

Friends of the Wild Swan v. Department of Natural Resources and Conservation, et al.  
CDV 97-558, 1st Judicial District  
Judge Honzel  
Decided 1998

Appealed to the Montana Supreme Court  
2000 MT 209  
Affirmed the District Court's Decision 2000

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

Court Decision: No. The court enjoined the Soup Creek timber sale for lack of cumulative impacts analysis and changed economic conditions due to remarking of the timber sale harvest units resulting in a lesser sale volume.

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

Court Decision: Yes.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW



1 represented by Tommy H. Butler and Michael Mortimer. Intervenor  
2 and co-Defendant Plum Creek Manufacturing Company was represented  
3 by Rebecca W. Watson. Following the hearing, the parties were  
4 given an opportunity to file post-hearing memoranda. Those have  
5 been received and the matter is ready for decision. From the  
6 evidence and testimony presented, the Court makes the following:

7 FINDINGS OF FACT

- 8 1. FWS is a Montana nonprofit corporation dedicated  
9 to preserving the natural environment of the Swan Valley.
- 10 2. DNRC is an agency of the State of Montana which  
11 manages portions of the State's lands, including the Swan River  
12 State Forest (SRSF), for the benefit of the public school trusts.
- 13 3. Plum Creek Manufacturing Company is a limited  
14 partnership which processes and sells wood products. Plum Creek  
15 has entered into a contract with DNRC to log the Middle Soup  
16 Creek area, located in the SRSF.
- 17 4. In September of 1996, DNRC issued a draft  
18 environmental impact statement which purported to assess the  
19 impacts of four alternative management plans with respect to the  
20 Middle Soup Creek project area. The first alternative, "A",  
21 required no action and would have left the Middle Soup Creek  
22 area unmanaged. Alternative "B" required intensive management  
23 in an effort to replicate DNRC's idea of "historical" conditions  
24 within the SRSF. Alternative "C" required preservation of old  
25 growth timber, allowing logging only in saw-timber stands and

1 one multi-storied stand. Alternative "D" maximized timber  
2 productivity by harvesting old growth, saw-timber and multi-  
3 storied stands. Public hearings were held and public comments  
4 on the alternatives were received.

5           5. In February of 1997, DNRC released the final  
6 Environmental Impact Statement (EIS) for the Middle Soup Creek  
7 project. Alternative "B" was chosen. DNRC proposed a sale of  
8 6 million board feet of timber taken from 2,591 acres within  
9 the SRSF. The harvest was to occur through a process called  
10 "structural enhancement" wherein selected trees were to be cut  
11 in an attempt to mimic historical conditions, before fire  
12 suppression. The sale was to generate net revenue in the amount  
13 of \$1,045,572. Alternatives "A" and "C" were rejected because  
14 they were "each projected to generate negative net revenue."  
15 See Middle Soup Creek Project Final Environmental Impact  
16 Statement at II-25.

17           6. In July of 1997, the sale was approved by the  
18 State Board of Land Commissioners and a final record of decision  
19 was issued.

20           7. In September of 1997, DNRC awarded Plum Creek the  
21 logging contract, but the contract provided for a harvest of only  
22 3.8 million board feet of timber. The difference in board feet  
23 remains unexplained. DNRC staff marked the trees to be cut with  
24 orange paint.

25           8. Once the trees to be cut were marked, FWS asked

1 Sara Johnson, Ph.D., a wildlife biologist, to review the site of  
2 the sale and the final EIS.

3 9. Johnson found that the sale, as marked, was much  
4 more extensive than the final EIS described. She also testified  
5 that the final EIS was inadequate because it misled the public  
6 about the amount of old growth actually to be cut and the effects  
7 of that harvest; failed to adequately address the impacts on old  
8 growth associated species; and failed to address cumulative  
9 impacts.

10 10. FWS brought this action originally alleging  
11 violations of the Montana Environmental Policy Act (MEPA);  
12 failure to prepare a programmatic review; and failure to complete  
13 a cumulative watershed effects analysis.

14 11. On March 16, 1998, DNRC released a statement  
15 acknowledging that the trees in the Middle Soup Creek project had  
16 been mismarked. It admitted that many more trees were marked to  
17 be cut than should have been. The trees which were actually to  
18 be cut were re-marked by painting a blue vertical line. As a  
19 result of the re-marking, the contract between Plum Creek and  
20 DNRC was renegotiated. The harvest now is to be 1.99 million  
21 board feet and may result in a net loss to the State of over  
22 \$150,000.

23 12. FWS amended its complaint alleging violations of  
24 MEPA due to inadequate environmental analysis; failure to prepare  
25 a programmatic review for the SRSF; failure to complete a

1 cumulative watershed effects analysis; violation of Article II,  
2 Section 3, and Article IX, Section 1, of the Montana  
3 Constitution; failure to prepare a supplemental EIS once the sale  
4 was significantly reduced; violation of trust duties; and,  
5 failure to prepare an accurate cost-benefit analysis.

6           13. Approximately 50 percent of the Swan Valley forest  
7 consists of old growth. This forest contains one of the last  
8 large stands of old growth left in Montana, and even the largest  
9 patches are relatively small, averaging 484 acres. Due to past  
10 harvesting, the patches of old growth are already fairly  
11 isolated, lacking connective corridors. There are a number of  
12 species which depend on old growth for habitat, including the  
13 fisher, lynx, marten, goshawk, and black-backed woodpecker, to  
14 name a few. Some species require large, unfragmented stands  
15 of old growth and fairly dense cover. Some require snags and  
16 woody, deteriorating debris. Fragmentation of the stands has a  
17 significant impact on old growth-dependent species since once  
18 the cover or the corridors are removed, the isolated patches  
19 become inaccessible, and thus, less useful habitat.

20           14. The sale in the Middle Soup Creek area, as  
21 re-marked, will harvest 1.99 million board feet of timber. Some  
22 of that timber will be old growth. Although the trees will  
23 be individually selected, some loss of cover and additional  
24 fragmentation will result from the sale. The final EIS calls  
25 for "moderate-reserve, regeneration" harvesting in parts of the

1 SRSF. That type of harvest requires that only six large seed  
2 trees over 20 inches in breast diameter remain per acre after  
3 the cut. DNRC predicts that only 38.8 percent of the forest will  
4 be old growth after the sale. Some of the old growth-dependent  
5 species cannot use the relatively small, fragmented stands of old  
6 growth that will remain after the harvest of the proposed  
7 severity. Consequently, the sale will result in some species  
8 losing the last useful habitat remaining in Montana.

9 From the foregoing Findings of Fact, the Court makes  
10 the following:

11 CONCLUSIONS OF LAW

12 1. The Court has jurisdiction over the parties and  
13 this matter.

14 2. The Montana Supreme Court has held that MEPA is  
15 procedural, not substantive. See Ravalli Co. Fish and Game  
16 Ass'n, Inc. v. Dep't of State Lands, 273 Mont. 371, 377, 903 P.2d  
17 1362, 1367 (1995) (citing Stryker's Bay Neighborhood Council v.  
18 Karlen, 444 U.S. 223, 100 S. Ct. 497, 62 L. Ed. 2d 433 (1980)).

19 The Court is required to give great deference to agency expertise  
20 in matters of substantive policy decisions. See North Fork  
21 Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 778  
22 P.2d 862 (1989). The party challenging agency action has the  
23 burden of proving the action was outside of the agency's  
24 authority or that the agency acted arbitrarily, capriciously, or  
25 unlawfully. Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of



1 State Lands, 273 Mont. 371, 903 P.2d 1362 (1995).

2 3. Section 75-1-201, MCA, sets out the general  
3 direction for an EIS and applies to this case.

4 4. In Count I of its amended complaint, FWS contends  
5 that the final EIS is inadequate. ARM 36.2.524 sets out the  
6 criteria DNRC is to consider in its evaluation of environmental  
7 impacts. Among other things, DNRC is to consider cumulative  
8 impacts. ARM 36.2.522 defines "cumulative impact" as

9 the collective impacts on the human  
10 environment of the proposed action when  
11 considered in conjunction with other past  
12 and present actions related to the proposed  
13 action by location or generic type. Related  
14 future actions must also be considered when  
15 these actions are under concurrent con-  
16 sideration by any state agency through  
17 pre-impact statement studies, separate  
18 impact statement evaluation, or permit  
19 processing procedures.

20 Chapter III of the Middle Soup Creek final EIS  
21 discusses cumulative impacts with respect to fire suppression,  
22 but it does not discuss the cumulative impact this harvest may  
23 have, analyzed in conjunction with impacts from previous logging  
24 efforts in the area. Nor does it discuss the cumulative impacts  
25 of the three other timber sales concurrently under consideration.  
The final EIS does mention the Cilly Creek sale and the South  
Fork Lost Creek sale, but it lacks analysis as to cumulative  
impacts from the proposed and current sales. Furthermore, the  
final EIS does not mention the proposed Woodward/Porcupine timber  
sale, although DNRC listed that sale on its "Three-year listing"

1 as being under consideration at the same time the Middle Soup  
2 Creek project was being considered.

3 An aerial photograph of the SRSF area submitted at the  
4 hearing showed substantial patches of clearcut, in a checkerboard  
5 fashion, surrounding the Middle Soup Creek area. Yet, no mention  
6 of these clearcuts is made in the final EIS and no cumulative  
7 impact of this timber sale in the context of the present  
8 patchwork is discussed in the final EIS.

9 Chapter III adequately discusses the components of the  
10 present forest, as far as the size and type of stands, the amount  
11 and quality of water, and the current adequacy of habitat for  
12 some species. But, apart from fire suppression, it does not give  
13 the reader any information about how the SRSF came to be in its  
14 present condition. For example, the final EIS mentions that the  
15 old-growth stands are considerably more fragmented than in the  
16 1930s, but does not discuss how the stands got that way.  
17 Although MEPA requires that DNRC consider this project in the  
18 context of all the surrounding activity in the area, the final  
19 EIS fails to make an adequate inquiry into the cumulative impacts  
20 of all of the past and proposed logging in the area.

21 ARM 36.2.524(1)(g) also requires DNRC to assess  
22 "potential conflicts with local, state, or federal laws,  
23 requirements, or formal plans." The final EIS, however, does not  
24 reconcile the proposed action with the State Forest Land  
25 Management Plan even though that plan was being developed at the

1 same time that the Middle Soup Creek project was under  
2 discussion. The second publishing of the State Forest Land  
3 Management Plan was distributed in May of 1996. As previously  
4 mentioned, the final EIS was published in February of 1997. The  
5 final EIS does mention the state-wide plan, but only cursorily.  
6 The plan states that "DNRC would seek to maintain or restore  
7 old-growth forest" and would consider "successional stage,  
8 species composition, stand structure, patch size and shape,  
9 habitat connectivity and fragmentation, disturbance regime,  
10 old-growth distribution and composition, and habitat type." See  
11 State Forest Land Management Plan final EIS at SUM-12 and II-8.  
12 Although the Middle Soup Creek final EIS does discuss old growth  
13 and fragmentation, listing them as "concerns", it does not  
14 discuss the State Forest Land Management Plan's objective to  
15 preserve old growth, reduce fragmentation, and protect unique  
16 habitat. Consequently, the Court concludes that the Middle Soup  
17 Creek final EIS is inadequate and violates the procedural  
18 requirements of MEPA.

19           The purpose of allowing public involvement in  
20 environmental decision-making is frustrated if an EIS does not  
21 accurately describe the impact of proposed action in the context  
22 of past, present and future proposed action. The average member  
23 of the public must rely on DNRC's expertise, and therefore, DNRC  
24 must give sufficient information so that the public can make a  
25 meaningful evaluation of the proposed action. To do so, a

1 thorough analysis and discussion of cumulative impacts is  
2 necessary. The legislature recognized as much, making a  
3 cumulative impacts analysis mandatory. A thorough analysis of  
4 cumulative impacts is lacking here.

5           5. In Count II, FWS contends that DNRC should have  
6 prepared a programmatic review pursuant to ARM 36.2.537. That  
7 rule provides that DNRC shall prepare a programmatic review  
8 whenever it is contemplating a series of agency-initiated  
9 actions which may significantly affect the human environment.  
10 ARM 36.2.537. DNRC has prepared a statewide programmatic review  
11 which is the State Forest Land Management Plan, discussed above.  
12 DNRC has also prepared a final EIS for the Middle Soup Creek  
13 project on a site-specific basis. Because great deference must  
14 be given to agency expertise, the Court concludes that DNRC has  
15 the discretion to determine the scope of agency action. Since  
16 MEPA requires a cumulative affects analysis in each EIS, the  
17 Court concludes that statewide and site-specific analyses, if  
18 done according to law, are sufficient to meet the requirements of  
19 MEPA. DNRC has the discretion to choose the scope of its  
20 evaluation so long as the evaluation is done according to law.  
21 FWS has not shown that DNRC acted arbitrarily or capriciously in  
22 deciding to use statewide and site-specific analyses with respect  
23 to the SRSF. Therefore, DNRC should not be required to prepare  
24 a programmatic review for the SRSF.

25           6. In Count III, FWS alleges that DNRC failed to

1 prepare a cumulative watershed analysis for the Middle Soup  
2 timber sale. However, no evidence was presented at the hearing  
3 regarding FWS's procedural challenge to DNRC's watershed  
4 analysis. As noted, MEPA is essentially procedural. "[I]t does  
5 not demand that an agency make particular substantive decisions."  
6 Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of State Lands,  
7 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). Since particular  
8 methods of forest management and watershed analyses are not  
9 prescribed by law, DNRC has the discretion to choose reasonable  
10 methods.

11 Chapter III, sub-part III of the Middle Soup Creek  
12 final EIS describes DNRC's water quality analysis. The burden is  
13 on FWS to prove by substantial and credible evidence that DNRC  
14 failed to prepare an adequate watershed analysis. This, the  
15 Court concludes, it has failed to do.

16 7. In Count IV, FWS asserts that in offering the  
17 Middle Soup Creek timber sale, DNRC has violated Article II,  
18 Section 3, and Article IX, Section 1, of the Montana  
19 Constitution.

20 Article II, Section 3, provides:

21 All persons are born free and have  
22 certain inalienable rights. They include  
23 the right to a clean and healthful environ-  
24 ment and the rights of pursuing life's  
25 basic necessities, enjoying and defending  
their lives and liberties, acquiring,  
possessing and protecting property, and  
seeking their safety, health and happiness  
in all lawful ways. In enjoying these

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rights, all persons recognize corresponding responsibilities.

Article IX, Section 1, provides:

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

This Court has previously held that the right to a clean and healthful environment as stated in Article II, Section 3, and Article IX, Section 1, is self-executing, and that "all persons" affected by state action which degrades the environment have recourse to the courts. See Montana Wildlife Federation v. Dep't of State Lands, Docket No. CDV-92-486, Order entered May 28, 1993. The right to a clean and healthful environment is inalienable and has substance.

However, in the instant action, FWS has not shown that DNRC's proposed action will result in an unclean, unhealthy environment. Consequently, the Court is unable to discern the grounds on which FWS bases its claim. If FWS is alleging that DNRC is violating the Constitution by degrading the water quality, stemming from its allegation that DNRC failed to prepare

1 an adequate watershed analysis, then that argument must fail. If  
2 FWS is simply alleging that the proposed harvesting of old growth  
3 timber will result in an unclean, unhealthful environment, there  
4 is insufficient evidence in the record to support that claim.  
5 Therefore, the Court concludes that FWS has failed to prove a  
6 constitutional violation.

7 8. In Count V, FWS contends that DNRC should have  
8 prepared a supplemental EIS under ARM 36.2.533, which provides  
9 in part:

10 (1) The agency shall prepare supple-  
11 ments to either draft or final environmental  
12 impact statements whenever:

13 (a) the agency or the applicant makes a  
14 substantial change in a proposed action;

15 (b) there are significant new circum-  
16 stances, discovered prior to final agency  
17 decision, including information bearing on  
18 the proposed action or its impacts that  
19 change the basis for the decision . . . .

20 ARM 36.2.522(12) states:

21 (12) "Human environment" includes, but  
22 is not limited to biological, physical,  
23 social, economic, cultural, and aesthetic  
24 factors that interrelate to form the  
25 environment. As the term applies to the  
agency's determination of whether an EIS  
is necessary . . . , economic and social  
impacts do not by themselves require an  
EIS. However, whenever an EIS is prepared,  
economic and social impacts and their  
relationship to biological, physical,  
cultural and aesthetic impacts must be  
discussed.

DNRC argues that because the definition of "human

1 environment" does not require an EIS when only economic and  
2 social impacts are involved, a supplemental EIS is not necessary  
3 when purely economic circumstances change. The Court concludes  
4 that ARM 36.2.533 is clear on its face. DNRC is required to  
5 prepare a supplement EIS when substantial changes are made to a  
6 proposed action.

7           In the instant case, the Board of Land Commissioners  
8 approved a sale of nearly 6 million board feet of timber.  
9 Alternative "B", discussed in the final EIS, proposed a harvest  
10 of a similar quantity. The sale was estimated to net over a  
11 million dollars in revenue for the school trust. The Middle Soup  
12 Creek final EIS states "[t]he purpose of the project is to  
13 generate revenue for the Montana School Trust from project area  
14 lands." See Middle Soup Creek Final Environmental Impact  
15 Statement at I-1. The final EIS also states "[e]conomic criteria  
16 is an integral part of project objectives." See Middle Soup  
17 Creek Final Environmental Impact Statement at II-22. DNRC  
18 specifically rejected two of the four alternatives at the outset  
19 because they were "projected to generate negative net revenue."  
20 See Middle Soup Creek Final Environmental Impact Statement at  
21 II-25.

22           The project DNRC now proposes is a harvest of 1.99  
23 million board feet. The sale is expected to lose at least  
24 \$150,000. The substantial change in the harvest quantity and in  
25 the net revenue resulting from the harvest certainly are



1 "substantial changes" to the proposed action. Indeed, the  
2 motivation for the sale, producing net revenue for the trust,  
3 has been completely removed. The sale now will cost the State  
4 money. The public and the Board of Land Commissioners may have  
5 been willing to lose valuable old growth timber for the benefit  
6 of substantial revenue to the trust, but the cost benefit has  
7 now been substantially changed. The public may not be willing,  
8 and the Board of Land Commissioners may not wish to require  
9 the public to pay to lose its old growth timber. These are  
10 significant "new circumstances bearing on the proposed action"  
11 which may very well "change the basis for the decision."

12 Moreover, the Board of Land Commissioners, which is  
13 charged with the responsibility of overseeing DNRC's actions,  
14 never approved a sale of 1.99 million board feet which will  
15 result in a loss to the State. Instead, the Board approved a  
16 6 million board feet sale netting over a million dollars for the  
17 trust. The timber harvest and sale which DNRC now purports to  
18 conduct is not the same sale that was proposed in the final EIS  
19 or that received approval. Consequently, the Court concludes a  
20 supplemental EIS is required under ARM 36.2.533.

21 The Court can find no harm in preparing the supplement.  
22 A reconsideration of the changed circumstances can only provide  
23 DNRC and the Board with better information with which to make a  
24 more informed decision. Because DNRC must prepare a more  
25 thorough cumulative impacts analysis in order to comply with

1 MEPA anyway, both the additional analysis and a reconsideration  
2 based on the changed circumstances may be accomplished by means  
3 of the supplemental EIS.

4 9. The last two Counts, VI and VII, allege trust  
5 duty violations because of the below-cost sale and insufficient  
6 economic impact analysis, respectively. The Court concludes  
7 that because DNRC is required to prepare a supplemental EIS  
8 under Count V, the economic impacts of the harvest and DNRC's  
9 trust obligations will be adequately addressed.

10 ORDER

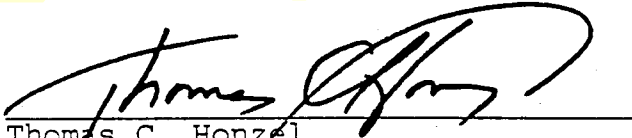
11 Based on the foregoing,

12 IT IS ORDERED:

13 1. This matter is remanded to DNRC for preparation  
14 of a cumulative impacts analysis and a supplemental EIS on the  
15 change in economic circumstances.

16 2. DNRC is enjoined from proceeding with further  
17 activities relating to the Middle Soup Creek Project timber sale  
18 until the cumulative impacts analysis and the supplemental EIS  
19 have been prepared.

20 DATED this 23<sup>rd</sup> day of December, 1998.

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22   
23 Thomas C. Honzel  
24 District Court Judge

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1 pc: Stephen C. Pohl  
Tommy H. Butler  
2 Rebecca W. Watson/  
Jeffrey M. Hindoien

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MEMORANDUM AND ORDER

Friends of Wild Swan v. DNRC  
Decided Feb. 26, 1999  
Honorable Judge Honzel  
First Judicial District

MONTANA FIRST JUDICIAL DISTRICT COURT  
COUNTY OF LEWIS AND CLARK

\*\*\*\*\* )  
FRIENDS OF THE WILD SWAN, ) Cause No. CDV-97-558  
a Montana nonprofit corporation, )  
Plaintiff, )  
 )  
vs. )  
 )  
DEPARTMENT OF NATURAL RESOURCES ) MEMORANDUM AND ORDER  
AND CONSERVATION, )  
Defendant, )  
 )  
and )  
 )  
PLUM CREEK MANUFACTURING )  
COMPANY, L.P., )  
Defendant-Intervenor. )  
\*\*\*\*\* )

Before the Court is the motion of Defendant Department of Natural Resources and Conservation (DNRC) to modify the injunction issued December 23, 1998. Also before the Court is the motion of Plaintiff Friends of the Wild Swan (FWS) for Rule 11 sanctions.

BACKGROUND

FWS brought this action to challenge the adequacy of an Environmental Impact Statement (EIS) prepared by DNRC with respect to a timber sale DNRC proposed in the Middle Soup Creek area of the Swan River State Forest. A hearing on the merits was held October 15 and 16, 1998. On December 23, 1998, the Court issued its Findings of Fact, Conclusions of Law and Order in which it remanded the matter to DNRC for preparation of a cumulative impacts analysis and a supplemental EIS on the change in economic circumstances. The Court also enjoined DNRC from proceeding with further activities relating to the Middle Soup Creek project timber sale until the cumulative impacts analysis

and the supplemental EIS had been prepared.

The EIS on the Middle Soup Creek timber sale contains mitigation controls to prevent soil compaction and other soil-related problems. Those mitigation controls include requirements that the ground be frozen and a sufficient accumulation of snow (18 to 24 inches) cover the soil before harvesting occurs. DNRC allowed Plum Creek to begin harvesting trees by hand on December 15, 1998, even though the ground was not frozen and there was no measurable accumulation of snow. Between December 15, 1998, and December 23, 1998, when the Court's injunction issued, Plum Creek felled approximately 90,000 board feet of timber. That timber is still laying on the ground in the Middle Soup Creek project area. DNRC asks this Court to modify its injunction to allow Plum Creek to remove the downed timber before its value is compromised.

DNRC also requests that the Court require FWS to post a bond in the amount of \$13,404 or \$17,212, depending on whether the felled timber is allowed to be removed, in order to cover potential costs if, on appeal, the injunction turns out to have been improperly issued.

In response, FWS contends that DNRC specifically misled the public with respect to the beginning date of harvesting activities and began harvesting in violation of the mitigation controls specified in the final EIS. FWS also argues that a bond is inappropriate under the facts and circumstances surrounding this case. In addition, FWS seeks imposition of Rule 11 sanctions on the basis that DNRC acted in bad faith by seeking modification of the injunction and by inappropriately requesting a bond.

#### DISCUSSION

Having fully considered the arguments of counsel and the Court's Order of December 23, 1998, the Court concludes that DNRC's motion to modify the injunction and to require Plaintiff to post a bond should be denied. The Court further concludes that FWS's request for Rule 11 sanctions should be denied.

At the time DNRC allowed Plum Creek to begin harvesting trees, no injunction was in effect. Plaintiff's counsel was aware that DNRC might allow Plum Creek to begin cutting trees on December 15 and, in fact, Plaintiff's counsel, with the consent of DNRC's counsel, contacted the Court about that possibility. Counsel was informed that although the Court hoped to have a decision out by the middle part of December, it did not know for certain whether the decision would be issued by December 15, and that if there was a concern, the Court would consider an application for a temporary restraining order. FWS did not

request a temporary restraining order. This, however, does not mean that DNRC should be able to conduct further activities on the project, even limited activities, without preparing a cumulative impacts analysis and a supplemental EIS. Rather, DNRC should comply with that part of the Court's Order before proceeding with further activity.

DNRC argues that Section 77-1-110, MCA, requires the Court to order FWS to post a bond during the pendency of appeal by DNRC. That section provides:

In any civil action seeking an injunction or restraining order concerning a decision of the board approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board is wrongfully enjoined or restrained.

The Middle Soup sale is expected to lose money. It is difficult to comprehend how damages might be incurred as a result of enjoining the project, particularly when the project, if allowed to proceed, will lose money. The Court concludes, therefore, that FWS should not be required to post a bond.

Rule 11, M.R.Civ.P., states in part:

Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The fact that DNRC may have violated the mitigation controls prescribed in the EIS does not implicate Rule 11. If DNRC acted in bad faith or violated the EIS, there are specific statutory remedies, but Rule 11 sanctions is not one of those remedies. Nor does Rule 11 constitute grounds to impose sanctions merely

because DNRC sought to have a bond posted. Section 77-1-110, MCA, is a fairly new provision, having been enacted in 1995. The Court cannot say DNRC acted in bad faith by seeking to have a bond posted. Therefore, the Court declines to impose Rule 11 sanctions against DNRC.

NOW, THEREFORE, IT IS ORDERED:

1. The motion of DNRC to modify the injunction is DENIED.
2. The motion of Friends of the Wild Swan for Rule 11 sanctions is DENIED.

DATED this 26th day of February, 1999.

Thomas C. Honzel  
District Court Judge



## DECISION

No. 99-158

IN THE SUPREME COURT OF THE STATE OF MONTANA

2000 MT 209

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FRIENDS OF THE WILD SWAN, a  
nonprofit corporation,

Plaintiff, Respondent, and  
Cross-Appellant,

v.

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION,

Defendant, Appellant, and  
Cross-Respondent.

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APPEAL FROM: District Court of the First Judicial District,  
In and for the County of Lewis and Clark,  
The Honorable Thomas C. Honzel, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Tom Butler and Michael J. Mortimer, Montana Department of  
Natural Resources & Conservation, Helena, Montana

For Respondent:

Stephen C. Pohl, Attorney at Law, Bozeman, Montana

For Amicus:

Rebecca W. Watson, Gough, Shanahan, Johnson & Waterman,  
Helena, Montana

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Submitted on Briefs: November 4, 1999

Decided: August 8, 2000

Filed:

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Clerk

Justice Terry N. Trieweiler delivered the opinion of the Court.

1. ¶ The Plaintiff, Friends of the Wild Swan, brought this action in the District Court for the First Judicial District in Lewis and Clark County to challenge the sufficiency of the Environmental Impact Statement (EIS) prepared by the Defendant, Montana Department of Natural Resources and Conservation (DNRC), for the Middle Soup Creek Project pursuant to the Montana Environmental Policy Act (MEPA) §§ 75-1-201, et seq., MCA. The District Court held that the EIS prepared by the DNRC inadequately addressed the cumulative impacts of the project and also held that the DNRC should have prepared a supplemental EIS due to changed economic circumstances of the project. The District Court enjoined any harvest of timber on the Middle Soup Creek Project until the DNRC prepares the

supplemental EIS. DNRC appeals from that judgment. Friends of the Wild Swan cross-appeals from the District Court's denial of Rule 11 sanctions against the DNRC. We affirm the judgment of the District Court.

2. ¶¶The following issues are presented on appeal by the DNRC:
3. ¶1. Did the District Court err when it held that the DNRC violated the MEPA by its failure to include an adequate cumulative impacts analysis in its EIS?
4. ¶2. Did the District Court err when it held that the DNRC was required to prepare a supplemental EIS?
5. ¶3. Did the District Court err when it held that Friends of the Wild Swan was not required to provide a postappeal injunction bond pursuant to § 77-1-110, MCA?
6. ¶¶The following issue is presented on cross-appeal by Friends of the Wild Swan:
7. ¶4. Did the District Court err when it denied Friends of the Wild Swan's motion for imposition of Rule 11, M.R.Civ.P., sanctions against the DNRC?

### FACTUAL BACKGROUND

1. ¶¶This dispute relates to the DNRC's proposed timber sale, known as the Middle Soup Creek Project, on land near Swan Lake, Montana. The land is owned by the State of Montana and held in trust by the DNRC for the support of the public schools pursuant to Article X of the Montana Constitution. The purpose of the project is to generate both short-and long-term revenue for the Montana School Trust. The project, as originally proposed, involved the harvest of approximately 6 million board feet of timber on 2591 acres of Swan Valley forest. Approximately 50 percent of the Swan Valley forest consists of old growth, including one of the last large stands of old growth remaining in Montana.
2. ¶¶In September 1996, the DNRC issued a draft EIS which discussed the impacts of four alternative management plans for the Middle Soup Creek Project. Alternative "A" required no action and would have left the Middle Soup Creek area unmanaged and permitted the DNRC to enter into a 20-year conservation lease. Alternative "B" required intensive management and was designed to promote sustainability of the ecosystem by harvesting approximately 5.2 million board feet of timber. Alternative "C" required preservation of old growth timber, while permitting the harvest of approximately 150,000 board feet of saw-timber stand. Alternative "D" maximized timber productivity by harvesting approximately 5.6 million board feet of old growth, saw-timber, and multistoried stands.
3. ¶¶Following public hearings and comments, the DNRC issued the final Middle Soup Creek Project EIS in February 1997. Alternative "B" was identified as the preferred alternative because of its economic viability and its positive short- and long-term benefits in accordance with the State Forest Land Management Plan philosophy and its Resource Management Standards. Alternative "B" was projected to generate approximately \$1,045,572 in net revenue in the short-term, and was to be accomplished by using a harvesting process known as "structural enhancement," in which selected trees would be cut in order to mimic historical forest conditions.
4. ¶¶In July 1997, the Board of Land Commissioners approved the Middle Soup Creek timber sale. The minutes of the board's meeting reflect their approval of a harvest of approximately 3.8 million board feet from 970 acres of the Swan Valley forest. There was no explanation for reduction of the sale from 5.2 million board feet as proposed in the final EIS to 3.8 million board feet as approved by the board.
5. ¶¶On September 4, 1997, Friends of the Wild Swan, a Montana nonprofit

corporation dedicated to preserving the natural environment of the Swan Valley, filed a complaint alleging various violations of the MEPA by the DNRC in its final EIS, including inadequate environmental analysis. Friends of the Wild Swan sought an order directing the DNRC to complete an EIS in accordance with the MEPA and an injunction prohibiting the DNRC from proceeding with any activity in furtherance of the Middle Soup Creek Project until a proper EIS was prepared.

6. ¶ On September 10, 1997, the DNRC entered into a contract with Plum Creek Manufacturing Company for the harvest of 3.8 million board feet of timber on the Middle Soup Creek Project. Pursuant to the contract, the DNRC staff marked the trees to be harvested by Plum Creek with orange paint.
7. ¶ Following the DNRC's selection of trees to be harvested, Friends of the Wild Swan requested Sara Johnson, Ph.D., a wildlife biologist, to review the site of the sale, the selection of trees by the DNRC, and the final EIS. Johnson concluded that the selection of trees by the DNRC was more extensive than described by the final EIS, and that the final EIS was misleading to the public regarding the amount of old growth timber to be harvested.
8. ¶ On January 5, 1998, Friends of the Wild Swan and the DNRC stipulated that no timber would be harvested on the Middle Soup Creek Project until December 1, 1998. As a result of the parties' stipulation, Friends of the Wild Swan withdrew its pending motion for a preliminary injunction.
9. ¶ On March 16, 1998, the DNRC sent a letter to all interested parties and acknowledged that it had made a mistake when it identified the trees to be harvested by Plum Creek. The DNRC explained that proper identification of the trees would result in a harvest of fewer and smaller trees, which in turn would reduce the volume of timber harvested from 3.8 million board feet to 1.99 million board feet. Because of the reduction in volume and tree size, the DNRC and Plum Creek negotiated a reduced price per thousand board feet of timber harvested.
10. ¶ On October 6, 1998, Friends of the Wild Swan filed its Second Amended Complaint which added the alleged MEPA violation of failure to prepare a supplemental EIS in light of the changed economic circumstances of the sale.
11. ¶ On October 15 and 16, 1998, the District Court held a hearing to consider the merits of Friends of the Wild Swan's complaint.
12. ¶ The parties' stipulation that no harvest would occur expired on December 1, 1998. Friends of the Wild Swan received a letter from the DNRC dated November 27, 1998, which informed them that "Plum Creek timber Company is preparing to begin harvesting operations on December 1 or as soon after that date when the desired environmental conditions are achieved." The letter further informed them that the "sale contract allows logging activities to begin on December 1, 1998, if there is at least 18 inches of snow accumulation and freezing temperatures. Logging activities may begin on December 15 if there is at least 24 inches of snow accumulation, even though temperatures may not be freezing." Friends of the Wild Swan recognized that these environmental conditions were also set forth in the EIS as required mitigators for reducing impact upon the soil.
13. ¶ In an affidavit dated January 14, 1999, Arlene Montgomery, Director of Friends of the Wild Swan, stated that she personally made visits to the Middle Soup Creek Project area on November 28 and December 18, 1998, and on both occasions it was raining and muddy, there was no measurable snow accumulation on the ground, nor was the ground frozen.
14. ¶ On December 23, 1998, the District Court issued its findings of fact, conclusions

of law, and order in which the District Court held that the DNRC was required to include a cumulative impacts analysis in the EIS and a supplemental EIS as a result of the change in economic circumstances. The order enjoined the DNRC from proceeding with further activities relating to the Middle Soup Creek Project until the supplemental EIS and the cumulative impacts analysis have been prepared.

15. ¶ On December 29, 1998, the DNRC filed a motion and brief requesting the District Court to modify the injunction issued in its December 23, 1998 order. In its motion, the DNRC admitted that it had allowed Plum Creek to commence harvesting timber on the Middle Soup Creek Project on December 15, 1998, and then ordered Plum Creek to cease activities upon receipt of the District Court's order on December 23, 1998. As a result, the DNRC requested the District Court to modify its injunction to allow the DNRC and Plum Creek to remove any timber that was felled prior to December 23, 1998. Additionally, the DNRC requested that the District Court require Friends of the Wild Swan to post an injunction bond pursuant to § 77-1-110, MCA, to compensate the school trust beneficiaries should the injunction be wrongful.
16. ¶ On January 11, 1999, the DNRC sent a letter to Arlene Montgomery, Director of Friends of the Wild Swan, which detailed the timber harvesting that occurred prior to December 23, 1998 on the Middle Soup Creek Project. The DNRC explained that 90,000 board feet of timber was cut by Plum Creek during that time and that the harvesting was done pursuant to a timber sale inspection report in which the DNRC "gave approval for the felling of timber in Unit #1 to proceed, but due to unfrozen wet soils . . . did not allow skidding activities to proceed."
17. ¶ On January 21, 1999, Friends of the Wild Swan sought Rule 11, M.R.Civ.P. sanctions against the DNRC for its motion to modify the injunction and request for Friends of the Wild Swan to post an injunction bond.
18. ¶ On February 26, 1999, the District Court issued its memorandum and order denying the DNRC's motion for modification of the injunction and request for an injunction bond and denying Friends of the Wild Swan's motion for Rule 11 sanctions.
19. ¶ The DNRC filed its notice of appeal on March 2, 1999, and Friends of the Wild Swan filed its notice of cross-appeal on March 16, 1999.

#### STANDARD OF REVIEW

1. ¶ The proper standard of review of an administrative decision pursuant to the Montana Environmental Policy Act (MEPA), is whether the record establishes that the agency acted arbitrarily, capriciously or unlawfully. *North Fork Preservation Ass'n v. Department of State Lands* (1989), 238 Mont. 451, 465, 778 P.2d 862, 871. In *North Fork Preservation Ass'n*, we stated that:

[I]n making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one."

*North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871 (quoting *Marsh v. Oregon*

*Natural Resources Council (1989), 490 U.S. 360, 378).*

1. ¶In *Marsh*, the U.S. Supreme Court stated:

[I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance-or lack of significance-of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

*Marsh, 490 U.S. at 378.*

1. ¶In *North Fork Preservation Ass'n*, 238 Mont. at 460, 778 P.2d at 868, we stated that the omission of the cumulative impacts analysis was directly relevant to the "unlawful" portion of our standard of review.

## DISCUSSION

### ISSUE 1

1. ¶Did the District Court err when it held that the DNRC violated the MEPA as a result of its failure to include an adequate cumulative impacts analysis in its EIS?
2. ¶The DNRC asserts that the District Court erred when it found that the EIS prepared by the DNRC for the Middle Soup Creek Project was insufficient because it did not adequately analyze and discuss the cumulative impacts of the project. The DNRC contends that the District Court failed to comprehend that the new "coarse filter" ecological analysis takes into account all of the prevailing conditions of the affected lands and therefore incorporates a cumulative effects analysis. The DNRC argues that the District Court's primary error was its "disregard for the evidence presented that each of the court's concerns had in fact been considered in the preparation of the final EIS, and that the cumulative impacts of all the past and present actions were carefully considered."
3. ¶In response, Friends of the Wild Swan contends that even if the DRNC's new "coarse filter" approach is recognized as valid and includes cumulative impacts analysis as part of its methodology, the MEPA still requires a cumulative impacts analysis in every EIS and therefore the DNRC is required to include the requisite discussion in its EIS.
4. ¶The Administrative Rules of Montana provide in relevant part as follows:

#### **36.2.529 Preparation and Contents of Draft Environmental Impact Statements**

**If required by these rules, the agency shall prepare a draft environmental impact statement using an interdisciplinary approach and containing the following:**

....

(4) a description of the impacts on the quality of the human environment of the proposed action including:

.....

(b) primary, secondary, and cumulative impacts;

### 36.2.522 Definitions

.....

**(7) "Cumulative impact" means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.**

.....

(12) "Human environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary, economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.

1. ¶The District Court found that:

The purpose of allowing public involvement in environmental decision-making is frustrated if an EIS does not accurately describe the impact of proposed action in the context of past, present and future proposed action. The average member of the public must rely on DNRC's expertise, and therefore, DNRC must give sufficient information



so that the public can make a meaningful evaluation of the proposed action. To do so, a thorough analysis and discussion of cumulative impacts is necessary. The legislature recognized as much, making a cumulative impacts analysis mandatory. A thorough analysis of cumulative impacts is lacking here.

1. ¶The DNRC argues that the District Court's findings were erroneous because, although Rule 36.2.529, ARM, requires a cumulative effects analysis, the Administrative Rules do not dictate any particular methodology. However, we conclude that Rule 36.2.529(4)(b), ARM, clearly states that the EIS shall contain a description of the cumulative effects and does not allow, as the DRNC suggests, mere analysis implicit within the EIS. The public is not benefited by reviewing an EIS which does not explicitly set forth the actual cumulative impacts analysis and the facts which form the basis for the analysis.
2. ¶The DNRC additionally argues that the District Court erred when it relied on Rule 36.2.524(1)(g), ARM, to conclude that the DNRC's cumulative impacts analysis was also inadequate for its failure to reconcile the proposed action with the State Forest Land Management Plan (SFLMP). The DNRC states that Rule 36.2.524, ARM, "applies only to the analysis performed in attempting to ascertain whether an EIS should be prepared. . . . This section is not a substantive element to be contained within an EIS."
3. ¶Rule 36.2.524, ARM, states, in relevant part:

(1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and *also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs*. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

....

(g) *potential conflict with local, state, or federal laws, requirements, or formal plans;*

(Emphasis added.) Clearly, Rule 36.2.524, ARM, pertains to the contents of an EIS, in addition to the decision of whether or not to prepare an EIS.

1. ¶The DNRC further contends that the EIS did discuss the SFLMP. We note that the District Court did recognize discussion of the SFLMP, stating that: "Although the Middle Soup Creek final EIS does discuss old growth and fragmentation, listing them as 'concerns,' it does not discuss the SFLMP's objective to preserve old growth, reduce fragmentation, and protect unique habitat." The District Court was correct.
2. ¶Accordingly, we conclude that the EIS prepared by the DNRC fails to comport

with the provision in Rule 36.2.529(4)(b), ARM, which requires an explicit discussion of the cumulative impacts analysis, in accordance with the definitions of "cumulative impact" and "human environment" set forth at Rule 36.2.522, ARM, or with the provision provided by Rule 36.2.524(1)(g), ARM. As a result, we conclude that the DNRC acted unlawfully, in violation of the MEPA, in its preparation of the EIS for the Middle Soup Creek Project. Therefore, we further conclude that the District Court did not err when it held that the DNRC violated the MEPA as a result of its failure to include an adequate cumulative impacts analysis in its EIS.

## ISSUE 2

1. ¶ Did the District Court err when it held that the DNRC was required to prepare a supplemental EIS?
2. ¶ The DNRC contends that the District Court erred by concluding that a supplemental EIS is required, because there was no proof offered by Friends of the Wild Swan that a reduction in the total timber sale revenue would result in any physical impact to the human environment. The DNRC argues based on Rule 36.2.522(12), ARM, that a change in economic impacts alone does not compel the preparation of a supplemental EIS. The DNRC further asserts that it acted reasonably in preparing its economic estimate and did not portray the economic returns in the EIS as reliable estimates of absolute, guaranteed revenues.
3. ¶ In response, Friends of the Wild Swan asserts that the DNRC's failure to supplement the EIS was arbitrary and capricious in light of the substantial changes in the proposed action. Friends of the Wild Swan points out that the final EIS described a sale of nearly 6 million board feet of timber, estimated to net over a million dollars in revenue for the school trust. Whereas, the sale as now proposed describes a sale of 1.99 million board feet of timber, which is estimated to result in a loss to the State.
4. ¶ The final EIS identifies Alternative "B" as the preferred alternative and sets forth an estimated sale of 5.2 million board feet of timber. The final EIS further states that Alternative "B" is projected to generate approximately \$1,045,572 of net revenue in the short-term. The final EIS states that:

The objective of the Middle Soup Creek Project is to generate the largest, reasonable monetary return to the school trust in both the short term and long term by either selling approximately six million board feet of timber or selling a twenty-year conservation lease. Alternatives A and C are each projected to generate negative net revenue if harvested this year or if harvesting is deferred for twenty years. These alternatives do not meet the project objective and therefore are not considered further.

1. ¶ It appears that by the time of the meeting of the Board of Land Commissioners on July 21, 1997, the DNRC had re-estimated the Middle Soup Creek Timber Sale to include the sale of 3.8 million board feet of timber and \$812,605 in revenue. In April 1998, following the discovery of the mismarked trees in the Middle Soup Creek Project, the DNRC notified Friends of the Wild Swan that the project would be further reduced to 1.99 million board feet of timber and \$350,000 in revenue. However, the costs to the State of the Middle Soup Creek Project, including the MEPA costs, sale preparation costs, administrative costs and treatment costs has

reached approximately \$500,000. Accordingly, the DNRC's proposed sale of 1.99 million board feet results in a loss of approximately \$150,000 to the State.

2. ¶Rule 36.2.533, ARM, provides in relevant part as follows:

(1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

(a) the agency or the applicant makes a substantial change in a proposed action;

....

(2) A supplement must include, but is not limited to, a description of the following:

....

(c) any impacts, alternatives or other items required by ARM 36.2.529 for a draft EIS or ARM 36.2.531 for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.

1. ¶We conclude that, contrary to the DNRC's assertions, there is no requirement in Rule 36.2.533, ARM, that a substantial change must result in an additional impact to the environment before a supplemental EIS is required. There is no limitation on what may be considered a "substantial change". Accordingly, we further conclude that a substantial economic change in a project can serve as the basis for the supplemental EIS required by Rule 36.2.533, ARM.
2. ¶In this case, the District Court found that:

The substantial change in the harvest quantity and in the net revenue resulting from the harvest certainly are "substantial changes" to the proposed action. Indeed, the motivation for the sale, producing net revenue for the trust, has been completely removed. The sale now will cost the State money. The public and the Board of Land Commissioners may have been willing to lose valuable old growth timber for the benefit of substantial revenue to the trust, but the cost benefit had now been substantially changed. The public may not be willing, and the Board of Land Commissioners may not wish to require the public to pay to lose its old growth timber.

1. ¶We conclude that the change in economic circumstances in the Middle Soup Creek Project was a "substantial change" pursuant to Rule 36.2.533, ARM, which

required the preparation of a supplemental EIS. Accordingly, we conclude that the DNRC's decision not to supplement the EIS was a clear error of judgment. Therefore, we further conclude that the District Court did not err when it held that the DNRC was required to prepare a supplemental EIS.

### ISSUE 3

1. ¶ Did the District Court err when it held that Friends of the Wild Swan was not required to post a postappeal injunction bond pursuant to § 77-1-110, MCA?
2. ¶ The DNRC contends that § 77-1-110, MCA, required the District Court to order Friends of the Wild Swan to post an injunction bond during the pendency of this appeal.
3. ¶ Section 77-1-110, MCA, provides:

In any civil action seeking an injunction or restraining order concerning a decision of the board approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board is wrongfully enjoined or restrained.

1. ¶ The District Court concluded that because the Middle Soup sale was expected to lose money, it would be difficult to comprehend how damages might be incurred as a result of enjoining the project and, therefore, concluded that Friends of the Wild Swan was not required to post a bond.
2. ¶ On appeal, Friends of the Wild Swan contends that the DNRC has no standing to invoke § 77-1-110, MCA, because that statute only pertains to actions enjoining a decision of the State Land Board. Friends of the Wild Swan argues that, here, no injunction has been issued against the Land Board, nor is the Land Board even a party to this action.
3. ¶ Section 77-1-110, MCA, provides for a bond in a civil action "seeking an injunction or restraining order *concerning a decision of the board*" for damages "that may be incurred by the trust beneficiary if the *board* is wrongfully enjoined or restrained." (Emphasis added.) This statute does not apply to this case which deals with an injunction against the DRNC based on the inadequacy of its EIS and has no effect on the Land Board's decision.
4. ¶ Therefore, we conclude that the District Court came to the right conclusion, whether or not it was for the right reason and that Friends of the Wild Swan was not required to post an injunction bond pursuant to § 77-1-110, MCA.

### ISSUE 4

1. ¶ The following issue is presented on cross-appeal by Friends of the Wild Swan:
2. ¶ Did the District Court err when it denied Friends of the Wild Swan's motion for imposition of Rule 11, M.R.Civ.P., sanctions against the DNRC?
3. ¶ This Court gives a district court broad discretion to determine whether the factual circumstances of a particular case amount to frivolous or abusive litigation tactics. Accordingly, we apply the following standard of review:

A district court's findings of fact will be overturned if clearly erroneous. The court's legal conclusion that the facts constitute a violation of Rule 11 will be reversed if the determination constitutes an abuse of discretion. We will review the case de novo only if the violation is based on the legal sufficiency of a plea or motion.

*D'Agostino v. Swanson* (1990), 240 Mont. 435, 446, 784 P.2d 919, 926.

1. ¶Friends of the Wild Swan contends that Rule 11, M.R.Civ.P. clearly applies to the circumstances underlying the DNRC's request for an injunction bond pursuant to § 77-1-110, MCA, and request for modification of the District Court's injunction. Friends of the Wild Swan asserts that the DNRC's request of the District Court to allow it to sell the "illegally harvested timber" and to require an injunction bond, was made solely to harass and cause needless increase in the costs of this litigation.
2. ¶Rule 11, M.R.Civ.P., provides:

The signature of an attorney or party constitutes a certificate by the signer that the signer had read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

1. ¶The District Court found the following:

The fact that DNRC may have violated the mitigation controls prescribed in the EIS does not implicate Rule 11. If DNRC acted in bad faith or violated the EIS, there are specific statutory remedies, but Rule 11 sanctions is not one of those remedies. Nor does Rule 11 constitute grounds to impose sanctions merely because DNRC sought to have a bond posted. Section 77-1-110, MCA, is a fairly new provision, having been enacted in 1995. The Court cannot say DNRC acted in bad faith by seeking to have a bond posted. Therefore, the Court declines to impose Rule 11 sanctions against DNRC.

1. ¶We conclude that the District Court's findings that the DNRC did not act in bad faith are not clearly erroneous, and that the District Court did not abuse its discretion. Therefore, we affirm the District Court's denial of Rule 11, M.R.Civ.P. sanctions against the DNRC.
2. ¶The judgment of the District Court is affirmed.

/S/ TERRY N. TRIEWELER

We Concur:

/S/ KARLA M. GRAY

/S/ JIM REGNIER

/S/ JAMES C. NELSON

/S/ W. WILLIAM LEAPHART

**GOUGH, SHANAHAN, JOHNSON & WATERMAN**

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TERI A. WALTER  
RONALD F. WATERMAN  
REBECCA W. WATSON

RECEIVED  
AUG 10 2000

August 9, 2000

Via U.S. Mail:

Cary Hegreberg  
Montana Wood Products  
2027 - 11 Ave  
Helena, MT 59601

Loren Rose  
Seeley Lake School District  
c/o Pyramid Mountain Lumber, Inc.  
P.O. Box 549  
Seeley Lake, MT 59868

Jim Kranz  
Plum Creek Timber Company  
500 12th Avenue West  
Columbia Falls, MT 59912

**RE: *Friends of the Wild Swan v. Department of Natural Resources,*  
2000 MT 209 (2000) (Middle Soup Sale)**

Gentlemen:

This is to inform you that the Montana Supreme Court has brought the most recent chapter in the Middle Soup Sale saga to a close. On August 8, 2000, the Supreme Court affirmed the decision of the district court in all respects. *See enclosed.* The opinion confined its discussion to the Montana Environmental Policy Act (MEPA) environmental impact statement (EIS) issues and did not address the issue of the interplay between MEPA and the Trust duty to generate income we raised in our *amicus* brief. As you may recall, the key issues on appeal were:

- 1) the adequacy of the EIS discussion of cumulative impacts;

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- 2) does a change in the economics of the sale trigger a need to supplement the EIS; and
- 3) were the plaintiffs required to post a bond when they enjoined the sale.

As to the first issue, DNRC argued that its "coarse filter" environmental analysis method implicitly incorporated a cumulative effects analysis. Since MEPA rules do not dictate a particular method of cumulative effects analysis the Court should defer to DNRC's agency expertise that the coarse filter analysis fulfilled the requirement for a cumulative effects analysis. The Court rejected this approach and held:

[T]he EIS shall contain a *description* of the cumulative effects and does not allow, as the DNRC suggests, mere analysis implicit within the EIS. The public is not benefitted by reviewing an EIS which does not explicitly set forth the actual cumulative impacts analysis and the facts which form the basis for the analysis.

In addition, DNRC also argued that it was not required to specifically address in the EIS how the proposed action related to the requirements of the State Forest Land Management Plan (SFLMP). The Court held MEPA rules required DNRC specifically to discuss the "SFLMP's objective to preserve old growth, reduce fragmentation, and protect unique habitat."

As to the second issue, DNRC argued that only substantial changes that would impact the *environment* trigger a need to supplement the EIS. The Court rejected this,

[T]here is no requirement in [MEPA rules] that a substantial change must result in an additional impact to the environment before a supplemental EIS is required. There is no limitation on what may be considered a 'substantial change.' Accordingly, we further conclude that a substantial economic change in a project can serve as the basis for the supplemental EIS required by [MEPA rule].

As to the third issue, DNRC argued that a recently enacted statute, section 77-1-110, MCA, required that a bond be posted when seeking an injunction against the Department concerning a Trust revenue producing action. The Court rejected DNRC's interpretation of the statute and agreed with the Friends of the Wild Swan that the statute is narrowly focused on an injunction concerning "a *decision of the board* for changes that may be incurred by the trust beneficiary if the *board* is wrongfully enjoined or restrained (quoting the statute)." The Court concluded, "This statute does not apply to this case which deals with an injunction against the DNRC based on the inadequacy of its EIS and has no effect on the Land Board's decision."



Gough, Shanahan, Johnson & Waterman

August 9, 2000

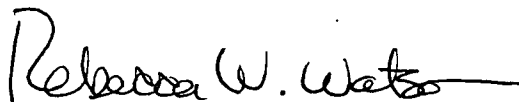
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In summary, the Court has refused to accord the DNRC the deference owed to an "expert" administrative agency and has applied a strict construction to the MEPA rules to find DNRC's EIS analysis inadequate. The Court has also ignored relevant NEPA case law on whether impacts other than to the environment can trigger a duty to supplement and has made it much easier to trigger a supplemental EIS in Montana. Finally, it has narrowed the application of the bond posting statute to only actions involving Board decisions and lawsuits against the Board and not DNRC income-producing activities on State lands. The latter holding is contrary to the legislative intent expressed during the passage of this statute.

If you have any questions, please give me a call.

Sincerely,

GOUGH, SHANAHAN, JOHNSON, & WATERMAN

A handwritten signature in black ink that reads "Rebecca W. Watson". The signature is written in a cursive style with a long horizontal stroke at the end.

Rebecca W. Watson

Enclosure

## DNRC Timber Sale Cancelled

**From:**  [cmassman@state.mt.us](mailto:cmassman@state.mt.us), Internet

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Date: November 3, 2000  
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FOR IMMEDIATE RELEASE

### MIDDLE SOUP CREEK TIMBER SALE CANCELLED

The Montana Department of Natural Resources and Conservation (DNRC) has determined that continuation of the Middle Soup Creek timber sale project in the Swan River State Forest is not in the state's best interest at this time. The decision not to proceed with this sale was precipitated in light of a recent Montana Supreme Court ruling regarding the management of state school trust timber resources.

In August 2000, the Montana Supreme Court upheld the First Judicial District Court's ruling that the Middle Soup Creek Final Environmental Impact Statement (EIS) failed to adequately assess cumulative impacts of past and proposed logging; failed to discuss the State Forest Land Management Plan's objective to preserve old growth, reduce fragmentation, and protect unique habitat; and failed to complete a supplemental EIS as required to analyze the economic differences between the original sale (6 million board feet), and the final sale (2 million board feet) approved by the State Board of Land Commissioners.

In light of this ruling, current workloads, and the protracted history of the Middle Soup Creek timber sale (an earlier version of this sale was first proposed in 1992), DNRC has decided to cancel this timber sale project. The Middle Soup Creek timber sale contract with Plum Creek Timber Company was terminated on September 25, 2000.

Even though this particular project has been dropped, DNRC will strive to actively manage the Swan River State Forest, including the Soup Creek drainage, in accordance with the State Forest Land Management Plan, the Swan Valley Grizzly Bear Conservation Agreement, and all applicable state and federal laws, including the lessons learned from the recent court ruling.

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