

1 Jack R. Tuholske
2 TUHOLSKE LAW OFFICE, P.C.
3 PO Box 7458
4 234 East Pine Street
5 Missoula, Montana 59807
6 Telephone: (406) 721-6986
7 tuholske@centric.net

8 Patrick Parenteau, Esq
9 Vermont Law School
10 South Royalton, VT 05068
11 802 831-1305
12 pparenteau@vermontlaw.edu

13 MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, POWDER RIVER COUNTY

14 Northern Plain Resource Council Inc., National
15 Wildlife Federation,

16 Plaintiffs,

17 v.

18 Montana Board of Land Commissioners, State of
19 Montana, Ark Land Company Inc., Arch Coal
20 Inc.

21 Defendants.

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

FIRST AMENDED COMPLAINT

22 Plaintiffs state their claim for relief as follows:

23 **INTRODUCTION**

24 This matter arises from the decision of the Montana Board of Land Commissioners' (Board)
25 to lease approximately 9000 acres of state lands and mineral rights in southeastern Montana. Both
26
27

1 practically and legally, this lease constitutes an irretrievable and irreversible commitment of public
2 resources that forecloses alternative uses of these lands. Known as “Otter Creek,” these lands
3 contain substantial coal reserves that, in combination with the proposed development of interspersed
4 tracts, will create the largest new coal mine in North America. Otter Creek also lies in the heart of
5 the ranching and farming communities in the Tongue River Valley, contains important wildlife
6 resources, and borders the Northern Cheyenne Reservation. Plaintiff Northern Plains Resource
7 Council (Northern Plains), is a non-profit devoted to promoting family farming and ranching and
8 environmental stewardship. Plaintiff National Wildlife Federation is the nation’s largest conservation
9 organization, which over 5,000 Montana members. Plaintiffs do not contest the Board’s authority to
10 lease Otter Creek. Rather, they contest the Board’s decision to enter into a binding ease without
11 conducting *any* adequate environmental review of the impacts of its leasing decision, or considering
12 alternatives to the irrevocable grant contained in the lease.
13
14

15 The Board’s decision to forego environmental review is based upon M.C.A. § 77-1-121,
16 which exempts “any lease” from MEPA when the lease is subject to further permitting under other
17 environmental statutes. However none of those statutes allow the state to forego mining altogether
18 or change the amount of land under lease. The Board has foreclosed the option of retaining these
19 lands in public ownership and committed them to mineral development without first considering
20 and disclosing to the public the substantial environmental consequences of this action, including
21 the potentially devastating climate change impacts from adding billions of tons of carbon dioxide
22 to the atmosphere from the combustion of this coal. Otter Creek may become North America’s
23 largest coal mine. Montana’s Constitution does not sanction blind leadership by officials imbued
24 with a constitutional duty to protect the environment nor does it grant the Legislature authority to
25
26
27

1 override fundamental constitutional rights. Because the constitutional environmental rights
2 contained in Article II, section 3 and Article IX, section 1 are fundamental rights, laws that infringe
3 upon those rights are subject to strict scrutiny. *Montana Environmental Information Center v.*
4 *Department of Environmental Quality*, 988 P.2d 1236, 1246 (Mont. 1999). The Board cannot
5 advance a compelling state interest for the statute as applied herein, nor can it show that the
6 exemption from all pre-leasing MEPA review is narrowly tailored to achieve such an interest. Indeed
7 the legislature has declared that MEPA is designed to implement our constitutional environmental
8 rights, M.C.A. § 75-1-102, rights which are both “preventative and anticipatory,” *MEIC, supra.*, and
9 which impose pro-active obligations on government to protect the environment. *Cape France*
10 *Enterprises v. Estate of Lola Peed*, 2001 MT 139; 305 Mont. 513; 29 P.3d 1011. The statute’s
11 blanket prohibition on any pre-leasing environmental review unlawfully prevents the Board from
12 fulfilling its constitutional duty to “maintain and improve a clean and healthful environment” for
13 current and future generations of Montanans. .

16 For the foregoing reasons, M.C.A. § 77-1-121 is unconstitutional. The Board’s lease is *void*
17 *ab initio*. This Court should declare the same and remand the matter to the Board with instructions
18 to comply with MEPA before entering into a lease for Otter Creek which conveys the states’ mineral
19 interests and authorizes ground disturbing activities on Otter Creek.

21 GENERAL ALLEGATIONS

22 I. JURISDICTION, VENUE AND STANDING

23 1. Jurisdiction is based on, *inter alia*, the Montana Constitution, Article II Section 3,
24 Article IX Sections 1, 2 & 3, the Montana Declaratory Judgment Act, 27-8-101 et seq. Venue is
25 proper in this district because (to be determined).[under 27-8-201 venue appears to be appropriate
26 in any “court of record”], and MEPA, M.C.A. § 75-1-101 *et. seq.* Defendant Montana Board of

Land Commissioners, a subdivision of the State of Montana is the state Board with legal responsibility for managing state trust lands, and is the state entity that approved and entered into the leases that are the subject of the complaint. Defendant Arch Coal Inc. is a Missouri corporation, the nation's second largest coal producer, and the parent company for Ark Land Company. Ark Land Company is a wholly-owned subsidiary of Arch Coal and is the lessee for the Otter Creek leases that are the subject of this complaint. Under the Uniform Declaratory Judgment Act, these Defendants have an interest in the subject matter of this lawsuit and are a proper and necessary party to this suit.

2. Plaintiff Northern Plains Resource Council, Inc. (Northern Plains) is a Montana non-profit public benefit corporation pursuant to Mont. Code Ann. § 35-2-101, *et. seq.*, and at all times pertinent hereto has had its principal office in Yellowstone County, Montana. This action is brought on behalf of the organization and its members.

3. Members of the Plaintiff's organization reside in southeastern Montana, including in the vicinity of Otter Creek. Members live in and regularly use and enjoy the aesthetic qualities, wildlife, and lifestyle opportunities in southeastern Montana and have been actively involved in the conservation of these resources for over three decades.

4. Northern Plain's members are directly and adversely affected by the decision to lease Otter Creek. The environmental, health, aesthetic, economic, and recreational interests of Northern Plains' members have been, are being, and will be adversely affected by the decision to lease Otter Creek without adequate environmental review. Members use and enjoy the waters of southeastern Montana for irrigation, stock water and recreational pursuits that will be affected by mining. Some of the surface and ground water that will be adversely affected by coal mining at Otter Creek will eventually end up in the Tongue River, which Plaintiff's members use for irrigation. Plaintiff's members live in, recreate in, and appreciate Otter Creek and surrounding

lands, and the Tongue River Valley, and intend to do so in the immediate future.

1 5. Because Northern Plains’ members live in the vicinity of Otter Creek, and because
2 they use water that may be affected by Otter Creek, and because they have personal direct ties to
3 the area, their interests in this matter and injuries arising from the lease of Otter Creek are
4 different from the interests of other Montana citizens.

5 6. Northern Plains is a grassroots organization made up of concerned community
6 members. Northern Plains’s mission is to inform residents of the region about activities that
7 endanger the health and quality of life for current and future residents through education and
8 citizen empowerment and to advocate for actions to protect and restore the economic, social and
9 environmental resources of southeastern Montana. Plaintiff Northern Plains has standing in this
10 suit to protect its own interests and those of its individual members in a representative capacity.
11 Northern Plains’s organizational purposes are adversely affected by the Board’s decision to lease
12 Otter Creek without environmental review. The lack of adequate information about environmental
13 impacts before leasing impedes the organizational mission of Northern Plains by limiting its right,
14 and the rights of its members, to understand the consequences of the actions of Montana state
15 government, to inform the members and the general public about such matters, and to effectively
16 participate in decisions affecting the states’ public lands and associated natural resources.
17
18
19

20 7. The National Wildlife Federation (“NWF”) is the nation’s largest conservation
21 advocacy and education organization with members in every state, including over 5,000 members
22 in Montana. NWF’s mission is to educate, inspire, and assist individuals and organizations of
23 diverse cultures to conserve wildlife and other natural resources and to protect the Earth’s
24 environment in order to achieve a peaceful, equitable, and sustainable future. Individual NWF
25
26

1 members are concerned with the conservation of irreplaceable natural resources and sustaining the
2 nation's rich fish and wildlife heritage. Individual NWF members hunt, fish and recreate
3 throughout Montana, including the Otter Creek drainage, and intend to continue to do so in the
4 future. Founded in 1936, NWF is a non-profit, tax-exempt corporation with its headquarters in
5 Reston, Virginia and a regional natural resource center in Missoula, Montana. NWF brings this
6 suit on its behalf and on behalf of its members, who have actual injury based on the allegations
7 contained herein, and such injuries are distinct from those of the general public. The injury
8 allegations contained in paragraphs 5 and 6.

9 **II. Statutory and Constitutional Provisions Relevant to the Complaint.**

10 8. The Montana Constitution declares in Article II, section 3 that: "All persons are born
11 free and have certain inalienable rights. They include the right to a clean and healthful
12 environment and the rights of pursuing life's basic necessities, enjoying and defending their lives
13 and liberties, acquiring, possessing and protecting property, and seeking their safety, health and
14 happiness in all lawful ways."

15 9. The Montana Constitution declares in Article IX, section 1 that: "The State and each
16 person shall maintain and improve a clean and healthful environment in Montana for present and
17 future generations..... The legislature shall provide for the administration and enforcement of this
18 duty... [and] provide adequate remedies for the protection of the environmental life support
19 system from degradation and provide adequate remedies to prevent unreasonable depletion and
20 degradation of natural resources." The aforementioned rights in Articles II and IX are referred to
21 herein as Montana's Constitutional Environmental Rights.
22
23
24

25 10. Articles II and IX are conjoined. Articles II and IX provide substantive constitutional
26

rights and duties. The rights and duties imposed by the Environmental Constitutional Rights are
1 anticipatory and preventative. These provisions also impose affirmative obligations on the
2 Montana Legislature to provide statutory remedies to implement these public health and
3 environmental protections and to preserve Montana’s priceless natural heritage. In addition, the
4 Montana Constitution contains a fundamental right in Article II, section 8 to participate in
5 government that is implicated by the actions of the Board described herein..
6

7 11. The Montana Legislature has a constitutional duty to enact statutes to maintain and
8 improve a clean and healthful environment, and to provide remedies to enforce these protections.
9 The Montana Environmental Policy Act (MEPA) is one such statute established by the Montana
10 Legislature in order to effectuate its constitutional obligations under Article II § 3 and Article IX
11 of the Montana Constitution. MEPA reads in part “The legislature, mindful of its constitutional
12 obligations under Article II, section 3, and Article XI of the Montana constitution has enacted the
13 Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it
14 is the legislature’s intent that the requirements of parts 1 through 3 of this chapter provide for the
15 adequate review of state actions in order to ensure that environmental attributes are fully
16 considered. The purpose of parts 1 through 3 of this chapter is to declare a state policy that will
17 encourage productive and enjoyable harmony between humans and their environment, to protect
18 the right to use and enjoy private property free of undue government regulation, to promote efforts
19 that will prevent or eliminate damage to the environment and biosphere and stimulate the health
20 and welfare of humans, to enrich the understanding of the ecological systems and natural
21 resources important to the state, and to establish an environmental quality council.” Mont. Code
22 Ann. § 75-1-102 (2009).
23
24
25
26

12. MEPA also states in Mont. Code Ann. § 75-1-103, in relevant part:

1 Policy.

2 (1) The legislature, recognizing the profound impact of human activity on the interrelations of
3 all components of the natural environment, particularly the profound influences of population
4 growth, high-density urbanization, industrial expansion, resource exploitation, and new and
5 expanding technological advances, recognizing the critical importance of restoring and
6 maintaining environmental quality to the overall welfare and human development, and further
7 recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of
8 private property, declares that it is the continuing policy of the state of Montana, in cooperation
9 with the federal government, local governments, and other concerned public and private
10 organizations, to use all practicable means and measures, including financial and technical
11 assistance, in a manner calculated to foster and promote the general welfare, to create and
12 maintain conditions under which humans and nature can coexist in productive harmony, to
13 recognize the right to use and enjoy private property free of undue government regulation, and to
14 fulfill the social, economic, and other requirements of present and future generations of
15 Montanans.

16 (2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility
17 of the state of Montana to use all practicable means consistent with other essential considerations
18 of state policy to improve and coordinate state plans, functions, programs, and resources so that
19 the state may:

20 (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding
21 generations;

22 (b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing
23 surroundings;

24 (c) attain the widest range of beneficial uses of the environment without degradation, risk to
25 health or safety, or other undesirable and unintended consequences;

26 13. MEPA is a principle tool by which the State seeks to ensure that constitutional
27 guarantees are recognized and integrated into every decision affecting Montana's environment.

28 MEPA also effectuates the Article II, Section 8 right to participate in government. MEPA also
contains procedural requirements for disclosure of environmental impacts and participation by
citizens in decision-making, including the right to comment upon and discuss the full

environmental impacts of actions before decisions are made.

1 14. In 2003, the Montana Legislature enacted an amendment to MEPA that provides:

2 “[T]he department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2,
3 when issuing any lease or license that expressly states that the lease or license is subject to further
4 permitting under any of the provisions of Title 75 or 82.”Mont. Code Ann. § 77-1-121 (2) (2009).
5 Title 75 includes specific permitting for water and air quality, waste management, etc. Title 82
6 includes permitting for minerals, oil and gas.
7

8 15. M.C.A. § 77-1-121 purports to exempt “any lease” from the EIS and other procedural
9 requirements of MEPA when the lease is subject to further permitting under the Montana Strip
10 Mine Siting Act and the Montana Strip and Underground Mine Reclamation Act. All coal leases
11 are subject to permitting standards under the Montana Strip Mine Siting Act and the Montana
12 Strip and Underground Mine Reclamation Act. The Legislature enacted this statute because
13 absent the exemption, leases of state lands and resources are state actions with environmental
14 impacts that are subject to MEPA. The statute serves no other purpose other than to exempt an
15 entire class of actions from MEPA where those actions are otherwise required to comply with
16 MEPA. Because the Otter Creek lease would be subject to further coal permitting standards under
17 M.C.A. § 77-1-121, the Board did not comply with any provision of MEPA before entering into
18 the leases.
19
20

21 **III. Factual Allegations Regarding the Otter Creek Leases**

22 16. Located southeast of the town of Ashland in western Powder River County, the Otter
23 Creek property contains over 1.2 billion tons of recoverable coal reserves. Approximately one-half
24 of the reserve is located on what is now Montana school trust land. The other half of the coal
25
26

reserve is privately owned, with the vast majority held by Arch Coal Company (Arch). The ownership pattern resembles a checkerboard, with Arch and the State owning alternating sections. Both parties must participate for the coal to be fully developed.

17. In 2008, the Board authorized the Department of Natural Resources and Conservation (DNRC) to perform an economic valuation of the coal reserves. DNRC contracted with Norwest Corporation to produce the Montana Otter Creek State Coal Valuation (“the appraisal”), which was submitted to the Board in April, 2009.

18. The appraisal was distributed for public comment pursuant to §77-3-312. The comment period closed on July 31, 2009. Northern Plains and others provided extensive comments raising the concerns that form the basis for this lawsuit.

19. Northern Plains submitted two sets of detailed comments raising a number of issues including flaws in the economic analysis, the lack of any environmental review under MEPA, violations of the constitutional right to a healthy environment provisions and the failure to properly consider the immediate and long term environmental, economic and social consequences of leasing Otter Creek for coal development. Northern Plains urged the Board to reject the appraisal and not proceed with the lease process. The majority of the comments received by the Board were in opposition to the lease.

20. On November 16, 2009 the Board approved the appraisal and instructed the staff to prepare a draft lease and a bonus bid package.

21. On December 21, 2009 the Board approved a draft lease, set a minimum bid price of 25 cents per ton and set a 45 day limit on the bid with a deadline of February 8, 2010. No bids were received. However, Ark Land Company (Ark), a subsidiary of Arch Coal, submitted a letter

of interest proposing a lower bonus bid and different royalty payment.

1 22. On February 16, 2010, the Board voted 3-2 to lower the minimum bid price to 15 cents
2 per ton and set a deadline of March 16, 2010 to receive bids. Ark was the lone bidder.

3 23. On March 18, 2010, the Board voted 3-2 (Attorney General Bullock and
4 Superintendent Juneau dissenting) to approve the lease of the Otter Creek tracts to Ark for the
5 offered bonus bid of \$85,845,110. The decision to approve the Otter Creek lease has
6 environmental consequences, the full extent of which were not analyzed by the Board, and
7 disclosed to the public before the decision to lease was made.
8

9 24. Northern Plains and others commented at these Land Board meetings, raising many
10 of the issues set forth herein and opposing the lease of Otter Creek as approved by the Board.
11

12 25. The Board entered into fourteen separate but identical leases with Ark Land Company,
13 denoted Leases C - 1103-10 through C 1116-10 (hereafter referred to as the Otter Creek Lease.
14 The Otter Creek Lease (¶1) grants Ark the right to mine “all lands” covered by the leases. The
15 lease (¶19) requires compliance with applicable laws including the Montana Strip Mine Siting Act
16 and the Montan Strip and Underground Mine Reclamation Act, so long as compliance does not
17 “does not deprive Lessee of an existing property right recognized by law.” The right to mine all of
18 the land is an existing property right upon signing of the lease. The lease takes effect on March
19 18,2010 and is granted for a primary term of ten years “and so long thereafter as coal is produced
20 from such lands in commercial quantities.” ¶ 3. The lease further guarantees Ark the right to mine
21 in the event that the state chooses to sell, lease, transfer or otherwise dispose of any interest in the
22 leased property.
23
24

25 26. The State of Montana has made an irretrievable and irreversible commitment of
26

resources in approving and signing the Otter Creek Leases. Board member Secretary of State
1 Linda McCullough told the public in a letter dated April 10, 2010 to Northern Plains' member
2 Linda Orr that "At the peak of mine production, budget estimates project the state will be
3 receiving approximately \$500 million per biennium, not counting what local governments will
4 receive." Thus the State of Montana already expects to receive substantial revenues from the mine
5 at Otter Creek. The State of Montana has already started to spend the money it received for the
6 bonus bid from the Otter Creek Leases.
7

8 27. In a letter dated April 2, 2010, Governor Schweitzer has calculated that, based upon
9 the Board's decision to lease Otter Creek Montana will gain economic benefits from the actual
10 mining: "Assuming a projected 25-year life of the mine, it is estimated that \$5.34 billion in tax
11 revenues and royalties will be paid to the state treasury. In addition, the mine will provide
12 hundreds of good paying jobs for Southeastern Montana." These statements and others made by
13 the Board, coupled with the terms of the lease, indicate that the Board has made an irretrievable
14 and irrevocable commitment of resources when it entered into the Otter Creek leases with Ark.
15 The Governor has acknowledged that the leases will cause environmental damage and called for
16 creation of a five million dollar fund to indemnify people from damages caused by the mining.
17
18

19 28. The Otter Creek Leases comprise an estimated 8,300 acres of state lands. The Board
20 has the authority to lease some, all or none of the lands for coal development. The only property
21 interest offered in the Otter Creek Leases was for all of the above-mentioned state lands.
22

23 29. In the bid package presented to potential bidders, the Board did not offer a lease for
24 part of the state lands or mineral interests in the Otter Creek area.

25 30. The Board did not consider the value to the public of maintaining existing uses of the
26

1 Otter Creek tracts for rangeland, recreation, watershed protection, open space and other ecological
2 functions before entering into the Otter Creek Leases.

3 31. The Board did not present the public with a lease package that leased only some of the
4 state lands and preserved others within Otter Creek for other uses.

5 32. The Board has the authority, independent of the authority of other state agencies, to
6 impose restrictions to protect state lands and the environment as a condition of the lease. The
7 Board did not impose any such restriction in the Otter Creek Leases. The Board no longer has the
8 authority to impose restrictions or new conditions in the Otter Creek Leases beyond what is
9 already contained in the leases.

10 33. The Board did not consider the alternative of imposing no surface occupancy (NSO)
11 and similar environmental restrictions on the leases pending development of an environmental
12 assessment under MEPA. The Board's decision to lease the Otter Creek tracts for coal
13 development without Non Surface Occupancy (NSO) restrictions forecloses the option of
14 maintaining the lands in their present condition.

15 34. The Board did not formally consider the alternative of delaying the lease of the Otter
16 Creek tracts rather than lowering the bid price as requested by Arch Coal.

17 35. The Board did not direct MDNRC to determine what portion of the Otter Creek tracts
18 qualify as "alluvial valley floors" before leasing them. Neither the Board nor any other state
19 agency conducted a scientific study to determine what portions of the Otter Creek tracts are within
20 an alluvial valley floor as defined by federal law before entering the Otter Creek leases.

21 36. The Board's decision fails to acknowledge the fact that there is currently no rail access
22 to Otter Creek and no way to transport the coal to market.

1 37. The Board failed to consider the cumulative impacts of constructing the Tongue
2 River Railroad prior to the Otter Creek Leases.

3 38. The Board cannot impose any conditions on the Otter Creek development requiring
4 the lessee to mitigate the effects of increased Green House Gas emissions from the development
5 of the Otter Creek coal on state lands now that the leases have been signed.

6 39. The Board did not develop a scientific analysis of the climate change impacts on
7 current and future generations of Montanans from leasing over 500 million tons of coal before
8 approving the Otter Creek Leases.

9 40. The Board cannot now prevent coal from being mined at Otter Creek as long as the
10 lessee remains in compliance with the terms and conditions of the Otter Creek Leases.

11 41. The Board did not consider developing a plan for the use of Otter Creek coal that
12 provided revenue to the State and mitigated the effects of Green House Gas emissions.

13 42. The Board has a duty to consider environmental impacts of its decisions before
14 entering into such decisions.

15 43. The State of Montana is a member of the Big Sky Carbon Sequestration Partnership,
16 which is conducting pilot projects to test the viability of carbon capture and sequestration (CCS)
17 in the Northern Rockies Region.

18 44. The Board did not consider the alternative of delaying leasing of Otter Creek pending
19 commercial scale demonstration of CCS technologies.

20 45. The Board did not condition the lease so that the coal mined at Otter Creek would be
21 contingent upon its use in a facility that employs carbon sequestration technology. The Board
22 cannot now impose a requirement to use carbon sequestration technology on the lessee as a
23

condition of developing Otter Creek.

1 46. The leases grant Ark Land Company an irrevocable property right in the coal. The
2 lease grants Ark Land Company an irrevocable property right in the state lands that are subject to
3 the lease, as long as Ark is in compliance with the terms and conditions of the Otter Creek Leases.

4 47. The Otter Creek Leases are within a checkerboard pattern of land ownership where
5 the state owns alternating sections of land. Because of the checkerboard land ownership pattern,
6 no other entity besides Ark Land Company or Arch Coal Company could lease Otter Creek for
7 commercial coal production. The Board was aware of this fact when it entered into the Otter
8 Creek Leases.
9

10 48. The State of Montana is capable of preparing an environmental impact statement
11 pursuant to MEPA on the decision to lease state lands at Otter Creek.
12

13 **IV. Factual Allegations Regarding the Environmental Consequences of Leasing
14 Otter Creek.**

15 **A. Direct and Indirect Effects of Coal Mining**

16 49. Development of the state's coal resource at Otter Creek will may have significant
17 environmental impacts on the land and water in the Otter Creek area. The project may result in
18 the largest new coal mine in North America. The Board is aware of the general nature of these
19 impacts but has not analyzed them in adequate detail before deciding to lease.
20

21 50. Terrestrial impacts of mining at Otter Creek include, but are not limited to, loss of
22 wildlife habitat, destruction of vegetation, and direct mortality of wildlife. Numerous species
23 inhabit the Otter Creek area and they will be adversely affected by the development.

24 51. Mining at Otter Creek will adversely affect ground and surface water resources.
25 Large sections of the coal deposits at Otter Creek lie within alluvial valleys. Massive strip mines
26

1 require dewatering of coal seam aquifers requiring disposal of large quantities of ground water. In
2 addition, coal mining can cause impacts to surface waters. The ground and surface waters in Otter
3 Creek are hydrologically connected to the Tongue River, the most important source of irrigation
4 water in the area, as well as an important riverine ecosystem and will cause impacts to surface
5 waters.

6 52. Coal mining at Otter Creek will have impacts to air quality from the use of heavy
7 equipment and from the mining and transportation of the coal.

8 53. Coal mining at Otter Creek will have socio-economic impacts on the farming and
9 ranching operations in the area, on small towns throughout southeastern Montana, and on the
10 Northern Cheyenne Tribe and reservation. The socio-economic impacts of major coal mines can
11 have adverse consequences by creating a “boom and bust” cycle that affects local education,
12 public services, crime, jobs and other facets of life that are important to small communities. The
13 socio-economic impacts of coal development at Otter Creek is likely to have short and long term
14 adverse impacts on the socio-economic aspects of farms and communities in southeastern
15 Montana.
16

17 54. Coal mining at Otter Creek requires the construction of the Tongue River Railroad.
18 The U.S. Surface Transportation Board has already determined that the Tongue River Railroad
19 will have significant environmental impacts. The impacts caused by the construction of the
20 Tongue River Railroad are directly, indirectly and cumulative related to and proximately caused
21 by the impacts that will occur from mining coal at Otter Creek.
22
23

24 **B. Climate Change Impacts of Coal Combustion**

25 55. Climate change is the term scientists use to describe the heat trapping effects of
26

greenhouse gases (GHG) emitted from power plants, industries, motor vehicles and other sources.

1 Montana, particularly eastern Montana, will be subject to profound climatological changes. The
2 impacts of those changes will affect hydrological cycles, surface and subsurface water supplies,
3 soil, wildlife habitat, growing seasons, prevalence of pests, and cause many other significant
4 environmental and socio-economic consequences for Montanans and our landscape.

5
6 56. Carbon dioxide (CO₂) accounts for 80% of global emissions the GHG emitted to the
7 atmosphere.

8 57. Coal is the most carbon-intensive fuel on earth. Coal combustion accounts for 40% of
9 the CO₂ emissions produced in the United States.

10 58. There is currently no commercially demonstrated technology to capture and
11 permanently sequester CO₂ underground. Pilot projects are underway in Montana and elsewhere
12 to determine whether carbon capture and sequestration (CCS) is technically and economically
13 feasible.
14

15 59. The U.S. Environmental Protection Agency has published a formal “endangerment
16 finding” under the Clean Air Act concluding that GHG emissions pose a clear and present danger
17 to public health and welfare. Among other things, EPA found that CO₂ concentrations in earth’s
18 atmosphere are the highest they have been in over 650,000 years.
19

20 60. Methane is another greenhouse gas that is twenty time more potent than CO₂. Coal
21 mining is the second leading source of methane emissions.

22 61. According to the recent report of the United States Global Research Program
23 (USGRP), climate change is already having serious adverse impacts throughout the United States
24 and in the West in particular. Key findings of the USGRP include the following:
25
26

1 • Global warming is unequivocal and primarily human-induced. Global temperature
2 has increased over the past 50 years. This observed increase is due primarily to human-induced
3 emissions of heat-trapping gases.

4 • Climate changes are underway in the United States and are projected to grow. For
5 example, increases in heavy downpours, rising temperature and sea level, rapidly retreating
6 glaciers, thawing permafrost, lengthening growing seasons, lengthening ice-free seasons in the
7 ocean and on lakes and rivers, earlier snowmelt, and alterations in river flows. In the Western
8 United States, scientists have already documented climate- related changes in river hydrology
9 resulting in earlier peak spring flows and diminished late summer flows, which adversely affects
10 irrigated agriculture and riverine ecology.

11 • Widespread climate-related impacts are occurring now and are expected to
12 increase. Climate changes are already affecting water, energy, transportation, agriculture,
13 ecosystems, and health. These impacts are different from region to region and will grow under
14 projected climate change.

15 • Threats to human health will increase. Health impacts of climate change are related
16 to heat stress, waterborne diseases, poor air quality, extreme weather events, and diseases
17 transmitted by insects and rodents.

18 • Climate change will stress water resources. Drought, related to reduced
19 precipitation, increased evaporation, and increased water loss from plants, is an important issue in
20 many regions, especially in the West. Floods and water quality problems are likely to be amplified
21 by climate change in most regions. Declines in mountain snowpack are important in the West and
22 Alaska where snowpack provides vital natural water storage.

• Coastal areas are at increasing risk from sea-level rise and storm surge.

1 • Crop and livestock production will be increasingly challenged. Agriculture is
2 considered one of the sectors most adaptable to changes in climate. However, increased heat,
3 pests, water stress, diseases, and weather extremes will pose adaptation challenges for crop and
4 livestock production.

5 • Climate change will interact with many social and environmental stresses. Climate
6 change will combine with pollution, population growth, overuse of resources, urbanization, and
7 other social, economic, and environmental stresses to create larger impacts than from any of these
8 factors alone.

9 • Thresholds will be crossed, leading to large changes in climate and ecosystems.
10 There are a variety of thresholds in the climate system and ecosystems. These thresholds
11 determine, for example, the presence of sea ice and permafrost, and the survival of species, from
12 fish to insect pests, with implications for society. With further climate change, the crossing of
13 additional thresholds is expected.

14 • Future climate change and its impacts depend on choices made today. The amount
15 and rate of future climate change depend primarily on current and future human-caused emissions
16 of heat-trapping gases and airborne particles.

17 62. The effects of climate change are already visible in Montana in the melting of the
18 glaciers at Glacier National Park; in reduced snowpack in the Rockies; in lower stream flows in
19 southeastern Montana, and the loss of coldwater trout habitat in many river basins; in the
20 destruction of forests by pine bark beetle infestations; in increasing summer heat waves and more
21 air pollution; in less water for irrigation and less soil moisture for pastures, native plants and
22
23
24
25
26

grasslands; in shifting ranges of native species of plants and animals; and in the spread of pests
1 and invasive species. The mining and combustion of Otter Creek coal is a substantial new source
2 of GHG at a time when the United States and Montana are committed to reducing GHG.

3 **COUNT I**

4 63. Plaintiffs re-allege all previous allegations as if set forth in full.

5
6 64. The Board does not adequately understand the nature, extent, timing and scope of the
7 aforementioned environmental consequences of its decision to lease Otter Creek, and therefore
8 did not disclose to the public the consequences of its decision to lease Otter Creek because the
9 Board did not comply with MEPA before making an irretrievable commitment of resources when
10 it entered into the leases with Ark.

11
12 65. The decision to lease Otter Creek constitutes an irreversible commitment of resources
13 which will cause significant environmental consequences.

14 66. The Board failed to weigh and balance the environmental and socio-economic impacts
15 of leasing of different alternatives pertaining to Otter Creek, including but not limited to leasing
16 only portions of Otter Creek, deferring leasing until carbon sequestration technology is
17 economically viable, or until markets change, imposing non-surface occupancy stipulations on the
18 leases, imposing environmentally-protective stipulations on the leases, and/or not leasing (no
19 action) Otter Creek.
20

21 67. The decision to lease Otter Creek is a major state action with significant
22 environmental consequences and is therefore subject to MEPA.
23

24 68. The Board relied upon M.C.A. § 77-1-121 to exempt the Otter Creek leases. Absent
25 the Board's application of M.C.A. § 77-1-121, the Otter Creek leases would have been subject to
26

MEPA and the Board would have been required to comply with MEPA before entering into the lease.

69. Montana's Constitutional Environmental Rights are fundamental right. So to is the right to informed participation in governmental decision-making contained in Article II, Section 8. The Board's decision to lease Otter Creek and to rely upon M.C.A. § 77-1-121 implicates and infringes upon those rights as they are held by members of Plaintiffs' organizations. The Montana Supreme Court has declared that statutes that infringe upon or implicate Montana's Constitutional Environmental Rights are subject to strict scrutiny. Strict scrutiny requires that the state demonstrate a compelling state interest narrowly tailored to effectuate that purpose by taking the least environmentally damaging path to achieve that purpose. Strict scrutiny must be applied to M.C.A. § 77-1-121.

70. No *compelling* state purpose is served by exempting the Otter Creek lease decision from MEPA review before irreversibly committing the state to this course of action in March, 2010. Exempting the Otter Creek leases from MEPA is contrary to the compelling state interests served by MEPA. It is contrary to the compelling state interests served by the right to participate in Article II, section 8 of the Montana Constitution. Montana has owned the Otter Creek minerals for over 12 years and has been capable of performing a MEPA analysis before leasing the tracts for over a decade. Thus Montana could have complied with MEPA and reached a more informed decision about the costs and benefits of leasing Otter Creek. A more informed decision about the consequences of creating what may be the largest coal mine in North America, and therefore having the ability to modify or forego mining all or part of Otter Creek, or imposing other mitigation at the lease stage, benefits all Montanans, now and in the future.

1 71. M.C.A. § 77-1-121 is not narrowly-tailored to effectuate any identifiable state
2 interest. The statute repeals MEPA requirements for the Otter Creek Lease. Therefore the state
3 did not conduct any MEPA analysis at the time the state decided to sign the Otter Creek Leases.
4 The Board did not evaluate the environmental consequences of leasing Otter Creek. The Board
5 did not inform the public of the environmental consequences of leasing Otter Creek and thus
6 deprived the public of the opportunity to meaningfully participate in a decision with profound
7 implications for Montana's future. Less draconian options are available for modifying the MEPA
8 process at the leasing stage to take account of what is known and not known. The legislature
9 failed to even consider such options. .

10 72. M.C.A. § 77-1-121 is unconstitutional as applied to the Otter Creek leases.

11 73. Alternatively, M.C.A. § 77-1-121 does not survive middle-tier or any other
12 constitutional scrutiny and is therefore unconstitutional because the statute's classification (in this
13 case exempting one class of activities from MEPA) is not reasonably related to a substantial
14 government interest. Any such interest is not outweighed by the infringement and burden upon
15 Plaintiffs' members constitutional rights as set forth herein.

16 74. Because the statute is unconstitutional, and because the Board made a decision in
17 reliance upon an unconstitutional statute and did not comply with MEPA, the Otter Creek leases
18 were issued in violation of the Montana constitutional and statutory law and are therefore *void ab*
19 *initio* and of no force and effect.

20
21
22 **COUNT II.**

23 75. Plaintiffs reallege all previous paragraphs as if set forth in full.

24 76. The Board's decision to enter into the Otter Creek Leases is state action with
25
26

environmental consequences that is subject to MEPA.

1 77. Because M.C.A. § 77-1-121 is unconstitutional as applied herein, the Board has no
2 lawful exemption from MEPA and must therefore comply with MEPA and determine, *inter alia*,
3 whether the Otter Creek Leases require preparation of an Environmental Impact Statement.

4 78. Because the Otter Creek Leases were entered into in violation of MEPA, they are *void*
5 *ab initio* and of no force and effect.

6 **REQUEST FOR RELIEF**

7 Wherefore Plaintiffs request the following relief:

- 8 1. That the Court enter a Declaratory Judgment that M.C.A. §77-1-121 is unconstitutional
9 as applied herein, and that the Board's decision to lease Otter Creek is unlawful.
10
11 2. That the Otter Creek leases are *void ab initio* and of no force and effect.
12
13 3. That the matter is remanded to the Board with instructions that the Board must
14 comply with MEPA before entering into any future leases for coal mining at Otter Creek.
15
16 4. That Plaintiffs are entitled to their costs and attorney fees.
17
18 5. For all other relief that the Court deems just and proper.
19
20
21
22
23
24
25
26

Dated this __ day of July, 2010.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jack R. Tuholske

Patrick Parenteau

Attorneys for the Plaintiffs