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.

REPLY 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

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I. INTRODUCTION AND RESPONSE TO STATEMENT OF FACTS

The issue here is whether the Constitution requires that the Board must first consider the risks and consequences before issuing leases that are reasonably certain to result in substantial and irreversible harm to Montana's environment from the mining and burning of up to 1.4 billion tons of coal. The District Court found mining at Otter Creek is reasonably certain, and the impacts of mining and combusting that coal are both known and severe. Those two findings implicate our "anticipatory and preventative" constitutional rights. The Constitution, implemented in part through MEPA, demands that government officials consider these impacts prior to leasing, before hundreds of millions of dollars are invested in the mine, and the irresistible momentum to approve mining and generate billions in State revenue makes an objective environmental review virtually impossible.

The Board and Arch ignore the uncontested facts of this case and they bear repeating. They ignore the known, profound environmental impacts resulting from mining Otter Creek, writing-off such concerns because the leases do not authorize coal mining and coal combustion. Board Br. at 2. Yet it is undisputed that 2.4 ***billion*** tons of CO_2 emissions will result from combustion of all coal from the Otter Creek tracts. *See* Supplemental Appendix (Supp. App.) 28 at Table FE4. The District Court found that Defendants "presented no evidence" contravening these impacts, and that "the myriad adverse environmental consequences alleged by

Plaintiffs, including global warming, would occur should the coal be mined and burned." Appendix (App.) at 4 (*District Court Memorandum and Order re: Cross Motions for Summary Judgment*). Effects such as stressed water supplies, an increase in the frequency and intensity of wildfires, loss of wildlife habitat, and vanishing glaciers will adversely impact Montana's economy. *See* Supp. App. 17 at 123. Ranching, agriculture, Glacier National Park and other protected areas, water resources, and Montana citizens' economic and physical well-being will suffer as a result. *See id.* The District Court logically concluded that "mining and combustion of coal have the potential of significantly degrading the clean and healthful environment." App. at 10.

Arch and the Board also incorrectly argue that coal mining is not reasonably certain. Regardless of the Board's ability to cancel the leases, which Northern Plains disputes, the State's actions suggest mining is a foregone conclusion. The Board accepted over $85,000,000 in bonus bid monies from Arch/Ark. Supp. App. 8 at 1. *See also* Supp. App. 8 at 7–8. Governor Schweitzer espoused the billions in tax revenues and royalties that would be paid to the state treasury, the hundreds of jobs to be created, and the long-term financial support the mine would provide to the State. *See* Supp. App. 25 at 12; Supp. App. 26 at 7; Supp. App. 8 at 8. He already budgeted $10 million of the bonus bid monies to fund two programs. *See* Supp. App. 7 at 13. Based on these facts, the District Court found that "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 . . . ." Thus mining is "reasonably certain" and "probable" in light of the investments by Arch and the State in the leases. App. at 4, 10.

These two ultimate and uncontested facts—the reasonable certainty of mining and the resulting substantial, irreversible environmental effects—implicate the Constitution's environmental rights.

II. STANDARD OF REVIEW

The parties agree on *de novo* review of the District Court's legal conclusions. *Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 13, 305 Mont. 513, 29 P.3d 1011. When the facts are undisputed, "review is confined to the District Court's conclusions of law." *Id.* ¶ 14. As discussed above, two key facts found by the District Court—the likelihood of mining and combustion of Otter Creek coal, and the irreversible impacts from mining—are undisputed. Appellees have not argued that these findings are clearly erroneous, so they must stand as uncontested.

III. THE ROLE OF MEPA AS A LEGISLATIVE FULFILLMENT OF THE CONSTITUTION'S ENVIRONMENTAL RIGHTS

This Court need not decide whether MEPA or some other procedural mechanism is required by the Constitution; the Legislature has made that

determination. Because MEPA was passed before the Constitution, the original statute did not express whether it was designed to implement the constitutional guarantee to a clean and healthful environment. The court in *Kadillak* recognized this. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 138, 602 P.2d 147, 154 (1979). However, the Legislature explained the Constitution's relationship to MEPA in 2003, when it amended MEPA, "providing that the enactment of certain legislation [including MEPA] 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. Sess. Laws 2003, ch. 361, §5 (HB 437). Furthermore, "the Legislature, mindful of its constitutional obligation to provide for the *administration and enforcement* of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including . . . [MEPA]." *Id.* (emphasis added). The Legislature chose MEPA as part of its method of implementation, administration, and enforcement of the environmental constitutional provisions, and thereby answered the question that *Kadillak* sought to address. The Board's continued reliance on *Kadillak* is misplaced; it is not "controlling precedent." Board Br. at 30.

It is logical that MEPA—an information generating statute—can both protect citizens' fundamental right to a clean and healthy environment in Article II,

section 3, and effectuate the government's duty to protect that right for present and future generations as required by Article IX, section 1. These are textual, fundamental rights. This Court's previous in-depth discussion of the Transcripts from the 1972 Convention highlights the "anticipatory and preventative" nature of these provisions. *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality (MEIC)*, 1999 MT 248, ¶ 77, 296 Mont. 207, 230, 988 P.2d 1236, 1249. When discussing the effect of the environmental rights, delegates intended "to adopt whatever the convention could agree was the stronger language." *Id.* ¶ 75. The delegates stated their "intention was to permit no degradation from the present environment," and the Legislature was directed to be "anticipatory" in this role. *Id.* ¶¶ 69–70. The only way to anticipate and prevent harm is to acquire knowledge before acting. MEPA is the Legislature's chosen mechanism for anticipating environmental effects.

The list of federal NEPA exemptions cited by the Board has no bearing here. Board Br. at 29. NEPA, unlike MEPA, is unmoored to an underlying constitutional right and Congress has unfettered latitude to create exemptions. The hypothetical question of whether the State can exempt certain actions from MEPA, or change the timing of MEPA compliance, is also not an issue here. This is an as-applied challenge to a specific statute that exempted the Board from any

environmental review when it leased state coal that will allow for the largest new coal mine in the United States.

Finally, Arch wrongly asserts that the constitutionality of mining the Otter Creek tracts and the resulting environmental harms are both issues presented here. *See* Arch Br. at 14, 17. Northern Plains has never claimed that mining is unconstitutional or that any action adding CO_2 to the atmosphere is unconstitutional. The only constitutional issue presented here is whether the MEPA exemption in MCA § 77-1-121(2) is an unconstitutional infringement on the fundamental rights and duties in Articles II and IX.

IV. LEASING DECISIONS ARE SUBJECT TO MEPA REVIEW.

To understand why MEPA compliance must occur before leases are signed, instead of when the mine is being permitted, the role of MEPA in effectuating our "anticipatory and preventative" environmental constitutional right requires more explanation than the Board provides. MEPA, like its federal counterpart NEPA, informs both the public and the government about environmental consequences ***before*** they occur. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency . . . will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process . . . .").

The Board argues that that MEPA doesn't apply at all during the leasing of energy resources, and thus the constitutionality of MCA § 77-1-121(2), need not be addressed. Board Br. at 13–17. The District Court properly dispensed with this argument when it held that "but for" MCA § 77-1-121(2), MEPA would apply. App. at 5–6. However, the Board still cites *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) and *N. Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989) for the proposition that MEPA compliance is not required for leasing. In both *Conner* and *North Fork*, a full EIS was not required at the lease stage. Nevertheless, the respective agencies conducted *preliminary environmental review* under NEPA and MEPA *before* granting any leases and in each case found that issuing the leases were not actions with significant impacts requiring an EIS. *Conner*, 848 F. 2d at 1443; *N. Fork*, 238 Mont. at 455. In both situations, an Environmental Assessment addressing known impacts was completed. MEPA/NEPA were triggered at the lease stage, even though an EIS was not required.

Later federal decisions are in unanimous accord that NEPA review is triggered at the lease stage. *See, e.g., Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1229 n.4 (9th Cir. 1988); *Cal. v. Watt*, 520 F. Supp. 1359, 1371 (C.D. Cal. 1981). NEPA compliance at the leasing stage is exactly what Justice Breyer believed was necessary to avoid harm resulting from a decision to grant a lease

"without the informed environmental consideration that NEPA requires . . . ." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). Breyer recognized that if the lease sale at issue took place, and "if the court *then* held that a supplemental EIS was required," the "successful oil companies would have [already] committed time and effort to planning the development" of the land leased, and the Department of the Interior and other relevant state agencies would have the beginnings of plans based upon the leased tracts. *Id.* He understood that "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Id.*

Similarly, the State and Arch Coal have already begun constructing a "chain of commitment" through the Board's acceptance of over $85,000,000 in bonus bid monies and allocation by the Governor of $10 million of it into two different State funds. As Justice Breyer feared, both parties "may well have become committed to the previously chosen course of action [to go forward with the mining], and new information—a new EIS—may bring about a *new* decision, but it is that much less likely to bring about a *different* one." *Id.* Once committed to a course of action, as the State and Arch have already done, "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 953.

V. LEASING ONE-HALF BILLION TONS OF STATE COAL IMPLICATES NORTHERN PLAINS' CONSTITUTIONAL RIGHTS, AND THE STATUTE EXEMPTING THE LEASING DECISIONS FROM ENVIRONMENTAL REVIEW IS UNCONSTITUTIONAL.

The crux of this case will be the determination whether fundamental rights are implicated by the decision to lease Otter Creek. If so, MCA § 77-1-121(2), cannot withstand strict scrutiny; the Board concedes that argument and Arch's attempt to find a compelling interest flounders on its own ill-conceived logic. Conversely, if a fundamental right is not implicated, the statute likely survives the low threshold of rational basis review.

The gravamen of Appellees' constitutional argument is that because the leases do not sanction immediate mining, lease approval cannot implicate environmental constitutional rights. *See, e.g.,* Arch Br. at 10 ("It is axiomatic that ***plaintiffs must still prove that some unreasonable impact to the environment will occur.***") (emphasis in original). They ask this Court to adopt a standard for implicating the Constitution that requires proof of immediate harm. That is the wrong standard. The standard for implicating the rights found in Articles II and IX, derived from the Framer's intent and this Court's decisions in *MEIC* and *Cape France,* is whether substantial, irreversible environmental harm is a reasonably foreseeable result of government action.

A. Neither *MEIC* nor *Cape France* Require Immediate Environmental Harm to Implicate Constitutional Rights.

All parties agree that this Court must be guided by *MEIC* and *Cape France*. Arch counters that these cases were premised on immediate environmental harm, and that absent such immediate harm the constitution is not implicated. Arch Br. at 11 ("In *MEIC*, the Court found . . . a significant impact to the environment was ***in fact*** going to occur.") (emphasis added). However, this Court made no such holding. Neither case required proof of harm. The proper standard does not require proof of harm: "[O]ur 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. In *MEIC* no fish were killed, no one got cancer, water quality standards were not violated, and the pollutant could not be detected 4,000 feet downstream of the discharge. *See, e.g., MEIC*, ¶ 16. In *Cape France*, though groundwater contamination was not exacerbated, constitutional rights were implicated because "there is a very real ***possibility*** of substantial environmental degradation." *Cape France*, ¶ 37.

This Court has never stated that significant degradation must "in fact" occur to implicate constitutional environmental rights. In both cases no actual environmental degradation was proven. It would be at odds with the precautionary nature of the Constitution to require proof of immediate, actual harm. It is true that both cases were litigated from a posture where no later environmental review was

required before the potentially damaging action was going to occur. Appellees correctly note this distinction from here, where a later review will occur. However, the cases' different posture does not negate what this Court said about implicating constitutional rights. The structure of the Constitution (Articles II and IX are "co-joined") and the nature of the rights (anticipatory and preventative) were defined by the Framers as stated in the Convention Transcripts. These rights do not change simply because here the exemption is premised on MEPA, instead of the Water Quality Act at issue in *MEIC*, or because a later review may occur.

MEPA is a procedural statute, the Legislature's vehicle to help effectuate the Constitution's environmental right by requiring government officials to discern the impacts of their actions before they act. The fact that there are other substantive environmental laws, like the Water Quality Act, that also implement these rights does not diminish the importance of MEPA's procedural requirements. The Constitution's guarantee of a "right to a clean and healthful environment" and that "the state and each person [corporations like Arch now being legally "persons"] shall maintain and improve a clean and healthy environment for present and future generations" is meaningless if government officials can ignore what may be the most profound environmental problem of this century and make a decision that is "reasonably certain" to make that problem worse.

In sum, this Court should adopt a standard that actions that make it reasonably foreseeable that significant, irreversible harm may occur implicate the Constitution's environmental rights.

B. Coal Mining is Likely at Otter Creek and the Impacts of Mining and Burning the Coal are Reasonably Foreseeable.

Based on uncontested facts demonstrating that coal mining at Otter Creek was not remote, but instead presumed by the Board when it leased the coal, the District Court found that coal mining was "reasonably certain to occur in accordance with the purpose of the lease." App. at 4. No evidence was presented that Arch was not going to mine Otter Creek. Substantial evidence was presented that Board members were already calculating how much money would flow into State coffers from mining beyond the bonus bid. For example, Governor Schweitzer publically stated after signing the leases, "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.

Despite the District Court's finding, the Board now asserts that "it is entirely possible that Arch Coal will choose not to develop the resource, which is a common occurrence with oil and gas leases." Board Br. at 20. Arch exclaims "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." (emphasis added). Arch Br. at 11. To the extent that Arch and the State are now making a factual argument that mining is unlikely, they fail to cite any supporting fact from the record. Though the Board claims "there is nothing reasonably certain about development," Board Br. at 21, the Board fails to explain why the District Court's finding is clearly erroneous.

If Arch and the Board now advance a legal argument that mining may not occur, that too is misplaced. The company is telling this Court one thing and its shareholders and the public another. It is a matter of public record that Otter Creek has filed a mining permit application.[1] Arch tells its shareholders that it has purchased the "right to mine about 1.4 billion tons of coal in the Otter Creek area."[2] Thus, any legal argument that Northern Plains' environmental rights have not been implicated because the mine will not be built is unfounded.

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[1] Arch has agreed to the inclusion of this statement in Northern Plains' brief.

[2] "On March 18, 2010, the Company was awarded a Montana state coal lease for the Otter Creek tracts for a price of $85.8 million. These two transactions gave the Company the right to mine about 1.4 billion tons of coal reserves in the Montana's Otter Creek Area." http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTMxMzY2fENoaWxkSUQ9LTF8VHlwZT0z&t=1 (last viewed Aug. 22, 2012)10-K at F-14.

Both Arch and the Board argue that because the impacts of the mine are speculative until a mine plan is finalized, MEPA compliance at the lease stage is pointless. *See, e.g.,* Arch Br. at 12. That too is wrong; the amount of CO_2 and other pollutants released from mining and combusting 1.4 billion tons of coal were known the day the leases were signed. So too were the basic terrestrial impacts; the amount of leased land, over 9,000 acres, and the resulting checkerboard disturbance of an equal amount of private land. Montana had already documented the drastic impacts that climate change portends for this state, including increased severity and intensity of wildfires, more drought, lower summer river flows leading to loss of irrigation water and damage to trout fisheries, the loss of glaciers in Glacier National Park. These impacts will not change with the development of a more specific mine plan. They were known, and ignored, at the time the leases were signed.

A future EIS on the mine will be prepared, but that does not negate the obligation to address the known impacts of leasing when the leases were signed. "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.

C. Montana Lacks Authority to Unilaterally Change to Terms of the Leases to Address Climate Change.

The District Court found that the Board retained authority in the leases to revoke or modify them after the final EIS for any reason, including climate change impacts. While the Board's actual authority to cancel the leases does not change Northern Plains' above argument, none of the statutes cited give the Board the carte blanche authority it claims to re-write the leases to mitigate climate impacts or to deny or delay the mine for such reasons by imposing conditions like requiring the coal to be burned in clean coal plants, or telling Arch it must hold off on coal mining for a decade until newer technologies allow even stronger mitigation options. The Board had those options, and many others, when it wrote the leases; those options have now been contracted away. The District Court wrongly accepted the Board and Arch's statements that notwithstanding the lease terms, mining could be conditioned to address climate change.

The State is bound by the terms of the leases it signed and cancellation is limited to the conditions provided therein. "Public bodies are as bound by their contracts as are private parties." *Carbon Cnty. v. Dain Bosworth, Inc.*, 265 Mont. 75, 87, 874 P.2d 718, 726 (1994). When the language is clear, the court must "apply the language as written." *Bain v. Williams*, 245 Mont. 228, 231, 800 P.2d 693, 695 (1990). In this case, the lease subjects the lessee to certain laws and obligations. The State's ability to cancel or condition is therefore limited to the

mutually agreed upon terms of the contract, as stated in section fourteen of the lease, or failure to comply with applicable law as stated in sections one and nineteen.

The State claims that it can prohibit mining or condition subsequent permits to "address the concerns raised by Environmental Challengers" after the leasing stage. Board Br. at 18. However, the State's authority is not so far-reaching after entering into a binding contract. While Montana can impose conventional mitigation through the mine permitting process, the Board has not provided any authority—no case from this Court or statute—that allows it to radically re-write or delay the lease for climate impacts or other reasons not covered by the permitting statutes.

The Board claims it reserves plenary authority to control and manage trust lands, including the mineral reserves, noting that the duty to produce income still requires compliance with environmental laws. Board Br. at 24-5. However, the authority cited by the Board proclaims a policy to "*increase* utilization of Montana's vast coal reserves in an environmentally sound manner that includes the *mitigation* of greenhouse gas and other emissions." MCA § 90-4-1001 (emphasis added).

Neither the Board nor the District Court explained precisely what process it can use to re-write a binding contract, nor did they define the precise source and

bounds of the State's authority. As discussed above, the four corners of the contract do not provide it. The Board is bound by its own contract, and future mitigation is circumscribed by limited authority under conventional statutes. While the Board accuses Northern Plains of creating constitutional "mischief" by opening the floodgates, Board Br. at 27, it is the Board's claim of unfettered and undefined authority to revisit contracts based on environmental rights and duties that creates mischief. Can the Department of Transportation stop highway projects after bids have been awarded to reduce GHG? Can DEQ renege on a mine already permitted? The Board's theory of unfettered authority leaves these questions unanswered.

Northern Plains notes again that its case is not premised on whether the Board can mitigate climate change after the leases have been signed. The case is premised on the reality that leases themselves create a likelihood that serious, known and irreversible consequences must be studied before a decision is made. However, the District Court's holding that the Board has such broad power is unfounded, and must be corrected.

VI. THE MEPA EXEMPTION CANNOT WITHSTAND STRICT SCRUTINY.

This Court's authority to decide constitutional questions is plenary. *Seven Up Pete Joint Venture v. State*, 2005 MT 146, ¶ 18, 327 Mont. 306, 114 P.3d 1009. Both the Board and Arch argue that Northern Plains must prove the

unconstitutionality of the statute at issue "beyond a reasonable doubt." Arch Br. at 12. Appellees use the phrase out of context to dissuade this Court from its traditional mode of constitutional analysis. "Beyond a reasonable doubt" is the measure of factual proof needed to convict someone of a crime. Appellants do not have that burden here, though they do have to convince this Court that the statute is constitutionally infirm. Northern Plains does not minimize that burden. However, this Court's usual mode of analysis to assess the constitutionality of a statute mirrors the traditional approach of the U.S. Supreme Court.

Northern Plains must demonstrate that state action "implicates" or infringes upon a constitutional right. Once a right is implicated, this Court must determine the level of scrutiny to apply, depending on the nature of the right. The level of scrutiny determines the burden of proof; for strict scrutiny the burden is not the plaintiff's but rather shifts to the State to show a compelling interest narrowly tailored. *W. Tradition P'ship v. Attorney Gen.,* 2011 MT 328, ¶¶ 34–5, 363 Mont. 220, 271 P.3d 1; *Miller v. Johnson,* 515 U.S. 900, 919–21 (1995). The nature of the right also determines the degree of deference or presumption of constitutionality the Court should apply. The Board and Arch fling the "presumption of constitutionality" standard as if it blindly applies in all cases. Arch Br. at 6. The required analysis is far more nuanced. As Professor Chemerinsky, a leading constitutional scholar explains, "courts should generally presume that laws are

constitutional. However, 'more searching judicial inquiry' is appropriate when it is a law that interferes with individual rights . . . ." Erwin Chemerinsky, *Constitutional Law* 540 (3d ed. 2009).[3]

It is settled Montana jurisprudence that Article II/IX environmental rights are fundamental. *MEIC,* ¶ 63-65. As with all fundamental rights, a strict scrutiny analysis applies. To withstand strict scrutiny, "when the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling interest." *State v. Siegal,* 281 Mont. 250, 263, 934 P.2d 176, 184 (1997). Strict scrutiny "is of course the most intensive type of judicial review," *Chemerinsky,* at 542, and the proper standard to apply here.

The Board's reliance on *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Walters v. Flathead Concrete Products, Inc.*, 2011 MT 45, 359 Mont. 346, 249 P.3d 913, is also wrong. In *Glucksberg*, the Court discusses the parameters for recognizing *new* fundamental rights such as a "right to die," first determining whether the right is "objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720–21. The Court in *Glucksberg* did not determine whether an existing textual right was implicated by legislative action;

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[3] The quoted language comes from the famous footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) where the Court distinguished between different types of constitutional rights and signaled the necessity of invoking different analysis. *Carolene Products* is the foundation for the strict scrutiny/middle tier/rational basis analysis that this Court has adopted.

the Court was concerned with whether to craft a new right from the amorphous principle of substantive due process.

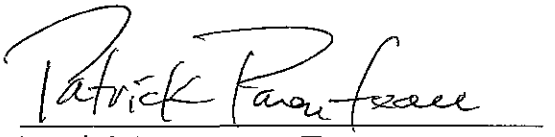
Walters also does not address the issue of when legislation implicates a fundamental right, but rather when new due process rights are created. Similar to *Glucksberg*, this Court discussed the threshold question of whether something constitutes a sufficient interest to trigger due process. *Walters*, ¶ 22. *Walters* focuses on whether the government action violated substantive due process by being "arbitrary" or "unreasonable." *Id.* ¶ 18.

Here a textual right has been implicated, shifting the burden to the State to show the statute effectuates a compelling interest narrowly tailored. While the Board concedes that MCA §77-1-121(2), cannot survive strict scrutiny, Arch argues that because the Legislature passed this law, the Board's compliance is *ipso facto*, automatically a compelling state interest. Arch Br. at 24. If simply following the law automatically creates a compelling state interest, every statute would survive strict scrutiny. *MEIC, Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997), and a host of other cases teach otherwise. As argued in Northern Plains' opening brief, greater governmental efficiency has never been a compelling reason to overcome strict scrutiny.

VII. CONCLUSION AND REQUEST FOR RELIEF

The District Court's grant of summary judgment should be reversed, MCA § 77-1-121(2) should be declared unconstitutional as applied herein, and the fourteen Otter Creek leases declared void.

Dated August 24, 2012.



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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 reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; the word count calculated by Word 4875; and the brief does not average more than 280 words per page excluding Certificate of Service and Certificate of Compliance.

Dated this 24th day of August, 2012.

Patrick Parenteau

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 24th day of August, 2012 upon the following by first class mail postage prepaid:

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