

Friends of the Wild Swan v. Department of State Lands and Champion International
Corp.

DV 93-361-B, 11th Judicial District

Judge McKittrick

Decided 1994

MEPA Issue Litigated: Was the MEPA analysis (an EA) adequate?

Court Decision: No

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

Court Decision: Yes

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RECEIVED
FEB 24 1994
ENVIRONMENTAL
QUALITY CONC.

1
2
3
4
5
6
7
8 MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY
9

10 FRIENDS OF THE WILD SWAN,)
11)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)
PLAINTIFF,)

CAUSE NO. DV-93-361-B

VS.

FINDINGS OF FACT

MONTANA DEPARTMENT OF STATE
LANDS AND CHAMPION INTERNATIONAL
CORPORATION,

AND CONCLUSIONS OF LAW

DEFENDANTS.

17 This matter came before the Court on January 14, 1994, upon
18 Plaintiff's Application for a Preliminary Injunction. Two
19 experts testified for the Plaintiff, Dr. Sara Jane Johnson
20 and Dave Hadden. The Department of State Lands called Dave
21 Remington and Dr. Alan Wood as experts, and Glen Gray and Pat
22 Flowers as additional witnesses. All parties submitted
23 affidavits. Based upon the testimony of the witnesses, the
24 exhibits introduced at trial, the affidavits, depositions, briefs
25 and pleadings of the parties, the Court enters the following
26
27
28

1 FINDINGS OF FACT:

2 BACKGROUND

3 1. The Swan River State Forest encompasses approximately
4 79,000 acres. Due to the checkerboard ownership of Plum Creek
5 and U.S. Forest Service lands within the Swan River State Forest,
6 only 39,000 acres are administered by the Department. Those
7 lands are part of Montana's school trust lands, which are
8 administered for revenue to the school trust and the attainment
9 of other worthy objects. 77-1-202, MCA (1993).

10 2. State Forest lands provide habitat for a rich and
11 diverse array of flora and fauna. Those lands contain some of
12 the some of the largest undeveloped stands of low elevation old
13 growth forests in the Swan River valley, which provide necessary
14 habitat for old growth dependent bird and mammal species,
15 including fisher, pine marten, lynx, northern goshawk, great gray
16 owls, boreal owls, black backed woodpeckers, pileated woodpeckers
17 and numerous species of forest songbirds¹. Tes. Dr. Johnson.
18 The Swan River State Forest is also classified as Management
19 Situation One grizzly bear habitat, deemed essential to the long
20 term survival of bears, and provides excellent grizzly bear
21 habitat. Tes. D. Hadden; Dep. Alan Wood. EA III-1.

22 3. The lands within the Swan River State Forest have
23 undergone substantial timber harvest, which has fragmented the
24 once vast tracts of low elevation old growth forest. The Plum

25 _____
26 ¹The reference to old growth dependent species contained
27 throughout these Findings encompasses the species listed above,
28 which were agreed upon by all parties as species that require at
least some old growth forest for their habitat needs.

1 Creek lands have been largely denuded of mature timber, as have
2 much of the Forest Service lands. The Department estimates that
3 in the Cilly and Soup Creek drainages, the site of the timber
4 sale, 43% is old growth, while over the entire Swan River State
5 Forest, only 15% can be classified as old growth. This makes the
6 area of the timber sale unique in terms of the quantity and
7 quality of remaining growth forest. The project area and
8 adjacent lands contain five large blocks (250+ acres) of
9 unfragmented habitat, the only area on the Swan River State
10 Forest that has such a large concentration of old growth blocks.
11 EA at III-4; Tes. Dr. Johnson; Tes. D. Remington; Remington Dep.
12 at 42.

13 4. Habitat fragmentation is the breakup of large tracts of
14 virgin forest into increasingly smaller patches. It is caused by
15 natural events (fire) and man-caused activities, such as logging
16 and road building. Habitat fragmentation can cause significant
17 adverse environmental impacts on old growth dependent wildlife by
18 cutting their habitat into increasingly smaller patches, below
19 the amounts they require. Habitat fragmentation also creates
20 sharp edges between old growth and harvested areas, which allows
21 increased predation on old growth dependent species by
22 opportunistic wildlife species. Tes. Dr. Johnson.

23 5. It is possible to maintain old growth habitat for
24 wildlife and to harvest timber by creating a network of old
25 growth patches and connecting corridors of sufficient size and
26 quantity to provide for the habitat needs of wildlife. Dr.
27 Johnson; Tes. D. Remington

1 6. Plaintiff's Exhibit 6 (aerial photo) demonstrates that
2 timber harvest activities have fragmented the forest landscape in
3 the Middle Soup project area. The few patches that remain are in
4 relatively small, increasingly isolated blocks.

5 7. Plaintiff sued the Department of State Lands in 1989,
6 alleging that its 1978 Environmental Impact Statement on the Swan
7 River State Forest was hopelessly outdated, and that issues
8 pertaining to old growth forests and grizzly bears needed to be
9 addressed through a new programmatic Environmental Impact
10 Statement before additional timber harvest should occur.
11 Plaintiff also sought revised standards for protecting old growth
12 and grizzly bear habitat.²

13 8. The Department of State Lands has an on-going timber
14 harvest program, which seeks to harvest about 3 million board
15 feet annually from the Swan River State Forest. This figure is
16 predicated in part on the outdated 1978 Environmental Impact
17 Statement, which determined that amount as the long term
18 sustainable harvest based on a 105 year rotation. This will
19 result in the elimination of all old growth. See FOF #13.
20 Deposition of Glen Gray at page 24; Tes. G. Gray.

21 9. In the 1989 litigation, the District Court agreed with
22 a number of Plaintiffs' contentions. First the Court found that
23 State Lands' 1978 Environmental Impact Statement presented a

24 ²Friends of the Wild Swan v Department of State Lands,
25 Flathead County Cause No. DV-89-074 (A). The Court takes
26 judicial notice of the Findings of Fact, Conclusions of Law and
27 Order in that case, and the references herein are to those
Findings and Conclusions, which are incorporated into this
opinion.

1 programmatic review of the forest's timber program. Finding of
2 Fact (FOF) #14. However, the 1978 Environmental Impact Statement
3 provided for liquidation of "all old growth stands." (FOF #13),
4 and "[i]t is now generally accepted in the scientific community
5 that a complete liquidation of old growth stands is harmful to
6 old growth dependent wildlife species." FOF #18. Therefore,
7 "[t]he information in the 1978 Environmental Impact Statement is
8 out of date." FOF #22. The Court also found that the
9 information in the 1978 Environmental Impact Statement for
10 grizzly bears was out-dated. FOF #19.

11 10. The Department responded to these allegations by
12 promising a new state wide programmatic Environmental Impact
13 Statement on its timber management program, as opposed to an
14 Environmental Impact Statement just on the Swan River Forest.
15 The Court accepted this argument: "Department of State Lands has
16 determined that a statewide approach to forest management
17 planning is the most effective and appropriate method ..." (FOF
18 #24) and that "Department of State Lands is committed to conduct
19 a programmatic environmental review on each chapter of Forest
20 Management Standards and Guidelines ..." FOF #27. The Court
21 therefore declined to order an Environmental Impact Statement on
22 the Swan River State Forest's timber sale program based on the
23 Department's representations of a new state-wide programmatic
24 review.

25 11. The Department of State Lands is in the process of
26 preparing its state-wide programmatic Environmental Impact
27 Statement which will, among other things, set forth standards and

1 guidelines that pertain to the management of old growth forests
2 and grizzly bears. The Department of State Lands represented
3 that it intends to publish a draft Environmental Impact Statement
4 by June, 1994, and complete the final Environmental Impact
5 Statement later that year, in time for the 1995 legislature. Tes.
6 Pat Flowers.

7 12. The programmatic Environmental Impact Statement
8 contains several alternatives with respect to old growth
9 management on state lands, including at least two that provide
10 permanent standards for the protection of old growth forests on
11 state lands even if this reduces revenue to the trust.

12 Department of State Lands Exhibit 33. The Department of State
13 Lands continues to harvest old growth while it prepares the
14 programmatic Environmental Impact Statement. The harvest of old
15 growth forecloses options to protect that old growth in the
16 programmatic Environmental Impact Statement when that document is
17 finalized. Tes. Pat Flowers.

18 13. The Middle Soup Timber Sale was conceived in 1992 as
19 part of the Swan River State Forest's on-going timber sale
20 program. The Department prepared an Environmental Assessment
21 which was finalized in the spring of 1993. The Environmental
22 Assessment analyzes three alternatives, all of which cut 3
23 million board feet within the Soup and Cilly drainages
24 (Alternatives B, C, D). A "no action" alternative (Alternative
25 A) is also analyzed. A "wildlife preferred" alternative
26
27
28

1 (Alternative E) was briefly considered and dropped from detailed
2 evaluation from the Environmental Assessment.³

3 14. The only wildlife species that are specifically
4 addressed in the Environmental Assessment are elk, white tailed
5 deer, and grizzly bears. See Environmental Assessment at Section
6 III and IV under "Wildlife". A section on old growth impacts is
7 included, but does not contain any analysis of individual old
8 growth dependent wildlife species. Environmental Assessment at IV
9 12-18.

10 15. The project area which is the subject of this
11 litigation provides habitat for a variety of old growth dependent
12 species, such as lynx, fisher, pine marten, goshawks, boreal
13 owls, great grey owls, black-backed woodpeckers, pileated
14 woodpeckers and a variety of songbirds.

15 16. The Findings section of the Environmental Assessment
16 contains the Department of State Land's determination that the
17 Middle Soup project will not significantly affect the
18 environment, and that an Environmental Impact Statement is not
19 warranted. Environmental Assessment at page 3.

20 17. The Department relies on an interim standard of ten
21 percent old growth per third order drainage in order to protect
22 old growth dependent wildlife species. Remington Tes. This
23 standard is not linked to any particular species, and is not
24 supported by current scientific literature. Tes. Dr. Johnson.

25

26 ³References to the Environmental Assessment (EA) can be
27 found in DSL Exhibit 1.

28

1 INADEQUACY OF THE ENVIRONMENTAL ASSESSMENT AND NEED FOR
2 FOR AN ENVIRONMENTAL IMPACT STATEMENT.

3 18. The Middle Soup timber sale will eliminate
4 approximately 270 acres of old growth in the Soup and Cilly Creek
5 drainages. Once removed, this area, even if left unharvested,
6 will not provide suitable habitat for old growth dependent
7 species for 200 to 400 years.

8 19. The harvest will significantly increase habitat
9 fragmentation for old growth dependent species in the project
10 area by eliminating most of the best remaining patches of old
11 growth. Plaintiff's Exhibit 12 a-d. This impact is neither
12 addressed nor disclosed in the Environmental Assessment. Tes. Dr.
13 Johnson. Furthermore, the Soup and Cilly Creek drainages are
14 unique because of the high percentage of old growth that remains,
15 and this was not addressed in the Environmental Assessment. Tes.
16 D. Remington. None of these facts were disputed nor rebutted by
17 the Defendants.

18 20. The Environmental Assessment lacks any discussion of
19 the impacts of the sale on old growth dependent wildlife species.
20 Each of the species addressed by Dr. Johnson has different
21 habitat needs, none of which are met by the Department's 10%
22 interim standard. The removal of old growth and elimination of
23 large patches caused by the Middle Soup project is likely to
24 significantly affect these species. Tes. Dr. Johnson.

25 21. While the Department disputes Dr. Johnson's conclusions
26 regarding the impact of the sale on various old growth species,
27 the Defendant's expert could not cite one scientific authority or
28

1 other evidence that refuted Dr. Johnson's conclusions regarding
2 significant impacts caused by the Middle Soup sale. By contrast,
3 Dr. Johnson's testimony was supported in every instance by
4 recognized scientific authorities. Tes. D. Remington, Dr. Johnson
5 Affidavit of Dr. Johnson.

6 22. This Court finds the testimony of Plaintiff's old
7 growth/wildlife expert Dr. Sara Jane Johnson credible, reliable,
8 and authoritative. Dr. Johnson has an M.S. and Phd. in wildlife
9 biology, and spent fourteen years employed by the U.S. Forest
10 Service as a wildlife biologist. One of Dr. Johnson's chief
11 duties with the Forest Service was to help plan timber sales and
12 assess their impacts on wildlife. She has participated in over
13 fifty Environmental Assessments or Impact Statements for timber
14 sales.

15 23. The Middle Soup Environmental Assessment is inadequate
16 for failing to analyze the impacts of the sale on old growth
17 dependent wildlife species.

18 24. Based on the testimony provided, it appears to the
19 Court that the Middle Soup Timber sale will cause significant
20 adverse environmental consequences from the loss of old growth
21 habitat and the attendant increase in habitat fragmentation.

22 25. One of the principal sources of authority relied upon
23 by the Department of State Land's expert for its ten percent
24 standard old growth retention standard is a 1979 publication
25 entitled "Wildlife Habitat in Managed Forests of the Blue
26 Mountains of Oregon, authored by Dr. Jack Ward Thomas". Dr.
27 Thomas is currently the Chief of the United States Forest Service

1 and the author of its old growth conservation plan for the
2 spotted owl.

3 26. Both experts recognize that Dr. Thomas is a leading
4 authority on old growth issues. Mr. Remington acknowledged a
5 more recent 1988 publication in which Dr. Thomas advocated
6 retaining all old growth so as not to foreclose future management
7 options, but did not take Dr. Thomas's more recent work into
8 account when formulating the ten percent standard or justifying
9 the finding of no impact for the Middle Soup project. Tes. D.
10 Remington. The unjustified exclusion of the more recent work of
11 the authority relied upon by the Department of State Lands is
12 arbitrary.

13 27. The Department of State Lands has no research or data
14 on old growth dependent wildlife species or their habitat needs
15 on the Swan River State Forest that supports any of their
16 conclusions of no impact. Tes. D. Remington. Both parties relied
17 on studies and reports from other areas of the country in
18 assessing old growth impacts.

19 28. Grizzly bears require secure habitat for their long
20 term survival. Secure habitat is predicated on existing road
21 densities, which is a critical factor in assessing the impacts of
22 secure habitat for bears. It is important to consider both open
23 road densities (roads that are open to public travel) and total
24 road densities (open roads plus all other roads, even those that
25 are gated, barricaded or otherwise not open to public travel) in
26 determining the impact of a timber sale on bears Both parties
27 rely on the South Fork Study, an on-going grizzly bear research

1 project conducted by the Montana Department of Fish Wildlife and
2 Parks, in analyzing the impacts of road densities on bears.
3 Environmental Assessment at IV 6-7; Plaintiff's Exhibits 14 &
4 17;.

5 29. Road densities in the project area currently have an
6 adverse impact on bear use of the area. The sale will increase
7 total road densities. This constitutes a significant impact
8 which is neither disclosed nor analyzed in the Environmental
9 Assessment. In addition, the Environmental Assessment fails to
10 even discuss the importance of corridors or linkage zones for
11 bears between the Swan and Mission Mountains. Such corridors are
12 important in terms of linking populations of grizzly bears in the
13 Swan and Mission Mountains. Tes. Dr. Wood; D. Hadden.

14 ALTERNATIVES

15 30. The Department of State Lands failed to consider
16 alternatives other than to harvest 3 million board feet while
17 preparing its environmental analysis. The record demonstrates
18 that the Department of State Lands has sold varying amounts of
19 timber over the last 15 years ranging from .074 mmbf in 1977 to
20 as much as 8 mmbf in 1982 and 1986. In 1976 1978, and 1990 the
21 Department did not harvest any timber from the Swan River State
22 Forest. Plaintiff's Exhibit 26.

23 31. The Department of State Lands has no mandate to cut any
24 given amount of timber from the Swan River State Forest in any
25 year. Neither the legislature nor the Department has provided a
26 specific board foot amount for this year or any other year. Tes.
27 Glen Gray. The Department clearly has the discretion in this

1 case to at least consider plans to harvest amounts of timber
2 other than 3 mmbf.

3 32. The Department of State Lands also has the discretion
4 to defer timber harvest on the Swan River State Forest while it
5 prepares an Environmental Impact Statement and the statewide
6 standards are completed. This occurred in the late 1970's, when
7 the Department was preparing the Swan River State Forest
8 Environmental Impact Statement. Gray. Dep. The Department of
9 State Lands manages over 600,000 acres of forest land. It
10 offered no evidence that timber necessary to meet its overall
11 program could not be harvested from non old growth on other state
12 lands.

13 33. It was unreasonable for the Department of State Lands
14 to refuse to consider alternatives that harvested only 3 mmbf for
15 the Middle Soup project. The Department of State Lands should
16 have considered an alternative that harvested less old growth,
17 and consequently had fewer impacts on old growth dependent
18 species. The brief consideration given to Alternative E late in
19 the Middle Soup project did not suffice in this regard. It was
20 also unreasonable for the Department of State Lands not to
21 consider an alternative that deferred the project until after the
22 completion of the programmatic Environmental Impact Statement,
23 especially since it will be completed in less than one year.
24 This is different than the "No Action" alternative, which never
25 harvests timber from the project area.

26 34. The Department of State Lands is in the process of
27 preparing a state wide forest management plan that was required

28

1 as a result of the 1989 litigation. Department of State Lands
2 has not completed that plan, and the earliest it will do so is
3 late 1994. Tes. P. Flowers.

4 35. The factual findings contained herein are not simply
5 the product of disagreement between the Plaintiff and Defendant
6 over methodology, interpretation of data, or difference of
7 professional opinion. The undisputed evidence thus far shows
8 that the Middle Soup Environmental Assessment failed to analyze
9 impacts to wildlife species, it failed to address the problem of
10 fragmentation in a meaningful manner, and relied upon a 10%
11 interim old growth standard that was not supported by their own
12 authority. The same is true for Department of State Land's
13 determination that the project will not have significant impacts.
14 Based upon the evidence now before the Court, the Department of
15 State Lands appears to have acted arbitrarily and capriciously in
16 finding that the Middle Soup timber sale will not significantly
17 affect the environment.

18 REQUEST FOR A PRELIMINARY INJUNCTION

19 36. The Middle Soup timber sale was approved by the Board
20 of Land Commissioners in June of 1993. The contract with
21 Champion International (now assumed by Plum Creek) was signed on
22 August 13, 1993. Plaintiffs filed suit on August 6th, 1993

23 37. The Plaintiffs moved for a preliminary injunction on
24 September 29, 1993. A hearing was schedule for October 27, 1993.
25 Both Defendants, Department of State Lands and Plum Creek, used
26 their preemptory judicial disqualifications to remove judges,
27 resulting in a three month delay in this hearing.

1 38. The first part of the Middle Soup timber sale is
2 scheduled to be harvested between January 1 and March 15, 1994,
3 and an additional 1 mmbf harvested between January 1 and March
4 15, 1995. Defendant Plum Creek is prepared and desires to
5 proceed with the harvest of timber immediately, and would have
6 done so without the issuance of an injunction. By written
7 stipulation of the parties, no harvest was allowed to occur prior
8 to this hearing.

9 39. The cutting of old growth timber and attendant habitat
10 fragmentation constitutes irreparable harm to the Plaintiffs, who
11 have a long standing interest in the protection of wildlife and
12 other natural resources, and who use the Swan River State Forest.
13 It will take 200-400 years to replace the stands that are
14 scheduled for harvest. Tes. Dr. Johnson, Glen Gray.

15 40. Plaintiffs requested relief, compliance with Montana
16 Environmental Policy Act, would be rendered meaningless if the
17 timber is harvested prior to a determination on the merits of
18 this case.

19 41. Defendant Plum Creek signed the timber contract after
20 the lawsuit was filed. It has expended its funds with knowledge
21 of these proceedings. It will possibly experience a temporary
22 disruption in its timber supply, but has other sources of timber
23 from its two million acres of commercial timberlands. Boehm
24 Affidavit.

25 42. As a result of this preliminary injunction, Department
26 of State Lands may temporarily contribute less revenue to
27 Montana's school trust. Department of State Lands has other
28

1 sources of timber to provide revenue to the trust. However, the
2 Department of State Lands has no mandate to harvest any given
3 amount of timber or return a specific amount of revenue per year.

4 Gray Tes.

5 43. The harm to both Defendants is therefore entirely
6 financial, which is not irreparable, and not a reason to avoid
7 compliance with the law.

8 CONCLUSIONS OF LAW

9 MONTANA ENVIRONMENTAL POLICY ACT

10 1. The Montana Environmental Policy Act requires
11 preparation of an Environmental Impact Statement for state
12 actions that significantly affect the environment. 75-1-201
13 (1)(b)(iii) M.C.A. (1993). An Environmental Impact Statement
14 must address the adverse environmental consequences,
15 irretrievable commitments of resources, and alternatives to the
16 proposed action. 75-1-201 (1)(b)(iii)(A)-(C).

17 2. In situations where the agency believes adverse
18 environmental consequences are not significant, a less detailed
19 Environmental Assessment may be prepared instead of an
20 Environmental Impact Statement. See generally A.R.M. 26.2.643
21 (2)-(4). The discussion of environmental impacts and alternatives
22 to the proposed action listed above must be addressed in an
23 Environmental Assessment. See ARM 16.2.645(3). Preparation of
24 an Environmental Assessment -- as opposed to an Environmental
25 Impact Statement -- does not relieve the agency from its
26 obligation to take a "hard look" at the environmental impacts of
27 the action.

1 3. Montana Environmental Policy Act assures that, by
2 following the procedures that it prescribes, "agencies will be
3 fully aware of the impacts of their decisions when they make
4 them." Montana Wilderness Assoc. v. Department of Natural
5 Resources, 200 Mont. 11, 21, 648 P.2d 734. (1982). In addition
6 to promoting informed governmental decision-making, Montana
7 Environmental Policy Act is designed to "make available to the
8 public information on the proposed project's environmental impact
9 and to encourage public participation in the development of that
10 information." Montana Wilderness, supra, 200 Mont. at 24.
11 (emphasis).

12 4. On a Department of State Lands "decision on whether to
13 prepare an Environmental Impact Statement the standard of
14 review to be applied by the trial court ... is whether the record
15 establishes that the agency acted arbitrarily, capriciously, or
16 unlawfully." North Fork Preservation Association v. Department
17 of State Lands (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867
18 (1989).

19 5. The Department of State Land's actions will be
20 judicially reviewed for compliance with the procedural requisites
21 set forth in State Lands' Montana Environmental Policy Act
22 regulations. ARM 26.2.628 et seq. This review is performed
23 under "the 'unlawful' portion" of the standard of review. North
24 Fork, 238 Mont. at 459, 778 P.2d at 867.

25 6. In deciding whether or not the Department of State
26 Lands acted in an arbitrary and capricious manner in preparing
27 the Middle Soup Environmental Assessment and determining that the
28

1 project will not significantly affect the environment, the Court
2 must consider whether the relevant factors have been considered,
3 and whether there has been a clear error of judgement. North
4 Fork, supra, 778 P.2d at 871.

5 OLD GROWTH

6 7. With respect to the issue of old growth, based on the
7 evidence now before the Court as set forth above, the Department
8 has not considered the relevant factors by failing to analyze
9 impacts on old growth dependent species, by failing to consider
10 fragmentation patch size and by failing to consider the unique
11 opportunities for old growth preservation in the Soup and Cilly
12 Creek drainages, especially in light of the position by the
13 Department's recognized authority, Dr. Jack Ward Thomas, that all
14 existing stands of old growth should be preserved to insure
15 future management options. Therefore, it appears to the court at
16 this time that the Department of State Land's determination that
17 the Middle Soup Environmental Assessment is adequate, and that
18 the project will not have significant impacts requiring
19 preparation of an Environmental Impact Statement is arbitrary and
20 capacious.

21 GRIZZLY BEARS

22 8. The same is true for the Department of State Land's
23 failure to adequately consider impacts of total road densities and
24 migration corridors for grizzly bears, and this is a separate
25 ground for holding the Department of State Land's actions
26 arbitrary and capricious.

27
28

1 ALTERNATIVES

2 9. The Department of State Lands is required under Montana
3 Environmental Policy Act to analyze alternatives to the proposed
4 action. 75-1-201 (b) (iii) (C). This requirement mandates the
5 consideration of a reasonable range of alternatives, but not
6 unrealistic or infeasible ones. Under the Department of State
7 Land's regulations, the term alternative means: "for agency
8 initiated actions, a different program or other series of
9 activities that would accomplish other objectives or a different
10 use resources than the proposed program or series of activities".
11 See A.R.M. 26.2.642 (2) (a) and (b).

12 10. By limiting the range of " action" alternatives to
13 those which harvest 3 mmbf of timber, the Middle Soup
14 Environmental Assessment as both arbitrary and unlawful. The
15 undisputed evidence at this hearing demonstrated that Department
16 of State Lands has harvested varying amounts of timber over the
17 years, including years when they harvested no timber, and amounts
18 substantially less than 3 mmbf. There is no legal requirement
19 nor written policy that mandates that the Swan River State Forest
20 harvest 3 mmbf of timber each year. It appears to the Court at
21 this time that Department of State Land's refusal to even
22 consider forgoing harvesting old growth pending completion of the
23 state wide Environmental Impact Statement and implementation of
24 new old growth standards is therefore arbitrary and unlawful.

25 11. In making these determinations, this Court stresses
26 that it is not questioning Department of State Land's mandate to
27 manage the Swan River State Forest, nor is it substituting its

1 judgement for the agency's in terms of the ultimate decision
2 regarding the amount of timber cut in any given sale. However,
3 this does not mean that the Court cannot review the Department of
4 State Land's actions for compliance with the procedural
5 requirements of Montana Environmental Policy Act. That is the
6 nature of judicial review in this case.

7 STANDARDS

8 12. The standards by which this court must adjudge
9 Plaintiffs' request for a preliminary injunction are set forth in
10 § 27-19-201, M.C.A.:

11 § 27-19-201. When preliminary injunction may
12 be granted. An injunction order may be
granted in the following cases:

- 13 (1) When it shall appear that the applicant is
14 entitled to the relief demanded and such relief or
15 any part thereof consists in restraining the
commission or continuance of the act complained
of, either for a limited period or perpetually;
- 16 (2) when it shall appear that the commission or
17 continuance of some act during the litigation
would produce a great or irreparable injury to the
applicant;
- 18 (3) when it shall appear during the
19 litigation that the adverse party is
20 doing or threatens or is about to do or
is procuring or suffering to be done
21 some act in violation of the applicant's
rights, respecting the subject of the
22 act, and tending to render the judgment
ineffectual; ... (emphasis added).

23 13. The subsections are disjunctive, meaning that findings
24 that satisfy one subsection are sufficient. Stark v. Borner
25 (1987), 226 Mont. 356, 735 P.2d 314.

1 14. The purpose of a preliminary injunction is to preserve
2 the status quo. The opinion in Porter v. K & S Partnership
3 (1981), 192 Mont. 175, 181, 627 P.2d 836

4 15. An applicant for a preliminary injunction establishes a
5 prima facie case, upon showing that he may suffer irreparable
6 injury before his rights can be fully litigated. If such showing
7 is made, then courts are inclined to issue the preliminary
8 injunction to preserve the status quo pending trial. Rea Bros.
9 Sheep Co. v. Rudi (1912), 46 Mont. 149, 160, 127 P. 85, 87.

10 16. The cutting of timber is a particularly appropriate
11 subject for injunctive relief, since the "threatened destruction
12 of [timber stands] cannot be remedied by an action of law."

13 Madison Fork Ranch v. L & B Lodge Pole Timber (1980), 189 Mont.
14 292, 302, 615 P.2d 900.

15 17. While irreparable damage may not be automatically
16 presumed in these cases, "(e)nvironmental injury, by its nature,
17 can seldom be adequately remedied by money damages," and
18 therefore injunctive relief is usually appropriate. Amoco
19 Production Co. v Village of Gambell, 480 U.S. 531, 545 (1987).

20 18. Plaintiffs have met all three subsections under 27-19-
21 201. Based on the evidence presented thus far they have made a
22 strong showing of their claims under Montana Environmental Policy
23 Act, both in terms of the inadequacy of the present Environmental
24 Assessment, the need for an Environmental Impact Statement based
25 on the significant adverse environmental impacts, and the
26 unreasonably narrow range of alternatives considered by the
27 Department.

1 19. Plaintiffs have also demonstrated that the cutting of
2 270 acres of old growth, and the attendant fragmentation
3 constitutes irreparable harm, while the only possible harm to the
4 Defendants is financial. 27-19-201 (2).

5 20. There is no doubt that absent a preliminary injunction,
6 any relief granted to the Plaintiffs will be rendered ineffective
7 if the Middle Soup sale proceeds as planned during the pendency
8 of this litigation. 27-1-201 (3).

9 21. A preliminary injunction will preserve the status quo
10 during this litigation. The status quo consists of the present
11 unharvested stands of timber in the Middle Soup project area.

12 22. The Swan River State Forest is part of Montana's school
13 trust lands, which are administered for revenue to the school
14 trust and the attainment of other worthy objects for the benefit
15 of the people of the state of Montana. 77-1-202, MCA (1993).

16 23. Under this mandate, Department of State Lands clearly
17 has the responsibility to return revenues to the trust. However,
18 this does not require them to harvest the Middle Soup timber sale
19 in its present form at this time, Department of State Lands has
20 not complied with the law. Their trust duties do not override
21 their responsibility to comply with all of Montana's laws.
22 Moreover, Department of State Land's trust responsibility does
23 not preclude the Department of State Lands from refraining from
24 timber harvest in order to protect old growth values and
25 wildlife. The protection of wildlife is consistent with the
26 statutory requirement that Department of State Lands manage the
27 trust to obtain other worthy objects for the benefit of the

1 people of the state of Montana. Indeed Department of State Lands
2 is presently doing just that, with its 10% interim old growth
3 standard and grizzly bear, deer and elk guidelines. All of these
4 standards protect wildlife, even though they may serve to lessen
5 the amount of timber harvested, and thus lessen the amount of
6 revenue received. Department of State Lands Exhibits 21-24. In
7 addition the Department of State Lands is considering
8 strengthening these standards through its state wide
9 Environmental Impact Statement now in preparation, (Department
10 of State Lands Exhibit 33) which is further evidence that
11 Department of State Lands construes its mandate to include
12 protection of wildlife and old growth. Therefore, temporarily
13 enjoining this sale on the basis that Department of State Lands
14 has not adequately considered wildlife and old growth is not
15 inconsistent with its trust obligations, notwithstanding
16 Department of State Land's arguments to the contrary.

17 24. The state has a fiduciary responsibility to manage
18 wildlife "for the use and benefit of the people generally."
19 Heiser v. Severy, 158 P.2d 501, 505 (Mont. 1945). If one applies
20 a trust analogy to state lands, the wildlife and aesthetic
21 qualities of old growth forests can be considered part of the
22 trust corpus, which the trustee has a duty to consider in trust
23 management.

24 25. The Montana Environmental Protection Act applies to
25 Department of State Land's timber harvest program, including the
26 Middle Soup project. The Department of State Lands must manage
27 the trust to "secure the largest measure of reasonable and
28

1
2 legitimate advantage to the state". 77-1-202 M.C.A. (1993).
3 Legitimate means in compliance with the law, including the
4 Montana Environmental Protection Act. It is unlawful for the
5 Department of State Lands to proceed in violation of the
6 Environmental Protection Act, even when trust revenues are
7 involved.

8 26. Pursuant to established case law under the National
9 Environmental Policy Act, and in consideration of Plaintiff's
10 status as a non-profit public interest organization, the bond
11 requirement is waived pursuant to 27-19-306 (1), as the interests
12 of justice so require.

13 From these Findings of Fact and Conclusions of Law, IT IS
14 HEREBY ORDERED:

15 1. That Plaintiff's Application for a preliminary
16 injunction is granted and the Defendants are enjoined from
17 proceeding with the Middle Soup timber sale during this
18 litigation.

19 2. That the parties complete and file a stipulated
20 discovery and briefing schedule to present this matter to the
21 Court for final determination on summary judgement motions on the
22 merits within 120 days of this Order.

23
24 DATED this 9th day of February, 1994.

25
26 **THOMAS M. MCKITTRICK**
27 **DISTRICT COURT JUDGE**

1 cc:

2 Jack R. Tuholske
3 401 N. Washington
4 P.O. Box 8142
5 Missoula, MT 59807-8142

6 Richard R. Thweatt & Tommy H. Butler
7 Department of State Land
8 P.O. Box 201601
9 Helena, MT 59620-1601

10 Richard Schneebeck
11 HOLLAND & HART
12 P.O. Box 1347
13 Cheyenne, WY 82003-1347

14 Todd Hammer
15 WARDEN, CHRISTIANSEN, JOHNSON & BERG
16 P.O. Box 3038
17 Kalispell, MT 59903-3038

18
19
20
21
22
23
24
25
26
27
28

CONSENT DECREE

DV-93-361 B

64
071

FILED
CLERK OF DISTRICT COURT
MONTANA
35

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY
* * * * *

FRIENDS OF THE WILD SWAN,)	
)	Cause No. DV-93-361-B
Plaintiff,)	
)	CONSENT DECREE
-vs-)	
)	
MONTANA DEPARTMENT OF STATE LANDS)	
and PLUM CREEK TIMBER CO., L.P.,)	
)	
Defendants.)	

WHEREAS, the Middle-Soup Timber Sale has been the subject of the above-captioned litigation between the parties;

WHEREAS, this Court has entered an injunction on February 12, 1994 enjoining the harvest of timber from the Middle-Soup Timber Sale;

WHEREAS, the parties hereto desire to enter into this Consent Decree in order to resolve this litigation;

The parties hereto, by and through their attorneys, who are acting in full authority on behalf of their respective clients, agree to the following terms and conditions which they request to be entered as a Consent Decree by Order of this Court:

1. Defendant, Montana Department of State Lands (DSL) admits that the Environmental Assessment for the Middle Soup Timber Sale inadequately documented the Department's analysis of old growth habitat and old growth dependent species in violation

64
072

of the Montana Environmental Policy Act, §75-1-201, et seq., MCA, thereby invalidating the Finding of No Significant Impact in the accompanying Decision Notice. The Plaintiff is accordingly entitled to judgment under the Second Claim of the Plaintiff's Amended Complaint. Plum Creek Timber, L.P. denies any liability or fault whatsoever in the above-captioned matter. Without further admission or prejudice to any party, the remaining claims in Plaintiff's Amended Complaint shall be dismissed.

2. DSL agrees to withdraw the Decision Notice and accompanying Environmental Assessment for the Middle Soup Timber Sale and to cancel the timber sale contract for the Middle Soup Timber Sale with Defendant Champion International and Champion's successor in interest, Plum Creek Timber, L.P.

3. DSL and Champion, through its successor in interest Plum Creek, shall resolve any other matters pertaining to said contract between themselves, independent from this Consent Decree.

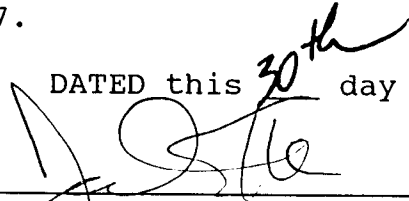
4. DSL agrees that prior to offering for sale any timber within the project area within Soup Creek as delineated by the Middle Soup Environmental Assessment, DSL shall initiate a new process for such sale under the Montana Environmental Policy Act, including, but not limited to, the implementation of a public scoping process, preparation of a new document, and providing public review and input by imposing a 45-day review and comment period for that environmental review document prior to its final approval by the DSL and submission to the State Board of Land

64
073

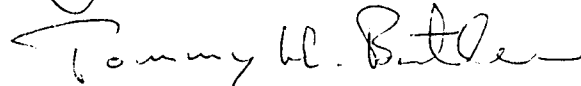
Commissioners. No harvest of timber shall occur within the project area described above until 18 months after entry of this Consent Decree by the Court.

5. DSL agrees to pay to Plaintiff its costs of filing the Complaint in this action and for the cost of depositions used at the preliminary injunction hearing in the total amount of \$1,242-.47.

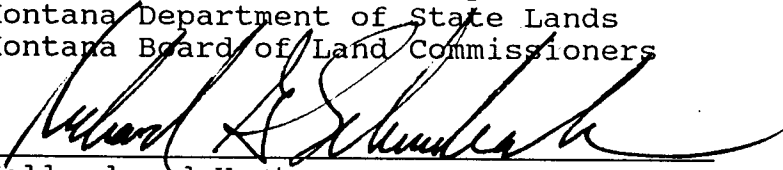
DATED this 30th day of June, 1994.



Jack R. Tulholske
Friends of the Wild Swan



Tommy H. Butler
Special Assistant Attorney General
Montana Department of State Lands
Montana Board of Land Commissioners



Holland and Hart
Richard Schneebeck
Plum Creek Timber, L.P. as successor in
interest to Champion International, Inc.

ORDER

For good cause appearing, the terms of this Consent Decree are hereby accepted, and made an ORDER of this Court.

DATED this 17th day of ~~June~~ July, 1994.



Thomas M. McKittrick
District Judge

cc: Todd Hammer
Richard Thweatt
Richard Schneebeck
Jack Tulholski
7-20-94
SS