

Exhibit Number: 3

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EXHIBIT 3
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FRIENDS OF THE WILD SWAN, a Montana non-profit corporation,	Cause No. BDV-2003-527
Plaintiff,	ORDER ON VARIOUS MOTIONS
v.	
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA BOARD OF LAND COMMISSIONERS,	
Defendants.	

Pending before the Court is a motion by Friends of the Wild Swan (hereinafter Plaintiff) for a preliminary injunction and a motion by the Department of Natural Resources and Conservation and the Montana Board of Land Commissioners (hereinafter Defendants) to dismiss the complaint in this case. The Court will do neither.

This matter was heard on February 12, 2004. Andrew J. Nelson represented Plaintiff, and Tommy H. Butler represented Defendants. Plaintiff is a non-profit corporation dedicated to the conservation of the natural environment.

At issue here is the timber sale known as the Goat Squeezer Timber Sale. This

1 timber sale is taking place on state trust lands. The final environmental impact statement (EIS)
2 for the sale was issued on April 2, 2003. The Board of Land Commissioners (Board) approved
3 the final EIS on July 21, 2003. Bids were opened on the project on September 15, 2003. Road
4 construction and timber harvesting began on December 29, 2003. On January 14, 2004, this
5 Court denied a temporary restraining order requested by Plaintiff - primarily, the restraining order
6 was denied because no hearing had been held.

7 The timber sale in question is located approximately 12 miles southeast of Swan
8 Lake, Montana. In all, the Goat Squeezer sale envisions harvesting approximately 10.2 million
9 board feet of timber. Three separate contracts are involved, and the contract with which we are
10 here concerned is the first of the three.

11 At issue in the case is the thermal cover on the big game winter range enclosed
12 within the contract area. Thermal cover is important for wildlife, especially whitetail deer.
13 Thermal cover regulates the ambient temperature and reduces the snow accumulation on the
14 ground, allowing the wildlife to feed. The project area here at issue includes 3,776 acres (58
15 percent) that provide thermal cover. (Pl.'s Br. Support Mot. Prelim. Inj., Ex. 5; EIS, App. F at F-
16 42.)¹ Under the alternative plan ultimately selected by Defendants, 1,567 acres of thermal cover
17 would be harvested, leaving approximately 2,169 acres (34 percent) of thermal cover. (Ex. 17;
18 EIS, App. F. at F-44.)

19 As an aside, the Court notes that no endangered species or old growth timber are
20 involved in this particular dispute.

21 **Motion to Dismiss**

22 First, the Court must deal with Defendant's motion to dismiss. Defendants feel
23

24 ¹ All exhibits mentioned herein are attached to Plaintiff's brief. If relevant, the
25 Court will also note the corresponding location in the EIS.

1 this matter should be dismissed on the basis of several decisions of the First Judicial District
2 Court. The cited opinions hold that it is inappropriate to combine a petition for judicial review
3 and a request for an injunction. The reason for this rule is that such a procedure impermissibly
4 combines two different standards of review.

5 However, in reviewing the complaint on file, this is not a petition for judicial
6 review. Such being the case, the motion to dismiss is DENIED.

7 **Preliminary Injunction**

8 In reviewing a request for a preliminary injunction involving an environmental
9 impact statement, the Court must be cognizant of several standards of review.

10 (1) when it appears that the applicant is entitled to the relief demanded and the
11 relief or any part of the relief consists in restraining the commission or continuance of the
act complained of, either for a limited period or perpetually;

12 (2) when it appears that the commission or continuance of some act
during the litigation would produce a great or irreparable injury to the applicant;

13 (3) when it appears during the litigation that the adverse party is doing or
14 threatens or is about to do or is procuring or suffering to be done some act in
violation of the applicant's rights, respecting the subject of the action, and tending
to render the judgment ineffectual;

15 (4) when it appears that the adverse party, during the pendency of the
16 action, threatens or is about to remove or to dispose of the adverse party's property
with intent to defraud the applicant, an injunction order may be granted to restrain
the removal or disposition;

17 (5) when it appears that the applicant has applied for an order under the
provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

18 Section 27-19-201, MCA.

19 The Montana Supreme Court determined that the "subsections of this statute are
20 disjunctive, 'meaning that findings that satisfy one subsection are sufficient.' Consequently, only
21 one subsection need be met for an injunction to issue." Sweet Grass Farms v. Hunter's Hot
22 Springs Canal Co., 2000 MT 147, ¶ 27, 300 Mont. 66, ¶ 27, 2 P.3d 825, ¶ 27 (citations omitted)
23 (quoting Stark v. Borner, 226 Mont. 356, 359-60, 735 P.2d 314, 317 (1987)). "An applicant for
24 a preliminary injunction must establish a prima facie case or show that it is at least doubtful
25 whether or not he will suffer irreparable injury before his rights can be fully litigated." Id., ¶ 28

1 (quoting Porter v. K & S P'ship, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). "In deciding
2 whether an applicant has established a prima facie case, a court should determine whether a
3 sufficient case has been made out to warrant the preservation of the property or rights in status
4 quo until trial, without expressing a final opinion as to such rights." Id. "'Status quo' has been
5 defined as 'the last actual, peaceable, noncontested condition which preceded the pending
6 controversy.'" Id. (quoting Porter, 192 Mont. at 181, 627 P.2d at 839).

7 Additionally, in reviewing a environmental impact statement: "A court may not
8 set aside the agency's decision unless it finds that there is clear and convincing evidence that the
9 decision was arbitrary or capricious or not in compliance with law." Section 75-1-201(3)(a),
10 MCA.

11 Further, in reviewing Montana Environmental Policy Act (MEPA) decisions, this
12 Court is guided by the following language from the Montana Supreme Court:

13 We review MEPA decisions to determine "whether the record establishes
14 that the agency acted arbitrarily, capriciously, or unlawfully." North Fork
Preservation Assoc. v. Dept. of State Lands (1989), 238 Mont. 451, 458-59, 778
15 P.2d 862, 867. In North Fork we divided our review into two parts: Whether the
agency acted unlawfully, and whether the agency acted arbitrarily or capriciously.
North Fork, 778 P.2d at 867.

16 To evaluate the lawfulness of the DSL's actions, we look to the laws and
17 regulations governing the DSL's MEPA review process. North Fork, 778 P.2d at
867. We therefore review §§ 75-1-101 et seq., MCA, and §§ 26.2.641 et seq.,
18 ARM. Because MEPA is modeled after the National Environmental Policy Act
(NEPA), when interpreting MEPA, we find federal case law persuasive. Kadillak
v. Anaconda Co. (1979), 184 Mont. 127, 137, 602 P.2d 147, 153.

19 DISCUSSION

20 NEPA requires that an agency take a "hard look" at the environmental
21 impacts of a given project or proposal. See Kleppe v. Sierra Club (1976), 427
U.S. 390, 410, n.21, 96 S. Ct. 2718, 2730, 49 L. Ed. 2d 576, 590. NEPA is
22 essentially procedural; it does not demand that an agency make particular
substantive decisions. Strycker's Bay Neighborhood Council v. Karlen (1980),
23 444 U.S. 223, 227-28, 100 S. Ct. 497, 499-500, 62 L. Ed. 2d 433, 437. MEPA
24 requires that an agency take procedural steps to review "projects, programs,
legislation, and other major actions of state government significantly affecting the
25 quality of the human environment" in order to make informed decisions. Section
75-1-201(1)(b)(iii), MCA; See § 26.2.643, ARM.