IN THE SUPREME COURT OF THE STATE OF MONTANA
Case Nos. DA–12-0184 and DA–12-0185

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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.

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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.

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# BRIEF OF APPELLANTS NORTHERN PLAINS RESOURCE COUNCIL and NATIONAL WILDLIFE FEDERATION

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On Appeal from the Montana Sixteenth Judicial District Court,
Powder River County, The Honorable Joe L. Hegel, Presiding

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## TABLE OF CONTENTS

TABLE OF CONTENTS. . . . . i - ii

TABLE OF AUTHORITIES.. . . . . iii - v

I. STATEMENT OF THE ISSUE. . . . . 1

II. STATEMENT OF THE CASE. . . . . 1

III. STATEMENT OF FACTS. . . . . 3

A. Background Regarding the Otter Creek Tracts.. . . . . 3

B. Leasing the Otter Creek Tracts.. . . . . 4

C. Once Leased, the Subsequent Actions of Montana and Arch Make Mining Reasonably Foreseeable.. . . . . 6

D. The Environmental Impacts of Mining at Otter Creek are Profound.. . . . 8

1. The undisputed facts show that climate change poses grave dangers to the economic and environmental health of Montana.. . . . . 8

2.Coal mining will cause other environmental impacts to the Otter Creek Region.. . . . . 12

IV. SUMMARY OF ARGUMENT.. . . . . 15

V. ARGUMENT. . . . . 19

A. The Standard of Review for Assessing the District Court's Decision is *De Novo* and Plenary.. . . . . 19

B. Plaintiffs' Fundamental Constitutional Environmental Rights Are Preventative and Anticipatory.. . . . . 21

C. MEPA and the Constitution.. . . . . 22

D. Plaintiffs' Constitutional Rights Are Implicated by the Land Board's Action of Entering into Leases with Arch/Ark.. . . . . 24

E. The District Court's Justification for Not Applying Strict Scrutiny is Based Upon a Misreading of MEPA and *Seven-Up Pete*.. . . . . 31

1. Because leasing sets in motion a process that leads to resource extraction, courts require Environmental Impact Statements at the leasing stage.. . . . . 32

2. Seven-Up Pete is not precedent, nor is it persuasive authority, on the issues presented here.. . . . . 36

F. The MEPA Exemption Statute As Applied Cannot Withstand Strict Scrutiny.. . . . . 40

G. The Leases Should be Declared Void Because They Were Unlawfully Issued.. . . . . 42

VI. CONCLUSION. . . . . 43

CERTIFICATE OF COMPLIANCE.. . . . . 44

CERTIFICATE OF SERVICE. . . . . 45

## TABLE OF AUTHORITIES

**Cases**

*Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, 356 Mont. 41, 230 P.3d 808 . . . . . 43, 44

*Bob Marshall Alliance v. Hodel,* 852 F.2d 1223 (9th Cir.1988). . . . . 24, 34, 35, 44

*Butte Community Union v. Lewis* (1986), 219 Mont. 426, 712 P.2d 1309.. . . . . 20

*Cady v. Morton*, 527 F.2d 786, (9th Cir. 1975). . . . . 24

*California v. Watt,* 520 F. Supp. 1359*, (C.D. Cal. 1981).*. . . . . 35

*California v. Watt,* 683 F.2d 1253, (9th Cir. 1982). . . . . 35

*Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011. . . . . 29, 31, 40, 42

*Citizens for Responsible Dev. v. Bd. of Cnty. Comm'rs of Sanders Cnty.*, 2009 MT 182, 351 Mont. 40, 208 P.3d 876. . . . . 43

*General Agric. Corp. v. Moore* (1975), 166 Mont. 510, 534 P.2d 859, ..... 22

*Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (Mont.1997). . . . . 30, 31

*Korematsu v. U.S.*, 323 U.S. 214 (1943).. . . . . 42

*Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003. . . . . 38

*Marbury v. Madison,* 5 U.S. (Cranch 1), 137, 177. . . . . 15

*Massachusetts v. Watt,* 916 F.2d 946, (1st Cir. 1983). . . . . 18, 23, 33, 34

*Mobil Oil v. United States,* 530 U.S. 604, (2000).. . . . . 38, 39

*Montana Environmental Information Center v. Department of Environmental Quality* (*MEIC*), 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 . . . . . passim

*Ravalli Cty Fish and Game v. DSL,* 273 Mont. 371, 903 P.2d 1362 (1995). . 22, 33

*Seven Up Pete Venture v. State*, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009. . . . . passim

*State v. Price***,** 2002 MT 229, 311 Mont. 439, 57 P.3d 42. . . . . 19

*Sunburst School District No. 2 v. Texaco* 165 P.3d 1079 (Mont. 2007). . . . . 21

*Wadsworth v State,* 275 Mont. 287, 911 P.2d 1165, (Mont. 1995). . . . . 20

*Western Tradition Partnership v. Attorney General,* 2011 MT 328; 363 Mont. 220; 271 P.3d 1. . . . . 20, 42

**Statutes**

Mont. Code Ann. §75-1-102. . . . . 24

Mont. Code Ann. §75-1-102 (1). . . . . 22

Mont. Code Ann. §77-1-121. . . . . 16

Mont. Code Ann. § 77-1-121(1). . . . . 19

Mont. Code Ann. § 77-1-121(2). . . . . passim

42 U.S.C. §4321. . . . . 23

**Other Authorities**

Mont. Const., art. II. . . . . 19, 22, 39

Mont. Const., art. II, § 3. . . . . 15, 21, 24

Mont. Const., art. IX. . . . . 19, 22, 24, 39

Mont. Const., art. IX, § 1.. . . . . 15

Mont. Const. art. IX, § 1(1), (3). . . . . 21

Senate Bill 409.. . . . . 4

HB 436 Legislative Session (Mar. 5, 2003). . . . . 24, 42

## 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.

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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 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.

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Jack R. Tuholske

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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:

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