

Little Snowies Coalition v. Department of Natural Resources and Conservation, et al.
BDV 99-10, 1st Judicial District Court
Judge Sherlock
Decided 1999

Plaintiffs challenged the adequacy of an EA prepared for the Middle Bench timber sale. The focus of the suit was on impacts to a heron rookery located near the harvest area.

MEPA Issue Litigated: Should the agency have conducted a MEPA analysis (an EIS)?

Court Decision: No

Was the MEPA analysis (an EA) adequate?

Court Decision: Yes

ORDER ON PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

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FEB 12 1999

FILED BY JEN WRIGHT

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

<p>LITTLE SNOWIES COALITION, Plaintiff, v. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and WTL LOGGING, INC., Defendants.</p>	<p>Cause No. BDV 99-10 ORDER ON PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION</p>
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A hearing on Plaintiff's request for preliminary injunction was held on February 5, 1999. Representing Plaintiff was Mariah Eastman of the Eastman Law Firm, Lewistown, Montana. Representing the Department of Natural Resources and Conservation (DNRC) was Tommy H. Butler and Michael J. Mortimer.

Plaintiff is a non-profit corporation dedicated to the conservation of the natural environment, including wildlife, water, old growth forests, habitat and recreational values. The land involved in this case, the Middle Bench Timber Sale, is an area located

1 near Grass Range in Fergus County, Montana. In April 1998, the DNRC issued an
2 environmental assessment (EA) for the timber sale here in question. On October 19, 1998,
3 the Board of Land Commissioners (Land Board) unanimously approved the Middle Bench
4 Timber Sale. The contract was awarded in late December 1998 to WTL Logging, Inc.
5 Harvesting of the timber began in early January 1999, and is currently 50 percent.
6 complete.

7 The Court notes that there is no public access to this land. The land is land
8 locked by private ownership. In addition, the timber harvest must be completed by
9 April 1, 2000, when the contract itself expires and the right of way allowing the logging
10 company into the area also expires.

11 The Court also notes, before proceeding further, that no expert witness
12 testified on behalf of Plaintiff.

13 STANDARD OF REVIEW

14 In determining whether a preliminary injunction is appropriate, the Court
15 must consider Section 27-19-201, MCA, which provides as follows:

16 **When preliminary injunction may be granted.** An injunction
17 order may be granted in the following cases:

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

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

25 (3) when it appears during the litigation that the adverse party is
doing or 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;

(4) when it appears that the adverse party, during the pendency of the
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;

(5) when it appears that the applicant has applied for an order under

1 the provisions of 40-4-121 or an order of protection under Title 40, chapter
2 15.

3 Further, the Montana Supreme Court has noted that there are four elements
4 that should be considered by a court when determining whether or not to issue an
5 injunction. The elements are: (1) the likelihood that the movant will succeed on the merits
6 of the action; (2) the likelihood that the movant will suffer irreparable injury absent the
7 issuance of a preliminary injunction; (3) the threatened injury to the movant outweighs
8 whatever damage the proposed injunction may cause the opposing party (a balancing of
9 the equities); and, (4) the injunction, if issued, would not be adverse to the public interest.
10 Van Loan v. Van Loan, 271 Mont. 176, 182, 895 P.2d 614, 617 (1995). The moving party
11 has the burden of proving these elements. Van Loan, 271 Mont. at 182, 895 P.2d at 617-
12 18.

13 Initially, this Court has had some difficulty in determining exactly the nature
14 of Plaintiff's complaint. In the first instance, Plaintiff seemed to be focusing on wildlife
15 and timber issues. However, in Plaintiff's post-trial brief filed on February 9, 1999,
16 Plaintiff crystallizes its view stating that "DNRC failed to follow prescribed procedure in
17 this cause acting arbitrarily and capriciously, as well as illegally." (Pl.'s Post-Trial Br. at
18 2.) At the bottom of page 2 and the top of page 3 of that brief, Plaintiff sets forth six
19 alleged failures of the DNRC in meeting the procedural requirements of Montana's
20 Environmental Protection Act. Section 75-1-101, et seq., MCA. It is on these six alleged
21 violations that the Court will concentrate.

22 **1. Need for Environmental Impact Statement**

23 As noted above, the DRNC completed an EA and did not feel it necessary
24 to do an environmental impact statement (EIS). In mounting such a challenge, the burden
25 of proof is on Plaintiff to show by clear and convincing evidence that the agency's

1 decision was arbitrary or capricious, or not in compliance with the law. Section 75-1-
2 201(3), MCA.

3 The EA concluded that “impacts from implementing the action alternative
4 are not significant and an EIS is not necessary.” Plaintiff contends that the “EA fails to
5 make any economic analysis of the primary or secondary impacts on adjacent land
6 owners, either long- or short-term.” (Pl.’s Post-Trial Br. at 3.) However, in looking at
7 what an environmental assessment must contain, there is no requirement that such an
8 analysis take place. ARM 36.2.525

9 Two neighbors of the land in question, Jacqueline Mercenier and David
10 Murnion, testified that they live not far from the property line here in question. They
11 allege that the noise of the timber harvesting operations have made it impossible for them
12 to concentrate on their income-related activities. Although their complaints may be true,
13 they are temporary in nature. Mercenier complained that, on occasion, logging trucks
14 block the road and she had difficulty getting around them. Both individuals testified that
15 they have trouble concentrating on their artwork, which they sell. However, the Court
16 concludes that any of these interruptions, although they may be temporarily troubling, are
17 not permanent and should not be classified as significant since they are not permanent.
18 Indeed, the logging operation is about 50 percent complete, and there is no indication that
19 the problems complained of by the neighboring land owners will continue for any
20 significant time into the future.

21 Further, Plaintiff complains that the EA did not analyze the aesthetic
22 impacts of the timber sale on adjacent land owners. Again, it is questionable whether or
23 not this is specifically required. However, even if it was, in the view of the Court, the
24 process has analyzed the aesthetic impacts. For example, the timber harvest currently
25 leaves 40 percent of the trees on the affected area. In addition, 70 percent of the old

1 growth trees are preserved.

2 The Court has observed photographs from a neighbor's property looking
3 toward the area that has been logged. (State's Ex. G.) From looking at that photograph,
4 it would be impossible to tell that any timber harvesting had occurred over the tree line.
5 The harvest boundary is within the section lines here affected. In other words, there
6 appears to be a stand of trees shielding the neighbors from view of the timber actually
7 being cut. Further, a photograph of land that was actually harvested shows nothing
8 remotely close to what would be known as a "clear cut." (State's Ex. H.) The
9 photographs displays many standing trees and only a few identifiable stumps.

10 **2. Failure to List Additional Reasonable Alternatives**

11 Plaintiff next complains that the DNRC failed to list additional reasonable
12 alternatives. ARM 36.2.525(3)(f) requires the EA to describe reasonable alternatives that
13 are reasonably available. The State is under an obligation to manage land, such as the
14 land here in dispute (school trust lands). The lands are to be used for the support of public
15 education. Section 77-1-202, MCA. Plaintiff suggests that the only alternative considered
16 was no action. However, the EA, on page 2, specifically mentions that it considered five
17 alternate means suggested by the neighboring land owners. "These proposals were
18 evaluated and dismissed from further consideration in this analysis due to limited income-
19 generating potential, as well as limited accomplishment of forest management objectives."
20 Attachment 3 to the EA is a three-page analysis of the alternative suggestions by the
21 neighboring land owners. Thus, not only did the Land Board consider the action
22 alternative and the no action alternative, but it also considered the five alternative
23 proposals suggested by the neighboring land owners.

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1 **3. DNRC's Failure to Provide the Land Board with an EA on the Actual Sale**
2 **Proposal**

3 The EA, on page 1, considered "harvest up to 2000 MBF of Ponderosa pine
4 saw logs on up to 470 acres of forest land to produce revenue for the Public School Trust."
5 (Emphasis added.) The actual proposal before the Land Board concerned 380 acres being
6 harvested for 1.4 million board feet of trees. The actual contract is for 1.3 million board
7 feet being cut on 256 acres. Plaintiff seems to contend that since the DNRC did not do
8 an EA on the exact number of acres and board feet contracted for, that the action of the
9 DNRC is illegal.

10 This contention is easily disposed of with that well-known maxim of
11 jurisprudence: "the greater contains the less." Section 1-3-227, MCA. Plaintiff is
12 contending that the actual contract provided for cutting of 86 percent of the trees on the
13 acreage involved, while the EA did not consider such a high percentage of trees being cut.
14 However, the State has presented the affidavit of Brian Long, who shows us that
15 Plaintiff's calculations are in error because they have mixed the estimated amount of
16 timber being cut under the EA with the actual measured timber being cut under the
17 contract. According to Long, the EA provided for 65 percent of the timber to be cut. The
18 actual contract, on the other hand, provides for a lesser amount being cut, that being 60
19 percent. According to the foresters for the DNRC, they feel there is less impact under the
20 actual contract than was contemplated by the EA, since fewer acres are involved and
21 fewer board feet of timber will be cut. In addition, a smaller percentage of trees, 60
22 percent versus 65 percent, will actually be cut. Thus, the impacts under the contract are
23 less than actually contemplated under the EA. Since the volume per acre of trees being
24 cut is equal to or less than considered by the Land Board and under the EA, this Court
25 does not see how the impact of the contract can be greater than the impact considered

1 under the EA.

2 **4. DNRC's Failure to Allow for Public Comment for Changing the Proposed**
3 **Sale's Parameters**

4 Discussion of this alleged irregularity only requires review of the last
5 subsection. While it is true that the actual contracted amount of acreage and board feet
6 involved are different than was contemplated under the EA, the impact is not greater. If
7 the impact was greater and the percentage of timber being cut were more than originally
8 anticipated, Plaintiff would have a point. However, there is actually less timber being cut.
9 Not only is the acreage less, but the amount of board feet is certainly less. Further,
10 according to Long, the EA contemplated cutting 65 percent of the timber, while the
11 contract actually contemplates less, that being 60 percent of the timber.

12 **5. Cumulative Affect Analysis**

13 Pursuant to ARM 36.2.525(3)(d)-(e), the EA must include an evaluation of
14 the cumulative impacts on the physical environment and on the human environment.
15 Cumulative impacts are the "collective impacts on the human environment of the
16 proposed action when considered in conjunction with other past and present actions
17 related to the proposed action by location or generic type." ARM 36.2.522(7). Related
18 future actions must also be considered when those action are under concurrent
19 consideration by any state agency through pre-impact statement studies. *Id.*

20 Plaintiff suggests that the EA fails to address the cumulative impacts of
21 current proposed actions. Plaintiff has the burden here to show that a violation of the law
22 has occurred. Plaintiff has not shown the Court that there are any "other current proposed
23 actions" on this section of land or on neighboring land. Further, the administrative rules
24 cited above make it clear that cumulative impacts, when dealing with future actions, are
25 limited to those that are under consideration by other state agencies, and not private

1 individuals.

2 Thus, in the view of this Court, there has been no showing that there is any
3 other proposed action involved that needs to be discussed.

4 Next, Plaintiff contends that the EA failed to evaluate the cumulative
5 impacts of other logging in the area adjacent to the land here in question. (Pl.'s Post-Trial
6 Br. at 6.) The Court disagrees. For example, in the EA under water quality, we find the
7 following statement: "Due to the ephemeral nature of the draws and lack of connectivity
8 to N.F. Flatwillow Creek, the potential for offsite impacts is extremely low." Further,
9 Attachment 2 to the EA, at pages 3 and 4, discusses present and past adjacent land
10 management. On page 3 of Attachment 3 of the EA, the hydrologist's report, there is
11 again discussion of how the cumulative watershed affects of this project. The conclusion
12 is that "[a]s a result, the effects of the proposed activities are confined to the project area."
13 Also see Attachment 5, at page 3, for more discussion of the ephemeral nature of the
14 watersheds in this area, and see page 4 of Attachment 5, which has a watershed effects
15 analysis.

16 Finally, on Attachment 6 (Wildlife Habitat Evaluation), at page 15, the
17 following statement is made:

18 Various other human activities occur in the project area vicinity on
19 adjacent ownerships. Primary activities include livestock grazing, timber
20 harvesting, and agricultural development. Implementation of the action
21 alternative would potentially contribute cumulatively to on-going reductions
in potential heron roosting sites and cover for big game animals that have
previously been reduced by timber harvests on adjacent ownerships. Such
reductions could have minor adverse consequences for these species.

22 (Emphasis added.) Here, the EA is telling us of the cumulative affect on wildlife by this
23 project, when coupled with previous neighboring projects. Further, that portion of the EA
24 tells us of the potential negative impact of this cumulative affect of further timber
25 reduction.

1 Taken as a whole, this Court cannot conclude that there was an inadequate
2 discussion of cumulative impacts of this project on the physical and human environments.
3 It is true that the discussion of cumulative impacts is not contained in one particular neatly
4 labeled subsection, rather it is found by reading the document as a whole.

5 Brian Townsend, forest manager for the DNRC's northeast Montana area,
6 stated that he did evaluate the timber that had been cut on this section and on neighboring
7 lands, particularly those owned by the N-Bar Ranch.

8 **6. Failure to Provide a Sufficient Cost Analysis**

9 Finally, Plaintiff contends that an insufficient cost analysis was prepared by
10 the DNRC. This portion of Plaintiff's brief, at page 7, does not cite any administrative
11 rule, statute or court case in support of Plaintiff's contention. Plaintiff contends, without
12 much more, that this is a below-cost sale. However, Pat Flowers, chief forester for the
13 DNRC, testified that the gross revenue for this project would be between \$92,000 and
14 \$133,000. The net revenue would vary between \$47,000 and \$88,000. According to
15 Flowers, the DRNC does not keep cost records as to each project, but experience has
16 shown them that the figures he mentioned are roughly accurate.

17 Plaintiff also points out that the EA contemplated an original income of
18 about \$260,000. However, when one keeps in mind that the contract is for a considerably
19 less amount of acres (470 acres versus 256 acres), and considerably less amount of board
20 feet of harvested timber (2 million board feet versus 1.3 million board feet), this difference
21 is easily understandable.

22 Thus there has been no evidence that this is a below-cost sale.

23 This case is greatly different from the recent Lewis and Clark County case
24 Friends of the Wild Swan v. Department of Natural Resources and Conservation, No.
25 CDV 97-558 (1st Jud. Dist., Findings of Fact, Conclusions of Law and Order,

1 Dec. 23, 1998). In that case, Judge Thomas C. Honzel issued an injunction against a
2 timber project in the Swan Valley. One thing Judge Honzel noted was that the final
3 harvest differed from the harvest proposed to the Land Board. The final harvest was
4 expected to lose \$150,000. There is no such evidence here. Here, the evidence is that the
5 State will be making less money, but it will not be going into negative figures.

6 Further, Judge Honzel found that the DNRC had failed to address
7 cumulative impacts. Judge Honzel noted that the EIS there “did not discuss the
8 cumulative impact this harvest may have, analyzed in conjunction with impacts from
9 previous logging efforts in the area.” *Id.*, at 7.

10 Here, as noted above, the EA did discuss the fact that other harvests, when
11 combined with the harvest concerned here, may reduce cover for wildlife. Judge Honzel
12 went on to note that the final EIS did not mention another proposed sale that DRNC was
13 considering in the area.

14 Thus, the facts in Friends of the Wild Swan are vastly different than the facts
15 here.

16 CONCLUSION

17 For the reasons stated above, this Court concludes that a preliminary
18 injunction should not issue. Since Plaintiff has the burden of proving its case by clear and
19 convincing evidence, the Court cannot conclude that the movant will succeed on the
20 merits of this action, or that movant will suffer irreparable injury.

21 Further, since the public interest on this section of publicly inaccessible
22 school trust land seems to require the production of some income, the Court cannot find

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1 that the injury threatened to Plaintiff outweighs the damage of the proposed injunction
2 would cause the State.

3 DATED this 12 day of February 1999.

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6 JEFFREY M. SHERLOCK
District Court Judge

7 pc. Christopher K. Williams
8 Tommy H. Butler/Michael J. Mortimer

9 T/JMS/SNOWIES.OPJ

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