

Friends of the Wild Swan v. Department of Natural Resources and Conservation and
the Board of Land Commissioners
CDV-2003-527, 1st Judicial District
Judge Sherlock
Decided 2004

In September 2003, the Friends of the Wild Swan filed suit against the DNRC over the Goat Squeezer timber sale. The case included six complaint allegations including two MEPA counts. The agency prepared an EIS for the proposed timber sale. The plaintiffs claimed that the DNRC should have considered an alternative that took into account the cumulative impacts on game winter range from nearby Plum Creek and U.S. Forest Service harvests that had already reduced thermal cover on wildlife winter range. The complaint also alleged that the DNRC had an obligation to manage for wildlife and protect biodiversity as well as to harvest timber.

The court ruled that the DNRC prepared an adequate environmental review to determine the impacts of the Goat Squeezer timber sale upon Whitetail Deer and that the DNRC was legally authorized to prepare the financial accounting for its timber sale program on a programmatic basis, rather than by harvest unit.

FRIENDS OF THE WILD SWAN, a Montana nonprofit corporation, Plaintiff, v.
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA
BOARD OF LAND COMMISSIONERS, Defendants.

FIRST JUDICIAL DISTRICT COURT OF MONTANA
LEWIS AND CLARK COUNTY

2004 ML 87; 2004 Mont. Dist. LEXIS 2478

Cause No. BDV 2003-527

January 14, 2004, Decided

SUBSEQUENT HISTORY: Affirmed by Friends of the Wild Swan v. Dep't of Natural Res. & Conservation, 2005 MT 351, 330 Mont. 186, 127 P.3d 394, 2005 Mont. LEXIS 625 (2005)

JUDGES: [*1] [*1] Jeffrey M. Sherlock, DISTRICT COURT JUDGE.

OPINION BY: Jeffrey M. Sherlock

OPINION

ORDER

Plaintiff seeks a temporary restraining order (TRO) preventing the Department of Natural Resources and Conservation (DNRC) from proceeding with logging and road construction for the proposed Goat Squeezer Timber Sale in the Swan River State Forest. The final environmental impact statement (EIS) on this timber sale was issued on April 2, 2003. The Montana Board of Land Commissioners approved the proposed timber sale on July 21, 2003, and the area was put up for bid on September 15, 2003. This action was filed on September 11, 2003, and on December 16, 2003, Plaintiffs moved for preliminary injunction. Feeling that road construction and logging was imminent, Plaintiffs moved on December 29, 2003, for a temporary restraining order.

The Montana Code states that "[w]here an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order." Section 2719-314, MCA. A TRO [*2] is "[a]n [*2] emergency remedy of brief duration which may issue only in exceptional circumstances and only until the trial court

can hear arguments or evidence . . . on the subject matter of the controversy." BLACKS LAW DICTIONARY 1313 (5 TH ed. 1979). "A TRO and an injunction are not equivalent. A TRO generally precedes an injunction and is intended to last only until a hearing is held and a decision made on the injunction application." *Marketing Specialists v. Service Mktg.*, 214 Mont. 377, 388 (1985).

An injunction is an order of the court requiring a party to refrain from a particular act. Section 27-19-101, MCA. A preliminary injunction restrains a party pending trial on the merits and is issued after notice and a hearing. BLACK'S LAW DICTIONARY 1062 (5 th ed. 1979). The district court is vested with the discretion to determine whether a preliminary injunction should issue and this decision will not be overturned except in instances of manifest abuse. *Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs*, 2000 MT 147, P20, 300 Mont. 66, P20, 2 P.3d 825, P20; [*3] *Porter v. K & S P'ship*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). [*3]

The Montana Code provides for the issuance of a preliminary injunction in the following cases:

(1) when it appears that the applicant is entitled to the relief demanded and the 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;

(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;

(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 [*4] for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

[*4] Section 27-19-201, MCA.

The Montana Supreme Court determined that the "subsections of this statute are disjunctive, 'meaning that findings that satisfy one subsection are sufficient.' Consequently, only one

subsection need be met for an injunction to issue." Sweet Grass Farms, P27 (citations omitted) (quoting Stark v. Borner, 226 Mont. 356, 35960, 735 P.2d 314, 317 (1987)). "An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." Id., P28 (quoting Porter v. K & S P'ship, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981)). "In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of the property or rights in status quo until trial, without expressing a final opinion as to such rights." Id. "'Status quo' has been defined as 'the last actual, [*5] peaceable, noncontested condition which preceded the pending controversy.'" Id. (quoting Porter, 192 Mont. at 181, 627 P.2d at 839). [*5]

In reviewing Plaintiff's complaint and the affidavit submitted therewith, the Court is not inclined to issue a temporary restraining order. The Court notes that by the time Plaintiff moved for a restraining order, the activities of road building and logging had begun. Plaintiff had at least three months from the day it filed the complaint for a preliminary injunction. Plaintiff waited until the activities were underway and then sought this Court's order to stop the work. Since the work has already begun, this Court looks very strictly at Section 77-1110, MCA, requiring the posting of a bond, which Plaintiff has not done.

Next, considering the various arguments put forth by Plaintiff, the Court, at this stage of the proceedings, is not at all sure that Plaintiff will prevail in this case. The EIS discussed cumulative impacts and the range of alternatives available. It appears that the result of the sale is not what Plaintiff desires. However, the EIS procedure does not guarantee any particular result, [*6] it only requires that the decision makers be adequately informed about what they are doing.

In the view of this Court, the balance of Plaintiff's complaint [*6] is insufficiently supported with precedent to authorize this Court to issue a restraining order. Perhaps Plaintiff will prevail on its request for a preliminary injunction, but this Court rules that an inadequate showing has been made insofar as a temporary restraining order is concerned.

Therefore, Plaintiff's request for a temporary restraining order is hereby DENIED. Plaintiff's request for a preliminary injunction will be heard on February 12, 2004 at 3:30 p.m.

DATED this 14th day of January, 2004.

Jeffrey M. Sherlock

DISTRICT COURT JUDGE