

Friends of the Wild Swan v. Department of State Lands, et al.
DV 89-074(A), 11th Judicial District
Judge Keller
Decided 1991

MEPA Issue Litigated: Was the MEPA analysis adequate?

Court Decision: Yes

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

Court Decision: No

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

FRIENDS OF THE WILD SWAN, a)	
Montana non-profit)	
corporation,)	
)	
Plaintiff,)	No. DV-89-074(A)
)	
-vs-)	FINDINGS OF FACT.
)	CONCLUSIONS OF LAW
DEPARTMENT OF STATE LANDS,)	AND JUDGMENT
)	
Defendant.)	
)	
and)	
)	
MONTANA WOOD PRODUCTS)	
ASSOCIATION,)	
)	
Defendant/Intervenor.)	

Trial of the above entitled matter came on before the Court, without a jury, on June 25, 1990. with the Plaintiff represented by Jon L. Heberling, Esq. and Roger M. Sullivan, Esq., and the Department of State Lands represented by John F. North, Esq. and Richard R. Thweatt, Esq., and the Montana Wood Products Association represented by Marcelle Shoop, Esq., Donald I.

1 Schultz, Esq. and Kent P. Saxby, Esq.; evidence, both oral and
2 documentary, was introduced, and the Court being fully apprised,
3 makes the following Findings of Fact, Conclusions of Law and
4 Judgment:

5 FINDINGS OF FACT

6 1. Friends of the Wild Swan (hereinafter referred to as
7 FOWS) is a Montana non-profit corporation with its registered
8 agent in Kalispell, Montana. Agreed Fact #1.

9 2. The Department of State Lands (hereinafter referred to
10 as DSL) is an agency of the State of Montana. The DSL, Forestry
11 and Field Operations Divisions, has the management responsibility
12 for the school trust forest lands, under the general direction of
13 the Board of Land Commissioners. For administrative purposes, the
14 DSL has divided the State geographically into six administrative
15 areas. Each area is administered by a separate State Land Office
16 organized and staffed to provide the needed support to the DSL'
17 programs. The Northwestern Land Office is located at Kalispell,
18 Montana. The Northwestern Land Office is directly responsible for
19 supervision of the management of a number of units, including the
20 Swan Unit, located in the vicinity of the community of Swan Lake,
21 Montana, and including the Swan River State Forest. Agreed Fact
22 #2. The seven state forests are located across the State of
23 Montana, often with hundreds of miles between them. Exh. A.

24 The DSL administers approximately 5,163,000 acres of state
25 trust land; of this, approximately 590,000 acres is commercial
26 forest land administered by the Forestry Division. About half of

1 the commercial forest land lies in scattered sections across
2 western Montana. The remaining half is in more or less
3 consolidated blocks of state forest land such as the Swan River
4 State Forest. About half of the land lying in such blocks is
5 actually in mixed "checkerboard" ownership with privately or
6 federally owned lands. Agreed Fact #17.

7 3. The Montana Wood Products Association (hereinafter
8 referred to as MWPA) is a non-profit corporation comprised of
9 several timber companies and business interests that are involved
10 with the timber industry. The members of the MWPA are responsible
11 for harvesting and processing a majority of logs and timber that
12 are harvested and processed in northwest Montana. Its members
13 include those timber companies which currently have timber sale
14 contracts in the Swan River State Forest. Its members also
15 include the timber organizations that have had contracts in the
16 past and intend to bid upon such contracts in the immediate
17 future. These companies include, but are not limited to, the
18 following: Plum Creek Timber Company, F.H. Stoltze Land & Lumber
19 Company, Flathead Lumber Company, Pyramid Lumber and Champion
20 International. Several members of the MWPA currently hold timber
21 contracts with the State of Montana on DSL lands and all members
22 have a significant interest in maintaining their ability to
23 competitively bid on timber sales within the Swan River State
24 Forest. Agreed Fact #3.

25 4. FOWS is a corporation dedicated to conservation of the
26 natural environment, and its standing to sue has been stipulated.

1 5. Officers and directors of FOWS reside in the Swan Valley
2 and fish, hike, observe wildlife, and recreate in areas directly
3 affected by management of the Swan River State Forest.

4 6. Managers of the Swan River State Forest have taken the
5 position that the State Forest is open to public access.

6 7. An Environmental Impact Statement (EIS) was prepared for
7 the Swan River State Forest Management Plan in July 1978. Exh.
8 1. The 1978 EIS provides substantial background information on
9 the forest.

10 8. The Swan River State Forest (Swan Forest) is located
11 approximately 50 miles southeast of Kalispell, Montana. Exh. 1,
12 p.1; Vicinity Map, p.3.

13 9. The total area within the boundaries of the Swan Forest
14 is 69,714 acres. Exh. 1, p.16. Of this area, 38,912 acres of
15 state lands, and the balance of 30,802 acres are primarily U.S.
16 Forest Service and Plum Creek Timber Company lands. Exh. 1, p.16:
17 Ownership Map, p.13. Most of the forest is in what is commonly
18 known as "checkerboard" ownership. Management decisions by other
19 "checkerboard" landowners affect the Swan Forest lands and
20 resources. Exh. 1, p.2.

21 10. The Swan Forest is comparatively rich in fish and
22 wildlife resources. Exh. 1, pp. 32, 47.

23 11. Aerial photos of portions of the Swan Forest show some
24 effects of management activities by the various owners in the
25 area, including substantial areas of clearcuts. Exh. 20b-c.

26 12. The 1978 EIS set a harvest level for the forest of 240

1 acres per year, resulting in a projected average annual volume of
2 3.6 million board feet (mmbf). Exh. 1, p.20. DSL still continues
3 at this harvest level as set in the 1978 EIS. Exh. 13.

4 13. The 1978 EIS provides for a 105-year rotation on the
5 commercial forest zone. Exh. 1, p.20. This meant that all old
6 growth stands on the commercial forest (Map, p.21) would be
7 liquidated.

8 14. The 1978 EIS presented a programmatic review of the Swan
9 Forest Management Program, including maps of environmentally
10 sensitive areas, the evaluation of alternatives for forest
11 management, and analysis of environmental impacts. Agreed Fact
12 #5.

13 15. Since 1978, no further management plan or EIS has been
14 done on the Swan River State Forest. The DSL has never done an
15 EIS on a timber sale on the Swan River State Forest. Agreed Fact
16 #6.

17 16. DSL has no plans to do an EIS on the Swan River State
18 Forest. Agreed Fact #12. DSL does not plan a programmatic review
19 which is an EIS or an Environmental Assessment (EA) on the forest.

20 17. The 1978 EIS states, at page 2:

21 Because future needs and conditions cannot be predicted
22 with certainty, the Swan River State Forest Plan is
23 purposely designed to provide management flexibility as
24 forest conditions change, advanced technology becomes
25 available, additional resource data becomes known,
26 funding levels are set, and management decisions by
other landowners are made. The Plan will be modified
to meet future needs as they occur, by decisions of the
State Land Board. At present, it is anticipated that
this Plan ~~will be reviewed and revised as needed at~~
intervals of approximately ten years.

1 18. It is now generally accepted in the scientific community
2 that a complete liquidation of old growth stands is harmful to old
3 growth dependent wildlife species.

4 19. The 1978 EIS presents outdated, and therefore, erroneous
5 information on grizzly bears, stating that bears principally use
6 the higher elevation areas on the east and west boundaries of the
7 forest. Exh. 1. p.47. The entire forest could provide excellent
8 habitat for the grizzly bear. One of the key factors in grizzly
9 bear habitat evaluation is road density.

10 20. The two witnesses on this point, David Hadden and Dean
11 C. Graham, (who were extremely credible in all of their testimony)
12 were in substantial agreement with respect to the grizzly bear and
13 its habitat, and really differed only in the evaluation of road
14 density. Hadden included the main Swan River highway in his
15 computation, and added a weight factor to the "closed roads,"
16 neither of which Graham did. Graham's rationale for not including
17 the Swan Valley corridor (a strip of land one mile wide,
18 presumably one-half mile on either side of the main highway) was
19 that it constitutes a "special management area," a people-
20 populated area that bears are not encouraged to use. (The
21 Flathead National Forest has identified the Big Mountain Ski Area
22 as a similar area, one where they do not want bears in contact
23 with humans.) The road would not be used to determine road
24 density, but it would be included in the Cumulative Effects
25 Analysis. Graham does not assign weights to closed road because,
26 "adding a weight is a guess." Nevertheless, he factors, or

1 considers the presence of closed roads in determining the
2 Cumulative Effects Analysis.

3 21. There have been substantial changes on neighboring lands
4 in the area of the Swan Forest due to clearcutting and road
5 building by the U.S. Forest Service and the Plum Creek Timber
6 Company. Exh. 21a-c and 15a.

7 22. Substantial data and scientific information new since
8 1978 is now available on fisheries, water quality, grizzly bear
9 habitat, old growth, wildlife and economics (and it is constantly
10 changing.) The information in the 1978 EIS is out-of-date.

11 23. The 1978 EIS does not take into account the 1979 Swan
12 Highway Corridor Agreement signed by the U.S. Forest Service,
13 Burlington Northern, and the State of Montana, regarding
14 preservation of scenic qualities in the Corridor 150 feet on
15 either side of the center line of Highway 83 through the Swan
16 Valley. Exh. 7.

17 24. DSL has determined that a statewide approach to forest
18 management planning is the most effective and appropriate method
19 given the quantity and distribution of state forest lands.

20 25. DSL is developing Forest Management Standards and
21 Guidelines which provide specific direction for the conduct of
22 important forest management activities including timber management
23 and management of resources affected by timber management. The
24 Forest Management Standards and Guidelines will be divided
25 topically into "chapters." Agreed Fact #18.

26 26. The following management documents and standards have

1 been adopted by DSL since 1978:

- 2 1. Forest Management Standards and Guidelines, Chapter 1
3 Overview (1/88), Exh. 36
- 4 2. Best Management Practices for Forestry in Montana
5 (7/89), Exh. 31
- 6 3. Streamside Management Zone Guidelines and Prescriptions
7 (1987), Exh. 32
- 8 4. The standard preserving a minimum 10% per third order
9 watershed in old growth stands under 5,000 feet
10 elevation (and includes all ownership in a Cumulative
11 Effects Analysis), Exh. 39
- 12 5. Interim Grizzly Bear Management Standards and Guidelines
13 (12/88), Exh. 33, and 1989 road closures map (Exh. 15c)
- 14 6. Interim Whitetail Deer Winter Range Management Standards
15 and Guidelines, which includes a standard retaining a
16 minimum of 50% of each section of state lands in thermal
17 cover, Exh. 38, (11/89), Exh. 34
- 18 7. Interim Elk Winter Habitat Management Standards and
19 Guidelines (11/89), Exh. 35
- 20 8. Montana Bald Eagle Management Plan (6/86), Exh. G
- 21 9. Swan Valley Highway Landscape Management Plan (1979),
22 Exh. 7, with Memorandum of Understanding.

23 27. DSL is committed to conduct a programmatic environmental
24 review on each chapter of Forest Management Standards and
25 Guidelines which affect the manner in which forest management
26 activities affect the human environment. DSL has committed that
such review will be conducted in accordance with MEPA (Montana
Environmental Protection Act) and the MEPA rules.

27 28. DSL is revising Chapter One of its Forest Management
28 Standards and Guidelines which is an overview of its statewide
29 forest management process.

30 29. DSL is committed to conduct a programmatic environmental

1 review in accordance with MEPA and the MEPA rules of the revised
2 Chapter One overview and of the forest management process in
3 general and the impacts of that process upon the human
4 environment.

5 30. DSL is committed to provide opportunities for public
6 participation at each level of environmental review described
7 above. DSL is currently conducting a review of alternatives for
8 recreational management of state lands, including state forest
9 lands. This review has included public involvement in the form
10 of public meetings and invitation for written comments, and DSL
11 has committed to preparation of a programmatic review, including
12 additional opportunity for public comment.

13 31. In that same connection, new environmental review and
14 public participation requirements are set forth in ARM 26.2.628
15 et seq., effective 1/13/89.

16 32. Beginning in the fall of 1988, DSL commenced a
17 continuing series of public meetings to distribute information and
18 encourage public involvement in management activities on the Swan
19 River State Forest. FOWS have participated in some of these
20 meetings and has been on the mailing list. Additionally, Glen
21 Gray, Unit Manager of the Swan River State Forest, and other
22 public officials within the DSL or working with the DSL have
23 cooperated with the FOWS to provide information and clarification
24 regarding the DSL' actions.

25 33. DSL has an ongoing program of timber sales for state
26 forest lands, including the Northwestern Area and the Swan River

1 State Forest, which DSL intends to continue. Agreed Fact #11.

2 34. DSL plans to conduct timber harvest activities within
3 the constraints set by the Forest Management Standards and
4 Guidelines which will set minimum protection standards for certain
5 non-timber resources and establish guidelines for certain timber
6 activities for the purpose of minimizing impacts.

7 35. In management of its statewide forest management
8 program, DSL is committed to prepare environmental review
9 documents (EA or EIS) that include cumulative impacts and
10 alternatives analyses on site-specific timber sales.

11 36. The 1978 EIS discusses four management alternatives for
12 the Swan River State Forest with the preferred alternative being
13 forest production enhancement.

14 37. DSL conducts environmental review under MEPA of each
15 proposed timber sale in the Swan River State Forest.

16 38. DSL is presently preparing an environmental assessment
17 under the MEPA rules on the proposed Woodward Face Timber Sale
18 within the Swan River State Forest and is evaluating alternatives
19 and cumulative effects of that project, e.g., upon grizzly bear
20 and grizzly bear habitat, old growth, fisheries, whitetail deer,
21 watershed and silvacultural alternatives.

22 39. For that portion of its statewide timber program that
23 is conducted on the Swan River State Forest, DSL periodically
24 issues a proposed Six-Year Timber Sale Plan. One is done for the
25 Northwestern Land Office, and from that, one is done for the Swan
26 River State Forest as a forest unit under the aegis of the

1 Northwestern Land Office. See, e.g., Exhs. 2, 3 and M. The
2 proposed Six-Year Timber Sale Plan is an annually revised document
3 of the Northwestern Land Office which serves to begin work
4 planning, data collection and environmental analysis on the listed
5 timber sale projects. The plan typically lists proposed timber
6 sale by location (Section, Township and Range), estimated volume,
7 estimated acreage, the name of the drainage or drainage, the
8 proposed regeneration harvest type, miles of road construction,
9 proposed project beginning, proposed project completion, and
10 notes/remarks. Listing on this document is not a decision or
11 preliminary decision to conduct a sale, nor is a listing
12 irreversible.

13 40. The same is true of the "Three-Year Listing of Tracts
14 to Investigate for Timber Sale Feasibility on the Northwestern
15 Land Office," more commonly referred to as the "Three-Year
16 Listing."

17 41. The proposed Six-Year Timber Sale Plans and the Three-
18 Year Listing of Timber Sales are issued by DSL as a continuation
19 of its ongoing timber program.

20 42. By letter of 3/29-88, the FOWS notified DSL that they
21 intended to exercise fully their rights of public participation
22 as an interested party, and requested notice of projects and
23 decisions. Exh. 28.

24 43. In February and March of 1989, DSL revised the proposed
25 Six-Year Timber Sale Plan for the Northwestern Land Office and for
26 the Swan River State Forest without preparation of a programmatic

1 review. Agreed Fact #13. DSL prepared no environmental impact
2 statement or review, and conducted no administrative proceeding.

3 44. In February and March of 1990, DSL prepared Three-Year
4 Listing of Tracts to Investigate for Timber Sale Feasibility on
5 the Northwestern Land Office, including the Swan River State
6 Forest, without preparation of a programmatic review. Agreed
7 Facts #14.

8 45. By letter of 9/5/87, Steve Kelly, now President of FOWS,
9 alleged the failure of the Swan River State Forest to assess
10 cumulative effects and suggested that an EIS be prepared. Exh.
11 14. Agreed Fact #8.

12 46. By letter dated 3/29/88, the FOWS demanded of the DSL
13 that a new EIS for the Swan River State Forest be prepared. Exh.
14 28. Agreed Fact #9.

15 47. By letter dated 5/16/88, the Commissioner of DSL
16 declined to prepare a new EIS for the Swan River State Forest.
17 Exh. 5. Agreed Fact #10.

18 48. "Programmatic review" means an analysis (environmental
19 impact statement or environmental assessment) of the impacts of
20 the quality of the human environment of related actions, programs,
21 or policy. ARM 26.2.643(15).

22 49. The Court received testimony from various experts in the
23 fields of old growth biology, fisheries biology and bear biology.
24 The basic question addressed was whether management activities
25 (i.e., the timber program) within the Swan Forest could
26 significantly affect the human environment. The various

1 biologists testified to cumulative impacts of past and present
2 actions based on information available.

3 50. A significant amount of old growth forest remains on the
4 Swan River State Forest.

5 51. Old growth stands may be simplistically defined as those
6 of a minimum age of stand origin of 200 years. See, e.g., Exh.

7 39. However, "old growth characteristics" have been identified
8 in stands of varying years, and for this purpose, DSL has used the
9 following:

10 All stands considered must be saw timber
11 class, have a saw timber tree crown density
12 of more than 39%, have an average stand age
13 of 100 years or greater, and provide at least
14 50 contiguous acres of old growth; stands
15 meeting the above criteria with an average
16 stand age of 200 plus years have been
17 included; stands with an average age between
18 150 to 200 years and an uneven-age stand
19 structure have been included; and stands with
20 an average age between 100 to 149 years, and
21 uneven-age stand structure and a poor or very
22 poor stand vigor class have been included.
23 Exh. L1.

24 52. Old growth forests serve as conservators with longterm
25 benefits to the soil, water, fisheries, wildlife habitat and
26 overall forest ecosystems. Old growth forests are at the moment
27 recognized to be of great importance, offering substantial
28 diversity in plants and animals, and are important to old growth
29 associated species. See, Exh. 6 - DSL' Memo.

30 53. The 1978 EIS failed to recognize the importance of old
31 growth habitat, and provided no adequate assessment of old growth
32 stands, and the effects of their liquidation. Most of the

1 literature and information on old growth forests and old growth
2 habitat has appeared since 1978. The liquidation of old growth
3 habitat as per the 1978 Swan River State Forest Plan and EIS (Exh.
4 1) would have a significant adverse impact on the environment.

5 54. DSL has adopted a policy of retaining old growth values
6 on the Swan River State Forest over the next five years while
7 conducting an evaluation of old growth and protection options.

8 55. To evaluate the effects of old growth stand liquidation
9 on any basis, e.g., by forest, drainage-by-drainage, by timber
10 sale, it is necessary to review the actions of neighboring
11 landowners.

12 56. A cumulative effects analysis for old growth would
13 evaluate old growth stands and habitat on all land in the drainage
14 on the Swan River State Forest. Such an analysis is feasible on
15 a drainage-wide basis.

16 57. The Plaintiff requests that the Court find that under
17 DSL' ongoing timber program per the 1978 EIS, liquidation of old
18 growth stands is scheduled for the slopes above Goat Creek and
19 Squeezer Creek (critical trout streams) and South Fork Lost Creek
20 (an important trout stream), citing Exh. 1 (1978 EIS.) The
21 Plaintiff also asks that the Court find that under DSL' Six-Year
22 Timber Sale Plan, liquidation of certain old growths stands is
23 scheduled for the slopes above South Fork Lost Creek, referring
24 to Exh. 39. Under the 1978 EIS, old growth stands were scheduled
25 to be liquidated. Under the current standards and guidelines
26 approach of DSL, the 1978 EIS is not being followed. No

1 liquidation of old growth stands is proposed for the slopes above
2 Goat Creek or Squeezer Creek, Exh. 39, and only 35 acres is
3 proposed for the slopes above South Fork Lost Creek, which leaves
4 that area with over 10% old growth. Since the Six-Year Timber
5 Sale Plan is a planning tool and in a constant state of flux, the
6 only facts that we can find from the foregoing is that "scheduled"
7 sales in "critical" drainage can be significant, but in this area,
8 the DSL is not permitting itself to be limited by the 1978 EIS.

9 58. Scott Rumsey is a Montana Department of Fish, Wildlife
10 and Parks (MDFWP) Fisheries Biologist III, with responsibility for
11 the Swan fishery.

12 59. The Swan fishery is geographically defined as the area
13 upstream from the confluence of the Swan River and Flathead Lake,
14 including Swan Lake, the Swan River and tributaries thereto.
15 There are 47 streams which are tributaries to the Swan River.

16 60. Bulltrout and Westslope cutthroat trout are native
17 species, and are designated as species of special concern by the
18 MDFWP. All bulltrout and some westslope cutthroat trout are
19 adfluvial, meaning they spend 1-3 years in the stream where they
20 were hatched, then move primarily to Swan Lake, then return to the
21 stream for spawning.

22 61. The MDFWP has designated four streams in the Swan as
23 critical bulltrout streams (Elk, Goat, Lion and Squeezer.) North
24 Lost, South Lost, Piper and Woodward are critical juvenile
25 bulltrout streams. Four of these (Goat, Squeezer, South Lost and
26 Woodward) are on the Swan River State Forest.

1 62. The MDFWP considers a number of streams in the Swan as
2 important bulltrout streams including Cold Creek and Jim Creek.
3 Most of the bulltrout's spawning in the Swan occurs in the eight
4 critical and important streams just named.

5 63. The Swan fishery is interdependent, meaning damage to
6 one stream, particularly to a critical or important stream, has
7 cumulative effects upon the fishery as a whole.

8 64. The major landowners in the Swan have entered into an
9 agreement to use "Best Management Practices" (BMPs) for logging
10 practices which may affect trout streams. Exh. F. The BMPs are
11 incorporated into the timber contracts (not written policy), but
12 they contain no enforcement mechanism and may allow clearcutting
13 to within 25 feet of a stream. The BMPs, when properly applied,
14 effectively control erosion.

15 65. DSL conducts watershed cumulative effects analyses on
16 each proposed action to project increased water yield in order to
17 prevent instream erosion and channel destabilization. DSL
18 implements Best Management Practices for the control of surface
19 erosion and protection of water quality. DSL also implements
20 Streamside Management Zone Guidelines for additional protection
21 of riparian habitats.

22 66. There were six BMP audits of DSL in the Flathead Basin
23 with no major departures and three minor departures (the only
24 landowner with no major departures.)

25 67. Scott Rumsey was the principal author of a report
26 entitled "Jim Creek Monitoring" (1990). Exh. 26b. The report

1 investigated the effects of the West Jim Creek Timber Sale on Plum
2 Creek lands upon the fishery at Jim Creek.

3 68. In 1989, the Jim Creek spawning redd count was 39 total,
4 and 10 per kilometer. Exh. 26b. Redd counts have not been done
5 every year on Jim Creek. If Jim Creek averaged 10 redds per
6 kilometer each year, it would be a critical trout stream. This
7 was an "important" stream prior to 1989, and the redd count in
8 1989 brought it to the "critical" level. ("Critical" as used here
9 means that there are a great many fish, and the stream is
10 "critical" to the fish population and repopulation. "Important"
11 as applied to a stream means other than critical, less than the
12 mean average, but it will maintain a population.)

13 69. A cumulative effects analysis was done on the Swan
14 fishery in 1985.

15 70. The appropriate area for a cumulative effects analysis
16 is the area of the Swan fishery, because the fishery resources are
17 interdependent.

18 71. It would be useful and feasible to update the 1985
19 Cumulative Effects Analysis for the streams on the Swan Forest in
20 relation to the Swan fishery; it may not be currently feasible to
21 prepare a cumulative effects analysis on a statewide basis, by
22 virtue of an insufficient database, but an analysis on the Swan
23 Forest in relation to the Swan fishery would be extremely helpful
24 for a site-specific environmental assessment.

25 72. David Hadden is a masters degree grizzly bear biologist
26 who works as a private consultant. Hadden testified to the

1 effects of forest management activities on grizzly bear habitat.
2 73. The grizzly bear has been officially listed as a
3 threatened species by the federal government since 1978. DSL
4 recognizes its responsibilities regarding the grizzly bear under
5 the Endangered Species Act. Exh. 33a.

6 74. Federal agencies and the Montana Department of Fish,
7 Wildlife and Parks are signatories to the Interagency Grizzly Bear
8 Committee Guidelines. DSL is not. In December 1988, DSL adopted
9 its own Interim Grizzly Bear Management Standards and Guidelines.
10 Exh. 33a. DSL' Standards and Guidelines will undergo
11 environmental review prior to final adoption. Agreed Fact #20.

12 75. By and large, the entire area of the Swan River State
13 Forest provides excellent grizzly bear habitat. In the critical
14 periods of the spring and fall, grizzly bears mainly use areas
15 lower than 5000 feet in elevation. Use of the Swan Forest by
16 grizzly bears is well documented.

17 76. David Hadden selected an analysis area described on the
18 north and south by the boundaries of the Swan River State Forest,
19 on the east by the Swan Divide, and on the west by the Mission
20 Divide. Exh. 15a. Hadden divided the analysis area into units
21 of 5000-15,000 acres, based upon accepted methodology.

22 77. Using aerial photos, available data, and consultations
23 with Swan Forest Supervisor Glen Gray and others, David Hadden
24 prepared a report and various maps of grizzly bear habitat in the
25 area of the Swan Forest. Exh. 15a. Map Layer 1 shows grizzly
26 bear foraging habitat, and includes areas of preferred vegetation.

1 wet areas and stream courses. A 600 foot buffer security and
2 hiding cover is drawn around all foraging habitat.

3 78. On Map Layer 2 (Exh. 15a). Hadden presents all timber
4 stands cut within the last 20 years which may not provide
5 sufficient cover to afford adequate security for grizzly bears.
6 The map is based upon aerial photo analysis. timber stand
7 inventory analysis and consultation with Glen Gray.

8 79. Based upon DSL maps, aerial photos, and his own
9 reconnaissance of road closure sites. Hadden produced Map Layer
10 3. plotting roads and road closures on the Swan River State
11 Forest, and a report dated June 1990. Exh. 15g.

12 80. Hadden calculated road densities for bear analysis
13 units, for the analysis area as a whole, and for spring bear
14 habitat (Units 4,5,6 & 7 of Map Layer 3.) Road densities are the
15 most important factor in grizzly bear habitat security. The
16 maximum road density standard accepted by bear biologists is 1.0
17 miles per section (square mile). Hadden assigned 1/10 to 1/4 mile
18 of road to each road which was closed, but not obliterated. This
19 was based on the degree of use during spring and fall hunting
20 seasons per Glen Gray. Road densities in all the bear analysis
21 units on the valley floor exceeded 1.0 miles per section, under
22 the Hadden method of calculation.

23 81. In the analysis area, the U.S. Forest Service and the
24 Plum Creek Timber Company both plan liquidation of old growth
25 timber stands which implies additional road construction.

26 82. DSL has implemented road closures on the Swan River

1 State Forest to protect grizzly bear habitat. Both the U.S.
2 Forest Service and the Plum Creek Timber Company have also
3 implemented road closures, for the same purpose. and all three
4 landowners appear to be not only cooperating, but agreed in
5 principle.

6 83. An appropriate area size for a cumulative effects
7 analysis on grizzly bear habitat is about 75 square miles. For
8 a cumulative effects analysis to be scientifically useful, it must
9 detail foraging sites, wet areas and stream courses. It must
10 evaluate the status of all timber stands on the analysis area for
11 hiding cover status. And, it must calculate road densities and
12 evaluate the effectiveness of road closures.

13 84. On the Swan River Timber Sale, no cumulative effects
14 analysis was included in the Environmental Review documents for
15 grizzly bear, old growth or fisheries. No wildlife comments were
16 submitted until after the sale decision was made and the sale
17 sold. No grizzly bear evaluation was done for the sale decision.
18 No alternatives analysis was done. Exh. 4 and Exh. 37. However,
19 this was a bug infestation sale.

20 85. On the New Squeezer Timber Sale, no cumulative effects
21 analysis was included for grizzly bears, old growth or fisheries.
22 No environmental assessment was prepared under the format set
23 forth in DSL current MEPA regulations. Although an alternatives
24 analysis was done, it was not included in the Environmental Review
25 documents. The environmental assessment was prepared (November
26 1988) before the new format (January 1989) even though the sale

1 was let in April 1989.

2 86. To date it has not been the practice of DSL to include
3 in Environmental Review documents a cumulative effects analysis
4 on timber sales, except as to water quality and run-off. This has
5 been true since 1986.

6 87. The 1978 EIS evaluated the following alternative courses
7 of action:

- 8 1. The no action alternative;
9 2. The forest amenities enhancement alternative;
10 3. The forest production enhancement alternative;
11 4. The economic enhancement alternative.

12 88. In the 1978 EIS, the alternative finally chosen was the
13 forest production enhancement alternative. Agreed Fact #15.

14 89. No evaluation of program alternatives has been prepared
15 on the Swan Forest since 1978, and DSL has no plans to do one
16 limited specifically to the Swan Forest.

17 90. DSL still has the four management alternatives above
18 described, including the use of a blend of timber and recreation
19 revenues on the Swan Forest.

20 91. DSL currently collects no recreation, hunting or fishing
21 revenues on the Swan Forest, and has not included these values in
22 an economic value calculation. DSL currently collects revenues
23 from recreation, as well as fishing and hunting access rights on
24 other state forest, including the Sula State Forest. Exh. 11b and
25 11c.

26 92. In 1979, DSL entered into the Swan Highway Corridor
~~Agreement with other state and federal agencies for preservation~~
of the scenery along the Swan Highway, including that portion of

1 the Highway that traverses the Swan River State Forest.

2 93. It is DSL policy to follow the 1979 Landscape Management
3 Plan and Memorandum of Understanding regarding management
4 activities in the Scenic Highway 83 Corridor. Exh. 7.

5 94. The evidence presented at the trial of violations of the
6 Swan Highway Corridor Agreement was not substantial; if anything,
7 the lack of substantial evidence reflects substantial compliance.

8 95. DSL had adopted Interim Grizzly Bear and Whitetail Deer
9 Standards and Guidelines to be implemented while the proposed
10 Grizzly Bear and Whitetailed Deer Standards and Guidelines undergo
11 environmental review prior to final adoption. Agreed Fact #20.

12 96. The U.S. Forest Service environmental review process
13 includes national, regional and local programmatic reviews, with
14 a cumulative effects analysis in an EIS at the local forest wide
15 level and at the timber sale level.

16 97. DSL has no programmatic review at the State, regional
17 or local level, and has done no cumulative effects analysis at the
18 local forest wide level or the timber sale level. There are only
19 70,000 acres in the entire Swan River State Forest, of which
20 39,000 acres are state land.

21 Based upon the foregoing Findings of Fact, the Court makes
22 the following:

23 CONCLUSIONS OF LAW

- 24 1. The Parties have standing.
25 2. This action was brought pursuant to the Montana
26 Environmental Policy Act (MEPA), Section 75-1-101, et seq. for

1 judicial review of the actions of the Department of State Lands
2 (DSL). The standard of judicial review generally is that agency
3 action will not be overturned unless it is found to be "arbitrary,
4 capricious or unlawful".

5 3. The DSL and the Board of Land Commissioners have the
6 fiduciary duty to manage state school lands for the support of
7 education or other purposes for which those lands were granted to
8 the State in the Enabling Act, 25 Stat. 676. 77-1-201 M.C.A.

9 4. ARM 26.2.657, in part, requires "Whenever an agency is
10 contemplating a series of agency-initiated actions, programs, or
11 policies which in part or in total may constitute a major state
12 action significantly affecting the human environment, it shall
13 prepare a programmatic review discussing the impacts of the series
14 of action."

15 5. The "Proposed Six-Year Timber Sale Plan" and the "Three
16 Year Timber Sale Listing" (collectively the "Listings") do not
17 require new programmatic reviews. They represent planning
18 documents developed in accord with the 1978 Swan River Timber
19 Management Plan and are intended for purpose of collecting data
20 for the planning and environmental analysis of the listed timber
21 sales. The listings do not constitute an "irretrievable
22 commitment of resources."

23 6. The listing of timber sales in the "Six Year Proposed
24 Timber Sale Plan" and the "Three Year Timber Sale Listing" are
25 actions which are excluded from the those requiring acts which
26 require an EIS or an EA under the terms of ARM 26.2.643(5)(d).

1 The Listings do not constitute a proposal within the meaning of
2 Section 75-1-201(1)(b)(iv), MCA.

3 7. Forest management activities on the Swan River State
4 forest are part of DSL's statewide forest management program and
5 preparation of the statewide programmatic review and site specific
6 environmental documents with an evaluation of program alternatives
7 is adequate for compliance with MEPA.

8 8. Since DSL has not completed environmental assessments
9 on any part of its statewide forest management program and has not
10 made a determination whether programmatic review must be an EA or
11 an EIS, the issue is not ripe for judicial determination.

12 9. The adoption of a management approach on forest lands
13 pursuant to DSL's Chapter 1 Overview and Standards and Guidelines
14 and the application of that approach to site-specific proposed
15 actions, such as individual timber sales, is not arbitrary,
16 capricious or contrary to law.

17 10. The decision by DSL to analyze cumulative effects on
18 grizzly bears, whitetail deer, elk, stream-side management zones,
19 and other impacts on the human environment attributable to timber
20 sales at the statewide and the site-specific level is a matter
21 within the DSL's discretion and is not arbitrary, capricious or
22 unlawful.

23 11. The DSL is not required to conduct a cumulative effects
24 analysis at the Swan State Forest level.

25 12. It is within the discretion of the DSL to analyze
26 cumulative effects on grizzly bears, whitetail deer, elk, stream-

1 side management zones and other impacts on the human environment
2 attributable to timber sales on the state-wide and site-specific
3 level.

4 13. The DSL has adhered to the intent of the "Memorandum of
5 Understanding Aimed at Maintaining the Scenic Qualities Adjacent
6 to The Swan Valley Forest #83" and the "Swan Valley Highway
7 Landscape Management Plan"

8 14. Mandamus does not lie to compel the exercise of
9 discretion and therefore is not proper in this case to compel that
10 programmatic review be in the form of an EIS.

11 15. The DSL is in the process of adopting new management
12 standards and guidelines to be applied to all state lands
13 including the Swan River State Forest. The Court will not assume
14 that DSL will fail to comply with its MEPA obligations as the plan
15 is developed and implemented. DSL has the obligation to develop
16 the plan in accordance with MEPA and school trust obligations.
17 The Plaintiff's appropriate remedy is through the administrative
18 process by means of public participation.

19 16. A writ of mandamus is not appropriate under the
20 circumstances of this case.

21 JUDGMENT

22 Based upon the foregoing Findings of Fact and Conclusions of
23 Law, the Court enters the following Judgment:

- 24 1. The Plaintiff take nothing by its complaint.
25 2. Reasonable attorneys fees and litigation expenses as
26 damages pursuant to Section 27-26-402, MCA are hereby awarded to

1 the Defendant. the Department of State Lands. Counsel for the
2 Defendant shall file an affidavit within 20 days of the date of
3 this Judgment. Thereafter, a hearing shall be held unless the
4 parties stipulate otherwise.

5 3. Final Judgment will be entered after the hearing on
6 attorneys fees and litigation expenses under mandamus.

7 4. Costs of suit are awarded to the Defendants.

8 DATED October 17, 1991.

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ROBERT S. KELLER
District Judge

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