147, 648 P.2d 729, 731 (citing Mont. Code Ann. § 28-2-603, and quoting *McManus v. Fulton* (1929), 85 Mont. 170, 278 P. 126, 131).

C. Alternatively, the Leases are Voidable as Against Public Policy and the Court Should Exercise its Equitable Powers to Vacate them and Remand the Case to the Board for Compliance with MEPA.

If this Court determines that the Otter Creek leases are not void ab initio, this Court should

find that they are voidable, and that the only solution that effectuates the purposes of MEPA and remedies the violation of Plaintiffs' constitutional rights is to void the leases. As this Court previously noted, Mont. Code Ann. § 77-1-121(2) allows the Board to "convert public property rights to private property rights, stripping away special protections before even considering possible environmental consequences." Memorandum and Order Re Motions to Dismiss at 4. Voiding the leases is necessary to remove the irresistible momentum that may skew subsequent environmental analysis. *Massachusetts v. Watt,* 716 F.2d at 952.

In Montana, a constitutional violation taints an entire proceeding resulting in the need to void any decision during that proceeding. *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 52, 312 Mont. 257, 760 P.3d 381 (declaring a school board's closure "null and void," due to a violation of plaintiff's constitutional right). As stated above, the Board's decision to grant the leases without environmental review infringes on Plaintiffs' constitutional rights, and has tainted the State's permitting process in favor of mining. Just as in *Bryan v. Yellowstone,* this leaves the Court with no viable option other than voiding the leases. *Id.* ¶ 53. "[T]he circumstances of this case compel an unfortunate result" for the State, but "the vigilant protection of one's constitutional rights warrants such a disposition." *Id.* Neither the State nor Arch can claim surprise or undue prejudice from such a result; Plaintiffs have informed the Board repeatedly during the pre-leasing process that withholding all meaningful environmental review violates Montana's Constitution. See Plaintiff's Exhibit Y at 12 (Comments from June 29, 2009 Otter Creek Appraisal Public Hearing available on at www.dnrc.mt.gov/trust/MMB/otter_creek/.../909-7OtterCrComments.pdf).

The Board may not reach a decision without first engaging in the requisite significant impacts analysis. *Ravalli*, 273 Mont. at 384, 903 P.2d at 1371. The action at issue here – the

possible mining of 19,836 acres of land to extract 572 million tons of State owned coal - has the potential for a significantly greater impact than changing an existing grazing permit from cattle to sheep, as was the issue in *Ravalli. See* Joint Statement ¶ 2; *See also*, *Ravalli*, 273 Mont. at 384, 903 P.2d at 1371. By not first conducting any environmental analysis, the Board acted unlawfully, and arbitrarily and capriciously. The Board must conduct an environmental analysis before the issuance of a lease, just as the Department of State Lands was required to assess the impacts of adjusting a permit before the issuance of an amended permit. *Id.*

In federal NEPA cases, the courts have repeatedly held that environmental review must be conducted *before* the issuance of a lease, and that either voiding existing leases or issuing an injunction to prevent leasing are required remedies for not following applicable laws. *See generally Massachusetts v. Watt,* 716 F.2d 946; *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998); *Pit River Tribe v. Bureau of Land Mgmt.*, 2009 WL 3651827 (9th Cir. 2009); *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292 (D. Mont. 1992); *N. Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281 (D. Mont. 1991). In *Massachusetts v. Watt*, the court granted an injunction, determining that an EIS should be completed *prior* to the issuance of oil leases. *Massachusetts v. Watt,* 716 F.2d at 952-953. Then judge (now Justice) Breyer noted the importance of granting the injunction prior to the leasing stage when he wrote that, "leasing sets in motion the entire chain of events which culminates in...development." *Id.* at 952. Additionally, as further steps are taken in the bureaucratic process it becomes more difficult to change that course. *Id.* Requiring agencies to decide an issue a second time pending further review becomes more unrealistic as the commitments become set in concrete. *Id.* at 953; W. Rodgers, *Environmental Law* § 7.7 at 767 (1977) ("[NEPA's] purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in

concrete.").

The Ninth Circuit has held that a NEPA violation had to be remedied before a federal bureau entered into a contract, and that an injunction *prior* to leasing "served the purpose of preserving the decision makers' opportunity to choose among policy alternatives." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 at 1129 (emphasis added). The court went on to say that:

> Where contracts have already been entered into, the opportunity to "choose" has been eliminated—all that remains is the limited ability to make the path chosen as palatable as possible. Therefore, an injunction would not serve any purpose if the contracts are not invalidated. We conclude that the district court's decision to rescind the contracts was not an abuse of discretion.

Id. The Ninth Circuit expanded upon *NRDC v. Houston* by applying the same legal argument to an already existing agreement that violated NEPA. *Pit River Tribe v. Bureau of Land Mgmt.*, 2009 WL 3651827 (stating, "[t]o avoid such bureaucratic momentum, it is sometimes necessary and appropriate for a court to vacate and void, rather than merely suspend, the illegal agency decision.") (citing *Natural Res. Def. Council v. Houston*, 146 F.3d at 1129).

The District Court for the District of Montana has stated, "[b]y definition, the no-leasing option is no longer viable once the *leases have been issued;* it *must be considered* before any action is taken." *Bob Marshall Alliance v. Lujan*, 804 F.Supp. at 1295. In distinguishing *Bob Marshall Alliance v. Lujan* from other cases where the leases were not cancelled, the district court found that "the failure... to consider the no-action alternative" required cancellation of leases. *Id.* at 1295–96. The position of the present case is analogous to *Bob Marshall.* The failure to consider the no-action alternative is a deficiency that can only be remedied by voiding the leases so that MEPA review can happen with a clean slate. "The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal." *Natural Res. Def. Council v. Houston*, 146 F.3d at 1129.

Leases are also void due to the government's failure to comply with the law. *N. Cheyenne Tribe v. Lujan*, 804 F. Supp. at 1285. In *Northern Cheyenne*, the District Court for the District of Montana originally ruled that the coal leases in question violated NEPA, and that the leases were therefore void. *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1154 (9th Cir. 1988). On a motion to reconsider submitted by the government and the coal companies, the district court revised its opinion and held the leases in abeyance until the government remedied the deficiencies with the EIS. *Id.* On appeal, the Ninth Circuit held that the district court erred by not ordering the government to comply with its own regulations requiring input by affected tribes during the competitive leasing phase, and by not considering the public interest when balancing the equities in issuing an injunction. *Id.* at 1158. On remand, the District Court reinstated its original order, voiding the leases. *N. Cheyenne Tribe v. Lujan*, 804 F.Supp. at 1291.

D. The Recent Passage of Legislation Amending MEPA Does Not Affect this Court's Authority to Void the Leases.

Montana Senate Bill 233 (SB 233), amending various portions of MEPA, was enacted on May 12, 2011 without the signature of the Governor. Mont. Sess. Laws 2011, ch. 396 (SB 233) (*See* final page of bill). One of the ways SB 233 amends MEPA is by limiting the choice of remedies a court may impose on contested leases. The amendment at issue states, "[a] . . . lease . . . issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court." SB 233 § 6(6)(d). This section of the amendments assumes that a lease is valid. This provision does not apply to this case because the leases issued in this case are not valid, but rather *invalid* because they were issued under an unconstitutional statutory exemption. Therefore, as stated above, the leases must be voided.

Courts possess the authority to assess the constitutionality of a contract or state action. *Montana Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, 341 Mont. 33, 174 P.3d 948. The Montana Supreme Court held that despite a statute limiting the role of the courts in enforcing provisions of Mont. Code Ann. § 33-15-338(2), the court still had the authority to determine the constitutionality of an insurance contract. *Id.* ¶ 57. The Montana Supreme Court held, "This provision may bar a private right of action under the Insurance Simplification Act, but does not bar the courts of this state from performing their constitutionally designated roles in interpreting and upholding the law." *Id.* (citing Mont. Const. art. VII, § 1; *Best v. Police Dept. of City of Billings,* 2000 MT 97, ¶ 16, 299 Mont. 247, ¶ 16, 999 P.2d 334, ¶ 16 ("It is the province and duty of the judiciary 'to say what the law is' ....") (citing *Marbury v. Madison,* 5 U.S. 137, 177 (1803))).

In the alternative if this Court, at the remedy stage, feels bound to apply § 6(6)(d), the law is unconstitutional because it infringes on the fundamental right to a clean and healthful environment by limiting the remedies available under MEPA, and fails strict scrutiny analysis for the same reasons that Mont. Code Ann. §77-1-121 fails such analysis. SB 233 also violates a cardinal principle of separation of powers doctrine, by stripping courts of their inherent authority to control the executive branch when it runs afoul of the law. *See Marbury v. Madison*, 5 U.S. 137, 147 (declaring, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress"). SB 233 attempts to undo the Montana constitution's environmental protections by leaving courts utterly powerless to remedy violations of the law; agencies could finish projects without ever completing their constitutionally-ordained MEPA duties and courts would be powerless to interfere. The Legislature itself recognized a possible constitutional problem with the amendment by including a severability provision, which states, "If

either subsection (6)(c) or (6)(d) of 75-1-201 . . . is invalidated or found to be unconstitutional by the Montana supreme court, then the amendments to 75-1-201 . . . terminate on the date of the invalidation or the finding of unconstitutionality." SB 233).

MEPA's first stated purpose is to "promote adequate review of state actions in order to ensure that environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations." SB 233 § 1(1)(a). Another primary purpose of MEPA is to "promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state" SB 233 § 1(2). By amending MEPA to prohibit a judge from voiding a lease, the Legislature has taken away the courts' ability to require the Board to do an environmental analysis with a clean slate and with the full set of alternatives available, including the option to not grant a lease at all. Therefore, SB 233 § 6(6)(d) is unconstitutional because it implicates and infringes Plaintiffs' fundamental right to a clean and healthful environment. As previously stated, the only appropriate remedy in this case is to void the leases, and the Court retains the ability to do so.

IV. Conclusion

Only a statute meeting the high burdens of strict scrutiny could relieve the State of its constitutional obligation to protect a clean and healthful environment – Mont. Code Ann. § 77-1-121(2) is not such a statute. The State has failed to comply with the requirements of the Montana Constitution to protect and improve the environment. The only remedy that can protect Plaintiffs' constitutional rights and further MEPA's purpose of effectuating those rights is to void the coal leases issued to Ark Land Company. MEPA and the Montana Constitution embody a precautionary principle; the State is required to consider the environmental impacts and potential

alternatives *before* it makes major decisions. At this point, the only way that the State can meaningfully consider the impacts of, and alternatives to the leases – the only way the State can meet its constitutional and statutory burden – is if the leases are voided and the process begins anew.

Dated this 29th day of June, 2011

Jack R. Tuholske

Patrick Parenteau (by JT)

Patrick Parenteau

Attorneys for Plaintiffs Northern Plains and National Wildlife Federation

STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTIONS

STEVE BULLOCK
Montana Attorney General
JENNIFER ANDERS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

CANDACE F. WEST
TOMMY H. BUTLER
Special Assistant Attorneys General
Montana Department of Natural
Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-3776

ATTORNEYS FOR THE STATE OF MONTANA and
MONTANA BOARD OF LAND COMMISSIONERS

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
POWDER RIVER COUNTY

NORTHERN PLAINS RESOURCE COUNCIL, INC. and NATIONAL WILDLIFE FEDERATION, Plaintiffs, v. MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, and ARCH COAL, INC., Defendants.	Cause No. DV-38-2010-2480 **STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTIONS**

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB, Plaintiffs, v. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, and ARCH COAL, INC., Defendants.	)	Cause No. DV-38-2010-2481 Judge Joe L. Hegel

The State Defendants submit the following brief in support of the cross-motion for summary judgment and in opposition to Plaintiffs' motions for summary judgment.

BACKGROUND

Plaintiffs filed this action seeking to invalidate 14 leases approved by the Montana Board of Land Commissioners (Land Board) for the Otter Creek Coal Tracts in southeastern Montana. Plaintiffs claim that the leases are void because the Land Board failed to conduct a constitutionally-required environmental review prior to leasing. The statute at issue is Mont. Code Ann. § 77-1-121(2), which addresses the timing of environmental review on all leases subject to further permitting.[1] Plaintiffs claim that the Legislature has no authority to direct the timing of environmental review in the absence of a compelling state interest.

[1] Mont. Code Ann. § 77-1-121(2) provides: "The department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2, 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 Defendants filed separate motions to dismiss the Amended Complaints, arguing that Plaintiffs lacked standing and that the legal issue was not ripe for review because the leases authorize no activity that could result in environmental harm. This Court ruled in Plaintiffs' favor on the standing issue, and concluded that Plaintiffs had made "at least a cognizable claim that MCA 77-1-121(2) was not constitutional." 12/29/10 Order at 7. After denying the motions to dismiss, the parties agreed to brief the outstanding legal issues on cross-motions for summary judgment, and to submit a Statement of Undisputed Facts for the Court's review. 4/27/11 Scheduling Order.

ISSUES

Although this Court has ruled that Plaintiffs' allegations of injury are sufficient to establish standing, the question of whether Plaintiffs have demonstrated sufficient harm to ultimately prevail on their constitutional claims is a separate inquiry. Aspen Trails Ranch, LLC v. Simmons, et al., 2010 MT 79, ¶ 42, 356 Mont. 41, 230 P.3d 808, citing Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (hereinafter "MEIC").

The issue now before the Court is whether Plaintiffs have proven there is state action which poses a sufficient risk of environmental degradation to implicate their constitutional rights. MEIC v. DEQ, ¶ 63. As part of this analysis, the Court should consider the nature of the lease and the Land Board's ultimate trust responsibilities, since these factors undermine Plaintiffs' claim that the opportunity to mitigate environmental damage or halt development has forever been lost. (MEIC Br. at 11, NRPC Br. at 1-2).

ARGUMENT

I. STANDARD OF REVIEW

Montana Code Annotated § 77-1-121(2) must be presumed constitutional, and Plaintiffs bear the initial burden of proving its unconstitutionality beyond a reasonable doubt. Rohlfs v. Klemenhagen, LLC, 2009 MT 440, ¶ 7, 354 Mont. 133, 227 P.3d 42; Montanans for the Responsible Use of the School Trust v. Darkenwald, 2005 MT 190, ¶ 22, 328 Mont. 105, 119 P.3d 27. Any doubt as to the constitutionality of a statute should be resolved in favor of the statute. Powder River County v. State, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357.

Plaintiffs' burden consists of establishing injury to a constitutionally protected right. MEIC v. DEQ, ¶ ¶ 63-64. For purposes of this case, Plaintiffs must show that a specific MEPA procedure is textually based in the Constitution or that it is objectively rooted as a fundamental right in Montana's "history, legal traditions, and practices." Washington v. Glucksberg, 521 U.S. 702 (1997); Walters v. Flathead Concrete Prods., Inc., 2011 MT 45, 359 Mont. 346, 353-354, 249 P.3d 913, 918-919.

Only if Plaintiffs meet their initial burden of proving that the statute implicates fundamental rights does strict scrutiny analysis apply, in which case the burden then shifts to the State to prove that the statute is narrowly tailored to serve a compelling government interest. See e.g., State v. Guill, 2011 MT 32, ¶ 67, 359 Mont. 225, 248 P.3d 826, citing Walker v. State, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872.

Statutes which do not affect fundamental rights are not subject to strict scrutiny analysis. Rohlfs v. Klemenhagen, ¶ ¶ 26, 29. Under the rational basis test, courts defer

to the policymaking function of the Legislature, and it is the challenger's burden to show the law is not rationally related to a legitimate government interest. Id., ¶ ¶ 18, 26.

II. PLAINTIFFS FAIL TO PROVE THAT THE LEASES, WHICH CONVEY NO PROPERTY DEVELOPMENT RIGHTS AND RESULT IN NO ENVIRONMENTAL HARM, IMPLICATE THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The parties agree, and this Court has determined, that the benchmark case to determine whether the clean and healthful provisions of the Montana Constitution are triggered by state action is MEIC v. DEQ, supra (12/29/10 Order at 7).

A. MEIC Requires Some Connection Between the State Action and the Resulting Harm – the Leasing of Coals Tracts Subject to Further Permitting Does Not Meet that Standard.

Plaintiffs claim that MEIC compels a ruling in their favor, but they provide no analysis of the case. In fact, MEIC imposes a significant burden on parties attempting to establish environmental risk as a result of state action in order to trigger constitutional protection. Otherwise, every governmental decision could implicate the clean and healthful environment provisions of the Constitution and trigger review under the Montana Environmental Policy Act (MEPA).

In MEIC, a mining company (Seven Up Pete Joint Venture, hereinafter SPJV) proposed direct discharges of arsenic-laden groundwater from test wells into the Blackfoot and Landers Fork rivers. The Department of Environmental Quality (DEQ) approved the proposal as part of an exploratory permit, without regard to the nature or volume of water discharged and without conducting an otherwise mandatory

environmental review designed to protect high quality water from degradation. To justify this procedure, the DEQ claimed that the discharges were "nonsignificant" and were thus exempt from environmental review because the receiving water would adequately dilute the arsenic. In response, Plaintiffs presented expert testimony to show that discharges of arsenic should not be classified as "nonsignificant" because they were in concentrations greater than the receiving water, that any amount of arsenic in drinking water is harmful to humans, and that DEQ was aware of these risks.

The Montana Supreme Court ruled that the clean and healthful environment provisions of the Montana Constitution were implicated because Plaintiffs sufficiently demonstrated an actual risk of harm: "[T]he pumping tests proposed by SPJV would have added a known carcinogen such as arsenic to the environment greater than the concentrations present in the receiving water," and the agency itself "concluded that discharges containing carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation[.]" 1999 MT 248, ¶ ¶ 79-80). In other words, the Court found a substantive environmental impact based on a direct connection between the state's action and resulting harm sufficient to trigger the clean and healthful environment provisions of the Montana Constitution. The same is not true here.

1. The Environmental Harm in MEIC Was the Direct Result of a Final Permitting Decision, With No Opportunity for Further Environmental Review

The agency's decision to forego environmental review and authorize test wells as part of SPJV's permit had immediate and measurable consequences, that is, the discharge

of carcinogens into high quality waters. Despite the fact that nondegradation review is mandated by the Clean Water Act to protect high quality water, the agency relied on a rule that completely exempted the toxins from any kind of review, without regard to the substance or volume of the discharge.

Here, the Land Board's decision was to lease coal tracts for potential development, all subject to environmental review and permitting. It was not to authorize mining or exploratory activity, let alone exempt from review any activity that necessarily results in immediate and measurable harm to the environment. Even though Plaintiffs argue that the leases will inevitably lead to coal mining, the leases themselves have no direct environmental consequence and specifically preclude any activity that could result in environmental impact until a permit is issued. See Statement of Undisputed Facts, § 25. There is no case in Montana which holds that leasing, without more, triggers the clean and healthful provisions of the Montana Constitution. If that were true, every oil and gas lease sale (of which there are hundreds each year), and a host of other leases issued by the Department and approved by the Land Board, would have constitutional implications.[2]

Plaintiffs' allegations of harm are all dependent on subsequent events, namely, the mining and burning of coal, a point they concede in the Undisputed Statement of Facts, ¶ 35. None of the facts submitted in their most recent filing establish direct environmental harm from leasing. Rather, all harm is the result of coal mining and coal

[2] Between June 2010 and July 2011 the DNRC issued 879 leases for oil and gas development, all of which were exempt from MEPA at the leasing stage by virtue of Mont. Code Ann. § 77-1-121(2). (http://dnrc.mt.gov/trust/MMB/OG/Default.asp). Currently, there are more than 5,000 oil and gas leases, the majority of which have not been developed. See 11/16/09 Minutes of the Land Board (Undisputed Facts, Ex. D at 5; Ex. I at 4).

burning, neither of which are authorized by the leases. In the absence of any facts linking the Land Board's decision to lease and the resulting environmental harm alleged, there is no substantive environmental impact as required by MEIC and Plaintiffs fail their burden of proof. This Court would significantly expand the reach of MEIC if it were to conclude otherwise.

2. Plaintiffs Find No Additional Support in Cape-France or the Federal NEPA Cases

Plaintiffs also cite Cape-France Enters. v. In re Estate of Peed, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, as authority that their constitutional rights are implicated by the Land Board's leasing decision. In Cape-France, the Montana Supreme Court applied the MEIC standard to private action and held that the clean and healthful environment provisions of the Montana Constitution precluded a developer from drilling a well on its property where substantial evidence showed that the water system required for subdivision may "tap into contaminated groundwater and that pumping this water could spread the pollution plume further into other, uncontaminated aquifers." Id., ¶ ¶ 27, 33.

In Cape-France, similar to MEIC, there was a direct connection between the proposed activity (well drilling) and the environmental harm (contaminated groundwater) because once the decision to engage in the activity was made, there was no intervening governmental oversight to mitigate environmental damage. Here, governmental oversight is required by the leases themselves, thus providing the opportunity for mitigation of damage through permitting or complete disapproval of the project. See § IIB, infra.

Plaintiffs also cite federal cases under the National Environmental Protection Act (NEPA) for the proposition that environmental review must occur at the leasing stage if the Land Board is to fulfill its constitutional obligations under Article IX, § 1. The federal courts are clear, however, that an environmental impact statement (EIS) is required under NEPA prior to leasing only if the lease authorizes surface-disturbing activity and constitutes an "irretrievable commitment of resources." See Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988).

In Conner v. Burford, the Ninth Circuit Court of Appeals concluded that sale of a no-surface occupancy (NSO) lease "cannot be considered the go/no go point of commitment at which an EIS is required." Id., 848 F.2d at 1448; see also, Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 (9th Cir. 1998) (cited by Plaintiff MEIC for the proposition that "the no-leasing option is no longer viable once the leases have been issued," without accounting for the distinction between a NSO lease and a non-NSO lease). The Court in Conner v. Burford held that what the lessee really acquires with an NSO lease is a "right of first refusal" and nothing more, because the right to take action under the lease is "contingent upon subsequent preparation of (an) EIS and approval by the Secretary of the Interior[.]" Id. at 1448; see also, Northern Alaska Environmental Center v. Kempthorne, 457 F.3d 969, 976 (9th Cir. 2006).

The cases cited by Plaintiffs are inapposite. They involved situations where the agency prepared an EIS, and the question for the Court involved the adequacy of the document or whether a supplemental EIS was required in response to a proposed change. They do not stand for the proposition that all leasing decisions require an EIS.

Here, the leases are the equivalent of a NSO lease because they "do not authorize any mining activity or allow any significant surface disturbance," until further permitting has occurred with Land Board oversight. See Statement of Undisputed Facts, ¶ 25. As shown below, the leases grant no property development rights and, like the federal NSO leases, grant only a right of first refusal contingent upon subsequent environmental review. In this respect, they are similar to the leases at issue in Conner v. Burford, where the Court determined that the agency's future discretion to deny or condition a permit did not constitute an irretrievable commitment of resources. The Montana Supreme Court recognized the same distinction in North Fork Preservation Ass'n.v. Department of State Lands, 238 Mont. 451, 778 P.2d 862 (1989), and found there was no irretrievable commitment of resources that would trigger MEPA where the leases in question did not authorize any activity and, like the Otter Creek leases, specifically required an operating permit before any activity could take place. Id., 238 Mont. at 460-61, 778 P.2d at 868-69.

B. The Leases Do Not Grant a Property Right to Mine or Otherwise Limit the Land Board's Authority to Deny or Condition a Mining Permit

Plaintiffs NPRC claim that "the leases grant irrevocable property interests" to the nation's second largest coal company, Arch Coal. (NPRC Br. at 2.) The Montana Supreme Court's ruling in Seven Up Pete Venture, et al. v. Mont., 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, confirms otherwise.

1. There is No Authority for the Proposition That a Contingent Right Lease Grants Lessee a Right to Do Anything But Apply for Permits

The issue in Seven Up Pete was whether various mining companies acquired property rights as a result of mineral leases on state land, such that the State was precluded from interfering with those property rights and could be subject to a regulatory takings claim. The Court determined that the mineral leases granted nothing more than the "opportunity" to obtain an operating permit, and that no property right attached because the decision-maker (in that case, the DEQ) had ultimate discretion in deciding whether to issue the permit in the first instance.

Similar to the Otter Creek leases, the leases in Seven Up Pete contemplated a significant project area, involving the extraction of more than 9 million ounces of gold and 20 million ounces of silver (2005 MT 146, ¶ 8). The leases required compliance with all environmental laws, including permitting, before any mining could commence (¶¶ 30, 31). The leases contained no language limiting DEQ's discretion to condition or deny the operating permit, and the Court recognized that DEQ had broad authority to decide whether the proposed mining method (cyanide heap leaching) was appropriate or even to reject the permit application altogether (¶ 32).

Subsequent to issuance of the leases, the voters approved I-137 which outlawed cyanide heap leaching in Montana. The mining company (the Venture) sued the State, alleging that I-137 interfered with their rights to mine property identified in the leases. The Court found no such property interest because the right to mine was a function of the

operating permit – not the leases – and the Venture had not yet obtained the requisite permit, nor was it assured "of ever obtaining such a right." Id., ¶ 33.

While the Court found a contractual relationship between the State and the Venture, the Venture was nonetheless required to comply with all applicable state and federal laws, including laws to protect the environment, so that there was no impairment of their contractual rights by virtue of I-137. The fact that the Venture had invested more than $70 million in the project was of no consequence (¶ 42). In his concurring opinion, Justice Nelson confirmed the nature of the lease as nothing more than the opportunity to go through the expensive, lengthy, highly regulated process to apply for and, maybe, obtain a permit to mine. There was no guarantee that this process would be successful anymore than there was any guarantee that the mining venture itself would succeed (¶ 72).

The Otter Creek leases are no different. The fact that Arch Coal paid nearly $86 million for the leases does not transform them into property rights to engage in mining, nor does it hinder the Land Board's authority to condition or deny the permits altogether, either as a matter of constitutional principle or under its public trust obligations.

2. The Land Board Has Public Trust Responsibilities Wholly Apart from the Regulatory Functions of the Permitting Agencies

Plaintiffs suggest that the Land Board's authority to review and condition a permit is merely regulatory, implying that the leasing phase was the only opportunity for the Board to protect the environment. Now that the leases have issued, Plaintiffs posit that

the Land Board's hands are tied and that it may not impose any greater restriction than the agency can impose under the Montana Strip and Underground Mine Reclamation Act.

In fact, the Land Board's ability to impose conditions on a permit to protect the resource or the environment generally is not dependent on the DEQ's regulatory authority. The Land Board is constitutionally mandated to hold lands of the state in trust for the people, to be disposed of only upon realization of full market value. Art. X § 11. The Land Board "owes a higher duty to the public than does an ordinary businessman". State ex rel. Thompson v. Babcock , 147 Mont. 46, 54, 409 P.2d 808, 812 (1966). The Board has the authority to direct, control, lease, exchange and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law. Art. X, § 4.

The discretion of the Land Board to manage state trust lands is broad. Friends of the Wild Swan v. Dep't of Natural Res. & Conservation, 2005 MT 351, ¶ 10, 330 Mont. 186, 127 P.3d 394 ("it is clear that the Board's obligation as trustee is a complex one, that the obligation is governed by constitutional and statutory provisions which grant authority to the Board over the trust, and that these provisions grant 'large' or 'considerable' discretion to the Board in the performance of its duties"). These principles impose a duty on the Land Board not only to maximize revenue, but to ensure that the resource itself is managed in such a way as to "secure the largest measure of legitimate and reasonable advantage to the state." Mont. Code Ann. § 77-1-202.

Plaintiffs agree that the Land Board's duty embodies more than economic factors, and that the Land Board's obligation to protect the best interests of the state necessarily includes consideration of consequences to the environment. [MEIC Br. at 15, quoting Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995)]. So, for example, if it were shown that staged development, or some other option proposed by Plaintiffs were most advantageous to the state and/or the environment, nothing prevents the Land Board from imposing those requirements as part of its trust obligations or under its constitutional mandate to "maintain and improve a clean and healthful environment." Art. IX, § 1, Mont. Const. It is inconceivable that Plaintiffs would advocate for anything less.

In addition to its standalone constitutional obligations, the Land Board (and the permitting agencies) now has specific direction from the Legislature regarding coal development and environmental protection, including the mitigation of greenhouse gases. In 2011, the Legislature amended the State's energy policy to include the following goals:

- enhance existing energy development and create new diversified energy development from all of Montana's abundant energy resources;
- promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;
- increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the **mitigation of greenhouse gas and other emissions**

Mont. Code Ann. § 90-4-1001(1)(b)(c)(d) (2011) (emphasis added). The policy is also intended to "enhance Montana's overall management responsibilities . . . in pursuing energy development on state lands." Mont. Code Ann. § 90-4-1001(1)(u) (2011).

Given these overriding trust responsibilities, the Land Board occupies a unique position in the permitting process. There is nothing preventing the Land Board from disallowing mining altogether or conditioning the permit to address the concerns raised by Plaintiffs. While the Land Board cannot unilaterally alter the terms of the leases, the Board may nonetheless impose any permit condition it could have imposed during the lease phase, including conditions that mitigate greenhouse gases and other emissions consistent with its trust obligations, the state's energy policy, or the constitutional directive to maintain and improve a clean and healthful environment.

The fact that the leases themselves do not reserve that right to the Land Board (MEIC Br. at 11) does not undermine the Land Board's ultimate authority. That authority is ever-present, and is not dependent on the timing of MEPA review. In other words, whatever constitutional obligations the Land Board had at the time of leasing are the same constitutional obligations the Land Board has throughout this process. The leases have no effect on the Land Board's trust responsibilities – to the contrary, Arch Coal as lessee takes an interest in the property subject to the trust.

3. Arch Coal Acquired an Interest in the Otter Creek Coal Tracts Subject to the Public Trust

The Otter Creek coal tracts were acquired by the State of Montana to be held in trust. See Undisputed Facts, ¶ 4. The essence of a determination that property is held in

trust, whether it is school, public or otherwise, is that "anyone who acquires interests in such property" does so "subject to the trust." Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Com'rs, 1999 MT 263, 296 Mont. 402, 989 P.2d 800, citing In re Powder River Drainage Area, 216 Mont. 361, 375, 702 P.2d 948, 956-57 (1985).

Under the lease terms, Arch Coal acquired nothing more than the exclusive right to apply for permits from the State. There was no guarantee that the tracts contained any coal; that the tracts could ever be developed; or that Arch Coal would ever realize its $86 million investment or otherwise be allowed to mine coal. The State remains the trustee of the tracts and must oversee their development – if and when there is such a proposal – in a manner that ensures long term benefit to the trust. As the lessee, Arch Coal cannot disavow the Land Board's trust responsibilities as part of the permitting process, since any interest bestowed by the leases is acquired subject to the public trust.

C. The Timing of MEPA Review Does Not Implicate Fundamental Rights

The arguments above demonstrate that Section 77-1-121(2) affects the timing, not the substance, of MEPA review. There is no dispute that Plaintiffs, as interested parties, will have the opportunity to fully participate in the public process, both during MEPA review and proceedings before the Land Board, if and when there is a proposal for development. See ARM 36.2.531 (requiring agency responses to all substantive public comments in the preparation of a Final EIS). At that time, the State fully anticipates that

Plaintiffs will urge the Land Board to deny or condition a permit for development based on environmental concerns – a power they now claim the Land Board does not have.

It is well settled that MEPA, like its federal counterpart NEPA, is procedural in nature and does not demand that the agency make any particular substantive decision. Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands, 273 Mont. 371, 377-78, 903 P.2d 1362, 1367 (1995). The purpose of MEPA is to ensure that the agency is informed when balancing preservation versus the utilization of natural resources, not to ensure the most environmentally protective outcome. Id. In this respect, the procedural rights created by MEPA do not operate as constitutional safeguards nor do they create fundamental, substantive rights. Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147 (1979) ("the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this [article IX, § 1] constitutional guarantee.")

Plaintiffs make no effort to distinguish Kadillak's holding, which remains good law unless and until the Montana Supreme Court, not Plaintiffs, says otherwise. See, e.g. Seven Up Pete Venture v. Montana, 327 Mont. at 308, citing Kadillak, 184 Mont. at 138-40 ("a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained.")

Like NEPA, MEPA is purely a creature of statute. As such, it is the result of legislative insight, experience, compromise, and public policy. Congress has provided multiple instances where NEPA is not triggered by certain agency actions:

- Clean Air Act: 15 USC § 793(c)
- Clean Water Act: 33 USC §33 USC 1371(c)(1)
- Columbia River Gorge National Scenic Area Act: 16 USC § 544o(f)

- Deep Seabed Hard Mineral Resources Act: 30 USC §1419(d)
- Defense Production Act: 50 USC Appendix §§ 2095(h), 2096(i)(fuels)
- Disaster Relief Act: 42 USC § 5159
- Endangered Species Act: 16 USC §1536(k), 16 U.S.C. § 1536 (a)(2) (1988)
- Energy Supply and Environmental Coordination Act: 15 USC § 793(c)(2)
- Native Amer. Housing Assistance and Block Grant Act: 25 USC §4115(a)
- National Forest Management Act: 16 USC §544o(f)
- Navajo and Hopi Indian Relocation Amendment Act: 25 USC §640d – 26(a)
- Military Law, Lease of Non-excess Property: 10 USC § 2667(g)(4)(A)
- Nuclear Waste Policy Act: 42 USC § 1014(c)
- Power Plant and Industrial Fuel Use: § 42 USC §8473
- Surface Mining Control and Reclamation Act: 30 USC § 1292(d)
- Transportation Equity Act for the Twenty-First Century: 23 USC §§134(o), 135(i)

This Court should recognize similar efforts by the Montana Legislature to tailor MEPA's procedures to address practical concerns – none of which affect Plaintiffs' constitutional rights. Perhaps Plaintiffs' fundamental rights may be implicated later (i.e., at the permitting stage, if they can show substantive harm), but they cannot be implicated at the leasing stage merely because the Legislature has imposed procedural requirements on environmental review.

III. ABSENT A SHOWING THAT FUNDAMENTAL RIGHTS ARE IMPLICATED, THE STATUTE IS SUBJECT TO THE RATIONAL BASIS TEST.

The rational basis test requires a law to be rationally related to a legitimate government interest. Snetsinger v. Mont. Univ. Sys., 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. "What a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of a statute." Rolfs v.

Klemenhagen, 2009 MT 440, ¶ 31. Plaintiffs bear the burden of proving that there is no rational basis for the law in question. Id., ¶ 26.

The legislature's decision to exempt the DNRC and the Land Board from MEPA requirements when issuing leases or licenses subject to further permitting affects only the *timing* – not the *substance* – of environmental review. To delay MEPA review for those projects makes sense in light of the vast number of leases and licenses issued by the DNRC upon Land Board approval.[3] This is particularly true with respect to oil and gas leases, which generate substantial income to the State of Montana and have no environmental implications because they grant no development rights. For example, the oil and gas leases issued between June 2010 and June 2011 generated nearly $20 million for the trust.[4] In the month of June 2011 alone, the Land Board leased 324 tracts for a total of $6.5 million. The vast majority of these leases will never be developed. Undisputed Facts, Ex. I, p. 4. Because of the exemption in Mont. Code Ann. § 77-1-121(2), the State did not have to bear the costly burden of environmental review prior to issuing those leases, which grant no right of development and may never, in fact, be developed. All of those leases will be subject to permitting if and when there is a proposal for development. The leases, however, authorize no degradation whatsoever.

---

[3] See e.g. Mont. Code Ann. § 77-1-801 (authorizing recreational use licenses); Mont. Code Ann. § 77-1-904 (authorizing commercial leasing); Mont. Code Ann. § 77-3-102 (authorizing mining leases); Mont. Code Ann. § 77-3-201 (authorizing nonmetallic mineral leases); Mont. Code Ann. § 77-3-301 (coal leases); Mont. Code Ann. § 77-3-401 (oil and gas leases); Mont. Code Ann. § 77-3-501 (underground storage of natural gas leases); Mont. Code Ann. § 77-4-101 (geothermal leases); Mont. Code Ann. § 77-4-201 (leases or licenses for power sites); Mont. Code Ann. § 77-6-102 (grazing and agricultural leases).

[4] http://dnrc.mt.gov/trust/MMB/OG/LeaseInformation/2010.asp

The Otter Creek leases are no different. There is no risk of environmental harm until development occurs. Until there is a proposal for development, there is no way to evaluate the potential impacts of the project.

Meanwhile, the statute ensures that the State's ability to fund education is not compromised by the added expense of environmental review or resulting litigation, and further ensures that the permitting agencies and the Land Board have specific information about the project (not just the possibility of harm claimed by Plaintiffs) when deciding whether and how development should proceed. These are legitimate governmental interests that are furthered by Mont. Code Ann. § 77-1-121(2).

Plaintiffs cite MEIC v. DEQ, supra, for the proposition that strict scrutiny is the appropriate standard for analyzing the constitutionality of Mont. Code Ann. § 77-1-121(2), but that argument assumes that fundamental rights are implicated. The Montana Supreme Court has yet to extend the strict scrutiny standard from MEIC, which involved substantive environmental degradation, to legislatively prescribed timelines for MEPA review. Here, the Legislature has deemed it appropriate to delay the timing of an EIS for leases that are expressly subject to further environmental review, at which time Plaintiffs will have the opportunity to participate in the public process and raise all concerns, both environmental and policy-based, relating to development of the Otter Creek coal tracts. Plaintiffs have no fundamental right to insist that review occur prior to leasing, and thus no basis upon which to demand that the statute be subject to strict scrutiny analysis.

Merely because Mont. Code Ann. § 75-1-102, mentions that the legislature was mindful of the right to a clean and healthful environment when enacting MEPA, does not

elevate MEPA to constitutional status. Legislative pronouncements on the constitutionality of statutes do not control. As the Montana Supreme Court stated in Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 Mont. 194, 199-200, 53 P.3d 1268, 1271-1272:

> It is the exclusive power of the courts to determine if an act of the legislature is unconstitutional. Moreover, the laws enacted by the legislators are presumed constitutional unless proven otherwise beyond a reasonable doubt.

(Citations omitted.)

The Plaintiffs have failed to satisfy a threshold requirement that the application of Mont. Code Ann. § 77-1-121, to the issuance of the Otter Creek leases implicates a fundamental right. It is not enough for the Plaintiffs to claim that a wiser or better policy exists for MEPA. Instead, the Plaintiffs must prove beyond a reasonable doubt, based on some higher legal authority than statute, that the Montana Constitution mandates a specific MEPA procedure. In the absence of that showing, Mont. Code Ann. § 77-1-121(2) is subject to the rational basis test.

III. PLAINTIFFS' REQUEST TO VOID THE LEASES UNDER CONTRACT PRINCIPLES SHOULD BE DENIED ABSENT A DEMONSTRATED CONSTITUTIONAL VIOLATION

Plaintiffs propose alternative theories based on principles of contract to argue that the leases are void or voidable. But their requested relief is premised on the underlying theory that the leases violate the fundamental right to a clean and healthful environment. (NPRC Br. at 26; MEIC Br. at 16). Absent a finding that the procedural protections of MEPA enjoy constitutional status and implicate fundamental rights, Plaintiffs are not

entitled to any relief, whether it be a declaration of constitutional invalidity regarding Mont. Code Ann. § 77-1-121(2), or a declaration that the leases are void or voidable.

Plaintiffs also suggest that recent amendments to MEPA may affect this Court's ability to declare the leases void for MEPA noncompliance. If that is so, Plaintiffs argue that the Court can nonetheless cancel the leases under common law contract principles and require the Land Board to take into account any environmental consequences. (MEIC Br. at 16, NPRC Br. at 26). The new provision of MEPA is § 6(d), Mont. Sess. Laws 2011, ch. 396 (SB 233), which provides:

> A permit, license, lease or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.

Although the new amendments are effective on passage and approval, they apply only to "an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Mont. Sess. Laws 2011, §§ 9, 10. Thus, the amendments have no application to the leases, and do not affect this Court's ability to declare the leases void if Plaintiffs were able to meet their burden of proving the statute unconstitutional beyond a reasonable doubt.

CONCLUSION

This case is not about preventing environmental damage -- that task will come at a later date if and when Arch Coal decides to mine the Otter Creek Coal Tracts. Rather, this case is about Plaintiffs' effort to secure constitutional status for MEPA review and

clear the way for litigation over government decisions that may have only speculative environmental impact. Nothing in Montana law supports that effort. This Court should grant summary judgment in Defendants' favor based on the fact that Plaintiffs have failed in their burden of proving that fundamental rights are implicated or that the statute is unconstitutional, and that no case supports Plaintiffs' arguments to the contrary.

Respectfully submitted this 27th day of July, 2011.

STEVE BULLOCK
Montana Attorney General
JENNIFER ANDERS
Assistant Attorney General
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JENNIFER ANDERS
Assistant Attorney General
janders@mt.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing **STATE DEFENDANTS' CONSOLIDATED BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTIONS** to be mailed to:

MR DOUGLAS L HONNOLD
DHONNOLD@EARTHJUSTICE.ORG
MS JENNY K HARBINE
JHARBINE@EARTHJUSTICE.ORGEARTHJUSTICE
209 S WILLSON AVE
BOZEMAN MT 59715

MR JACK R TUHOLSKE
TUHOLSKE@CENTRIC.NET
TUHOLSKE LAW OFFICE
PO BOX 7458
MISSOULA MT 59807-7458

MR PATRICK PARENTEAU
PPARENTEAU@VERMNTLAW.EDU
VERMONT LAW SCHOOL
SOUTH ROYALTON VT 05068

MR MARK STERMITZ
MSTERMITZ@CROWLEYFLECK.COM
CROWLEY FLECK PLLP
PO BOX 7099
MISSOULA MT 59807-7099

MR JEFF OVEN
JOVEN @ CROWLEYFLECK.COM
CROWLEY FLECK PLLP
PO BOX 2529
BILLINGS MT 59103-2529

DATED: July 27, 2011

Kathy Stelling

ARK AND ARCH'S COMBINED BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Mark L. Stermitz
Jeffery J. Oven
Christopher C. Stoneback
Crowley Fleck PLLP
305 S. Fourth Street E., Suite 100
P.O. Box 7099
Missoula, MT 59807-7099
Telephone 406-523-3600
Fax 406-523-3636
mstermitz@crowleyfleck.com
joven@crowleyfleck.com
cstoneback@crowleyfleck.com

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

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
POWDER RIVER COUNTY

NORTHERN PLAINS RESOURCE COUNCIL INC., NATIONAL WILDLIFE FEDERATION,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, and ARCH COAL, INC.,

Defendants.

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, and ARCH COAL, INC.,

Defendants.

Cause No. DV-38-2010-2480
Cause No. DV-38-2010-2481

Judge Joe L. Hegel

ARK AND ARCH'S COMBINED BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

COME NOW, Defendants ARK LAND COMPANY and ARCH COAL, INC. (together "Ark"), and file this Combined Brief In Support of Their Motion For Summary Judgment and Brief In Opposition To Plaintiffs' Motions For Summary Judgment.

I. INTRODUCTION.

Plaintiffs' claims fail for the simple reason that neither Mont. Code Ann. § 77-1-121(2), nor the coal leasing decision at issue here, implicate strict scrutiny analysis under the Montana Constitution. Despite reams of irrelevant and immaterial argument concerning coal combustion, Plaintiffs have failed to meet their burden of proof for fundamental, constitutional right protection established by the Montana Supreme Court in *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. As a result, Ark's motion for summary judgment should be granted and Plaintiffs' motions for summary judgment must be denied.

II. ARK'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED.

A. The Montana Board of Land Commissioners appropriately considered numerous factors in exercising its constitutional duty to lease Otter Creek Coal.

On March 18, 2010, the Land Board leased the Otter Creek Coal tracts to Ark Land Company. It is uncontroverted that the leases were issued after the Land Board took numerous factors into account, including:

(1) The Land Board's constitutional duty to lease school trust lands for the support and benefit of public education. Mont. Const. Art. X, § 4.

(2) The Land Board's constitutional duty to lease school trust lands in accordance with the "regulations and restrictions imposed by the legislature," including the duty to "secure the largest measure of legitimate and reasonable advantage to the state" and the express Legislative encouragement to lease the mineral interests at Otter Creek. Mont. Const. Art. 10, §§

4, 10; Mont. Code Ann. § 77-1-202(1); § 77-3-303; *see also* Mont. Code Ann. § 77-1-1002(2)(b) (stating that the "timely development" of the mineral interests was to be facilitated and encouraged).

(3) The "tremendous" socioeconomic benefit of leasing the Otter Creek coal tracts, including, as found by the legislature, the generation of "significant long-term sources of revenue for Montana schools." 2003 Mont. Laws 1080; *see also* Statement of Undisputed Facts ¶ 11 (hereinafter "SUF") (estimating as much as $1.4 billion in revenue to the state and its schools).

(4) The economic and employment benefit the proposed Otter Creek mine will have on the people residing on and near the Northern Cheyenne Reservation, an area of Montana with an unemployment rate of 60 percent and a poverty rate of over 46 percent. MT Dept. Commerce Bulletin (attached hereto as Exhibit 1); Coal Lease § 28 (SUF ¶ 23); Settlement Agreement (SUF ¶ 6).

(5) The Land Board's ability to issue leases that preserve all existing environmental considerations and protections available at law.

B. In exercising its trust obligations, the Land Board issued leases that preserve all existing environmental considerations and protections allowed by law.

Of singular importance to this lawsuit, the Coal Leases reserve to the State the full range of existing environmental protections available at law. The Coal Leases read:

> "All rights granted to the Lessee under this Lease are contingent upon Lessee's compliance with the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act [SUMRA] . . . *and upon Lessor review and approval of Lessee's mine operation and reclamation plan.*"
>
> "The rights granted under this Lease are further subject to agency responsibilities and *authority under the provisions of the Montana Environmental Policy Act* [MEPA]."
>
> "Lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging

any forage and timber growth thereon; (2) damaging crops, including forage, timber, or improvements of a surface owner; or (3) damaging range improvements whether owned by the Lessor or by its grazing permittees or lessees."

"The lessee shall not pollute or deplete surface or groundwater in excess of those impacts to water allowed by state or federal law or permit."

"*Lessor may prescribe the steps to be taken and reclamation to be made with respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.*"

"This Lease is subject to further permitting under the provisions of Title 75 or 82, Montana Code Annotated."

Coal Leases §§ 2, 16, 19 (SUF ¶ 23) (emphasis added).

These Coal Leases then reserve to the State all of those protections offered by the "clean and healthful environment" provisions of the Constitution. That is so because the Coal Leases say so, and Plaintiffs have provided no legal authority to justify not accepting the Coal Leases at face value. Furthermore, there is no exclusion in the Coal Leases of future consideration of the impacts of the mine on global warming or any other harm decried – but not proven – by Plaintiffs in their pleadings.

Without question, the Land Board – consisting of the five, highest statewide elected officials – exercised its constitutional trust obligation by leasing the State's mineral interests in the Otter Creek coal. In return, Ark purchased the exclusive right to mine some or maybe all of the Otter Creek tracts – *if actual mining is ultimately allowed by law* – and the right to a fair and open process whereby the effects of the mine – as defined by actual mining operations – can be accurately studied and evaluated.

In that the Land Board issued the Coal Leases in accordance with its constitutional and statutory obligations, Ark's motion for summary judgment should be granted.

III. THE PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT MUST BE DENIED.

Plaintiffs demand that this Court declare the Coal Leases void. Plaintiffs make this demand not because the Land Board *failed* to follow its statutory directives, but rather, because the Land Board *followed* the express provisions of Mont. Code Ann. § 77-1-121(2). Therefore, Plaintiffs are left only with the legally disfavored task of declaring a statute unconstitutional. *See e.g., Powell v. State Compensation Insurance Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 (holding that every intendment toward constitutionality in the Legislative act's favor be presumed, and its unconstitutionality, if any, must be proven beyond a reasonable doubt).

A. The constitutional right to a clean and healthful environment is not implicated by Mont. Code Ann. § 77-1-121(2) or the Coal Leases.

In its Order on the Motions to Dismiss, this Court stated: "The remaining question is whether this state action is sufficient to implicate the constitutional protection of the clean and healthful environment?" Order Re Motions to Dismiss 7 (Dec. 29, 2010). The answer to the question is clearly: "No."

The right to a clean and healthful environment in Montana is, of course, defined by the language of the Montana Constitution. *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 31, 776 P.2d 488, 494 (1989) (holding that a party that seeks to deprive the legislature of its authority to exercise its plenary power "must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the power exercised"). The constitutional right is found in both Articles II and IX of the Constitution. These provisions "cannot be interpreted separately." *Montana Environmental Information Center v. Department of Environmental Quality,* 1999 MT 248, ¶¶ 64-65, 296 Mont. 207, 988 P.2d 1236 (hereinafter "*MEIC*").

Article II, § 3 reads: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...." Whereas Article IX, § 1 reads:

> (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.*

(emphasis added).

Without question, the constitutional directives *to the legislature* (and not to Plaintiffs filing lawsuits) of "administration and enforcement" and "shall provide adequate remedies" are broad. And where the Constitution provides broad directives, the "specifics are left to the legislature." *Kottel v. Montana*, 2002 MT 278, ¶ 52, 312 Mont. 387, 60 P.3d 403. These broad directives "are implemented through legislative decision, not by constitutional mandate." *Montana Stockgrowers Association v. State Dept. of Revenue*, 238 Mont. 113, 117, 777 P.2d 285, 288 (1989).

The Montana Supreme Court has spoken on the legislature's duty to maintain a clean and healthful environment. The legislature has a duty to enact reasonable schemes that provide substantive protection to the environment. *MEIC*, ¶ 80. These schemes must be upheld if they are "reasonable" legislative action. *Id.* (finding Mont. Code Ann. § 75-5-303 (nondegradation of water quality) a "*reasonable* legislative implementation of the mandate provided for in Article IX, Section 1" (emphasis added)); *see also Kottel*, ¶ 52; *Montana Stockgrowers Association*, 238 Mont. at 117, 777 P.2d at 288 (holding rational basis test proper where broad constitutional directives involved). It is only when a statute or rule allows for the actual and proven

"unreasonable degradation" of the environment, without any intervening environmental assessment, that strict scrutiny analysis applies. *MEIC*, ¶¶ 79-80.

The fact is, Mont. Code Ann. § 77-1-121(2) (which delays MEPA) only deals with the legislative scheme put in place to ensure that agencies comply with the substantive environmental directives of the legislature – such as SUMRA. The statute exempts nothing from substantive environmental review. It allows no environmentally degrading or natural resource depleting activity to occur. As a result, according to the Montana Supreme Court in *MEIC*, Mont. Code Ann. § 77-1-121(2) must be upheld as long as it is "reasonable." *MEIC*, ¶ 80. Plaintiffs have made no argument that Mont. Code Ann. § 77-1-121(2) would fail rational basis review. It clearly is reasonable. It avoids duplicative and speculative MEPA analysis, while preserving all existing environmental considerations and protections allowed by law.

And while this Court in its Order Re Motions to Dismiss at page 7 found that the right to a clean and healthful environment may be implicated because later SUMRA review "would appear" to be regulatory, Ark respectfully submits that on top of this regulatory review stand the Coal Leases, which make Ark's property rights contingent not only upon the State Land Board's *"review and approval of Lessee's mine operation and reclamation plan,"* but also, the ability of the State Land Board to *"prescribe the steps to be taken and reclamation to be made with the land and the improvements thereon."* Coal Leases §§ 1, 16 (SUF ¶ 23). In this "as applied" constitutional challenge, the language of these Coal Leases must be considered. *Roosevelt v. Montana Dept. of Revenue*, 1999 MT 30, ¶¶ 51-52, 293 Mont. 240, 975 P.2d 295.

Therefore, if, after the mine is defined by the permitting process, and if, after the

extensive studies demanded by SUMRA, MEPA and other statutes are conducted, the harms alleged by Plaintiffs are finally proven through real study and analysis (and not by lawyer-argument), and the issuance of the mining permit would violate the Constitution, the Land Board can take reasonable and appropriate action and prevent the mine from moving forward. The Constitution requires nothing less.

In that Plaintiffs are challenging the legislature's "administration" of the right to a clean and healthful environment, and are not challenging a statute or rule that will necessarily lead to the unconstitutional degradation of the environment, issuing these Coal Leases in reliance on Mont. Code Ann. § 77-1-121(2) did not implicate fundamental rights found in the Constitution. As a result, Plaintiffs' motions for summary judgment must be denied.

B. Plaintiffs' complete lack of proof of a real, particularized threat to the environment is fatal to their motions for summary judgment.

It is Plaintiffs' burden to prove that Mont. Code Ann. § 77-1-121(2) is unconstitutional. Order Re Motions to Dismiss 7. Despite this fact, Plaintiffs have presented not one shred of evidence as to how Otter Creek will be mined, what mitigation procedures will be put in place, what the effect on the landscape will be, what the effect on the watershed will be, how the coal will be utilized, or how Otter Creek Coal, once sold and utilized, will lead to global warming. To shore up this deficiency, and in an attempt to impose their worldview of climate change as a hard regulatory target in Montana, Plaintiffs resort to hyperbole and outright falsehood. For example, they state: "If constructed, the Otter Creek mine will be one of the nation's largest single sources of carbon dioxide, contributing to climate change and its potentially disastrous impacts globally and in Montana." MEIC Br. 7. This is false. Otter Creek is a proposed *mine* and the combustion of coal is not even a state action under review in this case.

Put simply, Plaintiffs cannot meet the burden of proof for fundamental right protection established by *MEIC*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. In that case, the Montana Supreme Court considered water well pump tests associated with a gold mine. The pump tests were studied extensively, and testimony and evidence on the harmful effect of the tests on a watershed were submitted by a geologist, a professional engineer, another geologist and two hydrologists. *Id.* at ¶¶ 10-24. Unlike the Plaintiffs here, the plaintiff in *MEIC* did not talk in vague generalities, but argued that a statute (that entirely exempted discharges from water well pump tests from clean water statutes) and a permit (that *actually allowed* the water well pump tests to discharge arsenic into the watershed) were unconstitutional. Plaintiffs argued that the *proven* arsenic discharges from those actual pump tests would violate Montana's nondegradation of water statute and implicate the fundamental right to a clean and healthful environment. The Montana Supreme Court agreed and held:

> We conclude that the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment is implicated ***based on the Plaintiffs' demonstration*** that the pumping tests proposed by [defendant] ***would have added a known carcinogen such as arsenic to the environment*** . . . and that the DEQ or its predecessor after ***studying the issue and conducting hearings has concluded*** that discharges containing carcinogenic parameters greater that the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation set forth at § 75-5-303, MCA.

Id. at ¶ 79 (emphasis added).

Plaintiffs here submit reams of information in their attempt to "prove" there is no dispute or question whatsoever about the impact of coal mining on climate change and the environment. The problem, again, with their "facts," is that they do not relate to coal mining at Otter Creek (which of course will be thoroughly analyzed in the MEPA and SUMRA process on a mine

permit application), but rather, concern generic, worst-case-scenario coal combustion.[1] Moreover, in contrast to the actual potential violation of Montana's water quality laws at issue in *MEIC*, here the Plaintiffs offer the same unsupported assertions about climate change the Montana Supreme Court has already said it is "ill-equipped to resolve." *Barhaugh*, Sup. Ct. Order No. Op. 11-0258 at 2 (Exhibit 2). For purposes of this case, and for summary judgment, these "facts" are not "material" and should not even be considered. *Broadwater Development, L.L.C. v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 219 P.3d 492 (noting "[w]hether a fact is 'material' depends on the substantive law, i.e., the elements of the cause of action or defenses at issue."). This case involves a decision to lease coal rights, not to authorize mining, the combustion of coal, or the transportation of coal.

Indeed, when the political hyperbole is stripped away, Plaintiffs have not proven, as required in the *MEIC* case, an "unreasonable degradation" of the environment. *MEIC*, ¶¶ 79-80. There has been no data from studies or hearings. There has been no testimony from experts. There is not even a permit that would cause a violation of the environmental standards or policies established by statute. All Plaintiffs have here are generalities about global warming and the threats of a hypothetical and speculative coal mine.[2] As a matter of law, this is not enough.

In fact, due to the express provisions of the MEPA timing statute, the express provisions of the Coal Leases, and the environmental protections found in Montana statutes, the problem

---

[1] In addition to the joint statement of undisputed facts submitted by the parties, Plaintiffs have separately submitted supplemental statements of "undisputed" facts. These "facts" are not undisputed, and are immaterial to the present summary judgment motions.

[2] Despite their voluminous submissions, Plaintiffs have not even shown a link between leasing coal rights – or mining for that matter – and potential harm to Plaintiffs. Even if the Court were to accept those submissions at face value (it should not), the U.S. Environmental Protection Agency itself has found that the correlation between greenhouse gas emissions and impacts to Plaintiffs depends upon how greenhouse gases, in various quantities, affect weather and other climatological patterns, which in turn allegedly impact Plaintiffs and their lands. *See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,524-26, 66,530-36 (Dec. 15, 2009).

created by the unconstitutional statute in *MEIC* ***cannot*** occur here. No preparatory work – of any kind – may be commenced on the Otter Creek mine until a mine-site location or mining permit is approved by the Department of Environmental Quality (DEQ) and the Land Board. Coal Leases § 19 (SUF ¶ 23); Mont. Code Ann. §§ 82-4-121, 122; §§ 82-4-221, 222. There will be no discharges into the environment until the environmental statutes are satisfied, including Mont. Code Ann. § 75-5-303, the very statute the Court in *MEIC* found to be constitutionally sound.

In other words, unlike what happened in *MEIC*, there can be no proven threat of degradation of the environment, if any, until the nature and extent of the impact of the mine are studied, debated and ultimately approved by the DEQ and the Land Board. Thus, Plaintiffs' motions for summary judgment must be denied. *MEIC*, ¶¶ 79-80; *see also Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 37, 305 Mont. 513, 29 P.3d 1011 (finding the right to a clean and healthful environment applicable in a case where "there is a *very real possibility of substantial environmental degradation*" (emphasis added)).[3]

C. Even if the constitutional right to a clean and healthful environment is implicated, and strict scrutiny analysis applied, the MEPA timing statute found at Mont. Code Ann. § 77-1-121(2) is still constitutional.

Even if Plaintiffs are correct that their constitutional right to a clean and healthful environment is implicated and that they are entitled to strict scrutiny analysis (they are not), their motions for summary judgment should still be denied. As found by this Court, even if strict scrutiny analysis applies, the statute survives if a compelling state interest exists and the leasing

---

[3] Both MEIC and NPRC place considerable weight on federal National Environmental Policy Act (NEPA) decisions pertaining to environmental review of mineral right leasing. Most of these cases were fully briefed in the motions to dismiss, but at this point they are extraneous because the summary judgment motions can, and should be, decided under Montana law (including the *MEIC* case).

decision "is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." Order Re Motions to Dismiss 7.

Without question, the State's duty to abide by a specific obligation in the Constitution is a compelling State interest. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (noting the interest of the State "in complying with its constitutional obligations may be characterized as compelling"); *Grutler v. Bollinger,* 539 U.S. 306 (2003) (upholding affirmative action because it serves the compelling interest of promoting racial diversity). In Montana for example, the fundamental right to privacy must yield to the constitutional commands of Article II, Section 11 of the Montana Constitution, which permits searches or investigative subpoenas where probable cause is demonstrated. *Montana v. Nelson*, 283 Mont. 231, 244, 941 P.2d 441, 450 (1997).

Here, the Land Board is under a constitutional obligation to lease school lands for the support and benefit of education and must do so "for the respective purposes for which they have been or may be granted, donated or devised." Mont. Const. Art. X, §§ 4, 11. The Land Board also has a constitutional obligation to follow the directives of the legislature in the disposition of the land. *Montanans for Responsible Use of School Trust v. Darkenwald*, 2005 MT 190, ¶ 61, 328 Mont. 105, 119 P.3d 27. In this case, the Otter Creek coal tracts were acquired from the federal government, by the State, for the purpose of coal development to support Montana's schools and the local economy. For example, Mont. Code Ann. § 77-3-303 dictates that:

> The [Land Board] is encouraged to lease the property interests acquired from the federal government in the Crown Butte land exchange [Otter Creek] for coal mining purposes. The proceeds from the leases must be used for the direct funding of education, including K-12 school districts, institutions of higher education, and vocational-technical education, unless otherwise proved in the transfer agreement.

Furthermore, the legislature has demanded that the management of the mineral interests acquired from the federal government in the Crown Butte land exchange must "optimize the

monetary return to the public school fund" and must "facilitate and encourage timely development of the property interests . . . ." Mont. Code Ann. § 77-1-1002(2)(a), (b). The Land Board made its leasing decision in consideration of these constitutional and statutory boundaries and certainly, for purposes of this "as applied" challenge, *by conditionally leasing the Otter Creek coal,* has "closely tailored" state action to effectuate the constitutional compelling interest.

As discussed above, the Land Board has leased the Otter Creek Coal in such a way that all environmental protections that currently exist at law are preserved to the State. This is the very essence of a "closely tailored" action.

D. The remedy demanded by the Plaintiffs is incorrect and unnecessary.

Plaintiffs in this case contend MEPA should have been conducted at the leasing stage rather than concurrent with SUMRA. Yet they must also admit that MEPA is not substantive and does not demand that the mine be stopped or limited in any way. Nevertheless, Plaintiffs request that the leases be voided in their entirety, and therefore seek a drastic remedy they would never be entitled to in a MEPA challenge. Voiding the leases is thus improper, would accomplish nothing in terms of an environmental review, and would force the State to immediately return the $86 million bonus bid paid by Ark. If this Court finds that MEPA at the leasing stage is required by the Constitution, the remedy lies with conducting MEPA, *not* with voiding the leases.

The proposed remedy for an alleged failure to properly respond to the issue of global warming is *not* a *de facto* injunction imposed by a District Court. Rather, Plaintiffs should look to the legislature and the technical agency (DEQ) with responsibility for protecting Montana's environment. Where a non-self-executing constitutional provision is at issue, "the remedy lies, not with the courts, but with the legislature." *State ex rel. Stafford v. Fox-Great Falls Theatre*

Corp., 114 Mont. 52, 79, 132 P.2d 689, 703 (1942). The remedy for the ostensible constitutional violation of the right to a clean and healthful environment is "only to the extent to which the legislature has declared it [to be] so." *Id.* at 76, 132 at 701. Where adequate remedies at law already exist for an alleged violation of the constitutional right to a clean and healthful environment, there is no constitutional claim. *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶¶ 60-64, 338 Mont. 259, 165 P.3d 1079; *Shammel v. Canyon Resources Corp.*, 2007 MT 206, ¶¶ 8-10, 338 Mont. 541, 167 P.3d 886; *Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 2010 MT 63, ¶ 48, 355 Mont. 387, 228 P.3d 1134.

Plaintiffs have not challenged the constitutionality of pre-2011 amendment MEPA or its remedial provisions, and, in fact, allege MEPA is the *sine qua non* of ensuring constitutional environmental rights.

Pursuant to MEPA, Mont. Code Ann. § 75-1-201:

> (6)(a)(i) A challenge to an agency action under this part may only be brought against a *final agency action* and may only be brought in district court or in federal court, whichever is appropriate.
>
> ...
>
> (iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, *"final agency action" means* the date that the board of land commissioners or the department of natural resources and conservation issues a final environmental review document under this part or the date that the board approves the action that is subject to this part, *whichever is later*.

(emphasis added).

By MEPA's own terms, which Plaintiffs do not challenge, it is not constitutionally deficient to approve an action prior to the issuance of a MEPA document, or defer a challenge to the adequacy of the MEPA document to the latter point of its issuance. Thus, the appropriate remedy, if any is warranted, is to conduct MEPA and for Plaintiffs to challenge the adequacy of MEPA at the time a final environmental review document is issued.

E. Plaintiffs are wrong in their demand that this Court assume the inadequacy of both Federal and State environmental laws.

At their core, these lawsuits are about politics, not the environment, and the Otter Creek coal leases merely provide the rhetorical vehicle by which Plaintiffs complain about the manner in which the Montana Legislature is dealing with global warming. If that were not so, Plaintiffs' arguments would not be almost exclusively directed at the combustion of coal and how it may relate to climate change on a global scale.

In fact, Plaintiffs' entire case is premised on their view that the existing substantive environmental laws are inadequate to protect against the alleged harms they contend may implicate their constitutional right to a clean and healthful environment. Their argument proves too much for them to prevail in this case. If they are correct that the substantive environmental laws are inadequate to protect their constitutional rights, then it is those substantive laws that implicate their constitutional rights, not the procedural provisions of MEPA. Plaintiffs have not directly attacked the substantive environmental laws because they recognize they cannot do so until those laws have been applied at the permitting stage. They should not be allowed to indirectly attack those laws by simply presuming their inadequacy.[4]

Here, the legislature has made an unambiguous and specific determination that the environmental review associated with mine permitting is the appropriate time to evaluate the potential impacts of coal mining. However, Plaintiffs want the Court to focus not on coal mining or the actual Coal Leases, but on global climate change and coal combustion, neither of which

---

[4] Plaintiffs chose to ignore the Coal Leases and comprehensive environmental requirements that will address the very deficiencies they allege, because such an approach does not square with their view of the politics of climate change. These lawsuits are akin to recent unsuccessful efforts by the proponents of climate change regulation to: (1) have the Montana Supreme Court set climate change policy because the state legislature and Governor have allegedly failed to do so, *see Barhaugh,* Montana, Sup. Ct. Order No. OP-11-0258 (June 15, 2011) (Exhibit 2); and (2) seek a United States Supreme Court ruling greenhouse gas emissions constitute a nuisance under federal common law, in the absence of Congressional action to regulate such emissions, *see American Electric Power Co., Inc. v. Connecticut,* No. 10-174, 131 S.Ct. 2527 (U.S. June 20, 2011) (Exhibit 3).

was on the table before the Land Board. This is a political dispute the Court should decline to enter and has nothing to do with the Coal Leases currently before this Court. As a result, Plaintiffs' motions for summary judgment must be denied.

F. Plaintiffs' briefs are replete with inaccuracies, failures of proof and misstatement of law.

As touched upon earlier, Plaintiffs' briefs posit numerous misstatements and inaccuracies. While Ark disagrees with nearly every word in Plaintiffs' briefs and supporting documents, some of the more noteworthy examples of these inaccuracies are as follows:

(1) MEIC on the first line of its brief argues: "The Montana Board of Land Commissioners leased 572 million tons of coal . . . without considering the environmental consequences of its actions or options to minimize or avoid such consequences." MEIC Br. 1. This statement is false. Not only did the Land Board consider the environment, it issued coal leases *preserving all of the existing environmental considerations available at law.*

(2) MEIC argues: "the Land Board has eliminated its opportunity to mitigate significant, secondary impacts of coal mining, particularly the climate change impacts of coal combustion." MEIC Br. 3. This is false. First, Otter Creek is a mine and will not combust coal. Second, the Coal Leases specifically make progress of the mine contingent upon the Land Board's "review and approval of Lessee's mine operation and reclamation plan" and its ability to "prescribe the steps to be taken and reclamation to be made with the land and improvements thereon." Coal Leases §§ 1, 16 (SUF ¶ 23). Despite claiming that the Land Board has eliminated all opportunity to address certain impacts, in the same breath, Plaintiffs are forced to admit that in fact there will be such a review when MEPA is conducted and it includes "assessment of an action's 'primary, secondary, and cumulative impacts.'" MEIC Br. 4 (citing Admin. R. Mont. 36.2.529(4)(b)).

(3) MEIC claims: The Governor's Climate Change Advisory Committee (CCAC) recognized the "likely increase in fossil fuel production that will occur in Montana but that '[k]ey choices in technology and infrastructure can have a significant impact on emissions growth.'" MEIC Br. 6. This is Ark's point exactly. By Plaintiffs' own admission then, the mining of coal does not necessarily lead to unreasonable emissions growth or global warming. MEIC has nicely admitted that it cannot, at this stage, prove that the Otter Creek mine *will* lead to growth in emissions, and certainly cannot show any emissions growth would be contrary to law.

(4) Likewise, MEIC argues: "Montana Governor Schweitzer (a Land Board member) and the Montana CCAC have recognized that economy-wide reductions in carbon dioxide emissions are necessary to achieve emissions reductions essential to averting the worst-case climate change scenarios." MEIC Br. 8. Once again, MEIC has proven Ark's point precisely. Plaintiffs have failed in their burden to prove that the Otter Creek mine *will* lead to higher emissions. According to Plaintiffs, the allowable emissions of carbon dioxide will be set by political entities, and these emission controls will presumably exist regardless of whether the Land Board issues leases for a coal mine.

(5) NPRC argues a litany of possible environmental impacts of coal mining: soil, plants, wildlife, air quality, fugitive dust, gaseous pollutants, nitrogen oxide emissions, groundwater, surface water, runoff rates, erosion rates, vegetation removal, hydro modification, etc. NPRC should be given credit for focusing, at least in part, on mining itself, as opposed to combustion and other matters not at issue in this case. Nevertheless, all of these concerns are precisely what the Coal Leases, SUMRA, and MEPA review will address, so these claims are premature and NRPC cannot possibly prove them because the proof is not available until the

mining plans, baseline environmental data and engineering plans have been submitted. The question before the Court is not whether generic coal mining impacts the environment, it is whether Mont. Code Ann. § 77-1-121(2) and the Coal Leases, by merely delaying MEPA review, violate the Montana Constitution. In that regard, Plaintiffs have offered no proof that the Constitution has been violated and not sustained their burden in a summary judgment motion.

(6) NPRC argues that *MEIC v. Department of Environmental Quality* and *Cape-France v. Estate of Peed* command that fundamental right, strict scrutiny analysis applies to this case. NPRC Br. 18. This is wrong. As discussed above, in *MEIC*, plaintiff *proved* that a specific pump test would lead to a discharge of arsenic into the environment and this discharge could violate nondegration standards. In *Cape-France*, "a very real possibility of substantial environmental degradation" was demonstrated from the construction of a specific well. Plaintiffs have no such proof, but offer generic information about global warming, disembodied from any state action. As a result, strict scrutiny does not apply.

(7) NPRC argues: "Absent the leases, no mining could occur and the harms to Plaintiffs would not exist." NPRC Br. 19. This statement suffers from various problems, including the fact that it claims that the leases authorize mining, which of course is flatly false. It also seems to suggest that the Plaintiffs have some sort of constitutional right to "no mining." To the contrary, the Montana Constitution specifically contemplates, allows for, and *encourages* the use of natural resources, while avoiding "unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, §§ 1, 2. Whether Otter Creek is a "reasonable" depletion of natural resources is not before the Court at this time, certainly not without the voluminous technical record that will be developed before a mining and reclamation permit is actually issued.

IV. CONCLUSION.

For the reasons set forth above, Ark's motion for summary judgment should be granted and Plaintiffs' motions for summary judgment must be denied.

Dated this 29th day of July, 2011.

CROWLEY FLECK PLLP

By: _____

Mark L. Stermitz
Jeffery J. Oven
P. O. Box 7099
Missoula, MT 59807-7099
Attorneys for Defendants
Ark Land Company and Arch Coal, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 29th day of July, 2011:

[X] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[X] Email

Douglas L. Honnold
Jenny K. Harbine
EARTHJUSTICE
209 South Wilson Ave.
Bozeman, MT 59715

[X] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[X] Email

Jack R. Tuholske
TUHOLSKE LAW OFFICE, P.C.
P.O. Box 7458
234 East Pine Street
Missoula, MT 59807

[X] U.S. Mail
[ ] FedEx
[ ] Facsimile
[X] Email

Patrick Parenteau
Vermont Law School
South Royalton, VT 06068

[X] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[X] Email

Anthony Johnstone
Jennifer Anders
Department of Justice
215 North Sanders
Helena, MT 59620

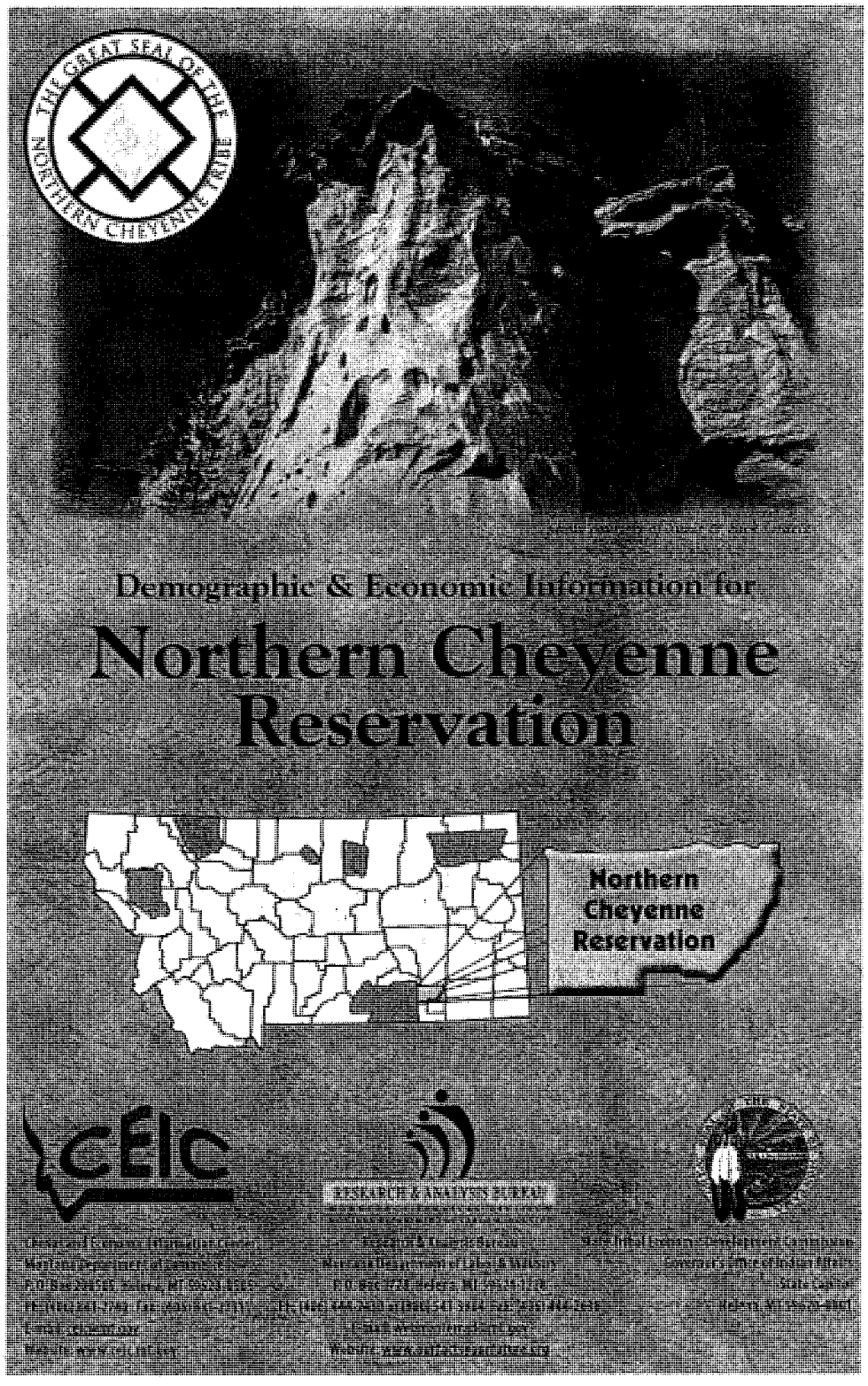
[X] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[X] Email

Candace West
Tom Butler
Department of Natural Resources & Conservation
State of Montana
1625 11th Avenue
Helena, MT 59620-1601

Jeffery J. Oven
CROWLEY FLECK PLLP

EXHIBIT

1


THE GREAT SEAL OF THE NORTHERN CHEYENNE TRIBE
Demographic & Economic Information for
Northern Cheyenne Reservation
Northern Cheyenne Reservation
CEIC
RESEARCH & ANALYSIS BUREAU

EXHIBIT

1

Northern Cheyenne Reservation

The Little Wolf Capitol Building is the Northern Cheyenne Tribe's headquarters, and is located in Lame Deer, Montana. The Tribal homeland encompasses 445,000 acres of grass covered hills, narrow valleys and steep outcroppings near the Tongue River Valley, and is home to nearly 55% of the Tribe's 9,043 enrolled members. Unlike most rural Montana communities, which are losing population, reservations such as Northern Cheyenne are experiencing an increase. According to Tribal Enrollment officials, nearly one-third (1,431) of the population residing on the reservation is below the age of 16.

Beneath the reservation's surface lies part of a coal belt stretching from southeast Montana into Wyoming that is estimated to contain 20 to 50 billion tons of a low-sulfur, relatively clean-burning coal. Legal, environmental and cultural issues involving the Tribe, private industry, and the US Government were decisive and influenced the Tribe's approach in the potential development of its coal, oil and gas resources on the reservation. In addition, the Tribe seeks to tap into renewable energy development projects including wind and solar.

Evolving out of the vocational education program or "Indian Action Program," Chief Dull Knife College (CDKC), an accredited community college, offered its first academic courses in the winter quarter of 1978. From its orgins, CDKC offered students vocational training that would prepare them to enter and succeed in the skilled labor force. Many enrolled in such programs as Heavy Equipment Mechanics and Welding. Today, CDKC has expanded its curricular offerings to include an Associate of Arts degree, an Associate of Applied Science degree, and Vocational Certificates.

A recent initiative, of notable significance, is an effort to improve homeownership on the reservation. To bolster this undertaking the Tribal Council has adopted a new Mortgage Lending Code that provides the security for financial institutions to initiate more home loans for tribal members on the reservation.

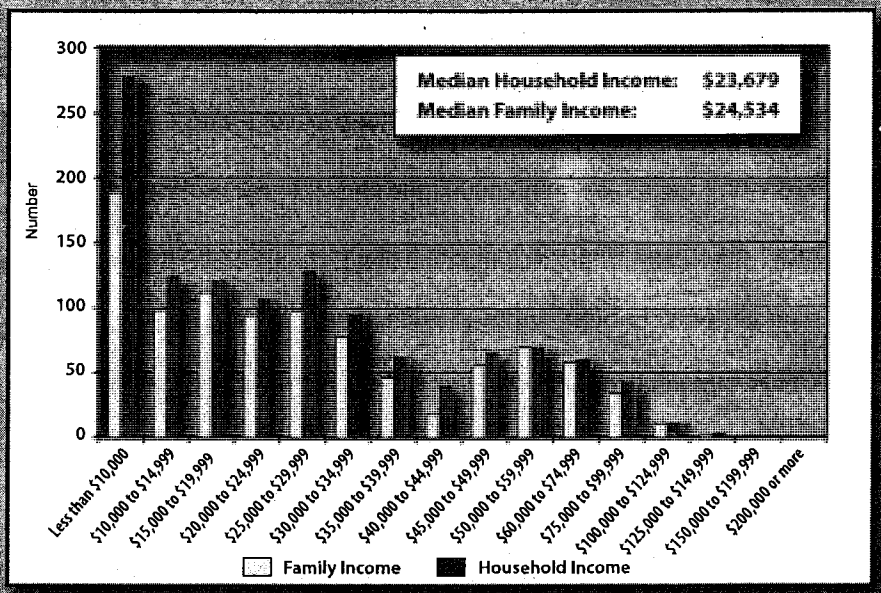
The economy is primarily supported by federal government, tribal government, farming/ranching, and non-native/native owned businesses. The largest employers serving the reservation are the Northern Cheyenne Tribe, providing employment opportunities to 519 employees, Indian Health Service (104), Bureau of Indian Affairs (45), Chief Dull Knife College (61), Lame Deer Public Schools (85), Charging Horse Casino (33), Western Energy (41), and St. Labre Indian School (approx. 300).

Northern Cheyenne Reservation - Agricultural Statistics
2007 Census of Agriculture

	2002		2007	
	All Farms	Farms Operated by American Indians	All Farms	Farms Operated by American Indians
Farms				
Farms: (number)	**64**	**50**	**109**	**98**
Land in farms (acres)	403,152	320,065	474,110	450,933
Average size of farms (acres)	6,299	6,401	4,350	4,601
Farms by size: (number)				
Less than 1,000 acres	43	38	85	77
1,000 acres or more	21	12	24	21
Farms by value of products sold and government payments received: (number)				
Less than $100,000	49	39	95	85
$100,000 or more	15	11	14	13
Farms by type of organization: (number)				
Family, Individual, Partnership	59	46	107	96
Corporation, Cooperative, Trust	5	4	2	2
Livestock Inventory and Crops Harvested				
Livestock and Poultry Inventory (number)				
Cattle and calves	10,364	7,360	11,477	10,715
Hogs and pigs	-	-	(D)	(D)
Sheep and lambs	(D)	(D)	(D)	-
Horses and ponies	558	456	1,096	1,018
Bison	(D)	(D)	(D)	(D)
Chickens (layers and broilers)	0	0	59	(D)
Crops Harvested (acres)				
Corn for grain	-	-	-	-
Corn for silage or greenchop	-	-	-	-
Wheat for grain, All	(D)	-	(D)	-
Winter wheat for grain	(D)	-	(D)	-
Durum wheat for grain	-	-	-	-
Spring wheat for grain	(D)	-	-	-
Barley for grain	(D)	-	-	-
Oats for grain	-	-	(D)	-
Sunflower seed, All	-	-	-	-
Soybeans for beans	-	-	(D)	-
Hay, haylage, grass silage	7,674	4,402	16,860	15,358
Operator Demographics				
Primary occupation: (number)				
Farming	48	30	52	39
Other	59	42	86	71
Place of residence: (number)				
On farm operated	85	52	113	91
Not on farm operated	22	20	25	19
Years on present farm: (number)				
Less than 10 years	23	15	33	25
10 years or more	84	57	105	86
Age group: (number)				
Under 55 years	65	43	53	40
55 years and over	42	29	85	70
Average age of operators: (number)	50.4	50.7	56.6	57.0

(D): Not Disclosable *Source: U.S. Department of Agriculture, National Agricultural Statistics Service*

Northern Cheyenne Reservation - Distribution of Income by Family and Household from Census 2000



Household Income: This includes the income of the householder and all other individuals 15 years old and over in the household, whether they are related to the householder or not. Because many households consist of only one person, average household income is usually less than average family income.
Family Income: In compiling statistics on family income, the incomes of all members 15 years old and over related to the householder are summed and treated as a single amount.
Source: U.S. Census Bureau, Census 2000

Northern Cheyenne Reservation - Educational Attainment
Population 25 Years and Older

Educational Attainment	Total	American Indian
High School Diploma (or equivalent)	27.9%	30.3%
Associate Degree	9.5%	9.8%
Bachelor's Degree	9.8%	6.7%
Master's Degree	2.5%	0.6%

Source: U.S. Census Bureau, Census 2000

Owner and Renter Occupied Housing Units

Housing	Total	American Indian
Owner Occupied	49.5%	52.3%
Rental Occupied	50.5%	47.7%

Source: U.S. Census Bureau, Census 2000

Northern Cheyenne Reservation - Labor Force Statistics

The table below provides labor force statistics from three separate sources. The reader will notice some of the numbers are dissimilar, owing to the differing definitions and statistical techniques used by each source. These differences are explained below:

Bureau of Labor Statistics (BLS):

- Statistics represent labor characteristics of the reservation, not the tribe.
- Unemployment rates produced by MT Department of Labor
- Labor Force definition
  - Civilian, non-institutional population 16 years and older
  - The sum of Employment and Unemployment
- Employment definition
  - Did any work as paid employees
  - Worked in their own business, profession, or farm
  - Worked 15 hours or more as unpaid workers in a family owned enterprise
- Unemployment definition
  - Have not worked during monthly survey period (usually the week containing the 12th of the month)
  - Available for work
  - Actively seeking a job during last four weeks
- Unemployment Rate definition
  - Equal to the number of Unemployed divided by number in the Labor Force

U.S. Census Bureau:

- Statistics represent labor characteristics of the reservation, not the tribe.
- Uses the same definitions for Labor Force, Employment, and Unemployment as BLS
- Self-reported every ten years
- Rate reflects employment status as of April 1st, 2000

Bureau of Indian Affairs (BIA):

- Statistics represent labor characteristics of the tribe, not the reservation.
- Labor Force definition
  - Number of tribal members between 16 and 64 years old
  - Available for work
  - Not disabled or incarcerated
- Employment definition
  - Tribal members working for money
- Unemployment definition
  - Calculated by subtracting Employment from Labor Force

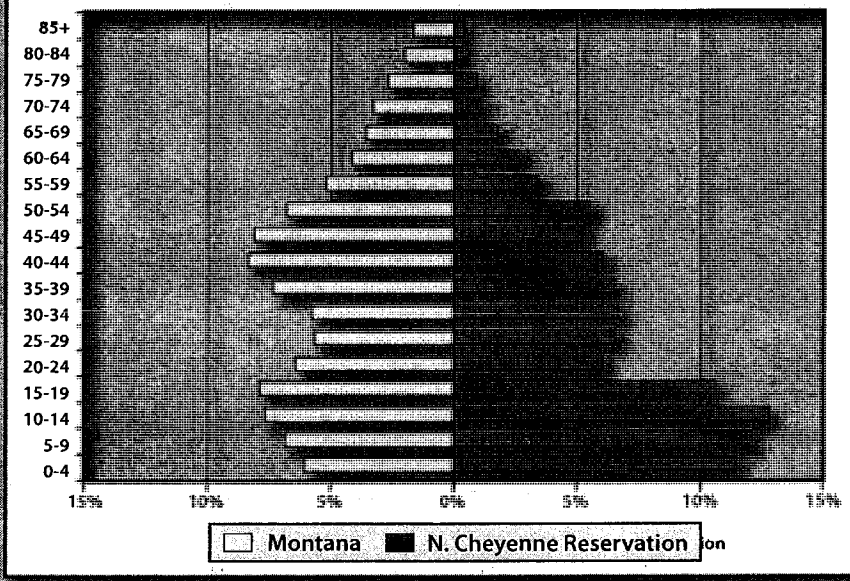
	Year	Labor Force	Employed	Unemp.	Unemp. Rate
MT Dept. of Labor & Industry	2008	1,414	1,232	182	12.9%
U.S. Census Bureau	2000	1,567	1,261	308	19.5%
U.S. Bureau of Indian Affairs	2005	2,927	1,177	1,750	59.8%

Northern Cheyenne Reservation - Occupation by Gender
Employed Civilian Population 16 Years and Over

Occupation	Total	American Indian
Total:	1,261	987
Male:	648	506
Management, professional, and related occupations	207	127
Service occupations	148	144
Sales and office occupations	28	26
Farming, fishing, and forestry occupations	26	17
Construction, extraction, and maintenance occupations	121	99
Production, transportation, and material moving occupations	118	93
Female:	613	481
Management, professional, and related occupations	287	196
Service occupations	119	93
Sales and office occupations	181	168
Farming, fishing, and forestry occupations	4	4
Construction, extraction, and maintenance occupations	0	0
Production, transportation, and material moving occupations	22	20

Source: U.S. Census Bureau, Census 2000

Northern Cheyenne Reservation - Population Pyramid
Percent of Total Reservation Population by Age Group



Source: U.S. Census Bureau, Census 2000

Northern Cheyenne Reservation Wage & Salary Employment - Annual Averages 2006 - 2008

Industry	2006		2008		Employ Growth	Wage Growth
	Employ.	Wages	Employ.	Wages		
Total	1,027	$27,815	1,133	$28,934	10.3%	4.0%
Total Private	181	$14,411	250	$13,944	38.1%	-3.2%
Goods Producing	8	$11,749	NA	NA	NA	NA
Construction	5	$16,402	NA	NA	NA	NA
Service Providing	173	$14,532	249	$13,970	43.9%	-3.9%
Retail Trade	80	$11,889	66	$13,782	-17.5%	15.9%
Professional & Business Services	4	$13,353	10	$21,011	150.0%	57.4%
Leisure & Hospitality	56	$15,768	NA	NA	NA	NA
Accommodation and Food Services	NA	NA	18	$9,870	NA	NA
Other Services	NA	NA	10	$28,260	NA	NA
Total Government	846	$30,675	883	$33,178	4.4%	8.2%
Federal Government	166	$49,218	170	$52,405	2.4%	6.5%
Local Government	681	$26,162	713	$28,593	4.7%	9.3%
Local Government Education	226	$28,589	228	$31,234	0.9%	9.3%
Local Government Non-Education	455	$24,960	485	$27,352	6.6%	9.6%

Source: U.S. Bureau of Labor Statistics
Note: This data is based on the Quarterly Census of Employment and Wages (QCEW) series which compiles data reported by all employers covered under Montana unemployment insurance. Some sectors are not shown to preserve confidentiality of individual businesses.

American Indian and Total Population for Northern Cheyenne Reservation and Related Areas

	American Indian Population						
	Census	Estimates					
Geography	2000	2003	2004	2005	2006	2007	2008
Northern Cheyenne Reservation	4,029	n/a	n/a	n/a	n/a	n/a	n/a
Big Horn County	7,560	7,691	7,714	7,684	7,672	7,724	7,761
Busby CDP*	622	n/a	n/a	n/a	n/a	n/a	n/a
Muddy CDP*	591	n/a	n/a	n/a	n/a	n/a	n/a
Rosebud County	3,041	3,121	3,163	3,219	3,238	3,295	3,309
Ashland CDP*	349	n/a	n/a	n/a	n/a	n/a	n/a
Birney CDP*	93	n/a	n/a	n/a	n/a	n/a	n/a
Lame Deer CDP*	1,866	n/a	n/a	n/a	n/a	n/a	n/a

	Total Population						
	Census	Estimates					
Geography	2000	2003	2004	2005	2006	2007	2008
Northern Cheyenne Reservation	4,470	n/a	n/a	n/a	n/a	n/a	n/a
Big Horn County	12,671	12,732	12,844	12,769	12,703	12,751	12,809
Busby CDP*	695	n/a	n/a	n/a	n/a	n/a	n/a
Muddy CDP*	677	n/a	n/a	n/a	n/a	n/a	n/a
Rosebud County	9,383	9,216	9,151	9,147	9,079	9,126	9,150
Ashland CDP*	464	n/a	n/a	n/a	n/a	n/a	n/a
Birney CDP*	108	n/a	n/a	n/a	n/a	n/a	n/a
Lame Deer CDP*	2,018	n/a	n/a	n/a	n/a	n/a	n/a

Source: U.S. Census Bureau n/a = Not available

**Census designated places (CDPs) are delineated for each decennial census as the statistical counterparts of incorporated places. CDPs are closely settled, named places that are locally recognized and identified by name, but are not legally incorporated under the laws of the state in which they are located. The boundaries usually are defined in cooperation with local governmental officials. These boundaries usually coincide with visible features or the boundary of an adjacent incorporated place or other legal entity boundary shown on the Census Bureau's maps. CDP boundaries, names, and codes are updated for the decennial censuses.*

Northern Cheyenne Reservation Information

Tribal Council President
Jerry Chilcoat

Tribe:
Northern Cheyenne

Tribe Address:
Northern Cheyenne Tribal Council
P.O. Box 128, Lame Deer MT 59043
406-477-6284, www.cheyenne.net

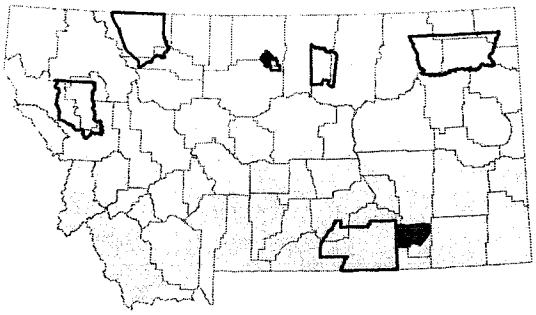
Governor
Rick Williamson

Chief Dull Knife College:
P.O Box 98, 1 College Drive, Lame Deer MT
59043, 406-477-6215, www.cdkc.edu

750 copies of this public document were published at an estimated cost of $0.62 per copy, for a total cost of $467.71 which includes $467.71 for printing and $0.00 for distribution.

NORTHERN CHEYENNE RESERVATION

The poverty rate for the Northern Cheyenne Reservation decreased from 48.2% in 1990 to 46.1% in 2000. In 2005, the reservation had a higher unemployment rate (59.8%) than the average unemployment rate for all Montana reservations combined (51.6%). The percentage of school-age children eligible for free and reduced school lunch on the reservation increased from 84.8% in 2007 to 90.5% in 2010.



Poverty Rate

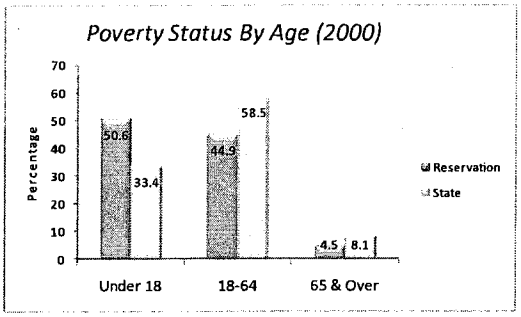
- The poverty rate for the Northern Cheyenne Reservation was 46.1%, while the rate for all Montana reservations was 30.4% in 2000.
- From 1990 to 2000, the poverty rate for the reservation and all Montana reservations decreased.

Poverty Rate	Reservation	All Reservations[1]
(%) In 1990	48.2	34.2
(%) In 2000	46.1	30.4

[1]Little Shell Reservation not included for 1990.

Poverty Status By Age

- In 2000, the reservation had a greater percentage of individuals under the age of 18 in poverty than the state average, and a lesser percentage of individuals 18 to 64 years of age in poverty.



Unemployment Rate

- In 2005, the Northern Cheyenne Reservation had a higher unemployment rate (59.8%) than the average unemployment rate for all Montana reservations combined (51.6%).

2005 Unemployment	Reservation	All Reservations[1]
(#) Available for work	2,927	27,720
(#) Employed	1,177	13,419
(#) Not employed	1,750	52
(%) Unemployment Rate*	59.8	51.6

**Calculated by dividing the number of not employed individuals by the number of individuals available for work. [1]Little Shell Reservation not included.*

NORTHERN CHEYENNE RESERVATION

Utilization of SNAP (Supplemental Nutrition Assistance Program) & TANF (Temporary Assistance for Needy Families)

- From 2009 to 2010, the monthly average number of SNAP households increased by 11.1% for the reservation and 12.4% for all Montana reservations.

Monthly Average Utilization	Reservation[1]	All Reservations[2]
(#) Households for 2009	805	8,227
(#) Households for 2010	894	9,247
(%) Change 2009-2010	11.1	12.4

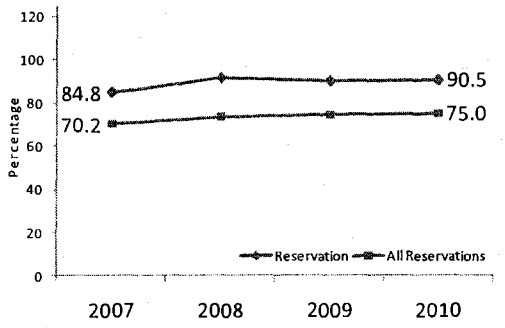
[1]Chart figures calculated by adding Native American data for Rosebud County and 1/4 of Big Horn County. [2]Native American data of households living on or near Montana's reservations except Little Shell. Calculated by adding Native American data for Big Horn, Blaine, Choteau, Daniels, Glacier, Hill, Lake, Missoula, Phillips, Pondera, Rosebud, Roosevelt, Sanders, Sheridan, Valley and Yellowstone Counties.

A General Assistance (or GA program) through the Bureau of Indian Affairs exists for Native Americans residing on the reservation. GA serves as a last resort when no income exists and eligibility for other assistance programs is not avoilable. GA data is currently unavailable. TANF information is currently unavailable.

Free & Reduced School Lunch Eligibility

- From 2007 to 2010, the Northern Cheyenne Reservation had a higher percentage of eligible students for the school lunch program than the average for all Montana reservations combined.
- In 2010, student eligibility on the Northern Cheyenne Reservation was 90.5%, while all Montana reservations averaged 75%.
- The percentage of school-age children eligible for free and reduced school lunch on the reservation increased from 84.8% in 2007 to 90.5% in 2010.

*Eligible for Free & Reduced School Lunch**



**Calculated by dividing the number of eligible students by the total number of students enrolled in schools residing on or near the reservation. Any missing data has been supplemented with existing school data from 2008.*

Utilization of LIHEAP (Low Income Home Energy Assistance Program)

- From 2003 to 2009, LIHEAP utilization increased by 28.2% for the reservation and 30% for all Montana reservations.

Yearly LIHEAP Utilization	Reservation[1]	All Reservations[2]
(#) Households for 2003	109	1,378
(#) Households for 2009	140	1,792
(%) Change 2003-2009	28.2	30.0

[1]Calculated by adding Native American data for Rosebud County and 1/4 of Big Horn County. [2]Native American data of households living on or near Montana's reservations except the Little Shell Reservation. Calculated by adding Native American data for Big Horn, Blaine, Choteau, Daniels, Glacier, Hill, Lake, Missoula, Phillips, Pondera, Rosebud, Roosevelt, Sanders, Sheridan, Valley and Yellowstone Counties.

Other home energy assistance is available on the reservation that is not included here.

NORTHERN CHEYENNE RESERVATION

Medicaid Utilization Estimates

- From 2008 to 2009, the monthly average number of Medicaid recipients decreased by 4.8% for the reservation and increased by 0.3% for all Montana reservations.

Monthly Average Utilization	Reservation[1]	All Reservations[2]
(#) Recipients for 2008	1,795	16,673
(#) Recipients for 2009	1,708	16,727
(%) Change 2008-2009	-4.8	0.3

[1]Chart figures calculated by adding Native American data for Rosebud and 1/4 Big Horn Counties. [2]Native American data of recipients living on or near Montana's reservations except Little Shell. Calculated by adding Native American data for Big Horn, Blaine, Chateau, Daniels, Glacier, Hill, Lake, Missoula, Phillips, Pondera, Rasebud, Roosevelt, Sanders, Sheridan, Valley and Yellowstone Counties.

Population

- From 1990 to 2000, the Northern Cheyenne Reservation gained about 12.3% of its population, while the state of Montana gained about 11.4% overall.

Population Change	Reservation	State
(#) In 1990	3,923	799,065
(#) In 2000	4,471	902,195
(%) Change	12.3	11.4

Labor Force

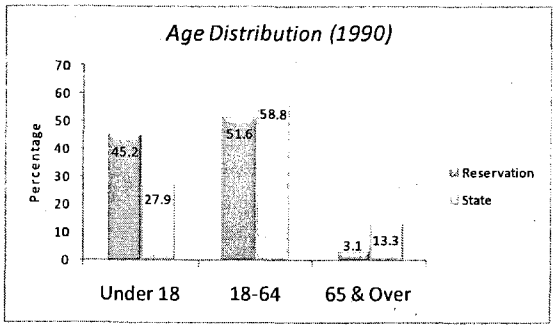
- From 1990 to 2000, the labor force in the reservation increased by 10.4%, while the labor force for all Montana reservations increased by 23.6%.

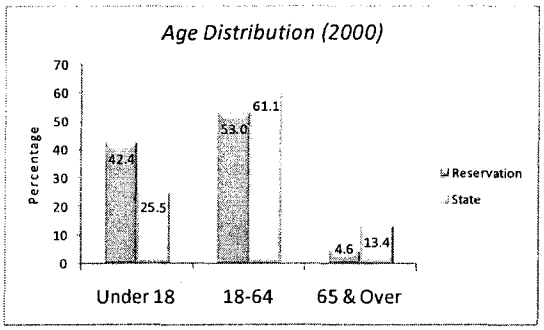
Labor Force	Reservation	All Reservations[1]
(#) In 1990	1,419	376,940
(#) In 2000	1,567	458,306
(%) Change	10.4	23.6

[1]Little Shell Reservation not included.

Age Distribution

- For 1990 and 2000, the age distribution for the reservation indicates a greater proportion of individuals under the age of 18 reside on the reservation as compared with the state.





NORTHERN CHEYENNE RESERVATION

Dependency Ratios

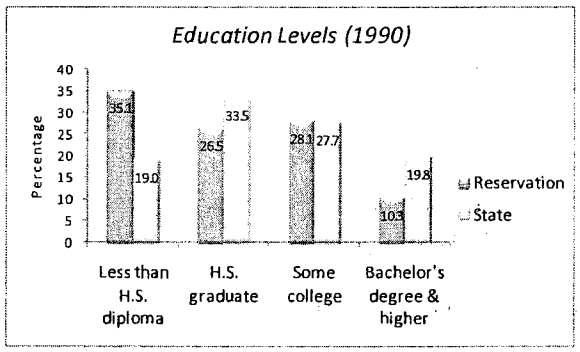
- In 2000, the dependency ratio for the reservation of 88.6% was greater than the state average of 63.7%.
- The dependency ratio for the reservation was greater than the state ratio due to a higher percentage of young people residing on the reservation.

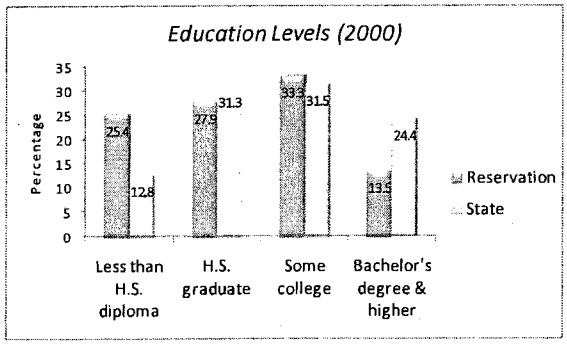
Dependency Ratios	Reservation	State
(%) In 1990	93.7	70.1
(%) In 2000	88.6	63.7

The **dependency ratio** for a given group is the economically dependent portion of the population to the potentially employable portion of the same population.

Educational Attainment Age 25 and Older

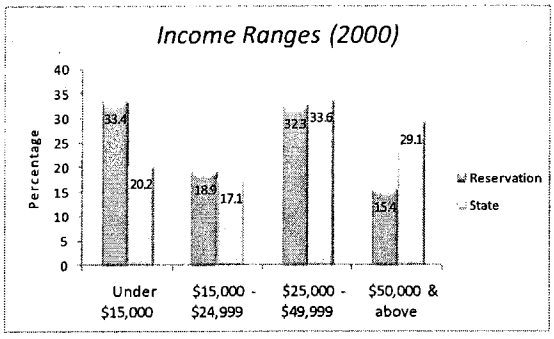
- From 1990 to 2000, the percentage of reservation residents age 25 and over that did not obtain a high school diploma decreased from 35.1% to 25.4%. The percentage for the state decreased from 19% to 12.8%.





Ranges of Income

- The reservation (52.3%) had a greater percentage of households earning less than $25,000 a year than the state average (37.3%) in 2000.



NORTHERN CHEYENNE RESERVATION

Median Income

- In 2000, the median and per-capita income amounts were lower for the reservation than for the state overall.

Median Income (2000)	Reservation	State
($) Median Household Income	23,679	33,024
($) Per-Capita Income	7,736	17,151
(#) Total Households	1,204	359,070

The **Median Household Income** represents the middle value of household incomes. Fifty percent of household incomes fall below the median value, and fifty percent of household incomes fall about the median income amount.

Personal Income by Source

Information is currently unavailable.

Transfer Payments

Information is currently unavailable.

EXHIBIT

2

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 11-0258

KIP BARHAUGH; TIMOTHY BECHTOLD as natural parent and on behalf of S.B. and B.B.; RYAN BUSSE as natural parent and on behalf of L.B. and B.B.; GRADEN HAHN and JAMUL F. HAHN as natural parents and on behalf of A.H. and A.H.; EMILY HOWELL; LARRY HOWELL as natural parent and on behalf of S.H.; MAYLINN SMITH as natural parent and on behalf of W.F. and M.F.; and JOHN THIEBES,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

ORDER

Petitioners ask us to enter judgment in this original proceeding to declare that the State of Montana (State) holds the atmosphere in trust for the present and future citizens of the State of Montana. Petitioners further contend that this trust imposes on the State the affirmative duty to protect and preserve the atmosphere, including establishing and enforcing limitations on the levels of greenhouse gas emissions as necessary to mitigate human-caused climate change. At our request, the office of the Attorney General of the State of Montana has filed a summary response to the petition on behalf of the State.

A group that refers to itself as "Legislative Leaders" has moved for leave to file an amicus brief. A second group, the first identified member of which is a non-profit association called Climate Physics Institute, has moved for leave to intervene. Both of these groups state that their motions are opposed by both the Petitioners and the State.

An original proceeding in the form of a declaratory judgment may be commenced before this Court under limited circumstances. The circumstances include the presence of

constitutional issues of statewide importance, where the case involves purely legal questions of statutory and constitutional construction, and urgency and emergency factors make the normal appeal process inadequate. M. R. App. P. 14(4). We are persuaded by the State's response that this petition fails to satisfy these criteria.

As the State points out, the petition incorporates factual claims such as that the State "has been prevented by the Legislature from taking any action to regulate [greenhouse gas] emissions[.]" The State posits that the relief requested by Petitioners would require numerous other factual determinations, such as the role of Montana in the global problem of climate change and how emissions created in Montana ultimately affect Montana's climate.

The State further points out that in relation to urgency and emergency factors making the normal appeal process inadequate, this action is part of a nationwide effort known as the Atmospheric Trust Litigation. The State notes that Montana apparently is the only jurisdiction in which the litigation has been filed as an original proceeding in the state's highest court. *See* www.ourchildrenstrust.org.

We conclude this case does not involve purely legal questions. This Court is ill-equipped to resolve the factual assertions presented by Petitioners. We further conclude that Petitioners have not established urgency or emergency factors that would preclude litigation in a trial court followed by the normal appeal process. Petitioners have failed to establish how emergent factors exist in Montana that require this Court's immediate attention in light of the lack of original litigation in the other forty-nine states.

Therefore,

IT IS ORDERED that the Petition for Original Jurisdiction is DENIED and DISMISSED.

IT IS FURTHER ORDERED that the Legislative Leaders' Motion to File an Amicus Brief is DENIED.

IT IS FURTHER ORDERED that the Climate Physics Institute group's Motion to Intervene is DENIED.

The Clerk is directed to provide copies of this Order to all counsel of record, counsel for Legislative Leaders, and counsel for Climate Physics Institute.

DATED this 15th day of June, 2011.

Justices

EXHIBIT

3

131 S.Ct. 2527, 72 ERC 1609, 79 USLW 4547, 11 Cal. Daily Op. Serv. 7480, 2011 Daily Journal D.A.R. 8968, 22 Fla. L. Weekly Fed. S 1184
(Cite as: 131 S.Ct. 2527)

H

Supreme Court of the United States
AMERICAN ELECTRIC POWER COMPANY, INC., et al., Petitioners,
v.
CONNECTICUT et al.

No. 10–174.
Argued April 19, 2011.
Decided June 20, 2011.

Background: Eight states, New York City, and three land trusts separately sued the same electric power corporations that owned and operated fossil-fuel-fired power plants in twenty states, seeking abatement of defendants' ongoing contributions to public nuisance of global warming. The United States District Court for the Southern District of New York, Loretta A. Preska, Chief Judge, 406 F.Supp.2d 265, dismissed plaintiffs' federal common law nuisance claims as non-justiciable under the political question doctrine, and plaintiffs appealed. The United States Court of Appeals for the Second Circuit, Peter W. Hall, Circuit Judge, 582 F.3d 309, vacated and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:
(1) for an equally divided court, at least some plaintiffs had Article III standing under *Massachusetts v. EPA* which permitted state to challenge refusal of Environmental Protection Agency (EPA) to regulate greenhouse gas emissions, and no other threshold obstacle barred review;
(2) Clean Air Act (CAA) and EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants; and
(3) availability of claim under state nuisance law would be left for consideration on remand.

Reversed and remanded.

Justice Alito filed opinion concurring in part and concurring in the judgment in which Justice Thomas joined.

Justice Sotamayor did not participate.

West Headnotes

[1] Environmental Law 149E ⚿654

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek654 k. Government entities, agencies, and officials. Most Cited Cases

Environmental Law 149E ⚿656

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek656 k. Other particular parties. Most Cited Cases

Nuisance 279 ⚿82

279 Nuisance
279II Public Nuisances
279II(C) Abatement and Injunction
279k82 k. Persons by or against whom proceedings may be brought. Most Cited Cases

In action by eight states, New York City, and three land trusts against electric power corporations that owned and operated fossil-fuel-fired power plants in twenty states seeking abatement of their ongoing contributions to public nuisance of global warming, plaintiffs had Article III standing under Supreme Court's 2007 *Massachusetts v. EPA* decision which permitted a state to challenge refusal of Environmental Protection Agency (EPA) to regulate greenhouse gas emissions, and no other

EXHIBIT 3

threshold obstacle barred review. (Per Justice Ginsburg for an equally divided court.) U.S.C.A. Const. Art. 3, § 2, cl. 1; Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[2] Federal Courts 170B ⚿371

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk371 k. Nature and extent of authority. Most Cited Cases

Recognition that a subject is meet for federal law governance does not necessarily mean that federal courts should create the controlling law; absent a demonstrated need for a federal rule of decision, prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.

[3] Statutes 361 ⚿222

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k222 k. Construction with reference to common or civil law. Most Cited Cases

Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law; test for whether congressional legislation excludes declaration of federal common law is simply whether statute speaks directly to question at issue.

[4] Environmental Law 149E ⚿250

149E Environmental Law
149EVI Air Pollution
149Ek249 Concurrent and Conflicting Statutes or Regulations
149Ek250 k. In general. Most Cited Cases

Nuisance 279 ⚿59

279 Nuisance
279II Public Nuisances
279II(A) Nature of Injury, and Liability Therefor
279k59 k. Nature and elements of public nuisance in general. Most Cited Cases

Clean Air Act (CAA) and Environmental Protection Agency (EPA) actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[5] Environmental Law 149E ⚿250

149E Environmental Law
149EVI Air Pollution
149Ek249 Concurrent and Conflicting Statutes or Regulations
149Ek250 k. In general. Most Cited Cases

Environmental Protection Agency (EPA) need not actually exercise its regulatory authority under Clean Air Act (CAA), i.e., set standards governing greenhouse gas emissions from electric power plants, for federal common law to be displaced; relevant question for purposes of displacement is whether the field has been occupied, not whether it has been occupied in a particular manner. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

[6] Courts 106 ⚿96(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k96 Decisions of United States Courts as Authority in Other United States Courts
106k96(1) k. In general. Most Cited Cases

Federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

[7] Federal Courts 170B ⚿462

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk462 k. Determination and disposition of cause. Most Cited Cases

Availability of nuisance claim against operators of fossil-fuel fired power plants under laws of states where plants were operated would be left for consideration on remand by United States Supreme Court following determination that federal common law right to seek abatement of carbon dioxide emissions from those plants had been displaced by Clean Air Act (CAA), where none of the parties had briefed issue of preemption or otherwise addressed availability of claim under state nuisance law. Clean Air Act, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

***2529** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248, this Court held that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases, and that the Environmental Protection Agency (EPA) had misread that Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. In response, EPA commenced a rulemaking under § 111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a final rule by May 2012.

The lawsuits considered here began well before EPA initiated efforts to regulate greenhouse gases. Two groups of plaintiffs, respondents here, filed separate complaints in a Federal District Court against the same five major electric power companies, petitioners here. One group of plaintiffs included eight States and New York City; the second joined three nonprofit land trusts. According to the complaint, the defendants are the largest emitters of carbon dioxide in the Nation. By contributing to global warming, the plaintiffs asserted, the defendants' emissions substantially and unreasonably interfered with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. All plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually.

The District Court dismissed both suits as presenting nonjusticiable political questions, but the Second Circuit reversed. On the threshold questions, the Circuit held that the suits were not barred by the political question doctrine and that the plaintiffs had adequately alleged Article III standing. On the merits, the court held that the plaintiffs had stated a claim under the "federal common law of nuisance," relying on this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry, see, *e.g., Illinois v. Milwaukee,* 406 U.S. 91, 93, 92 S.Ct. 1385, 31 L.Ed.2d 712 ***2530***(Milwaukee I)*. The court further determined that the Clean Air Act did not "displace" federal common law.

Held:

1. The Second Circuit's exercise of jurisdiction is affirmed by an equally divided Court. P. 2535.

2. The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Pp. 2535 – 2540.

(a) Since *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, recognized that

there "is no federal general common law," a new federal common law has emerged for subjects of national concern. When dealing "with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I,* 406 U.S., at 103, 92 S.Ct. 1385. Decisions of this Court predating *Erie,* but compatible with the emerging distinction between general common law and the new federal common law, have approved federal common-law suits brought by one State to abate pollution emanating from another State. See, *e.g., Missouri v. Illinois,* 180 U.S. 208, 241–243, 21 S.Ct. 331, 45 L.Ed. 497. The plaintiffs contend that their right to maintain this suit follows from such cases. But recognition that a subject is meet for federal law governance does not necessarily mean that federal courts should create the controlling law. The Court need not address the question whether, absent the Clean Air Act and the EPA actions it authorizes, the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions. Pp. 2535 – 2537.

(b) "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee v. Illinois,* 451 U.S. 304, 314, 101 S.Ct. 1784, 68 L.Ed.2d 114 *(Milwaukee II).* Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. *Id.,* at 317, 101 S.Ct. 1784. Rather, the test is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581. Here, *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Clean Air Act. 549 U.S., at 528–529, 127 S.Ct. 1438. And it is equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants. The Act directs EPA to establish emissions standards for categories of stationary sources that, "in [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, it must establish performance standards for emission of pollutants from new or modified sources within that category, § 7411(b)(1)(B), and, most relevant here, must regulate existing sources within the same category, § 7411(d). The Act also provides multiple avenues for enforcement. If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1). The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs***2531** seek by invoking federal common law. There is no room for a parallel track. Pp. 2536 – 2538.

(c) The Court rejects the plaintiffs' argument, and the Second Circuit's holding, that federal common law is not displaced until EPA actually exercises its regulatory authority by setting emissions standards for the defendants' plants. The relevant question for displacement purposes is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II,* 451 U.S., at 324, 101 S.Ct. 1784. The Clean Air Act is no less an exercise of the Legislature's "considered judgment" concerning air pollution regulation because it permits emissions until EPA acts. The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation displaces federal common law. If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse is to seek Court of Appeals review, and, ultimately, to petition for certiorari.

The Act's prescribed order of decisionmak-

ing—first by the expert agency, and then by federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in a particular greenhouse gas-producing sector requires informed assessment of competing interests. The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. The expert agency is surely better equipped to do the job than federal judges, who lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. The plaintiffs' proposal to have federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable" and what level of reduction is necessary cannot be reconciled with Congress' scheme. Pp. 2538 – 2540.

(d) The plaintiffs also sought relief under state nuisance law. The Second Circuit did not reach those claims because it held that federal common law governed. In light of the holding here that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act. Because none of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law, the matter is left for consideration on remand. P. 2540.

582 F.3d 309, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, BREYER, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.
Peter D. Keisler, Washington, DC, for Petitioners.

Neal Kumar Katyal, for Respondent Tennessee Valley Authority, supporting the Petitioners.

Barbara D. Underwood, New York, NY, for Respondents Connecticut, et al.

F. William Brownell, Norman W. Fichthorn, Allison D. Wood, Hunton & Williams LLP, Washington, D.C., Shawn Patrick Regan, Hunton & Williams LLP, New York, N.Y., for Petitioner Southern Company.

Peter D. Keisler, Carter G. Phillips, David T. Buente Jr., Roger R. Martella Jr., Quin M. Sorenson, James W. Coleman, *2532 Sidley Austin LLP, Washington, D.C., Martin H. Redish, Chicago, Illinois, for Petitioners.

Donald B. Ayer, Kevin P. Holewinski, Jones Day, Washington, D.C., Thomas E. Fennell, Michael L. Rice, Jones Day, Dallas, Texas, for Petitioner Xcel Energy Inc.

Neal Kumar Katyal, Acting Solicitor General, Washington, D.C., for the Tennessee Valley Authority as Respondent Supporting Petitioners.

Michael K. Kellogg, Gregory G. Rapawy, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C., Matthew F. Pawa, Newton Centre, MA, David D. Doniger, Gerald Goldman, Washington, D.C., for Respondents Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

Eric T. Schneiderman, Attorney General of New York, Barbara D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, Monica Wagner, Assistant Solicitor General, Michael J. Myers, Morgan A. Costello, Robert Rosenthal, Assistant Attorneys General, New York, NY, George Jepsen, Attorney General of Connecticut, Hartford, CT, Kamala D. Harris, Attorney General of California, Oakland, CA, Thomas J. Miller, Attorney General of Iowa, Des Moines, IA, Peter F. Kilmartin, Attorney General of Rhode Island, Providence, RI, William H. Sorrell, Attorney General of Vermont, Montpelier, VT, Michael A. Cardozo, New York, NY, for Respondents Connecticut, New York, California, Iowa, Rhode Island, Ver-

mont, and the City of New York.

For U.S. Supreme Court Briefs, See:2011 WL 334707 (Pet.Brief)2011 WL 882590 (Resp.Brief)2011 WL 915093 (Resp.Brief)2011 WL 1393804 (Reply.Brief)2011 WL 1393805 (Reply.Brief)

Justice GINSBURG delivered the opinion of the Court.

We address in this opinion the question whether the plaintiffs (several States, the city of New York, and three private land trusts) can maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). As relief, the plaintiffs ask for a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.

I

In *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), this Court held that the Clean Air Act, 42 U.S.C. § 7401 *et seq.,* authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. "[N]aturally present in the atmosphere and ... also emitted by human activities," greenhouse gases are so named because they "trap ... heat that would otherwise escape from the [Earth's] atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life." 74 Fed.Reg. 66499 (2009). [FN1] *Massachusetts* held that the Environmental Protection Agency (EPA) had misread the Clean Air Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. 549 U.S., at 510–511, 127 S.Ct. 1438. Greenhouse gases,***2533** we determined, qualify as "air pollutant[s]" within the meaning of the governing Clean Air Act provision, *id.,* at 528–529, 127 S.Ct. 1438 (quoting § 7602(g)); they are therefore within EPA's regulatory ken. Because EPA had authority to set greenhouse gas emission standards and had offered no "reasoned explanation" for failing to do so, we concluded that the agency had not acted "in accordance with law" when it denied the requested rulemaking. *Id.,* at 534–535, 127 S.Ct. 1438 (quoting § 7607(d)(9)(A)).

> FN1. In addition to carbon dioxide, the primary greenhouse gases emitted by human activities include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 74 Fed.Reg. 66499.

Responding to our decision in *Massachusetts,* EPA undertook greenhouse gas regulation. In December 2009, the agency concluded that greenhouse gas emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," the Act's regulatory trigger. § 7521(a)(1); 74 Fed.Reg. 66496. The agency observed that "atmospheric greenhouse gas concentrations are now at elevated and essentially unprecedented levels," almost entirely "due to anthropogenic emissions," *id.,* at 66517; mean global temperatures, the agency continued, demonstrate an "unambiguous warming trend over the last 100 years," and particularly "over the past 30 years," *ibid.* Acknowledging that not all scientists agreed on the causes and consequences of the rise in global temperatures, *id.,* at 66506, 66518, 66523–66524, EPA concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases, *id.,* at 66518. Consequent dangers of greenhouse gas emissions, EPA determined, included increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of

food production. *Id.,* at 66524–66535.[FN2]

FN2. For views opposing EPA's, see, *e.g.,* Dawidoff, The Civil Heretic, N.Y. Times Magazine 32 (March 29, 2009). The Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change.

EPA and the Department of Transportation subsequently issued a joint final rule regulating emissions from light-duty vehicles, see 75 Fed.Reg. 25324 (2010), and initiated a joint rulemaking covering medium- and heavy-duty vehicles, see *id.,* at 74152. EPA also began phasing in requirements that new or modified "[m]ajor [greenhouse gas] emitting facilities" use the "best available control technology." § 7475(a)(4); 75 Fed.Reg. 31520–31521. Fin-ally, EPA commenced a rulemaking under § 111 of the Act, 42 U.S.C. § 7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. Pursuant to a settlement finalized in March 2011, EPA has committed to issuing a proposed rule by July 2011, and a final rule by May 2012. See 75 Fed.Reg. 82392; Reply Brief for Tennessee Valley Authority 18.

II

The lawsuits we consider here began well before EPA initiated the efforts to regulate greenhouse gases just described. In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five major electric power companies. The first group of plaintiffs included eight States [FN3] ***2534** and New York City, the second joined three nonprofit land trusts [FN4]; both groups are respondents here. The defendants, now petitioners, are four private companies [FN5] and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several States. According to the complaints, the defendants "are the five largest emitters of carbon dioxide in the United States." App. 57, 118. Their collective annual emissions of 650 million tons constitute 25 percent of emissions from the domestic electric power sector, 10 percent of emissions from all domestic human activities, *ibid.,* and 2.5 percent of all anthropogenic emissions worldwide, App. to Pet. for Cert. 72a.

FN3. California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, although New Jersey and Wisconsin are no longer participating. Brief for Respondents Connecticut et al. 3, n. 1.

FN4. Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire.

FN5. American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation.

By contributing to global warming, the plaintiffs asserted, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. App. 103–105, 145–147. The States and New York City alleged that public lands, infrastructure, and health were at risk from climate change. App. 88–93. The trusts urged that climate change would destroy habitats for animals and rare species of trees and plants on land the trusts owned and conserved. App. 139–145. All plaintiffs sought injunctive relief requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." App. 110, 153.

The District Court dismissed both suits as presenting non-justiciable political questions, citing *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), but the Second Circuit reversed, 582 F.3d 309 (2009). On the threshold questions, the Court of Appeals held that the suits

were not barred by the political question doctrine, *id.,* at 332, and that the plaintiffs had adequately alleged Article III standing, *id.,* at 349.

Turning to the merits, the Second Circuit held that all plaintiffs had stated a claim under the "federal common law of nuisance." *Id.,* at 358, 371. For this determination, the court relied dominantly on a series of this Court's decisions holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry. *Id.,* at 350–351; see, *e.g., Illinois v. Milwaukee,* 406 U.S. 91, 93, 92 S.Ct. 1385, 31 L.Ed.2d 712, (1972) (*Milwaukee I*) (recognizing right of Illinois to sue in federal district court to abate discharge of sewage into Lake Michigan).

The Court of Appeals further determined that the Clean Air Act did not "displace" federal common law. In *Milwaukee v. Illinois,* 451 U.S. 304, 316–319, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (*Milwaukee II*), this Court held that Congress had displaced the federal common law right of action recognized in *Milwaukee I* by adopting amendments to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* That legislation installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution. The legislation itself prohibited the discharge ***2535** of pollutants into the waters of the United States without a permit from a proper permitting authority. *Milwaukee II,* 451 U.S., at 310–311, 101 S.Ct. 1784 (citing § 1311). At the time of the Second Circuit's decision, by contrast, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive. 582 F.3d, at 379–381. "Until EPA completes the rulemaking process," the court reasoned, "we cannot speculate as to whether the hypothetical regulation of greenhouse gases under the Clean Air Act would in fact 'spea[k] directly' to the 'particular issue' raised here by Plaintiffs." *Id.,* at 380.

We granted certiorari. 562 U.S. ——, 131 S.Ct. 2527, —— L.Ed.2d ——, 2011 WL 2437011 (2010).

III

[1] The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts,* which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions, 549 U.S., at 520–526, 127 S.Ct. 1438; and, further, that no other threshold obstacle bars review.[FN6] Four members of the Court, adhering to a dissenting opinion in *Massachusetts,* 549 U.S., at 535, 127 S.Ct. 1438, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits. See *Nye v. United States,* 313 U.S. 33, 44, 61 S.Ct. 810, 85 L.Ed. 1172 (1941).

FN6. In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a "prudential" bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar. See Brief for Tennessee Valley Authority 14–24; Brief for Petitioners 30–31.

IV

A

"There is no federal general common law," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), famously recognized. In the wake of *Erie,* however, a keener understanding developed. See generally Friendly, In Praise of *Erie* —And of the New Federal Common Law, 39 N.Y.U.L.Rev. 383 (1964). *Erie* "le[ft] to the states what ought be left to them," *id.,* at 405, and thus required "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states," *id.,* at 422. *Erie* also sparked "the emergence of a federal decisional law in areas of national concern." *Id.,* at 405. The "new" federal

common law addresses "subjects within national legislative power where Congress has so directed" or where the basic scheme of the Constitution so demands. *Id.,* at 408, n. 119, 421–422. Environmental protection is undoubtedly an area "within national legislative power," one in which federal courts may fill in "statutory interstices," and, if necessary, even "fashion federal law." *Id.,* at 421–422. As the Court stated in *Milwaukee I* : "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." 406 U.S., at 103, 92 S.Ct. 1385.

Decisions of this Court predating *Erie,* but compatible with the distinction emerging from that decision between "general common law" and "specialized federal common law," Friendly, *supra,* at 405, have approved federal common law suits brought by one State to abate pollution emanating from another State. See, *e.g.,* ***2536***Missouri v. Illinois,* 180 U.S. 208, 241–243, 21 S.Ct. 331, 45 L.Ed. 497 (1901) (permitting suit by Missouri to enjoin Chicago from discharging untreated sewage into interstate waters); *New Jersey v. City of New York,* 283 U.S. 473, 477, 481–483, 51 S.Ct. 519, 75 L.Ed. 1176 (1931) (ordering New York City to stop dumping garbage off New Jersey coast); *Georgia v. Tennessee Copper Co.,* 240 U.S. 650, 36 S.Ct. 465, 60 L.Ed. 846 (1916) (ordering private copper companies to curtail sulfur-dioxide discharges in Tennessee that caused harm in Georgia). See also *Milwaukee I,* 406 U.S., at 107, 92 S.Ct. 1385 (post-*Erie* decision upholding suit by Illinois to abate sewage discharges into Lake Michigan). The plaintiffs contend that their right to maintain this suit follows inexorably from that line of decisions.

[2] Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken "the prudent course" of "adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979); see *Bank of America Nat. Trust & Sav. Assn. v. Parnell,* 352 U.S. 29, 32–34, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956). And where, as here, borrowing the law of a particular State would be inappropriate, the Court remains mindful that it does not have creative power akin to that vested in Congress. See *Missouri v. Illinois,* 200 U.S. 496, 519, 26 S.Ct. 268, 50 L.Ed. 572 (1906) ("fact that this court must decide does not mean, of course, that it takes the place of a legislature"); cf. *United States v. Standard Oil Co. of Cal.,* 332 U.S. 301, 308, 314, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947) (holding that federal law determines whether Government could secure indemnity from a company whose truck injured a United States soldier, but declining to impose such an indemnity absent action by Congress, "the primary and most often the exclusive arbiter of federal fiscal affairs").

In the cases on which the plaintiffs heavily rely, States were permitted to sue to challenge activity harmful to their citizens' health and welfare. We have not yet decided whether private citizens (here, the land trusts) or political subdivisions (New York City) of a State may invoke the federal common law of nuisance to abate out-of-state pollution. Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.

The defendants argue that considerations of scale and complexity distinguish global warming from the more bounded pollution giving rise to past federal nuisance suits. Greenhouse gases once emitted "become well mixed in the atmosphere," 74 Fed.Reg. 66514; emissions in New Jersey may contribute no more to flooding in New York than emissions in China. Cf. Brief for Petitioners 18–19. The plaintiffs, on the other hand, contend that an equitable remedy against the largest emitters of carbon dioxide in the United States is in order and not beyond judicial competence. See Brief for Respondents Open Space Institute et al. 32–35. And we have re-

cognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances. *Missouri,* 200 U.S., at 522, 26 S.Ct. 268 (adjudicating claim though it did not concern "nuisance of the simple kind that was known to the older common law"); see also *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 472, 62 S.Ct. 676, 86 L.Ed. 956 (1942) (Jackson, J., concurring) ("federal courts are free to apply the traditional common-law technique***2537** of decision" when fashioning federal common law).

We need not address the parties' dispute in this regard. For it is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

B

[3] "[W]hen Congress addresses a question previously governed by a decision rested on federal common law," the Court has explained, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II,* 451 U.S., at 314, 101 S.Ct. 1784 (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*). Legislative displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" demanded for preemption of state law. *Id.,* at 317, 101 S.Ct. 1784. " '[D]ue regard for the presuppositions of our embracing federal system ... as a promoter of democracy,' " *id.,* at 316, 101 S.Ct. 1784 (quoting *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)), does not enter the calculus, for it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. *TVA v. Hill,* 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); see *Milwaukee II,* 451 U.S., at 315, 101 S.Ct. 1784; *County of Oneida v. Oneida Indian Nation of N. Y.,* 470 U.S. 226, 236–237, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

[4] We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. 549 U.S., at 528–529, 127 S.Ct. 1438. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants.

Section 111 of the Act directs the EPA Administrator to list "categories of stationary sources" that "in [her] judgment ... caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. § 7411(b)(1)(B); see also § 7411(a)(2). And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category.[FN7] For existing sources, EPA issues emissions guidelines, see 40 C.F.R. § 60.22, .23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary***2538** sources within their jurisdiction, § 7411(d)(1).

> FN7. There is an exception: EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the "hazardous air pollutants" program, §

7412. See § 7411(d)(1).

The Act provides multiple avenues for enforcement. See *County of Oneida,* 470 U.S., at 237–239, 105 S.Ct. 1245 (reach of remedial provisions is important to determination whether statute displaces federal common law). EPA may delegate implementation and enforcement authority to the States, § 7411(c)(1), (d)(1), but the agency retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. §§ 7411(c)(2), (d)(2), 7413, 7414. In specified circumstances, the Act imposes criminal penalties on any person who knowingly violates emissions standards issued under § 7411. See § 7413(c). And the Act provides for private enforcement. If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. § 7604(a).

If EPA does not *set* emissions limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. See § 7607(b)(1); *Massachusetts,* 549 U.S., at 516–517, 529, 127 S.Ct. 1438. As earlier noted, see *supra,* at 2530 – 2531, EPA is currently engaged in a § 7411 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired power plants. To settle litigation brought under § 7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. 75 Fed.Reg. 82392. The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.

C

[5] The plaintiffs argue, as the Second Circuit held, that federal common law is not displaced until EPA actually exercises its regulatory authority, *i.e.,* until it sets standards governing emissions from the defendants' plants. We disagree.

The sewage discharges at issue in *Milwaukee II,* we do not overlook, were subject to effluent limits set by EPA; under the displacing statute, "[e]very point source discharge" of water pollution was "prohibited unless covered by a permit." 451 U.S., at 318–320, 101 S.Ct. 1784 (emphasis deleted). As *Milwaukee II* made clear, however, the relevant question for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.,* at 324, 101 S.Ct. 1784. Of necessity, Congress selects different regulatory regimes to address different problems. Congress could hardly preemptively prohibit every discharge of carbon dioxide unless covered by a permit. After all, we each emit carbon dioxide merely by breathing.

The Clean Air Act is no less an exercise of the legislature's "considered judgment" concerning the regulation of air pollution because it permits emissions *until* EPA acts. See *Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1, 22, n. 32, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (finding displacement although Congress "allowed some continued dumping of sludge" prior to a certain date). The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law. Indeed, were EPA to decline to regulate***2539** carbon-dioxide emissions altogether at the conclusion of its ongoing § 7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.

EPA's judgment, we hasten to add, would not escape judicial review. Federal courts, we earlier observed, see *supra,* at 2537 – 2538, can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. As we have noted, see *supra,* at 2537, the Clean Air Act directs EPA to establish emissions standards for categories of stationary

sources that, "in [the Administrator's] judgment," "caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." § 7411(b)(1)(A). "[T]he use of the word 'judgment,' " we explained in *Massachusetts,* "is not a roving license to ignore the statutory text." 549 U.S., at 533, 127 S.Ct. 1438. "It is but a direction to exercise discretion within defined statutory limits." *Ibid.* EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 7607(d)(9)(A). If the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court.

Indeed, this prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: as with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance.

The Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators. Each "standard of performance" EPA sets must "tak[e] into account the cost of achieving [emissions] reduction and any nonair quality health and environmental impact and energy requirements." § 7411(a)(1), (b)(1)(B), (d)(1); see also 40 C.F.R. § 60.24(f) (EPA may permit state plans to deviate from generally applicable emissions standards upon demonstration that costs are "[u]n-reasonable"). EPA may "distinguish among classes, types, and sizes" of stationary sources in apportioning responsibility for emissions reductions. § 7411(b)(2), (d); see also 40 C.F.R. § 60.22(b)(5). And the agency may waive compliance with emission limits to permit a facility to test drive an "innovative technological system" that has "not [yet] been adequately demonstrated." § 7411(j)(1)(A). The Act envisions extensive cooperation between federal and state authorities, see § 7401(a), (b), generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain, see § 7411(c)(1), (d)(1)-(2).

[6] It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping ***2540** with issues of this order. See generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 865–866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.

Notwithstanding these disabilities, the plaintiffs propose that individual federal judges determine, in the first instance, what amount of carbon-dioxide emissions is "unreasonable," App. 103, 145, and then decide what level of reduction is "practical, feasible and economically viable," App. 58, 119. These determinations would be made for the defendants named in the two lawsuits launched by the plaintiffs. Similar suits could be mounted,

counsel for the States and New York City estimated, against "thousands or hundreds or tens" of other defendants fitting the description "large contributors" to carbon-dioxide emissions. Tr. of Oral Arg. 57.

The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action "arbitrary, capricious, ... or otherwise not in accordance with law." § 7607(d)(9).

V

[7] The plaintiffs also sought relief under state law, in particular, the law of each State where the defendants operate power plants. See App. 105, 147. The Second Circuit did not reach the state law claims because it held that federal common law governed. 582 F.3d, at 392; see *International Paper Co. v. Ouellette*, 479 U.S. 481, 488, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (if a case "should be resolved by reference to federal common law [,] ... state common law [is] preempted"). In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act. *Id.,* at 489, 491, 497, 107 S.Ct. 805 (holding that the Clean Water Act does not preclude aggrieved individuals from bringing a "nuisance claim pursuant to the law of the *source* State"). None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.

* * *

For the reasons stated, we reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR took no part in the consideration or decision of this case.

Justice ALITO, with whom Justice THOMAS joins, concurring in part and concurring in the judgment.

I concur in the judgment, and I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends ***2541** otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, adopted by the majority in *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), is correct.

U.S.,2011.
American Elec. Power Co., Inc. v. Connecticut
131 S.Ct. 2527, 72 ERC 1609, 79 USLW 4547, 11 Cal. Daily Op. Serv. 7480, 2011 Daily Journal D.A.R. 8968, 22 Fla. L. Weekly Fed. S 1184

END OF DOCUMENT

PLAINTIFFS' NORTHERN PLAINS RESOURCE COUNCIL
REPLY BRIEF TO MOTION FOR SUMMARY JUDGMENT

TUHOLSKE LAW OFFICE, P.C.

Jack R. Tuholske

234 East Pine Street, P.O. Box 7458,
Missoula, Montana 59807
Telephone: 406-721-6986 FAX 406-728-8445
tuholske@centric.net

August 17, 2011

Clerk of Court
Aletta Shannon
Powder River County
PO Box 200
Broadus, MT 59317-0239

RE: *Northern Plains Resource Council et al. v. MT Board of Land Commissioners, et al*
Cause No: DV-38-2010-2480 & DV-38-2010-2481

Dear Clerk:

Enclosed for filing is the original *Plaintiffs' Northern Plains Resource Council Reply Brief to Motion for Summary Judgment* in the above-captioned matter. The document was fax filed today pursuant to Rule 5 of the Montana Rules of Civil Procedure.

Thank you for your attention on this matter. Please call should you have any questions.

Very truly yours,

Kathy P. Clark

Kathy P. Clark
Tuholske Law Office, PC

Jack R. Tuholske
TUHOLSKE LAW OFFICE, P.C.
PO Box 7458
Missoula, Montana 59807
Telephone: (406) 396-6415
Fax: (406) 728-8445
tuholske@centric.net

Patrick Parenteau, Esq
VERMONT LAW SCHOOL
South Royalton, VT 05068
Telephone: (802) 831-1305
pparenteau@vermontlaw.edu

Attorneys for the Plaintiffs

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
POWDER RIVER COUNTY

NORTHERN PLAIN RESOURCE COUNCIL INC., NATIONAL WILDLIFE FEDERATION, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, ARCH COAL INC. Defendants.	Cause No. DV-38-2010-2480 Cause No. DV-38-2010-2481 Judge Joe L. Hegel PLAINTIFFS' NORTHERN PLAINS RESOURCE COUNCIL REPLY BRIEF TO MOTION FOR SUMMARY JUDGMENT
MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Plaintiffs, vs. MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, ARCH COAL INC., Defendants.	

INTRODUCTION

The only question remaining before this Court "is whether this state action [of leasing the coal tracts without prior environmental review] is sufficient to implicate the constitutional protection of the clean and healthful environment." Memorandum and Order Re Motions to Dismiss, 7, Dec. 29, 2010. The controlling rule of law, the Montana Constitution, creates both a fundamental right to a "clean and healthful environment" and imposes a duty to "**maintain and improve** a clean and healthful environment in Montana for present and future generations. . . ." Mont. Const. art. II, § 3; art. IX, § 1. Large-scale coal mining is a reasonably foreseeable consequence of the Land Board's leases; the likely environmental impacts from such mining are well known and implicate Northern Plains' members' constitutional rights.

The undisputed affidavits of ranchers and residents of southeastern Montana, who will bear the brunt of coal strip mining on Otter Creek, attest to the need for MEPA's "look before you leap" mandate. Defendants' binding contractual arrangement, an 85 million dollar bonus bid, constant touting of the 1.4 billion dollars in cash to the state, and the jobs and prosperity all flowing from coal mining make the development of Otter Creek reasonably foreseeable as a consequence of the leases. Northern Plains has presented sufficient evidence to meet the test for implicating the fundamental right created by *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (hereinafter "*MEIC*"). Defendants argue that *MEIC* requires actual harm to implicate constitutional rights, ignoring the Montana Supreme Court's characterization of the purpose of constitutional environmental rights as "preventative and anticipatory."

Leasing decisions are normally subject to MEPA review – the State's chosen means to assess impacts and make environmentally sound decisions. The Land Board relied on Mont. Code

Ann. § 77-1-121 to avoid MEPA review; the statute is otherwise Montana's means to ensure that environmental impacts are addressed before decisions are made. That statute must be declared unconstitutional. Statutes implicating fundamental rights require strict scrutiny, and neither Defendant argues that the MEPA exemption survives strict scrutiny.

Defendants argue instead that only rational basis review applies. They ignore the well-established canon of constitutional interpretation that statutes that implicate fundamental rights must be subject to strict scrutiny; lesser constitutional rights undergo rational basis review. The Montana Supreme Court has already held – clearly, unequivocally, and by unanimous decision – that environmental rights are fundamental rights. Strict scrutiny is the proper test.

While the Land Board has a legal responsibility to manage state lands for revenue and "other worthy objects," that responsibility does not compel the Board to lease Otter Creek without environmental review. Indeed the Board waited over a decade after Congress granted Montana the mineral rights in Otter Creek to even begin the leasing process.

I. Plaintiffs' Statement of Undisputed Facts is Uncontested and, Therefore, Must Be Accepted as True.

In the "Joint Statement of Undisputed Facts," the parties reserved "the right to submit supplemental statements of undisputed facts with their motions for summary judgment." Joint Statement of Undisputed Facts 2 (May 13, 2011). Pursuant to this agreement, Northern Plains submitted "Plaintiffs' Statement of Undisputed Facts" (hereinafter "SUOF") with its Motion for Summary Judgment on June 29, 2011, along with Exhibits that consist of government documents.

Under Rule 56(e) of the Montana Rules of Civil Procedure:

> When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the

adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

While "[t]he initial burden is on the moving party to establish that there is no genuine issue of material fact; and once met, the burden shifts to the party opposing the motion to establish otherwise." *Ravalli Co. Fish & Game Assn., Inc. v. Mont. Dept. of St. Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995) (other citations omitted). Not only did Defendants fail to counter Northern Plains' affidavits and exhibits, these facts are not controvertible anyway, because they come from the State of Montana's published information and from the affidavits of area farmers and ranchers who are concerned about the effects of coal development. The absence of a contrary showing on summary judgment[1] is telling, and means that Defendants stake their claims on purely legal arguments.

Neither Defendant has "set forth specific facts showing that there is a genuine issue for trial" as required by Rule 56(e). Therefore, Plaintiffs' Statement of Undisputed Facts must be taken as true. Taken together these facts more than demonstrate the injury required to implicate Northern Plains' constitutional right to a clean and healthful environment.

II. Northern Plains Meets the Standard Set Forth in *MEIC* for Implicating the Fundamental Right to a Clean and Healthful Environment.

A. Contrary to Defendants' Argument, *MEIC* Requires that "Preventative and Anticipatory" Actions Need to be Taken to Ensure the Fundamental Environmental Right is Protected.

Defendants mischaracterize *MEIC* and understate the reach of the Montana Supreme Court's unanimous holding. Defendants argue that the test set forth in *MEIC* requires an "immediate and measurable harm to the environment" (State Br. 7), and "actual and proven

'unreasonable degradation' of the environment, without any intervening environmental assessment." Arch Br. 6-7.

In *MEIC*, the Montana Supreme Court searched deep into the legislative history generated during the 1972 Constitutional Convention "to determine the showing that must be made before the rights [to a clean and healthful environment] are implicated and strict scrutiny applied." *MEIC*, ¶ 65. The court concluded that "the delegates' intention was to provide language and protections which are both *anticipatory and preventative*." *Id.* at ¶ 77 (emphasis added). Nowhere does the Supreme Court state in the *MEIC* opinion that there must be an "immediate and measurable harm to the environment" or "the actual and proven 'unreasonable degradation' of the environment, without any intervening environmental assessment." Indeed the whole point of the constitutional amendments was to prevent actual harm through sound planning and the kind of precautionary "look before you leap" consideration of environmental consequences that MEPA requires. The Court summarized the delegates' intent stating, "[t]he delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. 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." *MEIC*, ¶ 77.[2]

The test set forth in *MEIC* is not as Defendants have portrayed it. The *MEIC* Court stressed that the fundamental right to a clean and healthful environment is "*anticipatory and preventative*."

---

[1] In Arch's brief on page 10 in footnote 1, Arch argues that Plaintiffs' facts are not "undisputed." This conclusory statement is not sufficient to contest all of the detailed facts presented by Northern Plains, and does not rise to the standards necessary to create material issues of disputed fact.

[2] The Montana Court's interpretation of the Constitution's environmental rights follows well-established canons of constitutional construction. *Id.* at ¶ 75 (quoting 16 C.J.S. *Constitutional Laws* § 16 (1984) ("The prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it.")).

MEIC, ¶ 77. It was the threat of environmental harm that concerned the *MEIC* Court; no fish were killed or human made sick by the statutory exemption to environmental review. If a state action poses a significant threat to the environment, then "anticipatory and preventative" steps must be taken. *MEIC*, ¶¶ 77, 79. In *Cape-France Enterprises v. Estate of Peed*, a case applying *MEIC*, the Montana Supreme Court found that the right to a clean and healthful environment was implicated when there was substantial evidence that taking certain actions "*may* cause significant degradation" to the environment. 2001 MT 139, ¶ 33, 305 Mont. 513, 29 P.3d 1011 (emphasis added). In *Cape-France Enterprises* it was uncertain whether drilling would actually harm the aquifer. Yet the threat of harm – not immediate and measurable harm or actual and proven harm – to the aquifer was enough to implicate the Constitution's clean and healthful environmental rights.

The implication of constitutional environmental rights in *MEIC* and *Cape France* did not turn on a certainty of harm as Defendants' argue, but rather on the foreseeability of harm. Tort law provides an excellent analogy. The Montana Supreme Court, quoting Justice Cardozo's famous *Palsgraf* decision, explains: "'[T]he risk reasonably to be perceived defines the duty to be obeyed.' *Palsgraf v. Long Island R. Co.* . . . That is to say, a defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first instance." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 21, 181 P.3d 601, 342 Mont. 335. The Court's approach in *MEIC* defining constitutional rights and obligations as "anticipatory and preventive" contains the same notion of foreseeability. Here environmental harm is reasonably foreseeable because of the State's decision to enter into contracts it admits it cannot unilaterally alter, the exchange of millions of dollars and promises to the citizens of Montana of billions to follow from the Otter Creek leases, and the known effects of coal mining and combustion. This reasonable foreseeability of environmental harm implicates Plaintiffs' constitutional rights and the

State's corresponding duties. MEPA is the only means to ensure that the leasing decision weighed environmental considerations before the leases were signed.

Uncontroverted facts demonstrate that environmental impacts from mining and combusting coal are well known and also reasonably foreseeable. Indeed, if the mere possibility of harming groundwater is enough to implicate fundamental environmental right in *Cape France*, and the addition of nearly undetectable amounts of arsenic with no resulting harm to fish implicated environmental rights in *MEIC,* then the Plaintiffs' fundamental environmental rights are easily implicated by the foreseeable consequences of coal leasing resulting in harm to Plaintiffs' ranches, health, and welfare, as well as to the State's water, air, land, animal species, and climate. As discussed below, the factual predicate that implicates Plaintiffs' environmental rights fits within the parameters defined by the Montana Supreme Court.

Finally, Defendants ignore the similarities between *MEIC* and the case at bar. Both cases involve statutory exemptions from otherwise mandatory environmental review, a point already noted by this Court. *MEIC*, ¶ 1; *See* Memorandum and Order Re Motions to Dismiss, 5. Additionally, in both cases the Defendants attempted to justify the State's actions by claiming that the exempt action did not warrant environmental review. *MEIC*, ¶ 19; State Br. 7; Arch Br. 7. Finally, in both cases the Plaintiffs presented proof – undisputed evidence in this case – that the exempt actions have the potential to cause significant impacts. *MEIC*, ¶¶ 18-24; Plaintiffs' Statement of Undisputed Facts ("SOUF") (June 29, 2011).

B. The Undisputed Facts Show that Leasing the Otter Creek Coal Tracts Presents a Significant Threat to the Environment, Which is Sufficient to Implicate the Fundamental Environmental Right.

The circumstances surrounding the granting of the Otter Creek leases demonstrate that mining is reasonably foreseeable. The leases are owned in a checkerboard fashion, with the Lessee,

Arch, owning in fee the intermingled, coal-rich lands. SOUF ¶ 1. Once the leases were signed, "the Land Board cannot unilaterally alter the terms of the leases." State Br. 15. Moreover, the State and Arch have vested financial interests in ensuring this project receives every needed permit and approval. Arch has invested over $86 million in these leases (SOUF ¶ 19), and Arch will pay the State an additional $1.4 billion in revenue to the State and its schools as the coal is mined and sold (Arch Br. 3; SOUF ¶ 11). Arch Coal acknowledges that the leases are projected to generate $5.4 billion in total revenue. Arch Reply Mot. Dismiss 4. The leases, in addition to granting the right to mine, require Arch to spend two million dollars a year to develop them. SOUF Exhibit L – Special Condition ¶ 28A. The State's appraisal projects 33.2 million tons of coal per year will be mined. SOUF ¶ 73 (citing Exhibits C, D and O). Therefore, unless Arch abandons this project altogether, an unimaginable situation, mining will occur, making MEPA review after leasing just another hurdle to jump through, rather than a meaningful opportunity to weigh the different possible options for using these lands. While Arch and the Land Board argue that, technically, mining can still be prevented, this is a point Plaintiffs dispute but it is not necessary to resolve. The critical point is that Arch and the Land Board cannot claim that mining at Otter Creek is not reasonably foreseeable.

One thing is certain: if the leases were not issued, then mining would not take place. It is that go/no-go decision that MEPA is designed to address. Only during pre-leasing review can the State truly decide whether to lease the mineral rights, which portions of the mineral rights/lands to lease, and which up-front restrictions and mandatory mitigation that the Land Board may want to impose as part of its constitutional obligation to "**maintain and improve** a clean and healthful environment in Montana for present and future generations." Mont. Const. Art. IX, § 1. Additionally, pre-leasing review is the only time the State can meaningfully assess the climate

change implications of mining, which in and of itself releases carbon dioxide and methane (SOUF ¶ 61), as well as the connected and related actions of building the Tongue River Railroad and coal combustion. Once the leases have been issued, the State has already pre-ordained the release of more greenhouse gases into the atmosphere, damaging the health of the environment for current and future generations without first assessing the alternatives. The State argues that the Land Board can impose permit conditions to mitigate greenhouse gases (State Br. 15), but has admitted that it cannot unilaterally alter the leases. DEQ, the agency responsible for the permits, has no legal authority to limit that the coal from Otter Creek must be combusted in only the most advanced carbon capture facilities (especially since all or most of the Otter Creek coal is currently projected to be shipped to Asia, where environmental regulations are even more lax than in the United States).

The State and Arch mistakenly put great emphasis on the fact that *MEIC* and *Cape-France* are both cases involving factual scenarios at the permitting stage, thus leaving no opportunity for further environmental review. Defendants have missed the point – to conduct Montana's initial environmental review after leasing is too late. The horse has left the barn. The scales have been tipped. Huge amounts of money have changed hands and options have been taken off the table.

C. Northern Plains has Presented Specific Evidence and Affidavits Demonstrating the Environmental Threat Leasing Poses.

Northern Plains has asserted that there is an increased risk of harm to the environment that implicates their fundamental right to a clean and healthful environment. In their opening brief Northern Plains presented voluminous governmental documents that compel a finding that the environmental values protected by the Constitution – clean air, clean water, human health, sustainable ecosystems – are implicated by mining, transporting, and combusting Otter Creek coal.

The Court is referred to Plaintiffs' Statement of Undisputed Facts and supporting exhibits. In summary form, Plaintiffs have established that:

- Coal mining affects surface and ground water. SOUF ¶¶ 26, 35-46.
- Coal mining destroys wildlife habitat. SOUF ¶¶ 28, 47-50.
- Coal mining and the transportation can potentially affect air quality. SOUF ¶¶ 32-37.
- Combustion of coal is a significant source of greenhouse gas, which, in turn, is causing anthropogenic-forced changes to Montana's climate. SOUF ¶¶ 69-79.
- Where Otter Creek coal is burned it will incrementally increase greenhouse gas accumulations that will exacerbate climate change. SOUF ¶¶ 54-62, 70-72, 75-83.
- The likely effects of climate change in Montana include increased drought, decreased summer stream flows affecting fish and irrigation, and increased severity of forest fires and insect outbreaks. SOUF ¶¶ 64-65, 75-83.

These effects are all foreseeable consequences of coal mining and combustion. They are not abstract. Rather, Plaintiffs' particular interests in continuing to ranch and enjoy the quality of life in their communities are directly implicated by the State's failure to conduct pre-leasing review. Plaintiffs' use and enjoyment of the waters of southeastern Montana, including Otter Creek and the Tongue River, for irrigation, stock water, and recreational pursuits are seriously threatened by the leases, which severely tip the scales toward coal mining at Otter Creek. SOUF ¶ 22; Fix Aff. ¶¶ 9-12, 15; Morris Aff. ¶¶ 12-13; Dunning Aff. ¶¶ 6-8. Northern Plains' member and local rancher Denny Dunning is concerned about impacts to both his family's surface water rights and coal seam aquifer wells used for domestic stock purposes.

Additionally, as stated in Northern Plains' Brief in Support of its Motion for Summary

Judgment, surface coal mining at Otter Creek would significantly affect air quality. SOUF ¶ 31. According to DEQ, surface coal mining impacts air quality by generating fugitive dust, particulate matter, gaseous pollutants, and nitrogen oxide emissions. SOUF ¶¶ 32–33. Nitrogen oxide emissions can cause serious adverse health effects, and even death. SOUF ¶ 34. Northern Plains' member, Hannah Eileen Morris, an asthmatic, has particular concerns about the effects of mining at Otter Creek on air quality. Morris Aff. ¶ 11. She worries that she may have to limit the amount of time she spends visiting her ranch, and that the air there could trigger severe asthma attacks for her. *Id.*

Montana is already experiencing the effects of climate change, and the significant impacts of mining and burning Otter Creek coal would significantly affect Plaintiffs, as well as the greater Montana environment. *See* Morris Aff. ¶ 19; Fix Aff. ¶¶ 14, 30. Northern Plains' member Mark Fix is particularly worried about how increases in droughts, wildfires, and pests, as a result of climate change, could affect his ranching operations. Fix Aff. ¶ 14. He is already experiencing extreme weather, such as lowland flooding and mudslides. *Id.*

D. The *Seven-Up Pete* Decision Does Not Obviate the Land Board's Duties to Consider the Environmental Consequences of Leasing.

The State attempts to use *Seven Up Pete Venture v. State*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, to show that leases do not grant property rights to engage in mining, a point Northern Plains never contested. State Br. 12. *Seven Up Pete* involved a state-wide initiative outlawing cyanide heap leaching in Montana, not Land Board action that created a lease-contract. *Seven Up Pete*, ¶ 7. The legal issue involved a claimed constitutional taking by a dysfunctional mining company that failed to perfect its leases. The State's application of the case is largely irrelevant and misses the point of Northern Plains' arguments that the State relied on an

unconstitutional statute, made an uninformed decision, and tipped the scales significantly in favor of mining through the lease contracts and transfer of funds. *Seven Up Pete* stands for the proposition that a lease is a contract, and as this Court noted, public property has been converted to private property, thus agency action is limited to the regulatory functions set by the Legislature. *Id.*; Memorandum and Order Re Motions to Dismiss 7. Neither the State nor Arch contest that a lease is a contract. As stated previously, Mont. Code Ann. § 28-2-701 states that anything in a contract which is "(1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals" is unlawful. The Montana Supreme Court long ago adopted the view that "whenever a statute is made for the protection of the public, a contract in violation of its provisions is void." *McManus v. Fulton*, 85 Mont. 170, __, 278 P. 126, 130 (1929) (quoting Judge Kerrigan in *Brandenburg v. Miley Petroleum Exploration Co.*, 16 F.2d 933, 933 (S.D. Cal. 1926)).

III. The Standard of Review is Strict Scrutiny Not Rational Basis, Because Northern Plains has Successfully Shown that the Statutory Exemption Implicates Fundamental Rights.

Soon after the Montana Constitution was adopted, the Court emphasized that "the prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished and proper regard should be given to the evils, if any, sought to be prevented or remedied." *General Agriculture Corp. v. Moore*, 166 Mont. 510, 518, 534 P.2d 859, 864 (1975) (citations omitted). The *MEIC* Court thoroughly vetted the constitutional "object to be accomplished" by the environmental provisions as revealed in the Convention Transcripts, fully aware of the "evils sought to be prevented or remedied" – mining among them. The *MEIC* holding, undisturbed in subsequent cases, declared environmental rights

to be fundamental, and it decreed that strict scrutiny was to be applied when statutes implicated those rights.

The State of Montana's burden under strict scrutiny is heavy. Statutes infringing on fundamental rights are presumed unconstitutional, and the burden of showing constitutionality lies with the State. *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 15, 21, 314 Mont. 314, 65 P.3d 567 (holding that a law infringing upon the fundamental right to vote must be presumed unconstitutional, unless the State met the burdens of strict scrutiny) (citing *Johnson v. Killingsworth*, 271 Mont. 1, 4, 894 P.2d 272, 273 (1995)); *Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating that if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional") (citing *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76 (1980) (plurality opinion)). Therefore, Mont. Code Ann. § 77-1-121(2), which implicates and infringes upon the fundamental right to a clean and healthful environment must be subject to the highest degree of scrutiny. As this Court stated in its Memorandum and Order Re Motions to Dismiss, citing *MEIC*:

> The right to a clean and healthful environment is a fundamental right and *any rule* that implicates that right is subject to strict scrutiny and can only survive scrutiny if the State establishes 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.

Memorandum and Order Re Motions to Dismiss 7.

The State of Montana does not even attempt to satisfy the strict scrutiny standard. Arch attempts to elevate the State's interest in leasing the Otter Creek tracts to a compelling state interest. Arch Br. in Support of S.J. 12. Arch proposes that the State's obligation to lease the Otter Creek tracks is "compelling." That argument misses the mark, because Plaintiffs have never argued that Montana could not ultimately lease the tracts. What Arch must satisfy as compelling is the statute

exempting the Board's actions from MEPA. Arch does not even attempt to make that argument. Moreover, the cases cited by Arch defeat its very argument. Arch's reliance on *Grutler [sic] v. Bollinger,* demonstrates that compelling state interests, such as racial diversity in university education, are only those of the highest societal order. *Grutter v. Bollinger*, 530 U.S. 306, 329 (2003) ("given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). Such lofty purposes cannot be ascribed to Mont. Code Ann. § 77-1-121, as its purpose is solely to exempt the Land Board from environmental review. Indeed courts recognize very few societal interests as compelling. *See e.g. Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), *Korematsu v. United States*, 323 U.S. 214 (1944) (national security in wartime justified racial-based internments).

The interest served by the MEPA exemption – permitting environmentally uninformed decision making by our highest elected officials – is not compelling. The statute cannot survive strict scrutiny.[3]

The State of Montana argues that instead of strict scrutiny, this Court should apply rational basis review – the lowest level of judicial scrutiny. The problem with that argument is that no case has ever applied rational basis review to a statute that infringes upon what has previously determined to be a fundamental right. The State cites no authority for its argument. The Supreme Court has foreclosed using rational basis in *MEIC* and *Cape France*; those holdings are binding on

---

[3] Even if the statute's purpose to exempt Land Board leasing actions from environmental review is deemed compelling, the statute must also be narrowly tailored. "[T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish [its] purpose." *Grutter*, 539 U.S. at 333. The MEPA exemption rigidly cuts far too wide of swath, exempting the entire class of Land Board leasing decisions, without regard to any other factors. In

this Court.

The State argues at length that its trust responsibilities justify its actions and give it vague authority to reframe the leases in the public trust at some future point. Such claims, of course, conflict with the State's statement that the Land Board cannot unilaterally impose new conditions on Arch. The latter point is the correct statement of the Land Board's authority. Furthermore, Northern Plains does not contest the State's responsibility to manage and return money to the school trust. There is a constitutional duty to manage state lands as a fiduciary. Mont. Const. art. X, § 11. However, trust fund management cannot be done in ignorance of or in violation of the fundamental rights that are at stake. As the Montana Supreme Court held in *Ravalli,* the "[g]oal of maximizing income derived from school trust lands does not exempt Department of State Lands (DSL) or *any agency* from complying with applicable environmental laws . . . income is 'a' consideration, not 'the' consideration regarding school trust lands, and maximizing income is not paramount to exclusion of wildlife or environmental considerations in Montana Environmental Policy Act (MEPA) context." *Ravalli Co. Fish & Game Assn., Inc.,* 273 Mont. at 383-84, 903 P.2d at 1370 (citing Mont. Code Ann. §§ 75-1-102, 75-1-103(2), 75-1-105, 77-6-209) (emphasis added). Therefore, Arch's argument that the Land Board's duty to manage the school trust lands is a compelling state interest that trumps the fundamental right to a clean and healthful environment is null. Arch Br. 12-13.

The State admits that "the Land Board cannot unilaterally alter the terms of the leases." State Br. 15. This crucial concession is exactly why the Land Board's public trust responsibilities require it to conduct some type of environmental review prior to leasing. Although the Land Board

---

Grutter, by contrast, the policy that the Court found to be narrowly tailored was highly individualized and flexible. *Id.* at 333-339.

could impose permit conditions after leasing, there is no way to "mitigate greenhouse gases and other emissions" as the State argues. As stated above, carbon and methane sequestration does not exist yet. Therefore, the only way the Land Board can mitigate greenhouse gases, as required by the State's energy policy (Mont. Code Ann. § 90-4-1001(1)(b)(c)(d) (2011)), is to do environmental assessments prior to leasing, so that an environmentally informed decision can be made about leasing. By not requiring or conducting pre-leasing environmental review, the State was unable to make an informed decision and violated its trust obligations because it did not preserve the Land Board's ability to obtain more favorable financial terms based on the environmental assessment or decide not to enter into a lease at all.

IV. NEPA Case Law Supports Northern Plains' Position that Environmental Review Must be Conducted Prior to Leasing.

Arch argues that NEPA is irrelevant. Arch Br. 11, fn. 3. However as this Court has already recognized, the Montana Supreme Court finds NEPA case law persuasive. *Ravalli Co. Fish & Game Assn.*, 273 Mont. at 377, 903 P.2d at 1366 (quoting *Kadillak v. Anaconda Co.*, 184 Mont. 127, 137, 602 P.2d 147, 153 (1979)).

The federal courts are clear that some form of environmental review is required prior to leasing. *Connor v. Burford*, 848 F.2d 1441, 1443 (9th Cir. 1988). The Defendants' attempt to distinguish *Connor* must fail. The State mischaracterizes the facts of *Connor*. *Connor* does not say that environmental review is not required before leasing, rather an environmental assessment (EA) was performed prior to leasing in *Connor*.[4] *Id.* What the court found in *Connor* was that an

[4] Similarly, as this Court already recognized in its Memorandum and Order Re Motions to Dismiss on page 5, in *North Fork Preservation Association v. Department of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989) environmental review was required and conducted at the pre-leasing stage. Defendants fail to mention that this preliminary environmental review was completed pursuant to MEPA.

environmental impact statement (EIS) was not required prior to granting no-surface occupancy (NSO) oil and gas leases. *Id.* at 1445. But the court also noted the distinction between oil and gas leases and coal leases when it cited *Cady v. Morton,* 527 F.2d 786, 793-95 (9th Cir. 1975) for the proposition that an "EIS [is] required for [the] decision to issue coal leases." *Connor*, 848 F.2d at 1451.

After discussing *Connor*, the State quickly dismissed the remainder of the NEPA cases cited by Northern Plains as inapposite. The State failed to explain why cases such as *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983) were irrelevant. In *Massachusetts v. Watt*, an EIS was required at the pre-leasing stage even though, as the government stated, the leases did not entitle the buyers to drill for oil and there were several more steps that had to be taken before exploration could begin. *Id.* at 951-52. The court in *Massachusetts v. Watt* recognized that "leasing sets in motion the entire chain of events which culminates in . . . development." *Id.* at 953.

As the U.S. Supreme Court explained, "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Those words ring true here. The Land Board's binding lease, acceptance of an 85 million dollar bonus payment (the funds for which have long-since been spent), and claims of pending billions more in state revenue mean that the die is already cast in terms of Otter Creek mining. The future EIS will be completely shaped by Arch's mining application and limited by DEQ's statutory authority over the regulatory process, which does not include the authority to cancel or limit the lease.

Additionally, in *Pennaco Energy, Inc. v. U.S. Department of the Interior*, the 10th Circuit asserted that the lease at issue was committing "irretrievably to a given course of action" and found

that at least an EA, if not an EIS, was required prior to leasing, so that the BLM could consider options such as not leasing at all. 377 F.3d 1147, 1159 (10th Cir. 2004) (citing *Sierra Club v. Hodel,* 848 F.2d 1068, 1093 (10th Cir.1988)). Distinctively, the court in *Pennaco* was addressing whether the BLM needed to conduct an environmental assessment specifically for Coalbed Methane (CBM) development, which had not been included in an earlier EIS for the project. The court held that environmental review specific to CBM needing to occur prior to leasing.

Further undercutting the Defendants' argument that MEPA should not apply at the leasing stage because a further round of environmental review is required is Montana's Programmatic CBM EIS. The Montana Department of Natural Resources and Conservation Board of Oil & Gas Conservation (MBOGC) acknowledged in its Record of Decision on the Programmatic EIS conducted on CBM development that "the Montana Environmental Policy Act (MEPA) mandates that State agencies, such as MBOGC and MDEQ, consider the potential impacts of an action prior to making a decision." MBOGC, *Record of Decision: Statewide Coal Bed Methane Exploration and Development,* 8 (March 26, 2003) (accessed at http://bogc.dnrc. mt.gov/CoalBedMeth.asp). The MBOGC recognized the importance of preleasing assessment with respect to CBM development when it put oil and gas leases on hold to conduct a programmatic EIS on CBM development. The MBOGC conducted this analysis at time when "there were no related future actions under concurrent consideration that, when considered in conjunction with past and present actions, are likely to result in additional significant impacts. Should future actions be proposed which have or may have cumulative effects, additional analysis pursuant to applicable requirements of MEPA would be conducted." *See Pl.'s Exhibit Y (attached, Record of Decision,* p. 8.) Thus, it is possible, reasonable, and even required that the State assess the overall effects of leasing and subsequent development, mining, combustion and related actions of the Otter Creek

tracts for coal mining before leasing, while all options remain on the table. Then, site-specific analysis and additional analysis can be conducted at the permitting stage and as additional significant impacts arise.

Defendants simply cannot claim they prepare MEPA analyses only for ground-disturbing activities. Approved in 2003, Montana's Final EIS ("FEIS") for CBM development does not implement any ground-disturbing activities. The Record of Decision for the CBM FEIS did not authorize any surface disturbing activity, but sets the stage for large-scale CBM development down the road. The Record of Decision Conditions 1 and 2 at page 2 define the programmatic purpose of the FEIS and provide extensive mitigation to be implemented later, at the stage of site specific development. Section 2.3 states that "[T]his decision does not include approval of any specific oil and gas exploration, production, or development activities." *Id.* at p. 3. Yet Montana prepared an FEIS that "documents the direct, indirect, and cumulative effects that may result from the development of CBM based on the reasonably foreseeable development scenario activities analyzed in the study." *Id.* Despite Defendants claims, there is clear precedent that the State has prepared MEPA analyses for activities that do not disturb the ground surface.

Moreover, the argument that environmental review must occur at the leasing stage is even stronger under MEPA than it is under NEPA. There is no federal constitutional right to a clean and healthful environment, whereas the Montana legislature deemed MEPA to be the primary mechanism for implementing Montana's fundamental right to a clean and healthful environment. *See* Mont. Code Ann. § 75-1-102; Mont. Sess. Laws 2003, ch. 361, § 5 (HB 437). Moreover, even if MEPA did not exist, some type of environmental review would be required under Montana's Constitution to provide a procedural remedy to ensure the anticipatory and preventative nature of the fundamental right to a clean and healthful environment. Article IX, section 1(3) requires that

"[T]he 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." MEPA remains the Legislature's chosen vehicle to implement the fundamental right to a clean and healthful environment, and MEPA applies in full force to the Land Board's most significant environmental decision ever.

CONCLUSION and REQUEST FOR RELIEF

For the reasons set forth herein, Plaintiffs request that this Court enter a declaratory judgment that Mont. Code Ann. § 77-1-121 is unconstitutional for the reasons set forth herein. Plaintiffs request that the Leases between the Land Board and Arch/Ark be set aside as void for the reasons set forth in Plaintiffs' Opening Brief, and the matter remanded to the Land Board to undertake compliance with MEPA before deciding whether to proceed with future Leases at Otter Creek.

Dated this 16th day of August, 2011

Jack R. Tuholske

Patrick Parenteau (by JT)

Patrick Parenteau
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 16th day of August, 2011, via first class mail, postage-prepaid to the following:

Mark L. Stermitz
Jeffery J. Oven
Christopher C. Stonebeck
CROWLEY FLECK PPLP
305 S. Fourth Street E. Suite 100
PO Box 7099
Missoula MT 59807-7099

Douglas L. Honnold
Earthjustice Legal Defense Fund
209 S. Wilson Street
Bozeman, MT 59715

Anthony Johnstone
Jennifer Anders
Department of Justice
215 North Sanders
Helena, MT 59620

Candace West
Tom Butler
Dept of Natural Resources & Conservation
State Of Montana
1625 11th Avenue
Helena, MT 59620-1601

Courtesy copy to:
Judge Joe L. Hegel
1010 Main Street
Miles City, MT 59301

Patty P. Clark

MONTANA DEPARTMENT OF NATURAL RESOURCES

AND

CONSERVATION

BOARD OF OIL AND GAS CONSERVATION

Record of Decision:

Statewide Coal Bed Methane Exploration and Development

March 26, 2003

1.0 Introduction

The Montana Board of Oil and Gas Conservation (MBOGC), the Montana Department of Environmental Quality (MDEQ), and the Bureau of Land Management (BLM) as joint lead agencies, prepared the Montana Final Statewide Oil and Gas Environmental Impact Statement (FEIS) and Proposed Amendment of the Powder River and Billings Resource Management Plans (RMPs). A Draft Environmental Impact Statement (EIS) was prepared to examine the impacts of the proposal and alternatives. The Final EIS was prepared based upon comments received on the draft. The FEIS focused on the potential impacts of coal bed methane (CBM) exploration and production throughout the state. The affects of anticipated conventional oil and gas development were also analyzed.

As lead agencies, the MBOGC, MDEQ and the BLM are responsible for compliance with the Montana Environmental Policy Act (MEPA), and National Environmental Policy Act (NEPA), respectively. However, the information and proposed decisions discussed in the plan are not final until the State agencies and the BLM sign a Record of Decision (ROD). This document is the ROD for the MBOGC and does not in any way make decisions for the BLM.

1.1 Purpose and Need

The purpose of the FEIS was to analyze potential impacts from oil and gas activity, particularly from CBM exploration, production, development, and reclamation statewide. The MBOGC is responsible for regulating the development of state and fee oil and gas resources. This FEIS was used to analyze options for CBM development including mitigating measures that would help minimize the environmental and social impacts related to these activities. The alternatives analyzed provided a range of management options for conducting and permitting CBM development.

The preferred alternative (Alternative E) is the State permitting agencies proposed outline for altering the current oil and gas program to allow for CBM development. The FEIS focused the analysis on the oil and gas development issues not covered in the current program, such as water management from CBM production.

1.2 Background Information

The MBOGC currently manages CBM developments based on the Stipulation and Settlement Agreement reached in the First Judicial District Court, Lewis and Clark County, between the MBOGC and the Northern Plains Resource Council, Inc., on June 19, 2000. The Stipulation also provides for the preparation of a comprehensive supplemental state-wide programmatic EIS pursuant to the Montana Environmental Policy Act, 75-1-101 *et seq.* and the Department's regulations at A.R.M. 36.2.521 *et seq.* addressing the environmental consequences of CBM exploration, development, production, reclamation and closure. The MBOGC may fulfill this obligation by participation in, and providing final approval of another programmatic or regional EIS prepared pursuant to MEPA or NEPA.

The MBOGC has fulfilled this obligation by participating in this EIS process and providing approval of the Final EIS. The stipulation and settlement agreement remains in effect until this Record of Decision (ROD) is formulated and signed for this FEIS.

2.0 Decisions

2.1 Decision Being Made

After considering the proposal, issues, alternatives, potential impacts, and management constraints, MBOGC has selected Alternative E along with the CBM Plan of Development (POD) outline. The Preferred Alternative (E) is approved for implementation as described in the FEIS and this Record of Decision (ROD).

A number of mitigation measures to further reduce environmental impacts of the proposal were developed pursuant to the Montana Environmental Policy Act, or MEPA (§ 75-1-201(5)(b), MCA), and are described in Chapter 2 of the FEIS. CBM Operators can implement these mitigation measures voluntarily, or, MBOGC can incorporate them into a permit or field order depending on site-specific conditions, and upon the authority of the MBOGC to impose them.

The basis for this decision is an analysis conducted by the State co-lead agencies and the BLM. This analysis is documented in the *Montana Final Statewide Oil and Gas EIS and Proposed Amendment to the Powder River and Billings RMPs*, published in January 2003.

2.2 Approved Oil and Gas Program Amendments (Conditions)

The amendments under consideration consist of a number of oil and gas related determinations for CBM development. These determinations would apply to state and fee mineral operations regulated by the MBOGC. The determinations include the following:

1. Exploration and development of CBM resources on MBOGC regulated lands are allowed subject to agency decisions, lease stipulations, permit requirements, and surface owner agreements.

2. Operators will be required to submit to the MBOGC a Project Plan of Development (POD) outlining the proposed environmentally responsible development of an area when requesting CBM well densities greater than 1 well per 640 acres.

3. The POD will be developed by the CBM operator in consultation with affected surface owner(s), and other involved permitting agencies.

4. The POD is to be submitted in draft form so that it can be reviewed and any changes made prior to submission to the MBOGC for approval.

5. The POD will include the following sub-plans: a Water Management Plan, a Surface Use Plan, and a Reclamation Plan.

6. A Water Management Plan for Exploration will be required for CBM exploration wells drilled under statewide spacing rules and for each POD.

7. Produced Water Management Plans and permits would be approved by the MBOGC. The MBOGC may request copies of surface agreements, water well mitigation agreements, or certifications that such agreements were offered, as part of the permit or POD submission.

8. MBOGC will permit the construction of CBM water impoundments under its current regulatory authority for oil and gas related earthen pits. The MBOGC intends to conduct a scientific investigation of the siting, construction, and operation of such impoundments and will use the results of that investigation to review its existing rules and policies. If necessary the MBOGC will adopt new rules or modify existing rules as appropriate.

9. There would be no discharge of produced water (treated or untreated) into the watershed unless the operator has an approved MPDES permit or a non-significance review by MDEQ (see section 5.3.3 "Montana Water Quality Act" below) and can demonstrate in the Water Management Plan how discharge could occur in accordance with water quality laws without damaging the watershed.

10. To minimize surface disturbance as many wells as economically and technically feasible will be co-located on a single well pad.

11. Well spacing rules would determine the number of wells per coal seam per designated spacing unit.

12. The number of wells connected to each compressor would be maximized and natural gas-fired engines for compressors and generators or other emission controls would be required.

13. In areas where sensitive resources including people are present alternative fuels (including electricity) or other sound mitigation measures may be used for compressor operations if it helps to reduce the sound level. The MBOGC may consider establishing the sound level and minimum distance to sensitive sound receptors as part of the POD approval process or as a rule or MBOGC Order.

14. Operators will be encouraged to post and enforce speed limits to reduce fugitive dust emissions, minimize effects to wildlife, and help maintain regional air quality.

15. Proposed roads, flowline routes, and utility line routes would be located to follow existing routes, transportation corridors or areas of previous surface disturbance when possible.

16. Operators will be encouraged to place roads on or adjacent to tract boundaries where practical to reduce impacts on residential and agricultural lands. However, the MBOGC recognizes that surface owner agreements may govern road route, type of road, maintenance and eventual disposition or reclamation of roads and transportation facilities.

17. MBOGC will encourage operators and private owners to agree to the use of CBM-related roads for CBM operations only to reduce public access and overuse.

18. When wells are abandoned, the associated oil and gas roads would be closed, or could remain open at the surface owner's discretion. If the roads were requested to be closed they would be rehabilitated.

19. Mitigation measures or stipulations designed to protect natural resources will be attached to APDs as appropriate, additional site specific mitigation measures will also be attached to APDs as site conditions warrant. POD's approved by MBOGC Order will be subject to those stipulations or conditions imposed by the MBOGC. The MBOGC may choose to delegate approval of supplemental POD's or changes to existing POD's to its staff.

To the extent practical, the MBOGC's staff and the appropriate office of the Bureau of Land Management will co-operate in developing common procedures that will allow a single comprehensive Plan of Development for areas involving

federal, state and private land to be submitted for approval to the permitting agencies. BLM and MBOGC will develop procedures to coordinate the review of POD's by appropriate affected agency staff and other agencies having permit authority, and provide a coordinated recommendation to the MBOGC and BLM managers for approval, modification, or rejection of POD's. The MBOGC will consider preparation of a step-by-step guideline for preparation and submission of the Project Plans of Development. MBOGC staff will review the document currently being written by BLM, and may choose to adopt all or portions of this document as interim guidance until a state/private land guidance document can be prepared. This guideline will provide direction to industry to ensure that all necessary information is submitted to federal and state decision makers.

2.3 Decision Not Being Made

This decision does not include approval of any specific oil and gas exploration, production, or development activities. Furthermore, this decision does not apply to minerals administered by the BLM or federal minerals under the surface of lands managed by the following federal agencies: Forest Service, National Park Service, Bureau of Indian Affairs, Fish and Wildlife Service, or federal minerals under private lands within the administrative boundaries of the National Forest System Lands. Additionally, this decision does not apply in any way to minerals administered by sovereign Native American Tribes.

The FEIS documents the direct, indirect, and cumulative effects that may result from the development of CBM based on the reasonably foreseeable development scenario activities analyzed in the study. The analysis acknowledges that a decision to allow CBM development recognizes that current oil and gas leases include the right to develop CBM under standard lease terms and conditions. MBOGC stipulations, project plan requirements or specific mitigation measures directing CBM development are attached at the APD approval stage. Thus, the analysis assumes that appropriate environmental protection measures will be implemented as required by project plans and that all site-specific developments will be sufficiently scrutinized prior to APD approval. These assumptions do not represent proposed or planned activities. They were analyzed in the FEIS to disclose the range of long-term effects that may result from adoption of the CBM development criteria under Alternative E – the selected alternative.

2.4 Implementation

This decision is effective upon signing of this ROD. The MBOGC will start accepting applications for drilling permits for exploratory wells and for CBM development projects with fully completed PODs 15 days following the signing of this ROD. APD approvals for wells in proposed development projects will be issued once PODs have been reviewed and approved by the MBOGC at a hearing held to increase well density to project level, or for the purpose of approving a CBM project, supplemental project, or project modification. Wells in approved projects will be approved administratively provided the proposed well complies with the approved plan and the MBOGC order approving the project. The MBOGC may choose to adopt polices by Board Order or rule to establish procedure for approving modifications of existing approved projects or expansion of approved projects.

3.0 Public Involvement

This section summarizes the public participation efforts for identifying issues and comments received during the preparation of the Draft and Final EISs.

3.1 EIS Public Participation

3.1.1 Public Involvement in Identifying Issues

A public participation plan was prepared to provide management and team guidance for developing the RMP EIS and Amendments, and to ensure public involvement during the entire document preparation process. During the scoping of the EIS, formal and informal public input was encouraged and sought.

Preparation of the FEIS began with the publishing of a Notice of Intent in the *Federal Register* on December 19, 2000 informing the public of the intention to plan and announcing the notice of availability for the planning criteria. Extensive public involvement occurred during preparation of the 2003 FEIS to identify and address relevant environmental issues.

The public was informed of, and involved in, the EIS process through additional *Federal Register* notices, news releases, direct mailings, and public meetings. Several news releases were published in local papers, announcing the beginning of the plan, encouraging public involvement, and publicizing the availability of the planning criteria. Brochures were mailed to over 1,000 individuals, groups, and agencies in December 2000 notifying the public of the expected issues and upcoming public scoping meetings.

Public scoping meetings were conducted in five towns across the State with a total attendance of 329 people. These meetings were held in January 2001 at Ashland, Billings, Broadus, Miles City, and Helena.

A total of 311 written communications, with more than 2,100 comments, were received after the public scoping meetings. Most of these written comments reiterated oral comments from the public meetings. Oral and written comments covered a spectrum of issues, but the majority was concerned with the management of water, lands, air, and

wildlife resources. Records of public comments and concerns are on file in the BLM Miles City Field Office.

A *Public Comment Summary and Recommendations Report* was prepared and made available electronically and in hardcopy in March 2001. This report summarizes the comments received from the public scoping meetings. These issues and the alternatives are summarized below and presented in detail in the Final EIS.

3.1.2 Summary of Public Involvement on the Draft and Final EIS

On February 15, 2002, a Federal Register notice was published beginning the comment period for the DEIS. Approximately 1,500 copies of the DEIS/RMP Amendment were distributed to the public and other federal and state agencies for comment. Additionally, a copy was posted on the Montana Department of Environmental Quality's (MDEQ's) web site for public downloading. The DEIS presented five alternatives including the no action alternative, and the agencies' preferred alternative (Alternative E).

The agencies received more than 8,800 e-mails, faxes, letters, cards and oral statements on the Draft HS during the public comment period which ran through May 15, 2002. In addition to the written comments six public hearings were held at communities across the state in April 2002, to receive oral comments on the Draft EIS. These communities are Billings, Bozeman, Broadus, Crow Agency, Lame Deer, and Helena. Over 700 citizens attended these hearings.

Transcripts from the public hearings are available on the BLM Miles City Field Office Internet site at http://www.mt.blm.gov/mcfo. All participants were encouraged to submit written comments following their oral testimony. These hearings were also a forum for the MDEQ to collect public comments on the proposed CBM Produced Water General Discharge Permit (CBMPW-GDP Permit No.: MT-G390000).

From the 8,800 communications, more than 25,000 comments were made on the DEIS. Many of the comments tended to be polarized between those supporting CBM development urging selection of Alternative E, and those opposed to CBM development requesting additional safeguards be put in place to protect surface owner rights and downstream resources from impacts. Comments that presented new data, questioned facts or analysis, or raised questions or issues bearing directly upon the alternatives or environmental analysis were responded to in Chapter 5 of the Final EIS. Comments expressing personal opinions or statements were carefully considered in the decision-making process for developing the FEIS but not responded to directly. Records of all comments are available at the BLM Miles City Field Office.

3.1.3 Protest Procedures

The EPA Notice of Availability for the Final EIS was published in the *Federal Register* on January 17, 2003. The public was given the opportunity to protest the BLM's preferred plan to the BLM Director in Washington D.C. following the instructions included in the FEIS. The 32-day protest period ended February 18, 2003.

The MBOGC opened a public comment period on the final EIS on January 18th, 2003; the comment period ended on February 18th, 2003. Additionally, the MBOGC scheduled and held a public hearing on February 6, 2003 in Billings to receive comments from the public prior to proceeding with the ROD. Copies of written comments were distributed to each MBOGC member and a transcript of oral testimony from the public hearing has been prepared. Public comments and the transcript are available for public review at the MBOGC's Billings office. The MBOGC received 936 written comments, 36 of which generally were not supportive of the preferred alternative and/or CBM development in general; 900 of the comments generally favored the preferred alternative and supported CBM development.

3.2 Consultation with Other Agencies

Federal and state agencies were contacted individually to gather input for the EIS. Consultation was conducted with other resource management agencies at the Federal and State level to identify common concerns for the planning effort.

In addition to the two state lead agencies, a number of other state departments were consulted, including the Montana Bureau of Mines and Geology, the Montana Department of Fish, Wildlife, and Parks, the Montana Department of Natural Resources and Conservation, and the Montana State Historic Preservation Office. Additional state agencies from Wyoming who participated in the preparation of the EIS and various technical meetings included the Wyoming Department of Environmental Quality, Wyoming State Engineers Office, and the Wyoming Office of Federal Land Policy.

Federal agencies participating as cooperating agencies included the EPA, Bureau of Indian Affairs (BIA), and the Department of Energy (DOE). In addition to these agencies the Department of Agriculture (DOA) Forest Service and the Wyoming BLM offices in Buffalo and Casper contributed to the review and comment processes for the FEIS.

As required by Section 7 of the Endangered Species Act (ESA) of 1973, the BLM prepared and submitted a biological assessment to the U.S. Fish and Wildlife Service (FWS). This document defined potential impacts on threatened and endangered species as a result of management actions proposed in the EIS. The FEIS contains the biological assessment and FWS biological opinion on the impacts from the amendments to threatened and endangered species.

4.0 Alternatives

The FEIS described five alternatives that analyzed different actions regarding the management of CBM activities. The "No Action" Alternative describes and analyzes current regulation of CBM activities by MBOGC, MDEQ, and the BLM while the other four alternatives describe and analyze other management actions that provide different methods of protection to other resources and land uses from CBM activities. The preferred alternative (Alternative E) identified in the Final EIS has been selected for implementation. The decision took into account the impacts of the alternatives as well as public comment and the potential for the Alternative E to resolve the issues.

4.1 Alternatives Considered

Chapter 2 of the FEIS describes the alternatives analyzed and the alternatives excluded from detailed analysis. The alternatives analyzed in detail are described briefly below.

4.1.1 Alternative A—No Action (Existing CBM Management)

Under the Stipulation and Settlement Agreement the MBOGC would be limited to issuing, upon proper application by the operator, 200 CBM permits for water quality, quantity, and for testing the coals. Additional restrictions limit the number of wells per pod to nine and pods per township to one, and prohibit the discharge of any water into the waters of Montana or the U.S. In addition to these exploration wells, the agreement specifies that Fidelity Exploration and Production (formerly Redstone Gas Partners) could apply to the MBOGC for up to 90 additional wells for its CX Field Pilot Project in southeastern Big Horn County. The total producing wells in the CX Pilot Field cannot exceed 250. In addition to these, Fidelity can drill another 75 exploration wells for a total of 325 wells. Discharge of production water was arranged through the MDEQ, via a Montana Pollutant Discharge Elimination System (MPDES) permit. The current Fidelity MPDES permit allows for up to 1,600 gallons per minute (gpm) to be discharge into the Upper Tongue River from up to 11 discharge points.

Testing of CBM wells that have been previously drilled would continue, provided no water is discharged to the waters of Montana or the U.S. No commercial production of methane would occur from any of the wells. For each landowner where test wells are drilled, the operator conducting the drilling would enter into a water well mitigation agreement. All wells drilled under the terms of the settlement agreement would be required to comply with the MBOGC's regulations. After test wells are completed, they would be abandoned or plugged according to the MBOGC's regulations.

4.1.2 Alternative B—CBM Development with Emphasis on Soil, Water, Air, Vegetation, Wildlife, and Cultural Resources

The State regulatory agencies would review and approve CBM activities with an emphasis on natural and cultural resource protection. The State would use stringent management measures to minimize or eliminate adverse impacts to other resources during development. Examples of such management measures would include; requiring all compressors to be fueled by natural gas; and water from producing wells would be injected into a different aquifer. Environmental mitigation measures envisioned to reduce impacts on various resources include the harvesting of commercially valuable trees during construction of ROWs and roads; use of CBM-related roads would be limited to industry; speed limits would be posted and enforced to reduce fugitive dust emissions; operator's weed prevention plans must include measures to prevent the spread of weed seeds from any vehicle or equipment; and wildlife surveys required by the EPA to identify endangered status species would be conducted prior to the approval of APDs.

4.1.3 Alternative C—Emphasize CBM Development

The State regulatory agencies would review and approve CBM activities with an emphasis on facilitating production of CBM. The State would use the least restrictive mitigation measures to minimize or eliminate adverse impacts to other resources. Examples of such measures would be to authorize the discharge of water produced with CBM onto the ground or into the water bodies when the discharge water meets applicable standards. Compressors could be fueled by gas, diesel, electricity, or other means as long as other permitting standards, such as air quality, are met.

4.1.4 Alternative D—Encourage CBM Exploration and Development While Maintaining Existing Land Uses

The State regulatory agencies would review and approve CBM activities with an emphasis on maintaining or enhancing land uses in combination with CBM development. The State would use mitigation measures, as much as possible, that compliment the needs of landowners and other lessees. Management of water produced with CBM would be greatly influenced by the surface owner. The water could be made available for beneficial uses or may be required to be reinjected. Location of facilities, such as compressors, would be influenced by the needs of the landowner.

4.1.5 Alternative E—Preferred Alternative

The MBOGC would review and approve CBM activities in a manner that facilitates efficient and orderly CBM activities while providing the appropriate type of resource protection on a site-specific basis. Different management actions, such as discharge, impoundment, re-injection or beneficial use, would be applied to water produced with CBM. Likewise, different management actions such as location, size, and mufflers (as required) would be applied to compressors. Also, property rights considerations, such as the handling of surface disturbance, would be handled by requiring the operator to consult with the owner of the surface rights.

Alternative E is the MBOGC's preferred alternative and would provide management options to facilitate CBM exploration and development, while sustaining resource and social values, and existing land uses.

4.1.6 Environmentally Preferred Alternative

Identification of the environmentally preferable alternative involves difficult judgments because the effects to the biological, physical and human environment must all be considered along with the social, economic and other requirements of present and future generations. On the basis of the effects on the biological and physical resources only Alternative A is the environmentally preferable alternative because of the limited number of wells which would be drilled and the minimal production infrastructure that is associated with this reduced development scenario. On the basis of social and economic considerations, Alternative E would be recognized as the environmentally preferable alternative because it combines an assortment of management actions to commence CBM exploration and development without economic constraints while still supporting resource and social values, and protecting existing land uses.

5.0 Rationale for the Decisions

5.1 Rationale for the Selected Alternative

The MBOGC has selected the Proposed Action for development of CBM within the State of Montana after considering the potential impacts of all the alternatives. The selected alternative will best meet the purpose and need to develop a program for the exploration, development, production and reclamation of CBM while minimizing the long-term adverse environmental and social impacts by imposing statutorily authorized conditions. Operators will be required to submit a Project Plan of Development (POD) outlining the proposed environmentally responsible development of an area when requesting CBM well densities greater than 1 well per 640 acres. The MBOGC has selected this alternative over the No Action Alternative because it meets all requirements of state statutes and rules.

All practicable means to avoid or minimize environmental harm have been included in the selected alternative. For example, combined water management options have been selected to allow for the greatest flexibility to select the most environmentally sensitive option to protect area water quality and Tribal water resources. Air quality protection measures selected combine methods for minimizing air pollutants during the construction, operation and reclamation phases of development. These include reducing fugitive dust from roads during construction and maintenance activities, decreasing compressor emissions through the use of natural gas and electric boosters and diminishing of natural gas releases from area mines and seeps by recovering the gas that may otherwise be lost. Surface disturbances will be reduced by co-locating multiple vertical wells and, if necessary to further reduce surface impacts, directionally drilled wells to deeper coals on the same well pad and through the use of placing all utilities along existing routes where practical. These measures, together with other general environmental mitigation measures, will meet all applicable requirements and, achieve water quality objectives, while CBM development is taking place in the State of Montana. Furthermore, the use of these adaptive management approaches allows for incorporation of future technology, which may improve the options available to minimize environmental effects.

The following sections discuss in detail the rationale for selection of Alternatives E.

5.2 Resolution of Issues

The purpose of developing and presenting alternatives is to allow the decision maker an opportunity to address and resolve issues recognized during the scoping process. Alternatives meet the purpose and need for doing the EIS, and balance ways to address different resource issues. The resolution of key issues forms the framework of an alternative, with the resolution of lesser issues included around the alternative's central idea. This section describes how those key issues were resolved under the selected alternative. The development of alternatives for this EIS centered on addressing regulatory issues in seven general areas:

- Air quality
- Coal mines
- Coal bed methane
- Hydrology
- Realty
- Indian trust resources
- Environmental mitigation

Although other relevant issues were considered, these key issues played a major role in defining the alternatives to be analyzed in detail.

5.2.1 Air Quality

Potential changes in ambient air quality from CBM activities, such as reduced visibility, air quality emissions, dust emissions, harmful gases, and changes in climate constituted the majority of issues related to this resource.

The selected alternative resolved the air quality issues by maximizing the number of wells connected to each compressor to reduce overall emission sources; requiring natural gas engines for compressors and generators so actual emissions would be further reduced; requiring electrical boosters when natural gas engines could not be used to maintain low emissions; requiring operators of federal leases to post and enforce speed limits to reduce fugitive dust emissions; and limiting CBM-related roads to industrial use through construction of additional fences and gates to minimize public access and overuse, thereby reducing fugitive dust and auto emissions. Additionally, the current MDEQ air permitting process includes analyses of equipment emissions and associated ambient impacts. Emission sources that may violate NAAQS (ambient standards) will not be issued a permit.

5.2.2 Coal Mines

This issue centered around buffer zone requirements for active coal mines, as well as the ability of adjacent or nearby coal companies to recover bonds and determine the effects on aquifer reconstruction. The issue also included CBM water discharge affecting new coal mines, the effects on oil and gas development, loss of coal production resources from CBM development, loss of methane resources because of venting, and subsurface coal fires.

The selected alternative included provisions for CBM producers to work with surface owners and mine operators with regards to placement of well locations and groundwater removal. The use of these agreements will reduce the impacts on mine operations and establish means to determine aquifer impacts and responsibilities during reconstruction. It is conceivable that CBM operations may reduce water in coal mines and create a situation where mines would need to obtain water for dust control, however this is viewed as a beneficial use of CBM produced water. Furthermore, the EIS analysis concluded that CBM development would not impact conventional oil and gas recovery due to the different geological strata produced, but may inhibit seismic prospecting in certain areas. Finally, the analysis found the chances of increasing methane venting from coal mines and subsurface coal fires were exceedingly remote.

5.2.3 Coal Bed Methane

The issue considered was the restriction of CBM exploration and production methods. Options included directional-drilling requirements; the number of coal seams per well bore, and chronological seam development. Other issues addressed were the drainage of methane from federal minerals and the effect of over-pumping water.

The selected alternative includes a requirement for directional drilling of deeper coals to reduce surface disturbances. No restrictions were included to require multiple coal seams per well bore or to require chronological coal seem development because it was concluded that the impact reduction by these requirements would be negligible. The EIS analysis also concluded that the effect of over-pumping water might cause some slight (<1/2 inch) subsidence but this does not represent a significant impact to surface lands.

5.2.4 Hydrology

Hydrology issues brought up during scoping included inspection, treatment, storage, and conveyance of CBM-produced water, short- and long-term effects on groundwater and surface water, impacts on water quality, and water rights. Requirements for site-specific Water Management Plans, treatment, conveyance methods, and the beneficial use of exploration and production water were considered.

The preferred alternative combines water management options emphasizing beneficial use of produced water. This adaptive management approach allows for the greatest flexibility to select the most environmentally sensitive option to protect area water quality and water resources. This also allows for development of future technologies that may improve inspection, treatment, storage, and conveyance methods. The selected alternative also requires that each CBM operator requesting spacing greater than 1 well per 640 acres develop a POD that includes a Water Management Plan (WMP). The WMP is required for both exploration wells and development sites. The WMP will detail how the operator plans to manage CBM produced water so that there would be no unnecessary or undue degradation, as defined by MDEQ, of water quality in any watershed. With regards to water rights, the operators are required under the selected alternative to offer water well mitigation agreements to affected surface owners within a one-mile radius of the well or project. Users of existing surface waters (irrigators) will be protected by the use of MPDES discharge permits (or non-significance review) and/or the development of TMDL standards for each river/stream affected in the basin.

5.2.5 Realty

Realty issues center on requirements for ROW corridors, power line placement, and use of or abandonment of roads from CBM development. Other issues included requirements for buried powerlines, installation of raptor safe power line equipment, and multiple utility corridor use.

The selected alternative includes requirements for the placement of proposed roads, flowline routes, and utility line routes along existing routes or areas of previous surface disturbance where possible, this will reduce surface

disturbances. Furthermore, road placement would be limited to tract boundaries where practical to reduce impacts on residential and agricultural lands. In an effort to help meet surface owner needs, the selected alternative requires operators to address in the POD was consulted for input into the location of roads, pipelines, and utility line routes. Powerlines are also a POD consideration; the operator will demonstrate how the proposal for power distribution would mitigate or minimize impacts on affected wildlife. For example, on BLM lands the operator may be required to bury a portion of the powerlines near sage grouse habitat to safely eliminate use by raptors, but when allowed to use aboveground lines, raptor-safe specifications are required. When wells are abandoned under the selected alternative, the associated oil and gas roads would remain open or be closed at the surface owner's discretion. If the roads were requested to be closed they would be rehabilitated.

5.2.6 Environmental Mitigation

Possible environmental mitigation measures to address resource issues presented in the scoping comments have been addressed under the selected alternative. These include commercially harvesting trees within rights-of-way (ROWs); implementation of high fire danger restrictions; road use enforcement; road placement restrictions; wellhead camouflage requirements; conducting wildlife surveys; and the use of early successional species dong with appropriate late serial stage native species for revegetation.

In addition to the requirements outlined in the POD and in the WMP, the selected alternative has incorporated general environmental mitigation measures that will further reduce potential impacts. Subject to landowner preferences and the MBOGC's regulatory authority, these mitigation measures include provisions for the protection of visual resources, surface disturbance, fire danger, noxious weeds, air pollutants, and wildlife protection.

5.3 Selected Alternative Compliance with Legal Mandates

This section explains how the selected alternative satisfies the States' major legal, regulatory, and policy mandates or objectives. It is not exhaustive of all applicable management constraints, but explains why the alternatives were selected and how they conform with legal, regulatory, and policy requirements. The selected alternative has been chosen because it provides the best means to meet the regulatory requirements with the least likelihood of causing long term environmental impacts while still developing this important resource.

5.3.1 Montana Environmental Policy Acts (MEPA) Cumulative Effects Assessment

The Montana Environmental Policy Act (MEPA) mandates that State agencies, such as MBOGC and MDEQ, consider the potential impacts of an action prior to making a decision. The impacts of the Proposed Action have been evaluated in the Final Environmental Impact Statement prepared in 2003 by the MBOGC, MDEQ, and the BLM with EPA, BIA, DOE, and the Crow Tribe of Indians as official cooperators. Chapter 4 of the FEIS provides cumulative effects analysis.

There are no related future actions under concurrent consideration that, when considered in conjunction with past and present actions, are likely to result in additional significant impacts. Should future actions be proposed which have or may have cumulative effects, additional analysis pursuant to applicable requirements of MEPA would be conducted. The agencies have completed the required "hard look" at the potential impacts of CBM development and are issuing this ROD as the final step in the MEPA process.

5.3.2 Clean Air Act

Requirements of the Clean Air Act of Montana and the federal Clean Air Act will be met through compliance with new air quality permits for all compressor stations and other stationary sources. This includes abiding by requirements of the State Implementation Plans.

The Montana Department of Environmental Quality has reviewed the proposed activities and determined that the emissions associated with these projects would not trigger any additional air quality permitting requirements for the types of facilities associated with CBM development.

In the case where emissions are anticipated to exceed the federal or state ambient air quality standards, permits would not be issued. The current MDEQ air permitting process includes analyses of equipment emissions and associated ambient impacts. Therefore, this activity can be undertaken in accordance with the Montana and Federal Clean Air Acts.

5.3.3 Montana Water Quality Act

The selected alternative and required water management plans in combination with the MPDES (or other authorization) and Class V Injection permits will effectively prevent the degradation of water quality by elevated SAR value production water and trace pollutants to surface or ground waters. The water management plans will combine water handling practices and treatment methods to ensure that no undue or unnecessary degradation of water quality in any watershed occurs. These plans also limit the discharge of produced water

and provide for the capture and/or treatment of any produced water that is developed that does not meet WQA standards.

Limits in the MPDES permits (or other authorizations) will have been set so that assimilative capacities of the receiving river or stream are not exceeded. Numerical limits to the MPDES permits are currently under consideration by the Board of Environmental Review and may be set so that compliance with Montana water quality standards is required at the actual points where discharges from CBM operations enter surface waters, without the need for dilution.

Continued water management and treatment as specified in the selected alternative, including the MPDES permit conditions; will result in compliance with the Montana Water Quality Act.

5.3.4 Clean Water Act

The Clean Water Act of 1987, as amended, establishes objectives to restore and maintain the chemical, physical, and biological integrity of the nation's Water.

On August 23, 2002, U.S. District Judge Sam E. Haddon ruled that unaltered ground water discharged as a result of coal bed methane development is not a "pollutant" as that term is defined in the federal Clean Water Act (CWA). Since the court found that unaltered ground water is not a pollutant under the CWA, the court went on to hold that discharges from coal bed methane development do not require permits under the federal NPDES permit program (*Northern Plains Resource Council v. Redstone Gas Partners,* CV 00-105-BLG-SHE, District of Montana, Billings Division). In it's ruling, the court explained that it's holding applied with equal force to Montana's MPDES permit requirements. This decision is currently being appealed.

In response to this ruling, the MDEQ is in the process of developing rules that, if approved by the Montana Board of Environmental Review, would require proposed discharges from coal bed methane development to be reviewed by the MDEQ to ensure compliance with Montana water quality standards. The rules would clarify MDEQ's authority to impose limits or conditions on discharges of coal bed methane to ensure that all water quality standards, including Montana's non-degradation requirements, will be met.

Through this process, the anticipated impacts to surface waters from CBM activities would be similar if the Haddon decision is upheld or if CBM discharges are subject to permitting under the MPDES program. For the sake of analysis it is assumed in this document that CBM discharges are subject to MPDES requirements, however if this is not the case, the anticipated impacts would be similar, but the permitting process would change.

5.3.5 Safe Drinking Water Act

The Safe Drinking Water Act is designed to make the nation's waters "drinkable" as well as "swimmable". Amendments in 1996 established a direct connection between safe drinking water and watershed protection and management The selected alternative requires that each operator prepare a Water Management Plan for their proposed development project that details how the operator plans to managed CBM produced water so that there would be no degradation, as defined by MDEQ, of water quality in any watershed. Furthermore, various water handling and disposal methods are coupled to existing permit requirements such as MPDES and Class V Injection that requires accounting for discharge standards and injection concentrations.

6.0 Monitoring and Compliance

6.1 Agency Monitoring

Pursuant to State law and under the proposed drilling permits issued for CBM exploration and development, MBOGC's representatives will have access to all CBM related facilities at all times for the purpose of making inspections or surveys, collecting samples, obtaining data, auditing any monitoring equipment or observing any monitoring or testing, and otherwise conducting all necessary functions related to the permits.

Additionally, further project monitoring will be conducted during and after implementation of the selected alternative. The purpose of the monitoring is to assure compliance with the APD permit requirements and federal, state and local regulatory requirements, detect problems or unanticipated events early, provide a basis for directing remediation of problems and to verify the restoration performance predicted in the FEIS. Staff from MDEQ, MBOGC and BLM will conduct inspections and gather samples as necessary at CBM operations and facilities across the basin under the authority of the respective agencies.

6.2 Resource Monitoring

Through its approval of a Plan of Development, the MBOGC may require monitoring for resources that could be significantly impacted by activities within the scope of operations subject to MBOGC's regulatory authority. For each resource, a series of items would be monitored. Each item is evaluated by its location, technique for data gathering, unit of measure, and frequency and duration of data gathering. When duration is not specified, the duration is for the next 20 years. The monitoring plan attached to the FEIS states the event that will be evaluated and lists the key resources that will be monitored if required by the POD approval. If a significant adverse impact can be corrected by a management action within the scope of the approved POD, the change will be implemented. If the adverse impact can be corrected only by a management action that is outside the scope of this plan, an additional or supplemental POD may be required.

The Department of Natural Resources and Conservation (DNRC) Technical Advisory Committee (TAC) for the Powder

River Basin Controlled Groundwater Area has proposed a groundwater-monitoring plan for CBM development. The monitoring recommendations are incorporated into the monitoring table. A complete copy of that plan is at the end of the Monitoring appendix in the FEIS. Specific monitoring requirements incorporated into POD approvals by MBOGC will be conducted by the CBM operator and will include specific reporting requirements to the MBOGC staff and to the TAC.

The Montana Department of Fish, Wildlife and Parks in association with the BLM and FWS have developed a wildlife monitoring and protection plan. The MBOGC does not have regulatory authority to require wildlife monitoring or protection plans, cultural resources investigations or protection plans, or similar restrictions on the ability of the owner to operate and manage the land as conditions of POD or APD approval. Moreover, the MBOGC has no authority to require landowners to allow BLM, FWS, or other state wildlife management agencies to conduct wildlife monitoring or cultural investigations.

Recommended for adoption:

_____

Thomas P. Richmond, Administrator
Montana Board of Oil and Gas Conservation

MEMORANDUM AND ORDER RE
CROSS MOTIONS FOR SUMMARY JUDGMENT

V - 38 - 2010 - 2480
2481

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, POWDER RIVER COUNTY

Y

NORTHERN PLAINS RESOURCE COUNCIL, INC., and NATIONAL WILDLIFE FEDERATION,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC.

Defendants.

and

MONTANA ENVIRONMENTAL INFORMATION CENTER, THE SIERRA CLUB,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC.

Defendants.

Cause No. DV-38-2010-2480
Cause No. DV-38-2010-2481

Judge Joe L. Hegel

MEMORANDUM AND ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the Parties' Cross Motions for Summary Judgment. The parties fully briefed the motions. The Parties also submitted a Stipulated Joint Statement of Agreed Facts, reserving the right to submit other evidence. Plaintiff Northern Plains Research Council and Montana Environmental Information Center also submitted separate statements of agreed facts, supported by affidavits and excerpts of government and scientific reports. The Defendants did not submit any opposing affidavits or reports.

On September 17, 2011, this Court heard oral argument. Jennifer Anders represented the Defendant Montana Board of Land Commissioners ("Land Board"). Mark Stermitz and Jeffrey Oven represented Defendants Ark Land Company, Inc. and Arch Coal, Inc. (collectively "Arch Coal"). Jack Tuholske represented Plaintiffs Northern Plains Resource Council ("NPRC") and the National Wildlife Federation ("NWF"). Jenny K. Harbine represented Plaintiffs Montana Environmental Information Center ("MEIC") and the Sierra Club. At close of argument, the motions were deemed submitted.

From the record before the Court, the Court now issues its Memorandum and Order:

Memorandum

I. PLEADINGS & PROCEDURE.

Plaintiffs have filed suit seeking a declaratory judgment that the Defendant Land Board failed to conduct a constitutionally-required environmental review prior to entering into a lease of approximately 8,300 mineral acres in Southeastern Montana to the Defendants Arch Coal, for the purpose of strip mining coal. The Land Board's holdings are checker-boarded with privately-held mineral holdings, mostly owned by Arch Coal. Together, the holdings contain approximately 1.2 billion tons of coal. Plaintiffs allege that the mining of the coal may result in a broad array of environmental and socioeconomic effects, including, but not limited to, air and water pollution, boom and bust cycles, and global warming. Defendants have submitted no evidence to the contrary.

Plaintiffs complain that Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3 ("Montana Constitution environmental provisions") require that the State of Montana conduct its business in a manner to protect its citizens' right to a clean and healthful environment and that the chief mechanism the Montana Legislature has used to implement these constitutional protections is the Montana Environmental Policy Act ("MEPA"). *See* § 75-1-102; Mont. Sess. Laws 2003, ch. 361, § 5.

Plaintiffs further complain that but for the enactment of MCA § 77-1-121(2), MEPA would have required the Land Board to conduct an environmental study prior to entering into the lease in this case, and that the statute's deferral of the environmental review from the leasing

stage to the later mine permitting stage in this case unconstitutionally denies the Plaintiffs' right to the early environmental review, which would preserve the Land Board's right to place mitigating conditions on the coal mining, obtain more favorable financial terms, or to decide not to enter into a lease at all.

The Defendants previously moved to dismiss the Plaintiffs' Amended Complaints arguing:

(1) Plaintiffs lack standing for failure to sufficiently allege harm;

(2) Plaintiffs lack standing because the controversy is not ripe (ready for adjudication) in that the execution of the lease does not result in any harm or imminent threat of harm and that the controversy will not be ripe until the Land Board has reviewed a specific mine plan;

(3) Even in the absence of MCA § 77-1-121(2), MEPA would not apply until the Land Board and the Department of Natural Resources ("DNRC") have issued their final review documents under MEPA, since the lease only grants Arch Coal a contingent right to development.

(4) That properly enacted statutes are presumed constitutional and Plaintiffs have not proven that MCA § 77-1-121(2) is otherwise.

II. FACTS.

The following facts are not disputed. As of March 18 2010, the Land Board leased approximately 8,300 mineral acres to Ark Land, a wholly owned subsidiary of Arch Coal, for the purpose of mining coal. The state-owned acres which are checker-boarded with approximately 6,000 acres of privately owned mineral rights. Together they are referred to as the "Otter Creek tracts" and contain an estimated 1.3 billion tons of coal, which if mined and burned, could add a significant percentage of the carbon dioxide annually released into the atmosphere, thereby exacerbating global warming and climate change. The effects of climate change include specific adverse effects to Montana's water, air and agriculture.

Pursuant to MCA § 77-1-121(2), the Land Board did not conduct any review of the possible environmental consequences of the mining of the coal prior to entering into the leases. However, the leases are subject to later environmental review by the Department of

Environmental Quality ("DEQ") and the Department of Natural Resources ("DNRC"), as well as Land Board's final approval of a mine operating and reclamation plan before actual mining could occur.

The Defendant presented no evidence contravening the Plaintiffs' evidence of both direct and indirect environmental effects of the mining and combustion of the coal that is the subject of the leases in question ("Otter Creek leases"). Therefore, the Court finds that the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned. The Court further finds that the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease.

III. LAW & DISCUSSION.

A. **Standing**.

The Land Board and Arch Coal contend that the Plaintiffs do not have standing to bring this action because they do not allege imminent injury and because the process will not be ripe for review until a specific mining plan is considered and ruled upon, that is, the case does not present a "justiciable controversy."

Defendants argue that the any alleged injuries complained of would occur, if at all, from the mining and combustion of coal not from the leasing of coal and that Plaintiffs' suit is therefore premature. They further argue that the MEPA review undertaken by the DEQ and the DNRC at the time of further permitting, together with continuing Land Board oversight as trustee of the lands in question, is plenary and encompasses all the alleged damages envisioned by the Plaintiffs, including secondary damages such as global warming. Arch Coal got something for its money, whether that was merely an option to put forth a mining plan or something sufficient to implicate Montana's constitutional environmental protections is the question that will be further addressed below.

The Court has previously ruled that Plaintiffs have alleged injury to members of their organizations who fish, hunt, ranch, farm and recreate in the Otter Creek area and its hydrologically-connected riparian areas. This is sufficient to satisfy the requirement that the Plaintiffs allege existing and genuine rights. Plaintiffs have alleged a constitutional violation of

Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3, guaranteeing the public right to a clean and healthful environment. This qualifies as a controversy upon which the court may effectively operate and upon which the Court can issue a final judgmcnt.

The Court stands by its conclusion that the Plaintiffs have standing.

B. MEPA Application sans MCA § 77-1-121(2).

The Land Board and Arch Coal argue that even if MCA § 77-1-121(2) did not exist, MEPA would not apply at the leasing stage and would only corne into play at the permitting stage following the proposal of a specific mining plan, *citing North Fork Preservation Assn v. Dept. of State Lands,* 238 Mont. 451, 778 P.2d 862, (Mont. 1989).

Plaintiffs countered that this does not make sense because (1) there would be no reason to enact the statute if MEPA did not apply at the leasing stage and (2) in the case cited by Defendants, the state agency did, in fact, do a prelease environmental review.

The Court held that absent the exemption contained in MCA § 77-1-121(2), the leases in this case would have required a MEPA review, finding that *North Fork* did not involve a question of whether MEPA applied to the issuance of a lease, but whether a higher degree of review was required than the degree applied by the state agency. In *North Fork,* an environmental organization challenged the Land Board's approval of the drilling of a test well in an environmentally sensitive area adjacent to Glacier National Park without first preparing an Environmental Impact Statement ("EIS"). The Montana Supreme Court held that an EIS was not required because the preliminary environmental review ("PER") that the Land Board had completed prior to issuance of the leases in question concluded that the issuance of the requested oil and gas leases with certain protective stipulations would not be "an action by state government 'significantly affecting the quality of the human environment,' therefore requiring an EIS under § 75-1-201, MCA." *North Fork supra,* 778 P.2d at 865.[1] Thus it is clear that the Land Board did in fact engage in MEPA environmental review prior to issuance of the leases in *North Fork*, which MEPA review informed its decision and the public regarding protective stipulations to include in the leases.

[1] It should also be noted that *North Fork* involved the drilling of a test well pursuant to a second round of oil and gas leasing and that the Department of State Lands completed an EIS in 1976, prior to issuing the first round of leases.

The Court stands by its conclusion that but for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage.

C. Constitutionality of MCA § 77-1-121(2).

MCA §77-1-121(2) exempts the Department of State Lands and the Land Board from complying with Title 75, chapter 1, parts 1 and 2 (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." MEPA review has been the primary method of insuring that significant state actions were taken only after taking a hard look at the environmental consequences of such actions. It is undisputed that the Land Board entered into the coal leases without first conducting a MEPA or any other type of environmental review or assessment and that it did so in reliance on MCA § 77-1-121(2).

Plaintiffs claim the statutory exemption of coal leasing from MEPA review at the lease stage implicates the clean and healthful environment provisions of the Montana Constitution as applied to this case by exempting the Land Board from seriously considering the environmental consequences before committing the state's resources to development. They argue that the critical "go-no go" decision is taken at the leasing stage and that once the lease is signed, the Land Board gives up the right to change its mind in order to protect the wider environment.

Defendants claim that as applied to this case the "exemption" only delays MEPA review until there is something more tangible to review—i.e., a mining plan—that the Plaintiffs lose nothing with the delay, and that because of the combination of statutory requirements, regulations and the contingent nature of the lease, Plaintiffs will be free to raise all their environmental concerns, direct and indirect, at the later permitting stage, and DEQ, DNRC, and the Land Board can consider all of those concerns in determining whether to approve, modify or deny any proposed mining plans under the lease. They claim nothing is taken off the table.

Plaintiffs reply that although DEQ may be able to consider secondary impacts such as global warming, it has no authority to do anything about them. Its review is geared exclusively towards more local air and water quality issues, and that neither the Land Board nor DEQ can unilaterally change the terms of the lease. Arch allows as much when it states that the Board can only cancel lease if Arch fails in its commitments under the lease.

The question is whether the statute's exemption of the Land Board from a requirement to conduct any sort of initial environmental review at the lease stage in favor of later MEPA review, involves an irretrievable commitment of resources to a project that may significantly adversely affect the human environment. In other words, by signing the lease did the Land Board take something off the table that could not later be withheld and, if so, was that significant enough to implicate the constitutional environmental protections implemented by MEPA?

In ruling on the Defendants' motions to dismiss, this Court previously opined:

> To adopt the Defendants' reasoning with respect to the constitutionality of MCA § 77-1-121(2) would allow the Land Board to convert public property rights to private property rights, stripping away its special protections before even considering possible environmental consequences. Once converted from public property to private property, further review by the Land Board and other state agencies would appear to be restricted to its purely regulatory functions, with the need to treat the now private property rights with deference.

However, in it summary judgment motion, the State argued that the State retains the right to impose any reasonable environmental restrictions that it could have imposed at the leasing stage, *citing Seven-Up Pete* for the proposition that leaseholders of such conditional mining leases do not gain property rights sufficient to stand up to the authority of the state to enforce constitutional, trust, or even statutory environmental requirements. The State points to the leases themselves, which require permit approvals by DEQ and DNRC, as well as approval of a mine operating plan by the Land Board. Like the lease in *Seven-Up Pete*, the Otter Creek Leases condition actual mining extensively. The Otter Creek leases provide:

- ¶ 1: "All rights granted to Lessee under this Lease are contingent upon Lessee'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) and
    - upon Lessor review and approval of Lessee's mine operation and reclamation plan.
    - The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.
- ¶ 16: Lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereof; (2) damaging crops, including

forage, timber, or improvements of a surface owner; or (3) damaging range improvements whether owned by Lessor or by its grazing permittees or lessees. The lessee shall not pollute or deplete surface or groundwater in excess of those impacts to water allowed by state or federal law or permit. ... Lessor may prescribe the steps to be taken and reclamation to be made with respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.

- ¶ 19 **COMPLIANCE WITH LAWS AND RULES.** This Lease is subject to further permitting under the provisions of Title 75 or 82, Montana Code Annotated. **Lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of an existing property right recognized by law.** [Emphasis supplied.]
- **WATER RIGHTS.** Lessee may not interfere with any existing water right owned or operated by any person.

1. Standard of Proof.

Statutes are presumptively constitutional. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. In determining whether a statute is constitutional as applied, the party challenging the constitutionality of a statute normally shoulders the burden of proving that the state action undertaken pursuant to the statute is unconstitutional beyond a reasonable doubt. *Rohlfs v. Klemenhagen, LLC,* 2009 MT 440 ¶ 7, 354 Mont. 133, 227 P.3d 42. Only if the challenger can show that the state action pursuant to the statute implicates fundamental constitutional rights, does the burden shift to the State to show a compelling state interest. *State v. Guill*, 2011 MT 32, ¶ 67, 359 Mont. 225, 248 P.3d 826.

In this case the parties have clearly staked their claims. Plaintiffs argue the fundamental right is implicated and therefore strict scrutiny applies. They have not denied or attempted to disprove that the State has a rational basis for the statute. While Defendants argue that a fundamental right is not implicated at the leasing stage and therefore only the rational basis test applies. The State has not even suggested that it could meet the strict scrutiny standard, and while Arch has proffered the argument that maximizing profit is a compelling state interest, it has not supported this by applicable law or logical argument.

State action pursuant to a statute implicates fundamental rights if it infringes on a fundamental constitutional right. Constitutional rights enumerated in the Montana Constitutions

Declaration of Rights [Article II, Section 3] are fundamental rights. The Montana Supreme Court has previously declared that the right to a clean and healthful environment contained in the Montana Constitution is a fundamental right and any infringement on that right is subject to strict scrutiny. *MEIC, supra*, ¶ 53.

Does the state action of granting the Otter Creek leases without prior environmental review implicate the constitutional protection of the clean and healthful environment? If so, the right to a clean and healthful environment is a fundamental right and any statute or rule that implicates that right is subject to strict scrutiny and can only survive scrutiny if the State establishes 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. *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 Mont. 207, ¶ 53, 988 P.2d 1236, ¶ 53, (Mont. 1999) ("MEIC").

If the state action of issuing the Otter Creek leases is not sufficient to implicate the constitutional protection of the people's right to a clean and healthful environment, as argued by the Defendants, then the State need only demonstrate a rational basis for the rule to withstand the as applied constitutional challenge. *See Rohlfs, supra.*

In *Seven Up Pete* and the lease provisions, the Montana Supreme Court found that the constitutional right to a clean an healthful environment was implicated because the plaintiffs had shown that a higher level of arsenic would be released into high quality waters thereby degrading the waters without the opportunity for further review. In this case MEPA and other review will take place before any significant ground or water is disturbed and before any coal is mined or combusted. None of the claimed adverse effects will occur unless and until the coal is actually mined or combusted.

As clarified by *Seven Up Pete,* the Land Board, DNRC and DEQ all have significant discretion to place reasonable environmental restrictions on any mining plan in accordance with the State's energy policy [§ 90-4-100(1)(b),(c),(d) (2011), MCA] and the Land Board's overriding trust responsibilities. Arch takes its interest subject to the trust responsibilities and other environmental laws. *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Commissioners*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800. Arch Coal acquired nothing more than the exclusive right to apply for permits from the State. Although it may be

probable that the mining will go forward, there is no guarantee that it will and there is no way to determine that adequate environmental protections will not be put in place in the process.

While it is not entirely clear how the Montana Supreme Court will apply *Seven Up Pete* to the facts in this case, in light of the Montana Supreme Court's holding in *Seven Up Pete*, the Land Board's continuing trust responsibilities elaborated on below, and the lease provisions subjecting Arch's interests to those obligations, this Court finds that the State has retained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially.

Land Board's Trust Responsibilities.

MEIC alternatively argues that the State has breached its trust obligations with respect to its constitutional and statutory duties to manage state resources for the benefit of this and succeeding generations, and that, while it is true that the Land Board has a constitutional duty to prudently manage the property within its control with an eye towards financial return, it cannot do so by turning a blind eye to environmental protection. *Ravalli County Fish and Game Ass'n v. Mont. Dept. of State Lands*, 273 Mont. 371, 379 and 387 903 P.2d 1362, (Mont. 1995

Pursuant to MCA § 77-1-121(2), the Land Board issued the Otter Creek Leases without conducting any environmental review. While the Land Board cannot back out of the lease provisions or unilaterally alter the terms of the leases, Arch takes its leasehold interest subject to "all agency responsibility and authority under the Montana Environmental Policy Act," as well as the Montana Strip Mine Siting Act, SUMRA and the Land Board's approval of mine operations and reclamation plans. By ¶ 19, Arch also agrees "to be bound by all applicable laws in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of an existing property right recognized by law." [Emphasis supplied.] This clause appears to be coextensive with the limits described in *Seven Up Pete*. This should be broad enough to include all reasonable restrictions to be imposed by the Land Board in meeting its trust responsibilities.

The Court concludes, that while the issuance of the Otter Creek leases and the investment by Arch and the State make it possible, if not probable, that the mining permits will subsequently issue and mining take place, and mining and combustion of coal have the potential of significantly degrading the safe and healthful environment, in accordance with *Seven Up Pete* the

State has not made an irrevocable commitment of resources and still retains the discretion to mitigate or halt the development if it cannot be done without the unreasonable degradation of the environment.

Order

IT IS ORDERED:

1. The Plaintiffs' motions for summary judgment are denied.
2. The Defendants' motions for summary judgment are granted.
3. The Clerk of Court shall file this document and mail or deliver copies to counsel of record at their last known addresses.

Dated this 3rd day of February, 2012.

SIXTEENTH JUDICIAL DISTRICT COURT
POWDER RIVER COUNTY MONTANA
SEAL

Joe L. Hegel, District Judge

pc: J. Oven
M. Stermitz
T. Butler
J. Anders
J. Tuholske
J. Harkins
D. Honrold

UNOPPOSED MOTION TO CONSOLIDATE APPEALS AND FOR EXTENSION OF TIME TO FILE OPENING BRIEF

ORIGINAL

Timothy J. Preso
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
tpreso@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs-Appellants Montana Environmental Information Center and Sierra Club

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 12-0185

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, INC. and ARCH COAL, INC.

Defendants and Appellees.

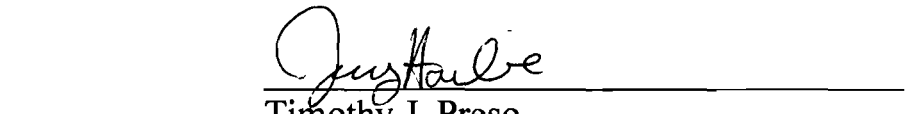
UNOPPOSED MOTION TO CONSOLIDATE APPEALS AND FOR EXTENSION OF TIME TO FILE OPENING BRIEF

Montana Environmental Information Center and Sierra Club, Plaintiffs-Appellants in this matter, hereby move for consolidation and for an extension of time to file their opening brief. The undersigned has contacted counsel for Defendant-Appellee Montana Board of Land Commissioners and Defendants-Appellees Ark Land Company, Inc. and Arch Coal, Inc., who stated that they do not oppose this motion.

First, Plaintiffs-Appellants move to consolidate this appeal with Northern Plains Resource Council v. Montana Board of Land Commissioners, Supreme Court Cause No. DA 12-0184. Consolidation is appropriate because the cases were consolidated in the district court (Cause Nos. DV-38-2010-2480 and DV-38-2010-2481), these appeals arise from a single order of the Sixteenth Judicial District, and they involve overlapping legal issues. The undersigned has contacted counsel for Plaintiffs-Appellants in Supreme Court Cause No. DA 12-0184, who agrees that consolidation is appropriate. Plaintiffs-Appellants in each appeal intend to file separate briefs.

Second, pursuant to Montana Rule of Appellate Procedure 26(1), Plaintiffs-Appellants move for a 30-day extension of time to file their opening brief, from May 16, 2012 to June 15, 2012. This is Plaintiffs-Appellants' first motion for an extension.

Respectfully submitted on this 25th day of April, 2012,



Timothy J. Preso
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
tpreso@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs-Appellants Montana Environmental Information Center and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing Motion to Consolidate Appeals and For an Extension of Time to File Opening Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the same upon each of the following by first-class mail:

Jennifer Anders
Department of Justice
215 North Sanders
Helena, MT 59620

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

Attorneys for Defendant Montana Board of Land Commissioners

Mark Stermitz,
Crowley Fleck PLLP
P.O. Box 7099
Missoula, MT 59807-7099

Jeff Oven
Crowley Fleck PLLP
P.O. Box 2529
Billings, MT 59103-2529

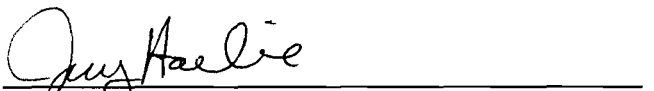
Attorneys for Defendants Ark Land Company and Arch Coal, Inc.

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

Patrick Parenteau
Vermont Law School
South Royalton, VT 05068

Attorneys for Plaintiffs Northern Plains Resource Council, Inc. and National Wildlife Federation
(Supreme Court Cause No. DA 12-0184)

Dated this 25th day of April, 2012.



Jenny K. Harbine

Attorney for Plaintiffs Montana Environmental Information Center and Sierra Club

APPELLANTS MEIC AND SIERRA CLUB'S OPENING BRIEF

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 12-0185

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND COMPANY, INC., and ARCH COAL, INC.,

Defendants and Appellees.

APPELLANTS MEIC AND SIERRA CLUB'S OPENING BRIEF

On Appeal from the Montana Sixteenth District Court, Powder River County, Cause Number DV-38-2010-2481, The Honorable Joe L. Hegel, Presiding

---

TIMOTHY J. PRESO
JENNY K. HARBINE
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 586-9695
tpreso@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs-Appellants MEIC and Sierra Club

STEVE BULLOCK
Montana Attorney General
JENNIFER ANDERS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620
(406) 444-2026

CANDACE F. WEST
TOMMY H. BUTLER
Special Assistant Attorneys General
P.O. Box 201601
Helena, MT 59620
(406) 444-3776

Attorneys for Defendant-Appellee Montana Board of Land Commissioners

MARK L. STERMITZ
JEFFERY J. OVEN
CHRISTOPHER C. STONEBACK
Crowley Fleck PLLP
305 S. Fourth Street E., Suite 100
P.O. Box 7099
Missoula, MT 59807
(406) 523-3600
Fax: (406) 523-3636

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

JACK TUHOLSKE
Tuholske Law Office, P.C.
PO Box 7458
234 East Pine Street
Missoula, MT 59807

PATRICK PARENTEAU
Vermont Law School
South Royalton, VT 05068

Attorneys for Plaintiffs Northern Plains Resource Council, Inc. and
National Wildlife Federation
(Supreme Court Cause No. DA 12-0184)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES AND REGULATIONS

FEDERAL STATUES AND REGULATIONS

STATEMENT OF ISSUE

Whether MCA § 77-1-121(2) violates Montana's environmental constitutional provisions, as applied, by exempting the Otter Creek coal leases from environmental review at the stage of the development process that opens the door to mining and burning 1.3 billion tons of coal and resulting environmental harm.

STATEMENT OF THE CASE

This case challenges the decision by the Montana Board of Land Commissioners ("Land Board") to lease 572 million tons of state-owned coal, encompassing 9,543 acres, to Arch Coal for a massive new strip mine in southeastern Montana's Otter Creek Valley without first evaluating the environmental consequences of its action or options to minimize or avoid such consequences. On May 14, 2010, Plaintiffs-Appellants Montana Environmental Information Center and Sierra Club (collectively, "MEIC") filed this case in the Sixteenth Judicial District, Powder River County, arguing that, as applied to the Otter Creek leases, MCA § 77-1-121(2), which exempts coal leases from environmental review pursuant to the Montana Environmental Policy Act ("MEPA"), violates the Plaintiffs' constitutional right to be free from unreasonable

environmental degradation.[1] Specifically, Plaintiffs argued that the Land Board is required to conduct MEPA review at the lease stage of coal-mine development because it offers the Land Board's only opportunity to minimize or avoid the mine's significant climate-change impacts. Further, Plaintiffs argued that MEPA review was constitutionally required before the Land Board leased Otter Creek coal because Arch Coal's payment to the state of $86 million to acquire the coal leases and required yearly expenditure of $2 million to develop the mine will, as a practical matter, make it impossible to halt or significantly limit coal mining after the leases were issued.

Defendants Land Board and Arch Coal each moved to dismiss the consolidated cases, arguing that the Court lacked jurisdiction and that Plaintiffs failed to state a claim upon which relief could be granted. The District Court denied these motions on January 7, 2011, holding that Plaintiffs had made ~~"a~~ cognizable claim that MCA § 77-1-121(2) is not constitutional," and identified the ~~"r~~emaining question" as whether the Land Board ~~"t~~[ook] something off the table" when it issued the Otter Creek leases that was ~~"s~~ufficient to implicate the constitutional protection of a clean and healthful environment." Mem. and Order re Motions to Dismiss (Jan. 7, 2011) at 6, 7.

[1] On July 7, 2010, District Court Judge Joe Hegel consolidated this case with the related case of Northern Plains Resource Council v. Montana Board of Land Commissioners, No. DV-38-2010-2480. See Order (July 7, 2010).

On February 7, 2012, the District Court denied Plaintiffs' summary judgment motion and granted summary judgment to the Defendants. Relevant to this appeal, the District Court found in its summary judgment ruling that:

> [T]he ~~"O~~tter Creek tracts" … contain an estimated 1.3 billion tons of coal, which if mined and burned, could add a significant percentage of the carbon dioxide annually released into the atmosphere, thereby exacerbating global warming and climate change. The effects of climate change include specific adverse effects to Montana's water, air and agriculture.

and

> The Defendant presented no evidence contravening the Plaintiffs' evidence … that the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned. The Court further finds that the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease.

Mem. and Order re Cross Motions for Summ. J. (Feb. 7, 2012) ("~~O~~rder") at 3, 4 (emphasis added). Further, the District Court concluded that "~~b~~ut for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage." Id. at 6. Nonetheless, the District Court held that pre-leasing MEPA review is not constitutionally required because the State "~~r~~etained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust

responsibilities" at a later, post-leasing stage of the coal-mine development process. Id. at 10.

MEIC timely filed its notice of appeal on March 20, 2012.

STATEMENT OF FACTS

On March 18, 2010, the Land Board leased to Ark Land Company, a wholly owned subsidiary of Arch Coal, 572 million tons of state-owned coal in the Otter Creek drainage near Ashland, Montana, in exchange for a bonus bid payment of $86 million. Joint SOF ¶¶ 2, 19, 43; Supp. App. 8 (Joint Ex. K) at 8.[2] The state-owned Otter Creek coal is intermingled with privately owned coal that has also been leased by Arch Coal. See Joint SOF ¶¶ 2, 19. Together, the Otter Creek coal tracts constitute 1.3 billion tons of coal. Id. ¶ 2.

At its peak, the Otter Creek mine could produce for sale to power plants 33.2 million tons of coal each year, nearly doubling Montana's total coal production. Supp. App. 3 (Plaintiffs' Ex. O) at 3-5, Appendix C; MEIC SOF, ¶ 24. If mined and burned as planned, the massive quantity of coal contained within the Otter Creek tracts will constitute one of the nation's largest single sources of carbon

[2] MEIC's factual citations refer either to the Joint Statement of Undisputed Facts ("Joint SOF") filed by Plaintiffs and Defendants in the District Court on May 13, 2011, or to exhibits in the District Court record. The District Court record contains Joint Exhibits A-L (filed May 13, 2011) and Plaintiffs' Exhibits A-Z and AA (filed June 29, 2011). Where applicable, citations include a reference to the document's location within the Supplemental Appendices ("Supp. App.") filed in the Supreme Court with the opening brief of Northern Plains Resource Council.

dioxide (~~"~~CO_2"), contributing to climate change and its potentially disastrous impacts in Montana and globally. Nearly all of the Otter Creek coal is destined for combustion at coal-fired power plants and could alone result in emissions of approximately 2.4 billion tons of CO_2.[3] When coal production from Otter Creek is at its peak, combustion of Otter Creek coal will result in 60.4 million tons of annual CO_2 emissions. Supp. App. 3 (Plaintiffs' Ex. O) at 3-5, Appendix C; Supp. App. 28 (Plaintiffs' Ex. AA) at 3. These emissions would amount to nearly double all of Montana's yearly CO_2-equivalent emissions generated (37 million tons in 2005). See Supp. App. 13 (Plaintiffs' Ex. N) at 4.[4]

The billions of tons of CO_2 emissions stemming from the proposed Otter Creek Mine would contribute to the ongoing warming of the Earth's climate that threatens major environmental impacts in Montana and worldwide. In 2007, the Intergovernmental Panel on Climate Change (IPCC) released its Fourth Assessment Report, stating that ~~"~~warming of the climate system is unequivocal," and it is human caused. Supp. App. 18 (Plaintiffs' Ex. U) at 2, 5. As the District

[3] Montana sub-bituminous coal has an average carbon dioxide emissions factor of 213.4 pounds of carbon dioxide per million BTUs. Supp. App. 28 (Plaintiffs' Ex. AA) at 3. Otter Creek coal heating values average 8,500 to 8,600 BTU/lb on an as-received basis. Supp. App. 3 (Plaintiffs' Ex. O) at E-3. Taking the median of 8,550 BTU/lb, one ton of Otter Creek coal will emit 1.82 tons CO_2 when combusted (3649.1 lbs CO_2/2000 lbs coal = 1.82).

[4] This accounting reflects Montana's gross consumption-based CO_2-equivalent emissions, which exclude Montana's electricity exports.

Court concluded, "[t]he effects of climate change include specific adverse effects to Montana's water, air and agriculture." Order at 3. 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_2 emissions scenarios. MEIC SOF ¶ 8. If CO_2 emissions continue to grow unabated, the region will likely experience warming at the high end of this range. Id.

According to the U.S. Global Change Research Program (GCRP), climate change could affect the Great Plains region, including eastern Montana, by causing "more frequent extreme events such as heat waves, droughts, and heavy rainfall, [jeopardizing] the region's already threatened water resources, essential agricultural and ranching activities, unique natural and protected areas, and the health and prosperity of its inhabitants." Supp. App. 17 (Plaintiffs' Ex. T) at 123.

These impacts were well known to state environmental officials at the time of the Otter Creek leasing decision. The Final Environmental Impact Statement ("FEIS") for a proposed—but aborted—new coal-fired power plant near Great Falls, Montana, which was co-authored by the U.S. Department of Agriculture's Rural Utility Service and the Montana Department of Environmental Quality ("DEQ"), stated that:

> While climate change is the ultimate global issue—with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another—it does manifest itself in particular ways in specific locales like

> Montana. During the past century, the average temperature in Helena increased 1.3°F and precipitation has decreased by up to 20 percent in many parts of the state.

Supp. App. 12 (Plaintiffs' Ex. H) at 3-46. Further, "[o]ver the next century, Montana's climate may change even more." Id. Along with higher temperatures, the northern Rockies will see less water stored in snowpack, earlier spring snowmelt, and lower stream flows in the summer. See id. As a result, Montana will have longer summer droughts, less water availability, more insect infestations, more intense wildfires, and decreased water availability for irrigation and crop production. See id. Based on current warming trends, scientists estimate that glaciers may entirely disappear from Glacier National Park, perhaps by 2020. See Supp. App. 12 (Plaintiffs' Ex. H) at 3-46. Further, climate change "could profoundly affect the distribution and abundance of many fishes." Plaintiffs' Ex. W at 1552. Montana's native Bull trout are especially at risk because of their dependence on cold water for spawning and early rearing. See id.

These conditions "and ultimately the effect they will have on Montana's short and long-term future" motivated Montana Governor Brian Schweitzer to form a Climate Change Advisory Committee (CCAC) in December 2005. Supp. App. 21 (Plaintiffs' Ex. F) at A-1. The CCAC produced a Climate Change Action Plan, which recommended "that Montana establish a statewide, economy-wide GHG [greenhouse gas] reduction goal to reduce gross GHG emissions to 1990

levels by 2020, for both consumption-based and production-based emissions, and to further reduce emissions to 80% below 1990 levels by 2050." Id. at 1-9. The CCAC recognized the ~~li~~likely increase in fossil fuel production that will occur in Montana" but that ~~"[k~~key choices in technology and infrastructure can have a significant impact on emissions growth." Id. at 1-5, 1-7.

Although global warming is a worldwide phenomenon, concentrations of CO_2 and other greenhouse gases in the atmosphere ~~ar~~are projected to continue increasing unless the major emitters take action to reduce emissions." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,539 (Dec. 15, 2009) [Supp. App. 19 (Plaintiffs' Ex. V)]. The U.S. Environmental Protection Agency (~~"E~~EPA") recognized the cumulative nature of both the climate change problem and the strategies needed to combat it:

> [N]o single greenhouse gas source category dominates on the global scale, and many (if not all) individual greenhouse gas source categories could appear small in comparison to the total, when, in fact, they could be very important contributors in terms of both absolute emissions or in comparison to other source categories, globally or within the United States. If the United States and the rest of the world are to combat the risks associated with global climate change, contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues.

Id. at 66,543 (emphasis added).

Further, Montana's Governor (a Land Board member) and the Montana CCAC have recognized that economy-wide reductions in carbon dioxide emissions are necessary to achieve emissions reductions essential to averting the worst-case climate change scenarios. See Supp. App. 21 (Plaintiffs' Ex. F) at 1-9. As the U.S. Supreme Court stated in the seminal case of Massachusetts v. EPA, the state "would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming." 549 U.S. 497, 526 (2007) (quotations and citation omitted) (referencing statements by the President and EPA). Despite this undisputed evidence that greenhouse gas emissions from sources such as coal mines must be limited to avert the worst climate-change scenarios, state officials pursued the opposite strategy here.

In addition to climate-change impacts, development of the Otter Creek coal tracts threatens other significant environmental impacts. Montana DEQ has found that mining has substantial environmental consequences, some enduring even after a mine is reclaimed. See Supp. App. 10 (Plaintiffs' Ex. E) at 3-182. In DEQ's words, "[a]s … coal is mined, almost all components of the present ecological system in the area, which have developed over a long period of time, would be modified." Id. Strip mining results in complete removal of the coal aquifer and any overburden. Id. at 3-66. As the mining area is "reclaimed," the aquifer is replaced with backfilled overburden material. Id. While reclamation attempts to

restore natural conditions, the landscape of the mined area is forever changed. Id. at 3-8, 4-17. DEQ's past assessment of surface coal mining has also concluded that mining degrades groundwater quality, impairing its use for household and irrigation purposes even after reclamation has taken place. See id. at 3-73; see also id. at 3-66. Further, mining displaces wildlife, which may not ~~be~~ completely restored [in the mined area] for an estimated 50 years after the initiation of [mining]." Id. at 3-182.

Although leasing the Otter Creek tracts marked the first of several steps that will lead to mining all or nearly all of Arch Coal's 1.3 billion tons of coal, the Land Board took this action without first conducting any environmental review of the consequences of mining or considering any leasing alternatives. See Joint SOF ¶¶ 22, 24-25. Specifically, relying on an exemption from MEPA in MCA § 77-1-121(2), state officials failed to prepare an environmental impact statement—or even a more abbreviated environmental assessment—to explore the environmental impacts of the Otter Creek leasing decision under MEPA. Instead, the Land Board elected to defer all environmental impact analyses to the permitting stage of the coal-mine development process—a stage when many options for avoiding the climate-change impacts of Otter Creek coal mining will be effectively off the table.

In fact, the State and its elected officials have touted the revenues thus far received as well as future royalties and tax revenues as sources of income for the

disabled, infrastructure, and environmental programs. Supp. App. 8 (Joint Ex. K) at 8. Portions of the $86 million bonus bid have already been ear-marked to fund programs in the State's budget. Supp. App. 7 (Joint Ex. J) at 13. Indeed, based on the substantial and undisputed facts of record, the District Court found ~~"t~~hat the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease." Order at 4.

STANDARD OF REVIEW

This Court's review of the District Court's summary judgment order is de novo. Seven Up Pete Venture v. State, 2005 MT 146, ¶ 19, 327 Mont. 306, 114 P.3d 1009. Under Rule 56 of the Montana Rules of Civil Procedure, summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. M.R.Civ.P. 56(c).

~~"W~~When resolution of an issue involves a question of constitutional law, this Court's review of the district court's interpretation of the law is plenary." Seven Up Pete Venture, ¶ 18 (citing State v. Price, 2002 MT 229, ¶ 27, 311 Mont. 439, 57 P.3d 42); see also Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality (~~"M~~MEIC") 1999 MT 248, ¶ 40, 296 Mont. 207, 988 P.2d 1236 (~~"W~~We review a district court's constitutional conclusions as we do other issues of law to determine whether they are correct.").

Statutes are entitled to a presumption of constitutionality. City of Billings v. Albert, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. However, once Plaintiffs have demonstrated that a statute infringes upon a fundamental right, then the burden shifts to the State to prove that the statute can survive strict scrutiny. Butte Cmty Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).

SUMMARY OF ARGUMENT

The Montana Constitution recognizes as inalienable ~~t~~the right to a clean and healthful environment," and, as a correlative responsibility, requires that ~~"[t~~]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const., art. II, § 3; id. art. IX, § 1. This Court has recognized that these fundamental rights are ~~b~~both preventative and anticipatory." MEIC, ¶ 77.

The Land Board's decision to lease 572 million tons of state-owned coal, or encompassing 9,543 acres, is massive. Moreover, based on the undisputed facts of record, the District Court found ~~t~~that the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease." Order at 4. As to the environmental impacts that will attend the mining and combustion of the coal, the District Court found ~~t~~that the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned." Id. Because of these

environmental consequences that the leasing of the Otter Creek tracts ultimately leads to, the District Court recognized ~~t~~hat but for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage." Id. at 6.

As applied to the Otter Creek coal leases, the Montana statutory exemption from MEPA review in MCA § 77-1-121(2) implicates Plaintiffs' fundamental constitutional right to a clean and healthful environment. Leasing is a critical decision point in the mine development process that opens the door to significant environmental degradation. Yet, the challenged statute allows coal leases to escape environmental review. As the federal courts have recognized under MEPA's federal analogue, the National Environmental Policy Act ("~~N~~NEPA"), 42 U.S.C. § 4321 et seq., once a lease issues, the mineral developer will (and indeed, under the lease, must) commit time and effort to development of the leased land and minerals, and the state agencies will begin to make plans based upon the leased revenues—just as has happened here. See Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983).

Contrary to the District Court's conclusion, the later prospect of regulatory review at the coal mine-permitting stage is no substitute for pre-leasing environmental review because the leases trigger a series of commitments by both Arch Coal and the State that make halting or significantly limiting the mining or

burning of Otter Creek coal practically impossible. Because the challenged action implicates Plaintiffs' constitutional right, it can withstand judicial review only if it survives application of the "strict scrutiny" standard. See MEIC, ¶ 63. Applying that standard here, MCA § 77-1-121(2) is unconstitutional as applied to this case because the State cannot demonstrate that it had a compelling interest for impairing Plaintiffs' constitutional right, let alone that it chose the "least onerous" path for satisfying that interest. See id.

This Court should declare the Otter Creek leases void to ensure that the Land Board's future study and consideration of the environmental consequences of the mining and burning of Otter Creek coal and options for avoiding those consequences are not prejudged by a decision to lease that has already been made. See Kadillak v. Anaconda Co., 184 Mont. 127, 144, 602 P.2d 147, 157 (1979) (voiding lease).

ARGUMENT

I. SECTION 77-1-121(2) IS UNCONSTITUTIONAL AS APPLIED TO THE OTTER CREEK COAL LEASES

As applied to the Otter Creek coal leases, the exemption from MEPA's environmental review requirement in MCA § 77-1-121(2) cannot survive constitutional scrutiny. Section 77-1-121(2) states that the Land Board is "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."

Relying on MCA § 77-1-121(2), the Land Board leased the Otter Creek coal tracts without first considering the environmental consequences of its actions or options for avoiding these consequences pursuant to MEPA. Based on the undisputed facts of record, the District Court found ~~t~~that the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease." Order at 4. Likewise, the District Court found ~~t~~that the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned." Id. However, the District Court erroneously concluded that ~~[~~a]lthough it may be probable that the mining will go forward, there is no guarantee that it will and there is no way to determine that adequate environmental protections will not be put in place in the process." Id. at 9-10.

The District Court's conclusion was incorrect. At the permitting stage, substantial resources have already been invested in developing the coal mine, which will make mining a foregone conclusion, and the State's requisite study of alternatives under MEPA will be meaningless. Because the leases are the point at which irreversible impacts of coal mining and coal burning become a practical inevitability, the Land Board's failure to undertake MEPA review, as sanctioned by MCA § 77-1-121(2), implicates the Montana Constitution's environmental

protections. The Land Board's omission is therefore subject to, and ultimately fails, strict scrutiny.

A. The Consequences of Mining Otter Creek Coal Implicate the Constitution's Environmental Protections

The dramatic environmental effects of mining and burning Otter Creek coal implicate Plaintiffs' environmental rights guaranteed by Montana's Constitution. Montana's Constitution guarantees "the right to a clean and healthful environment" and requires that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3; id. art. IX, § 1. This Court has determined that the right to a clean and healthful environment is "linked to the legislature's [constitutional] obligation … to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources." MEIC, ¶ 77.

The environmental protection provided by Montana's constitution was thought by its drafters "to be the strongest environmental protection provision found in any state constitution." MEIC, ¶ 66 (citing Mont. Const. Convention, Vol. IV at 1200 (Mar. 1, 1972)). Montana Constitution article II, section 3 and article IX, section 1 do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical

endangerment." MEIC, ¶ 77. Together, they provide environmental ~~p~~protections which are both anticipatory and preventative." Id.

This Court has found these far-reaching constitutional protections to be implicated even when the extent of environmental harm threatened by a challenged action may be far less grave than the harm threatened by the action at issue here. In MEIC, plaintiffs challenged the constitutionality of a statutory exemption from the requirement to review the potential for test wells to degrade high-quality surface waters as it applied to discharges of arsenic-contaminated water from a test well for a proposed gold mine. See MEIC, ¶ 6. The Court found that the exemption implicated the plaintiffs' constitutional rights even though ~~a~~ short distance from the points of discharge there were no changes from background levels of arsenic." MEIC, ¶¶ 26, 78-79.

Likewise, in Cape-France Enters. v. Estate of Peed, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, the Court found that drilling a well on private property with contaminated groundwater would result in ~~p~~potential health risks and possible environmental degradation," such that the drilling would violate the Constitution's environmental provisions. Id. ¶¶ 29, 33 (emphases added).

Given these holdings, the environmental consequences at issue here are more than sufficient to trigger the Montana Constitution's environmental guarantees. The District Court found, based on undisputed facts, that ~~t~~he myriad

adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should [Otter Creek] coal be mined and burned." Order at 4. The District Court's determination is well-founded: as described above, coal mining has substantial environmental consequences, many enduring even after a mine is reclaimed in accordance with permit conditions. See Supp. App. 10 (Plaintiffs' Ex. E) at 3-66, 3-73. Further, the burning of Otter Creek coal ~~c~~could add a significant percentage of the carbon dioxide annually released into the atmosphere." Order at 3. EPA has cautioned that ~~[~~i]f the United States and the rest of the world are to combat the risks associated with global climate change, contributors must do their part even if their contributions to the global problem, measured in terms of percentage, are smaller than typically encountered when tackling solely regional or local environmental issues." 74 Fed. Reg. at 66,543. Failing to reduce emissions from large sources such as Otter Creek ~~w~~would effectively lead to a tragedy of the commons, whereby no country or source category would be accountable for contributing to the global problem of climate change, and nobody would take action as the problem persists and worsens." Id.

With respect to such sources in Montana, the ~~a~~nticipatory and preventative" environmental provisions of our Constitution prohibits this result. MEIC, ¶ 77. As this Court has held:

> The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill

> health or physical endangerment. 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.

Id.

B. Pre-Leasing Environmental Review is Necessary to Allow the Land Board to Satisfy its Constitutional Duty to Prevent Unreasonable Environmental Degradation

Because the Land Board could not fulfill its constitutional obligation to minimize unreasonable environmental degradation when it did not even study the environmental consequences of its leasing decision, the MEPA exemption in MCA § 77-1-121(2), as applied to the Otter Creek coal leases, implicates Plaintiffs' fundamental right to a clean and healthful environment and triggers strict scrutiny. See Mont. Const. art. II, § 3; see also Mont. Const. art. IX, § 1.

The Montana Legislature identified MEPA as one necessary tool for implementing the state's constitutional obligation to prevent unreasonable environmental degradation. See 2003 Mont. Laws ch. 361, § 5 (HB 437); MCA § 75-1-102.[5] While MEPA mandates procedures rather than particular outcomes, "[t]he Legislature enacted MEPA to prevent or eliminate environmental damage." Pompeys Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality, 2002 MT 352, ¶

[5] The 2011 Legislature amended MEPA. See 2011 Mont. Laws ch. 396 (SB 233). To the extent that those amendments affect the Land Board's MEPA obligations, this Court must apply the law that was in effect at the time the Land Board issued the Otter Creek leases in 2010. See MCA § 1–2–109 ("No law contained in any of the statutes of Montana is retroactive unless expressly so declared.").

17, 313 Mont. 401, 61 P.3d 148. MEPA's environmental review requirement fosters better decision-making by establishing a "look before you leap" mandate, "ensur[ing] that presently unquantified environmental amenities and values may be given appropriate consideration." MCA § 75-1-201(1)(b)(ii); see also id. § 75-1-102(1) (legislature's intent is that MEPA "review of state actions [will] ensure that environmental attributes are fully considered"); Ravalli County Fish & Game Ass'n v. Mont. Dep't of State Lands, 273 Mont. 371, 378, 903 P.2d 1362, 1367 (1995) ("MEPA requires that an agency take procedural steps to review … major actions of state government significantly affecting the quality of the human environment' in order to make informed decisions.") (citation omitted). Thus, like NEPA, "[M]EPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The [M]EPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c); see also Kadillak, 184 Mont. at 136, 602 P.2d at 153 (using NEPA provisions to inform interpretation of MEPA).

MEPA regulations direct that the Land Board "shall determine the significance of impacts associated with a proposed action." Mont. Admin. R. 36.2.524(1) (emphasis added). The regulatory definition of "action" includes "a project or activity involving the issuance of a lease … or other entitlement for use

or permission to act by the agency, either singly or in combination with other state agencies." Id. 36.2.522(1) (emphasis added). Accordingly, on its face, MEPA applies to the Otter Creek leases. See, e.g., N. Fork Pres. Ass'n v. Dep't of State Lands, 238 Mont. 451, 455, 778 P.2d 862, 865 (1989) (agency ~~p~~repared a preliminary environmental review (PER) for the purpose of determining whether issuance of oil and gas leases would be an action by state government ~~s~~significantly affecting the quality of the human environment'"). Thus, as the District Court correctly held, ~~b~~ut for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage." Order at 6.

But for the § 77-1-121(2) exemption, MEPA would have required the Land Board to examine and consider the full panoply of foreseeable environmental impacts associated with mining and burning coal from the Otter Creek tracts. MEPA review must include an assessment of an action's ~~p~~rimary, secondary, and cumulative impacts." Mont. Admin. R. 36.2.529(4)(b). In cases arising under NEPA, federal courts have required agencies to analyze the secondary ~~e~~ffects on air quality that an increase in the supply of low-sulfur coal to power plants would produce" due to the construction of a rail line to transport coal, see Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 548-49 (8th Cir. 2003), and the climate change impacts of federal fuel-efficiency standards that were not as

stringent as considered alternatives, see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1218-19, 1225 (9th Cir. 2008). MEPA—and Montana's Constitution—require no less. [6]

MEPA review of the Otter Creek coal leases also could have revealed options for minimizing or avoiding the climate change impacts of coal combustion. See Mont. Admin. R. 36.2.525(3)(d)-(g). The Land Board could have considered the effect of lease stipulations that, for example, would require Arch Coal to condition coal sales to power plants on the receiving plant's avoidance or mitigation of CO_2 emissions through CO_2 sequestration or other technologies, prevent the export of Otter Creek coal to countries with lax clean air laws, or require Arch Coal to contribute to a fund that would be used to help mitigate climate-change impacts in Montana. Now that the leases have issued, the opportunity to include such lease stipulations is lost.

As applied to this case, the exemption from MEPA review in § 77-1-121(2) undermines the constitutional guarantee of a ~~"c~~lean and healthful environment" in much the same way as the statutory exemption examined by this Court in MEIC. In MEIC, the plaintiffs challenged the constitutionality of an exemption from a statutory requirement to review the potential for activities to degrade high-quality

[6] The Montana Supreme Court finds NEPA cases ~~"p~~ersuasive" when interpreting MEPA. Ravalli County Fish & Game Ass'n, 273 Mont. at 377, 903 P.2d at 1366; see also Kadillak, 184 Mont. at 136-37, 602 P.2d at 153.

waters. See MEIC, ¶ 80. The challenged statutory provision deemed certain activities categorically ―nonsignificant" and ―allow[ed] them to proceed without the form of review which would otherwise be required for degradation of the State's waters." Id. ¶ 19. The MEIC Court determined that the nondegradation review requirement was ―a reasonable legislative implementation of the mandate" to provide a ―clean and healthful environment." Id. ¶ 80. By creating a blanket exemption from nondegradation review for potentially polluting activities ―without regard to the nature or volume of the substances being discharged," the legislature ―violate[d] those environmental rights guaranteed by … the Montana Constitution." Id.

Similarly, MEPA ―is a reasonable legislative implementation of the mandate" to prevent unreasonable environmental degradation associated with coal leasing. Id.; see 2003 Mont. Laws ch. 361, § 5 (HB 437); MCA § 75-1-102. However, § 77-1-121(2) provides a blanket exemption for certain leases from MEPA review ―without regard to" whether any particular lease might have significant environmental impacts. MEIC, ¶ 80. Application of the MEPA exemption to the Otter Creek coal leases left the Land Board uninformed of the environmental consequences of its action and therefore ill-equipped to minimize those consequences, as required by Montana's Constitution. See Mont. Const. art. II, § 3; id. art. IX, § 1. Accordingly, like the exemption from nondegradation

review at issue in MEIC, the exemption from MEPA review at issue here implicates the Constitution's environmental guarantees.

C. Future Environmental Review is Insufficient to Satisfy the Land Board's Constitutional Obligations

While recognizing the significant environmental impacts associated with mining of Otter Creek coal, the District Court rejected Plaintiffs' constitutional claim upon finding a sufficient opportunity for MEPA review at the post-leasing, permitting stage of the mine-development process. This was error. Although MEPA review of the Otter Creek coal mine will occur before the State issues a permit to mine, this review will come too late to allow the Land Board to consider a meaningful no-action alternative or mitigation for some of the most harmful impacts of mining and burning coal. The Land Board's post-leasing authority to address environmental impacts, particularly impacts from coal combustion, is limited as a matter of law. Moreover, a government agency's post-leasing authority to meaningfully ameliorate or avoid environmental impacts is, as a practical matter, substantially limited.

1. The Land Board's Post-Leasing Authority to Minimize or Avoid Climate-Change Impacts is Limited as a Matter of Law

The Land Board's consideration of the Otter Creek coal mine at the permitting stage of mine development is not an adequate substitute for pre-leasing environmental review because the Land Board's post-leasing authority is

statutorily limited to prescribing mining and reclamation practices to mitigate localized impacts; it does not extend to the climate impacts of coal combustion.

Although Arch's interest in the Otter Creek leases is subject to DEQ's regulatory permitting authority under the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act, Supp. App. 9 (Joint Ex. L) ¶ 1, those statutes do not provide the Land Board with the opportunity to limit or halt mining, see, e.g., MCA §§ 82-4-205(1)(b) (DEQ approval required ~~–f~~or the method of operation, subsidence stabilization, water control, backfilling, grading, highwall reduction, and topsoiling and for the reclamation of the area of land affected by the operator's operation"), 82-4-227 (permit issuance criteria). And while the Otter Creek leases contain a provision requiring Land Board approval of mine operations and reclamation plans developed pursuant to the Montana Strip and Underground Mine Reclamation Act, such plans establish mining and reclamation practices that mitigate localized land and water impacts; they do not encompass mitigation of climate-change impacts or restrictions on coal combustion. See MCA § 82-4-222(1) (requirements for mining and reclamation plan); see also Order at 10.

Nor does MEPA give the Land Board such authority at the permitting stage. Indeed, MEPA specifically prohibits the denial of a permit—or even the imposition of mitigation measures—based upon the results of environmental

review if the agency does not have the independent statutory authority to take such action under another statute. MCA § 75-1-201(4)(a).

Aside from these statutory and lease provisions, the only plausible source of Land Board authority to deny or limit coal mining or the combustion of coal must derive from its constitutional environmental and public trust responsibilities. The District Court held that Arch's interest in the Otter Creek leases is subject to these responsibilities, and, therefore, no constitutional violation occurred when the Land Board refused to satisfy its constitutional duties before issuing the Otter Creek leases. See Order at 9. While Plaintiffs advocate for the strongest possible construction of the Land Board's authority to protect the environment, the Land Board's post-leasing authority is not explicit and may be challenged, constrained, or denied by the very parties who prevailed on this issue in the District Court. Although the District Court found that such authority exists, the State interprets this authority as ~~"a~~ question of degree." Summ. J. Hearing Tr., at 68:7-15. At the summary judgment hearing in this case, Arch Coal's lawyer finally stated, after repeated questioning by the District Court Judge, that climate change mitigation at the permitting stage would be ~~"in~~ theory … a legitimate act of [the Land Board's] authority", id. at 68:1-4, but he also suggested that his client may challenge the exercise of that authority, id. at 65:17-66:9. The District Court's ruling therefore places Plaintiffs in the untenable position of lacking any right to MEPA review of

alternatives and mitigation for the Land Board's leasing decision but facing the prospect of limitations of or objections to the Land Board's authority to require post-leasing alternatives and mitigations at the permitting stage, should it even decide to do so.[7]

Viewed from the standpoint of vindicating the constitution's ~~"a~~nticipatory and preventative" environmental protections, the requirement to examine impacts, consider alternatives, and assess potential mitigations should apply at the leasing stage, where the Land Board's statutory authority to condition development rights is clear. The Land Board has broad discretion at the leasing stage, as it may lease state coal resources in any ~~"m~~anner that it considers in the best interests of the state." MCA § 77-3-301. As this Court has held, the Land Board's obligation ~~"to~~ protect the best interests of the state ... necessarily includes considering consequences to … the environment," Ravalli County Fish & Game Ass'n, 273

[7] The doctrine of judicial estoppel does not ensure that Plaintiffs could prevail against the State or Arch Coal in a subsequent adjudication of the Land Board's environmental-protection authority at the permitting stage. The doctrine includes four elements: ~~"(~~1) the estopped party had knowledge of the facts at the time he took the original position; (2) the estopped party succeeded in maintaining the original position; (3) the position presently taken is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party." Stevens v. Novartis Pharm. Corp., 2010 MT 282, ¶ 76, 358 Mont. 474, 247 P.3d 244. Here, neither the State nor Arch Coal advocated without reservation the position adopted by the District Court: that the Land Board has unlimited discretion to condition or prohibit coal mining at the permitting stage.

Mont. at 379, 903 P.2d at 1368, and the Land Board's ~~"d~~uty to avoid environmental harm is mandatory," id. 273 Mont. at 387, 903 P.2d at 1373. MEPA is the vehicle identified by the Legislature to inform this consideration. MCA § 75-1-102(1). Yet the District Court's ruling leads to an outcome in which the Land Board's assessment of the ~~"b~~est interests of the state" is uninformed by any MEPA analysis of environmental consequences or means to avoid them.

2. The Land Board's Post-Leasing Authority to Halt or Substantially Limit the Mining or Burning of Coal is Limited as a Practical Matter

Even if, as the District Court held, the Land Board has legal authority at the mine-permitting stage to mitigate the full suite of environmental impacts caused by the mining and burning of Otter Creek coal, the impracticability of imposing significant limitations on the mining and burning of coal after substantial resources have been expended to further mine development renders this post-leasing legal authority insufficient to allow the Land Board to satisfy its constitutional environmental obligations. The Otter Creek leases triggered events that create substantial momentum toward eventual coal mining, effectively taking the ~~"n~~o-action alternative" off the table. Once a lease issues, a developer will ~~"c~~ommit[] time and effort to planning the development of the blocks they had leased, and the [federal and] state agencies [will] beg[i]n to make plans based upon the leased tracts." Watt, 716 F.2d at 952.

> Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues. Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to ~~re~~decide."

Id. at 952-53; see also D.C. Fed'n of Civic Ass'ns v. Adams, 571 F.2d 1310, 1312 (4th Cir. 1978) (An EIS must be prepared ~~be~~fore such substantial inertia develops that a proposal cannot be rejected or reevaluated.").

Here, Arch Coal has already paid $86 million for the Otter Creek leases. Joint SOF ¶¶ 19, 21. More importantly, the leases mandate massive future resource commitments, including a minimum expenditure of $2 million per year toward mine development for the first five years after the leases issued. See Supp. App. 9 (Joint Ex. L) ¶ 28. Further, Arch Coal has already applied for, and DEQ has issued to Arch Coal, a prospecting permit for Otter Creek. See Joint SOF ¶ 29. Arch Coal is not paying $86-million-plus for nothing. To the contrary, Arch's payments and the ongoing agency response to them give rise to the very real ~~b~~ureaucratic commitment" toward development deemed corruptive of the environmental analysis process in the NEPA line of cases.

In reaching its contrary conclusion, the District Court relied heavily on the holding in Seven Up Pete Venture that a mineral lease does not convey a property right. See Seven Up Pete Venture, ¶¶ 28, 32. Because the Otter Creek leases—like the lease at issue in Seven Up Pete Venture—conditioned future mining on

compliance with applicable laws, the District Court reasoned, issuance of the Otter Creek leases did not eliminate the Land Board's ability to impose "reasonable restrictions" on mining to fulfill its constitutional and trust obligations and thus no constitutional violation occurred. Order at 10.

However, Seven Up Pete Venture does not support the District Court's conclusion. The issue in that case was whether a citizen initiative that banned the cyanide heap-leach method of mining effected a regulatory taking of a lease-holder's property rights without compensation. Seven Up Pete Venture, ¶ 21. As the Supreme Court noted, constitutional prohibitions against uncompensated takings apply only when property rights are at stake. Id. ¶ 26. Accordingly, the question whether a mineral lease conveys a property right was dispositive of the constitutional issue in that case. Here, by contrast, the constitutional question is whether the Otter Creek leases make environmental degradation sufficiently probable to trigger the Constitution's "anticipatory and preventative" environmental protections. See MEIC, ¶ 26; Cape-France Enters., ¶¶ 29, 33. Based on its misplaced reliance on Seven Up Pete Venture, the District Court was persuaded that the State maintains the discretion to condition or disallow coal mining as a matter of law. However, the Court did not address the tremendous practical impediments to the exercise of that discretion—impediments that make pre-leasing environmental review a constitutional imperative.

Moreover, in the analogous oil and gas leasing context, federal courts have determined that post-leasing environmental review does not negate the legal infirmity caused by an agency's failure to conduct NEPA review before issuing leases, even though oil and gas development would only be authorized by further permitting. "[B]y definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or [NEPA's] statutory mandate becomes ineffective." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1229 n.4 (9th Cir. 1988). Accordingly, "full and meaningful consideration of the no-action alternative can be achieved only if all alternatives available … are developed and studied on a clean slate." Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992).

Likewise, here, the Land Board lacks the authority to terminate the Otter Creek leases unless Arch fails to fulfill its specific obligations under the lease. See Joint SOF ¶ 26; Supp. App. 9 (Joint Ex. L) ¶ 14; Order at 6. MEPA review after the leases have issued, therefore, cannot include meaningful consideration of the "no-leasing option." See Bob Marshall Alliance, 852 F.2d at 1229 n.4 (noting unviability of "no-leasing option" once leases have issued). MEPA review at the mine-permitting stage is not equivalent to MEPA review at the leasing stage; after leases have issued, it is too late to inform the Land Board's evaluation of project alternatives, particularly the alternative of not mining at all.

D. MCA § 77-1-121(2) Fails Strict Scrutiny

While MEPA review is a key component of the State's implementation of its constitutional mandate to prevent unreasonable environmental degradation, including the degradation from coal mining discussed above, here, the Land Board failed to conduct environmental review on the assumption that the Otter Creek leases were exempt from MEPA under MCA § 77-1-121(2). "[T]he right to a clean and healthful environment" found in article II, section 3 of Montana's Constitution "is a fundamental right because it is guaranteed by the Declaration of Rights." MEIC, ¶ 63. Accordingly, "any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes 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." Id. (emphasis omitted). Section 77-1-121(2), as applied to the Otter Creek coal leases, fails strict scrutiny. As the District Court noted, "The State has not even suggested that it could meet the strict scrutiny standard, and while Arch has proffered the argument that maximizing profit is a compelling state interest, it has not supported this by applicable law or logical argument." Order at 8.

Indeed, no compelling interest is evident in the legislative record for § 77-1-121(2), and the Land Board proffered none when applying the MEPA exemption to the Otter Creek leases. To demonstrate a compelling state interest, a state must

show, ~~at~~ a minimum, some interest ~~of~~ the highest order and ... not otherwise served' or ~~the~~ the gravest abuse[ ], endangering [a] paramount [government] interest.'" Armstrong v. State, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) and Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Legislators and public proponents justified the 2003 law that added § 77-1-121(2) only on grounds that the MEPA exemption would save time and money, enabling coal and gas extraction on state land to proceed more expeditiously. See MEIC SOF ¶¶ 56-57. Even if § 77-1-121(2) was intended to save state resources, such frugality is not an interest ~~of~~ the highest order." Armstrong, ¶ 41 n.6. While ~~[t~~]he government has a valid interest in protecting its treasury," there is no indication that environmental review of coal leases ~~would~~ impair the State's ability to function as a governmental entity or create a financial crisis." See White v. State, 203 Mont. 363, 369, 661 P.2d 1272, 1275 (1983), overruled on other grounds by Meech v. Hillhaven W., Inc., 238 Mont. 21, 776 P.2d 488 (1989); see also Pfost v. State, 219 Mont. 206, 221, 713 P.2d 495, 504 (1985), overruled on other grounds by Meech, 238 Mont. 21, 776 P.2d 488 (holding that the state's interest in avoiding a tax increase was not ~~an~~ acceptable or a compelling state interest"). The legislative record is devoid of any compelling interest to justify the blanket MEPA exemption in § 77-1-121(2).

Even if the State could demonstrate a compelling interest in avoiding MEPA review for a category of state actions—which it cannot do—the blanket exemption in § 77-1-121(2) is not ~~"t~~he least onerous path" to achieving the State's objective. See MEIC, ¶ 63. Section 77-1-121(2)'s infringement on Plaintiffs' constitutional rights ~~is~~ unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." See Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997). Here, the State cannot demonstrate that other alternatives to a MEPA exemption—such as wholesale programmatic consideration of climate-change impacts from statewide coal mining that could be incorporated and referenced in project-specific analyses—would not suffice to address the professed concern with streamlining the development authorization process. Because § 77-1-121(2) cannot satisfy this standard, it fails strict scrutiny as applied to the Otter Creek leases.

II. THIS COURT SHOULD DECLARE THE OTTER CREEK COAL LEASES VOID

The only adequate remedy for the Otter Creek leases' legal infirmities—and the remedy strongly favored by equitable considerations—is to declare the leases void and, in any new leasing process, require the Land Board to comply with the constitutional protections implemented by MEPA. This remedy is necessary to ensure that environmental review of the Otter Creek leases is not a futile exercise that merely ratifies a decision that has already been made.

This Court should declare the Otter Creek leases void and set them aside because they were issued in violation of the Constitution and MEPA. As this Court has previously held, a permit to mine is void when the agency fails to follow proper procedures before issuing the permit. See Kadillak, 184 Mont. at 144, 602 P.2d at 157 (finding that, where application for a mining permit was ~~"in~~complete and inadequate," the mining permit ~~"w~~as void from the beginning and [the permittee] may not continue the mining activities … until a valid permit is granted by State Lands"). This is no less true for the issuance of a lease in violation of MEPA and the Constitution.

Furthermore, a lease is a contract. See Sandtana, Inc. v. Wallin Ranch Co., 2003 MT 329, ¶ 26, 318 Mont. 369, 80 P.3d 1224 (applying contract law to interpret oil and gas lease). The object of a contract is unlawful and unenforceable when its performance would cause a party to the contract to violate the constitutional requirement to ~~"m~~aintain and improve a clean and healthful environment in Montana." Cape-France Enters., ¶¶ 32-34. Indeed, ~~"w~~henever a statute is made for the protection of the public," like MEPA, ~~"a~~ contract in violation of its provisions is void." See McManus v. Fulton, 85 Mont. 170, 278 P. 126, 130 (1929) (quotations and citation omitted).

Consistent with the principle in these cases, this Court has held that inadequate compliance with the Montana Subdivision and Platting Act's

environmental review requirement, which is similar to MEPA's, renders a county's subdivision approval unlawful and therefore "require[s] reversal" of the county's decision. Citizens for Responsible Dev. v. Bd. of County Comm'rs, 2009 MT 182, ¶ 26, 351 Mont. 40, 208 P.3d 876; see also Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, ¶ 58, 356 Mont. 41, 230 P.3d 808. The developers in those cases could submit new subdivision applications, but those applications would have to be reviewed anew in accordance with the Montana Subdivision and Platting Act. See Citizens for Responsible Dev., ¶ 26. This Court should similarly declare the Otter Creek leases void and require the Land Board to comply with the Constitution and MEPA when it considers new lease applications for the Otter Creek coal.

The leases should be set aside not only because they are void, but also to prevent irreparable harm to Plaintiffs' constitutional rights, the environment, and the public interest. Because the Otter Creek leases violate Plaintiffs' constitutional right to a clean and healthful environment, the equities in this case require the Court to set aside the unconstitutional action. A "presumption of irreparable injury … flows from a violation of constitutional rights." Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) (citations omitted). In addition to the irreparable injury to Plaintiffs, the public interest favors canceling the leases "because all citizens have a stake in upholding the Constitution." Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005).

As described above, irreparable environmental harm in this case will flow from the Land Board's decision to issue the Otter Creek leases without considering the environmental consequences of its action and possible alternatives, including the no-action alternative. ~~M~~MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands. The [state decisionmaker] may not, as here, reach a decision without first engaging in the requisite significant impacts analysis." Ravalli County Fish & Game Ass'n, 273 Mont. at 384, 903 P.2d at 1371 (emphasis added). Setting aside the Otter Creek leases is the only remedy that will restore the Land Board's ability to conduct a meaningful MEPA review. See Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (finding that if decisions are made before an EIS is complete, ~~t~~the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it").

In circumstances analogous to those here, the federal District Court for the District of Montana held that cancellation of certain federal oil and gas leases was ~~t~~the only remedy which will effectively foster NEPA's mandate requiring informed and meaningful consideration of alternatives to leasing … , including the no-leasing option." Bob Marshall Alliance, 804 F. Supp. at 1297. That court distinguished federal cases in which courts did not cancel mineral leases on grounds that the decisionmaker's failure to consider a no-action alternative in the

Bob Marshall Alliance case ~~c~~ompels the utilization of a more comprehensive remedy." Id. at 1297 n.8. Likewise, the Otter Creek leases must be set aside to allow the Land Board to meaningfully consider the full range of leasing alternatives, including not leasing the Otter Creek tracts at all, after all environmental consequences are considered.

Setting aside the Otter Creek coal leases serves the public interest. MEPA implements a state policy ~~t~~to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." MCA § 75-1-102(2). The public interest in ~~p~~revent[ing], mitigat[ing] or eliminat[ing]" environmental damage, id., would be undermined by leaving leases in place that foreclose the Land Board's ability to meaningfully consider a ~~n~~o leasing" alternative. This is particularly true in light of the constitutional violations in this case. The intent of the Constitution's framers ~~w~~was to permit no degradation from the present environment and affirmatively require enhancement of what we have now.'" MEIC, ¶ 69 (emphasis omitted; quoting Mont. Const. Convention, Vol. IV at 1205 (Mar. 1, 1972)). The public's right to a clean and healthful environment is ~~i~~inalienable." MEIC, ¶ 76. ~~I~~[I]t is always in the public interest to protect constitutional rights." Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008); see also Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (~~u~~upholding constitutional rights surely

serves the public interest"). This Court should declare the Otter Creek leases void to prevent irreparable environmental harm and vindicate the public interest.

CONCLUSION

As applied to the Otter Creek coal leases, the MEPA exemption in MCA § 77-1-121(2) violated Plaintiffs' constitutional right to a clean and healthful environment by allowing the Land Board to issue leases for coal mining without first analyzing the environmental consequences and options to minimize or avoid those consequences. Accordingly, Plaintiffs respectfully request an Order declaring the Otter Creek leases unlawful and void.

Respectfully submitted on this 12th day of June, 2012,

Timothy J. Preso
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
tpreso@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs-Appellants Montana Environmental Information Center and Sierra Club

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I hereby certify that the foregoing document has double-spaced line spacing and proportionately spaced, Times New Roman, 14-point font. The foregoing document contains 9,242 words, excluding the caption, tables, and certificate of compliance, and therefore complies with this Court's word limitation of 10,000 words for principle briefs.

Timothy J. Preso
Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(406) 586-9699
Fax: (406) 596-9695
tpreso@earthjustice.org
jharbine@earthjustice.org

Attorneys for Plaintiffs-Appellants Montana Environmental Information Center and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing Appellants MEIC and Sierra Club's Opening Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the same upon each of the following by first-class mail:

Jennifer Anders
Department of Justice
215 North Sanders
Helena, MT 59620

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

Attorneys for Defendant Montana Board of Land Commissioners

Mark Stermitz,
Crowley Fleck PLLP
P.O. Box 7099
Missoula, MT 59807-7099

Jeff Oven
Crowley Fleck PLLP
P.O. Box 2529
Billings, MT 59103-2529

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

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

Patrick Parenteau
Vermont Law School
South Royalton, VT 05068

Attorneys for Plaintiffs Northern Plains Resource Council, Inc. and National Wildlife Federation
(Supreme Court Cause No. DA 12-0184)

Dated this 12th day of June, 2012.

Jenny K. Harbine

Attorney for Plaintiffs Montana Environmental Information Center and Sierra Club

BRIEF OF APPELLANTS
NORTHERN PLAINS RESOURCE COUNCIL and
NATIONAL WILDLIFE FEDERATION

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case Nos. DA–12-0184 and DA–12-0185

NORTHERN PLAINS RESOURCE COUNCIL, INC.
and
NATIONAL WILDLIFE FEDERATION,
Plaintiffs/Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA,
ARK LAND CO. INC. and ARCH COAL, INC.,
Defendants/Appellees.

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,
Plaintiffs/Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND CO. INC.
and ARCH COAL, INC.,
Defendants/Appellees.

BRIEF OF APPELLANTS NORTHERN PLAINS RESOURCE COUNCIL and NATIONAL WILDLIFE FEDERATION

On Appeal from the Montana Sixteenth Judicial District Court,
Powder River County, The Honorable Joe L. Hegel, Presiding

Jack Tuholske
Tuholske Law Office, P.C.
PO Box 7458/234 East Pine Street
Missoula, MT 59807
Tel: (406) 721-6986
jtuholske@gmail.com

Pat Parenteau (*Pro Hac Vice)*
Attorney at Law
PO Box 96/164 Chelsea Street
Tel: (802) 831-1630

Attorneys for Plaintiffs-Appellants Northern Plains Resource Council and National Wildlife Federation

Additional Counsel of Record

Jenny Harbine/Tim Preso
Earthjustice
313 Main Street
Bozeman, MT 59715

Attorneys for Montana Environmental Information Center
and The Sierra Club

Jennifer Anders
Montana Department of Justice
215 North Sanders
Helena, MT 59620

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

Attorneys for Defendant Montana Board of Land Commissioners

Mark Stermitz
Jeffrey Oven
Chris Stoneback
Crowley Fleck PLLP
PO Box 7099
Missoula MT 59807

Attorneys for Arch/Ark Coal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF THE ISSUE

Is § 77-1-121(2), MCA, unconstitutional as applied against the Montana Constitution's fundamental environmental rights because it exempts the Land Board from conducting any environmental review prior to leasing the Otter Creek coal tracts, when leasing makes mining 1.3 billion tons of coal reasonably certain, and myriad adverse impacts were foreseeable at the time of leasing?

II. STATEMENT OF THE CASE

Northern Plains Resource Council (Northern Plains), a Montana non-profit promoting family agriculture and conservation, with members who reside in Otter Creek. The National Wildlife Federation (NWF) is the nation's largest conservation organization with over 5,000 Montana members dedicated to protecting the wildlife, water and air quality of Montana. Together, Appellant/Plaintiffs Northern Plains and NWF (collectively Northern Plains)filed suit in the Powder River County District Court seeking a declaratory judgment that § 77-1-121(2), MCA, was unconstitutional as applied after the Montana Board of Land Commissioners (Board), in reliance on that statute, decided to forego any environmental review before leasing the Otter Creek coal tracts to Ark Land Co., a wholly-owned subsidiary of Arch Coal Inc.—the nation's second largest coal producer. Subsequently, the suit was combined with a similar suit by Appellants Montana Environmental Information Center and the Sierra Club.

On January 7, 2011, the Honorable Judge Joe Hegel denied the State's and Arch Coal Co.'s motions to dismiss, finding that Plaintiffs have standing and that but for MCA § 77-1-121(2), MEPA would apply to the Board's leasing decision. Adoption of the Appellees'/Defendants' reasoning would strip away the "special protections [of public property rights] before even considering possible environmental consequences." *District Court Order Motions to Dismiss* at 4–6. The District Court further stated that the "Plaintiffs . . . made at least a cognizable claim that MCA § 77-1-121(2) is not constitutional." *Id.* at 7.

The parties then filed cross-motions for summary judgment. Appellants also filed numerous exhibits, mostly government documents, depicting the serious threats that coal mining and combustion pose for the land, wildlife, air and water quality of southeastern Montana and the looming disaster that human-caused climate change portends for the state. Neither the State nor Arch disputed this evidence. *See* Appendix (App.) at 4 (*District Court Memorandum and Order re: Cross Motions for Summary Judgment*). The District Court found that "[M]ining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease." *Id.* Moreover, the District Court found Northern Plains' substantial body of undisputed evidence convincing; strip mining at Otter Creek would cause "myriad adverse environmental consequences, . . . including global warming." *Id.* Moreover, the District Court found that "but for

the intervention of § 77-1-121(2), MCA, MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage." *Id.* at 6.

However, the District Court reasoned that later environmental review would suffice for the state's constitutional obligations to consider environmental impacts, because the State retained discretion to impose environmental protections at the permit stage. Summary judgment was granted for the Defendants and judgment was entered. *Id.* at 12. Plaintiffs timely appealed the grant of summary judgment, and the appeals were consolidated.

III. STATEMENT OF FACTS

A. Background Regarding the Otter Creek Tracts

Located in Powder River County ten miles southeast of Ashland, the Otter Creek coal tracts contain approximately 1.3 billion tons of recoverable coal and encompass 19,836 acres of state and private land in alternating "checkerboard" sections. *Id.* at 3; *see also* Supplemental Appendix (hereafter cited as Supp. App.) 1 at 2. The tracts lie within the Otter Creek drainage, a tributary of the Tongue River. Supp. App. 1 at 1. The Northern Cheyenne Reservation, with its own substantial coal reserves, neighbors the Otter Creek tracts approximately 10 miles to the west. *Id.* at 2. Ownership of the coal rights resides with the State of

Montana and Great Northern Properties (GNP) in a checkerboard pattern. *See id.* at 4.

The settlement of the Crown Butte Mine controversy near Yellowstone in the 1990s resulted in Montana receiving the above-described federal coal lands at Otter Creek from Congress to compensate for lost tax revenues from cancellation of mining rights. *Id.* at 1. Montana's coal interests in the Otter Creek tracts encompass approximately 9,543 acres, with an estimated 572 million tons of recoverable coal. *Id.* at 1–2.

B. Leasing the Otter Creek Tracts.

Due to checkerboard ownership, Montana and Great Northern Properties, the largest private owner of coal reserves in the nation, signed a coordination agreement in 2003 to facilitate cooperative development of the Otter Creek coal reserves. That same year, Senate Bill 409 appropriated funds for evaluation of Montana's coal resources and authorized the Otter Creek tracts for leasing.

Five years later the Board ordered an appraisal ("Norwest Appraisal"). See Supp. App. 3. The Norwest Appraisal concluded that Montana's 572 million tons of coal at Otter Creek had a fair market bonus value between $0.05 and $0.07 per ton of recoverable coal. *Id*. at E-2. Further, Norwest projected that the Otter Creek mine could produce 33.2 million tons of coal annually, resulting in royalties

reaching approximately $1.4 billion over the mine's lifetime. *Id.* at 3-5; Supp. App. 1 at 3; Supp. App. 4 at 2.

The Board approved the Norwest Appraisal and granted a 60-day public comment period, closing on July 31, 2009. The majority of public comments opposed the Board proceeding with immediate leasing. *See* Supp. App. 4. Comments stressed concern about the lack of any MEPA or other pre-leasing environmental review, violations of citizens' constitutional right to a healthful environment, and the State's failure to consider short and long-term environmental, socioeconomic, and climate impacts of leasing Otter Creek. *Id.*; *see also* Supp. App. 24.

Despite the public's concerns, the Board proceeded with a bid process to lease Otter Creek without ***any*** formal environmental review. *See* Supp. App. 5 at 3, 9–10, Attachments 1, 2. At the December 21, 2009 Board meeting, citizens and state legislators raised serious concern about climate change and associated impacts caused by coal mining at Otter Creek.[1] *See* Supp. App. 6. Ignoring public concerns, the Board set the minimum bid price at 25 cents per ton, and established the bid deadline as February 8, 2010. *Id.* at 13, 17. The Board received *no* bids, but Arch/Ark submitted a letter of interest propositioning a lower bonus bid and different royalty payment. Supp. App. 7 at 1.

[1] Rep. Chuck Hunter presented a letter signed by 24 other legislators urging the Board that climate change is a necessary part of the determination about whether or not to lease Otter Creek. Supp. App. 6 at 7, Attachment 8.

The Board acceded to Arch/Ark Coal's demand to lower the cost of the coal. The Board then lowered the minimum bid price to 15 cents per ton and allotted 30 days for bids. *Id.* at 9, 13. Arch/Ark placed the sole bid. Supp. App. 8 at 1. At the March 16, 2010 Board meeting, Arch/Ark's bonus bid of $85,845,110 was approved by a 3-2 Board vote (Attorney General Bullock and Superintendent Juneau dissenting). *Id.* at 1, 8. The Board executed fourteen identical leases and received the bonus bid money. *See* Supp. App. 9 (representative of all 14 leases). The Board leased the Otter Creek tracts absent any environmental review, relying on Mont. Code Ann. § 77-1-121(2).

Upon signing the leases, Ark gained the property right to mine "all lands" covered by the leases. *Id.* All applicable laws, including the Montana Strip Mine Siting Act and the Montana Strip and Underground Reclamation Act, must be complied with according to the lease terms, as long as the lessee is not deprived "of an existing property right recognized by law." *Id.*

C. Once Leased, the Subsequent Actions of Montana and Arch Make Mining Reasonably Foreseeable.

During the leasing process, the State acted as if mining is a foregone conclusion. Elected officials lauded the benefits of mining revenues. For example, though Superintendent Juneau voted against the leasing, she acknowledged in the March 18, 2010 Land Board meeting that the bonus bid money was "being touted

as saving the general fund, and that part will be used to offset proposed budget cuts." Supp. App. 8 at 7–8.

Further, Governor Schweitzer stated: "Assuming a projected 25-year life of the mine, it is estimated that $5.34 billion in tax revenues and royalties will be paid to the state treasury. In addition, the mine will provide hundreds of good paying jobs for Southeastern Montana." *See* Supp. App. 25 at 12; Supp. App. 26 at 7. The Governor also emphasized that the State would earn tax income from jobs created by the coal mining, as well as the $500 million per biennium that the trust would earn, indicating that such earnings are not "one time money, but long-term income for the disabled, infrastructure, and environmental concerns." Supp. App. 8 at 8.

The Governor even allotted $10 million of the bonus bid monies to fund two programs in the budget: the first granted $5 million for the implementation of wind turbines or solar panels in each high school; and another $5 million was "included in the budget to protect the people, and the water, in the Otter Creek area." Supp. App. 7 at 13.

D. The Environmental Impacts of Mining at Otter Creek are Profound.

1. The undisputed facts show that climate change poses grave dangers to the economic and environmental health of Montana.

Climate change results from the buildup of greenhouse gases (GHG) in the atmosphere—namely carbon dioxide (CO_2), methane, and nitrous oxide—which trap heat on the surface that would otherwise reflect back into space. Supp. App. 18 at 5; Supp. App. 13 at 74; Supp. App. 19 at 66,517. The U.S. Environmental Protection Agency published an "Endangerment Finding" in 2009, stating that "[w]arming of the climate system is unequivocal" due to the concentrations of GHGs that are the "unambiguous result of human activities." Supp. App. 19 at 66,517; *see also* Supp. App. 13 at 74 (stating that anthropogenic activities, not natural processes, cause additional GHG concentrations). The Endangerment Finding is EPA's formal conclusion that GHG emissions constitute a threat to human health.

Strip mining and combustion of Otter Creek's 1.3 billion tons of coal would "thereby exacerbat[e] global warming and climate change." App. at 3. Specifically, "adverse effects to Montana's water, air and agriculture" will result. *Id.* Climate change will increase the Rocky Mountain West's potential for "prolonged drought, earlier snowmelt, reduced snow pack, more severe forest fires, and other harmful effects." Supp. App. 21 at 1-1; *see also* Supp. App. 18 at

11. These adverse, on-going and cumulative impacts from GHG accumulation, enhanced by burning Otter Creek's coal, will jeopardize Montana's economy through adverse impacts to ranching and agriculture sectors, Glacier National Park and other protected areas, water resources, and citizens' economic and physical well-being. Supp. App. 17 at 123. For example, only 27 glaciers remain in Montana's Glacier National Park (down from 150 glaciers in 1850) and average only one-quarter of their previous size due to the effects of climate change.

The U.S. Department of Agriculture and the Montana DEQ noted in an EIS for the coal-fired Highwood Generating Station that the average temperature rose in Helena by 1.3°F over the past century and that the State had seen precipitation decline by up to 20 percent.[2] Supp. App. 12 at 3-46. The EIS highlighted the myriad adverse impacts that Montana will endure from climate change:

> - glaciers melting and disappearing in Glacier National Park and elsewhere in the Rocky Mountains (ABC News, 2006; NWF, 2005);
>
> - a potential decline in the northern Rockies snowpack and stressed water supplies both for human use and coldwater fish (USGS, 2004; ENS, 2006; NWF, 2005; Farling, no date);
>
> - survival of ski areas receiving more rain and less snow (Gilmore, 2006),

[2] *See also* Supp. App. 18 at 2 and Supp. App. 19 at 66,518 (discussing similar observations on a national and global scale).

- drying of prairie potholes in eastern Montana and a concomitant decline in duck production (NWF, 2005);

- an increase in the frequency and intensity of wildfires as forest habitats dry out, and perhaps a conversion of existing forests to shrub and grasslands (NRMSC, 2002; NWF, 2005; Devlin, 2004);

- loss of wildlife habitat (USGS, 2004; NWF, 2005);

- possible effects on human health from extreme heat waves and expanding diseases like Western equine encephalitis, West Nile virus, and malaria (EPA, 1997h; RP, 2005);

- possible impacts on the availability of water for irrigated and dryland crop production alike (EPA, 1997h; RP, 2005).

Id. The Board failed to consider any of these impacts prior to leasing Otter Creek's tracts.

Ironically, Montana already had undertaken a state-wide policy initiative to reduce GHG because of their dire consequences for the state. In 2005, prior to the leasing of the Otter Creek tracts, Governor Schweitzer ordered the establishment of a Climate Change Advisory Committee (CCAC) due to his concern about such impacts on Montana's short and long-term future and to look for ways to *reduce* GHG emissions in Montana. Supp. App. 21 at 1-1, A-1. The CCAC recommended that—through "*early and aggressive implementation*"—the State set a "statewide, economy-wide GHG reduction goal to reduce gross GHG emissions to 1990 levels by 2020, for both consumption-based and production-

based emissions, and to further reduce emissions to 80% below 1990 levels by 2050." *Id.* at 1-9 (emphasis added). Governor Schweitzer also signed the 25 x 25 Initiative, which recommends that the nation's energy should consist of 25% renewable resources by 2025. *Id.* at 1-2.

Conversely, among fossil fuels, coal produces the highest amount of CO_2 per unit of energy and is the second largest source of U.S. energy-related CO_2 emissions, at 36.5 percent. Supp. App. 16 at 2. The U.S. emits the second largest amount of GHGs in the world, emitting 18 percent of the world's total GHGs. Supp. App. 19 at 66,538. Montanans emit about twice the national average of CO_2e (carbon dioxide equivalent) per capita, which is largely attributable to Montana's fossil fuel production industry. Supp. App. 13 at 4; *see also* Supp. App. 20 at 19.

The Otter Creek mine's peak production of 33.2 million tons of coal annually could almost *double* Montana's total annual coal production (of 44.8 million tons of coal). *See* Supp. App. 3 at 3-5; Supp. App. 27 at 7. When one ton of Otter Creek coal is combusted, 1.84 tons of CO_2 is emitted—equating to 61 million tons of annual CO_2 emissions, totaling 2.4 billion tons of CO_2 emissions upon combustion of all coal from the Otter Creek tracts. Supp. App. 28 at Table

FE4.[3] Put another way, upon the combustion of Otter Creek coal, Montanans would emit *four times* the national average of CO_2e. Supp. App. 13 at 4.

Otter Creek coal's combustion will contribute to the amount of GHGs in the atmosphere regardless of the combustion's location. Supp. App. 19 at 66,517. "Contributors must do their part" to combat the effects of climate change, because while many GHG source categories may appear small when compared to the total, "in fact, they could be very important contributors in terms of both absolute emissions or in comparison to other source categories, globally or within the United States." *Id.* at 66,543.

2. Coal mining will cause other environmental impacts to the Otter Creek Region.

Coal mining also causes adverse impacts to land, soil, vegetation, wildlife, surface water, groundwater, and air quality. Neither the State nor Ark/Arch presented any evidence contravening the direct or indirect environmental effects of mining at Otter Creek. App. at 4.

"As coal is mined, almost all components of the present ecological system, which have developed over a long period of time, would be modified," according to a draft EIS prepared by the U.S. Bureau of Indian Affairs and MDEQ in

[3] The average CO_2 emissions factor of Montana's sub-bituminous coal is 213.4 pounds of CO_2 per million BTUs. Supp. App. 28 at Table FE4. Otter Creek coal's heat content is estimated at 8,609 BTU/lb. Supp. App. 3 at 2-9. Taken together, 1.84 tons of CO_2 emits for every one ton of Otter Creek coal. Supp. App. 28 at Table FE4.

response to an application to "*lease* a tract of Indian owned coal." Supp. App. 10 at 3-182, Introductory Letter (emphasis added). For example, an area's post-mining topography permanently results in more uniform slopes and lower surface elevation, ultimately reducing microhabitats and habitat diversity. *Id.* at 3-8. Of all the types of development in the Powder River Basin, the largest cumulative impact to soils is attributed to coal mining activities, which cause reduced soil quality due to a loss of permeability, declining microbial populations, and reduced fertility and organic matter. *Id.* at 4-38; *see also* Supp. App. 20 at 53–55.

Vegetation and water are adversely affected as well. Mining activities often introduce nonnative species and weeds. Supp. App. 10 at 4-40–4-42; Supp. App. 20 at 57. This directly affects both wildlife and grazing livestock. Wildlife may be killed by mine-related traffic or activity, or generally displaced during the mining. Supp. App. 10 at 3-136, 3-182; Supp. App. 20 at 59; Supp. App. 14 at 19. Water resources are also adversely impacted by coal mining. Supp. App. 14 at 18. Despite reclamation, aquifers can be permanently damaged from mining. Supp. App. 10 at 3-66. Groundwater quality declines due to increased salinity levels after surface mining, resulting in water that is "even more marginal than the poor quality water currently used for household and irrigation purposes." Supp. App. 14 at 18; Supp. App. 10 at 3-73. According to BLM and MDEQ, coal mining also adversely impacts surface water by causing: disruption of the surface drainage

system and its connectivity with groundwater; alterations in stream flow and runoff; higher amounts of erosion and sedimentation caused by mining's effects; and overall changes in surface water quality. Supp. App. 20 at 47; *see also* Supp. App. 10 at 4-35. Both Otter Creek and the portion of the Tongue River that it flows into are already listed as impaired under the Clean Water Act and in violation of state water quality standards. *See* Supp. App. 22, Supp. App. 23.

Northern Plains' member and Billings resident Hannah Morris, who owns a ranch eight-miles from Otter Creek, is deeply concerned about the coal mining impacts to water quality in the area and to the springs located on her property. Supp. App. 2 at 1, 3. As an asthmatic, Hannah Morris is mystified that the Board would lease the tracts without studying the environmental effects of such mining, as she also worries about the coal dust generated from mining at Otter Creek, which could trigger serious asthma attacks. *Id.* at 3; Supp. App. 20 at 15; Supp. App. 10 at 3-30, 3-43, 3-183. Mining equipment's tailpipe emissions, point sources that crush, store, and handle coal, and railroad locomotive emissions are a few of the sources responsible for degrading air quality during mining activities. *Id.* Blasting results in "gaseous, orange-colored clouds" that can drift or blow off permitted mining areas, to which exposure can cause adverse health effects. Supp. App. 10 at 3-43; *see also* Supp. App. 20 at 15. The Tongue River Railroad, being

built for the sole purpose of hauling Otter Creek coal, will cause additional cumulative impacts in southeastern Montana and other communities.

IV. SUMMARY OF ARGUMENT

In our tripartite constitutional democracy, courts must exercise their plenary authority over the other branches when the constitution demands it. As Justice Marshall noted over two centuries ago, "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177. This is one such case, because the actions of both the legislature and the executive are repugnant to a fundamental constitutional right.

Montana's Constitution guarantees "the right to a clean and healthful environment" and provides that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const., art. II, § 3, art. IX, § 1. These fundamental rights are "both preventative and anticipatory." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality* (*MEIC*), 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. The Land Board's decision sets in motion development of the largest new coal mine in North America. No party disputed the profound impacts that will flow from the mining and combustion of 1.3 billion tons of coal. Yet no environmental review of any type occurred before the lease decision. The Board relied on §77-1-121, MCA, to

exempt its decision from any environmental review. The statutory exemption is the antithesis of "preventative and anticipatory" and cannot survive a strict scrutiny analysis.

Leasing is the critical "go/no-go" point in the mining process. Exempting the Otter Creek leases from all environmental review infringes on Northern Plains' members' fundamental right to a clean and healthful environment because the state has abrogated its responsibility to inform itself and the public of the reasonably foreseeable impacts from the mine, to consider not proceeding with development, or to consider imposing up-front protections in the leases themselves. This Court's precedent establishes that the Constitution's environmental rights are infringed upon when environmental harm is reasonably certain. The facts of this case unequivocally establish the reasonable certainty of both the mine and the effects it will cause. Because Northern Plains' members' fundamental rights are implicated by the lack of any pre-leasing review, this Court—consistent with time-honored constitutional jurisprudence—must apply strict scrutiny, a burden the State already admits it cannot carry.

The District Court correctly analyzed critical aspects of this case. Defendants' motions to dismiss for lack of standing were dismissed; farmers, ranchers and sportsmen alleged specific concrete injuries related to climate change, pollution, habitat loss and socio-economic impacts from Otter Creek. The

District Court found that mining and burning up to 1.3 billion tons of coal would "exacerbat[e] global warming and climate change" and cause "adverse effects to Montana's water, air and agriculture." The District Court also found that "mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease."

However, the District Court ultimately erred on the central legal issue, concluding that the Montana Constitution's environmental rights were not implicated because the State would conduct a MEPA review at the final permit stage. The District Court's conclusion was premised on two legal errors: (1) a fundamental misunderstanding of MEPA; and (2) its mistaken reliance on the *Seven-Up Pete* decision. Once those legal errors are rectified, the undisputed factual record proves that Plaintiffs' constitutional rights are implicated by the Board's lease decision.

The first legal error the District Court committed was premised on its conclusion that MEPA review was not required because the leases were not an irretrievable commitment of resources; the State retained discretion to modify mining plans through other environmental statutes. But the fact that the State retains some future control over mine impacts does not mean that all environmental review can be eschewed at the leasing stage. As then-Judge Stephen Breyer explained, leasing "represents a link in a chain of bureaucratic

commitment that will become progressively harder to undo." *Massachusetts v. Watt,* 916 F.2d 946, 953 (1st Cir. 1983). For Judge Breyer, not only is an EIS required at the leasing stage, but the failure to prepare one constitutes irreparable harm. That "additional steps between the governmental decision and environmental harm [will occur]" is of no moment. *Id.* at 952. The same reasoning applies here, underscored by the Governors' repeated promises of the coming financial windfall from Otter Creek, which undercuts the District Court's reliance on post-leasing environmental review. The District Court made the critical finding that mine development and the impacts that flow from it are "reasonably certain." That is all the Constitution requires before environmental rights are implicated, and MEPA (or some other formal review) is required.

The District Court's second legal error was its reliance on *Seven-Up Pete* to discern a standard for when constitutional rights are implicated. Because this Court found that mineral leases did not convey a compensable property right in the *Seven-Up Pete* case, the District Court found Otter Creek leases are not irretrievable commitments of resources, thus constitutional rights are not implicated. *Seven-Up Pete* is not controlling; it did not address whether an exemption to MEPA thwarts the "anticipatory and preventative" environmental review required by the Constitution, nor did it define what constitutes an infringement of the rights found in Articles II and IX.

This case turns on whether the State's exemption at the lease stage implicates Plaintiffs' environmental constitutional rights. The standard for implicating the Constitution's environmental rights is whether the action at issue is reasonably certain to cause environmental harm. MEPA is the vehicle chosen by the Legislature to effectuate the Land Board's constitutional duty to acquire knowledge about, and to fully consider environmental impacts before setting the wheels in motion for such impacts to occur. Acting without such knowledge, in the face of overwhelming evidence that coal mining and combustion will cause significant and irreversible impacts, implicates constitutional rights and triggers strict scrutiny. The MEPA exemption at § 77-1-121(1), MCA, cannot survive.

V. ARGUMENT

A. The Standard of Review for Assessing the District Court's Decision is *De Novo* and Plenary.

This Court's review of the district court's summary judgment order is *de novo*. *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 19, 327 Mont. 306, 114 P.3d 1009. Moreover, this Court's power to review constitutional law questions and interpret the meaning of the Constitution is absolute. "When resolution of an issue involves a question of constitutional law, this Court's review of the district court's interpretation of the law is plenary." *Id. at* ¶ 18 (*citing State v. Price*, 2002 MT 229, ¶ 27, 311 Mont. 439, 57 P.3d 42). While legislation is entitled to a

presumption of constitutional regularity, once plaintiffs have demonstrated that a legislative act infringes upon a fundamental right (or a suspect class in cases involving equal protection) the burden shifts mightily to the state to prove that the statute or state action can survive strict scrutiny. *Western Tradition Partnership v. Attorney General,* 2011 MT 328, ¶ 34–5, 363 Mont. 220, 235, 271 P.3d 1, 11–12*; Butte Community Union v. Lewis* (1986), 219 Mont. 426, 712 P.2d 1309. Strict scrutiny requires the government to show both a compelling state interest for restricting a constitutional right and that the restriction is narrowly tailored, "the least onerous path." *Wadsworth v. State,* 275 Mont. 287, 302, 911 P.2d 1165, 1174 (Mont. 1995). Once plaintiffs have established that their rights are implicated by a statute, the burden of proof rests entirely with the government to defend the constitutionality of the statute. *Western Tradition, supra.*

B. Plaintiffs' Fundamental Constitutional Environmental Rights Are Preventative and Anticipatory.

In Montana, all persons have the inalienable right "to a clean and healthful environment." Mont. Const. art. II, § 3. The Montana Constitution also mandates that the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations," and that "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." Mont. Const. art. IX, § 1(1), (3). This Court has recently affirmed "that the right to a clean and healthful environment constitutes a ***fundamental right***" under Montana's constitution. *Sunburst School Dist. No. 2 v. Texaco,* 2007 MT 183, ¶ 61, 338 Mont. 259, 278, 165 P.3d 1079, 1092 (*citing MEIC*, ¶ 63) (emphasis added).

The rights in Articles II and IX (referred to herein as the constitutional environmental rights) work in tandem, because they 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, supra* ¶ 64. These inter-related rights and duties are preventative rather than reactionary. "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." *Id.,* ¶ 77. This Court found the constitutional environmental rights "both anticipatory and preventative." *Id.* The distinction between a constitutional right that is simply prohibitory and reactive (i.e. the Fifth Amendment prohibition on taking property) and one that is anticipatory is crucial in assessing when such rights are implicated or infringed upon. For the later, the threshold for implicating that right is different; a party must not be forced to wait until the damage has been done (dead fish float by) to assert the right. Otherwise the precautionary nature of the right is defeated.

This Court's conclusion that the Constitution's environmental rights are "anticipatory and preventative" was premised on the Framers' intent. "The prime effort or fundamental purpose, in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted." *General Agric. Corp. v. Moore* (1975), 166 Mont. 510, 518, 534 P.2d 859, 864. While divining Framers' intentions is a more complex question at the federal level, the Transcripts of our 1972 Convention make that task easier. This Court's in-depth review of those Transcripts in the *MEIC* case does not need repetition; this Court has already found that the delegates sought to achieve the highest level of constitutional protection in drafting Article II and IX. *MEIC,* ¶¶ 64–77.

C. MEPA and the Constitution.

MEPA is part of the Legislature's effort to provide adequate means for the State to effectuate its constitutional obligation to protect the environment from unreasonable degradation. § 75-1-102(1), MCA. MEPA fulfills this critical purpose by providing information to decision makers and the public before the State acts. This Court has always looked at MEPA's federal counter-part, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* to guide its interpretations. *See generally Ravalli Cnty. Fish and Game v. Mt. Dep't of State Lands* (1995), 273 Mont. 371, 903 P.2d 1362. MEPA, like NEPA, is a "look

before you leap" statute. The U.S. Supreme Court explained that "NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Because granting leases to mine or drill for energy constitutes a "casting of the die" in favor of development, federal courts have almost always required some level of NEPA analysis at the leasing stage, even when later, site-specific analysis is required. *See e.g., Massachusetts v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983) (requiring an EIS's completion *prior* to the issuance of the leases because "leasing sets in motion the entire chain of events which culminates in . . . development"); *Cady v. Morton*, 527 F.2d 786, 793–94 (9th Cir. 1975); *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223 (9th Cir.1988).

The District Court found that absent §77-1-121(2) MCA, MEPA applies to coal leases. App. at 6. The State usually prepares MEPA documents for energy development leases on state lands. *See e.g. N. Fork Pres. Ass'n v. Dep't of State Lands* (1989), 238 Mont. 451, 455, 778 P.2d 862, 865 (where an Environmental Assessment, not a full EIS was prepared for a single exploration well on state lands). As the District Court explained, "[t]here would be no reason to enact the statute if it were clear that MEPA did not apply at the lease stage." *Memorandum and Order Re Motions to Dismiss* at 5. But for the exemption, an EIS would have

been prepared at the lease stage. The MEPA exemption was not enacted because the Legislature no longer felt that coal leases posed a serious threat to the environment and public health. Rather, legislative history indicates that it was enacted to save "money, time and effort." HB 436 Legislative Session (Mar. 5, 2003) (statement of Jim Mockler, Executive Director, Montana Coal Council).

MEPA is the Legislature's chosen vehicle to implement the Constitution's environmental rights. *See* §75-1-102, MCA; Mont. Sess. Laws 2003, ch. 361, § 5 (HB 437) (amending MEPA to state "providing that the enactment of certain legislation is the legislative implementation of Article II, section 3 and Article IX of the Montana Constitution and providing that compliance with the requirements of the legislative implementation constitutes adequate remedies as required by the Constitution"). As such, it cannot be dispensed with for a whole class of activities that make environmental impacts reasonably certain, absent a compelling reason for the exemption.

D. Plaintiffs' Constitutional Rights Are Implicated by the Land Board's Action of Entering into Leases with Arch/Ark.

The undisputed factual predicate of this case demonstrates that the act of leasing the Otter Creek tracts implicates Plaintiffs' constitutional rights. Two broad classes of environmental harm are reasonably certain as a result of leasing of Otter Creek coal. First, mining and combustion of 1.3 billion tons of coal will

further exacerbate climate change, which the State's own documents demonstrate will profoundly affect the resources and people of Montana. Second, coal mining impacts the air, water quality, wildlife and the fabric of life in southeastern Montana. Both types of impacts were well-known when the Land Board forged ahead; the State has addressed them in other EISs. Yet the Land Board, relying on § 77-1-121(2), MCA, chose to keep blinders on.

The depth of the record on these "reasonably certain" impacts bears repeating, because the State's own evidence highlights why the Board's decision implicates environmental constitutional rights. The District Court found, for example, that: "[T]he Otter Creek tracts contain an estimated 1.3 billion tons of coal, which if mined and burned, could add a significant percentage of carbon dioxide annually released into the atmosphere, thereby exacerbating global warming and climate change." App. at 3. Combustion of Otter Creek coal results in emissions of approximately 2.4 billion tons of CO_2. *See* Supp. App. 3. The record shows that projected annual mining of 33.2 million tons will result in 60.4 million tons of ***annual*** CO_2 emissions each year, nearly ***doubling*** Montana's annual yearly consumption-based emissions for the entire state. *Id.* (showing peak mining rate of 33.2 million tons/year); Supp. App. 28 (showing CO_2 emissions factor for coal); Supp. App. 13 (showing annual consumption equivalent for 2005 of 37 million tons).

The undisputed record shows that Montana will endure some of the worst effects of climate change this century. Climate models for the northern Rocky Mountains project temperature increases of between 3.6 and 7.2° F by the end of this century. If CO_2 emissions continue to grow unabated, Montana will likely experience warming at the high end of this range. Such a dramatic swing in temperature (disruptive climate change can be triggered by only 1-2° F shifts) portends bad news for Montana's farmers, anglers, recreationists and tourists, to name a few affected groups. According to the U.S. Global Change Research Program (GCRP), climate change is likely to affect the Great Plains including eastern Montana with "more frequent extreme events such as heat waves, droughts, and heavy rainfall, [jeopardizing] the region's already threatened water resources, essential agricultural and ranching activities, unique natural and protected areas, and the health and prosperity of its inhabitants." Supp. App. 17 at 123. Western Montana will also see profound changes from a warming and drying climate. The already-severe bark beetle infestations, record fires over the last two decades, loss of mountain ecosystems (not to mention all of the glaciers at Glacier National Park) and low summer stream flows will continue to worsen in the 21st century. *See* Supp. App. 12.

Ironically, the State's own policy recognizing the link between GHG emissions and climate change impacts in Montana was being developed at

approximately the same time the Board was putting on the environmental review blinders for Otter Creek. One of the first steps Governor Schweitzer took as Governor was to form the Climate Change Advisory Committee (CCAC). Supp. App. 21 at A-1. The CCAC produced a Climate Change Action Plan that contained specific recommendations to reduce GHG emissions as a matter of state policy. The CCAC recommended a "statewide, economy-wide GHG reduction goal to reduce gross GHG emissions to 1990 levels by 2020, for both consumption-based and production-based emissions, and to further reduce emissions to 80% below 1990 levels by 2050." *Id.* at 1-9. GHG emission reduction is official State policy.

The DEQ was analyzing the specific adverse impacts from coal combustion at approximately the same time the Board was pondering Otter Creek. The Final Environmental Impact Statement (FEIS) for the now-defunct Highwood Coal-Fired Electrical Generating Plant analyzed and disclosed the consequences of increasing GHG emissions. The 2007 FEIS made clear that increasing GHG emissions and the resulting warming and drying of the state bode ill for Montanans. Higher temperatures mean less water stored in snowpack, earlier spring snowmelt, and lower stream flows in the summer. Supp. App. 12 at 3-46. These hydrological changes will cause longer summer droughts, less water availability, more insect infestations, more intense wildfires, and decreased water

availability for irrigation and crop production. *Id.* Moreover, the Highwood FEIS made clear that even incremental increases in the world's GHG emission levels merit careful consideration: "While climate change is the ultimate global issue—with every human being and every region on earth both contributing to the problem and being impacted by it to one degree or another—it does manifest itself in particular ways in specific locales like Montana." *Id.*

Coal mining at Otter Creek also poses environmental risks to the wildlife, air and water quality of southeastern Montana. Again the State's own record proves that coal mining destroys wildlife habitat, pollutes the water, pollutes the air, and degrades the soil. See Supp. App. 10; Supp. App. 12; Supp. App. 14. This undisputed factual predicate establishes that leasing Otter Creek coal implicates Plaintiffs' constitutional environmental rights, notwithstanding the fact that later environmental review will occur. This Court has twice addressed actions that implicate environmental constitutional rights. In both cases, a low threshold of potential environmental harm was sufficient. The standard that emerges from these cases—and the one that should be adopted here—is whether environmental harms are reasonably certain or foreseeable as a consequence of the government's actions.

In this Court's unanimous decision in *MEIC,* no environmental harm resulted from the unpermitted discharge of groundwater with elevated levels of

arsenic. *MEIC*, ¶ 35. No fish died, no water wells were contaminated, no individuals got sick. *Id.* The mere potential for water quality damage, without any consideration by the State, was sufficient to trigger strict scrutiny of the statute exempting the discharges from formal environmental review.

Proof of immediate environmental damage is not required to implicate environmental constitutional rights. MEPA and the Constitution are "preventative and anticipatory;" their purposes are thwarted by putting the blinders on at the most crucial point in the decision-making process. As discussed below, leasing sets into motion events leading to the reasonable certainty that coal mining will occur. The likelihood of a massive new mine at Otter Creek is amplified here by government officials'the representations of jobs, lower taxes, and vast new revenues that will flow into State coffers once Otter Creek is operational. Moreover, the magnitude of the harm is enormous; Otter Creek dwarfs any other coal mine this state has seen. As in *MEIC,* Plaintiffs have "demonstrated sufficient harm from the statute and activity complained of to implicate their constitutional rights." *MEIC*, ¶ *45.*

As well, this Court found that these rights are implicated when there is "substantial evidence" that taking certain actions "may cause significant degradation" to the environment. *Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 33, 305 Mont. 513, 29 P.3d 1011. In *Cape-France*, two parties

entered into a buy-sell agreement for a parcel of land. *Id.* at ¶ 5. Prior to completion of the sale, the DEQ became aware of a groundwater pollution plume that could affect the property. *Id.* at ¶ 7. The DEQ ordered the seller to drill a well, test the water, and treat the water if necessary. *Id.* at ¶ 8. The DEQ warned the seller it would be held liable for any clean-up costs. *Id.* The seller sought to rescind the contract, and the Montana Supreme Court upheld the rescission because the substantial risk of degrading the environment that drilling a well imposed implicated the fundamental right to a clean and healthful environment. *Id.* at ¶ 37. As in *MEIC,* the certainty of harm is not a prerequisite to trigger constitutional protection.

This Court has in other contexts found the mere threat of invading a constitutionally-protected right sufficient to trigger strict scrutiny. *Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (Mont.1997). In *Gryczan*, the State's sodomy laws were alleged to violate the fundamental Article II, Section 10 right of privacy. The State countered that no plaintiff had been prosecuted and that the State had no intention of enforcing the law. *Id*., 942 P.2d at 118, 283 Mont. at 443. This Court found the threat of prosecution sufficient to establish standing. Simply having the statute on the books infringed upon the right of privacy. The application of strict scrutiny left the statute constitutionally infirm, though Plaintiffs had never been charged under it.

If the possibility of environmental harm without proper review, as in *MEIC,* or the threat of harm from enforcing a contract as in *Cape France,* or the threat of prosecution even if none has ever occurred as in *Gryczan,* implicate fundamental rights, so too does the leasing of Otter Creek coal without any consideration of the threats of harm. The District Court's reasoning that Plaintiffs' rights are not implicated here because of Otter Creek will be subject to later environmental review is tantamount to saying that the environmental harm must be certain and well-defined to trigger constitutional rights. The District Court's reasoning is squarely at odds with what the Framers intended when they created a right that is "preventative and anticipatory." The signing of the leases, which convey conditional property rights to Arch/Ark and which the District Court found would make coal mining "probable" is sufficient to implicate Plaintiffs' environmental rights.

E. The District Court's Justification for Not Applying Strict Scrutiny is Based Upon a Misreading of MEPA and *Seven-Up Pete*.

The District Court found that because the leases did not convey an absolute right to mine, and because the Land Board promised to comply with its constitutional duties through MEPA when the mine is permitted, potential environmental harm could be addressed later. Despite agreeing with Plaintiffs' characterization of the harm flowing from mining, and finding that the Board's

actions made mining "reasonably certain," the District Court was swayed by its belief that later MEPA compliance would suffice. Its conclusion was buttressed by its reading of *Seven-Up Pete*. "While it is not entirely clear how the Montana Supreme Court will apply *Seven-Up Pete* to the facts of this case . . . this Court finds that the State has retained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially." App. at 10.

The District Court misreads the purpose of MEPA and the effect of *Seven-Up Pete*. Courts consistently recognize that granting energy leases sets in motion exploration and development activities that, as the District Court found here, make resource extraction probable. The fact that the actual development is subject to further review is irrelevant; the purpose of MEPA, and the constitutional protections it implements, is to consider impacts at every stage of the decision-making process, to foster better, more informed decisions. The District Court also misread the effect of *Seven-Up Pete*. That a State mineral lease does not grant a compensable property right is irrelevant to the question of whether the lease implicates citizens' rights under the Constitution. As discussed below, *Seven-Up Pete* is inapposite to the factual and legal circumstances here.

1. Because leasing sets in motion a process that leads to resource extraction, courts require Environmental Impact Statements at the leasing stage.

Like Montana, the federal government frequently leases its lands for coal, oil and gas development. As with Otter Creek, federal energy leases are conditioned upon the later approval of specific mining and drilling plans, which are subject to further environmental review. *See generally Massachusetts v. Watt, supra.* Federal courts have frequently faced the same basic question presented here, without the constitutional gloss: Should environmental review occur for government leases for energy resources even though development is contingent upon a review prior to development? The answer to that question is yes.

The need for thorough environmental review before leases are signed flows from NEPA and MEPA's central purpose to review ". . . major actions of state government significantly affecting the quality of the human environment' in order to make informed decisions." *Ravalli County Fish and Game Ass'n v. Mont. Dep't of State Lands* (1995), 273 Mont. 371, 378, 903 P.2d 1362, 1367. As part of the informed decision-making it fosters, MEPA review requires a no-action alternative so that decision-makers can see the benefits of delaying or withholding action. However, "by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or [NEPA's] statutory mandate becomes ineffective." *Bob Marshall Alliance v. Hodel,* 852 F.2d, 1223, 1229 n.4 (9th Cir. 1988). Thus "full and meaningful

consideration of the no-action alternative can be achieved only if all alternatives available . . . are developed and studied on a clean slate." *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292, 1297–98 (D. Mont. 1992). The slate is no longer clean once formal leases are signed, bonus bids accepted, and exploration begins.

Montana will claim that it can technically still consider a "no-action" alternative at the final mine review. Putting aside the question of whether the State can legally adopt a no-action alternative after the leases have been signed and a bonus bid paid, courts recognize that post-leasing review becomes a rubber-stamp for the wheels of development that begin inexorably turning the day the leases were signed, thus tainting any review process.

As then-Judge Stephen Breyer explained, leasing "represents a link in a chain of bureaucratic commitment that will become progressively harder to undo." *Massachusetts v. Watt,* 916 F.2d 946, 953 (1st Cir. 1983). Breyer, a leading scholar in the field of administrative law, articulated what agency personnel, politicians, and energy producers know: the momentum for development created by leasing is unstoppable once the leases are signed. Here the reality of bureaucratic momentum is underscored by the payment of the $86,000,000 bonus bid, and repeated statements by the Land Board as to the benefits of mining. The federal government in *Massachusetts v. Watt* made the same argument that Montana makes here: "the lease sale does not necessarily entitle the

lease buyers to drill for oil. . . . This fact, in the government's view, shows that the lease sale alone cannot hurt the environment." *Id.* at 951–52. Justice Breyer rejected that argument because "[o]nce large bureaucracies are committed to a course of action, it is difficult to change that course - even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'" *Id.* at 952–53. *See also California v. Watt*, 520 F. Supp. 1359, 1371 (C.D. Cal. 1981) ("leasing sets in motion the entire chain of events which culminates in oil and gas development"), *cited with approval in California v. Watt,* 683 F.2d 1253, 1260 (9th Cir. 1982).

Justice Breyer's analysis is apropos here, yet the District Court never addressed it. The Otter Creek leases must be viewed in the real-world context in which they have been issued. Montana has already received an up-front bonus bid of $86,000,000.00. The Governor has represented that: "Assuming a projected 25-year life of the mine, it is estimated that $5.34 billion in tax revenues and royalties will be paid to the state treasury. In addition, the mine will provide hundreds of good paying jobs for Southeastern Montana." *See* Supp. App. 25 at 12; Supp. App. 26 at 7. Furthermore, in these hard economic times, "Montana will earn tax income from jobs created by the coal mining, as well as the $500 million per biennium that the trust would earn," indicating that such earnings are not "one time money, but long-term income for the disabled, infrastructure, and

environmental concerns." Supp. App. 8 at 8. The Governor even allotted $10 million of the bonus bid monies to fund two programs in the budget: the first granted $5 million for the implementation of wind turbines or solar panels in each high school; and another $5 million was "included in the budget to protect the people, and the water, in the Otter Creek area." Supp. App. 7 at 13. Moreover, Montana has already issued exploration permits to Arch/Ark.

The facts of this case demonstrate that the impetus towards the development of Otter Creek is in full swing. Plaintiffs' constitutional environmental rights are implicated by the leases because the undisputed, enormous, serious adverse impacts of North America's largest new coal mine are probable now that the leases have been signed. The opportunity to examine the merits of the leasing decision itself, in the context of the environmental effects that are certain to follow, has been lost. Our Constitution is designed to prevent such thoughtless action.

2. *Seven-Up Pete* is not precedent, nor is it persuasive authority, on the issues presented here.

The District Court relied entirely on *Seven-Up Pete Joint Venture et al v. State of Montana*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, though it also acknowledged that "it is not clear" how this Court will apply it. App. at 10. A careful review of *Seven-Up Pete* illustrates why it is not precedent, or even persuasive, in the case at bar.

The facts are complex. A mining venture acquired leases for a massive gold mine, the same operation that sparked the groundwater pump tests at issue in *MEIC*. The mining company's dilatory pursuit of an operating permit caused the leases to be suspended, amended and extended at various points in the multi-year permit process. In November, 1998, Montana voters banned cyanide heap-leach mining via I-137, the mining method of choice for this mine. The mining company then ceased further work on the project, a "material breach" of the lease agreement. Montana informed the mining company that the leases terminated of their own accord for the company's failure to continue to pursue an operating permit, failure to pay required fees, and failure to return any royalties to the state. *Seven Up Pete,* ¶ 8–15. The mining companies sued on multiple constitutional, contract and tort claims, and lost at the district court. *Id.* ¶ 16.

This Court addressed two claims on appeal: did the enactment of I-137 constitute a taking, and/or an unconstitutional impairment of the Contracts Clause? The takings claim was resolved on the basis that the mining company lacked a compensable property interest, so the regulatory takings analysis in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, did not apply. Because Montana retained discretion before and after I-137 to deny the operating permit, the "opportunity to seek a permit . . . did not constitute a property right." *Id.,* ¶ 32. The Contracts Clause issue was resolved on the basis that I-137 was a legitimate

exercise of the state's police power, and that the electorate may infringe on an otherwise valid contract (the leases were valid contracts) for the legitimate purpose of environmental protection. *Id.,* ¶48-50.

Seven-Up Pete is inapposite here for three reasons. First, the case did not address ***any*** of the issues presented here. The role that MEPA plays in effectuating Articles II and IX of the Constitution, the authority of the legislature to enact statutory exemptions to MEPA under the Constitution, and the factual predicate that constitutes an infringement on constitutional environmental rights were not discussed.

Second, *Seven-Up Pete* was presented to this Court in a far different factual posture. The mining company had already breached its long-standing lease obligations. The leases were terminated by the time the matter reached this Court. This case arises at the time the leases are issued. The Otter Creek leases are still valid. In addition, this Court found it significant the Seven-Up Pete had not paid a bonus bid along with the lease. The presence of a bonus bid is significant because of a U.S. Supreme Court's finding that mineral leases with bonus bids may grant unalterable rights. *Id.* at ¶ 52-54 *(citing Mobil Oil v. United States,* 530 U.S. 604, 617 (2000), where payment of a 158 million dollar bonus bid constrained subsequent government regulatory authority). The Otter Creek leases may indeed

grant much more of a property right that would constrain aspects of later environmental review.[4]

Third, Northern Plains has never argued that the Otter Creek leases create an absolute property right worthy of a takings claim. Plaintiffs have always acknowledged that the leases, while granting the right to mine, also require compliance with a suite of environmental laws. Northern Plains' argument focuses on whether the act of leasing Otter Creek, which the District Court found would "probably" lead to mining and its attendant severe environmental impacts, was constitutionally mandated to undergo some form of MEPA review before the leases were signed. The issue is whether our "preventative and anticipatory" environmental constitutional rights mandate that the Legislature not exempt the Otter Creek lease from the Legislature's chosen vehicle to implement the State's constitutional obligations to protect the environment. That issue is not guided by *Seven Up Pete*. That issue is guided by *MEIC* and *Cape France.*

[4]*Mobil Oil* raises an important point about the role of the bonus bid and how much authority the Board retains to alter the leases at the time the mine permit is sought. Northern Plains agrees with the discussion by Appellants *MEIC* et al. regarding how much authority the Board actually retains, despite its representations of *carte blanche* authority to alter lease terms at the permitting stage. The lease itself references conventional environmental statutes like the Montana Water Quality Act, which Northern Plains agrees can be applied to limit mining activities at the permitting stage. Whether the State could impose GHG-based restrictions, adopt a no-action alternative, or simply deny the mine based on unacceptable impacts to wildlife, is less clear. However, this Court need not decide the State's ultimate authority at the permitting stage. As explained herein, because the act of leasing makes the mining impacts reasonably certain, Appellants' constitutional environmental rights are implicated at the leasing stage, notwithstanding the extent of the State's authority to constrain the mine at down the road.

Beyond *Seven-Up Pete*, the District Court provided no additional authority for its conclusion that Plaintiffs' constitutional environmental rights were not implicated by the Otter Creek leases. Because this case is not guided by *Seven-Up Pete*, and because *MEIC* and *Cape France* establish a threshold for implicating constitutional rights that is met by the undisputed facts of this case, the District Court erred by not applying strict scrutiny.

F. The MEPA Exemption Statute As Applied Cannot Withstand Strict Scrutiny.

This Court has established that the rights/obligations in Articles II and IX are fundamental, and that strict scrutiny is the proper paradigm for review once those rights are implicated. *MEIC*, ¶ 60, 77. The strict scrutiny analysis, discussed *infra* in the Standard of Review, applies. The District Court concluded that § 77-1-121(2) would not survive strict scrutiny:

> The State has not even suggested that it could meet the strict scrutiny standard, and while Arch has proffered an argument that maximizing profits is a compelling state interest, it has not supported this by applicable law or logical argument.

App. at 8. The District Court is correct. Only government functions of the highest order, essential to democracy and liberty are compelling state interests. Protecting the integrity of the electoral process and preserving judicial integrity are

compelling. *Western Traditions, supra*. National security can be a compelling state interest. *Korematsu v. U.S.*, 323 U.S. 214 (1943). "Maximizing profits" is not a compelling state interest. The MEPA exemption was passed to save the state time and money. HB 436 Legislative Session (Mar. 5, 2003) (statement of Jim Mockler, Executive Director, Montana Coal Council). While government efficiency is a laudable goal, no court has ever placed it in the rarified air of compelling state interests.

Nor can the MEPA exemption claim to be narrowly tailored. The blanket exemption in section §77-1-121(2), MCA, is not "the least onerous path" to achieving the state's objective. *Armstrong, supra; MEIC*, ¶ 63. Even if increasing government efficiency is somehow compelling, the Legislature is obliged to fashion an exemption that has some discernible criteria. While there may be legitimate cases where foregoing review at the leasing stage comports with the constitution, the unique and profound consequences of Otter Creek warrant a formal look at the impacts of coal mining because this lease is "reasonably certain" to cause enormous, permanent changes to the environment. Exempting these leases from the only law that would inform the Land Board about environmental impacts before the decision to lease is made is not the "lease onerous path" to achieving governmental efficiency.

G. The Leases Should be Declared Void Because They Were Unlawfully Issued.

Leases issues in violation of the constitution are invalid. The only appropriate remedy here is to declare the leases void. The Constitution's environmental protection rights and the purpose of MEPA can only be fulfilled if the leases are taken off the table during the period of environmental review. Allowing the leases to remain in effect insures that the bureaucratic steamroller continues to move forward at the crucial time the Board must take an objective look.

As this Court has previously held, the object of a contract is unlawful and unenforceable when its performance would cause a party to the contract to violate the constitutional requirement to "maintain and improve a clean and healthful environment in Montana." *Cape-France Enter.,supra.*, ¶¶ 32-34.

Voiding the unlawful contract is the proper remedy. This Court takes the same approach in subdivision cases, finding preliminary subdivision plats void based on procedural failings. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, 356 Mont. 41, 230 P.3d 808; *Citizens for Responsible Dev. v. Bd. of Cnty. Comm'rs of Sanders Cnty.*, 2009 MT 182, 351 Mont. 40, 208 P.3d 876. In *Aspen Trails Ranch,* this Court voided a preliminary subdivision plat based on an insufficient environmental assessment. *Aspen Trails Ranch* ¶ 17. The court

agreed with the plaintiffs that the Montana Subdivision and Platting Act did "not confer a 'right' on Aspen Trails [the developer] to go back to the Commission and propose new mitigation measures." *Id.* ¶ 52. The only appropriate remedy was to void the preliminary subdivision plats. Otherwise the court-ordered environmental review would be meaningless. *Id.* ¶ 58. Here cancellation is even more appropriate, given the constitutional nature of the violation.

Cancellation of the leases is consistent with the purpose of MEPA. The federal District Court of Montana held that cancellation of certain federal oil and gas leases was "the only remedy which will effectively foster NEPA's mandate requiring informed and meaningful consideration of alternatives to leasing … , including the no-leasing option." *Bob Marshall Alliance*, *supra*., 804 F. Supp. at 1297-98. For the Board to meaningfully put the no action alternative on the table for consideration, a valid, signed lease cannot be looming in the background, like a proverbial 800 pound gorilla in the room. The Board's constitutional duty to the citizens of this state demands more than a perfunctory look.

VI. CONCLUSION

The District Court's grant of summary judgment should be reversed, § 77-1-121(2), MCA should be declared unconstitutional as applied herein, and the fourteen Otter Creek leases declared void.

Dated June 12, 2012.

_____
Jack R. Tuholske

_____
Patrick Parenteau
Attorneys for Northern Plains and NWF

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 17 of the Montana Rules of Appellate Procedure, as modified by Order dated June 14, 1999, I certify that this amicus brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; the word count calculated by Word Perfect 11 is 9974; and the brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

Dated this ___ day of June, 2012.

_____
Jack R. Tuholske

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this ____ day of June, 2012 upon the following by first class mail postage prepaid:

Jenny Harbine/Tim Preso
Earthjustice
313 Main Street
Bozeman, MT 59715

Attorneys for Montana Environmental Information Center
and The Sierra Club

Jennifer Anders
Montana Department of Justice
215 North Sanders
Helena, MT 59620

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

Attorneys for Defendant Montana Board of Land Commissioners

Mark Stermitz
Jeffrey Oven
Chris Stoneback
Crowley Fleck PLLP
PO Box 7099
Missoula MT 59807

Attorneys for Arch/Ark Coal

ANSWER BRIEF OF APPELLEES ARK LAND CO., INC. AND ARCH COAL, INC.

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause Nos. DA 12-0184 / DA 12-0185

NORTHERN PLAINS RESOURCE COUNCIL INC., and
NATIONAL WILDLIFE FEDERATION,

Plaintiffs and Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA,
ARK LAND COMPANY, INC. and ARCH COAL, INC.,

Defendants and Appellees.

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellants,

vs.

MONTANA BOARD OF LAND COMMISSIONERS,
ARK LAND COMPANY, INC. and ARCH COAL, INC.,

Defendants and Appellees.

Answer Brief of Appellees Ark Land Co., Inc. and Arch Coal, Inc.

On Appeal from the Montana Sixteenth Judicial District Court, Powder River County,
The Honorable Joe L. Hegel, Presiding.

APPEARANCES:

Mark L. Stermitz / Jeffery J. Oven
Christopher C. Stoneback
CROWLEY FLECK PLLP
305 S. 4th St., E., Ste 100
P. O. Box 7099
Missoula, MT 59807
PH: 406-526-3600
FAX: 406-523-3636
mstermitz@crowleyfleck.com
joven@crowleyfleck.com
cstoneback@crowleyfleck.com

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

Steve Bullock
Jennifer Anders
MT Department of Justice
215 North Sanders
Helena, MT 59620
PH: 406-444-2026

Candace West
Tom Butler
Department of Natural Resources & Conservation
State of Montana
P.O. Box 201601
Helena, MT 59620-1601
PH: 406-443-3776
Attorneys for Defendant/Appellee Montana Board of Land Commissioners

---

Timothy J. Preso
Jenny K. Harbine
EARTHJUSTICE
313 E. Main Street
Bozeman, MT 59715-4749
PH: 406-586-9699
FAX: 406-586-9695
tpreso@earthjustice.org
jharbine@earthjustice.org
Attorneys for Plaintiffs/Appellants MEIC and Sierra Club

Jack R. Tuholske
TUHOLSKE LAW OFFICE, P.C.
P.O. Box 7458
234 East Pine Street
Missoula, MT 59807
PH: 406-721-6986
jtuholske@gmail.com

Patrick Parenteau
Vermont Law School
South Royalton, VT 06068
PH: 802-831-1630

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

STATEMENT OF THE ISSUE

Do the Otter Creek Coal Leases, which do not authorize any impact to the environment, implicate Appellants' constitutional right to a clean and healthful environment?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Mont. Code Ann. § 77-1-121(2) (the "MEPA timing statute") provides that when state-owned coal is leased, Montana Environmental Policy Act ("MEPA") review is to be conducted, not at the coal leasing stage, but rather, at the permitting stage. In this case, the Montana Board of Land Commissioners ("Land Board") issued state coal leases to Ark Land Company, Inc. ("Otter Creek Coal Leases"). In doing so, it complied with the express terms of the MEPA timing statute and did not perform MEPA review of the leasing decision, deferring this review until the permitting stage, when the specifics of the mine are known and can be studied.

Of importance here, the Land Board issued the leases expressly contingent upon future compliance with "any applicable state or federal law, rule, regulation or permit," including MEPA, the Surface and Underground Mine Reclamation Act ("SUMRA"), and the Montana Constitution. Otter Creek Coal Leases ¶¶ 1, 16, 19 (example at Appx. Ex. A). The Land Board also reserved to itself a final approval

right over the mine operation and reclamation plan, requiring this approval *before* any mining or impact to the environment is to occur. Otter Creek Coal Leases ¶ 1.

Despite the fact that the Otter Creel Coal Leases do not yet authorize any impact to the environment, Appellants filed suit in Powder River County District Court, claiming a violation of Montana's constitutional right to a clean and healthful environment. The District Court correctly rejected Appellants' argument. *See* Memorandum and Order Re Cross Motions for Summary Judgment (Feb. 3, 2012) (Appx. Ex. B) (hereinafter "Order").

In its decision, the District Court cut through the hyperbole and recognized that, based on the actual coal leases at issue, the constitutional rights of Montana citizens are protected because comprehensive environmental review will, in fact, occur before there is *any* change in the environmental status quo:

> In this case MEPA and other review will take place before any significant ground or water is disturbed and before any coal is mined or combusted. None of the claimed adverse effects will occur unless and until the coal is actually mined and combusted.

Order 9. The District Court further determined that the Land Board reserved unto itself the ability to consider all constitutionally required environmental considerations:

> Although it may be probable that mining will go forward, there is no guarantee that it will and there is no way to determine that adequate environmental protections will not be put in place in the process.
> ...

> [T]he State has retained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially.
> ...
> [The State] still retains the discretion to mitigate or halt the development if it cannot be done without the unreasonable degradation of the environment.

Order 9-11.

Accordingly, the District Court concluded that issuing the Otter Creek Coal Leases without MEPA review did not implicate or violate the constitutional right to a clean and healthful environment. Order 8-11. Appellants appeal the District Court's ruling. The appeal is without merit.

II. STATEMENT OF FACTS.

The State coal at issue is located generally in the vicinity of Otter Creek, approximately 10 miles southeast of Ashland, Montana. The State of Montana acquired the coal from the United States to compensate Montana for lost economic benefits arising from the retirement of mining rights related to the proposed Crown Butte Mine located near Yellowstone National Park. *See* Pub. L. 105-83 (1997); Mont. Code Ann. § 77-3-303(2); Executive Order No. 12-02 (May 28, 2002).

The State serves as trustee of State trust lands, and the Land Board administers the trust. In discharging its trust responsibilities, the Land Board is constitutionally obligated "to follow the 'regulations and restrictions' imposed by the Legislature," and must lease trust lands for the support and benefit of

education. *Montanans for Responsible Use of School Trust v. Darkenwald,* 2005 MT 190, ¶ 61, 328 Mont. 105, 119 P.3d 27; *see also* Mont. Const. art. X, §§ 4, 11(1)-(2).

The Legislature encouraged the Land Board to lease the coal acquired from the United States in the Crown Butte land exchange for coal mining purposes. Mont. Code Ann. § 77-3-303(2). As found by the Legislature, leasing the coal for coal mining purposes will achieve "tremendous" socioeconomic benefit for Montana, including generation of "significant long-term sources of revenue for Montana schools." Laws of 2003, Ch. 318. Accordingly, the Legislature determined that "timely development" of the coal is to be facilitated and encouraged. Mont. Code. Ann. § 77-1-1002(2)(b).

On March 18, 2010, the Land Board leased to Ark Land Company, Inc. approximately 8,263.62 acres of the State's coal for the purpose of coal mining and reclamation. *See* Otter Creek Coal Leases ¶ 1. Of importance, the Otter Creek Coal Leases reserve to the State all environmental considerations and protections afforded by law. The Land Board specifically conditioned all mining on compliance with "any applicable state or federal law, rule, regulation or permit." Otter Creek Coal Leases ¶ 16. This, of course, includes MEPA, SUMRA, and the Montana Constitution. The Otter Creek Coal Leases further conditioned any mining on Land Board approval of the mine operation and reclamation plan.

In this regard, the Otter Creek Coal Leases expressly state:

> GRANTING CLAUSE...All rights granted to Lessee under this Lease are contingent upon Lessee's compliance with the Montana Strip Mine Siting Act ["MSA"] and the Montana Strip and Underground Mine Reclamation Act ["SUMRA"] (Title 82, Chapter 4, Parts 1 and 2, MCA) and upon Lessor review and approval of Lessee's mine operation and reclamation plan. The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act [MEPA].
>
> . . . .
>
> PROTECTION OF THE SURFACE, NATURAL RESOURCES, AND IMPROVEMENTS...Lessor may prescribe the steps to be taken and reclamation to be made with the respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.
>
> . . . .
>
> COMPLIANCE WITH LAWS AND RULES. This Lease is subject to further permitting under the provisions of Title 75 [MEPA] or 82 [SUMRA], Montana Code Annotated. Lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of any existing property right recognized by law.

Otter Creek Coal Leases ¶¶ 1, 16, 19.

The Otter Creek Coal Leases transfer an interest in coal. They *do not* permit mining. *See* Mont. Code Ann. §§ 77-1-121(2); 82-4-121; Otter Creek Coal Leases ¶ 1, *et seq*. Indeed, before any preparatory work and mining can occur, and before the environment will be impacted, all environmental hurdles required by Montana law (including those found in the Montana Constitution) must be met and passed.

As found by the District Court: "The State has retained [in the Otter Creek Coal Leases] sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially...." Order 9-10.

The material facts, therefore, are straightforward. The Land Board action under review does not yet permit mining or any surface disturbance. All constitutional environmental protections – whatever they may be – have been reserved to the Land Board. As a result, Montana's constitutional right to a clean and healthful environment has not been implicated and Appellants' ill-timed case fails as a matter of law.

STANDARD OF REVIEW

The "constitutionality of a legislative enactment is prima facie presumed." *Powell v. State Compensation Insurance Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 (internal quotations omitted). "Every possible presumption must be indulged in favor of the constitutionality of [the] legislative act." *Id.* The legislative act "will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Id.* (internal quotations omitted). "[I]f any doubt exists, it must be resolved in favor of the statute." *Id.*

Only if Appellants can show that the issuance of the Otter Creek Coal Leases implicates a fundamental constitutional right will the burden shift to the

State to show a compelling state interest. *See Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986); *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236. Because the MEPA timing statute and the Otter Creek Coal Leases do not implicate a fundamental right, those state actions are subject to rational basis review. *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 26, 354 Mont. 133, 227 P.3d 42.

Appellants have made an "as applied" constitutional challenge to the Otter Creek Coal Leases. An "as applied" challenge depends on the facts of the case. *See MEIC*, ¶ 80; *Roosevelt v. Montana Dept. of Revenue*, 1999 MT 30, ¶¶ 51-52, 293 Mont. 240, 975 P.2d 295. As a result, the actual terms of the Otter Creek Coal Leases must be considered.

SUMMARY OF ARGUMENT

The issuance of the Otter Creek Coal Leases, in accordance with 77-1-121(2), was constitutional. There is no implication or infringement of the constitutional right to a clean and healthful environment.

According to both the plain text of the Montana Constitution, and the consistent rulings of this Court, in order for Appellants to implicate fundamental right protection under Montana's clean and healthful environment provisions, they must prove that the challenged activity *will allow* unreasonable degradation of the

environment. In this case, however, Appellants have not, and cannot, prove that the mere issuance of the Otter Creek Coal Leases will lead to an unreasonable degradation of the environment.

The fact is, the Otter Creek Coal Leases specifically reserve to the Land Board all constitutionally mandated environmental considerations and protections. According to the Otter Creek Coal Leases, these considerations and protections must be satisfied *prior to* the commencement of any preparatory work or mining. As a result, the time to question whether the Otter Creek Mine is constitutionally sound – from an environmental standpoint – is when the Otter Creek Mine is permitted and considered for approval. There is no evidence – whatsoever – that the Land Board will not comply with its obligations. Appellants ill-timed case fails as a matter of law.

In the alternative, the MEPA timing statute is constitutional because the Legislature possesses the authority, through the Montana Constitution, to "administer" the constitutional right to a clean and healthful environment. Legislation administering this right will be upheld if reasonable. The MEPA timing statute at issue is a reasonable example of the Legislature administering this right.

Even if the MEPA timing statute is unconstitutional, the relief requested by Appellants – voiding the Otter Creek Coal Leases – is extreme and contrary to law.

The appropriate remedy for a constitutional violation here (if one had actually occurred) would be to grant Appellants what they claim should have occurred: MEPA review of the leasing decision. If MEPA is truly the focus of this case, as Appellants claim, its purposes are best served by conducting MEPA review of the Land Board's leasing decision, not voiding the leases in their entirety.

ARGUMENT

I. APPELLANTS' CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT HAS NOT BEEN IMPLICATED.

A. Appellants' constitutional right to a clean and healthful environment has not been implicated because Appellants cannot prove that the Otter Creek Coal Leases will cause an unconstitutional degradation of the environment.

The MEPA timing statute and the Otter Creek Coal Leases do not implicate the constitutional right to a clean and healthful environment. The statute merely defers MEPA review to the time when the owner of the lease submits an application for a mining permit to the Department of Environmental Quality ("DEQ"). In fact, the statute, as written, does not permit any activity that causes an environmental impact.

Likewise, the Otter Creek Coal Leases do not exempt mining the Otter Creek coal tracts from environmental review. As found by the District Court, the leases specifically require compliance, ***before*** mining occurs, with all constitutionally mandated environmental considerations and protections. *See e.g.*

Order 9. As a result, the Otter Creek Coal Leases, in and of themselves, cause no environmental impact.

In *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (hereinafter "*MEIC*"), this Court held that the constitutional right to a clean and healthful environment provides protections that are "both anticipatory and preventative." *MEIC*, ¶ 77. Thus, a plaintiff need not wait until the environment is impacted to file suit. However, it is axiomatic that ***plaintiffs must still prove that some unreasonable impact to the environment will occur.***

For example, in *MEIC* the Court found that the constitutional right to a clean and healthful environment was implicated because it was proven that, absent Court action, a significant impact to the environment was, in fact, going to occur:

> We conclude that the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment is implicated ***based on the Plaintiffs' demonstration*** that the pumping tests proposed by [defendant] ***would have added a known carcinogen such as arsenic to the environment*** . . . and that the DEQ or its predecessor after ***studying the issue and conducting hearings has concluded*** that discharges containing carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation set forth at § 75-5-303, MCA.

Id. ¶ 79 (emphasis added); *see also Cape-France Enterprise v. Estate of Peed*, 2001 MT 139, ¶ 37, 305 Mont. 513, 29 P.3d 1011 (noting the right to clean and

healthful environment is applicable where "there is a very real possibility of substantial environmental degradation").

Of course, this Court's rulings in this regard are entirely consistent with the express language of the Montana Constitution, which prohibits, "unreasonable degradation" of the environment. *See* Mont. Const. art. IX, § 1(3) (providing remedies shall prevent unreasonable depletion and degradation of natural resources). It is absurd to suggest that the Constitution somehow prevents unknown environmental harms that cannot yet occur.

Here, the District Court construed *MEIC* correctly:

> [T]he Montana Supreme Court found that the constitutional right to a clean and healthful environment was implicated because the plaintiffs had shown that a higher level of arsenic ***would be released*** into high quality waters thereby degrading the waters ***without the opportunity for further review***....

Order 9 (emphasis added). [1]

In this case, because the details of the mine – if it happens at all – are not yet known, Appellants cannot prove that the Otter Creek Coal Leases, as written, will cause any unreasonable environmental degradation. Appellants have no actual proof that an unreasonable impact on the environment will occur, and therefore,

---

[1] The District Court inadvertently cited *Seven Up Pete* instead of *MEIC*. *See* Order 9. Additionally, NPRC's assertion that the District Court "relied entirely on *Seven-Up Pete*..." is simply wrong. The District Court also relied on *MEIC*. *See id., et seq.*

Appellants' case fails. [2]

B. The MEPA timing statute and the Otter Creek Coal Leases do not exempt anything from full environmental review—they require it.

Appellants' case is based entirely on a false premise, that being, that Mont. Code Ann. § 77-1-121(2) somehow exempts the proposed Otter Creek Mine from full environmental review. This is absurd. As found by the District Court:

> In this case *MEPA and other review will take place before* any significant ground or water is disturbed *and before* any coal is mined or combusted.

Order 9 (emphasis added).

The MEPA timing statute simply establishes that MEPA review will occur during the permit application and review period. *See* Mont. Code Ann. §§ 77-1-121(2); 82-4-231(5); *see also* Otter Creek Coal Leases ¶ 1. The statute relieves the Land Board from conducting MEPA review when it is speculative on how, when, where, or to what extent mining may occur, and shifts it to the permitting stage when those questions are studied and answered.

Further, the Otter Creek Coal Leases condition any mining on compliance with the full panoply of applicable State and Federal environmental laws, including those implementing the Montana Constitution. The Otter Creek Coal Leases specifically read:

---

[2] Appellants do not dispute a rational basis exists for the MEPA timing statute. *See* Order 8 (noting Plaintiffs "have not denied or attempted to disprove that the State has a rational basis for the statute").

> All rights granted to Lessee under this Lease are contingent upon Lessee'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) *and upon Lessor review and approval of Lessee's mine operation and reclamation plan.* The rights granted under this Lease are further *subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.*
>
> ...
>
> Nothing in this section limits Lessee's *obligation to comply with any applicable state or federal law, rule, regulation, or permit.*
>
> ...
>
> Lessee agrees to *comply with all applicable laws and rules in effect at the date of this lease*, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of any existing property right recognized by law.

Otter Creek Coal Leases ¶¶ 1, 16, 19 (emphasis added).[3]

As found by the District Court, the State has reserved unto itself the ability to ultimately determine whether the mine will violate the Montana Constitution. Order 11 ("[The Land Board] still retains the discretion to mitigate or halt the development if it cannot be done without the unreasonable degradation of the environment.") This discretion will occur before *any* impact to the environment will occur. If the Land Board fails to fulfill its constitutional obligations, Appellants will have every opportunity to sue. As a result, the constitutional right to a clean and healthful environment is not implicated in this case and Appellants' case fails.

---

[3] In their opening briefs, Appellants target the Otter Creek Coal Leases without mentioning what they actually say.

C. Appellants' constitutional right to a clean and healthful environment has not been implicated because Appellants' claims rest almost entirely on the potential effects of coal mining and combustion.

As they did at the District Court, Appellants cite a litany of potential harmful environmental effects from coal mining, and beyond that, the combustion of coal. In terms of sheer volume, both NPRC and MEIC devote much of their argument to a discussion of climate change, CO2 emissions, water quality and various other environmental issues connected to activities that were not authorized by the action they challenge – leasing the Otter Creek coal tracts.[4] However, these claimed environmental injuries are not relevant to any issue before this Court.

At this stage of the process, Appellants cannot yet prove, as is their burden, that any of the suggested environmental harms will actually occur. The fact is, the determination of what harms will be caused by mining, and whether that harm is constitutionally impermissible, is for a later date. The MEPA timing statute, and the Otter Creek Coal Leases, place the entire panoply of applicable environmental statutory, regulatory and constitutional protections, including MEPA, SUMRA and Montana's clean and healthful environment provisions, *between* the Otter Creek Coal Leases and *any* preparatory work or mining. Those environmental protections have not been eroded by the mere issuance of the Otter Creek Coal

---

[4] As in the District Court, the fact that Appellees do not dispute the many factual assertions regarding GHG and climate change made by Appellants does not mean they are conceded. It merely means they are not material to the legal decision at issue.

Leases. As found by the District Court: "[T]here is no way to determine that adequate environmental protections will not be put in place in the process." Order 9-10.

Despite this finding, and despite the language of the Otter Creek Coal Leases, Appellants suggest that the Coal Leases do not mean what they say, and argue – without support – that it should be presumed that the DEQ and the Land Board are going to, in the future, act unconstitutionally. Appellants argue that the bonus bid money paid by Ark makes this future unconstitutional conduct a certainty. This Court, however, has specifically rejected this type argument, holding that courts cannot assume that state agencies will violate the law. *North Fork Preservation Ass'n v. Department of State Lands*, 238 Mont. 451, 462, 778 P.2d 862, 869 (1989) (holding courts "cannot assume that [state agencies] will not comply with [their] MEPA obligations if development proceeds beyond this stage").

Likewise, Appellants' speculative fear that the DEQ and the Land Board will, someday, violate the Constitution is a far cry, and a long distance, from the burden of *proving* unreasonable degradation of the environment as demanded by Article IX Section 1 of the Montana Constitution and this Court in *MEIC* and *Cape-France Enterprise*.

Finally, and most importantly, if, in fact, it turns out that the Land Board ultimately violates the Montana Constitution in its desire to keep Ark's bonus bid money or approve the mine, Plaintiffs will then have the opportunity to sue, and no doubt will. In that this opportunity for Plaintiffs to sue will occur long before any threatened degradation of the environment, Plaintiffs' ill-timed case fails as a matter of law.

D. Whether mining is "reasonably certain to occur" is of no relevance to the constitutional issues before the Court.

Appellants contend that the Land Board's act of issuing the Otter Creek Coal Leases makes mining "reasonably certain to occur," and for that reason, MEPA should have been conducted at the leasing stage. While it is true the District Court made the finding that mining was reasonably certain to occur, the District Court did *not* make the reasonable foreseeability of mining a legal standard by which to judge the merits of a law that defers the timing of MEPA. Furthermore, and more importantly, the District Court did *not* find that an *unconstitutional* mine was reasonably certain to occur. *See* Order.

There is no constitutional prohibition on mining. The Constitution encourages the reasonable development of the State's resources. *See* Mont. Const. art. IX, §§ 1(3), 2(1). What matters here is whether the State has preserved the ability to perform adequate environmental review of any impacts that mining may

cause. Put another way, what is at issue is whether mining, *if and how ultimately allowed*,[5] will comply with environmental requirements—constitutional, statutory, and regulatory. The MEPA timing statute and the Otter Creek Coal Leases have not eliminated any of these requirements, but explicitly require compliance with them. Order 9-10.

The time to question whether the Otter Creek Mine is constitutionally sound – from an environmental standpoint – is when the Otter Creek Mine is permitted and considered for approval. There is no evidence – whatsoever – that the Land Board will not comply with its obligations.

E. The constitutionality of the MEPA timing statute is measured against the Montana Constitution, not MEPA's provisions.

There is no constitutional right to MEPA review. *See* Mont. Const. NPRC at least recognizes this, noting that "[t]he need for thorough environmental review before leases are signed *flows from NEPA* [National Environmental Policy Act] *and MEPA's* central purpose...." Br. of Appellants NPRC 33 (June 12, 2012) (emphasis added). Even if MEPA review was constitutionally required, there is certainly no constitutional right to MEPA review at the leasing stage as opposed to the permitting stage of a project, particularly where MEPA review occurs prior to

---

[5] The *possibility* of mining is not the same thing as the certainty of mining, which the District Court understood in saying there is "no guarantee that it [mining] will" go forward. Order 10.

any potential alteration of the environmental status quo. MEPA's application and MEPA's timing are issues of administration left to the Legislature. *See* Mont. Const. art. IX, § 1(2); *Kottel v. Montana*, 2002 MT 278, ¶ 52, 312 Mont. 387, 60 P.3d 403; *Montana Stockgrowers Association v. State Department of Revenue*, 238 Mont. 113, 117, 777 P.2d 285, 288 (1989).

Appellants argue that MEPA is "the Legislature's chosen vehicle to implement the State's constitutional obligations to protect the environment." Br. of Appellants NPRC 39 (June 12, 2012); *see also* Appellants MEIC's Br. 19, 32 (June 12, 2012). Putting aside the question whether MEPA is the *only* such vehicle, if Appellants are correct, *then the MEPA timing statute is the Legislature's chosen vehicle to administer the timing of MEPA.*

Appellants, however, make the curious argument that, because MEPA "is the Legislature's chosen vehicle to implement the Constitution's environmental rights," it "cannot be dispensed with...," and that the Legislature should not be permitted to exempt the Otter Creek Coal Leases "from the Legislature's chosen vehicle to implement the State's constitutional obligations to protect the environment." Br. of Appellants NPRC 24, 39 (June 12, 2012); *see also* MEIC's Opening Br. 19-23 (June 12, 2012). Stated another way, Appellants quixotically argue that the Legislature had the authority to enact MEPA as a means of implementing the constitutional environmental rights, but lacked the corollary

authority to administer MEPA's timing, which it did in the very same legislative session. *See* Mont. Code Ann. §§ 75-1-102 (2003); 77-1-121(2)(2003).

Initially, it must be reiterated that MEPA *has not been* "dispensed with." Its timing has been modified. Nor is MEPA "*the*" chosen vehicle for implementing the constitutional right to a clean and healthful environment. The Legislature has also specifically enacted SUMRA to ensure mining complies with the constitutional right to a clean and healthful environment. *See* Mont. Code Ann. § 82-4-202(1). SUMRA reads:

> The [L]egislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana Constitution, has enacted the Montana Strip and Underground Mine Reclamation Act. It is the [L]egislature's intent that the requirements of this part *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.*

(emphasis added).

More fundamentally, however, the MEPA timing statute's constitutionality is not measured against MEPA or, for that matter, the National Environmental Policy Act ("NEPA"), the two statutory schemes so heavily relied upon by Appellants. Rather, in Montana, the constitutionality of statutes, such as Mont. Code Ann. § 77-1-121(2), is measured against the rights granted by the Montana Constitution. MEPA's provisions do not dictate the scope of the constitutional

right to a clean and healthful environment. The constitutional right itself dictates its scope.

Therefore, this case is decided on the fact that, before any environmental degradation can occur, the full assortment of environmental review and protections – mandated by the Montana Constitution – are available to the Land Board. As a result, Montana's constitutional right to a clean and healthful environment has not been implicated.

II. THE MEPA TIMING STATUTE IS A REASONABLE PART OF THE LEGISLATURE'S ADMINISTRATION OF THE CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT.

The Constitution assigns to the Legislature the task of administering the constitutional right to a clean and healthful environment.

Article IX, 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*.

(emphasis added).

Indeed, "administration" as used in the Constitution is a broad directive.[6] Where the Constitution provides broad directives, "the specifics are left to the Legislature." *Kottel*, ¶ 52. These broad directives "are implemented through legislative decision, not by constitutional mandate." *Montana Stockgrowers Association*, 238 Mont. at 117, 777 P.2d at 288. Where broad directives are involved, Legislative action administering the provision must be upheld if it is reasonable. *Kottel*, ¶ 52; *Montana Stockgrowers Association*, 238 Mont. at 117, 777 P.2d at 288.

Therefore, the Legislature's administration and implementation of the constitutional right to a clean and healthful environment is subject to rational basis review, and must be upheld if it is "reasonable." *MEIC*, ¶ 80. As concluded by this Court in *MEIC*:

> We conclude for purposes of the facts presented in this case, § 75-5-303 [nondegradation of water quality], MCA is a ***reasonable legislative implementation*** of the mandate provided for in Article IX, Section 1[] and that to the extent § 75-5-317(2)(j), MCA (1995) arbitrarily excludes certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by

---

6 *See e.g. Montana Stockgrowers Association v. State Dept. of Revenue*, 238 Mont. 113, 117, 777 P.2d 285, 288 (1989) (concluding constitutional agriculture provision providing the Legislature "shall provide for a Department of Agriculture and enact laws and provide appropriations to protect, enhance, and develop agriculture" is a "broad directive"); *Kottel v. Montana*, 2002 MT 278, ¶ 52, 312 Mont. 387, 60 P.3d 403 (concluding constitutional tax provisions providing for the levy of taxes for public purposes is "broad directive").

> Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.[7]

Id. (emphasis added); *see also* Appellants MEIC's Opening Br. 23 (June 12, 2012) (noting the *MEIC* "Court determined that nondegradation review requirement was 'a *reasonable* legislative implementation of the mandate' to provide a 'clean and healthful environment'" (emphasis added)).

Despite this broad directive to the Legislature, NPRC asserts that the standard for implicating the constitutional right to a clean and healthful environment (triggering strict scrutiny review) should be "whether environmental harms are reasonably certain or foreseeable as a consequence of the government's actions." Br. of Appellants NPRC 28 (June 12, 2012) (emphasis added). This standard is NPRC's creation. Article IX of the Montana Constitution says nothing about "reasonable foreseeability" and, in fact, it holds just the opposite. The Montana Constitution explicitly recognizes that natural resource extraction can and will occur, and prevents only unreasonable degradation to the environment. *See* Mont. Const. art. IX, §§ 1, 2. Otherwise, nearly every state action would be subject to strict scrutiny review (highways, zoning, speed limits, etc.).

---

7 As demonstrated above, it is only where a statutory provision excludes an action from environmental review and allows significant or unreasonable environmentally degrading or natural resource depleting activity to occur that strict scrutiny is applied. *MEIC*, ¶¶ 79-80.

Where this Court has found that strict scrutiny was triggered, it did so on the basis of a proven environmentally degrading activity that would occur without any intervening environmental review. *See MEIC*, ¶¶ 79-80. Reasonable foreseeability is not part of any strict scrutiny constitutional standard.

The fact is, the MEPA timing statute is a reasonable Legislative implementation of the broad constitutional directive to the Legislature to "administer" the constitutional right to a clean and healthful environment. It avoids duplicative and speculative MEPA review, while preserving all existing environmental considerations and protections afforded by law. It provides that MEPA review will occur in conjunction with, and inform and augment SUMRA. And it provides that MEPA shall be performed, not when an action's scope and effects are speculative, but when concrete information is known concerning the action's scope and effect. There is nothing unreasonable, much less unconstitutional, about such a logical approach.

Indeed, not only have Appellants failed to argue that the statute is unreasonable, they have also completely failed to acknowledge that, even if they are correct on all points (they clearly are not), the Otter Creek Coal Leases, as written, survive strict scrutiny review.

In this regard, abiding by a specific obligation of the Constitution constitutes

a compelling State interest. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Grutler v. Bollinger,* 539 U.S. 306 (2003); *Montana v. Nelson*, 283 Mont. 231, 244, 941 P.2d 441, 450 (1997).

The Land Board is constitutionally obligated "to follow the 'regulations and restrictions' imposed by the Legislature." *Montanans for Responsible Use of School Trust v. Darkenwald,* 2005 MT 190, ¶ 61, 328 Mont. 105, 119 P.3d 27; *see also* Mont. Const. art. 10, § 11(1)-(2). The Legislature encouraged the Land Board to lease the mineral interests acquired from the United States in the Crown Butte land exchange for coal mining purposes. *See* Mont. Code Ann. §§ 77-3-303, 77-1-1002(2)(a), (b); Laws of 2003, Ch. 318.

The Land Board made its leasing decision in consideration of its statutory obligations, and abiding by constitutional obligations is a compelling state interest. The Land Board, moreover, conditioned the Otter Creek Coal Leases to preserve all existing environmental considerations and protections afforded by law. *See* Otter Creek Coal Leases ¶¶ 1, 16, 19. Preserving all existing environmental considerations and protections afforded by law is the very essence of a "closely tailored" action, and is the least onerous path to balancing the realization of the tremendous socioeconomic benefits of coal development while, simultaneously, ensuring mining conforms to constitutional requirements.

III. ASSUMING THE MEPA TIMING STATUTE IS UNCONSTITUTIONAL, THE APPROPRIATE REMEDY, IF ANY, IS TO CONDUCT MEPA REVIEW OF THE LEASING DECISION, NOT TO VOID THE OTTER CREEK COAL LEASES.

Even if Appellants are correct that MEPA is constitutionally required at the leasing stage, they have asked for the wrong remedy. Where a non-self executing constitutional provision is at issue, "the remedy lies, not with the courts, but with the [L]egislature." *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 79, 132 P.2d 689, 703 (1942).

Appellants allege a failed MEPA process and demand a remedy that, rather than being consistent with MEPA's remedial provisions, simply throws out the Land Board's considered decision. MEPA's remedial provisions, however, state:

> (6)(a)(i) A challenge to an agency action under this part may only be brought against a ***final agency action***....
> ...
> (iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, ***"final agency action" means*** the date that the board of land commissioners or the department of natural resources and conservation ***issues a final environmental review document*** under this part ***or*** the date the ***board approves the action*** that is subject to this part, ***whichever is later.***

Mont. Code Ann. § 75-1-201(6)(a) (2009) (emphasis added). [8]

Here, by MEPA's own terms, it is permissible to "approve[] the action" *prior to* the issuance of the MEPA document, or to defer a challenge to the

---

[8] All references to MEPA refer to the MEPA in effect prior to the 2011 amendments.

adequacy of the MEPA document until after the action's approval. Appellants do not contest the validity of MEPA's remedial provisions. MEPA itself specifies that the appropriate remedy, if any, is to conduct a MEPA review of the leasing decision. *See id.* If that must occur, Appellants will have the ability to challenge that MEPA review when the MEPA document is issued. Voiding the leases would be an unnecessary remedy and would void numerous provisions that have nothing to do with the environment.

CONCLUSION

The Otter Creek Coal Leases, which do not authorize any impact to the environment, do not implicate Appellants' constitutional right to a clean and healthful environment. As a result, Appellants' ill-timed and ill-conceived case fails and the District Court's decision should be affirmed.

Respectfully submitted this 12th day of August, 2012.

CROWLEY FLECK PLLP

By _____

Mark L. Stermitz
Jeffery J. Oven
Christopher C. Stoneback
P. O. Box 7099
Missoula, MT 59807-7099

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

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11(4)(e), I certify that Answer Brief of Appellees Ark Land Co., Inc. and Arch Coal, Inc. is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, except for block quotations and footnotes, and the word count calculated by Microsoft Word is not more than 10,000 words pursuant to Montana Rule of Appellate Procedure 11(4)(a), being 5,919 words.

Dated this 12th day of August, 2012.

Mark L. Stermitz
Jeffery J. Oven
Christopher C. Stoneback
P. O. Box 7099
Missoula, MT 59807-7099
Attorneys for Defendants
Ark Land Company and Arch Coal, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 13th day of August, 2012:

[x] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile

Timothy J. Preso / Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715
(Attorneys for Plaintiffs Montana Environmental Info. Center and Sierra Club)

[x] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile

Jack R. Tuholske
Tuholske Law Office, PC
PO Box 7458
234 East Pine Street
Missoula, MT 59807

[x] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile

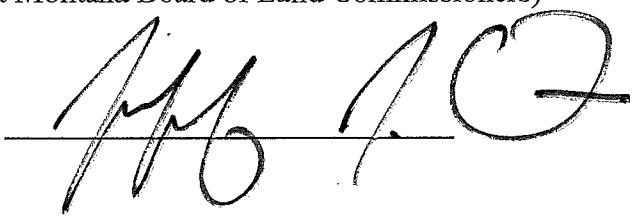
Patrick Parenteau
Vermont Law School
South Royalton, VT 06068
(Attorneys for Plaintiffs Northern Plains Resource Council, Inc. and National Wildlife Federation)

[x] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile

Steve Bullock / Jennifer Anders
Department of Justice
P.O. Box 201401
Helena, MT 59620-1401

[x] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile

Candace West
Tom Butler
Department of Natural Resources & Conservation
State of Montana
P.O. Box 201601
Helena, MT 59620-1601
(Attorneys for Defendant Montana Board of Land Commissioners)



APPENDIX

TABLE OF CONTENTS

APPENDIX

A

State of Montana
COAL LEASE

DS-459
Amended 12/21/2009

No. C-1103-10

THIS LEASE is made and entered into between the State of Montana, by and through its lawfully qualified and acting Board of Land Commissioners, hereinafter referred to as "Lessor", and

Ark Land Company
1 City Place Drive, Suite 300
St. Louis, MO 63141

hereinafter referred to as "Lessee", under and pursuant to the authority granted Lessor by the terms and provisions of Title 77, Chapter 3, Part 3, MCA, and all acts amendatory thereof and supplementary thereto, and all rules adopted pursuant thereto.

IT IS MUTUALLY UNDERSTOOD, AGREED AND COVENANTED BY AND BETWEEN THE PARTIES TO THIS LEASE AS FOLLOWS:

1. **GRANTING CLAUSE.** The Lessor, in consideration of the rents and royalties to be paid and the conditions to be observed as hereinafter set forth, does hereby grant and lease to the Lessee, 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, all the lands herein described as follows:

Land Located in: Township 3 South, Range 45 East County: Powder River

Description of land: Section 26: All

Total number of acres, more or less, 640.00 , belonging to Common Schools Grant.

All rights granted to Lessee under this Lease are contingent upon Lessee'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) and upon Lessor review and approval of Lessee's mine operation and reclamation plan. The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.

2. **EFFECTIVE DATE AND TERM.** This Lease takes effect on March 18, 2010 and is granted for a primary term of ten (10) years and so long thereafter as coal is produced from such lands in commercial quantities, subject to all of the terms and conditions herein set forth. A lease not producing coal in commercial quantities at the end of the primary term shall be terminated, unless the leased lands are described in a strip mine permit issued under Section 82-4-221, MCA, or in a mine site location permit issued under Section 82-4-122, MCA, prior to the end of the primary term, and the lease shall not be terminated so long as said lands are covered and described under valid permit.

3. **LEASE EXTENSION.** The Board of Land Commissioners may grant reasonable extensions of the primary term of this Lease upon a showing that Lessee, despite due care and diligence, is or has been directly or indirectly prevented from exploring, developing, or operating this Lease or is threatened with substantial economic loss due to litigation regarding this Lease or another lease in the same strip mine permit or mine site location permit held by the Lessee, state compliance with the Montana Environmental Policy Act, or adverse conditions caused by natural occurrences.

4. **RIGHTS RESERVED.** Lessor expressly reserves the right to sell, lease, or otherwise dispose of any interest or estate in the lands hereby leased, except the interest conveyed by this Lease; provided, however, that Lessor hereby agrees that subsequent sales, leases or other dispositions of any interest or estate in the lands hereby leased shall be subject to the terms of this Lease and shall not interfere with the Lessee's possession or rights hereunder.

5. BOND. Lessee shall immediately upon the execution of this Lease furnish a surety bond in the amount of $2,000, conditioned upon compliance with the provisions of this Lease, or, in the option of the Lessor, a cash deposit in the amount of $2,000, or an irrevocable letter of credit in a form approved by Lessor drawn upon an approved bank in the same amount. All rentals, royalties and interest must be paid and all disturbance must be reclaimed to the satisfaction of Lessor prior to release of any bond. Additional bonding may be required, or reduced bonding allowed, whenever Lessor determines it is necessary, or sufficient, to ensure compliance with this Lease.

6. RENTAL. Lessee shall pay Lessor annually, in advance, for each acre or fraction thereof covered by this Lease, beginning with the date this Lease takes effect, an annual money rental of $3.00 per acre. Rental terms are subject to readjustment as provided in Paragraph 8, but in no case shall it be less than two (2) dollars per acre.

7. ROYALTY. Lessee shall pay Lessor in money or in kind at Lessor's option a royalty on every short ton (2,000 pounds) of coal mined and produced during the term of this Lease, calculated upon the f.o.b. mine price of the coal prepared for shipment, including taxes based on production or value. Lessee shall pay a royalty of 12.5 % upon coal removed by strip, surface, or auger mining methods and a royalty of 10% for coal removed by underground mining methods. Royalty terms are subject to review and readjustment as provided in Paragraph 8, but in no case shall the royalty for the coal mined be less than ten (10) percent of the f.o.b. price of a ton prepared for shipment.

8. READJUSTMENT OF RENTAL AND ROYALTY TERMS. The Lessor reserves the right to readjust the rental and royalty terms of this Lease to reflect fair market value at the end of the primary term of ten (10 years) and at the end of each five (5) year period thereafter if the lease is producing coal in commercial quantities.

9. OFFSETTING PRODUCTION. The obligation of Lessee to pay royalties under this Lease may be reduced by the Board for coal produced from any particular tract within the Lease upon a showing by Lessee to the Board that the coal is uneconomical to mine at prevailing market prices and operating costs unless Lessor's royalty is reduced. Under no circumstances may Lessor's royalty be reduced below ten (10) percent of the coal produced and sold f.o.b. the mine site, prepared for shipment, including taxes based on production or value.

10. LESSOR NOTIFICATION AND REPORTS. Lessee shall notify Lessor prior to the commencement of any prospecting, exploration, development or production operations. As soon as any mining operations are commenced, Lessee shall submit to Lessor, on or before the last day of each month, a royalty report and payment covering the preceding calendar month, which report shall be in such form and include such information as Lessor shall prescribe. Upon request, Lessee shall also furnish to Lessor, reports, plats, and maps showing exploration data, development work, improvements, amount of leased deposits mined, contracts for sale and any other information with respect to the land leased which Lessor may require. Lessor's point of contact for all matters related to this Lease is:

Department of Natural Resources & Conservation
Minerals Management Bureau
P.O. Box 201601
1625 Eleventh Avenue
Helena, MT 59620-1601

Lessor will notify Lessee of any subsequent change in point of contact.

11. INSPECTION. Representatives of the Lessor shall at all times have the right to enter upon all parts of the leased premises for the purposes of inspection, examination, and testing that they may deem necessary to ascertain the condition of the Lease, the production of coal, and Lessee's compliance with its obligations under this Lease and to review the Lessee's records relating to operations upon and administration of the lease premises. Representatives of Lessor shall also, at all reasonable hours, have free access to all books, accounts, records, engineering data, and papers of Lessee insofar as they contain information relating to the production of coal under this Lease, the price obtained therefor, and the fair market value of the production. Lessor shall also have free access to agreements relating to production of coal under this Lease. Lessor may copy at its own expense any book, account, record, engineering data, papers, or agreements to which it has access pursuant to this paragraph.

12. CONFIDENTIALITY. Lessor agrees that Lessee may request any materials obtained by Lessor pursuant to this Lease be designated as confidential. Lessor shall agree to keep any information so designated strictly confidential if Lessor determines that confidentiality is not unlawful. Further, the parties agree that the information Lessee is obliged to provide pursuant to this Lease is only that information relating to the reasonable administration and enforcement by Lessor of the provisions of this Lease and state law.

13. ASSIGNMENT. This Lease may not be assigned without the prior approval of Lessor in writing. Assignments must be made in accordance with any statutes or administrative rules pertaining to assignments in effect at the time of assignment. Each Lessee executing this Lease, or accepting an assignment of an interest in this Lease, is jointly and severally liable for all obligations attributable to the entire working interest under this Lease. Assignments may not extend the expiration date of this Lease.

14. CANCELATION. Lessee may surrender and relinquish this Lease by giving written notice to the Lessor at least thirty (30) days prior to the anniversary date of the Lease. It is understood and agreed that the Lessor hereby reserves the right to declare this Lease forfeited and to cancel the same through the Board of Land Commissioners upon failure of Lessee to fully discharge any of the obligations provided herein, after written notice from the Department and reasonable time fixed and allowed by it to Lessee for the performance of any undertaking or obligation specified in such notice concerning which Lessee is in default. Lessee, upon written application therefor, shall be granted a hearing on any notice or demand of the Department before the Lease may be declared forfeited or canceled.

15. SURRENDER OF PREMISES. Upon the termination of this Lease for any cause, Lessee shall surrender possession of the leased premises to Lessor, subject to Lessee's right to re-enter (1) for the purpose of removing all machinery and improvements belonging to Lessee, hereby granted at any time within six (6) months after the date of such termination, except those improvements as are necessary for the preservation of the deposit and access to the deposit, which improvements shall become the property of Lessor; and (2) for the purpose of complying with State and Federal laws adopted pursuant to the police power of State or Federal government. If any of the property of Lessee is not removed from the leased premises as herein provided, the same shall be deemed forfeited to Lessor and become its property.

16. PROTECTION OF THE SURFACE, NATURAL RESOURCES, AND IMPROVEMENTS. Lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) damaging crops, including forage, timber, or improvements of a surface owner; or (3) damaging range improvements whether owned by Lessor or by its grazing permittees or lessees. The lessee shall not pollute or deplete surface or groundwater in excess of those impacts to water allowed by state or federal law or permit. Upon any partial or total relinquishment or the cancellation or expiration of this Lease, or at any other time prior thereto when required by Lessor and to the extent deemed necessary by Lessor, Lessee shall fill any sump holes, ditches and other excavations, remove or cover all debris, and, so far as reasonably possible, reclaim the disturbed area to a condition in keeping with the concept of the best beneficial use, including the removal of structures as and if required. Lessor may prescribe the steps to be taken and reclamation to be made with respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.

17. TAXES. Lessee shall pay when due all taxes lawfully assessed and levied upon improvements, output of mines, or other rights, property or assets of the Lessee.

18. SUCCESSORS IN INTEREST. Each obligation hereunder shall extend to, and be binding upon, and every benefit hereof shall inure to the heirs, executors, administrators, successors and assigns of the respective parties hereto.

19. COMPLIANCE WITH LAWS AND RULES. This Lease is subject to further permitting under the provisions of Title 75 or 82, Montana Code Annotated. Lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of an existing property right recognized by law.

20. WATER RIGHTS. Lessee may not interfere with any existing water right owned or operated by any person. Lessee shall hold Lessor harmless against all claims, including attorney fees, for damages claimed by any person asserting interference with a water right.

21. MINE SAFETY. Lessee agrees to operate the mine in accordance with rules promulgated by the Mine Safety and Health Administration for the health and safety of workers and employees.

22. WASTE PROHIBITED. All mining operations shall be done in good and workmanlike manner in accordance with approved methods and practices using such methods to insure the extraction of the greatest amount of economically minable and saleable mineral, having due regard for the prevention of waste of the minerals developed on the land, the protection of the environment and all natural resources, the preservation and conservation of the property for future use, and for the health and safety of workers and employees.

23. SURRENDER OF DATA. All geological data pertaining to the leased premises, including reports, maps, logs and other pertinent data regarding trust resources shall be given to the Lessor upon surrender, termination, or expiration of the Lease. Lessor may refuse to release bond until surrender of such data to the Lessor. All drill core unused or undamaged by testing shall be saved. Upon surrender, termination, or expiration of the lease, Lessee shall contact the State Geologist, Montana Bureau of Mines and Geology, Butte, Montana, to determine if such drill core is of interest to the State Geologist for the drill core library. Any drill core determined by the State Geologist to be of interest shall be forwarded by Lessee, at Lessee's cost, to the drill core library.

24. WEED CONTROL. Lessee is responsible for controlling noxious weeds on the leased premises and shall prevent or eradicate the spread of noxious weeds onto land adjoining the leased premises in consultation with any local weed control board.

25. SURFACE OWNER AND SURFACE LESSEE RIGHTS. Lessee shall notify the surface owner, if the surface owner is not the Lessor, and any surface lessee of the location of any facilities or access roads on the leased premises prior to their construction.

26. DAMAGES. Where Lessor owns the surface estate above the leased premises, Lessee shall compensate Lessor or Lessor's surface lessees or permittees for all damages to authorized improvements on the leased premises, including penalties and charges assessed by the FSA on CRP lands, as a result of Lessee's prospecting, exploration, development or mining operations. All such damages will be assessed by and paid directly to the Lessor. Lessee shall also make all payments required by law to surface owners and lessees if Lessor is not the owner of the surface estate above the leased premises.

27. INDEMNIFICATION. The Lessee shall protect, defend, and save the Lessor, its agents and employees harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by third parties on account of damage to property, personal injury, or death, which injury, death or damage, in whole or in part, arises out of or in any way results from the negligent, wanton, or willful acts or omissions of the Lessee, its contractors, agents or subcontractors.

28. SPECIAL CONDITIONS.

(A) DILIGENCE. The Lessee hereby commits to a work program on the Otter Creek Area Coal Tracts with a minimum expenditure of $2.0 million per lease year, for a period of five (5) years following the date this Lease takes effect, and at least $500,000 per lease year thereafter. For the purposes of this Lease commitment, the Otter Creek Area Coal Tracts includes all State and non-State coal located within the areas identified as "Tract #'s 1, 2, and 3" on the attached Exhibit A. Within 120 days following the end of each lease year, the Lessee shall provide Lessor an accounting of Work (as later defined) performed on the Otter Creek Area Coal Tracts for such lease year. Any amount in excess of the minimum expenditure amount is referred to as the "Excess Amount" and any shortfall is referred to as the "Shortfall Amount." Within 120 days following the end of each lease year, the Lessee shall pay to Lessor the amount, if any, equal to the Shortfall Amount for such lease year, less the sum of the Excess Amounts for all prior lease years (to the extent such Excess Amounts have not been previously applied against a Shortfall Amount). For purposes of calculating the minimum expenditure, the Lessee may only include costs for work directly attributable to the Otter Creek Area Coal Tracts. Work to be performed on the Otter Creek Area Coal Tracts may include, without limitation, environmental baseline studies, exploration drilling, initiation of

permitting and all permitting actions, acquisition of surface rights and access rights over or to the Otter Creek Area Coal Tracts, title curative actions, market studies, compiling mine economics, preparation of feasibility studies and any other works, study or verifiable third party expense required to commence operations for the mining of coal on the Otter Creek Area Coal Tracts (collectively, the "Work"). The accounting of Work does not include payments made to non-State Lessors for shortfalls in work program expenditures. In the event any of the Work is conducted by Lessee's employees, the actual verifiable salaries, wages and personal expenses of Lessee's employees either temporarily or permanently assigned to the development and operation of the Otter Creek Area Coal Tracts may be included in the minimum expenditure. Lessee shall not include any internal overhead of any nature in calculating the minimum expenditure. If it is anticipated that the Work conducted by Lessee's employees will exceed 50% of the minimum expenditure, the Lessee will seek Lessor's approval for such amounts over 50%. In addition, taxes and assessments Lessee pays shall not be included in calculating the minimum expenditure. Copies of all analyses, data and other information produced or compiled as a result of Lessee's work program on the Otter Creek Area Coal Tracts will be provided to Lessor within 120 days after the end of each lease year. However, such analyses, data and other information submitted to Lessor shall be subject to the confidentiality provisions of Paragraph 12 and 77-3-308, MCA.

(B) **SETTLEMENT AGREEMENT.** After the conclusion of any exploration operations and before conducting any mining, construction or other operations on any portion of the Otter Creek Area Coal Tracts (singly and collectively "Operations"), the Lessee or its agents in close consultation with the Northern Cheyenne Tribe ("Tribe"), shall develop and submit for approval to the Lessor, obtain Lessor approval of, and thereafter implement the five written Operating Plans as detailed in the attached Exhibit B of the Settlement Agreement dated February 19, 2002, between the Lessor and the Northern Cheyenne Tribe.

29. **NON-WARRANTY OF TITLE.** Regardless of any of the above provisions of this Lease, actual or implied, the State of Montana does not warrant title to its lands.

IN WITNESS WHEREOF, the parties hereto set their hands and Lessor has caused this agreement to be executed with the official seal of the State Board of Land Commissioners on this ___ day of APR 20 2010, 2010.

THE STATE OF MONTANA
Lessor

By Its State Board of Land Commissioners

DIRECTOR

ARK LAND COMPANY
Lessee

By: _____

Its: President

EXHIBIT A

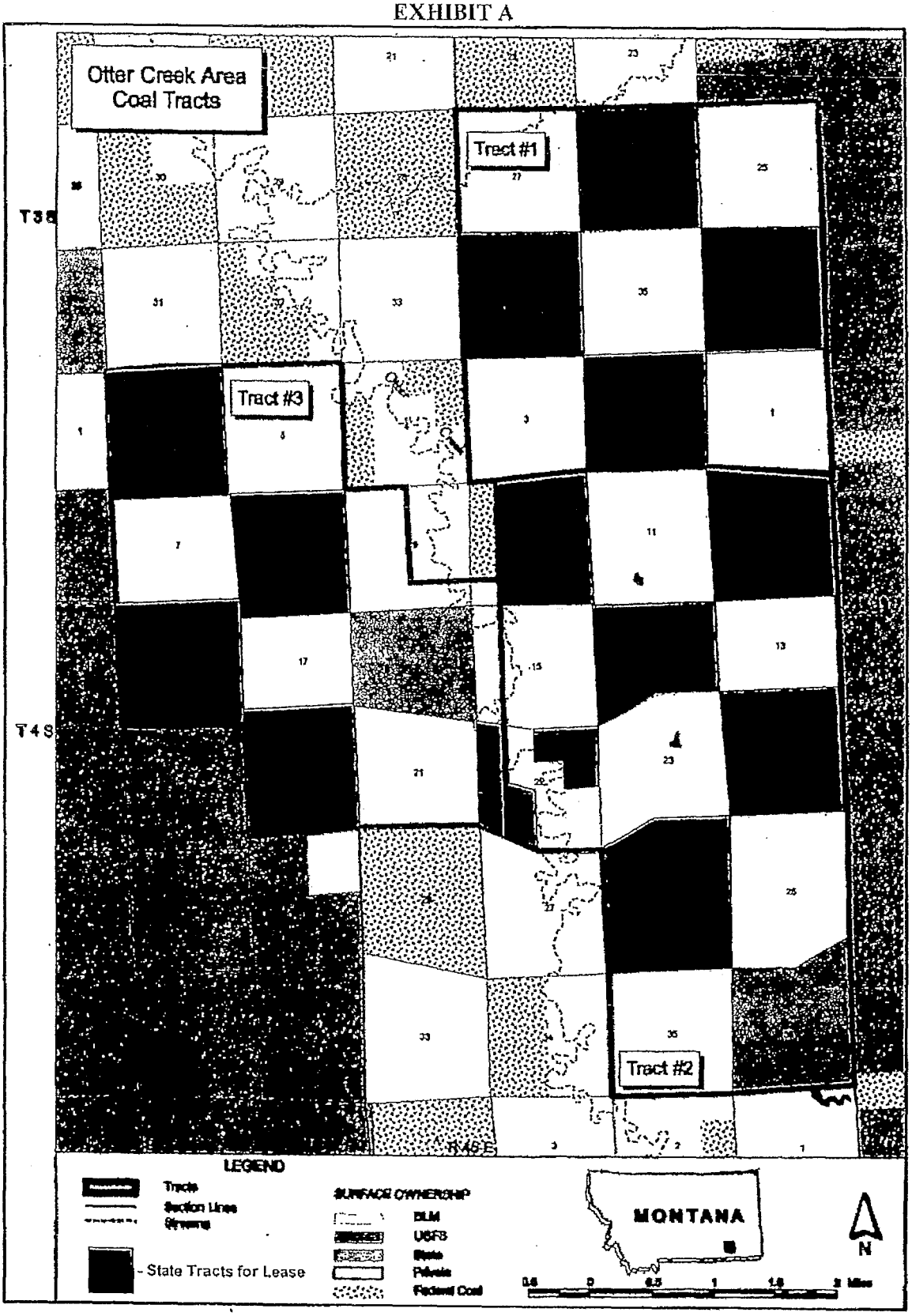

Otter Creek Area
Coal Tracts
Tract #1
Tract #3
Tract #2
T3S
T4S
R46E
LEGEND
Tracts
Section Lines
Streams
State Tracts for Lease
SURFACE OWNERSHIP
BLM
USFS
State
Private
Federal Coal
MONTANA
N

EXHIBIT B

Operating Plans

After the conclusion of any exploration operations and before conducting any mining, construction or other operations on any portion of the Otter Creek Tracts (singly and collectively "Operations"), the project operator in close consultation with the Northern Cheyenne Tribe ("Tribe"), shall develop and submit for approval to the Montana State Board of Land Commissioners ("Board"), obtain Board approval of, and thereafter implement, the following written Operating Plans:

1. **Employment Program.** A written Employment Program designed to provide meaningful and substantial employment opportunity in Operations, without any preferences or quotas, to enrolled members of federally-recognized Indian Tribes who resided on or near the Northern Cheyenne Reservation during the one-year period preceding their application for employment ("Indians") and to non-Indians who resided on the Reservation, in the off-Reservation communities of Ashland or Birney, or in Powder River County during the one-year period preceding their application for employment ("Other Local Residents"), to the extent such Indians and Other Local Residents are qualified and available and reside no more than 50 road miles from the Operations. The Employment Program shall address recruitment, training, hiring, promotion, reductions in workforce and termination for cause, in all categories of employment, and shall include:

   a. Programs for recruitment of Indians and Other Local Residents.

   b. Programs for training Indians and Other Local Residents, including entry-level training, on-the-job training, and training for advancement into supervisory positions.

   c. Preservation of the project operator's authority to establish reasonable, even-handed and job-validated training programs, employment criteria, and work rules for all project employees including Indians and Other Local Residents.

d. Workshops for other project workforce to develop an awareness of relevant Indian culture and concerns and an understanding of the need for and requirements of the Employment Program.

e. A requirement that contractors and subcontractors engaged in Operations assume and comply with all terms and conditions of the Employment Program reasonably adaptable to their own employment practices.

f. Notification to any involved labor union of the existence of the Employment Program and the project operator's duty and intent to abide by its terms, and accommodation of the Employment Program in any union collective bargaining agreement covering Operations.

g. Employment by the project operator of a Facilitator, who shall be a qualified and available enrolled member of the Tribe approved by the Northern Cheyenne Tribal Council and acceptable to the project operator, whose principal and primary duties shall be to: (a) serve as liaison between the project operator and the Tribe with respect to the Employment Program and the Contracting Program established under section 2 below; (b) assist in facilitating the successful implementation of the Employment Program and Contracting Program; and (c) assist in resolving any problems which may arise in implementing the Employment Program or Contracting Program.

h. A board of Administrators, consisting of equal numbers of Administrators separately designated by the Tribe and the project operator, which shall monitor compliance with and serve as a forum to discuss and resolve by agreement any disputes regarding the interpretation or implementation of the Employment Program or the Contracting Program.

2. **Contracting Program.** A written Contracting Program designed to provide meaningful and substantial opportunity, without preferences or quotas, to qualified and available businesses majority-owned and controlled by the Northern Cheyenne Tribe or its members ("Tribal Contractors"), to obtain contracts and subcontracts for services or goods in the conduct of Operations at competitive prices. The Contracting Program shall include:

a. A certification procedure under which a business entity applying for the status of Tribal Contractor must seek certification from the Administrators in the following two respects:

i. as majority-owned and controlled by the Tribe or Tribal Members; and

ii. as capable of competently providing particular kinds of contract services or goods.

b. Notice to certified Tribal Contractors of Operations contracts and subcontracts to be awarded for which they are qualified.

c. A requirement that project contractors and subcontractors involved in Operations assume and comply with all terms and conditions of the Contracting Program reasonably adaptable to their own project contracting activities.

3. **On-Reservation Conduct.** A written On-Reservation Conduct Program designed to encourage employees and truckers involved in Operations, while on the Northern Cheyenne Reservation, to comply with all relevant standards of conduct generally applicable to Northern Cheyenne Tribal members on the Reservation.

4. **Environmental Monitoring.** To the extent not independently required by applicable federal or State environmental law or regulations, a written Environmental Monitoring Program for state-of-the-art monitoring of air quality, visibility, water quality and biological resources on the Northern Cheyenne Reservation which may be affected adversely by Operations, including:

a. Baseline monitoring for at least one year before the initiation of any surface disturbing Operations.

b. Ongoing monitoring thereafter throughout the conduct of Operations, and thereafter until the completion of all required reclamation on the lands on which Operations were conducted and the release of all related reclamation bonds by regulatory agencies.

c. Training and employment of qualified and available Indians to assume responsibility, to the fullest extent feasible, for the operation of the monitoring programs on the Reservation.

d. In addition, full compliance by the project operator with all applicable federal and State environmental laws and regulations.

5. **Cultural Resources.** To the extent not independently required by applicable federal or State law or regulations, a written Cultural Resources Program designed to avoid disturbance or damage to Northern Cheyenne historic, cultural, religious and burial sites or items, including plants having cultural or religious significance, in the conduct of Operations, including:

a. A program carried out in consultation with the Tribe, to identify, record, and protect, in accordance with Northern Cheyenne standards and protections, all Northern Cheyenne historic, cultural, religious and burial sites on the lands covered by the Lease.

b. Re-burial, in consultation with the Tribe and in accordance with all Northern Cheyenne standards, of all Northern Cheyenne human remains and funerary objects jeopardized or disturbed by Operations.

c. In addition, full compliance by the project operator with all applicable federal and State laws and regulations that protect Northern Cheyenne historic, cultural and religious interests and values implicated by Operations.

* * * *

kw:c:wpdocs:0065:
OtterCreek-Settlement.AGM-Exh-B-Revised-2-15-02:
0065.09642

APPENDIX

B

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, POWDER RIVER COUNTY

NORTHERN PLAINS RESOURCE COUNCIL, INC., and NATIONAL WILDLIFE FEDERATION,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC.

Defendants.

and

MONTANA ENVIRONMENTAL INFORMATION CENTER, THE SIERRA CLUB,

Plaintiffs,

vs.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND COMPANY, INC. and ARCH COAL, INC.

Defendants.

Cause No. DV-38-2010-2480
Cause No. DV-38-2010-2481

Judge Joe L. Hegel

MEMORANDUM AND ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the Parties' Cross Motions for Summary Judgment. The parties fully briefed the motions. The Parties also submitted a Stipulated Joint Statement of Agreed Facts, reserving the right to submit other evidence. Plaintiff Northern Plains Research Council and Montana Environmental Information Center also submitted separate statements of agreed facts, supported by affidavits and excerpts of government and scientific reports. The Defendants did not submit any opposing affidavits or reports.

On September 17, 2011, this Court heard oral argument. Jennifer Anders represented the Defendant Montana Board of Land Commissioners ("Land Board"). Mark Stermitz and Jeffrey Oven represented Defendants Ark Land Company, Inc. and Arch Coal, Inc. (collectively "Arch Coal"). Jack Tuholske represented Plaintiffs Northern Plains Resource Council ("NPRC") and the National Wildlife Federation ("NWF"). Jenny K. Harbine represented Plaintiffs Montana Environmental Information Center ("MEIC") and the Sierra Club. At close of argument, the motions were deemed submitted.

From the record before the Court, the Court now issues its Memorandum and Order:

Memorandum

I. PLEADINGS & PROCEDURE.

Plaintiffs have filed suit seeking a declaratory judgment that the Defendant Land Board failed to conduct a constitutionally-required environmental review prior to entering into a lease of approximately 8,300 mineral acres in Southeastern Montana to the Defendants Arch Coal, for the purpose of strip mining coal. The Land Board's holdings are checker-boarded with privately-held mineral holdings, mostly owned by Arch Coal. Together, the holdings contain approximately 1.2 billion tons of coal. Plaintiffs allege that the mining of the coal may result in a broad array of environmental and socioeconomic effects, including, but not limited to, air and water pollution, boom and bust cycles, and global warming. Defendants have submitted no evidence to the contrary.

Plaintiffs complain that Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3 ("Montana Constitution environmental provisions") require that the State of Montana conduct its business in a manner to protect its citizens' right to a clean and healthful environment, and that the chief mechanism the Montana Legislature has used to implement these constitutional protections is the Montana Environmental Policy Act ("MEPA"). *See* § 75-1-102; Mont. Sess. Laws 2003, ch. 361, § 5.

Plaintiffs further complain that but for the enactment of MCA § 77-1-121(2), MEPA would have required the Land Board to conduct an environmental study prior to entering into the lease in this case, and that the statute's deferral of the environmental review from the leasing

stage to the later mine permitting stage in this case unconstitutionally denies the Plaintiffs' right to the early environmental review, which would preserve the Land Board's right to place mitigating conditions on the coal mining, obtain more favorable financial terms, or to decide not to enter into a lease at all.

The Defendants previously moved to dismiss the Plaintiffs' Amended Complaints arguing:

(1) Plaintiffs lack standing for failure to sufficiently allege harm;

(2) Plaintiffs lack standing because the controversy is not ripe (ready for adjudication) in that the execution of the lease does not result in any harm or imminent threat of harm and that the controversy will not be ripe until the Land Board has reviewed a specific mine plan;

(3) Even in the absence of MCA § 77-1-121(2), MEPA would not apply until the Land Board and the Department of Natural Resources ("DNRC") have issued their final review documents under MEPA, since the lease only grants Arch Coal a contingent right to development.

(4) That properly enacted statutes are presumed constitutional and Plaintiffs have not proven that MCA § 77-1-121(2) is otherwise.

II. FACTS.

The following facts are not disputed. As of March 18 2010, the Land Board leased approximately 8,300 mineral acres to Ark Land, a wholly owned subsidiary of Arch Coal, for the purpose of mining coal. The state-owned acres which are checker-boarded with approximately 6,000 acres of privately owned mineral rights. Together they are referred to as the "Otter Creek tracts" and contain an estimated 1.3 billion tons of coal, which if mined and burned, could add a significant percentage of the carbon dioxide annually released into the atmosphere, thereby exacerbating global warming and climate change. The effects of climate change include specific adverse effects to Montana's water, air and agriculture.

Pursuant to MCA § 77-1-121(2), the Land Board did not conduct any review of the possible environmental consequences of the mining of the coal prior to entering into the leases. However, the leases are subject to later environmental review by the Department of

Environmental Quality ("DEQ") and the Department of Natural Resources ("DNRC"), as well as Land Board's final approval of a mine operating and reclamation plan before actual mining could occur.

The Defendant presented no evidence contravening the Plaintiffs' evidence of both direct and indirect environmental effects of the mining and combustion of the coal that is the subject of the leases in question ("Otter Creek leases"). Therefore, the Court finds that the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned. The Court further finds that the mining and combustion of the bulk of the coal would be reasonably certain to occur in accordance with the purpose of the lease.

III. LAW & DISCUSSION.

A. **Standing**.

The Land Board and Arch Coal contend that the Plaintiffs do not have standing to bring this action because they do not allege imminent injury and because the process will not be ripe for review until a specific mining plan is considered and ruled upon, that is, the case does not present a "justiciable controversy."

Defendants argue that the any alleged injuries complained of would occur, if at all, from the mining and combustion of coal not from the leasing of coal and that Plaintiffs' suit is therefore premature. They further argue that the MEPA review undertaken by the DEQ and the DNRC at the time of further permitting, together with continuing Land Board oversight as trustee of the lands in question, is plenary and encompasses all the alleged damages envisioned by the Plaintiffs, including secondary damages such as global warming. Arch Coal got something for its money, whether that was merely an option to put forth a mining plan or something sufficient to implicate Montana's constitutional environmental protections is the question that will be further addressed below.

The Court has previously ruled that Plaintiffs have alleged injury to members of their organizations who fish, hunt, ranch, farm and recreate in the Otter Creek area and its hydrologically-connected riparian areas. This is sufficient to satisfy the requirement that the Plaintiffs allege existing and genuine rights. Plaintiffs have alleged a constitutional violation of

Montana Constitution Article II, Sec. 3, and Article IX, §§ 1, 2, and 3, guaranteeing the public right to a clean and healthful environment. This qualifies as a controversy upon which the court may effectively operate and upon which the Court can issue a final judgment.

The Court stands by its conclusion that the Plaintiffs have standing.

B. MEPA Application sans MCA § 77-1-121(2).

The Land Board and Arch Coal argue that even if MCA § 77-1-121(2) did not exist, MEPA would not apply at the leasing stage and would only come into play at the permitting stage following the proposal of a specific mining plan, *citing North Fork Preservation Assn v. Dept. of State Lands,* 238 Mont. 451, 778 P.2d 862, (Mont. 1989).

Plaintiffs countered that this does not make sense because (1) there would be no reason to enact the statute if MEPA did not apply at the leasing stage and (2) in the case cited by Defendants, the state agency did, in fact, do a prelease environmental review.

The Court held that absent the exemption contained in MCA § 77-1-121(2), the leases in this case would have required a MEPA review, finding that *North Fork* did not involve a question of whether MEPA applied to the issuance of a lease, but whether a higher degree of review was required than the degree applied by the state agency. In *North Fork,* an environmental organization challenged the Land Board's approval of the drilling of a test well in an environmentally sensitive area adjacent to Glacier National Park without first preparing an Environmental Impact Statement ("EIS"). The Montana Supreme Court held that an EIS was not required because the preliminary environmental review ("PER") that the Land Board had completed prior to issuance of the leases in question concluded that the issuance of the requested oil and gas leases with certain protective stipulations would not be "an action by state government 'significantly affecting the quality of the human environment,' therefore requiring an EIS under § 75-1-201, MCA." *North Fork supra,* 778 P.2d at 865.[1] Thus it is clear that the Land Board did in fact engage in MEPA environmental review prior to issuance of the leases in *North Fork*, which MEPA review informed its decision and the public regarding protective stipulations to include in the leases.

[1] It should also be noted that *North Fork* involved the drilling of a test well pursuant to a second round of oil and gas leasing and that the Department of State Lands completed an EIS in 1976, prior to issuing the first round of leases.

The Court stands by its conclusion that but for the intervention of MCA § 77-1-121(2), MEPA would apply at the lease stage in this case and some form of MEPA review would be called for at the lease stage.

C. Constitutionality of MCA § 77-1-121(2).

MCA §77-1-121(2) exempts the Department of State Lands and the Land Board from complying with Title 75, chapter 1, parts 1 and 2 (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." MEPA review has been the primary method of insuring that significant state actions were taken only after taking a hard look at the environmental consequences of such actions. It is undisputed that the Land Board entered into the coal leases without first conducting a MEPA or any other type of environmental review or assessment and that it did so in reliance on MCA § 77-1-121(2).

Plaintiffs claim the statutory exemption of coal leasing from MEPA review at the lease stage implicates the clean and healthful environment provisions of the Montana Constitution as applied to this case by exempting the Land Board from seriously considering the environmental consequences before committing the state's resources to development. They argue that the critical "go-no go" decision is taken at the leasing stage and that once the lease is signed, the Land Board gives up the right to change its mind in order to protect the wider environment.

Defendants claim that as applied to this case the "exemption" only delays MEPA review until there is something more tangible to review—i.e., a mining plan—that the Plaintiffs lose nothing with the delay, and that because of the combination of statutory requirements, regulations and the contingent nature of the lease, Plaintiffs will be free to raise all their environmental concerns, direct and indirect, at the later permitting stage, and DEQ, DNRC, and the Land Board can consider all of those concerns in determining whether to approve, modify or deny any proposed mining plans under the lease. They claim nothing is taken off the table.

Plaintiffs reply that although DEQ may be able to consider secondary impacts such as global warming, it has no authority to do anything about them. Its review is geared exclusively towards more local air and water quality issues, and that neither the Land Board nor DEQ can unilaterally change the terms of the lease. Arch allows as much when it states that the Board can only cancel lease if Arch fails in its commitments under the lease.

The question is whether the statute's exemption of the Land Board from a requirement to conduct any sort of initial environmental review at the lease stage in favor of later MEPA review, involves an irretrievable commitment of resources to a project that may significantly adversely affect the human environment. In other words, by signing the lease did the Land Board take something off the table that could not later be withheld and, if so, was that significant enough to implicate the constitutional environmental protections implemented by MEPA?

In ruling on the Defendants' motions to dismiss, this Court previously opined:

> To adopt the Defendants' reasoning with respect to the constitutionality of MCA § 77-1-121(2) would allow the Land Board to convert public property rights to private property rights, stripping away its special protections before even considering possible environmental consequences. Once converted from public property to private property, further review by the Land Board and other state agencies would appear to be restricted to its purely regulatory functions, with the need to treat the now private property rights with deference.

However, in it summary judgment motion, the State argued that the State retains the right to impose any reasonable environmental restrictions that it could have imposed at the leasing stage, *citing Seven-Up Pete* for the proposition that leaseholders of such conditional mining leases do not gain property rights sufficient to stand up to the authority of the state to enforce constitutional, trust, or even statutory environmental requirements. The State points to the leases themselves, which require permit approvals by DEQ and DNRC, as well as approval of a mine operating plan by the Land Board. Like the lease in *Seven-Up Pete*, the Otter Creek Leases condition actual mining extensively. The Otter Creek leases provide:

- ¶ 1: "All rights granted to Lessee under this Lease are contingent upon Lessee'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) and
    - upon Lessor review and approval of Lessee's mine operation and reclamation plan.
    - The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.
- ¶ 16: Lessee agrees to take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereof; (2) damaging crops, including

forage, timber, or improvements of a surface owner; or (3) damaging range improvements whether owned by Lessor or by its grazing permittees or lessees. The lessee shall not pollute or deplete surface or groundwater in excess of those impacts to water allowed by state or federal law or permit. ... Lessor may prescribe the steps to be taken and reclamation to be made with respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.

- ¶ 19 **COMPLIANCE WITH LAWS AND RULES.** This Lease is subject to further permitting under the provisions of Title 75 or 82, Montana Code Annotated. **Lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of an existing property right recognized by law.** [Emphasis supplied.]
- **WATER RIGHTS.** Lessee may not interfere with any existing water right owned or operated by any person.

1. Standard of Proof.

Statutes are presumptively constitutional. *City of Billings v. Albert*, 2009 MT 63, ¶ 11, 349 Mont. 400, 203 P.3d 828. In determining whether a statute is constitutional as applied, the party challenging the constitutionality of a statute normally shoulders the burden of proving that the state action undertaken pursuant to the statute is unconstitutional beyond a reasonable doubt. *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440 ¶ 7, 354 Mont. 133, 227 P.3d 42. Only if the challenger can show that the state action pursuant to the statute implicates fundamental constitutional rights, does the burden shift to the State to show a compelling state interest. *State v. Guill*, 2011 MT 32, ¶ 67, 359 Mont. 225, 248 P.3d 826.

In this case the parties have clearly staked their claims. Plaintiffs argue the fundamental right is implicated and therefore strict scrutiny applies. They have not denied or attempted to disprove that the State has a rational basis for the statute. While Defendants argue that a fundamental right is not implicated at the leasing stage and therefore only the rational basis test applies. The State has not even suggested that it could meet the strict scrutiny standard, and while Arch has proffered the argument that maximizing profit is a compelling state interest, it has not supported this by applicable law or logical argument.

State action pursuant to a statute implicates fundamental rights if it infringes on a fundamental constitutional right. Constitutional rights enumerated in the Montana Constitutions

Declaration of Rights [Article II, Section 3] are fundamental rights. The Montana Supreme Court has previously declared that the right to a clean and healthful environment contained in the Montana Constitution is a fundamental right and any infringement on that right is subject to strict scrutiny. *MEIC, supra*, ¶ 53.

Does the state action of granting the Otter Creek leases without prior environmental review implicate the constitutional protection of the clean and healthful environment? If so, the right to a clean and healthful environment is a fundamental right and any statute or rule that implicates that right is subject to strict scrutiny and can only survive scrutiny if the State establishes 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. *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 Mont. 207, ¶ 53, 988 P.2d 1236, ¶ 53, (Mont. 1999) ("MEIC").

If the state action of issuing the Otter Creek leases is not sufficient to implicate the constitutional protection of the people's right to a clean and healthful environment, as argued by the Defendants, then the State need only demonstrate a rational basis for the rule to withstand the as applied constitutional challenge. *See Rohlfs, supra.*

In *Seven Up Pete* and the lease provisions, the Montana Supreme Court found that the constitutional right to a clean an healthful environment was implicated because the plaintiffs had shown that a higher level of arsenic would be released into high quality waters thereby degrading the waters without the opportunity for further review. In this case MEPA and other review will take place before any significant ground or water is disturbed and before any coal is mined or combusted. None of the claimed adverse effects will occur unless and until the coal is actually mined or combusted.

As clarified by *Seven Up Pete,* the Land Board, DNRC and DEQ all have significant discretion to place reasonable environmental restrictions on any mining plan in accordance with the State's energy policy [§ 90-4-100(1)(b),(c),(d) (2011), MCA] and the Land Board's overriding trust responsibilities. Arch takes its interest subject to the trust responsibilities and other environmental laws. *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Commissioners*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800. Arch Coal acquired nothing more than the exclusive right to apply for permits from the State. Although it may be

probable that the mining will go forward, there is no guarantee that it will and there is no way to determine that adequate environmental protections will not be put in place in the process.

While it is not entirely clear how the Montana Supreme Court will apply *Seven Up Pete* to the facts in this case, in light of the Montana Supreme Court's holding in *Seven Up Pete*, the Land Board's continuing trust responsibilities elaborated on below, and the lease provisions subjecting Arch's interests to those obligations, this Court finds that the State has retained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially.

Land Board's Trust Responsibilities.

MEIC alternatively argues that the State has breached its trust obligations with respect to its constitutional and statutory duties to manage state resources for the benefit of this and succeeding generations, and that, while it is true that the Land Board has a constitutional duty to prudently manage the property within its control with an eye towards financial return, it cannot do so by turning a blind eye to environmental protection. *Ravalli County Fish and Game Ass'n v. Mont. Dept. of State Lands*, 273 Mont. 371, 379 and 387 903 P.2d 1362, (Mont. 1995

Pursuant to MCA § 77-1-121(2), the Land Board issued the Otter Creek Leases without conducting any environmental review. While the Land Board cannot back out of the lease provisions or unilaterally alter the terms of the leases, Arch takes its leasehold interest subject to "all agency responsibility and authority under the Montana Environmental Policy Act," as well as the Montana Strip Mine Siting Act, SUMRA and the Land Board's approval of mine operations and reclamation plans. By ¶ 19, Arch also agrees "to be bound by all applicable laws in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this lease and do not deprive the Lessee of an existing property right recognized by law." [Emphasis supplied.] This clause appears to be coextensive with the limits described in *Seven Up Pete.* This should be broad enough to include all reasonable restrictions to be imposed by the Land Board in meeting its trust responsibilities.

The Court concludes, that while the issuance of the Otter Creek leases and the investment by Arch and the State make it possible, if not probable, that the mining permits will subsequently issue and mining take place, and mining and combustion of coal have the potential of significantly degrading the safe and healthful environment, in accordance with *Seven Up Pete* the

State has not made an irrevocable commitment of resources and still retains the discretion to mitigate or halt the development if it cannot be done without the unreasonable degradation of the environment.

Order

IT IS ORDERED:

1. The Plaintiffs' motions for summary judgment are denied.
2. The Defendants' motions for summary judgment are granted.
3. The Clerk of Court shall file this document and mail or deliver copies to counsel of record at their last known addresses.

Dated this 3rd day of February, 2012.

SIXTEENTH JUDICIAL DISTRICT COURT
SEAL
MONTANA POWDER RIVER COUNTY

Joe L. Hegel, District Judge

pc: J. Oven
M. Stermitz
T. Butler
J. Anders
J. Tuholske
J. Harkins
D. Honnold

BRIEF OF STATE APPELLEES

IN THE SUPREME COURT OF THE STATE OF MONTANA
Nos. DA-12-0184 and DA-12-0185

NORTHERN PLAINS RESOURCE COUNCIL, INC.
and NATIONAL WILDLIFE FEDERATION,

Plaintiffs and Appellants,

v.

MONTANA BOARD OF LAND COMMISSIONERS, STATE OF MONTANA, ARK LAND CO. INC. and ARCH COAL, INC.,

Defendants and Appellees.

and

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellants,

v.

MONTANA BOARD OF LAND COMMISSIONERS, ARK LAND CO. INC. and ARCH COAL, INC.,

Defendants and Appellees

BRIEF OF STATE APPELLEES

On Appeal from the Montana Sixteenth Judicial District Court,
Powder River County, The Honorable Joe L. Hegel, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
JENNIFER ANDERS
Assistant Attorney General
KEIF STORRAR
Legal Intern
P.O. Box 201401
Helena, MT 59620-1401

CANDACE F. WEST
TOMMY H. BUTLER
Special Assistant Attorneys General
Montana Department of Natural Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601

ATTORNEYS FOR DEFENDANTS AND APPELLEES

JACK TUHOLSKE
P.O. Box 7458
234 East Pine Street
Missoula, MT 59807-7458

PAT PARENTEAU
Vermont Law School
P.O. Box 96
South Royalton, VT 05068

ATTORNEYS FOR PLAINTIFFS AND APPELLANTS NPRC AND NWF

TIMOTHY J. PRESO
JENNY K. HARBINE
Earthjustice
313 East Main Street
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFFS AND APPELLANTS MEIC AND SIERRA CLUB

TABLE OF CONTENTS

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES
(Cont.)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Cont.)

United States Code

Montana Constitution

STATEMENT OF THE ISSUES

1. Does issuance of the contingent-right Otter Creek coal leases by the State Land Board trigger immediate environmental review as being either a "major action of state government" or an "irretrievable commitment of resources" which may result in significant impacts to the human environment?

2. Is the MEPA procedure set forth in Mont. Code Ann. § 77-1-121(2), which eliminates the preparation of duplicate MEPA documents for leases that are subject to further permitting, consistent with article II, section 3, and article IX, section 1 of the Montana Constitution?

STATEMENT OF THE CASE

The above-captioned consolidated cases were brought by Northern Plains Resource Council, National Wildlife Federation, Montana Environmental Information Center, and Sierra Club (hereinafter cumulatively referred to as the Environmental Challengers), to contest the State Land Board's issuance of 14 contingent-right coal leases on State mineral trust lands to Ark Land Company, a subsidiary of Arch Coal, Inc. Environmental challengers alleged that issuance of the leases under the procedure outlined in Mont. Code Ann. § 77-1-121(2) irrevocably conflicts with the substantive environmental standards of article II, section 3, and article IX, section 1 of the Montana Constitution. (D.C. Docs. 1, 4).

The State and Arch Coal moved to dismiss the complaints, but the district court ruled that the Environmental Challengers had stated cognizable claims and denied the motions. (D.C. Doc. 22). Thereafter, the parties submitted cross-motions for summary judgment to the district court, based upon an agreed May 13, 2010 statement of facts, as well as other materials presented by affidavit. (D.C. Docs. 37, 52-55). The district court granted summary judgment in favor of the State and Arch Coal. (D.C. Doc. 63). The Environmental Challengers appeal from that ruling.

STATEMENT OF THE FACTS

The majority of Environmental Challengers' facts concern the environmental impacts of coal mining and coal combustion, neither of which is authorized by the Otter Creek coal leases. (D.C. Doc. 37, ¶ 25). The State will therefore set forth a detailed Statement of Facts regarding to the acquisition and leasing of the tracts, including the lease terms, which are critical to this case.

A. Description of the Otter Creek Coal Tracts

The Otter Creek coal tracts are located in Powder River County, Montana, within the Otter Creek drainage, which is a tributary of the Tongue River. The tracts encompass approximately 19,836 mineral acres in a checkerboard pattern of ownership. (D.C. Doc. 37, ¶ 1). Surface ownership within the tracts is

approximately 82 percent private, 10 percent state, and the remaining 8 percent is administered by the Bureau of Land Management (BLM). *Id.,* ¶ 2. As the relevant map shows, the State owns both the surface and minerals upon only three sections or 1,920 acres. (D.C. Doc. 37, Ex. A.) The "tracts" at issue in this proceeding are thus predominantly coal mineral rights, not surface lands with public access, recreational opportunity, or other means of producing income for the school trust beneficiaries.

The tracts contain an estimated 1.3 billion tons of recoverable coal, 572 million of which are owned by the State. (D.C. Doc. 37, ¶ 2).

B. Acquisition of the Otter Creek Tracts

The Otter Creek coal tracts include mineral rights acquired by the State of Montana as a consequence of the Crown Butte settlement dated August 12, 1996, between Crown Butte Mines, Inc., the Sierra Club, the Montana Wildlife Federation, and the United States of America, and others. To compensate the State of Montana for the nondevelopment of the Crown Butte gold project, Congress offered to convey additional mineral property to the State of Montana under section 503 of the Appropriations Act of November 14, 1997 (Pub. L. 105-83; 1l I Stat. 74-75), and the State received, "all Federal mineral rights in the tracts in Montana depicted as Otter Creek number 1, 2, and 3 on the map entitled 'Ashland Map.'" (D.C. Doc. 37, ¶ 4).

The Federal conveyance to the State was approved by the State Land Board on May 20, 2002, and certified by the Governor's Executive Order No. 12-02 on May 28, 2002. (D.C. Doc. 37, ¶ 5). The Federal conveyance includes only mineral estate; no surface ownership was transferred. Pursuant to article X, section 2 of the Montana Constitution, the mineral estate of the Otter Creek coal tracts is held in trust for the financial support of common public schools. Before approving the federal conveyance, the Land Board entered into a settlement agreement with the Northern Cheyenne Tribe, which places certain requirements on any coal leases issued by the Land Board covering coal acquired by the federal conveyance. *Id.*, ¶ 6.

In 2003, the State of Montana and Great Northern Properties signed a coordination agreement setting forth their mutual intent to proceed towards cooperative leasing of their respective checkerboard coal interests in the Otter Creek coal. The agreement recognized that the opportunity to successfully lease and develop these intermingled tracts is expected to be greater if the leases are offered in a coordinated process, rather than proceeding separately. *Id.*, ¶ 7.

C. Leasing of the Tracts

In 2003, the Legislature authorized the Department of Natural Resources and Conservation (DNRC) to offer the Otter Creek coal tracts for leasing, and appropriated funds to evaluate the State's coal resources at Otter Creek. *Id.*, ¶ 8.

The State and Great Northern Properties commissioned a joint study of the tracts, and an appraisal was completed in 2006. *Id.*, ¶ 9. The appraisal employed two different methods for determining fair market value of the resource to set an appropriate bonus bid price for potential bidders. *Id.* ¶ 11. In 2008, the Land Board authorized the DNRC to perform an economic valuation of the coal reserves. DNRC contracted with Norwest Corporation to produce the Montana Otter Creek State Coal Valuation (hereinafter Norwest Appraisal). *Id.* ¶ 10.

The Land Board sought public comment on the appraisal in April 2009. *Id.*, ¶ 11. This initial review period generated nearly 400 pages of comments, the majority of which expressed opinions either in favor of or against the development of the mine and/or the Tongue River Railroad. *Id.*, ¶ 13. In addition to soliciting written public comment, the DNRC also conducted comment hearings in Miles City and Lame Deer in June 2009. *Id.* The public comment period was extended in November 2009 to allow additional time for the public to review a proposed bid package which included a draft lease. *Id.*, ¶ 15. The Environmental Challengers had notice of all public proceedings and submitted comments opposing the leasing of Otter Creek coal. *Id.* ¶ 19.

Following extensive public comment and amendments to the draft lease, and in accordance with the trust status of these mineral lands and the resolution of the Montana legislature, the State Land Board approved the lease of the Otter Creek

tracts to Ark Land Company on March 18, 2010, a subsidiary of Arch Coal, for the offered bonus bid of $85,845,110. *Id.*, ¶ 19. Fourteen separate leases, corresponding to 14 different sections of land, were executed and issued on April 20, 2010. *Id.*, ¶¶ 21, 23.

The leases contain specific provisions addressing environmental concerns, including damage to soil, forage, timber and crops; surface and groundwater pollution or depletion; reclamation of the mine site; water rights and weed control. *Id.*, ¶ 27. They do not authorize any mining activity, and do not allow any significant surface disturbance without (a) the acquisition of all necessary regulatory permits; and (b) the approval by the Land Board of a mine operation and reclamation plan submitted by the Lessee. *Id.*, ¶ 25. The leases specifically provide:

> All rights granted to Lessee under this Lease are contingent upon Lessee's compliance with the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act (Title 82, Chapter 4, Parts I and 2, MCA) and upon Lessor review and approval of Lessee's mine operation and reclamation plan. The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.

Id., ¶ 24. Under the leases, the Land Board has reserved the legal power, subject to Montana law and the rights conveyed in the leases, to declare the leases forfeited and to cancel the same upon failure of the Lessee to fully discharge any of the obligations provided thereunder. *Id.*, ¶ 26. The leases further require the Lessee to implement written operating plans with the Northern Cheyenne Tribe, stemming

from the Northern Cheyenne settlement agreement, after any exploration operations are complete, but before any mining or construction occurs. *Id.*, ¶ 28.

D. Environmental Review under MEPA

By law, the Board's issuance of a contingent-right lease does not trigger the Montana Environmental Policy Act immediately because "the lease or license is subject to further permitting" before any development can occur. Mont. Code Ann. § 77-l-121(2). However, review under the Montana Environmental Policy Act (MEPA) will occur at least twice before any coal is mined at Otter Creek, and Montana law provides for public comment at both stages.

Before Arch Coal may gather on-the-ground information about its coal reserves and those it has leased, the company must apply for a prospecting permit from the Department of Environmental Quality (DEQ) pursuant to the Montana Strip and Underground Mine Reclamation Act, Mont. Code Ann. Tit. 82, ch. 4, pt. 2. (D.C. Doc. 37, ¶ 29). The application will trigger MEPA review, and the burden is on the applicant to demonstrate that all prospecting activities will be carried out in accordance with statutes and rules. Mont. Code Ann. § 82-4-227(1). For gathering additional information without substantial surface disturbance, Arch Coal must file a notice of intent to prospect in accordance with Mont. Admin R. 17.24.1018, which triggers additional review by DEQ. A Notice of Intent to Prospect is valid for one year, which should provide Arch Coal with

sufficient time in which to gather baseline environmental data for an actual mining permit. (D.C. Doc. 37, ¶ 30).

Before any mining may occur, Arch Coal must apply for and obtain an operating permit. Mont. Code Ann. § 82-4-221. The permit application must include a complete and detailed plan for mining, reclamation, revegetation, and rehabilitation of the land and water to be affected by the operation. Mont. Code Ann. § 82-4-222(1); D.C. Doc. 37, ¶ 31. The DEQ reviews the application to determine whether it is administratively complete before the permit is even processed. *Id.* ¶ 32. Deficiencies in the permit application, or public opposition to the suitability of the land for coal mining, may administratively delay issuance of the permit. Mont. Code Ann. §§ 82-4-228, -231.

Once the permit application is accepted as administratively complete, DEQ must determine that the application is acceptable before a permit is issued. (D.C. Doc. 37, ¶ 33). Issuance of the permit requires another environmental review under MEPA, including its public participation provisions. *Id.* ¶¶ 33-34. DEQ may not approve an application for a prospecting or operating permit when the proposed permit area includes land that has special, exceptional, critical, or unique characteristics or when mining or prospecting on that area would adversely affect the use, enjoyment, or fundamental character of neighboring land that has those characteristics. Mont. Code Ann. § 82-4-227(2). If an operating permit is

issued, DEQ retains the authority to suspend or revoke it under the circumstances described in Mont. Code Ann. §§ 82-4-250, -251. A component of the permit application is a mine operation and reclamation plan, which must be reviewed and approved by the State Land Board. *Id.*, ¶ 33.

E. The District Court's Ruling

The district court held that the permitting agencies and the State Land Board retain the authority to ensure adequate environmental review to fulfill their constitutional and trust responsibilities. Specifically, the court made the following findings and conclusions:

- Mont. Code Ann. § 77-1-121(2) allows the State to meet its constitutional and trust responsibilities, both environmentally and financially.
- The State has not irrevocably committed its resources, and retains the discretion to mitigate or halt development if development cannot be done without unreasonable degradation to the environment.
- The Land Board, DNRC and DEQ have significant discretion to place reasonable environmental restrictions on any mining permits issued in accordance with the State's energy policy and the Land Boards trust responsibilities.
- Arch Coal acquired nothing more than the exclusive right to apply for mining permits from the State, and there is no guarantee that adequate environmental protections will not be put in place during the process.

(D.C. Doc. 63 at 9-11.)

SUMMARY OF ARGUMENT

1. This Court need not reach the constitutional issue posed by the Environmental Challengers because there is an independent basis upon which the Court can declare the Otter Creek coal leases to be consistent with MEPA review. Environmental review under MEPA is triggered only for "major actions of state government significantly affecting the quality of the human environment." Mont. Code Ann. § 75-1-201(1)(b)(iv). This Court has interpreted the "significantly affect" standard to mean the "go/no go" point at which there has been an "irretrievable commitment of resources." *North Fork Preservation Assoc. v. Montana Dep't of State Lands*, 238 Mont. 451, 461-62, 778 P.2d 862, 869-70 (1989).

Issuance of the contingent-right coal leases at Otter Creek does neither. The leases authorize no activity whatsoever, and do nothing more than grant exclusive rights to apply for regulatory permits. The leases themselves reserve to the State Land Board final review and approval of all operating and reclamation plans prior to development, negating any claim by Environmental Challengers that environmental harm is reasonably certain. Montana Code Annotated, § 75-1-201(1)(b)(iv) thus does not trigger MEPA review at the leasing stage because there has been no major state action that results in an irretrievable

commitment of resources, wholly apart from Mont. Code Ann. § 77-1-121(2). Its constitutionality need not be considered.

2. Even if this Court considers the constitutionality of Mont. Code Ann. § 77-1-121(2), there is no basis on which to invalidate the Land Board's leasing decision. It is well understood that MEPA outlines a process and does not compel any particular substantive outcome. As part of that process, § 77-1-121(2) eliminates duplicative MEPA review and synchronizes MEPA review with actual permitting proposals for mining. It allows the State Land Board to generate substantial sums for public education by issuing leases that have no adverse environmental impacts, and that expressly require environmental review at a time when environmental review makes sense--when there is an actual proposal for development. Montana Code Annotated, § 77-1-121(2), is a rational constitutional policy choice by the legislature and does not implicate the clean and healthful environment provisions of the Montana Constitution.

ARGUMENT

I. STANDARD OF REVIEW

This Court's standard of review on appeal from summary judgment is *de novo*, and the Court should apply the same criteria applied by the district court pursuant to Mont. R. Civ. P. 56(c). *Cape-France Enters. v. In re Estate of Peed*, 2001 MT 139, ¶ 13, 305 Mont. 513; 29 P.3d 1011. A district court's grant of

summary judgment is proper when no genuine issue of material fact exists and when the moving party is entitled to a judgment as a matter of law. *Id*.

The Plaintiffs bear the initial burden of proving beyond a reasonable doubt that Mont. Code Ann. § 77-1-121(2) is unconstitutional, otherwise the statute is presumed constitutional. *Rohlfs v. Klemenhagen,* 2009 MT 440, ¶ 7, 354 Mont. 133, 227 P.3d 42; *Montanans for the Responsible Use of the School Trust v. Darkenwald*, 2005 MT 190, ¶ 22, 328 Mont. 105, 119 P.3d 27. Any doubt as to the constitutionality of a statute should be resolved in favor of the statute. *Powder River County v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357.

Statutes that do not affect fundamental rights are not subject to strict scrutiny analysis. *Rohlfs*, ¶ ¶ 26, 29. Under a rational basis test, courts defer to the policymaking function of the legislature, and it is the challenger's burden to show the law is not rationally related to a legitimate government interest. *Id.*, ¶ ¶ 18, 26.

The Plaintiffs' burden consists of establishing injury to a constitutionally protected right. *Montana Envtl. Info. Ctr. v. Department of Envtl. Quality (MEIC v. DEQ)*, 1999 MT 248, ¶¶ 63-64, 296 Mont. 207, 988 P.2d 1236. For purposes of this case, the Plaintiffs must show that a specific MEPA procedure is textually based in the Constitution or that it is objectively rooted as a fundamental right in Montana's "history, legal traditions, and practices." *Washington v.*

Glucksberg, 521 U.S. 702 (1997); *Walters v. Flathead Concrete Prods.*, 2011 MT 45, 359 Mont. 346, 353-354, 249 P.3d 913, 918-919.

Only if the Plaintiffs meet their initial burden of proving that the statute implicates fundamental rights does strict scrutiny analysis apply, in which case the burden then shifts to the State to prove that the statute is narrowly tailored to serve a compelling government interest. *See e.g.*, *State v. Guill*, 2011 MT 32, ¶ 67, 359 Mont. 255, 248 P.3d 826, citing *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872.

II. ISSUANCE OF THE OTTER CREEK COAL LEASES DOES NOT TRIGGER IMMEDIATE ENVIRONMENTAL REVIEW BECAUSE THERE IS NO MAJOR ACTION OF STATE GOVERNMENT OR AN IRRETRIEVABLE COMMITMENT OF RESOURCES.

Under MEPA, an environmental impact statement (EIS) is required only for "major actions of state government significantly affecting the quality of the human environment." This Court has interpreted the trigger-point for an EIS under Mont. Code Ann. § 75-1-201(1)(b)(iv) to be at the "go/no-go" point of development, which involves an "irretrievable commitment of resources." *North Fork Preservation Ass'n v. Montana Dep't of State Lands*, 238 Mont. at 461, 778 P. 2d at 868-69. In *North Fork*, this Court held that a mineral lease that makes all rights contingent on approval of a development plan by state agencies does not irretrievably commit resources sufficient to trigger an EIS. *Id.*, 238 Mont. at 461-62, 778 P.2d at 868-69;

see also Montana Wildlife Fed'n v. Montana Bd. of Oil & Gas Conservation, 2012 MT 128, 365 Mont. 232, 280 P.3d 877 (23 new wells in an existing field of 1,000 wells does not result in a changed condition that triggers preparation of a new MEPA document).

The leases in question are no different than the leases at issue in *North Fork*. They make all rights contingent upon future permitting and final approval of the mining and reclamation plan by the State Land Board. The leases make clear that environmental review will occur if and when permits are sought and before any development activity begins. The leases themselves authorize no activity that could result in environmental impact, let alone that would "significantly affect the quality of the human environment."

Despite the clear mandate of the leases and the undisputed facts regarding the nature of those leases, Environmental Challengers argue that leasing is the "go/no-go" decision point because the leases somehow commit the reviewing agencies and the State Land Board to a path of development. This argument is also resolved by *North Fork*, where this Court found no irretrievable commitment of resources, even though the lease itself might "ultimately empower [the developer] to conduct all of the listed activities, and it is easy to imagine these activities having a significant effect on the environment." *Id.*, 238 Mont. at 462, 778 P.2d at 869. The Otter Creek leases are no different. All rights granted to Arch Coal

are contingent upon compliance with the Montana Strip Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act, as well as the State Land Board's approval of the mine's operation and reclamation plan. It is undisputed that Arch Coal cannot proceed to mine without first applying for the necessary permits, and that all permits are subject to environmental review under MEPA. (D.C. Doc. 37, ¶¶ 24, 25.)

This Court has held that MEPA review is not triggered where a proposed governmental action would not change the status quo. *Ravalli County Fish & Game Ass'n v. Montana Dept. of State Lands*, 273 Mont. 371, 379, 903 P.2d 1362, 1367 (1995). Federal courts have similarly held that EIS requirements are not triggered by governmental actions that do not permit surface-disturbing activity or authorize degradation of environmental resources without further governmental approval. *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988); *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (to prevail on a motion for summary judgment environmental Plaintiffs must prove the existence of a final agency action which has an "actual or immediately threatened effect.")

The Otter Creek coal leases are similar to the federal "no surface occupancy" (NSO) leases at issue in *Conner* because they do not authorize any activity leading to environmental consequences, and are contingent upon issuance of permits. The Court in *Conner* held that what the lessee acquires with an NSO

lease is a "right of first refusal" and nothing more because the right to take action under the lease is contingent upon subsequent preparation of an EIS and approval by the Secretary of the Interior. *Id.*, 848 F.2d at 1448. This Court recognized a similar distinction between leases that permit surface disturbance and those that do not in *North Fork*, *supra*, where it held that a lease subject to further permitting is not an irretrievable commitment of resources triggering MEPA review. *North Fork*, 238 Mont. at 460-61, 778 P.2d at 868-69.

The issuance of a contingent-right lease is not the equivalent of a working coal mine. As the leases make clear, the Land Board contemplates MEPA review if and when permits are sought and before development activity begins. Nothing in these contingent conditions in the Leases constitutes an irretrievable commitment of resources. This Court has recognized that a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained, and that the right to mine is conditioned upon the acquisition of an operating permit. *Seven-Up Pete Venture v. State*, 2005 MT 146, ¶ ¶ 27-28, 327 Mont. 306, 316, 114 P.3d 1009, 1017. Moreover, in *Seven-Up Pete Venture*, this Court recognized that the State possesses wide discretion to refuse those permits. *Id.*, ¶ 32; see also Mont. Code Ann. § 82-4-125 (refusal of siting permit), § 82-4-227 (refusal of reclamation permit). Until then, however, this Court "cannot assume that the [State Land Board] will not comply with its MEPA obligations if development

proceeds beyond this stage." *North Fork*, 238 Mont. at 461, 778 P.2d at 869 (1989).

In short, MEPA is not triggered by the Land Board's decision to issue the Otter Creek coal tracts under the authority of Mont. Code Ann. § 75-1-201(1)(b)(iv) and case law interpreting that statute. The statute provides an independent basis upon which this Court may uphold the Land Board's leasing decision, without regard to Mont. Code Ann. § 77-1-121(2). This Court will avoid constitutional review of a legislative act if it is able to decide the case on other grounds. *See Baxter v. State*, 2009 MT 449, ¶ 10, 354 Mont. 234, 224 P.3d 1211 (where the Court declined to address the constitutionality of Montana's homicide statutes as applied to physicians who provide "aid in dying" where the criminal code affords an affirmative defense to such a charge). In view of clear precedent establishing that there has been no irretrievable commitment of resources, this Court should decline to review the constitutional question posed by Environmental Challengers.

III. THE MEPA PROCEDURE IN MONT. CODE. ANN. § 77-1-121(2) DOES NOT VIOLATE THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT OR INTERFERE WITH THE DUTY TO PREVENT UNREASONABLE ENVIRONMENTAL DEGRADATION.

Even if this Court were to consider the constitutionality of Mont. Code Ann. § 77-1-121(2), there is no basis upon which to invalidate the State Land Board's leasing decision. MEPA is a procedural statute which imposes no substantive

environmental standards. *Montana Wildlife Federation v. Montana Bd. of Oil & Gas Conservation,* 2012 MT 12, ¶ 32; Mont. Code Ann. § 75-1-201(4)(a). The legislature's decision to require MEPA for contingent-right mineral leases at the permitting stage affects only the *timing*--not the *substance*--of environmental review. To avoid duplicative MEPA and synchronize its occurrence with an actual proposal to mine is a practical solution in light of the vast number of mineral leases issued by the State Land Board for state trust lands.

Environmental challengers ignore these legitimate state interests by claiming that the opportunity to mitigate environmental harm has been lost. There is no factual or legal support for that claim. The leases grant nothing more than an exclusive right to apply for permits, which will then trigger appropriate environmental review and Land Board oversight. Arch Coal obtained no property right to mine coal, and its interest in the Otter Creek coal tracts is acquired subject to public trust responsibilities and environmental laws. Ultimately, there is nothing preventing the Land Board from disallowing mining altogether or conditioning the permit to address the concerns raised by Environmental Challengers.

A. Mont. Code Ann. § 77-1-121(2) Does Not Implicate the Fundamental Right to a Clean and Healthful Environment

The environmental harm alleged in this case does not meet the threshold requirements set forth by this Court in MEIC v. DE1*,* 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. The nexus between additional MEPA review and

environmental harm is simply too remote and speculative to infringe upon the fundamental right to a clean and healthful environment.

In *MEIC*, a mining company (Seven-Up Pete Joint Venture, hereinafter SPJV) proposed direct discharges of arsenic-laden groundwater from test well into the Blackfoot and Landers Fork rivers. The Department of Environmental Quality (DEQ) approved the proposal as part of an exploratory permit, without regard to the nature or volume of water discharged and without conducting an otherwise mandatory environmental review designed to protect high quality water from degradation. To justify this procedure, DEQ claimed that the discharges were "nonsignificant" and were thus prevented from environmental review because the receiving water would adequately dilute the arsenic. In response, the challengers in that case presented expert testimony to show that discharges of arsenic should not be classified as "nonsignificant" because they were in concentrations greater than the receiving water, that any amount of arsenic in drinking water is harmful to humans, and that DEQ was aware of these risks.

This Court ruled that the clean and healthful environment provisions of the Montana Constitution were implicated because challengers sufficiently demonstrated an actual risk of harm: "[T]he pumping tests proposed by SPJV would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water," and

the agency itself "concluded that discharges containing carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation[.]" 1999 MT 248, ¶¶ 79-80. Despite those known dangers, the agency classified the discharge as "nonsignificant" and thereby foreclosed environmental review that would otherwise be required by law. This case has no similar implications.

Here, the Land Board's decision was to lease the Otter Creek coal tracts for potential development, entirely subject to future environmental review and permitting. It was not to authorize any mining or exploratory activity, let alone authorize any activity that necessarily results in immediate and measurable harm to the environment. Even though the Environmental Challengers claim that the leases will inevitably lead to coal mining, it is undisputed that the leases themselves have no direct environmental consequence and specifically preclude any activity that might result in environmental impact until the necessary permits are obtained and the State Land Board has approved the mining and reclamation plan. (D.C. Doc. 37, § 25). It is entirely possible that Arch Coal will choose not to develop the resource, which is a common occurrence with oil and gas leases.[1]

[1] Currently, DNRC has issued and the State Land Board has approved more than 5,000 oil and gas leases, the majority of which have not been developed. See 11/16/09 Mins. of the Land Bd., D.C. Doc. 37, Ex. D at 5; Ex. I at 4.

There is nothing "reasonably certain" about development, let alone combustion, from the mere act of issuing a contingent-right lease.

Appellants also cite *Cape-France*, *supra*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, as authority that their constitutional rights are violated by the Land Board's decision to lease the coal tracts. In *Cape-France*, the Montana Supreme Court applied the *MEIC v. DEQ* standard to private action. This Court held that the clean and healthful environment provisions of the Montana Constitution precluded a developer from drilling a well on its property where substantial evidence showed that the water system required for the subdivision may "tap into contaminated groundwater and that pumping this water could spread the pollution plume further into other, uncontaminated aquifers." (*Id.* at ¶¶ 27, 33.)

In *Cape-France*, similar to *MEIC v. DEQ*, there was a direct connection between the proposed activity (well drilling) and the environmental harm (contaminated groundwater) because once the decision to engage in the activity was made, there was no intervening governmental oversight to mitigate environmental damage. Here, governmental oversight is required by the leases themselves, thus providing the opportunity for mitigation of damage through permitting or complete disapproval of the project.

Unlike both *MEIC* and *Cape-France* where there was a direct link between the proposed action and environmental harm, here, Appellants' allegations of harm

are all dependent on subsequent events, namely, the mining and burning of coal and the resulting greenhouse gases and climate impacts. The district court found, and Arch Coal agreed, that these concerns can and will be addressed as part of permitting and Land Board oversight. (D.C. Doc. 63 at 10-11.) No significant disturbance can occur without a mine reclamation permit, which must undergo environmental review before it can be issued. (D.C. Doc. 37, ¶¶ 29-34.) These undisputed facts fail to establish a direct environmental harm from leasing because the leases provide nothing more than the right to apply for permits to mine--all of which are subject to environmental review. (D.C. Doc. 63 at 9.)

B. <u>This Court's Decision in Seven-Up Pete Venture Confirms That the Lease Has No Environmental Consequence</u>.

This Court should consider *Seven-Up Pete Venture* as relevant authority for the State's proposition that issuance of a contingent-right lease does nothing more than provide the owner with the opportunity to obtain a permit to mine with no guarantee that the process will be successful. Similar to the Otter Creek leases, the leases in *Seven-Up Pete Venture* contemplated a significant project area, involving the extraction of more than 9 million ounces of gold and 20 million ounces of silver. 2005 MT 146, ¶ 8. The leases required compliance with all environmental laws, including permitting, before any mining could commence. *Id.* at ¶¶ 30, 31.

The leases contained no language limiting DEQ's discretion to condition or deny the operating permit, and the Court recognized that DEQ had broad authority

to decide whether the proposed mining method (cyanide heap leaching) was appropriate or even to reject the permit application altogether. *Id*. at ¶ 32.

Subsequent to issuance of the leases, the voters approved I-137, which outlawed cyanide heap leaching in Montana. The mining company (the Venture) sued the State, alleging that I-137 interfered with its rights to mine property identified in the leases. The Court found no such property interest because the right to mine was a function of the operating permit--not the leases--and the Venture had not yet obtained the requisite permit, nor was it assured "of ever obtaining such a right." *Id.* at ¶ 33.

While the Court found a contractual relationship between the State and the Venture, the Venture was nonetheless required to comply with all applicable state and federal laws, including laws to protect the environment, so that there was no impairment of their contractual rights by virtue of I-137. The fact that the Venture had invested more than $70 million in the project was of no consequence. *Id.* at ¶ 42. In his concurring opinion, Justice Nelson confirmed the nature of the lease as nothing more than the opportunity to go through the expensive, lengthy, highly regulated process to apply for and, maybe, obtain a permit to mine. There was no guarantee that this process would be successful any more than there was any guarantee that the mining venture itself would succeed. *Id*. at ¶ 72.

The Otter Creek leases are no different. The fact that Arch Coal paid nearly $86 million for the leases does not transform them into property rights to engage in mining, nor does it hinder the Land Board's authority to condition or deny the permits altogether, either as a matter of constitutional principle or under its public trust obligations The Environmental Challengers argue that *Seven-Up Pete* has no relevance here, and that the district court was remiss to consider it. However, it buttresses the notion that these leases do not--indeed cannot--have environmental impacts with constitutional implication.

C. Montana Code Annotated, § 77-1-121(2) Does Not Interfere With the State Land Board's Duty to Prevent Unreasonable Environmental Degradation or Otherwise Fulfill it Trust Obligations

The Environmental Challengers question the scope of the State Land Board's authority to review any reclamation and operating plan submitted by the Lessee under these contingent-right coal leases. The Land Board has plenary authority to control and manage State trust lands, including these mineral assets, under article X, section 4 of the 1972 Montana Constitution. See, *Friends of the Wild Swan v. Department of Natural Resources & Conservation*, 2005 MT 351, ¶ 10, 330 Mont. 186, 127 P.3d 394 ("it is clear that the Board's obligation as trustee is a complex one, that the obligations is governed by constitutional and statutory provisions which grant authority to the Board over the trust, and that these provisions grant 'large' or 'considerable' discretion to the Board in the

performance of its duties.") These principles impose upon the State Land Board a duty not only to maximize revenue, Mont. Const. art. X, § 11, but to ensure that the resource itself is managed in such a way as to "secure the largest measure of legitimate and reasonable advantage to the state." Mont. Code Ann. § 77-1-202.

The duty to prudently produce income for the trust beneficiaries does not prevent the State Land Board's compliance with over-arching State environmental duties. *Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. at 383, 903 P.2d at 1370. Consistent with the Legislature's State Energy Policy, set out in Mont. Code Ann. § 90-4-1001, the Board must manage these trust mineral assets in an environmentally sound manner which includes addressing the impacts of greenhouse gases and other emissions.

Given these overriding trust responsibilities, the Land Board occupies a unique position in the permitting process. Nothing forbids the Land Board from modifying, conditioning, or rejecting the Lessee's proposed reclamation and operating plan altogether or conditioning the surface operating plan to address environmental issues evaluated during a future MEPA process. The Land Board's trust obligations are not dependent on the timing of MEPA review, meaning the Land Board may impose any condition at the development stage that it could have imposed at the lease stage. Whatever constitutional obligations the Land Board had at the time of leasing, the Land Board maintains those same obligations

through the permitting process. In fact, as lessee Arch Coal takes an interest in the property subject to the trust. The Otter Creek coal tracts were acquired by the State of Montana to be held in trust. (D.C. Doc. 37, ¶ 4). The essence of a determination that property is held in trust is that "anyone who acquires interests in such property" does so "subject to the trust." *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'r*, 1999 MT 263, ¶ 19, 296 Mont. 402, 989 P.2d 800. Neither the Land Board nor Arch Coal can disavow those trust obligations simply because Mont. Code Ann. § 77-1-121(2) directs that environmental review for contingent-right leasing occur at permitting.

D. The Timing of MEPA Does Not Implicate Fundamental Rights

While MEPA reflects the Legislature's consideration of its substantive constitutional obligations with respect to a clean and healthful environment, its purpose is procedural not substantive: "it is the legislature's intent that the requirements of [MEPA] provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered." Mont. Code Ann. § 75-l-102(1); see also *Ravalli Countv Fish & Game Ass'n*, 273 Mont. at 377-378, 903 P.2d at 1369 ("MEPA requires that an agency take procedural steps"). The purpose of MEPA is to ensure that the agency is informed when balancing preservation versus the utilization of natural resources, not to ensure the most environmentally protective outcome. *Montana Wildlife Fed'n v. Montana Bd. of*

Oil & Gas Conservation, 2012 MT 12, ¶ 32. In this respect, the procedural rights created by MEPA do not operate as constitutional safeguards nor do they create fundamental, substantive rights. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 138, 602 P.2d 147, 154 (1979) ("the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this [art. IX, § 1] constitutional guarantee.")

Absent the Court's departure from this controlling precedent, *Kadillak* forecloses Plaintiffs' constitutional claim. Any other result would negate the carefully balanced policies embodied in MEPA processes, and replace them with unending constitutional litigation unmoored from justiciable standards for what environmental review should occur when. As Judge Sherlock observed in response to a similar claim, "[t]he system [MEIC] suggest[s] would be fraught with inconsistencies with no one able to determine whether they are acting within the laws of this state without a full fledged lawsuit. Furthermore, all decisions would be made by judges in courtrooms, rather than in an open process with public comment and expert input." See *MEIC v. Montana Dep't of Envtl. Quality*, 2002 ML 3836 (Mont. lst Dist. Dec. l7, 2002).

This case is an example of the mischief the Environmental Challengers' argument creates, because there is no sensible constitutional line to be drawn. The development of the Otter Creek tracts was contemplated fifteen years ago in the

Crown Butte Mine settlement, yet Environmental Challengers have not made their constitutional claim until today. If the timing of MEPA review is dictated by the broad outlines of the Montana Constitution instead of by the considered balancing of policy interests reflected in statute, why must it occur now and not when the settlement was signed in 1996, or when the federal appropriation was made in 1997, or when the State accepted the land in 2002, or when the Legislature encouraged development in 2003, all in clear contemplation of developing the coal within the tracts? There is no answer to be found in the Constitution. Such process questions are for policymakers.

Congress has provided multiple instances in which NEPA is not triggered by certain agency actions. *See Friends of Earth v. Weinberger,* 562 F. Supp. 265, 273 (D.D.C. 1983) (the court granted summary judgment to the government after environmental groups challenged Congress' proposal to construct a missile base without NEPA analysis by way of an amendment attached to an appropriations bill); *also see* 42 U.S.C.S. § 2297(h-5)(g) (2012) (explicitly waives EIS requirements for execution of a lease between the Secretary of Energy and a private corporation, declaring that such a maneuver does not constitute a major federal action significantly affecting the quality of the human environment). Pursuant to that authority, Congress has provided multiple instances where NEPA is not triggered by certain agency actions:

- Clean Air Act: 15 USC § 793(c)
- Clean Water Act: 33 USC §33 USC 1371(c)(1)
- Columbia River Gorge National Scenic Area Act: 16 USC § 544o(f)
- Deep Seabed Hard Mineral Resources Act: 30 USC §1419(d)
- Defense Production Act: 50 USC Appendix §§ 2095(h), 2096(i)(fuels)
- Disaster Relief Act: 42 USC § 5159
- Endangered Species Act: 16 USC §1536(k), 16 U.S.C. § 1536(a)(2) (1988)
- Energy Supply and Environmental Coordination Act: 15 USC § 793(c)(2)
- Native Amer. Housing Assistance and Block Grant Act: 25 USC § 4115(a)
- National Forest Management Act: 16 USC §544o(f)
- Navajo and Hopi Indian Relocation Amendment Act: 25 USC § 640d-26(a)
- Military Law, lease of Non-excess Property: 10 USC § 2667(g)(4)(A)
- Nuclear Waste Policy Act: 42 USC § 1014(c)
- Power Plant and Industrial Fuel Use: § 42 USC § 8473
- Surface Mining Control and Reclamation Act: 30 USC § 1292(d)
- Transportation Equity Act for the Twenty-First Century: 23 USC §§134(o), 135(i)
- Omnibus Consolidated Rescissions and Appropriations Act: Amending and adding 42 U.S.C.S. § 1297(h-5)(g).

Since this Court finds NEPA case law persuasive, *Kadillak*, 184 Mont. at 137, 602 P.2d at 153, the Court should recognize similar efforts by the Montana Legislature to tailor MEPA's procedures to address practical concerns--none of which affect Appellants' constitutional rights.

There is no dispute that Appellants, as interested parties, will have the opportunity to fully participate in the public process, during both MEPA review and proceedings before the Land Board, if and when there is a proposal for development. *See* Mont. Admin. R. 36.2.531 (requiring agency responses to all substantive public comments in the preparation of a final EIS). At that time, the State fully anticipates that Appellants will urge the Land Board to deny or condition an operating plan based on environmental concerns--a power they now claim the Land Board does not have.

E. Montana Code Annotated, § 77-1-121(2) is a Rational Policy Choice by the Legislature

Absent proof that Mont. Code Ann. § 77-1-121(2) results in a violation of the right to a clean and healthful environment, this Court should uphold the statute as being constitutional under rational basis review. *Tally Bissell Neighbors v. Eyrie Shotgun Ranch*, 2010 MT 63, 355 Mont. 387, 398, 228 P.3d 1134, 1142 (a Plaintiff's failure to demonstrate the inadequacy of statutory remedies to address potential environmental damage requires a Court to conclude that no cognizable

claim has been stated for violation of the constitutional right to clean and healthful environment).

The rational basis test requires a law to be rationally related to a legitimate government interest. *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445. "What a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of a statute." *Rohlfs*, ¶ 31. Plaintiffs bear the burden of proving that there is no rational basis for the law in question. *Id*. at ¶ 26.

Montana Code Annotated, § 77-1-121(2), eliminates "duplicate MEPA," yet requires a full review of environmental consequences if and when development is proposed. MEPA review is not denied by this statute. Adoption of efficient and relevant MEPA procedures are legitimate governmental interests that are furthered by Mont. Code Ann. § 77-1-121(2).

Mineral development is an inherently speculative endeavor. Many mineral leases may never be developed, or they are developed in a manner wholly dissimilar to the methods originally contemplated at the leasing stage. Since all mineral development requires regulatory permitting under Title 75 or 82 of the Montana Code Annotated, the Montana legislature determined that duplicate MEPA reviews at both the leasing and regulatory stages served little purpose if the lease provisions prohibit mining until all regulatory permits are obtained by the

lessee. Thus, Mont. Code Ann. § 77-1-121(2), eliminates "duplicate MEPA review" for contingent-right leases, and requires MEPA review for mineral development on State trust lands to be focused not upon a vague or uncertain possibilities, but upon actual concrete proposals for which a permit and development is sought. This makes MEPA review more meaningful and informative for both the decision maker and the public.

After a proposal for mining is submitted, actual environmental impacts can be accurately evaluated. MEPA review of a contingent-right mineral lease that prohibits mining until future approvals are granted would be wasteful and unnecessary. Accordingly, MEPA is not denied by Mont. Code Ann. § 77-1-121(2); it is only delayed until a concrete mining proposal is submitted to the Land Board by the lessee. By waiting until a concrete mine proposal can be accurately evaluated under MEPA, the decision maker and the public obtain a more accurate and comprehensive picture of any mine proposal and its environmental consequences. By contingent right leasing, an agency may properly avoid needless speculation about whether and where development activity is likely to occur.

MEPA documents produced prior to any actual mine proposal can only generally speculate as to the possible (not proposed) impacts of mining prior to lease issuance. Environmental reviews which hastily attempt to evaluate full-blown mine development at the leasing stage often fail because those MEPA

documents create the "chicken or the egg" conundrum, in which the public demands to know the exact impacts of full mine development, but the agency cannot accurately determine what the exact impacts will be without an exact mine plan, which cannot occur without a lease, which, according to the Environmental Challengers, cannot occur without an MEPA review document to evaluate the impacts of leasing. By limiting the legal rights granted to the lessee, while retaining agency discretion over the level of development, and sequentially producing tiered environmental reviews to evaluate the actual impacts at each step, the Land Board through the lease language has resolved this conundrum in a practical fashion, while maintaining the Board's legal ability to impose mitigation measures to protect the trust.

Environmental challengers characterize Mont. Code Ann. § 77-1-121(2) as an ill-conceived act of an environmentally unfriendly legislature. What they fail to acknowledge is that Mont. Code Ann. § 77-1-121(2) allows the State Land Board to generate substantial sums for public education by issuing contingent-right leases that have no adverse environmental impacts, and that expressly require environmental review at a time when that review makes most sense--when there is an actual proposal for development. In this respect, the statute creates a "win-win" for Montanans and the environment: It gives nothing away in terms of environmental

oversight, yet it allows the Land Board to generate millions of dollars for Montana's school children. The benefits of this statute cannot be ignored.

Environmental challengers cite *MEIC v. DEQ*, *supra*, for the proposition that strict scrutiny is the appropriate standard for analyzing the constitutionality of Mont. Code Ann. § 77-1-121(2), but that argument assumes that fundamental rights are implicated. The Montana Supreme Court has yet to extend the strict scrutiny standard from *MEIC v. DEQ*, which involved substantive environmental degradation, to legislatively prescribed timelines for MEPA review. Here, the Legislature has deemed it appropriate to synchronize the timing of an EIS for leases that are expressly subject to further environmental review, at which time Environmental Challengers will have the opportunity to participate in the public process and raise all concerns, both environmental and policy-based, relating to development of the Otter Creek coal tracts. It is not enough for the Environmental Challengers to claim that a wiser or better policy exists for MEPA. Instead, they must prove beyond a reasonable doubt, based on a higher legal authority than a statute, that the Montana Constitution mandates a specific MEPA procedure. In the absence of that showing, § 77-1-121(2) is subject to the rational basis test.

F. The Leases Are Not Void Because Mont. Code Ann. § 77-1-121(2) is Constitutional.

The leases are not void because § 77-1-121(2) only amends the timing of environmental review and should be found constitutional. Appellants propose

alternative theories based on principles of contract law to argue that the leases are void; however, their requested relief is premised on the underlying theory that the leases violate the fundamental right to a clean and healthful environment. (NPRC Br. at 43; MEIC Br. at 36.) Absent a finding that the procedural protections of MEPA enjoy constitutional status and implicate fundamental rights, Appellants are not entitled to any relief, whether it be a declaration of constitutional invalidity regarding Mont. Code Ann. § 77-1-121(2), or a declaration that the leases are void.

CONCLUSION

This Court should affirm the district court's order granting the Cross-Motions for Summary Judgment filed by the State and Arch Coal, and denying the Motion for Summary Judgment filed by Appellants' NPRC and MEIC.

Respectfully submitted this 13th day of August, 2012.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JENNIFER ANDERS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. Jack Tuholske
P.O. Box 7458
234 East Pine Street
Missoula, MT 59807-7458

Mr. Pat Parenteau
Vermont Law School
PO Box 96
South Royalton, VT 05068

Mr. Timothy J. Preso
Ms. Jenny K. Harbine
Earthjustice
313 East Main Street
Bozeman, MT 59715

Ms. Candace F. West
Mr. Tommy H. Butler
Special Assistant Attorneys General
Department of Natural Resources and Conservation
(Interagency Mail)

DATED_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JENNIFER ANDERS

APPEAL

DA 12-0184 and DA 12-0185

IN THE SUPREME COURT OF THE STATE OF MONTANA

2012 MT 234

NORTHERN PLAINS RESOURCE COUNCIL, INC.
and NATIONAL WILDLIFE FEDERATION,

Plaintiffs and Appellants,

v.

MONTANA BOARD OF LAND COMMISSIONERS,
STATE OF MONTANA, ARK LAND COMPANY, INC.
and ARCH COAL, INC.,

Defendants and Appellees.

****

MONTANA ENVIRONMENTAL INFORMATION
CENTER and SIERRA CLUB,

Plaintiffs and Appellants,

v.

MONTANA BOARD OF LAND COMMISSIONERS,
ARK LAND COMPANY, INC. and ARCH COAL, INC.,

Defendants and Appellees.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Powder River,
Cause Nos. DV-38-2010-2480 and DV-38-2010-2481
Honorable Joe L. Hegel, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Jack R. Tuholske; Tuholske Law Office, Missoula, Montana
Patrick Parenteau; Vermont Law School, South Royalton, Vermont
(for Northern Plains Resource Council and National Wildlife Federation)

Timothy J. Preso, Jenny K. Harbine; Earthjustice, Bozeman, Montana
(for Montana Environmental Information Center and Sierra Club)

For Appellees:

Steve Bullock, Montana Attorney General; Jennifer M. Anders, Assistant Attorney General, Keif Storrar, Legal Intern, Helena, Montana

Candace F. West, Tommy H. Butler, Special Assistant Attorneys General, Montana Department of Natural Resources and Conservation, Helena, Montana

Mark L. Stermitz, Jeffery J. Oven, Christopher C. Stoneback; Crowley Fleck PLLP, Missoula, Montana (for Ark Land Company, Inc. and Arch Coal, Inc.)

Submitted on Briefs: October 10, 2012

Decided: October 23, 2012

Filed:

_____
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 The Northern Plains Resource Council, the National Wildlife Federation, the Montana Environmental Information Center, and the Sierra Club (collectively referred to as NPRC) appeal from the District Court's memorandum and order of February 3, 2012 granting summary judgment to the Montana Board of Land Commissioners, Ark Land Co., and Arch Coal. We affirm.

¶2 We restate the issue for review: Whether the State Land Board properly issued leases to Ark Land Co., a subsidiary of Arch Coal, Inc., without first conducting environmental review under the Montana Environmental Policy Act, Title 75, Chapter I, MCA.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Plaintiffs filed suits seeking declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with Arch Coal on March 8, 2010. The leases cover State lands located in the Otter Creek drainage, a tributary of the Tongue River, in southeastern Montana. Arch Coal leased the State's mineral interest for the purpose of strip mining for coal. In 1997 the State of Montana obtained the mineral rights to these lands from the United States, and they are part of a larger coal reserve covering almost 20,000 acres. That land is checker-boarded with mineral interests that are 82% privately owned; 10% State owned; and 8% owned by the United States. The State holds its mineral interest in trust for the financial support of public education.

¶4 In 2003, the Legislature authorized the State to offer the Otter Creek mineral interests for leasing. After study, appraisal, presentation of a draft lease, and opportunity for public comment, the State Land Board approved leases to Arch Coal in 2010. The State received a bonus payment from Arch Coal of $85,000,000.

¶5 The Arch Coal leases do not authorize or permit any mining activity, and do not authorize or permit any degradation to any land or water. The leases do not allow any significant surface disturbance without acquisition of all required permits from the State of Montana. The leases specifically provide:

> All rights granted to Lessee under this Lease are contingent upon Lessee'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) and upon Lessor review and approval of Lessee's mine operation and reclamation plan. The rights granted under this Lease are further subject to agency responsibilities and authority under the provisions of the Montana Environmental Policy Act.
>
> . . .
>
> Lessor may prescribe the steps to be taken and reclamation to be made with respect to the land and improvements thereon. Nothing in this section limits Lessee's obligation to comply with any applicable state or federal law, rule, regulation, or permit.
>
> . . .
>
> This Lease is subject to further permitting under the provisions of Title 75 [MEPA] or 82 [mine reclamation], Montana Code Annotated. Lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted and which do not impair the obligations of this Lease and do not deprive the Lessee of any existing property right recognized by law.

The State may declare the leases forfeited and canceled if Arch Coal fails to fully discharge any of its duties. The leases also require Arch Coal to implement written

operating plans in agreement with the Northern Cheyenne Tribe before any mining commences.

¶6 The State contends that environmental review under MEPA will occur at least twice before any coal is mined. First, Arch Coal will have to obtain a prospecting permit under the Montana Strip and Underground Mine Reclamation Act, Title 82, Chapter 4, MCA, prior to gathering information about the coal reserves. Second, prior to any mining Arch Coal must obtain an operating permit under § 82-4-221, MCA, which will include detailed plans for mining, reclamation, revegetation and rehabilitation of the disturbed land. Further, as the parties stipulated in District Court, the mine operation and reclamation plan must be reviewed and approved by the State Land Board.

¶7 NPRC contends that mining and burning the coal may result in a broad range of environmental and other effects including air and water pollution, boom and bust economic cycles and global warming. The State Land Board did not conduct any environmental review prior to entering the leases, relying on § 77-1-121(2), MCA. That statute expressly exempts the State Land Board from compliance with the Montana Environmental Policy Act (Title 75, Ch. 1, Pts. 1 and 2, MCA) prior to issuing any lease as long as the lease is subject to "further permitting under any of the provisions of Title 75 or 82 [MCA]." For purposes of this case, the effect of the statute is to defer preparation of an environmental impact statement (EIS) until later in the development process.

¶8 NPRC contends that § 77-1-121(2), MCA, is unconstitutional because Article II, Section 3 and Article IX, Sections 1, 2, and 3 of the Montana Constitution require that the

State conduct activities such as leasing coal interests in a way that protects its citizens' right to a clean and healthful environment. NPRC contends that the chief mechanism to implement these constitutional protections is the Montana Environmental Policy Act (MEPA), Title 75, Ch. 1, MCA. NPRC further contends that but for § 77-1-121(2), MCA, the State Land Board would have been required to conduct environmental studies prior to entering the coal leases. They further contend that deferral of environmental review until the mine permitting stage unconstitutionally denies them the right to early environmental review that would preserve the State's right to place conditions on the mining; to obtain better financial terms; or to decide to not enter the leases at all.

¶9 In the summary judgment proceedings the parties agreed to a joint statement of uncontested facts. NPRC presented further evidence of the direct and indirect effects of mining and burning the Otter Creek coal. Neither the State nor Arch Coal presented any contrary evidence. Based upon the evidence submitted, the District Court found that it was reasonably certain that mining and burning the coal could add a significant percentage to the carbon dioxide released into the atmosphere, thereby exacerbating global warming and climate change. The District Court found that the effects of climate change include specific adverse effects on Montana's water, air and agriculture. The District Court found that "the myriad adverse environmental consequences alleged by Plaintiffs, including global warming, would occur should the coal be mined and burned."

¶10 The District Court framed the issue regarding § 77-1-121(2), MCA, as being whether the coal lease was such an irretrievable commitment of resources to a project that may significantly adversely affect the human environment so as to implicate the

environmental protections of the Constitution, implemented through MEPA. The State argued that it retained the right under the lease and the law to impose any reasonable environmental restrictions that could have been imposed at the leasing stage, relying upon *Seven Up Pete Venture v. State of Montana*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009.

¶11 The District Court determined that Arch Coal, by leasing the Otter Creek tracts from the State, acquired "nothing more than the exclusive right to apply for permits from the State." Further, the District Court determined that, as provided in the leases, environmental review under MEPA and any other applicable statutes will take place before there is any significant disturbance of ground or water and before any coal is mined or burned. Even though the District Court determined that it was probable that mining would go forward, there is no guarantee that it will and no basis for determining that adequate environmental protections, as required by Montana law and the leases, will not be put into place during the permitting process. The District Court therefore found that "the State has retained sufficient ability to require adequate environmental protections sufficient to meet its constitutional and trust responsibilities, both environmentally and financially."

STANDARD OF REVIEW

¶12 This Court undertakes plenary review of questions of constitutional law. *Seven Up Pete*, ¶ 18. This Court reviews a district court decision on a motion for summary judgment de novo, applying the same criteria under M. R. Civ. P. 56. *Seven Up Pete*, ¶

19. Legislative enactments are presumed to be constitutional. *Powell v. State Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

DISCUSSION

¶13 Article II, Section 3 of the Montana Constitution provides that all persons have an inalienable right to a clean and healthful environment. Article IX, Section 1 requires the State to maintain and improve a clean and healthful environment, and requires the Legislature to provide for the enforcement and administration of this duty. Article IX, Section 2 requires that all lands disturbed by the taking of natural resources must be reclaimed. Article IX, Section 3 recognizes and confirms all existing water rights and requires the Legislature to provide a system for the administration, control and regulation of water rights.

¶14 One of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA. MEPA is essentially procedural and does not demand any particular substantive decisions. Rather, it requires State agencies to review, through an EIS, major actions that significantly affect the quality of the human environment so that the agencies may make informed decisions. Section 75-1-102, MCA; *Montana Wildlife Fed. v. Montana Board of Oil & Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877. Under applicable regulations, an EIS is required for a "major action of state government significantly affecting the quality of the human environment." *Montana Wildlife Fed.*, ¶ 44.

¶15 As Arch Coal and the State argue, State statutes do not provide any other bright line for when preparation of an EIS is required under MEPA. Section 75-1-201(1)(b)(iv),

MCA, requires that an EIS be prepared prior to undertaking "major actions of state government significantly affecting the quality of the human environment. . . ." This "significant effect" has been defined as the "go/no go" point of action, beyond which the State will make an "irretrievable commitment of resources." *North Fork Preservation Association v. Department of State Lands*, 238 Mont. 451, 461, 778 P.2d 862, 868 (1989). In *North Fork* this Court held that leasing State lands for oil and gas development was not an irretrievable commitment of resources because the lessee could not undertake any ground-disturbing activity without prior State approval. "Nothing could happen under the leases without government approval." *North Fork*, 238 Mont. at 461, 778 P.2d at 868. Therefore, even though the lease could "ultimately empower" the lessee to conduct oil and gas activities that would have a significant impact on the environment, an EIS was not required at the point of issuing leases. *North Fork*, 238 Mont. at 462, 778 P.2d at 869. This is also the result under parallel Federal leasing and permitting actions. *Connor v. Burford*, 848 F.2d. 1441, 1448 (9th Cir. 1988) (EIS not required when issuing leases for Federal land where permits were required for any development activity), cited in *North Fork*.

¶16 The parallels between *North Fork* and the present case are clear. In both instances the State issued leases for mineral development on State lands, and did so without first completing an EIS. In both instances the leases clearly required express approvals by applicable State agencies before any ground disturbance could take place. In the present case Arch Coal's development rights are expressly contingent upon obtaining permits and approval of mining and reclamation plans under the Strip Mine Siting Act and the Strip

and Underground Mine Reclamation Act, as well as approval of the State Land Board. EIS review of the project will take place when the State considers whether to issue those permits and approvals.

¶17 Lessees of State land like Arch Coal have no right to engage in mining operations until all necessary permits required by State law or regulation are obtained. *Seven Up Pete*, ¶¶ 27-28; *Kadillak v. Anaconda Co.*, 184 Mont. 127, 138-140, 602 P.2d 147, 154-155 (1979). As the District Court recognized in the present case, lessees like Arch Coal acquire only "the exclusive right to apply for permits from the State."

¶18 NPRC contends that § 77-1-121(2), MCA, impacts the fundamental right to a clean and healthful environment contained in Article II, Section 3 of the Montana Constitution and therefore the State must present a compelling interest to justify its application. The right to a clean and healthful environment is a fundamental right. *MEIC v. DEQ*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236, and a statute that impacts that right to the extent that it interferes with the exercise of that right, is subject to strict scrutiny, requiring the State to provide a compelling interest for its existence. *MEIC*, ¶¶ 55, 60. In *MEIC* this Court found that a statute allowing the discharge of arsenic-containing water without any environmental review "implicated" or "impacted" the right to a clean and healthful environment and thus could survive only upon a showing of a compelling State interest. *MEIC*, ¶ 79.

¶19 Unlike the situation in *MEIC*, the leases at issue in the present case do not remove any action by Arch Coal from any environmental review or regulation provided by Montana law. Those reviews are only deferred from the leasing stage to the permitting

stage. As noted above the leases specifically require Arch Coal to comply with all applicable State and Federal laws that apply, and specifically with Montana laws regarding mine siting and mine reclamation and Montana laws requiring the preparation of an EIS analysis. Because the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases did not impact or implicate the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution. The act of leasing the Otter Creek mineral interests to Arch Coal did not interfere with the exercise of the fundamental right to a clean and healthful environment under the Montana Constitution so as to require strict scrutiny and demonstration of a compelling State interest.

¶20 Therefore, § 77-1-121(2), MCA, is not subject to strict scrutiny requiring demonstration of a compelling State interest. Similarly, "middle-tier" scrutiny is not called for here because the statute does not adversely impact constitutional rights provided for outside of Article II, such as the provisions of Article IX noted above. The requirements of an EIS review under MEPA have been enacted by the Legislature in response to the broad directives found in Article II and Article IX of the Montana Constitution. If no constitutionally-significant interests are interfered with by § 77-1-121(2), MCA, then the State must only demonstrate that the statute has a rational basis. *Kottel v. State*, 2002 MT 278, ¶¶ 50-52, 312 Mont. 387, 60 P.3d 403; *Snetsinger v. Mont. Univ. System*, 2004 MT 390, ¶¶ 16-19, 325 Mont. 148, 104 P.3d 445.

¶21 Sufficient rational basis exists for the deferral of an EIS under the facts of this case until there is a specific proposal to consider, rather than requiring an EIS at the leasing stage when there would be no specific mining proposal to evaluate. Deferring EIS consideration until there is a specific mining proposal thus strives to eliminate duplicate and speculative studies and review, while preserving all environmental protections required by law. For example, § 82-4-222(1), MCA, requires that a permit application contain a complete and detailed plan for the mining, reclamation, revegetation, and rehabilitation of the land and water to be affected by the operation. The plan must include intricate details regarding the land and water to be affected. As a practical matter, little of that information is available at the leasing stage. Execution of the lease grants the prospective operator the opportunity to begin to prepare a complete application for a mining permit. Any environmental review and protections that could have been put into place at the leasing stage can be implemented at later permitting stages, all before any prospecting or actual development begins. In addition, the statute in this case has allowed the State Land Board to generate substantial income for public schools, while still requiring full environmental review prior to any development taking place. Section 77-1-121(2), MCA, is therefore rationally based and does not contravene the Montana Constitution.

¶22 The District Court is affirmed.

/S/ MIKE McGRATH

We concur:

/S/ PATRICIA COTTER
/S/ MICHAEL E WHEAT
/S/ BRIAN MORRIS
/S/ BETH BAKER