Friends of the Wild Swan, et al. v. Department of Natural Resources and Conservation, et al.
BDV 2000-369, 1st Judicial District
Judge Sherlock
Decided 1994

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

Court Decision: No

NANCY SWEENEY
CLERK-DISTRICT COURT

JUN 14 11 56 AM '00

FILED BY D. ROSTOCKI
DEPUTY

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER INC.

Plaintiffs,

v.

ARTHUR CLINCH (in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,

Defendants.

Cause No. BDV-2000- 369

**COMPLAINT**

COMES NOW the Plaintiffs, and for their claims for relief, state and allege the following:

**INTRODUCTION**

This action stems from the failure of the Montana Department of Natural Resources and Conservation (hereafter Department) to use procedures required under the Montana Administrative Procedure Act (MAPA) and/or the Montana Environmental Policy Act (MEPA) before it adopted and implemented a new policy, standards and practices regarding logging old growth forests on state lands. In recognition of the vital role that old growth forests have in sustaining our wildlife heritage, in 1996 the Department adopted a State Forest Land



COPY

1 Management Plan (Plan) through a Record of Decision (ROD) that provided standards and
2 guidelines for maintaining old growth forests and defining appropriate limited logging within old
3 growth stands. Two years later the Department adopted a new policy and new practices and
4 standards that have significant consequences for the remaining old growth on state lands and the
5 wildlife that depend on old growth habitat. This new policy and associated practices represent a
6 substantial change in the Department's original policy as established in the Forest Plan because it
7 eliminates vital aspects of the Forest Plan that protect old growth forests and the resources
8 unique to such forests.

9 MAPA defines an administrative rule as an agency "regulation, standard, or statement of
10 general applicability that implements, interprets or prescribes law or policy... " The Department's
11 new policy and practice for managing old growth is a standard or statement of general
12 applicability and implements and interprets the Department's policy on that resource on all state
13 lands. Because the new policy constitutes the adoption of an administrative rule as defined by
14 MAPA, MAPA's notice, comment and public participation requirements for rulemaking were
15 triggered. The Department failed to follow required procedures before adopting the new policy.

16 In addition, the Department's new old growth standards, practices and policy represent
17 significant new information and create substantially changed conditions in terms of old growth
18 management when compared to the policy and standards that were adopted in the 1996 EIS. The
19 Department unlawfully failed to undertake a supplemental review under MEPA, other otherwise
20 analyze the environmental impacts of its actions before adopting the new policy. The Department
21 has never analyzed the additional loss of old growth forest as a result of changes in the Plan
22 resulting from its new policies and standards. The additional loss of old growth - an irretrievable
23 commitment of resources within our lifetime - must be addressed under MEPA.

24 The Department continues to implement the new policy, practices and standards both in
25 terms of its overall forest plan and for site specific logging projects, including timber sales
26 approved at the Board's May, 2000 meeting. Because the new policy was adopted in violation of
27 both MAPA and MEPA, implementation of the policy must be enjoined until the Department
28 undertakes proper review of its new old growth policy.

## JURISDICTION AND VENUE

1. Jurisdiction over this action arises under the Montana Administrative Procedure Act, 2-4-101 et seq., the Montana Environmental Policy Act, 75-1-201 et seq. and the Uniform Declaratory Judgement Act, 27-19-101 et seq. M.C.A. (1999).

2. Venue in this District is appropriate because the Defendants are the director of a state agency, a state agency and state board respectively.

## PARTIES AND STANDING

3. Plaintiff, Friends of the Wild Swan Inc. (Friends), is a tax-exempt, non-profit, public-benefit Montana non-profit corporation dedicated to the protection and preservation of the native biodiversity of the Swan valley and the Northern Rockies, their native plant, fish, and animal life, and naturally functioning ecosystems. The registered office for Friends of the Wild Swan is located in Swan Lake, Montana.

4. Plaintiff, the Alliance for the Wild Rockies Inc., is a tax-exempt, non-profit public-benefit Montana non-profit corporation interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and naturally functioning ecosystems. The registered office for the Alliance for the Wild Rockies is located in Missoula, Montana.

5. Plaintiff, The Ecology Center Inc., is a tax-exempt, non-profit, public-benefit Montana non-profit corporation interest organization. The Ecology Center works to protect biological diversity and ecosystem integrity, primarily in the Wild Rockies Bioregion (including Montana, Idaho, and parts of Wyoming, British Columbia, Alberta, Oregon, and Washington). The Ecology Center also works to influence agencies to conform to environmental legislation, and to increase citizen participation in public lands management including state forest lands in Montana. The registered office for the Ecology Center is located in Missoula, Montana.

6. For each of the named Plaintiffs, this action is brought on behalf of the organization and on behalf of its members and directors. Members and/or directors of the organization have used, and continue to use, state forest lands including areas proposed and planned for timber harvest. These areas are managed under the Plan and the changes thereto that

are being challenged herein. Each organizations' members and/or directors use these lands for aesthetic and recreational pursuits, including but not limited to, hiking, cross-country skiing, bird-watching, hunting, plant and wildlife study and aesthetic enjoyment. These interests are pursued in old growth forests that are affected by the actions described in this complaint. Plaintiffs and their directors and/or members are thus directly and adversely injured by the matters described in the complaint, and their injuries are redressable by a favorable decision. In addition, the Plaintiffs all have a long-standing interest in the protect of the flora and fauna of the northern Rockies, including old growth, of participating in land management decisions on state lands that affect those interests, and of obtaining and disseminating to their members, directors, and the larger public information about the management of state lands. As alleged herein, the failure of the Defendants to properly follow the procedures required by MAPA and MEPA have and will continue to hinder, obstruct and otherwise injure Plaintiffs', their directors' and members' rights to participate in the procedures required under MAPA and MEPA.

7. Defendant Montana Department of Natural Resources and Conservation (the Department), formerly the Department of State Lands is the state agency charged with the responsibility for administering school trust lands held in trust by the State of Montana under the general direction of the Board of Land Commissioners. The Department prepared the State Forest Plan and its director, Defendant Arthur Clinch, who is sued in his official capacity as Director of the Department approved it. The Department is responsible for MEPA compliance for all state land activities.

8. Defendant Montana Board of Land Commissioners (hereafter Board) is a Board composed of the Governor, Attorney General, Secretary of State, State Auditor, and Superintendent of Public Instruction. The Board, according to its statutory authority, must approve all timber sales on state trust lands. The Board also approved the Plan and the ROD. The Board has, and will continue to approve timber sales under the Plan as now implemented, including unlawful and arbitrary changes to the Plan as alleged herein.

## BACKGROUND

State Trust Lands

9. The State of Montana owns approximately 5.4 million acres of land granted by the federal government at the time of statehood. These lands, referred to as the state school trust lands, are to be managed "in trust for the support of education and for the attainment of other worthy objects helpful to the well being of the people of this state." § 77-1-202, M.C.A. (1999).

10. Approximately 700,000 acres of the trust lands acres have been designated State Forest Lands. State Forest Lands are retained in scattered square mile sections and in consolidated blocks of state forests such as the Swan River, Coal Creek and Stillwater State Forests (referred to as blocked forest lands). These blocked forest lands are large enough to manage for old growth dependent wildlife and other values associated with old growth forests. State Forest lands contain old growth habitat that has considerable future value both as a financial resource and as vital to the survival of many species of wildlife.

11. State Forest lands provide habitat for much of Montana's rich and diverse native flora and fauna indigenous to the mountains and valleys of the state. Among these include: species listed under the Endangered Species Act, 16 U.S.C. 1531 *et seq.* as endangered or threatened such as the bald eagle, grey wolf and grizzly bear, bull trout and lynx; candidate species for Federal protection such as the fisher, northern goshawk and wolverine; and numerous other species of special concern due to their dwindling populations such as westslope cutthroat trout, boreal owls, great grey owls, black backed woodpeckers, pileated woodpeckers and a variety of migratory songbirds. In addition state forest lands provide habitat for important big game species such as elk, big horn sheep, mule and white-tailed deer. Montana's state forest lands contain a high percentage of Montana's remaining low-elevation old growth forest.

12. The logging of old growth forest and attendant road construction adversely impact fish and wildlife in many ways; habitat fragmentation is one such impact. Habitat fragmentation is the breakup of large tracts of old growth forest into increasingly smaller patches. Habitat fragmentation can cause significant adverse environmental impacts on wildlife dependent on old growth forest habitat by cutting their habitat into increasingly smaller patches that are too small to maintain viable populations and not connected to other patches of old growth habitat. Habitat fragmentation also creates sharp edges between mature forests and harvested areas, which allows

increased predation on old growth dependent species by opportunistic wildlife species.

13. State forest lands have already been subjected to fragmentation of old growth forests from timber harvest, both within those lands and in association with timber harvest on adjacent tracts of private and federally managed forests. State forest lands also contain areas of old growth forest that are not fragmented or not badly fragmented and still provide the opportunity to manage for old growth dependent wildlife and other resources, particularly on the blocked forest lands.

14. In addition to habitat fragmentation, logging in old growth, including sanitation and salvage logging, can remove important habitat components and cause direct impacts to wildlife that depend on old growth forests. Even if an old growth tract is not completely stripped of its tree cover as in clear cutting, the loss of large trees and snags can affect the ability of that tract to provide habitat for old growth dependent species.

15. The removal of old growth forest from logging causes or may cause significant environmental impacts The destruction or alteration of old growth timber from logging constitutes an irretrievable commitment of resources in the context of human existence. Old growth forests can take hundreds of years to form. Once logging has occurred, the characteristics of the old growth forest that were altered or destroyed by logging may take several generations to fully replace.

16. All of the above impacts have, and will continue to occur on state lands as a result of past, present and future timber harvest.

State Forest Land Management Plan

17. In 1989, Plaintiff Friends of the Wild Swan sued the Department for failure to prepare an adequate Environmental Impact Statement for its timber harvest program on the Swan River State Forest. *Friends of the Wild Swan v Department of State Lands,* Flathead County Cause No. DV-89-074 (A). The Department responded to this lawsuit by promising a new state-wide programmatic EIS on its timber management program, as opposed to an EIS just on the Swan River Forest. The District Court accepted the Department's representations that it would prepare a state-wide EIS on its timber management program: "DSL has determined that a state-

wide approach to forest management planning is the most effective and appropriate method . . ." (Finding Of Fact #24) and that "DSL is committed to conduct a programmatic environmental review on each chapter of Forest Management Standards and Guidelines . . ." FOF #27.

18. The Department then undertook preparation of a programmatic state-wide EIS, which included the analysis and review of the impacts of logging old growth and for maintaining sufficient old growth to preserve biological diversity. The purpose of this EIS was to adopt a state-wide plan to provide standards and guidelines for the management of state lands. On May 30, 1996, the Department approved a Final Environmental Impact State and Record of Decision (ROD) adopting a State Forest Land Management Plan ("the Plan"). The ROD was signed by the Director of the Department and Defendant herein Arthur Clinch, and was also approved by the Board.

19. The Plan is a programmatic document that provided for policies, standards and guidelines for managing state owned forest lands. The Plan governs management of all trust lands managed as state forest lands. The Plan does not authorize particular logging projects. However all future logging projects must be consistent with the Plan and their environmental analysis tiered to the programmatic EIS that accompanied the Plan.

20. The Department determined that the Plan was subject to the requirements of MEPA. ROD at 6. The Department prepared both draft and final Environmental Impact Statements that addressed the environmental impacts of the standards and guidelines contained in the Plan on forest resources such as, *inter alia,* old growth and biodiversity.

21. The Plan adopted certain Resource Management Standards (RMS) to govern management activities. The Plan states that the RMS "will be implemented." ROD at 10. The Plan states that all new projects will have the RMS applied to them. ROD at 11. Therefore, under the Plan, new timber sales adopted after May 30, 1996 were to be conducted in accordance with the RMS.

22. RMS # 6 states : "Within an appropriate analysis area, DNRC would seek to maintain or restore old-growth forest in a mounts of at least one half the average proportion that would be expected to occur within natural processes on similar sites. We [the Department]

would maintain sufficient replacement old-growth to meet this goal given that old-growth does not live forever. However DNRC would not maintain additional old-growth to compensate for the loss of old-growth on adjoining ownerships. Procedures such as those described in "Biological Diversity Strategies for Forest Type Groups or other technical references would be used for designating and managing old growth blocks and replacement areas." ROD at 13.

23. The management standards, procedures and policies referred to in RMS # 6 are further defined and elaborated upon in a reference entitled "Biological Diversity Strategies for Fores Type Groups" prepared by Dave Remington, who at that time was an employee of the Department. It is referenced in the ROD as Remington, D., 1993. "Biological diversity strategies for forest type groups." Montana Department of State Lands, unpublished paper. The ROD also states that "The text of this paper follows on the next page." ROD at 14. The document appears in the Appendix to the EIS and ROD. This document is referred to as "Remington" in this complaint.

24. Under Remington the following management standards, polices and practices were included in old growth management direction and therefore were to be incorporated into the design and implementation of timber sales on state lands: retention of an old growth network, spatially and elevationally located in approximately 3rd order drainages of 5-15,000 acres; connecting corridors between blocks of a minimum of 50 acres to 500 plus acres; no salvage or sanitation harvest in old growth stands unless they are breaking up with heavy fuels. Plan Appendix RMS at 30-31.

25. Remington is cited in the Plan ROD a total of 4 times. In addition to the above two references, Remington is used as guidance to define the Department's approach to the management of wildlife denoted as "Sensitive Species." ROD - 31. Remington is cited as the sole reference for the development of specific Standards and Monitoring for Big Game. ROD at 32.

26. The only other technical reference cited in the Plan and ROD under the heading Biodiversity References (where Remington is cited) is "Jensen USDA National Forest System, Eastside Ecosystem Health Assessment pp. 9-18."

27. The Plan also contains a monitoring program that was to be implemented to monitor the effectiveness and the impacts of the RMS on state timber lands and the resources associated with those lands. The Department has failed to fully implement the monitoring program it set forth in the Plan. The Department thus does not have complete information to base decisions that abandon Remington or otherwise change the policies, practices or standards for old growth management.

Adoption of the Biodiveristy Guidelines

28. After the Plan was adopted, it applied to all new timber sale projects on state forest lands.

29. After the adoption of the Plan, the Department began developing, and then adopted, a document known as Biodiversity Implementation Guidance to establish new policies, procedures and standards for the Plan with respect to logging old growth and managing for old-growth dependent wildlife.

30. According to the Department, in May of 1998 Remington was superceded by the Biodiversity Guidelines. The Department stated as its rational for replacing Remington with the Biodiveristy Guidelines that the Landscape Planning and Old Growth Protection portions of Remington were no longer applicable to current management strategies since they [Remington] were now determined to be inconsistent with Biodiversity RMS 1,3 and 6 contained in the Forest Plan.

31. On July 23, 1998, the Department sent a memorandum to its Area and Unit Managers, Management Foresters from Scott McLeod, Supervisor, Forest Improvement Section that indicated that the Biodiversity Implementation Guidance had been adopted and that it should be applied to timber sales. In addition, the memorandum stated a definition of old growth as follows: "Stands older than 150 years (140 for lodgepole pine) that exhibit a range of structural attributes associated with old age." The Memorandum lists four references for the Implementation Guidance and the new policies, standards and practices for old growth. Remington was not cited as a reference for the Guidelines.

32. The Department no longer uses Remington as a basis for defining and maintaining

old growth on state forest lands and conducting logging operations in old growth.

33. There are significant differences in the environmental consequences of implementing the Forest Plan through Remington as compared to implementing the Forest Plan through the Biodiversity Guidelines. Under the Biodiversity Guidelines the 'working definition' allows logging of old growth down to only minimum of four thousand board feet per acre and still be considered old growth. The 'working definition' is acknowledged to be "minimal" in regard to old growth attributes. Bio. Sup. A-2 (December 30, 1999). This represents a significant change in old growth management from Remington.

34. Under the Biodiversity Guidelines, there is no requirement that old growth be managed for retention of ten percent in 3rd order drainages for blocked ownerships as in Remington. There is no minimum requirement for scattered tract sizes. Salvage or sanitation logging is permitted in designated old growth stands even if they are not breaking up. All of these portions of the Guidelines are in conflict with Remington and will allow more harvest within old growth stands.

35. Logging old growth on state forest lands under the Biodiversity Guidelines is likely to have significant adverse affects on wildlife and biodiversity, especially at the landscape level when compared to logging old growth under Remington. Many old growth species depend on old growth in large blocks managed for old growth in 3rd order drainages with connecting corridors which are no longer required in management prescriptions for old growth. In addition, to manage for scattered blocks in less than 50 acre minimums will allow the reduction of habitat for old-growth dependent bird species. The definition of old growth as been further altered so as to permit logging down to four thousand board feet per acre and still classify those lands as old growth, even if they do not provide habitat for old growth dependent wildlife. These and other differences between the Guidelines and Remington are likely to adversely affect old growth dependent wildlife when the Guidelines are used to define and implement logging operations instead of using Remington.

36. The Department now states that Remington is inconsistent with the Forest Plan therefore necessitating the adoption of the Biodiversity Guidelines to carry out the true intent of

1 the Forest Plan.

2 37. Subsequent to the adoption of the Biodiversity Guidelines the Department has
3 undertaken yet another new process to address the issue of logging in old growth. The new
4 process is on-going as of the date of this complaint. The new process is not being conducted in
5 accordance with MEPA or MAPA.

6 38. On April 4, 2000 the Department sent out a press release entitled "Input Sought on
7 Old Growth Policy." The Department stated that "Changes are being proposed to the current
8 "biodiversity implementation guidance," which outlines the process for meeting old growth
9 commitments identified in the State Forest Land Management Plan." The Department also
10 stated in the press release that "[T]he written implementation guidance will be open to review
11 and comment from the general public." The Department also stated in the press release that
12 public input would be sought and that any changes would be submitted to the State Land Board
13 (the Defendant herein) for approval prior to implementation.

14 39. DNRC has taken additional steps to further this new process. Further changes to
15 the manner in which old growth is classified, managed and logged that may result from this
16 review will not be subject to MEPA or MAPA according to the Department. The new process
17 will result in additional changes to the Plan, its implementation, old growth logging and old-
18 growth dependent wildlife on state forest lands.

19 40. On May 10, 2000 the Department stated in a letter to Friends that of the ten timber
20 sales that would be presented at the Board's May and June meetings, seven of these sales would
21 harvest old growth encompassing approximately 1,223 acres of state forest lands.

22 41. The Plan and its relationship to the environmental impacts of the harvest of old
23 growth was the subject of a case filed after implementation of the forest plan. The case was over
24 the Blacktail Timber Sale in southwestern Montana. On September 16, 1999 Judge Jeffrey
25 Sherlock of the Montana First Judicial District issued a permanent injunction preventing the
26 cutting of any old growth in the Blacktail Timber Sale on state lands until the Department
27 prepared a new EIS addressing the old growth in the timber sale and explaining why the
28 Department ignored portions of the State Forest Land Management Plan. Skyline Sportsmen

Association et al v. Board of Land Commissioners, BDV 99-146, Findings of Facts, Conclusions of Law and Order dated September 16, 1999 (referred to as slip op.).

42. In that case, the Court found as a Finding of Fact that the Department "ignored important parts" of the forest plan, namely the application of Remington to logging within old growth stands. The Court also found that the Department committed, in its forest plan, that the Remington study "would be used for designating and managing old growth blocks and replacement areas." Slip Op. at 13.

43. The Court also found that the Department had failed to demonstrate that Remington was not binding upon the Department. Slip Op. at 14. The Court also found that in September 1999, the Department failed to provide any other "technical references" for managing old growth. Id. The Department presented the Biodiversity Guidelines to the Court during the case. The Court made no finding that the Guidelines constituted a technical reference for managing old growth. The Court made no finding that the Guidelines had lawfully superceded or replaced Remington.

44. The Court also found that "since DNRC has adopted the Remington study as part of the policy it is to follow and then totally ignored it, the Court concludes that the DNRC failed to follow its own rules in preparing the EIS and thus acted unlawfully." Slip Op. at 15.

45. The Department and the Board continue to fail to follow the Remington Study in approving timber sales that harvest old growth timber on state lands. The Department and the Board have never lawfully amended the forest plan to delete Remington and the policies, procedures and standards bases thereon, and/or replace Remington with other appropriate policies, standards and procedures for managing old growth.

46. The adoption of the Biodiversity Implementation Guidance, changes in the Plan and the resulting change in old growth management has never been subject to MEPA nor have they ever gone through rulemaking under MAPA.

**COUNT ONE - MONTANA ADMINISTRATIVE PROCEDURE ACT**

47. Plaintiffs reallege all previous statements as if set forth in their entirety.

48. MAPA defines a "rule" as "each agency regulation, standard, or statement of

general applicability that implements, interprets or prescribes law or policy or describes the organization, procedures or practice requirements of an agency. The term includes the amendment or repeal of a prior rule..." 2-4-102 (11) M.C.A. (1999). The above-quoted definition of a rule lists six exceptions to the definition of a rule, none of which are applicable here.

49. The Biodiversity Guidelines are now applied to logging projects on all forest lands managed by the Department. The Guidelines replaced Remington to interpret and implement the Forest Plan with respect to old growth management. The Guidelines prescribe the Department's policy for old growth management and logging on all state forest lands. The Guidelines are generally applicable to all timber sales on state forest lands throughout the entire state of Montana, including the ten timber sales that the Board has stated will be presented for approval at the Board's May and June, 2000 meetings. The Guidelines define the practices of the Department and the Board with respect to the management of old growth. The Department claims the Biodiversity Guidelines are the correct means to interpret the Forest Plan. Therefore, the Biodiversity Guidelines are a rule as defined by 2-4-102 (11) M.C.A. (1999).

50. MAPA has procedural requirements regarding notice and comment by the public of proposed rules. MAPA requires that "prior to the adoption, amendment or repeal of any rule, the agency shall give written notice of its intended action." 2-4-302 (1). MAPA imposes certain requirements related to the notice of the adoption or amendment of rules, such as the terms of the rule, a description of the subjects and issues involved, rationale for the action and when and where the general public can provide input. 2-4-302 (1). MAPA also requires that "prior to the adoption, amendment or repeal of any rule, the agency shall afford interested persons at least 20 days notice to submit data, views or argument, orally or in writing.... If the proposed rule involves matters of significant public interest, the agency shall schedule an oral hearing." 2-4-302 (4)

51. Prior to their adoption, the Department failed to provide written notice of its intent to adopt the Biodiversity Guidelines. The agency failed to provide the public with opportunity to submit data and views prior to the adoption of the Biodiversity Guidelines. The subject of old growth logging has been the subject of at least five Montana District Court lawsuits and 3 U.S.

District Court cases over the last decade. The subject of old growth logging has been reported in the Montana news media throughout the last decade. The subject of old growth logging on state lands is a matter of significant public interest. The Department did not schedule a public hearing on the Biodiversity Guidelines prior to their adoption. Prior to the adoption of the Biodiversity Guidelines the Department did not fully consider written and oral submissions regarding the proposed rule. The Department therefore failed to comply with the provisions of MAPA, 2-4-302 and 2-4-304 M.C.A. (1999) prior to the adoption of the Biodiversity Guidelines. The use, adoption or implementation of the Biodiversity Guidelines by the Department is therefore in violation of MAPA, and is arbitrary and capricious, without observance of procedure required by law and illegal.

**COUNT TWO - MONTANA ENVIRONMENTAL POLICY ACT**

52. All previous statements are realleged as if set forth in full.

53. The Montana Environmental Policy Act (MEPA) requires that the Department prepare a "detailed statement" (known as an Environmental Impact Statement or EIS) for actions that significantly affect the human environment. § 75-1-201, MCA, (1991). The provisions implement the constitutional provision for maintenance of a clean and healthful environment, Article IX, Section 1, Mont.Const. (1972).

54. In its detailed statement, the state agency must address:

(A) the environmental impacts of the proposed action;

(B) adverse affects that cannot be avoided;

(C) alternatives to the proposed action;

(D) the relationship between local short term uses and the maintenance and enhancement of the long-term productivity; and

(E) irreversible commitments of resources if the project is implemented. § 75-1-201 (1)(b)(iii) (A) through (E).

55. The Defendant has adopted regulations that outline its procedures and further define the Department's obligations under MEPA. A.R.M. 36.2.521, *et seq.* These regulations require, *inter alia,* that whenever the agency is contemplating a series of agency initiated actions, programs or policies which in part or in total may constitute a major state actions significantly

affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions. The forest plan EIS adopted in 1996 was prepared as a programmatic EIS under these regulations.

56. Under MEPA, a supplement for either a draft or final EIS is required when:

> (b) there are significant new circumstances, discovered prior to the final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision.

A.R.M. 36.2.533.

57. The adoption Biodiveristy Guidelines with the resulting environmental consequences discussed herein, constitute significant new circumstances and/or information with respect to the Forest Plan EIS and ROD, and therefore the Department has to prepare and the Department and Board approved a supplement to the EIS addressing the environmental consequences of amending or replacing Remington with the Biodiveristy Guidelines. The Department failed to prepare a supplement to the EIS and therefore is in violation of MEPA.

58. The Department has never analyzed the environmental impacts, direct, indirect and cumulative, of using the Guidelines on state forest lands, particularly on blocked forest lands in an appropriate MEPA. The Department, in an appropriate MEPA document, has never considered alternatives to the Guidelines as defined by MEPA and its implementing regulations. These failures constitute violations of MEPA and the Department's implementing regulations and are arbitrary, capricious and a failure to follow lawful procedures.

59. The adoption of the Biodiversity Guidelines will result in an irretrievable commitment of resources with respect to the logging of old growth forest. The irretrievable commitment of resources resulting from the use of the Guidelines has never been analyzed in an appropriate MEPA document, in violation of MEPA.

**COUNT THREE - INJUNCTIVE RELIEF**

60. Plaintiffs reallege all previous statements as if set forth fully herein.

61. The requirements for listing names and addresses of members of Plaintiff organizations under 27-19-104 M.C.A. (1999) do not apply.

62. The continued logging of old growth forest and loss of habitat for old-growth dependent wildlife and the environmental impacts as alleged herein constitute irreparable injury to members of Plaintiffs' organizations and violate the laws and regulations of the state of Montana. The Defendants have represented that they will adopt ten timber sales at the May and June, 2000 meetings of the Board. Seven of those sales will use the Guidelines as a basis to log in old growth stands. Plaintiffs have no adequate remedy at law, and therefore a permanent injunction preventing the cutting of any old growth/mature forest under the Biodiversity Guidelines until such time as the Department has complied with all applicable law is the appropriate remedy.

**WHEREFORE PLAINTIFF PRAYS FOR RELIEF AS FOLLOWS:**

1. For a declaratory judgment declaring the Department's adoption and use of the Biodivesity Guidelines is in violation of the Montana Administrative Procedure Act and/or the Montana Environmental Policy Act and implementing regulations for the reasons set forth herein.

2. For a permanent injunction against the commercial or non-commercial sale and/or harvest of old growth forest, including sanitation and salvage logging, on state forest lands based upon the use or implementation of the Guidelines unless and until the Department adopts them in accordance with procedures required by law.

3. For an Order mandating that the Department comply with MEPA and MAPA prior to adopting or implementing any new rule, standard or policy concerning the harvest of old growth timber, or before implementing a change or amendment to the Forest Plan, including any proposals that are currently being reviewed by the Defendants.

4. For Plaintiffs' reasonable costs and attorney fees and for any and all other such relief as the court deems just and proper.

DATED this ___day of June, 2000.

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

JEFFREY M. SHERLOCK
Presiding Judge

FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER INC.

Plaintiffs,

v.

ARTHUR CLINCH (in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,

Defendants.

Cause No. BDV-2000- 369

**SUMMONS**

THE STATE OF MONTANA SENDS GREETINGS TO MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION.

You are hereby summoned to respond to the Complaint in this action which is filed in the office of the Clerk of District Court, a copy of which is hereby served upon you, and to file your response and serve a copy thereof upon Plaintiffs' attorney within forty (40) days after the service of this Summons, exclusive of the day of service; and in case of your failure to respond, Decree will be taken against you by default for the relief prayed for in the Complaint.

WITNESS my hand and seal of said Court this 14 day of June, 2000.

NANCY SWEENEY
Clerk of District Court

By: DRostock
Deputy Clerk

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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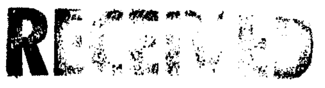
| FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER INC.<br><br>Plaintiffs,<br><br>v.<br><br>ARTHUR CLINCH (in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,<br><br>Defendants. | Cause No. BDV-2000-369<br><br>NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT |



JUN 2 7 2000
ENVIRONMENTAL QUALITY COUNCIL

**NOTICE**

**TO: MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, DEFENDANT**

The enclosed summons and complaint are served pursuant to Rule 4D (1) (b) of the Montana Rules of Civil Procedure.

You may complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days after the date it was mailed to you as shown below.

If you decide to complete and return this form, you must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership) or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate

under your signature your authority.

If you do not complete and return this form to the sender within 40 days after the date that it was mailed to you as shown below, you (or the other party on whose behalf you are being served) may be required to pay the expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 40 days after the date of the signature which you place on the acknowledgment below. If you fail to answer the complaint within the foregoing 40 day period, judgment by default will be taken against you for the relief demanded in the amended complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt and Summons and Complaint was mailed on the 15 of June, 2000

Signature　　　　　　　　　　Date 6/15/10

ACKNOWLEDGMENT OF RECEIPT
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and amended complaint in the above-captioned matter at

______________________________________________.

Signature　　　　　　　　　　Date

Relationship to Entity/Authority
to receive service of process

Jan 2001

NANCY SWEENEY
CLERK DISTRICT COURT

FEB 5 11 03 AM '01

FILED BY [signature] DEPUTY

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8 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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11 FRIENDS OF THE WILD SWAN, INC.,
12 ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER INC.

13
14 Plaintiffs,

v.

15 ARTHUR CLINCH (in his official capacity
16 as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF
17 NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,

18
19 Defendants.

20

Cause No.BDV-2000-369

**STIPULATION**

21
22 COMES NOW the parties by and through their attorneys, and agree and stipulate as follows:

23 1.) The Department will refrain from harvesting any harvest unit currently designated
24 as old growth within the Beaver 2000, Doran Hart #1, Sourfish, Clearwater River #2,,Gladstone,
25 Lukewarm, Chicken Werner, or Red Owl timber sales until March 1, 2001;

26 2.) Additionally, the Department will, until March 1, 2001, refrain from harvesting
27 any harvest unit currently designated as old growth within any timber sale which is approved by
28

1 the State Land Board between August 4, 2000 and March 1, 2001;

2 3.) The Department may proceed with the harvest of forest products from other
3 harvest units within these sales and carry out all other functions necessary for the harvest of those
4 units, including road construction and maintenance;

5 4.) This stipulation shall not in any manner, affect the ability of the Department to
6 take action in any harvest unit necessary, in the sole discretion of the Department, to defend
7 state, federal, or private lands from wildland fire, nor shall it affect the ability of the Department
8 to conduct salvage operations resulting from such activities, or any other natural calamity. The
9 Department shall provide Plaintiffs fourteen days advance notice prior to the approval of any
10 such decision pertaining to or related to any such salvage or harvest logging plans or operation in
11 any old growth unit on state forest lands, unless the presence of wildfire precludes giving such
12 advance as provided herein, but the Department will provide notice of such wildfire as soon as
13 practical.

14 5.) Plaintiffs shall not seek a preliminary injunction against the timber harvest
15 activities covered by this Stipulation prior to fourteen days before the expiration of the terms of
16 this Stipulation. In the event that this litigation is not concluded by February 21st, 2001, the
17 parties will discuss means of continuing or modifying the stipulation to suit the needs of both
18 parties. If discussions are not successful, Plaintiffs may move the court for appropriate relief at
19 that time.

20 6.) The parties request that each and every term of this Stipulation be made an Order
21 of this Court.

22 7.) The Department may agree to extend the terms of this Stipulation from time to
23 time upon providing written notice to the parties and the Court.

24 DATED this 23 day of January, 2001.

25

26 JACK R. TUHOLSKE
Attorney for Plaintiffs

27

28 TOMMY H. BUTLER
Attorney for the Defendants
Special Assistant Attorney General

Feb 2001

NANCY SWEENEY
CLERK DISTRICT COURT

FEB 5 11 03 AM '01

FILED BY [signature] DEPUTY

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER INC.

Plaintiffs,

v.

ARTHUR CLINCH (in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,

Defendants.

Cause No. BV 2000-369

ORDER

Based upon the Stipulation of the parties, and for good cause appearing, IT IS HEREBY ORDERED that each and every term of the Stipulation dated January 29, 2001 is made an order of this court.

Dated this 2 day of ~~January~~ Feb, 2001.

[signature]
Judge Jeffrey Sherlock
District Judge

| Post-it® Fax Note 7671 | Date 6/29. # of pages ▸ 3 |
|---|---|
| To Bently Litgaard | From Vicky |
| Co./Dept. | Co. Dist. Court |
| Phone # 4443598 | Phone # 447-8216 |
| Fax # 444-2588 | Fax # 447 8275 |

NANCY SWEENEY
CLERK-DISTRICT COURT

FEB 21 11 04 AM '01

FILED BY LISA KALLIO
DEPUTY

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8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
**LEWIS AND CLARK COUNTY**
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| FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>ARTHUR CLINCH (in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES, MONTANA BOARD OF LAND COMMISSIONERS,<br><br>Defendants. | Cause No. BDV 2000-369<br><br>**ORDER ON MOTIONS FOR SUMMARY JUDGMENT** |
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20 Before the Court are the parties' cross-motions for summary judgment. The
21 motions are fully briefed and are ready for decision.
22 **Background**
23 Plaintiff Friends of the Wild Swan is a public interest organization whose goal is
24 to protect and preserve the native biodiversity of the Swan Lake, Montana, area and the Northern
25 Rockies. Plaintiffs Alliance for the Wild Rockies and The Ecology Center are also public interest

1 organizations whose goals are similar to those of Friends of the Wild Swan.

2 Defendant Board of Land Commissioners (Board) is an agency of the state of
3 Montana with headquarters in Helena, Montana. The Board consists of the governor,
4 superintendent of public instruction, auditor, secretary of state, and attorney general. All state
5 school trust lands are under the direction and control of the Board. Defendant Department of
6 Natural Resources and Conservation (Department) is a state of Montana agency headquartered
7 in Helena, Montana. The Department manages portions of state land for the benefit of the public
8 school trusts.

9 This case concerns the Department's management of state forest lands under the
10 guidance of the State Forest Land Management Plan (SFLMP). On May 30, 1996, after an
11 extensive environmental review process was conducted in compliance with the provisions of the
12 Montana Environmental Protection Act (MEPA), the Department adopted the SFLMP as the
13 preferred alternative in the forest land management programmatic final environmental impact
14 statement. The SFLMP applies to over 660,000 acres of forested school trust lands and provides,
15 among other things, policies, standards and guidelines for managing these state-owned forest
16 lands.

17 Of import to this case are certain management standards in the SFLMP known as
18 Resource Management Standards (RMS) which ostensibly provide the framework for the
19 Department's project-level state forest land management decisions. Two of these RMS (RMS
20 Nos. 6 and 7) discuss management, maintenance, restoration and promotion of biodiversity of
21 old-growth forests on state land. Old-growth forests on state land are distinctive in that they have
22 considerable future value both as a financial resource for the state and as habitat vital to the
23 survival of many species of wildlife.

24 Specifically referenced in RMS Nos. 6 and 7 is a document prepared in 1993 by
25 former Department employee Dave Remington entitled "BIOLOGICAL DIVERSITY STRATEGIES FOR

1 FOREST TYPE GROUPS" (Remington Paper). The Remington Paper sets forth procedures for
2 identifying, designating and managing old growth forests. The Remington Paper also contains
3 several explicit management prescriptions regarding old-growth protection measures, including
4 a definition of old-growth, and statements on old-growth retention amounts, size of old-growth
5 areas, spatial arrangement of old-growth blocks, and general old-growth management activities.
6 Pursuant to the SFLMP, all Resource Management Standards including RMS Nos. 6 and 7, would
7 apply to any new projects, including timber sales, after May 30, 1996.

8 On July 23, 1998, the Department adopted a 43-page document entitled
9 "Biodiversity Implementation Guidance" (Biodiversity Guidance). It is undisputed that the
10 Department adopted the Biodiversity Guidance without conducting any independent MEPA
11 analysis or review.

12 Plaintiffs filed the present suit alleging that the Department's adoption of the
13 Biodiversity Guidance fundamentally altered the old-growth management standards and policies
14 outlined in the SFLMP. Plaintiffs therefore seek a summary judgment ruling that the adoption
15 of the Biodiversity Guidance was a substantial change to the SFLMP requiring a supplemental
16 MEPA analysis. Plaintiffs also seek a summary judgment ruling that the notice and participation
17 provisions of the Montana Administrative Procedure Act (MAPA) were violated. The
18 Department, on the other hand, seeks a summary judgment ruling that the adoption of the
19 Biodiversity Guidance does not trigger any additional MEPA review, nor does it violate MAPA.

20 **Standard**

21 Summary judgment is proper only when no genuine issue of material fact exists
22 and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The
23 movant has the initial burden to show that there is a complete absence of any genuine issue of
24 material fact. To satisfy this burden, the movant must make a clear showing as to what the truth
25 is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Minnie

1 v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to
2 the party opposing the motion to show, by more than mere denial and speculation, that there are
3 genuine issues for trial. Sunset Point v. Stuc-O-Flex Int'l, 287 Mont. 388, 392, 954 P.2d 1156,
4 1159 (1998). The party opposing the summary judgment is entitled to have any inferences drawn
5 from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.
6 Summary judgment motions encourage judicial economy through the elimination
7 of unnecessary trial, delay and expense. Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32,
8 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity
9 to try their cases before a jury. Brohman v. State, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988).
10 "Summary judgment is an extreme remedy and should never be substituted for a trial if a material
11 fact controversy exists." Clark v. Eagle Sys., Inc., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996)
12 (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment,
13 it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne
14 Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); Kober v. Stewart, 148 Mont. 117,
15 122, 417 P.2d 476, 479 (1966).
16 **Discussion**
17 Plaintiffs contend that the Department violated MEPA when it adopted the
18 Biodiversity Guidance without analyzing the environmental impacts of that decision. Plaintiffs
19 also contend that the Department violated MAPA because the Biodiversity Guidance was adopted
20 without allowing for public notice, comment and participation. The Department admits that it
21 neither prepared an independent MEPA document nor complied with MAPA when it adopted the
22 Biodiversity Guidance. However, the Department contends that such actions were unnecessary
23 because the Biodiversity Guidance did not significantly change, amend or alter the SFLMP, and
24 because the Biodiversity Guidance constitutes an intra-agency implementation guide and is not
25 a "rule" as defined under MAPA.

1 **MEPA Claim**

2 The parties agree that significant changes to the SFLMP's old-growth standards
3 and policies trigger further MEPA analysis. The dispositive issue, therefore, appears to revolve
4 around whether the Department's adoption of the Biodiversity Guidance constitutes a significant
5 change to the SFLMP. For the reasons stated below, it is this Court's opinion that the
6 Biodiversity Guidance does not constitute a significant change to the SFLMP which would
7 require additional MEPA review.

8 Plaintiffs contend that the Biodiversity Guidance significantly alters the SFLMP's
9 old-growth biodiversity management standards. In support of this contention, Plaintiffs make
10 much of the fact that old-growth management prescriptions contained in the Remington Paper
11 (which is specifically referenced in the SFLMP's RMS Nos. 6 and 7) were replaced by the
12 Biodiversity Guidance. Plaintiffs argue, among other things, that the Remington Paper's
13 definition of old-growth, the Paper's numeric and percentage-based retention requirements, and
14 the Paper's old-growth logging restrictions were replaced by what they consider to be more
15 lenient standards set forth in the Biodiversity Guidance.

16 The Department argues that the Biodiversity Guidance is consistent with the
17 resource management standards adopted in the SFLMP and is not an alteration to or amendment
18 of the old-growth biodiversity commitment goals set forth in the SFLMP. In addition, the
19 Department argues that language in the SFLMP itself excludes the adoption of intra-departmental
20 documents like the Biodiversity Guidance from additional MEPA review.

21 The Department acknowledges that the Remington Paper was specifically
22 referenced in RMS Nos. 6 and 7, however the Department denies that these references were
23 meant to do anything more than provide general information relating to forest management
24 techniques. The Department maintains that the Remington Paper was never intended to be
25 prescriptive or exclusively relied upon for old-growth management guidance.

1 The Department further asserts that some of the Remington Paper's management
2 prescriptions are inconsistent with other SFLMP standards and that the Remington Paper does
3 not define old-growth in a manner which could be practically applied to site-specific projects.
4 The Department maintains that these defects prompted the preparation and adoption of the
5 Biodiversity Guidance in order to clarify inconsistencies and provide field personnel with
6 practical procedures for managing old-growth biodiversity.

7 It is clear that the SFLMP was designed to provide a cohesive management
8 scheme for forested state lands and that this management scheme is realized in part through
9 various standards that are applied to timber sales on state lands. It is equally clear that the
10 management of old-growth forests involves a sensitive balancing of biodiversity and habitat
11 preservation concerns with responsible logging considerations. The SFLMP addresses the
12 biodiversity angle in RMS Nos. 6 and 7 which provide as follows:

13 6) Within an appropriate analysis area, DNRC would seek to maintain or restore old-growth forest in amounts of at least half the average proportion
14 that would be expected to occur with natural processes on similar sites. We would maintain sufficient replacement old-growth to meet this goal
15 given that old-growth does not live forever. However, DNRC would not maintain additional old-growth to compensate for loss of old-growth on
16 adjoining ownerships. Procedures such as those described in "Biological Diversity Strategies for Forest Type Groups" or other technical references
17 would be used for designating and managing old growth blocks and replacement areas.
18
7) "Biological Diversity Strategies for Forest Type Groups" or other current
19 references would be used as guidance for landscape-level biodiversity evaluations, old-growth protection, and design of timber harvests to
20 promote biodiversity. The Biological Diversity Strategies would be updated periodically, with professional review, as new information and
21 concepts are developed.

22 As stated above, RMS No. 6 commits the Department to maintaining or restoring
23 old-growth forest in amounts of at least half the average proportion that would be expected to
24 occur with natural processes on similar sites. Therefore, RMS No. 6 limits the Department's
25 ability to harvest old-growth timber to a maximum of 50 percent of the naturally occurring

1 amount of old-growth on state lands. RMS No. 6 also obligates the Department to use procedures
2 such as those described in the Remington Paper or other technical references for designating and
3 managing these old-growth forests.

4 The 1993 Remington Paper discusses several such procedures for old-growth
5 designation and management. The Remington Paper contains the following old-growth
6 management criteria:

7 Retention amounts: At least ten percent of the forested State ownership would be maintained as old-growth, unless different amounts are specified in landscape-
8 level biodiversity plans. On areas of blocked State ownership . . . specified amounts of old-growth would be retained within identified management units of
9 5,000 to 15,000 acres. . .

10 Size of old-growth areas: Retained old-growth blocks should be at least 50 acres. Approximately equal areas should be in small and large old-growth blocks,
11 ranging from 50 to 500 plus acres, in order to favor a balance between interior conditions and dispersal distances for dependent species. Blocks should generally
12 be fairly regular in shape to minimize the proportion of edge.

13 Spatial arrangement: Old-growth blocks should be distributed across the landscape, spatially and elevationally, to the extent permitted by existing old-
14 growth distributions and locations of State parcels . . .

15 . . .

16 Management activities: These areas are being retained to provide intact old-growth characteristics, so partial cutting should not be done except as described
17 below. Sanitation and salvage cutting are inappropriate because they remove snags and decadent trees, which are key old-growth components. However, if
18 stands are breaking up rapidly with heavy fuel accumulations, then some salvage cutting may be appropriate to reduce the risk of the stand being lost to wildfire.
19 If stands are in a state of rapid breakup, and suitable substitute blocks are available, then harvest may be considered.

20

21 The 1998 Biodiversity Guidance also discusses several old-growth management
22 standards and provides instruction on what procedures the Department must utilize when
23 performing old-growth landscape analyses. The first section of the Biodiversity Guidance
24 reiterates five of the seven original Biodiversity Resource Management Standards found in the
25

1 SFLMP.[1] The second section is entitled "How to Perform a Landscape Analysis" and contains
2 definitions of the "filter approaches" referred to in RMS Nos. 1 and 2 and a brief introduction.
3 The third and largest section of the Biodiversity Guidance entitled "Analysis Procedures" appears
4 to be a scientific and technical silvicultural guide to "vegetation manipulation" to achieve
5 "resource objectives" and "minimize unintended consequences."

6 The Biodiversity Guidance does not contain the specific numeric standards and
7 guidelines described in the Remington Paper, nor does it duplicate the same definition of old-
8 growth. According to the Department, the rationale behind its adoption of the Biodiversity
9 Guidance was "to assist Department personnel to interpret and implement the Resource
10 Management Standards contained in the SFLMP." (Pl.'s Ex. 4). Apparently this was necessary
11 because "the Landscape Planning and Old Growth Protection portions of Remington's Study
12 [were] not applicable to current management strategies since they [were] inconsistent with
13 direction in Biodiversity RMS 1, 3, and 6." (Pl.'s Ex. 5).

14 Plaintiffs place a great amount of weight on the biodiversity management
15 procedures found in the Remington Paper due to the fact that the Remington Paper is specifically
16 mentioned in RMS Nos. 6 and 7. Because of this, Plaintiffs argue that the Remington Paper's
17 biodiversity management procedures take on special significance as "an integral part of the
18 SFLMP." (Br. Supp. Pls.' Mot. Summ. J., at 6.)

19 The Court, however, is of the opinion that the disjunctive conjunction "or"
20 separating the Remington Paper from "other" technical or current references expresses the
21 SFLMP's contemplation of alternatives to the procedures set forth in the Remington Paper. RMS
22 No. 6 specifically states that procedures <u>such as those</u> described in the Remington Paper <u>or other</u>
23 <u>technical references</u> would be used for designating and managing old growth blocks and
24

25 [1] RMS Nos. 5 and 7 were omitted.

1 replacement areas; and RMS No. 7 states that the Remington Paper or other current references
2 would be used as guidance for biodiversity management decisions on old-growth forests.
3 The disjunctive and elective language surrounding the specific references to the
4 Remington Paper in RMS Nos. 6 and 7 precludes this Court from considering the Remington
5 Paper as integral a component of the SFLMP as Plaintiffs would urge. The Remington Paper
6 certainly contains specific and stringent procedures for managing old-growth which differ in form
7 from those set forth in the Biodiversity Guidance, however, the Court is not convinced that the
8 differences in detail constitute a level of overall change in the function of the SFLMP significant
9 enough to warrant ordering a supplemental environmental impact statement.
10 For one thing, the SFLMP itself allows for changes in management direction
11 without the need to formally amend the SFLMP so long as the changes are compatible with the
12 SFLMP. The SFLMP Record of Decision provides as follows:
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> The Forest Management Bureau Chief could change management direction without changing the Plan if the proposed change did not violate the fundamental intent as reflected in the Plan and EIS. For example, as our resource specialists became aware of new information through their ongoing review of scientific literature, we might modify our biodiversity strategy without amending the plan as long as the changes remained consistent with our original intent.

17 (SFLMP Record of Decision, at 10 (emphasis added).)
18 The Department submits the affidavits of two employees in support of its
19 contention that the Biodiversity Guidance is consistent with and not violative of the fundamental
20 intent of the SFLMP. The Court found the affidavits of Department employees Tom Schultz and
21 Scott McLeod particularly cogent in this respect. Although Plaintiffs argue that these affidavits
22 are post-hoc explanations of the Department's decision, the Court disagrees. McLeod has 20
23 years of professional experience in the field of forestry, and Schultz is currently the Department's
24 Chief of the Forest Management Bureau. Both men have personal experience with the
25 preparation and adoption of the SFLMP, and both are qualified to testify to the matters in

1 controversy here.

2 In his affidavit, McLeod unequivocally states that the Biodiversity Guidance does
3 not alter the SFLMP old-growth commitment, or the SFLMP in general. Schultz, for his part,
4 provides the Court with a 1999 document entitled "SUPPLEMENTAL BIODIVERSITY GUIDANCE:
5 OLD GROWTH MANAGEMENT STRATEGIES AND DEFINITIONS," which embarks upon a comparison
6 of the 1993 Remington Paper and the 1998 Biodiversity Guidance. That document states that the
7 Biodiversity Guidance addresses various inconsistencies and generalizations in the Remington
8 Paper which made its field use impractical. It further states that the Biodiversity Guidance
9 attempts to clarify the Department's interpretation of its goals under the SFLMP as well as to
10 facilitate the Department's implementation of the biodiversity standards set forth in the SFLMP.

11 Plaintiffs have not demonstrated that the Biodiversity Guidance has significantly
12 altered or amended the ultimate biodiversity standards and goals outlined in the SFLMP. Rather,
13 it appears that Plaintiffs are claiming that the mere promulgation of this particular guidance plan
14 was significant enough to trigger MEPA. Although Plaintiffs argue that the differences between
15 the Remington Paper management philosophy and the Biodiversity Guidance management
16 philosophy are significant and substantial, the record before the Court supports the opposite
17 conclusion.

18 The SFLMP, as a technical and scientific document espousing the Department's
19 management philosophies, was designed to allow for reasonable and nonsignificant future
20 alterations in management procedure based upon more recent research data. It is a programmatic
21 plan, providing the general framework for proposing and analyzing site-specific projects. The
22 FEIS states that the Remington Paper was included to assist readers in an understanding of the
23 biological diversity presented in the SFLMP, and that the Remington Paper was not intended to
24 supply "cookbook prescriptions." Rather, it recognizes that the Department's forest managers are
25 charged with the responsibility for managing old-growth forests in a way which will meet the

requirements of the SFLMP based upon silvicultural practices tailored to the unique conditions of each site and landscape situation in order to meet biodiversity goals.

After reviewing the parties' briefs and based on the above discussion, the Court cannot rule that the Department's adoption of the Biodiversity Guidance constitutes a significant change to the SFLMP. It is this Court's opinion, therefore, that the Department need not conduct an additional MEPA analysis of the Biodiversity Guidance. Plaintiff's request for injunctive relief under MEPA is denied.

**MAPA Claim**

Plaintiffs contend that the Department violated MAPA when it issued the Biodiversity Guidance because it meets the plain language definition of a "rule" and the Department failed to comply with MAPA's rulemaking procedures. The Department argues that the Biodiversity Guidance is an internal agency document and not a rule.

MAPA defines a rule as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency The term includes the amendment or repeal of a prior rule. . . " Section 2-4-102(11), MCA (1999).

The Court agrees with Plaintiffs' contention that the Biodiversity Guidance falls within the ambit of MAPA's definition of a rule. The Biodiversity Guidance applies to all timber sales on state lands and constitutes the implementation of the Department's approach to old-growth management on state forest lands. Thus, the Biodiversity Guidance implements and interprets the Department's old-growth biodiversity retention and timber harvesting policy.

The Department adopted the Biodiversity Guidance without following MAPA's procedural requirements concerning public notice and participation. The Court therefore temporarily enjoins the Department from harvesting old-growth timber until such time as the Department can comply with the procedural requirements of MAPA.

1 **Conclusion**

2 The SFLMP was adopted on the heels of an extensive environmental review
3 process that was undertaken by the Department to ensure compliance with MEPA. The SFLMP
4 was not significantly altered by the Department's subsequent adoption of the Biodiversity
5 Guidance and therefore supplemental environmental analysis is not required at this time.
6 Therefore, summary judgment is granted in favor of the Defendants as to Plaintiffs' MEPA claim.
7 The Biodiversity Guidance does, however, fall within the scope of MAPA's definition of a "rule,"
8 hence the Department must follow through on the procedural requirements of notice and public
9 participation as prescribed under MAPA. Therefore, summary judgment is granted in favor of
10 Plaintiffs as to their MAPA claim.

11 IT IS SO ORDERED.

12 DATED this 21 day of February 2001.

13

14 JEFFREY M. SHERLOCK
15 District Court Judge

16 pc. Jack R. Tuholske
Tommy H. Butler/Michael J. Mortimer

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18 T/JMS/WILDSWAN.OSJ

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Sub-Chapter 2

Organizational and Procedural Rules Required by the Montana Administrative Procedure Act

1.3.201 INTRODUCTION AND DEFINITIONS (1) Montana statutes are referred to collectively as the Montana Code Annotated. The term "MCA" is the abbreviation for Montana Code Annotated.

(2) The Montana Administrative Procedure Act is referred to as "the Act" and includes 2-4-101 through 2-4-711, MCA. The Act outlines procedures that agencies must follow when:

(a) adopting, amending or repealing agency rules;

(b) hearing contested cases; or

(c) issuing declaratory rulings.

(3) Each agency subject to the Act must adopt rules describing its organization and procedures. 2-4-201, MCA. Section 2-4-202, MCA directs the attorney general to prepare a model form for a rule describing the organization of agencies and model rules of practice for agency guidance in fulfilling these requirements. The model rules have been adopted for that purpose. The model rules may be incorporated by reference to the model rules. Subsequent amendments may be adopted only by following the rulemaking procedure of the Act. See 2-4-307, MCA.

(4) The term "register" refers to the Montana Administrative Register. (History: 2-4-202, MCA; IMP, 2-4-202, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1200, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

1.3.202 APPLICATION OF MONTANA ADMINISTRATIVE PROCEDURE ACT (1) The Act applies to all state agencies as defined in 2-4-102, MCA. Note that the state board of pardons and parole is subject to only the sections enumerated in 2-4-103, 2-4-201, 2-4-202 and 2-4-306, MCA, and the requirement that its rules be published. (History: 2-4-202, MCA; IMP, 2-4-202, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1200, Eff. 10/12/79; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

1.3.203 ORGANIZATIONAL RULE (1) An agency need not comply with the Montana Administrative Procedure Act notice and hearing requirements when adopting an organizational rule. 2-4-201(1), MCA.

(2) The organizational rule must be reviewed biennially to determine whether it should be modified. 2-4-314, MCA.

(3) The organizational rule should contain the following as illustrated by sample form 2:

(a) the items required by 2-4-201(1), MCA;

(b) charts showing both the organization of the agency and the functions of each division, indicating those divisions without rulemaking authority; and

(c) in the spirit of the rule, a personnel roster of agency heads, division heads and other key personnel should be appended to the rule. (History: 2-4-202, MCA; IMP, 2-4-202, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1200, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

1.3.204 RULEMAKING, INTRODUCTION (1) Title 2, chapter 4, part 3, MCA prescribes procedures to be followed by agencies when adopting, amending or repealing rules.

(2) See 2-4-102, MCA for the definition of "rule". Because of the difficulty in determining whether an agency action falls within the definition of rule, construe the exceptions narrowly and if in doubt, consult legal counsel. Interpretative rules are statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. Interpretive rules may be made under the express or implied authority of a statute, but are advisory only and do not have force of law.

(3) Substantive rules must implement either:

(a) a statute which clearly and specifically includes the subject matter of the rule as a subject upon which rules can be adopted;

(b) subject matter which is clearly and specifically included in a statute to which the agency's rulemaking authority extends; or

(c) an agency function which is clearly and specifically included in a statute to which the agency's rulemaking authority extends. 2-4-305(3), MCA.

(4) Rulemaking checklist. Rulemaking under the Administrative Procedure Act involves three steps.

(a) Notice of proposed agency action. Model Rule 3.

(i) notice in the register;

(ii) notice to sponsor as required;

(iii) notice to interested persons; and

(iv) statement of reasonable necessity for the proposed action.

(b) Opportunity to be heard.

(i) The agency shall allow at least 28 days from the publication of the original notice of proposed action for interested persons to submit comments in writing to the agency.

The agency may extend the response time in the event an amended or supplemental notice is filed;

(ii) The agency shall schedule an oral hearing at least 20 days from the publication of the notice of proposed action if the proposed rules affect matters which are of significant interest to the public as defined at 2-4-102(12), MCA;

(iii) Except where the proposed rules affect matters which are of significant interest to the public or otherwise required by law, a public hearing must be held only if the agency's proposed action affects a substantive rule and a hearing is requested by either:

(A) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action;

(B) a governmental subdivision or agency;

(C) an association having not less than 25 members who will be directly affected; or

(D) the appropriate administrative rule review committee of the legislature. Model Rule 4.

(c) Agency action. Model Rule 5.

(5) Pursuant to 2-4-302, MCA, the agency shall create and maintain a list of interested persons and the subject(s) of their interest. Persons submitting a written comment or attending a hearing must be informed by the agency of the list and be provided an opportunity to place their names on the list.

(6) In the event of imminent peril to the public health, safety, or welfare, temporary emergency rules may be adopted without prior notice or hearing or after abbreviated procedures. However, special notice must be given the appropriate administrative rule review committee. Model Rule 6.

(7) In the event a statute is effective prior to October 1 of the year of enactment, temporary rules may be adopted with abbreviated notice or hearing, but with at least 30 days notice, and are effective through October 1 of that year. Model Rule 6. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-302, 2-4-303, 2-4-305, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1204, Eff. 10/12/79; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

1.3.205 MODEL RULE 2 RULEMAKING, PETITION TO ADOPT, AMEND OR REPEAL RULE (1) Section 2-4-315, MCA authorizes an interested person or member of the legislature acting on behalf of an interested person when the legislature is not in session, to petition an agency to adopt, amend or repeal a rule.

(a) The petition shall be in writing, signed by or on behalf of the petitioner and shall contain, as illustrated by sample form 3, a detailed statement of:

(i) the name and address of petitioner and of any other person known by petitioner to be interested in the rule sought to be adopted, amended or repealed;

(ii) sufficient facts to show how petitioner will be affected by adoption, amendment or repeal of the rule;

(iii) the rule petitioner requests the agency to adopt, amend or repeal. Where amendment of an existing rule is sought, the rule shall be set forth in the petition with proposed deletions interlined and proposed additions underlined; and

(iv) facts and propositions of law in sufficient detail to show the reasons for adoption, amendment or repeal of the rule.

(b) Legislators may petition an agency on behalf of interested parties through an informal letter or memorandum. The petition should include the name of the person or a description of a class of persons on whose behalf the legislator acts. Petitions filed by the appropriate administrative rule review committee of the legislature need not be brought on the behalf of any specifically interested party. Any petition from the legislature or its members should comply with (1)(a)(iii) and (iv) of this rule.

(2) The petition shall be considered filed when received by the agency.

(3) Upon receipt of the petition, the agency:

(a) may, but is not required to, schedule a hearing or oral presentation of petitioner's or interested person's views to assist in developing the record;

(b) shall, within 60 days after date of submission of the petition, either:

(i) issue an order denying the petition; or

(ii) initiate rulemaking proceedings in accordance with the Administrative Procedure Act.

(4) A decision to deny a petition or to initiate rulemaking proceedings must:

(a) be in writing;

(b) be based on record evidence, including any information submitted by petitioner, the agency and interested persons; and

(c) include the reasons for the decision. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-315, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1207, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

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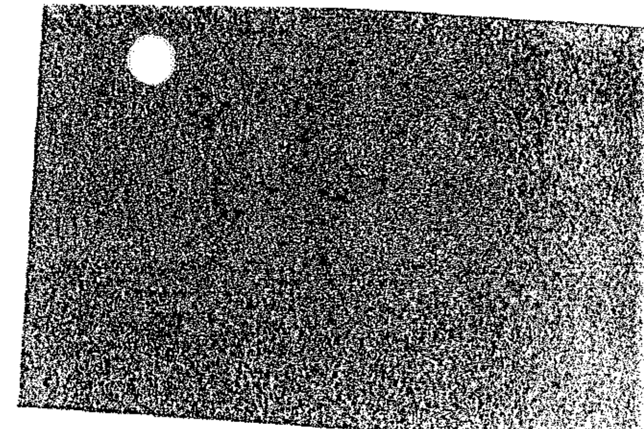



<u>1.3.206 MODEL RULE 3 RULEMAKING, NOTICE</u> (1) How notice is given. 2-4-302, MCA.

(a) An agency shall notify the chief sponsor of any legislation when the agency begins work on the initial rule proposal implementing one or more sections of that legislation. If a proposed rule implements more than one bill, the chief sponsor of each bill must be notified. 2-4-302(2), MCA.

(b) An agency shall publish notice of intent to adopt, amend or repeal a rule in accordance with 2-4-302(2) and (3), MCA.

(c) An agency shall post the notice on the state electronic bulletin board or other available electronic communications system. Posting on the agency's home page is adequate.

(d) Within 3 days of publication pursuant to ARM 1.3.206(1)(b), an agency shall send copies of the notice:

(i) to all interested persons; and

(ii) to the chief sponsor of the legislation being implemented, if the notice is the initial rule proposal regarding that legislation. 2-4-302(2), MCA. If a proposed rule implements more than one bill, the chief sponsor of each bill must receive a copy of the notice.

(e) Former legislators who wish to receive notice of initial proposals must keep their name, address, and telephone number on file with the secretary of state. Agencies proposing rules shall consult that listing. 2-4-302(8), MCA.

(f) An agency may send a copy of the notice to a statewide wire service and any other news media it considers appropriate. 2-3-105, MCA.

(g) Whenever practicable and appropriate, the agency may send written notice to licensees of the agency. 2-4-631(3), MCA.

(2) Notice of agency action must be published within six months of the date on which notice of the proposed action was published. 2-4-305, MCA.

(3) Contents of notice.

(a) <u>Notice of public hearing</u>.

(i) As illustrated by sample form 4, the notice must include:

(A) all notice items required by 2-4-302(1), MCA.

(I) The agency may issue a single public notice that it intends to adopt, amend and repeal several rules dealing with the same subject matter in a single proceeding.

(II) Whenever possible the agency should include in the notice the full text of any rule proposed to be adopted, amended or repealed. Summaries and paraphrasing may only be used when it is not possible to include a copy of the proposed rule in the notice. Such summaries and paraphrasing must accurately reflect the substance of the proposed agency actions.

(III) The agency shall include in its notice an easily understood statement of reasonable necessity which contains the principal reasons and the rationale for each proposed rule. One statement may cover several proposed rules if appropriate, and if the language of the statement clearly indicates which rules it covers. An inadequate statement of reasonable necessity cannot be corrected in an adoption notice. The corrected statement of reasonable necessity must be included in a new notice of proposed action.

(IV) The agency shall include in its notice information describing the interested persons list and explaining how persons may be placed on that list. 2-4-302, MCA.

(V) An agency may adopt a rule which adopts by reference any model code, federal agency rule, rule of any agency of this state, or other similar publication if the publication of the model code, rule or other publication would be unduly cumbersome, expensive or otherwise inexpedient. The notice must contain a citation to the material adopted by reference, a statement of its general subject matter content, and must state where a copy of the material may be obtained. Amendments to incorporated material are not effective unless adopted pursuant to 2-4-307, MCA.

(B) at the end of each rule noticed, a citation to the authority for the proposed rule, and citation to the MCA section or sections being implemented. When an amendment to a rule is proposed, the section(s) of the MCA that constitute authority for the amendment and sections implemented by the amendment must be underlined. If a proposed action implements a policy of a governing board or commission, the notice must include a citation to and description of the policy implemented.

(C) a designation of the officer or authority who will preside at and conduct the hearing.

(b) Notice when agency does not plan to hold a public hearing.

(i) As illustrated by sample forms 5 through 8, the notice must include:

(A) all notice items required by 2-4-302(1), MCA;

(B) a statement that any interested person desiring to express or submit data, views or arguments at a public hearing must request the opportunity to do so, and that if 10% or 25, whichever is less, of the persons directly affected; or a governmental subdivision or agency; or an association having not less than 25 members who will be directly affected; or the legislature's appropriate administrative rule review committee request a hearing, a hearing will be held after appropriate notice is given. Reference to the appropriate administrative rule review committee is unnecessary if the full legislature, by joint resolution, has ordered the repeal of a rule;

(C) a statement of the number of persons which constitutes 10% of those directly affected;

(D) the name and address of the person to whom request for public hearing must be submitted; and the date by which a request must be submitted; and

(E) at the end of each rule noticed, a citation to the authority for the rule and the code section or sections being implemented. When an amendment to a rule is proposed, the section(s) of the MCA that constitute authority for the amendment and the section(s) actually implemented by the amendment must be underlined.

(c) Notice of public hearing when a hearing has been properly requested. When a hearing has been properly requested, the agency shall mail notice of the hearing to persons who have requested a public hearing. 2-4-302, MCA. Also, notice must be published in the register. 2-4-302(2), MCA.

(i) As illustrated by sample form 10, the notice shall state that the hearing is being held upon request of the requisite number of persons designated in the original notice, 2-4-302(4), MCA; or the appropriate administrative rule review committee of the legislature, 2-4-402(3), MCA; or a governmental agency or subdivision; or an association. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-302, 2-4-305, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1219, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1992 MAR p. 1242, Eff. 6/12/92; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

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1.3.207 MODEL RULE 4 RULEMAKING, OPPORTUNITY TO BE HEARD

(1) Written comment.

(a) When the subject matter of a proposed rule is not of significant interest to the public, or an agency is not otherwise required and does not wish to hold a public hearing, written comments must be permitted. The person designated in the notice to receive written comments from interested persons shall review all submissions within a reasonable time after the period for comment has ended. 2-4-305(1), MCA. That person then shall prepare and submit a written summary of the comments to the rule maker.

(b) The agency shall notify all persons who submit written comments that a list of interested persons exists and provide each commenter the opportunity to have their name added to that list.

(2) Public hearing.

(a) Except as otherwise provided by statute, public hearings shall be conducted in the following manner:

(i) The hearing shall be conducted by and under the control of a presiding officer. The presiding officer shall be appointed by the rule maker; that is, the department, board, or administrative officer authorized by law to make rules for the agency. The rule maker retains the ultimate authority and responsibility to ensure that the hearing is conducted in accordance with MAPA.

(ii) At the commencement of the hearing, the presiding officer shall ask that any persons wishing to submit data, views or arguments orally or in writing submit their name, address, affiliation, whether they favor or oppose the proposed action, and such other information as may be required by the presiding officer for the efficient conduct of the hearing. The presiding officer shall provide an appropriate form for submittal of this information. The presiding officer may allow telephonic testimony at the hearing.

(iii) At the opening of the hearing, the presiding officer shall:

(A) read or summarize the notice that has been given in accordance with Model Rule 3;

(B) read the "Notice of Function of Administrative Rule Review Committee" appearing in the register; and

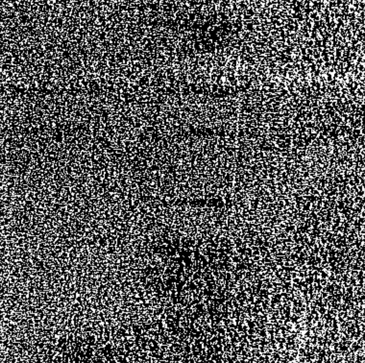
(C) inform persons at the hearing of the interested persons list and provide interested parties the opportunity t[illegible] have their names placed on that list.

(iv) subject to the discretion of the presiding office[illegible] the order of presentation may be:

(A) statement of proponents;

(B) statement of opponents;

(C) statements of any other witnesses present and wishi[illegible] to be heard.



(v) The presiding officer or rule maker has the right to question or examine any witnesses making a statement at the hearing. The presiding officer may, in his discretion, permit other persons to examine witnesses.

(vi) There shall be no rebuttal or additional statements given by any witness unless requested by the presiding officer, or granted for good cause. If such statement is given, the presiding officer shall allow an equal opportunity for reply.

(vii) The hearing may be continued with recesses as determined by the presiding officer until all witnesses present and wishing to make a statement have had an opportunity to do so.

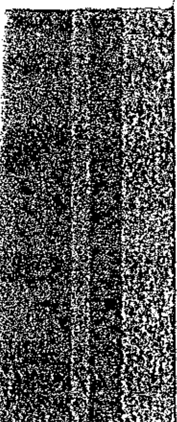
(viii) The presiding officer shall, where practicable, receive all relevant physical and documentary evidence presented by witnesses. Exhibits shall be marked and shall identify the witness offering the exhibits. In the discretion of the agency the exhibits may be preserved for one year after adoption of the rule or returned to the party submitting the exhibits, but in any event the agency shall preserve the exhibits until at least 30 days after the adoption of the rule.

(ix) The presiding officer may set reasonable time limits for oral presentation.

(x) A record must be made of all the proceedings, either in the form of minutes or a verbatim written or mechanical record.

(b) The presiding officer shall, within a reasonable time after the hearing, provide the rule makers with a written summary of statements given and exhibits received and a report of his observations of physical experiments, demonstrations and exhibits.

(3) Informal conferences or consultations. In addition to the required rulemaking procedures, an agency may obtain viewpoints and advice concerning proposed rulemaking through informal conferences and consultations or by creating committees of experts or interested persons or representatives of the general public. 2-4-304(2), MCA. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-302, 2-4-305, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1220, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1992 MAR p. 1242, Eff. 6/12/92; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)



1.3.208 MODEL RULE 5 RULEMAKING, AGENCY ACTION

(1) Thirty days after publication of notice and following receipt of the presiding officer's report, the rule maker may adopt, amend or repeal rules covered by the notice of intended action. 2-4-302(2), MCA.

(2) Notice of rulemaking. Upon adoption, amendment or repeal of a rule, the agency shall file notice of its action with the secretary of state. 2-4-306, MCA.

(a) As illustrated by sample form 13, the notice must include:

(i) either the text of the rule adopted or amended, reference to the notice of proposed agency action in which the text of the proposed rule or rule as proposed to be amended was printed in full, or reference to the page number of the Administrative Rules of Montana on which the rule appears;

(ii) if the rule adopts a model code, rule or other publication by reference, a citation to the material adopted, its year, a statement of the general subject matter thereof, and where a copy of the material may be obtained. The material adopted by reference need not be published if publication would be unduly cumbersome, expensive or otherwise inexpedient. Upon request of the secretary of state a copy of the omitted material must be filed with the secretary of state. 2-4-307, MCA.

(iii) a statement of the principal reasons for and against the adoption, amendment or repeal of a rule that was presented by interested persons. The statement also must include the agency's reasons for overruling the considerations urged against the agency action. If substantial differences exist between the rule as proposed and as adopted, and the differences have not been described or set forth in the adopted rule, the differences must be described in the statement of reasons for and against the agency action. The statement may be omitted if no written or oral submissions were presented. 2-4-305(1), MCA. See Patterson v. Montana Department of Revenue, 557 P.2d 798 (1976).

(3) Objection by an administrative rule review committee made pursuant to 2-4-305(9), 2-4-306(4), or 2-4-406(1), MCA.

(a) If the appropriate administrative rule review committee objects to a proposed notice of adoption, the proposed rules cannot be adopted until either:

(i) notification of withdrawal of the objection; or

(ii) publication of the last issue of the register before expiration of the 6-month period during which the adoption notice must be published.

(b) If the agency adopts the rule to which the appropriate administrative rule review committee objects, the adopted rule cannot become effective until either:

(i) withdrawal of the objection;

(ii) amendment of the rule to meet the concerns of the committee; or

(iii) the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published.

(4) Effective Date. Absent an objection of the type referred to in (3) by an administrative rule review committee, the agency action is effective on the day following publication of the notice in the register, unless a later date is required by statute or specified in the notice. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-305, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1223, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1992 MAR p. 1242, Eff. 6/12/92; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

1.3.209 MODEL RULE 6 RULEMAKING, TEMPORARY EMERGENCY RULES AND TEMPORARY RULES (1) Temporary Emergency Rules.

(a) If an agency finds that circumstances exist that truly and clearly constitute an imminent peril to the public health, safety, or welfare, that the circumstances cannot be averted or remedied by any other administrative act, and that the circumstances require a rulemaking action upon fewer than 30 days notice, it may adopt a temporary emergency rule without prior notice or hearing or, as illustrated by sample form 14, upon any abbreviated notice and hearing that it finds practicable. 2-4-303(1), MCA.

(b) To adopt an emergency rule the agency must:

(i) file with the secretary of state a copy of the emergency rule containing a statement in writing of its reasons for finding that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days notice. 2-4-306(4), MCA.

(ii) provide special notice of its intent to the appropriate administrative rule review committee which is normally accomplished by the secretary of state's office providing a copy to the legislative services division.

(iii) take appropriate and extraordinary measures to make emergency rules known to persons who may be affected by them, 2-4-306(4), MCA, including delivery of copies of the rule to a state wire service and to any other news media the agency considers appropriate. Extraordinary measures include, but are not limited to immediate personal delivery of copies of the rule to affected parties, and immediate delivery of copies of the rule to associations whose members are affected. 2-3-105, MCA.

(c) An agency's reasons for adopting a temporary emergency rule are subject to judicial review. In order to pass judicial review, the notice of adoption shall, standing on its own, provide compelling reasons for the emergency rule.

(d) A temporary emergency rule becomes effective immediately upon filing a copy with the secretary of state or on a stated date following publication in the register. 2-4-306(4), MCA.

(e) An emergency rule may be effective for a period not longer than 120 days, and may not be renewed. The agency may, however, adopt an identical, permanent rule after notice and hearing in accordance with Model Rules 2 through 5. 2-4-303(1), MCA.

(2) Temporary Rules.

(a) Temporary rules implementing a statute which becomes effective prior to October 1 of the year of enactment may be adopted through abbreviated procedures determined practicable by the agency.

(b) The temporary rules cannot become effective until at least 30 days after the notice of proposal to adopt is published.

(c) The temporary rules expire October 1 of the year adopted.

(d) Permanent rules can be adopted during the period that the temporary rules are effective. (History: 2-4-202, MCA; IMP, 2-4-202, 2-4-303, 2-4-306, MCA; Eff. 12/31/72; AMD, 1977 MAR p. 1192, Eff. 12/24/77; AMD, 1979 MAR p. 1225, Eff. 10/12/79; AMD, 1981 MAR p. 1196, Eff. 10/16/81; AMD, 1992 MAR p. 1242, Eff. 6/12/92; AMD, 1999 MAR p. 1225, Eff. 6/4/99.)

CHAPTER 7

MONTANA ADMINISTRATIVE PROCEDURE ACT

1.7.101 ADMINISTRATIVE PROCEDURE ACT (1) The act is printed here under one rule for insertion under Title 1. The act is printed as it appears in the Montana Code Annotated. The numbers preceding each section are the title and section numbers from the Montana Code Annotated.

2-4-101. Short title. This chapter shall be known and may be cited as the "Montana Administrative Procedure Act".

2-4-102. Definitions. For purposes of this chapter, the following definitions apply:

(1) "Administrative rule review committee" or "committee" means the appropriate committee assigned subject matter jurisdiction in Title 5, chapter 5, part 2.

(2) (a) "Agency" means an agency, as defined in 2-3-102, of the state government, except that the provisions of this chapter do not apply to the following:

(i) the state board of pardons and parole, except that the board is subject to the requirements of 2-4-103, 2-4-201, 2-4-202, and 2-4-306 and its rules must be published in the ARM and the register;

(ii) the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners;

(iii) the board of regents and the Montana university system;

(iv) the financing, construction, and maintenance of public works;

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837.

(b) "Agency" does not include a school district, unit of local government, or any other political subdivision of the state.

(3) "ARM" means the Administrative Rules of Montana.

(4) "Contested case" means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

(5) "Interested person" means a person who has expressed to the agency an interest concerning agency actions under this chapter and has requested to be placed on the agency's list of interested persons as to matters of which the person desires to be given notice. The term does not extend to contested cases.

(6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

(7) "Licensing" includes an agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

(8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person as a party for limited purposes.

(9) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character.

(10) "Register" means the Montana Administrative Register.

(11) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(c) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(d) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals;

(e) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(f) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the ARM.

(12) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals. The term does not extend to contested cases.

(13) "Substantive rules" are either:

(a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid; or

(b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law.

2-4-103. Rules and statements to be made available to public. (1) Each agency shall:

(a) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(b) upon request of any person, provide a copy of any rule.

(2) Unless otherwise provided by statute, an agency may require the payment of the cost of providing such copies.

(3) No agency rule is valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.

2-4-104. Subpoenas and enforcement -- compelling testimony. (1) An agency conducting any proceeding subject to this chapter shall have the power to require the furnishing of such information, the attendance of such witnesses, and the production of such books, records, papers, documents, and other objects as may be necessary and proper for the purposes of the proceeding. In furtherance of this power, an agency upon its own motion may and, upon request of any party appearing in a contested case, shall issue subpoenas for witnesses or subpoenas duces tecum. The method for service of subpoenas, witness fees, and mileage shall be the same as required in civil actions in the district courts of the state. Except as otherwise provided by statute, witness fees and mileage shall be paid by the party at whose request the subpoena was issued.

(2) In case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which he may be interrogated in a proceeding before the agency, the agency may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. If the agency fails or refuses to seek enforcement of a subpoena issued at the request of a party or to compel the giving of testimony considered material by a party, the party may make such application. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unjustified, the court shall enter an order requiring compliance. Disobedience of such order shall be punishable by contempt of court in the same manner and by the same procedures as is provided for like conduct committed in the course of civil actions in district courts. If another method of subpoena enforcement or compelling testimony is provided by statute, it

may be used as an alternative to the method provided for in this section.

2-4-105. Representation by counsel. Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel. In a proceeding before an agency, every party shall be accorded the right to appear in person or by or with counsel but this chapter shall not be construed as requiring an agency to furnish counsel to any such person.

2-4-106. Service. Except where a statute expressly provides to the contrary, service in all agency proceedings subject to the provisions of this chapter and in proceedings for judicial review thereof shall be as prescribed for civil actions in the district courts.

2-4-107. Construction and effect. Nothing in this chapter shall be considered to limit or repeal requirements imposed by statute or otherwise recognized law. No subsequent legislation shall be considered to supersede or modify any provision of this chapter, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

2-4-108 and 2-4-109 reserved.

2-4-110. Departmental review of rule notices. (1) The head of each department of the executive branch shall appoint an existing attorney, paralegal, or other qualified person from that department to review each departmental rule proposal notice, adoption notice, or other notice relating to administrative rulemaking. Notice of the name of the person appointed under this subsection and of any successor must be given to the secretary of state and the appropriate administrative rule review committee within 10 days of the appointment.

(2) The person appointed under subsection (1) shall review each notice by any division, bureau, or other unit of the department, including units attached to the department for administrative purposes only under 2-15-121, for compliance with this chapter before the notice is filed with the secretary of state. The reviewer shall pay particular attention to 2-4-302 and 2-4-305. The review must include but is not limited to consideration of:

(a) the adequacy of the rationale for the intended action and whether the intended action is reasonably necessary to effectuate the purpose of the code section or sections implemented;

(b) whether the proper statutory authority for the rule is cited;

(c) whether the citation of the code section or sections implemented is correct; and

(d) whether the intended action is contrary to the code section or sections implemented or to other law.

(3) The person appointed under subsection (1) shall sign each notice for which this section requires a review. The act of signing is an affirmation that the review required by this section has been performed to the best of the reviewer's ability. The secretary of state may not accept for filing a notice that does not have the signature required by this section.

2-4-201. Rules describing agency organization and procedures. In addition to other rulemaking requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests. The notice and hearing requirements contained in 2-4-302 do not apply to adoption of a rule relating to a description of its organization.

(2) adopt rules of practice, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.

2-4-202. Model rules. (1) The attorney general shall prepare a model form for a rule describing the organization of agencies and model rules of practice for agencies to use as a guide in fulfilling the requirements of 2-4-201. The attorney general shall add to, amend, or revise the model rules from time to time as he considers necessary for the proper guidance of agencies.

(2) The model rules and additions, amendments, or revisions thereto shall be appropriate for the use of as many agencies as is practicable and shall be filed with the secretary of state and provided to any agency upon request. The adoption by an agency of all or part of the model rules does not relieve the agency from following the rulemaking procedures required by this chapter.

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2-4-301. Authority to adopt not conferred. Except as provided in part 2, nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule.

2-4-302. Notice, hearing, and submission of views. (1) Prior to the adoption, amendment, or repeal of any rule, the agency shall give written notice of its intended action. The notice must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, the rationale for the intended action, and the time when, place where, and manner in which interested persons may present their views on the intended action. The rationale must be written in plain, easily understood language. If the agency proposes to adopt, increase, or decrease a monetary amount that a person shall pay or will receive, such as a fee, cost, or benefit, the notice must include an estimate, if known, of:

(a) the cumulative amount for all persons of the proposed increase, decrease, or new amount; and

(b) the number of persons affected.

(2) (a) The notice must be filed with the secretary of state for publication in the register, as provided in 2-4-312, and mailed within 3 days of publication to the sponsor of the legislative bill that enacted the section that is cited as implemented in the notice if the notice is the initial proposal to implement the section, to interested persons who have made timely requests to the agency to be informed of its rulemaking proceedings, and to the office of any professional, trade, or industrial society or organization or member of those entities who has filed a request with the appropriate administrative rule review committee when the request has been forwarded to the agency as provided in subsection (2)(b). Each agency shall create and maintain a list of interested persons and the subject or subjects in which each person on the list is interested. A person who submits a written comment or attends a hearing in regard to proposed agency action under this part must be informed of the list by the agency. An agency complies with this subsection if it includes in the notice an advisement explaining how persons may be placed on the list of interested persons and if it complies with subsection (7).

(b) The appropriate administrative rule review committee shall forward a list of all organizations or persons who have submitted a request to be informed of agency actions to the agencies that the committee oversees that publish rulemaking notices in the register. The list must be amended by the agency upon request of any person requesting to be added to or deleted from the list.

(c) The notice required by subsections (1) and (2)(a) must be published and mailed at least 30 days in advance of the agency's intended action. In addition to publishing and mailing the notice under subsection (2)(a), the agency shall post the notice on a state electronic access system or other electronic communications systems available to the public.

(d) The agency shall also, at the time that its personnel begin to work on the substantive content and the wording of the initial rule proposal to implement one or more statutes, notify the sponsor of the legislative bill that enacted the section.

(3) If a statute provides for a method of publication different from that provided in subsection (2), the affected agency shall comply with the statute in addition to the requirements contained in this section. However, the notice period may not be less than 30 days or more than 6 months.

(4) Prior to the adoption, amendment, or repeal of any rule, the agency shall afford interested persons at least 20 days' notice of a hearing and at least 28 days from the day of the original notice to submit data, views, or arguments, orally or in writing. If an amended or supplemental notice is filed, additional time may be allowed for oral or written submissions. In the case of substantive rules, the notice of proposed rulemaking must state that opportunity for oral hearing must be granted if requested by either 10% or 25, whichever is less, of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency, by the appropriate administrative rule review committee, or by an association having not less than 25 members who will be directly affected. If the proposed rulemaking involves matters of significant interest to the public, the agency shall schedule an oral hearing.

(5) An agency may continue a hearing date for cause. In the discretion of the agency, contested case procedures need not be followed in hearings held pursuant to this section. If a hearing is otherwise required by statute, nothing in this section alters that requirement.

(6) If an agency fails to publish a notice of adoption within the time required by 2-4-305(7) and the agency again proposes the same rule for adoption, amendment, or repeal, the proposal must be considered a new proposal for purposes of compliance with this chapter.

(7) At the commencement of a hearing on the intended action, the person designated by the agency to preside at the hearing shall:

(a) read aloud the "Notice of Function of Administrative Rule Review Committee" appearing in the register; and

(b) inform the persons at the hearing of the provisions of subsection (2)(a) and provide them an opportunity to place their names on the list.

(8) For purposes of notifying sponsors under subsections (2)(a) and (2)(d) who are no longer members of the legislature, a former legislator who wishes to receive notice may keep the former legislator's name, address, and telephone number on file with the secretary of state. An agency proposing rules shall consult the register when providing sponsor notice.

2-4-303. Emergency or temporary rules. (1) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice and states in writing its reasons for that finding, it may proceed upon special notice filed with the committee, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than 120 days, after which a new emergency rule with the same or substantially the same text may not be adopted, but the adoption of an identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be

compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review. The dissemination of emergency rules required by 2-4-306 must be strictly observed and liberally accomplished.

(2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year, upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical rule under 2-4-302 is not precluded during the period that the temporary rule is effective.

2-4-304. Informal conferences and committees. (1) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rulemaking.

(2) An agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking. The powers of the committees shall be advisory only.

(3) Nothing herein shall relieve the agency from following rulemaking procedures required by this chapter.

2-4-305. Requisites for validity -- authority and statement of reasons. (1) The agency shall fully consider written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the register, the differences must be described in the statement of reasons for and against agency action. When written or oral submissions have not been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate the portion of the language that is statutory and the portion that is an amplification of the language.

(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the

specific section or sections in the Montana Code Annotated that the rule purports to implement. A substantive rule may not be proposed or adopted unless:

(a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or

(b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.

(4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is:

(a) consistent and not in conflict with the statute; and

(b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and the rationale for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the agency.

(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules, and in citations of sections implemented by

rules. An agency may use an amended proposal notice, but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

(9) If a majority of the members of the appropriate administrative rule review committee notify the committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to the proposal notice and will address the objections at the next committee meeting. Following notice by the committee to the agency, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records.

2-4-306. Filing, format, and effective date -- dissemination of emergency rules. (1) Each agency shall file with the secretary of state a copy of each rule adopted by it.

(2) The secretary of state may prescribe a format, style, and arrangement for notices and rules that are filed pursuant to this chapter and may refuse to accept the filing of any notice or rule that is not in compliance with this chapter. The secretary of state shall keep and maintain a permanent register of all notices and rules filed, including superseded and repealed rules, that must be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing copies.

(3) In the event that the appropriate administrative rule review committee has conducted a poll of the legislature in accordance with 2-4-403, the results of the poll must be published with the rule.

(4) Each rule is effective after publication in the register, as provided in 2-4-312, except that:

(a) if a later date is required by statute or specified in the rule, the later date is the effective date;

(b) subject to applicable constitutional or statutory provisions:

(i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated date following publication in the register; and

(ii) an emergency rule is effective at a stated date following publication in the register or immediately upon filing with the secretary of state if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons for the finding must be filed with the rule. The agency shall, in addition to the required publication in the register, take appropriate and extraordinary

measures to make emergency rules known to each person who may be affected by them.

(c) if, following written administrative rule review committee notification to an agency under 2-4-305(9), the committee meets and under 2-4-406(1) objects to all or some portion of a proposed rule before the rule is adopted, the rule or portion of the rule objected to is not effective until the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published by the secretary of state, unless, following the committee's objection under 2-4-406(1):

(i) the committee withdraws its objection under 2-4-406 before the rule is adopted; or

(ii) the rule or portion of a rule objected to is adopted with changes that in the opinion of a majority of the committee members, as communicated in writing to the committee presiding officer and staff, make it comply with the committee's objection and concerns.

2-4-307. Omissions from ARM or register. (1) An agency may adopt by reference any model code, federal agency rule, rule of any agency of this state, or other similar publication if the publication of the model code, rule, or other publication would be unduly cumbersome, expensive, or otherwise inexpedient.

(2) The model code, rule, or other publication must be adopted by reference in a rule adopted under the rulemaking procedure required by this chapter. The rule must contain a citation to the material adopted by reference and a statement of the general subject matter of the omitted rule and must state where a copy of the omitted material may be obtained. Upon request of the secretary of state, a copy of the omitted material must be filed with the secretary of state.

(3) A rule originally adopting by reference any model code or rule provided for in subsection (1) may not adopt any later amendments or editions of the material adopted. Except as provided in subsection (5), each later amendment or edition may be adopted by reference only by following the rulemaking procedure required by this chapter.

(4) If requested by a three-fourths vote of the appropriate administrative rule review committee, an agency shall immediately publish the full or partial text of any pertinent material adopted by reference under this section. The committee may not require the publication of copyrighted material. Publication of the text of a rule previously adopted does not affect the date of adoption of the rule, but publication of the text of a rule before publication of the notice of final adoption must be in the form of and is considered to be a new notice of proposed rulemaking.

(5) Whenever later amendments of federal regulations must be adopted to comply with federal law or to qualify for federal funding, only a notice of incorporation by reference of the later amendments must be filed in the register. This notice must contain the information required by subsection (2) and must state the effective date of the incorporation. The effective date may be no sooner than 30 days after the date upon which the notice is published unless the 30 days causes a delay that jeopardizes compliance with federal law or qualification for federal funding, in which event the effective date may be no sooner than the date of publication. A hearing is not required unless requested under 2-4-315 by either 10% or 25, whichever is less, of the persons who will be directly affected by the incorporation, by a governmental subdivision or agency, or by an association having not less than 25 members who will be directly affected. Further notice of adoption or preparation of a replacement page for the ARM is not required.

(6) If a hearing is requested under subsection (5), the petition for hearing must contain a request for an amendment and may contain suggested language, reasons for an amendment, and any other information pertinent to the subject of the rule.

2-4-308. Adjective or interpretive rule -- statement of implied authority and legal effect. (1) Each adjective or interpretive rule or portion of an adjective or interpretive rule to be adopted under implied rulemaking authority must contain a statement in the historical notations of the rule that the rule is advisory only but may be a correct interpretation of the law. The statement must be placed in the ARM when the rule in question is scheduled for reprinting.

(2) The appropriate administrative rule review committee may file with the secretary of state, for publication with any rule or portion of a rule that it considers to be adjective or interpretive, a statement indicating that it is the opinion of the appropriate administrative rule review committee that the rule or portion of a rule is adjective or interpretive and therefore advisory only. If the committee requests the statement to be published for an adopted rule not scheduled for reprinting in the ARM, the cost of publishing the statement in the ARM must be paid by the committee.

2-4-309 and 2-4-310 reserved.

2-4-311. Publication and arrangement of ARM. (1) The secretary of state shall compile, index, arrange, rearrange, correct errors or inconsistencies without changing the meaning, intent, or effect of any rule, and publish in the appropriate format all rules filed pursuant to this chapter in the ARM. The secretary of state shall supplement, revise, and publish the ARM or any part of the ARM as often as the secretary of state considers necessary. The secretary of state may include editorial notes, cross-references, and other matter that the secretary of state considers desirable or advantageous. The secretary of state shall publish supplements to the ARM at the times and in the form that the secretary of state considers appropriate.

(2) The ARM must be arranged, indexed, and printed or duplicated in a manner that permits separate publication of portions relating to individual agencies. An agency may make arrangements with the secretary of state for the printing of as many copies of the separate publications as it may require. The cost of any separate publications, determined in accordance with 2-4-313(4), must be paid by the agency.

2-4-312. Publication and arrangement of register. (1) The secretary of state shall publish in the register all notices, rules, and interpretations filed with the secretary of state at least once a month but not more often than twice a month.

(2) The secretary of state shall send the register without charge to each person listed in 2-4-313(1) and to each member of the legislature requesting the register. The secretary of state shall send the register to any other person who pays a subscription fee established as provided in 2-4-313(4).

(3) The register must contain three sections, a rules section, a notice section, and an interpretation section, as follows:

(a) The rules section of the register must contain all rules filed since the compilation and publication of the preceding issue of the register, together with the concise statement of reasons required under 2-4-305(1).

(b) The notice section of the register must contain all rulemaking notices filed with the secretary of state pursuant to 2-4-302 since the compilation and publication of the preceding register.

(c) The interpretation section of the register must contain all opinions of the attorney general and all declaratory rulings of agencies issued since the publication of the preceding register.

(4) Each issue of the register must contain the issue number and date of the register and a table of contents. Each page of the register must contain the issue number and date of the register of which it is a part. The secretary of state may include with the register information to help the user in relating the register to the ARM.

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2-4-313. Distribution, costs, and maintenance. (1) The secretary of state shall distribute copies of the ARM and supplements or revisions to the ARM to the following:

(a) attorney general, one copy;

(b) clerk of United States district court for the district of Montana, one copy;

(c) clerk of United States court of appeals for the ninth circuit, one copy;

(d) county commissioners or governing body of each county of this state, for use of county officials and the public, at least one but not more than two copies, which may be maintained in a public library in the county seat or in the county offices as the county commissioners or governing body of the county may determine;

(e) state law library, one copy;

(f) state historical society, one copy;

(g) each unit of the Montana university system, one copy;

(h) law library of the university of Montana-Missoula, one copy;

(i) legislative services division, two copies;

(j) library of congress, one copy;

(k) state library, one copy.

(2) The secretary of state, each county in the state, and the librarians for the state law library and the university of Montana-Missoula law library shall maintain a complete, current set of the ARM, including supplements or revisions to the ARM. The designated persons shall also maintain the register issues published during the preceding 2 years. The secretary of state shall maintain a permanent set of the registers.

(3) The secretary of state shall make copies of and subscriptions to the ARM and supplements or revisions to the ARM and the register available to any person at prices fixed in accordance with subsection (4).

(4) The secretary of state shall determine the cost of supplying copies of the ARM and supplements or revisions to the ARM and the register to persons not listed in subsection (1). The cost must be the approximate cost of publication of the copies, including indexing, printing or duplicating, and mailing. However, a uniform price per page or group of pages may be established without regard to differences in the cost of printing different parts of the ARM and supplements or revisions to the ARM and the register. Fees are not refundable.

(5) The secretary of state shall deposit all fees in a proprietary fund.

(6) The secretary of state may charge agencies a filing fee for all material to be published in the ARM or the register. The secretary of state shall fix the fee to cover the costs of supplying copies of the ARM and supplements or revisions to the ARM and the register to the persons listed in subsection (1).

The cost must be the approximate cost of publication of the copies, including indexing, printing or duplicating, and mailing. However, a uniform price per page or group of pages may be established without regard to differences in the cost of printing different parts of the ARM and supplements or revisions to the ARM and the register.

2-4-314. Biennial review by agencies -- recommendations by committee. (1) Each agency shall at least biennially review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed.

(2) The committee may recommend to the legislature those modifications, additions, or deletions of agency rulemaking authority which the committee considers necessary.

2-4-315. Petition for adoption, amendment, or repeal of rules. An interested person or, when the legislature is not in session, a member of the legislature on behalf of an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall determine and prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305. A decision to deny a petition or to initiate rulemaking proceedings must be in writing and based on record evidence. The written decision must include the reasons for the decision. Record evidence must include any evidence submitted by the petitioner on behalf of the petition and by the agency and interested persons in response to the petition. An agency may, but is not required to, conduct a hearing or oral presentation on the petition in order to develop a record and record evidence and to allow the petitioner and interested persons to present their views.

2-4-316 through 2-4-320 reserved.

2-4-321. Repealed.

2-4-322. Repealed.

2-4-323. Repealed.

2-4-401. Repealed.

2-4-402. Powers of committees -- duty to review rules. (1) The administrative rules review committees shall review all proposed rules filed with the secretary of state.

(2) The appropriate administrative rule review committee may:

(a) request and obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305;

(b) prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing;

(c) require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305;

(d) institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies;

(e) review the incidence and conduct of administrative proceedings under this chapter.

2-4-403. Legislative intent -- poll. (1) If the legislature is not in session, the committee may poll all members of the legislature by mail to determine whether a proposed rule is consistent with the intent of the legislature.

(2) Should 20 or more legislators object to any rule, the committee shall poll the members of the legislature.

(3) The poll shall include an opportunity for the agency to present a written justification for the rule to the members of the legislature.

2-4-404. Evidentiary value of legislative poll. In the event that the appropriate administrative rule review committee has conducted a poll of the legislature in accordance with 2-4-403, the results of the poll must be admissible in any court proceeding involving the validity of the rule. In the event that the poll determines that a majority of the members of both houses find that the proposed rule is contrary to the intent of the legislature, the rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity.

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2-4-405. (Temporary) Economic impact statement -- family impact note. (1) Upon written request of the appropriate administrative rule review committee based upon the affirmative request of a majority of the members of the committee at an open meeting, an agency shall prepare a statement of the economic impact of the adoption, amendment, or repeal of a rule as proposed. The agency shall also prepare a statement upon receipt by the agency or the committee of a written request for a statement made by at least 15 legislators. If the request is received by the committee, the committee shall give the agency a copy of the request, and if the request is received by the agency, the agency shall give the committee a copy of the request. The agency shall also prepare a family impact note upon receipt by the agency or the appropriate administrative rule review committee of a written request for a family impact note made by at least 15 legislators. If the request if received by the appropriate administrative rule review committee, the committee shall give the agency a copy of the request, and if the request is received by the agency, the agency shall give the appropriate administrative rule review committee a copy of the request. A family impact note must contain the material required by 5-4-504 if appropriate data is available. As an alternative, the committee may, by contract, prepare the estimate or the family impact note. Except to the extent that the request expressly waives any one or more of the following, a requested economic impact statement must include and the statement prepared by the committee may include:

(a) a description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) a description of the probable economic impact of the proposed rule upon affected classes of persons and quantifying, to the extent practicable, that impact;

(c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue;

(d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;

(e) an analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule;

(f) an analysis of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(g) a determination as to whether the proposed rule represents an efficient allocation of public and private resources; and

(h) a quantification or description of the data upon which subsections (1)(a) through (1)(g) are based and an explanation of how the data was gathered.

(2) A request to an agency for a family impact note or economic impact statement or a decision to contract for the preparation of a note or statement must be made prior to the final agency action on the rule. The note or statement must be filed with the appropriate administrative rule review committee within 3 months of the request or decision. A request or decision for a note or statement may be withdrawn at any time.

(3) Upon receipt of an economic impact statement, the committee shall determine the sufficiency of the statement. If the committee determines that the statement is insufficient, the committee may return it to the agency or other person who prepared the statement and request that corrections or amendments be made. If the committee determines that the statement is sufficient, a notice, including a summary of the statement and indicating where a copy of the statement may be obtained, must be filed with the secretary of state for publication in the register by the agency preparing the statement or by the committee, if the statement is prepared under contract by the committee, and must be mailed to persons who have registered advance notice of the agency's rulemaking proceedings.

(4) This section does not apply to rulemaking pursuant to 2-4-303.

(5) The final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a result of the inaccuracy or inadequacy of a family impact note or economic impact statement required under this section.

(6) An environmental impact statement prepared pursuant to 75-1-201 that includes an analysis of the factors listed in this section satisfies the provisions of this section. (Terminates October 1, 2003--sec. 8, Ch. 339, L. 1999.)

2-4-405. (Effective October 1, 2003) Economic impact statement. (1) Upon written request of the appropriate administrative rule review committee based upon the affirmative request of a majority of the members of the committee at an open meeting, an agency shall prepare a statement of the economic impact of the adoption, amendment, or repeal of a rule as proposed. The agency shall also prepare a statement upon receipt by the agency or the committee of a written request for a statement made by at least 15 legislators. If the request is received by the committee, the committee shall give the agency a copy of the request, and if the request is received by the agency, the agency shall give the committee a copy of the request. As an alternative, the committee may, by contract, prepare the estimate. Except to the extent that the request expressly waives any one or more of the following, the requested statement must include and the statement prepared by the committee may include:

(a) a description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) a description of the probable economic impact of the proposed rule upon affected classes of persons and quantifying, to the extent practicable, that impact;

(c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue;

(d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;

(e) an analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule;

(f) an analysis of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(g) a determination as to whether the proposed rule represents an efficient allocation of public and private resources; and

(h) a quantification or description of the data upon which subsections (1)(a) through (1)(g) are based and an explanation of how the data was gathered.

(2) A request to an agency for a statement or a decision to contract for the preparation of a statement must be made prior to the final agency action on the rule. The statement must be filed with the appropriate administrative rule review committee within 3 months of the request or decision. A request or decision for an economic impact statement may be withdrawn at any time.

(3) Upon receipt of an impact statement, the committee shall determine the sufficiency of the statement. If the committee determines that the statement is insufficient, the committee may return it to the agency or other person who prepared the statement and request that corrections or amendments be made. If the committee determines that the statement is sufficient, a notice, including a summary of the statement and indicating where a copy of the statement may be obtained, must be filed with the secretary of state for publication in the register by the agency preparing the statement or by the committee, if the statement is prepared under contract by the committee, and must be mailed to persons who have registered advance notice of the agency's rulemaking proceedings.

(4) This section does not apply to rulemaking pursuant to 2-4-303.

(5) The final adoption, amendment, or repeal of a rule is not subject to challenge in any court as a result of the inaccuracy or inadequacy of a statement required under this section.

(6) An environmental impact statement prepared pursuant to 75-1-201 that includes an analysis of the factors listed in this section satisfies the provisions of this section.

2-4-406. Committee objection to violation of authority for rule -- effect. (1) If the appropriate administrative rule review committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.

2-4-407 through 2-4-409 reserved.

2-4-410. Report of litigation. Each agency shall report to the appropriate administrative rule review committee any judicial proceedings in which the construction or interpretation of any provision of this chapter is in issue and may report to the committee any proceeding in which the construction or interpretation of any rule of the agency is in issue. Upon request of the committee, copies of documents filed in any proceeding in which the construction or interpretation of either this chapter or an agency rule is in issue must be made available to the committee by the agency involved.

2-4-411. Report. The committee may recommend amendments to the Montana Administrative Procedure Act or the repeal, amendment, or adoption of a rule as provided in 2-4-412 and make other recommendations and reports as it considers advisable.

2-4-412. Legislative review of rules -- effect of failure to object. (1) The legislature may, by bill, repeal any rule in the ARM. If a rule is repealed, the legislature shall in the bill state its objections to the repealed rule. If an agency adopts a new rule to replace the repealed rule, the agency shall adopt the new rule in accordance with the objections stated by the legislature in the bill. If the legislature does not repeal a rule filed with it before the adjournment of that regular session, the rule remains valid.

(2) The legislature may also by joint resolution request or advise or by bill direct the adoption, amendment, or repeal of any rule. If a change in a rule or the adoption of an additional rule is advised, requested, or directed to be made, the legislature shall in the joint resolution or bill state the nature of the change or the additional rule to be made and its

reasons for the change or addition. The agency shall, in the manner provided in the Montana Administrative Procedure Act, adopt a new rule in accordance with the legislative direction in a bill.

(3) Rules and changes in rules made by agencies under subsection (2) of this section shall conform and be pursuant to statutory authority.

(4) Failure of the legislature or the appropriate administrative rule review committee to object in any manner to the adoption, amendment, or repeal of a rule is inadmissible in the courts of this state to prove the validity of any rule.

2-4-501. Declaratory rulings by agencies. Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

2-4-502 through 2-4-504 reserved.

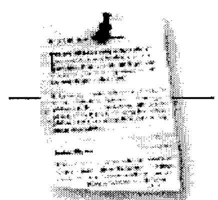
2-4-505. Judicial notice of rules. The courts shall take judicial notice of any rule filed and published under the provisions of this chapter.

2-4-506. Declaratory judgments on validity or application of rules. (1) A rule may be declared invalid or inapplicable in an action for declaratory judgment if it is found that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff.

(2) A rule may also be declared invalid in such an action on the grounds that the rule was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent.

(3) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

(4) The action may be brought in the district court for the county in which the plaintiff resides or has his principal place of business or in which the agency maintains its principal office. The agency shall be made a party to the action.



# Document

**This document, ranked number *129* in the hitlist, was retrieved from the *sdc* database.**

***Friends of the Wild Swan, Inc v. Clinch***
***Decided August 2, 2001***
***Judge Sherlock***
***First Judicial Court***
***Docket No. BDV 2000-369***
***2001 ML 2677 (1st Jud. Dist.)***

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**NOTE: This case has the following related cases (same docket number):**
21 Feb 2001 - Friends of the Wild Swan v. Clinch [2001 ML 992 (1st Jud. Dist.)]

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**MONTANA FIRST JUDICIAL DISTRICT COURT**
**LEWIS AND CLARK COUNTY**

FRIENDS OF THE WILD SWAN, INC.,
ALLIANCE FOR THE WILD ROCKIES, INC.,
and THE ECOLOGY CENTER, INC.,
Plaintiffs,
v.
ARTHUR CLINCH (in his official
capacity as Director of the
Department of Natural Resources)
MONTANA DEPARTMENT OF NATURAL
RESOURCES, MONTANA BOARD
OF LAND COMMISSIONERS,
Defendants.

Cause No. BDV 2000-369
**ORDER**

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¶1 This matter is before the Court on Plaintiffs' request that this Court enforce its February 21, 2001, order. The reader interested in a detailed rendition of the facts giving rise to this suit is invited to review the aforementioned order. At issue here are certain new policies for management of state forest lands.

¶2 In this Court's earlier order, at page 12, the Court ordered that "the Department must follow through on the procedural requirements of notice and public participation as prescribed under MAPA [the Montana Administrative Procedure Act]." On page 11 of that same document, this Court enjoined the Department from harvesting old growth timber until such time as the Department could comply with MAPA.

¶3 The last Montana legislative session enacted Senate Bill 354 which provides as follows:

AN ACT PROHIBITING THE STATE BOARD OF LAND COMMISSIONERS AND THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION FROM DESIGNATING, TREATING, OR DISPOSING OF ANY INTEREST IN STATE FOREST LANDS FOR PRESERVATION PURPOSES PRIOR TO OBTAINING THE FULL MARKET VALUE OF THE FOREGONE USES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, no interest in state trust lands or proceeds may be diverted from the trust without payment of the full market value of that use to the trust pursuant to section 11 of the state's Enabling Act and Article X, sections 3 and 11, of the Montana Constitution; and

WHEREAS, the Montana Supreme Court, in Montanans for the Responsible Use of the School Trust v. State, 296 Mont. 402, 989 P.2d 800 (1999), held that state trust land could not be held idle without the production of revenue pending the arbitration of lease improvements and referenced an earlier Supreme Court ruling that declared that a "trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person"; and

WHEREAS, Attorney General Robert Woodahl, in an opinion issued on July 7, 1976, 36 A.G. Op. 92, held that in order for the state to avoid a breach of trust under the Enabling Act and the Montana Constitution, the state is required to actually compensate the state school trust with funds for the full appraised value of any state trust lands designated or exchanged for natural areas pursuant to the Montana Natural Areas Act of 1974.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. State forest lands -- deferral of management prohibited. The board and the department are prohibited from designating, treating, or disposing of any interest in state forest lands for the preservation or nonuse of these lands prior to obtaining funds for the affected beneficiary equal to the full market value of that designation, treatment, or disposition. Unless the full market value of the property interest or of the revenue foregone is obtained, the board and the department are prohibited from either temporarily or permanently designating, treating, or disposing of any interest in any state forest lands for the following purposes:
(1) as a natural area pursuant to Title 76, chapter 12, part 1, or as otherwise provided for by law;
(2) as open-space land as defined in 76-6-104;
(3) for old growth timber preservation; and
(4) as a wildlife management area.

Section 2. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 77, chapter 5, part 1, and the provisions of Title 77, chapter 5, part 1, apply to [section 1].

Section 3. Effective date. [This act] is effective on passage and approval.

¶4 As is self evident, the aforementioned legislation did not mention this particular lawsuit or the injunction this Court issued. Further, Senate Bill 354 was not retroactive and did not apply to the rules that were enjoined by this Court.

¶5 The Department feels that this Court's injunction is dissolved by the Department's implementation of a temporary rule. (See Br. Supp. Mot. Enforce Ct's Ord., Ex. C.) It is clear that it is the Department's view that this temporary rule dissolves this Court's earlier injunction.

¶6 Initially we must address whether this Court has jurisdiction to act as Plaintiffs request. It should

here be noted that there has been no final judgment entered in this case. Therefore, this Court is of the view that, as a court of equity, it retains jurisdiction to continue to do equity. SeeJefferson v. Big Horn County, 300 Mont. 284, 293, 4 P.3d 26, 32 (2000).

¶7 Next, this Court does not intend to get drawn into the political fracas that seems to surround old growth timber. Indeed, this Court feels that the present issue before it has nothing to do with old growth timber. Rather, the narrow question is: Did the Department comply with this Court's February 21, 2001, order? The Court rules that the Department did not. This Court ordered the Department to follow through with the procedural requirements of notice and public participation as prescribed under MAPA. MAPA specifically provides that a temporary rule may only be used to implement a statute. See Section 2-4-303(2), MCA. It is undisputed that Senate Bill 354 is not retroactive. Therefore, it has nothing to do with the sales here in question. Senate Bill 354 ensures that the state is compensated for any preserved old growth areas. The temporary rule does not necessarily implement the statute. Rather, it seeks to do away with this Court's injunction. In the view of this Court, this Court's injunction is in full force and effect until the Department sees fit to comply with its mandates.

¶8 The Court realizes that the Department has found itself in a difficult situation meeting the various demands of the various branches of government. However, if the Department would have began the regular MAPA rule making process on February 21, 2001, perhaps we would not be at this particular junction. However, we are at this juncture, and this Court specifically rules that its injunction of February 21, 2001, is in full force and effect and is not, in any way, obviated by the temporary rule adopted as referenced herein.

¶9 In reviewing this Court's February 21, 2001, order, the Court recognizes that its earlier injunction may be too broad. Although the specifics of approved timber contracts are not well known to this Court, the Court limits this order and its February 21, 2001, order to the harvest of old growth timber that was approved under the Bio-diversity Guidance adopted by the Department on July 23, 1998. Any timber sales and the harvest
of old growth timber reviewed under the State Forest Land Management Plan and its Resource Management Standards 6 and 7 prior to July 23, 1998, are not affected by this order or this Court's February 21, 2001, order.

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DATED this 2nd day of August, 2001.

JEFFREY M. **SHERLOCK**
District Court Judge

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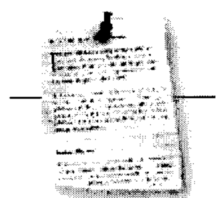

**This document, ranked number *20* in the hitlist, was retrieved from the *sdc* database.**

***Friends of the Wild Swan v. Clinch***
***Decided Nov. 16, 2001***
***Judge Sherlock***
***First Judicial District***
***Docket No. BDV 2000-369***
***2001 ML 4008 (1st Jud. Dist.)***

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**MONTANA FIRST JUDICIAL DISTRICT COURT**
**LEWIS AND CLARK COUNTY**

FRIENDS OF THE WILD SWAN,
INC., ALLIANCE FOR THE WILD
ROCKIES, INC., and THE ECOLOGY
CENTER, INC.,
Plaintiffs,
v.
ARTHUR CLINCH (in his official
capacity as Director of the
Department of Natural Resources),
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION, and
MONTANA BOARD OF LAND COMMISSIONERS,
Defendants.

Cause No. BDV 2000-369
**ORDER ON MOTION FOR ATTORNEY FEES**

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¶1 Before this Court is Plaintiffs' motion for costs and attorney fees incurred in prosecuting their claim under the Montana Administrative Procedure Act (MAPA) and in enforcing this Court's order dated February 21, 2001.

**BACKGROUND**

¶2 At issue in this dispute is the Department of Natural Resources and Conservation's (DNRC) changing management policies with respect to old-growth forest on state land. On May 30, 1996, after an extensive environmental review process conducted in compliance with the Montana Environmental Protection Act (MEPA), the DNRC adopted a State Forest Land Management Plan (Forest Plan). The Forest Plan applies to over 660,000 acres of forested school trust lands and provides, among other things, policies, standards and guidelines for managing these lands. Included within the Forest Plan are Resource Management Standards which discuss the management of old-growth forests on state land.

¶3 On July 23, 1998, DNRC adopted a 43-page document entitled "Biodiversity Implementation Guidance" (Biodiversity Guidance). Plaintiffs subsequently filed suit, contending that DNRC's adoption of the Biodiversity Guidance was unlawful. Plaintiffs stated two separate grounds in their complaint. Plaintiffs alleged that the Biodiversity Guidance was a significant change to the Forest Plan's management policies concerning old-growth timber and, therefore, its adoption by DNRC required an independent analysis and review pursuant to MEPA. Plaintiffs also claimed that the Biodiversity Guidance was an agency rule and, therefore, DNRC was required to provide public notice and participation prior to its adoption pursuant to MAPA.

¶4 On February 21, 2000, this Court issued an order granting summary judgment in favor of the Defendants on Plaintiffs' claim that the adoption of the Biodiversity Guidance violated MEPA. This Court concluded that DNRC's adoption of the Biodiversity Guidance did not constitute a significant change to the Forest Plan and thus did not require an independent MEPA review and analysis. However, this Court also held that DNRC had failed to comply with MAPA's rulemaking procedures in adopting the Biodiversity Guidance. Thus the Court enjoined DNRC from harvesting old-growth timber until it complied with MAPA.

¶5 In May 2001, DNRC began the procedures to adopt the Biodiversity Guidance as a "temporary rule" ostensibly implementing the then recently enacted Section 77-5-101, MCA (SB 354). Plaintiffs asked this Court to halt DNRC's adoption of the temporary rule. On August 2, 2001, this Court concluded that the Biodiversity Guidance did not implement SB 354 and issued an order requiring DNRC to abide by the terms of the previously entered injunction.

¶6 Plaintiffs now seek costs and attorney fees incurred both in prosecuting their claim that DNRC failed to abide by MAPA when it adopted the Biodiversity Guidance and in enforcing this Court's injunction requiring DNRC to abide by MAPA.

**DISCUSSION**

¶7 Plaintiffs seek costs and attorney fees pursuant to the private attorney general doctrine formally recognized by the Montana Supreme Court in *Montanans for Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Cmm'rs*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 (hereinafter *Montrust*). In determining whether a party is entitled to an award under this doctrine, the Court considers: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *Montrust*, ¶ 66.

**A. Importance of Public Policy Vindicated**

¶8 DNRC contends that direct constitutional rights must generally be vindicated in order for a plaintiff to receive fees under the private attorney general doctrine. DNRC argues that the only dispute resolved in this action was to require it to comply with "technical aspects" of MAPA.

¶9 Plaintiffs reply that the Montana Supreme Court has not expressly limited fee awards under the private attorney general doctrine to only those cases in which a constitutional right was vindicated. Furthermore, by requiring DNRC to comply with MAPA, Plaintiffs allege that their litigation vindicated an important public policy grounded in the constitutional right of public participation in government. Plaintiffs argue that in a democratic society the importance of citizen participation in the formation of laws and governmental rules cannot be overstated and is recognized by all.

¶10 The Montana Supreme Court has not expressly limited the private attorney general doctrine to only

those cases in which a constitutional right was vindicated. *Montrust* did, however, involve the vindication of constitutional rights. *Montrust*, ¶ 23. Moreover, *Montrust* does not contain an description of the analytical method a court should use in weighing the "strength or societal importance of the public policy vindicated."

¶11 Determining whether a public policy is sufficiently important to allow for fee shifting presents some difficultly. In support of its decisionto adopt the private attorney general doctrine in *Montrust*, the Montana Supreme Court cited with approval the California Supreme Court's decision in *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977). *Montrust*, ¶ 65. In discussing this difficulty, the *Serrano* Court observed:

It is at once apparent that a consideration of the [importance of the public policy] may in instances present difficulties since it is couched in generic terms, contains no specific objective standards and nevertheless calls for a subjective evaluation by the judge hearing the motion as to whether the litigation before the court has vindicated a public policy sufficiently strong or important to warrant an award of fees. We are aware of the apprehension voiced in some critiques that trial courts, whose function it is to apply existing law, will be thrust into the role of making assessments of the relative strength or weakness of public policies furthered by their decisions and of determining at the same time which public policy should be encouraged by an award of fees, and which not _ a role closely approaching that of the legislative function. Since generally speaking the enactment of a statute entails in a sense the declaration of a public policy, it is arguable that, where it contains no provision for the awarding of attorney fees, the Legislature was of the view that the public policy involved did not warrant such encouragement. A judicial evaluation, then, of the strength or importance of such statutorily based policy presents difficult and sensitive problems whose resolution by the courts may be of questionable propriety.

¶12 *Serrano*, 569 P.2d at 1314-15 (internal citations and footnotes omitted).

¶13 The *Serrano* Court attempted to avoid the difficulties presented by a judicial determination of what public policies are sufficiently important by noting that the particular policy vindicated in the instant litigation was found in the state constitution. *See Serrano*, 569 P.2d at 1315. Limiting important public policies to those found in the constitution has the advantage of avoiding arbitrary judicial decisions about which policies are to count as important. A judge posed with this issue will simply determine whether the issue is founded in the constitution or not. Neither party has provided this Court with an alternative definition of "important public policy" which would serve to avoid the delicate problem of allowing courts to reach the inherently subjective determination of what policies are sufficiently important to allow fee shifting. Clearly, the importance of the policy should not turn simply on the political opinions of the particular judge the lawsuit is brought before. Accordingly, this Court will limit the private attorney general doctrine to the vindication of constitutional rights.

¶14 In the instant case, such a rule would include the public policy vindicated by the Plaintiffs. In prevailing on their MAPA claim and their subsequent motion to enforce this Court's injunction, Plaintiffs forced DNRC to abide by the procedural requirements of MAPA. MAPA requires, among other things, that prior to the adoption of the Biodiversity Guidance, DNRC shall provide written notice of its intended action, including a description of the rule and the reasonable necessity of its adoption, shall afford interested persons the opportunity to submit data, views or arguments, and shall schedule an oral hearing if the proposed rulemaking involves matters of significant public interest. *See* Section 2-4-302, MCA. Agencies are constitutionally required to provide citizen participation as described in MAPA when reaching final decisions. Article II, section 8, of the Montana Constitution provides that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

Accordingly, the public policy vindicated by Plaintiffs' litigation is sufficiently important to warrant inclusion under the private attorney general doctrine.

**B. Necessity for Private Enforcement**

¶15 DNRC observes that in *Montrust*, the Montana Supreme Court found that private enforcement was a necessity because the State was obligated to defend the statutes which the plaintiffs had challenged as unconstitutional. DNRC argues that "such necessity is not present in the present case."

¶16 Plaintiffs respond that they had no choice but to seek judicial relief on the legality of the Biodiversity Guidance as DNRC refused to comply with MAPA and was forging ahead with oldgrowth harvest under the illegal rule when suit was filed. If they had not brought suit, Plaintiffs contend, the Biodiversity Guidance would have become the old-growth management paradigm without any public participation. Plaintiffs argue that the same is true with regard to its motion to enforce this Court's order.

¶17 DNRC is clearly wrong when it claims that Plaintiffs' suit was unnecessary. The State failed to abide by MAPA. DNRC has not directed our attention to any party other than Plaintiffs who would have ensured that it complied with MAPA.

**C. Number of Beneficiaries**

¶18 Plaintiffs argue that their litigation potentially benefits all citizens of this state, who now have the opportunity to participate via MAPA in rulemaking regarding the Forest Plan. Plaintiffs contend that this Court's order directly benefits conservation and logging communities who have a direct stake in old-growth management policies, as well as benefitting those persons interested in preserving transparency and public participation in agency rulemaking.

¶19 DNRC concludes that the public benefits secured by the litigation were only incidental to the primary objectives of the Plaintiffs. "There is no doubt . . . Plaintiffs were so motivated to modify the current old-growth timber harvest practices of the [s]tate of Montana that they brought the present action without regard for the recovery of attorney fees." (State's Br. Opp'n Pls.' Mot. Att'ys Fees, at 6.)

¶20 Plaintiffs reply that there is no evidence that they were in a position to gain monetarily either from the protection of old-growth or the protection of Montana citizens' right to participate in government. This Court agrees. There is no evidence that Plaintiffs had a pecuniary interest in the litigation or that their primary purpose in bringing the suit was to protect personal rather than public interests.

¶21 Accordingly, Plaintiffs are entitled to fees pursuant to the private attorney general doctrine adopted in *Montrust*. An award of costs and attorney fees will be limited to those costs and fees associated with the issues upon which Plaintiffs prevailed.

¶22 Plaintiffs' request for an award of costs and fees is hereby GRANTED.

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DATED this 16th day of November, 2001.

JEFFREY M. SHERLOCK
District Court Judge

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8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
**LEWIS AND CLARK COUNTY**
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| FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., and THE ECOLOGY CENTER, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>ARTHUR CLINCH, in his official capacity as Director of the Department of Natural Resources) MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA BOARD OF LAND COMMISSIONERS,<br><br>Defendants. | Cause No. BDV-2000-369<br><br>**ORDER** |

10–19

20 This matter is before the Court on Defendants' motion to vacate this Court's
21 injunction issued on February 21, 2001, and a subsequent judgment issued on
22 March 27, 2002. The injunction in question was based on the failure by the Department
23 of Natural Resources and Conservation (DNRC) and the Board of Land Commissioners
24 (Board) to adopt forest management rules via the Montana Administrative Procedure Act
25 (MAPA). Section 2-4-301, MCA. The forest management rules earlier at question were

1 called the Biodiversity Guidance. The Court has now been informed by Defendants that
2 they have adopted new forest management rules pursuant to MAPA. The new rules were
3 effective on March 14, 2003. The earlier injunction enjoined the DNRC from harvesting
4 old-growth timber on state lands that had been approved under the "non-MAPA"
5 Biodiversity Guidance.

6 Plaintiffs suggest that Defendants' proposed order would serve no purpose.
7 Plaintiffs note that any actions taken pursuant to the new, presumed to be valid, forest
8 management rules adopted on March 14, 2003, would not be affected by this Court's
9 earlier injunction which only forbad DNRC from harvesting old-growth timber on state
10 lands approved under the non-MAPA approved Biodiversity Guidance.

11 In its February 21, 2001, Order, this Court held "[t]he Court therefore
12 temporarily enjoins the Department from harvesting old-growth timber until such time as
13 the Department can comply with the procedural requirements of MAPA." (Ord. Mot.
14 Summ. J., at 11.) In the view of this Court, now that DNRC has complied with MAPA,
15 there is no reason for the injunction to remain in effect. This Court has no indication
16 whatsoever that Defendants are trying to pull a "fast one," and use the old non-MAPA
17 Biodiversity Guidance to approve any old-growth timber sales. Plaintiffs have proven
18 to be an effective watchdog. Therefore, if Defendants should be up to any funny business,
19 which this Court doubts, then Plaintiffs can certainly point that out to the Court, and the
20 Court would take rather severe action on the responsible parties. However, the Court must
21 and does assume that Defendant's have operated in good faith in going through the MAPA
22 process. Such being the case, and based upon the language in this Court's
23 February 21, 2001, order, the Court hereby ORDERS, ADJUDGES AND DECREES that
24 /////
25 /////

1 the injunction issued in by this Court on February 21, 2001, embodying a judgment of
2 March 27, 2002, is hereby VACATED.
3 DATED this 3 day of July, 2003.
4
5
JEFFREY M. SHERLOCK
6 District Court Judge
7 pc. Jack R. Tuholske
Tommy H. Butler/Mark C. Phares
8
T/JMS/WILD SWAN V CLINCH ORDER.WPD
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Filed Copy

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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|---|---|
| FRIENDS OF THE WILD SWAN, INC., ALLIANCE FOR THE WILD ROCKIES, INC., THE ECOLOGY CENTER, INC. ) | Cause No. BDV-2000-369 |
| Plaintiffs, ) | STATE'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION TO VACATE INJUNCTION |
| -vs- ) | |
| MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and MONTANA BOARD OF LAND COMMISSIONERS, ) | |
| Defendants. ) | |

**INTRODUCTION**

The Defendants, the Montana Department of Natural Resources and Conservation (hereinafter referred to as "DNRC"), and the State Board of Land Commissioners (hereinafter referred to as "the Board"), have moved to vacate the permanent injunction entered by the Court in the above-captioned matter. The Plaintiffs' Brief in Opposition to Application to Vacate Injunction (hereinafter referred to as the Plaintiffs' Response Brief) states no substantive reason why the lands affected by the Court's injunctive Order should continue to be burdened in any manner by the existing injunction. The Board and

the DNRC should be allowed to proceed to manage these state trust lands and harvest timber from them under the new forest management rules, unencumbered by any injunction.

## ARGUMENT

DNRC's application to vacate the injunction in this case was necessary for several reasons: 1) to keep the Court informed of the DNRC's progress in complying with the Court's Order in this case; 2) to seek verification from the Court, that the DNRC's actions are in compliance with the Court's understanding of its previous Orders in this matter; and 3) to lift any possible restrictions on future management or harvest actions on the affected State forest lands that may have been posed by the permanent injunction.

Should the Court vacate the injunction, it is not the intent of the DNRC to harvest those parcels of Old Growth timber on those timber sales that were enjoined by the Court, based upon the old biodiversity guidance. However, should the permanent injunction be vacated, those parcels of Old Growth timber would unquestionably be subject to management and possible harvest by DNRC under the newly-adopted forest management rules. DNRC believes that clarity of communication with the Court is essential, even though the Plaintiffs may find this dialogue with the Court to be an irrelevant nuisance.

Under the circumstances, vacating the permanent injunction that currently exists is just and proper. The Plaintiffs largely appear to agree. In their Response Brief, the Plaintiffs have conceded that, as a result of adopting the forest management rules: ". . . [the] Defendants are presumed to be operating pursuant to lawfully enacted rules". The

Plaintiffs have chosen not to contest the validity of the newly adopted forest management rules in the above-captioned matter.

Although the Plaintiffs argue that the Defendants' Application to Vacate Injunction is meaningless, DNRC asserts that the Court's vacation of the injunction upon the affected lands is an important affirmation to DNRC that it has complied with the Court's directions. This Court stated at page 11 of its February 21, 2001 Order that:

> The Department adopted the Biodiversity Guidance without following MAPA's procedural requirements concerning public notice and participation. *The court therefore temporarily enjoins the Department from harvesting old-growth timber until such time as the Department can comply with the procedural requirements of MAPA.*

(emphasis added).

This Court then stated at page 4 of its August 2, 2001 Order that:

> The Court limits this order and its February 21, 2001, order to the harvest of old growth timber that was approved under the Bio-diversity Guidance adopted by the Department on July 23, 1998.

This Court made it clear that the pending injunction would remain in force *until such time as DNRC complied with MAPA's procedural requirements* by adopting the Biodiversity Guidance as rules. DNRC has fulfilled that directive and now seeks to have the injunction vacated for the lands affected by the Court's Order. The quotes set forth above make it clear that DNRC's adoption of the Biodiversity Guidance in the newly adopted forest management rules was far from pointless. Quite contrary to the Plaintiffs' "sour grapes" assertions that there is no need to vacate the injunction, the fact is that proceeding in any other way in this matter would effectively leave DNRC and the Court with a nagging uncertainty. The Court needs to tell the parties the definitive management

status of these Old Growth parcels, given the adoption of the forest management rules under MAPA.

Moreover, the Plaintiffs fail to recognize that due to the promulgation of Section 77-5-116 by the 2001 Legislature, the forest management rules differ in certain respects from the original biodiversity guidance previously utilized by the DNRC. State forest management must respect statutory changes mandated by the legislature. Thus, under Missoula Rural Fire District v. City of Missoula, 237 Mont. 444, 775 P.2d 209 (1989), it is entirely appropriate for this Court to dissolve a permanent injunction where legislative changes required a change in Old Growth timber management. State forest management is a dynamic process which rapidly evolves in response to public policy directives issued by the legislature, as well as the constant increase in knowledge of forest processes by DNRC's staff. DNRC requests that the Court vacate the injunction so as to allow the DNRC and the Board to actively respond to the rapidly-changing needs of State forest management.

## CONCLUSION

When DNRC and the Board adopted the Forest Management Rules for state lands on March 14, 2003, it fully complied with the conditions set out in this Court's previous Orders to vacate the pending injunction upon the affected State forest lands. This Court stated that DNRC may not harvest Old Growth timber parcels utilizing the DNRC's Biodiversity Guidance unless the Department adopted them as MAPA rules. DNRC asserts that the adoption of the forest management rules for state lands meets the mandate set forth in this Court's February 21, 2001 Order and the March 27, 2002 Judgment, to

the fullest extent of the State Defendant's legal ability to do so. Having complied with the procedural requirements of MAPA, and having fully satisfied the terms required for a vacation of this Court's injunction, the DNRC and the Board respectfully request that the Court vacate the permanent injunction in the above-captioned matter.

DATED this 12 day of June, 2003.

By: /s/
Tommy H. Butler
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing STATE'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION TO VACATE INJUNCTION was served by mail, postage prepaid, upon the following on this 12 day of June 2003:

Mr. Jack R. Tuholske
Attorney at Law, P.C.
P.O. Box 7458
Missoula, MT 59807

/s/
Tommy H. Butler

# Environmentalists: Old-growth sales violate judge's order

By ERICKA SCHENCK SMITH
Missoulian State Bureau

HELENA – Attorneys for the state and three environmental groups met Monday in the courtroom of Helena District Judge Jeffrey Sherlock for another round in the battle over old-growth timber harvests on Montana school trust lands.

Jack Tuholske – representing Friends of the Wild Swan, the Alliance for the Wild Rockies and the Ecology Center – argued that temporary rules for old-growth timber harvests violate an earlier order from the judge. Sherlock did not make an immediate ruling.

In February, Sherlock ordered a stop to all old-growth timber sales on school trust lands until the state could come up with a proper set of rules governing the harvest. The Montana Land Board, comprising the top five statewide elected officials, adopted temporary rules in June, allowing 15 already-negotiated timber sales to continue. Those sales include 8.5 million board feet of timber, of which 2.5 million board feet comes from old-growth trees.

The Land Board intended the temporary rules to fulfill the judge's order and implement new legislation requiring the state to obtain fair market value for trust lands, including old-growth timber harvests. But Tuholske argued the Land Board should have implemented a permanent rule, which would have required review under the Montana Environmental Policy Act.

In addition, Tuholske said a MEPA review is also required because the Land Board made a significant change to its forest plan by removing a quota requiring 50 percent of an old-growth stand to be preserved during harvest.

In court documents, Tuholske called the temporary rules "a ruse to avoid both the spirit and the letter of the court's order."

But Tommy Butler, an assistant attorney general representing the state, said a permanent rule would have taken more than a year to implement, and that the state didn't believe the judge's initial order required immediate adoption of a permanent rule.

"This is not a ruse," Butler said. "We did not attempt to be deceitful."

Butler accused the environmental groups of trying to drag the whole issue – and the 15 affected timber sales – back into court.

At one point, Sherlock asked Tuholske: "What am I supposed to do? ... Are we starting all over again?"

Tuholske admitted he wasn't certain what the judge could do in this case but repeated the request he made in court documents, asking Sherlock to either enforce the previous order or require a MEPA review for the new rules.