DISTRICT COURT OPINION AND DECISION

SKYLINE SPORTSMEN'S ASSOCIATION, ANACONDA SPORTSMEN'S CLUB, MONTANA ACTION FOR ACCESS ASSOCIATION, and COALITION FOR APPROPRIATE MANAGEMENT OF STATE LANDS, Plaintiffs, - v - BOARD OF LAND COMMISSIONERS; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; and GOVERNOR MARC RACICOT; JOSEPH P. MAZUREK, ATTORNEY GENERAL; MIKE COONEY, SECRETARY OF STATE; NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION; and MARK O'KEEFE, STATE AUDITOR, in their capacities as Members of the State Land Board, Defendants. MONTANANS FOR THE RESPONSIBLE USE OF THE SCHOOL TRUST, Intervenors, - v - SKYLINE SPORTSMEN'S ASSOCIATION, ANACONDA SPORTSMEN'S CLUB, MONTANA ACTION FOR ACCESS ASSOCIATION, COALITION FOR APPROPRIATE MANAGEMENT OF STATE LANDS, TONY SCHOONEN, JACK JONES, WILLIAM FAIRHURST, CLINTON CAIN; BOARD OF LAND COMMISSIONERS; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; and GOVERNOR MARC RACICOT; JOSEPH P. MAZUREK, ATTORNEY GENERAL; MIKE COONEY, SECRETARY OF STATE; NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION; and MARK O'KEEFE, STATE AUDITOR, in their capacities as Members of the State Land Board, Defendants in Intervention.

Cause No. CDV-96-499

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

1996 Mont. Dist. LEXIS 1071

October 21, 1996, Decided

JUDGES: [*1] Honorable Judge Honzel, DISTRICT COURT JUDGE.

OPINION BY: Honorable Judge Honzel MEMORANDUM AND ORDERBefore the Court are: Plaintiff's motion for preliminary injunction; Defendants' motion to dismiss; Defendants' motion for summary judgment; and Intervenors' motion for summary judgment. The motions were heard September 18, 1996, and are ready for decision. BACKGROUND On April 15, 1996, the Montana Board of Land Commissioners (Board) approved an exchange of state school trust land for land owned by Turner Enterprises Inc. (TEI). That decision was made after nearly three years of review by the Department of Natural Resources and Conservation (Department), solicitation of public comment, and the preparation of an extensive environmental assessment (EA), as required under the Montana Environmental Policy Act, Sections 75-1-201, et seq., MCA, (MEPA). The private land currently held by TEI lies within the Snowcrest Ranch south of Alder and at Ulm Pishkin southwest of Great Falls. The state land lies within the boundaries of the Flying D Ranch southwest of Bozeman. The Flying D Ranch is owned by TEI. On February 1, 1996, Bud Clinch, the Director of the Department, issued his recommendation [*2] not to accept the exchange as

originally proposed. On February 21, 1996, TEI offered to modify the exchange by deleting two sections of state lands within the Flying D Ranch. Under the modified exchange, the State would acquire 12,689 acres of private land while divesting the State of 6,167 acres of state land.

OPINION

At the Board's direction, the Department reanalyzed the modified proposal and, on March 12, 1996, Clinch recommended that the Board accept it. The Board heard additional public comment concerning the modified exchange at its March 18, 1996, meeting. At that meeting, Bill Fairhurst, a member of Montana Action for Access Association, asked the Board if the land exchange complied with *Section 77-2-203 (2), MCA*, which provides: "state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for private land if the private land borders on similar navigable lakes, stream, or other bodies of water." Fairhurst, along with several others contended that the Board had disregarded *Section 77-2-203 (2), MCA*, because it made no express finding regarding the comparison [*3] of the public use value of Cherry Creek and Spanish Creek, which lie within the Flying D Ranch, and the public use value of Robb and Ledford Creeks, which lie within the Snowcrest Ranch. On April 9, 1996, Plaintiffs' counsel sent a letter to the Board expressing this same concern. At a subsequent Board meeting on April 15, 1996, the Department submitted a legal memorandum concerning the operation of the statute. At that same meeting, the Board approved the modified exchange.

On April 19, 1996, Plaintiffs filed a complaint seeking to enjoin the land exchange and to determine the rights of the respective parties. Plaintiffs alleged that the Board had failed to recognize and fulfill its obligation under *Section 77-2-203 (2), MCA.*

At its May 20, 1996, meeting, the Board sought to adopt written special findings to state the factual basis for its approval of the modified exchange. The Board allowed public comment on those special findings during Board meetings held May 20 and June 17, 1996. At the June 17, 1996, meeting, the Board adopted the special findings establishing its rationale for the approval of the exchange and ratifying its April 15, 1996, decision.

[*4] On June 6, 1996, Montanans for The Responsible Use of the School Trust (MonTRUST), moved to intervene. The purpose of MonTRUST is to promote the protection, advancement, and appropriate use of school trust lands on behalf of public education. MonTRUST voiced its support for the land exchange and argued that its interests were not adequately represented by the State. MonTRUST's motion to intervene was granted July 31, 1996. In its complaint in intervention, MonTRUST seeks a declaratory judgment that Plaintiffs' statutory basis for enjoining the exchange of lands violates the Montana Constitution and the Enabling Act of Montana.

The Board has agreed that the exchange will be postponed until the Court makes its decision.

STANDARD OF REVIEW

Although this comes before the Court on motions for summary judgment and for a preliminary injunction, it is really a proceeding to review the decision of the Board of Land Commissioners to approve the land exchange and the Court is treating it as such.

The parties agree that the Department's standard of review in this case is governed by MEPA. MEPA decisions are reviewed to determine "whether the record establishes that the agency acted arbitrarily, [*5] capriciously, or unlawfully." *Northfork Preservation Assoc. v. Dep't. of State Lands, 238 Mont. 451, 458-459, 778 P.2d 862, 867 (1989)*. To determine whether the Board acted arbitrarily or capriciously, the Court must decide whether the Board's decision was "fully informed and well-considered." *Ravalli County Fish and Game v. Montana Dep't. of State Lands, 273 Mont. 371,381, 903 P.2d 1362, 1369* (quoting *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978))*. Because analysis of the relevant documents requires a high level of technical expertise, the Court must defer to the informed discretion of the agency. *Northfork at 458, 778 P.2d at 867*. To evaluate the lawfulness of the Board's actions, the Court must look to the laws and regulations governing the process. Id. One such statute is *Section 77-2-203 (2), MCA.*

In determining whether the Board acted arbitrarily, capriciously, or unlawfully, the Court must determine whether it is appropriate to consider additional evidence presented at the September 18, 1996, hearing. [*6] At that hearing, witnesses testified about the disputed public use values of streams in the land exchanges. Since Plaintiffs contend that the Board did not exercise sound

judgment in approving the land exchange, review of the matters beyond the administrative record is permissible for the limited purpose of determining whether the Board fully considered all the factors, including the statute in question, in making its final recommendation. *Nat'l Audubon Society v. U.S. Forest Service, 46 F.3d 1437, 1447 (9th. Cir. 1993), Public Power Council v. Johnson, 674 F.2d 791, 795 (9th. Cir.1982).*

DISCUSSION

Although the parties have raised numerous issues, there are two core questions: 1) whether Plaintiffs have standing to bring this action; and, 2) did the Department proceed properly in recommending the land exchange and did the Board adequately consider the requirements of *Section 77-2-203 (2), MCA.*

I

The Department and MonTRUST argue that Plaintiffs do not have standing to bring this lawsuit for essentially two reasons. First, their members have no legal interest in the land; and second, Plaintiffs cannot show any potential [*7] injury-in-fact to themselves as a result of the land exchange because they will continue to have access to the affected streams under Montana's stream access laws. In bolstering its argument that Plaintiffs have no legal interest in the land, MonTRUST charges that the license fees paid by Plaintiffs' members for the right to recreate on school trust lands are below the fair market value and therefore in violation of the *Montana Constitution, Article 10, Section 11*.

Plaintiffs, on the other hand, argue that since the issues raised are matters of great public importance, they do have standing to assert and vindicate the public interest.

The Montana Supreme Court has broadly interpreted the concept of standing and has stated that standing questions must be viewed in part in light of "discretionary doctrines aimed at prudently managing judicial review of the legality of public acts . . ." Comm. for an *Effective Judiciary v. State, 209 Mont. 105,110, 679 P.2d 1223, 1226 (1984)* (quoting *Stewart v. Bd. of County Comm'rs. of Big Horn County, 175 Mont. 197,200, 573 P.2d 184, 186 (1977))*. The court in Committee for an Effective Judiciary acknowledged the New Mexico [*8] Supreme Court's recognition that private parties should be granted standing to contest important public issues. Committee for an Effective Judiciary at 110, 679 P.2d at 1226 (citing *State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)*. Some of the plaintiffs in this action were in fact parties in recent litigation concerning school trust land leases. *Ravalli County Fish and Game v. Montana Dep't. Of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995).*

In this case, the Department's recommendation and the Board's decision present matters of great public interest. The land exchange involves nearly 20,000 acres and will affect many state citizens who use those lands for recreational activities. Furthermore, since the Board is a constitutional agency charged with the administration of school trust lands for the benefit of Montana citizens, Plaintiffs should be permitted to raise valid questions in this controversy of serious public importance.

In addressing MonTRUST's contention that Plaintiffs have not paid fair market value for their recreational licenses and, therefore, do not have a legal interest in the lands, the Court finds that [*9] those issues are not properly before it. Such issues are best left for the legislature and the Board to decide. Disputes regarding the adequacy of those fees should be resolved in a separate proceeding. The principal issue in this case is whether the Board complied with statutory requirements in approving the land exchange and whether the Board acted arbitrarily, capriciously, or unlawfully in doing so. Plaintiffs do have standing to bring this lawsuit.

II

Plaintiffs' standing having been established, the question now turns to whether the Board's actions were arbitrary, capricious, or unlawful. Before addressing that question, it is helpful to briefly discuss the Board's responsibilities and obligations.

The State Board of Land Commissioners is one of a handful of boards directly established by the state constitution. The Board has direct constitutional authority to exchange trust lands under Article X, Sections 4 and 11 of the 1972 *Montana Constitution. Article X, Section 4* declares that:

> The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, [*10] lease, exchange, and sell school lands and lands which have

> been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.

Article X, Section 11(4) directs that:

> All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Section 77-1-202 (1), MCA, echoes the constitutional authority of the Board. It states:

> (1) The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held 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 [*11] as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

Numerous school trust land cases hold that the Board, as trustee, has considerable discretion in managing school trust lands as well as a fiduciary duty to the beneficiary public institutions. *Lassen v. Arizona, 385 U.S. 458 (1967), Skamania County v. Washington, 685 P.2d 576 (Wash. 1984), Dep't. of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985), Jeppeson v. Dep't. of State Lands, 205 Mont. 282, 667 P.2d 428 (1983).*

Plaintiffs argue that the Board overstepped its lawful discretionary limits under the constitution because it did not exchange the state land "under such regulations and restrictions as may be provided by law." Article X, Section 4. The statute central to this controversy is *Section 77-2-203 (2), MCA*, which states:

> If the requirements of subsection (1) and 77-2-204 are met, state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for private [*12] land if the private land borders on similar navigable lakes, streams, or other bodies of water.

Plaintiffs' contend that the Board failed to satisfy this statutory requirement because its comparison of Spanish and Cherry Creeks, situated on school trust land, with Robb and Ledford Creeks, situated on private land in the Snowcrest Range, was inadequate.

After reviewing the environmental assessment prepared by the Department, the Board concluded that Robb and Ledford Creeks offer similar public use value to that offered by Spanish and Cherry Creeks. The basis for its conclusion is contained within the EA at sections 3.2.8 (p. 3-35) and 4.1.8 (p. 4-6). In comparing the aquatic resource qualities of the creeks, those sections of the EA consider, among other factors, the miles of streams involved, types and quantity of fish populations, water quality, and the quality of recreational fishing. The EA does indicate that the Flying D Ranch has a recreational fishery value superior to that of the Snowcrest Ranch area. It also mentions, however, that Robb Creek contains a highly pure strain (98 percent) of the rare west slope cutthroat trout. The report states that "[t]he existence of [*13] this pure' strain of cutthroat allows for a high potential of gene pool recovery through planned management of the creek . . . [A] stream containing west slope cutthroat would be valuable from an aquatic resources management standpoint." EA at 3-36, 4-6. Furthermore, under the modified land swap, the State would exchange approximately 12 miles of waterways at the Flying D Ranch for about 14.5 miles of named streams and over 20 miles of springs and intermittent drainages in the Snowcrest Ranch area.

At that hearing, Plaintiffs offered the testimony of anglers who stated that in their opinion Robb and Ledford Creeks offer far fewer recreational fishing opportunities than Spanish and Cherry Creeks and are therefore of less significant public value. The witnesses also expressed concern about the public's alleged diminished access to

Cherry Creek after the exchange occurs. The State countered that the public's right to fish on Spanish and Cherry Creeks is protected under Montana's stream access law which permits the public to use the surface waters of the state for recreational use provided that they follow the streambeds. *Section 23-2-302, MCA*. The State [*14] also referred to the Board's April 15, 1996, meeting where the Board, in applying *Section 77-2-203 (2), MCA*, concluded that even though portions of Spanish and Cherry Creeks would fall under private control once the exchange occurred, the public would still have the right to walk up those creeks from legal access points to fish. Additionally, TEI has agreed to guarantee that access to the creeks would be maintained.

The record shows that the Department and the Board sufficiently considered *Section 77-2-203 (2), MCA*, before approving the land exchange. An April 3, 1996, memorandum to the Board from Tommy Butler, staff attorney for the Department, addressed the legal requirements of that section as applied to the land exchange. At the April 15, 1996, meeting where the Board approved the exchange, considerable discussion was held on the significant public use values of the affected streams. At the Board's May 20, 1996, meeting, the Board sought to adopt written special findings to state the factual basis for its approval of the exchange. On June 17, 1996, the Board adopted the special findings and ratified its April 15, 1996, decision. [*15] From the record, it is clear that Defendants complied with *Section 77-2-204 (2), MCA*, in providing for a sufficient comment and review period and weighing advantages and disadvantages before making its decision. Finally, *Section 77-2-203 (2), MCA*, provides that only similar not identical bodies of water may be exchanged. The statute does not require the exchange of bodies of water with identical fishing opportunities. To do so would seriously impair the Board's ability to fulfill its fiduciary obligations.

As noted, under the land exchange as approved, the total stream length divested by the State in this exchange is approximately 12 miles. In return, the State is acquiring 14.5 miles of named streams and over 20 miles of spring and intermittent drainages. The contested stretches of state land, however, involve just one mile of Cherry Creek and a quarter mile of the North Fork of Spanish Creek whereas Robb and Ledford Creeks, located on private land, comprise 6.5 miles of stream. Although Robb and Ledford Creeks do not offer anglers the superior fishing experience available on Spanish and Cherry Creeks, the streams possess [*16] other significant qualities. The Board found that Robb and Ledford Creek have the potential to provide significant public use value because:

> 1) the exchange would result in additional mileage of stream ownership than currently owned by the State; 2) these creeks can provide good sport fisheries to the public; and 3) Robb Creek contains a highly pure strain of native cutthroat trout which is largely absent in either Cherry Creek or Spanish Creek.

The land the State would obtain under the exchange does have significant public use value. The EA shows that the Snowcrest Ranch and Ulm Pishkin provide approximately 30 percent more wildlife habitat value for wildlife such as elk, deer, antelope, mountain goat, and grouse than the Flying D. In addition, under the exchange, the State would net more acreage for wildlife habitat. Much of this is in the Snowcrest area. The fact that Cherry Creek and the North Fork of Spanish Creek offer better fishing opportunities, by itself, does not in the opinion of the Court provide a sufficient basis to conclude that the Board acted contrary to *Section 77-2-203 (2), MCA*. Therefore, the Court concludes that the Board's [*17] decision approving the land exchange was not unlawful.

III

In deciding whether the Board's actions were arbitrary or capricious, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must be "searching and careful," but "the ultimate standard of review is a narrow one." *Northfork, at 465, 778 P.2d at 871* (quoting *Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989))*. The Court cannot substitute its judgment for that of the Board by determining whether its decision was correct but must examine that decision to see whether the information contained in the EA was considered. *Northfork at 465, 778 P.2d at 871*.

From a review of the record, it is clear that the Board adequately considered arguments for and against the land transfer. In addition to the impact the exchange would

have on aquatic resources, wildlife, and vegetation, the EA illustrates a host of other issues which were studied and compared including public access to the affected lands, recreation, socioeconomic aspects, and cultural resources. From the Board's [*18] special findings, it concluded that: 1) the exchange would increase the value of the corpus of the school trust by a minimum of $ 217,000; 2) the lands to be acquired would generate an additional $ 6,577 annually for Montana's public schools; 3) the exchange would consolidate and provide significant increase in legal public access to trust land. Furthermore, the Department recognized the cultural significance in obtaining one of North America's largest buffalo jumps for public viewing and study - the Ulm Pishkin.

Although the Board acknowledged that Spanish and Cherry Creeks are superior fishing resources compared with Robb and Ledford Creeks, this was just one of a myriad of considerations it weighed. The record shows that the Board did consider Plaintiffs' concerns. It is inevitable that a land exchange of this size will not satisfy all members of the public. The purpose of the school trust lands, however, is not for the benefit of the public but for Montana's public schools. From the record, it is apparent that the Board increased public recreational opportunities while increasing the value of trust assets. Cognizant of the Board's fiduciary duties in managing school trust lands, [*19] this Court finds that the Board's decision was not arbitrary or capricious.

IV

Because the Court finds that the Board did not violate *Section 77-2-203 (2), MCA*, it is not necessary to address the issue of whether that section is unconstitutional.

For the foregoing reasons,

IT IS ORDERED:

1. Defendants'motion to dismiss is denied.

2. Defendants' motion for summary judgment is granted.

3. Plaintiffs' motion for a preliminary injunction is denied.

DATED this 21st day of October, 1996.

DISTRICT COURT JUDGE

SUPREME COURT OPINION AND DECISION

Citation/Title
P.2d 29, 286 Mont. 108, Skyline Sportsmen's Ass'n v. Board of Land Com'rs, (Mont. 1997)

*29 951 P.2d 29

286 Mont. 108, 123 Ed. Law Rep. 941

SKYLINE SPORTSMEN'S ASSOCIATION, Anaconda Sportsmen's Club, Montana Action For Access Association, and Coalition for Appropriate Management of State Lands, Plaintiffs and Appellants,

v.

BOARD OF LAND COMMISSIONERS; Department of Natural Resources and Conservation; and Governor Marcracicot; Joseph P. Mazurek, Attorney General; Mike Cooney, Secretary of State; Nancy Keenan, Superintendent of Public Instruction; and Mark O'Keefe, State Auditor; in their capacities as Members of the State Land Board, Defendants and Respondents.

MONTANANS FOR THE RESPONSIBLE USE OF THE SCHOOL TRUST, Intervenors,

v.

SKYLINE SPORTSMEN'S ASSOCIATION, et al., and Board of Land Commissioners, et al., Defendants in Intervention.

No. 96-668.
Supreme Court of Montana.
Heard and Submitted Oct. 21, 1997.
Decided Dec. 15, 1997.

Following Board of Land Commissioner's approval of exchange of state school trust land for private land, private landowner moved for summary judgment in declaratory judgment action brought by recreational organizations seeking to nullify Board's approval. The District Court, Lewis and Clark County, Thomas C. Honzel, J., granted motion. Recreational organizations appealed. The Supreme Court, Turnage, C.J., held that genuine issue of material fact existed as to whether two creeks on private property were streams with significant public use value and, thus, precluded summary judgment.

Summary judgment vacated and remanded.

Buyske, J., filed a specially concurring opinion.

Gray, K., filed a dissenting opinion.

1. JUDGMENT ⚷185.3(1)
228 ----

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(1) In general.
Mont. 1997.

Evidence that two creeks on private property were not streams with significant public use value raised genuine issue of material fact as to whether Board of Land Commissioner's approval of exchange of state school trust land for private land was arbitrary, capricious, or unlawful, precluding summary judgment against recreational organizations seeking to block exchange. MCA 77-2-203(2).

2. APPEAL AND ERROR ⚿863
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In general.
Mont. 1997.

Supreme Court's standard of review of a summary judgment is same standard as that employed by district court, namely, whether there are genuine issues of material fact and moving party is entitled to judgment as a matter of law.

3. ADMINISTRATIVE LAW AND PROCEDURE ⚿763
15A ----
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 Arbitrary, unreasonable or capricious action; illegality.
Mont. 1997.

Standard of review of informal administrative decision is whether decision was arbitrary, capricious, or unlawful.

4. ADMINISTRATIVE LAW AND PROCEDURE ⚿673
15A ----
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak673 Parties.
Mont. 1997.

In proceeding to determine whether agency decision was arbitrary, capricious, or unlawful, unless reviewing court looks beyond record to determine what matters agency should have considered, it is impossible for court to determine whether agency took into consideration all relevant factors in reaching its

decision.

5. PUBLIC LANDS ⚿51
317 ----
317II Survey and Disposal of Lands of United States
317II(E) School and University Lands
317k51 Effect of reservation and grant to state in general.
Mont. 1997.

Neither Board of Land Commissioner's fiduciary duty to beneficiaries of state school land trust nor other factors which entered into decision on proposed land exchange relieved Board of its constitutional obligation to follow regulations and restriction imposed by legislature on proposed land exchanges. Const. Art. 10, § 4.

***30** [286 Mont. 110] Brian M. Morris (argued), Goetz, Madden & Dunn, Bozeman, for Plaintiffs and Appellants.

Tommy Butler (argued) and Richard E. Bach, Special Assistant Attorneys General, Helena, Roy H. Andes (Intervenor) (argued), Missoula, for Defendants and Respondents.

TURNAGE, Chief Justice.

The District Court for the First Judicial District, Lewis and Clark County, granted Defendants' motion for summary judgment and denied Plaintiffs' request for a preliminary injunction, dismissing a challenge to a proposed land exchange between the Board of Land Commissioners and Turner Enterprises, Inc. We vacate and remand.

The dispositive issue is whether the District Court erred by granting summary judgment because Plaintiffs raised genuine issues of material fact.

Background

The Board of Land Commissioners (Board) is one of a handful of boards established by the Montana Constitution. The Board has direct constitutional authority to lease, exchange, and sell state trust lands.

> The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of

the various state educational institutions, under such regulations and restrictions as may be provided by law.

***31** Article X, Section 4, Mont. Const. In addition, Article X, Section 11(4), Mont. Const., provides:

All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Section 77-1-202(1), MCA, echoes the constitutional authority of the Board. It states:

[286 Mont. 111] The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held 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 as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

In 1993, Turner Enterprises, Inc. (Turner), submitted a proposal to the Board to exchange state school trust land located within the boundaries of Turner's Flying D Ranch southwest of Bozeman, Montana, for private land Turner owned elsewhere in Montana. The original proposal was to exchange 7,486 acres of state land within the Flying D Ranch for 12,689 acres of land Turner owned within the Snowcrest Ranch south of Alder, Montana, and the Ulm Pishkun southwest of Great Falls, Montana. The Department of Natural Resources and Conservation (Department) reviewed the proposal and recommended that it be rejected as not assuring a "good deal" for the State when all attributes of the state lands were evaluated against the land proposed for state acquisition.

Turner then modified its proposal by deleting from the proposed exchange two sections of state lands within the Flying D Ranch. As modified, the proposal was to exchange 6,167 acres of state land for 12,689 acres of private land. On April 15, 1996, after review by the Department, solicitation of public comment, and preparation of an environmental assessment (EA) as required under the Montana Environmental Policy Act, §§ 75-1-101 through -324, MCA, the Board

approved the modified proposal.

The plaintiff organizations of recreationists and sportsmen brought this declaratory judgment action arguing that the Board had overstepped its lawful discretion under the Montana Constitution because it did not exchange the state land "under such regulations and restrictions as may be provided by law." Article X, Section 4, Mont. Const. Specifically, Plaintiffs argued that the Board did not comply with § 77-2-203(2), MCA:

> If the requirements of subsection (1) and 77-2-204 are met, state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for [286 Mont. 112] private land if the private land borders on similar navigable lakes, streams, or other bodies of water.

The two most significant bodies of water on the private land owned by Turner are Ledford Creek and Robb Creek, both of which are located on the Snowcrest Ranch. Cherry Creek and Spanish Creek are the two most significant bodies of water on the state land proposed for exchange. Plaintiffs argued that while Cherry Creek and Spanish Creek are streams with significant public use value, Ledford Creek and Robb Creek are not.

The Plaintiffs pointed out that throughout the process of approving the land exchange, the Board told them that § 77-2-203(2), MCA, did not apply because "there are no state lands bordering on a navigable lake or stream included in this proposed exchange." Only on June 17, 1996, after Plaintiffs had filed this action, did the Board make supplementary findings on § 77-2-203(2), MCA, including a finding that Robb Creek and Ledford Creek have "the potential to provide significant public use value."

MonTRUST, a non-profit citizens' organization promoting the protection, advancement and appropriate use of Montana's school trust lands on behalf of public education, was granted leave to intervene before ***32** the District Court. The Defendants moved to dismiss the action or, in the alterative, for summary judgment. Intervenors moved for summary judgment as well, while Plaintiffs moved for a preliminary injunction to prevent the exchange from proceeding during the pendency of this lawsuit. At a hearing on all of the pending motions, the attorneys for the parties and for the Intervenors made oral argument. Additionally, Plaintiffs presented testimony of five witnesses concerning the comparability of the bodies of water on the lands proposed for exchange.

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In a memorandum and order entered after the hearing, the court found that the Plaintiffs had standing to bring this action but that the Board had adequately considered the requirements set forth at § 77-2-203(2), MCA. Accordingly, the court granted the Defendants' motion for summary judgment and denied the Plaintiffs' motion for a preliminary injunction.

Discussion

[1] Did the District Court err by granting summary judgment because Plaintiffs raised genuine issues of material fact?

[2] Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a [286 Mont. 113] matter of law. Rule 56(c), M.R.Civ.P. This Court's standard of review of a summary judgment is the same standard as that employed by the district court--whether there are genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Missoula Rural Fire Dist. v. City of Missoula* (1997), 283 Mont. 113, ----, 938 P.2d 1328, 1329, 54 St.Rep. 480, 481.

[3] [4] The standard of review of an informal administrative decision is whether the decision was arbitrary, capricious, or unlawful. *North Fork Pres. v. Dept. of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867. It was appropriate for the District Court, in applying that standard, to accept new evidence and not to limit its review to the administrative record. In a proceeding to determine whether an agency decision was arbitrary, capricious, or unlawful, unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision. *Asarco, Inc. v. U.S.E.P.A.* (9th Cir.1980), 616 F.2d 1153, 1160.

Combining the two applicable standards of review, the question before the District Court and this Court is whether the Plaintiffs have established a genuine issue of material fact as to whether the Board's decision was arbitrary, capricious, or unlawful.

In their brief and at oral argument, the Defendants pointed out that under Montana's stream access law at § 23-2-302(1), MCA, the effect of the proposed land exchange on the availability of Cherry Creek and Spanish Creek to recreationists will merely be fewer points of access; recreationists will retain the right to use the creeks. A condition to the exchange would be that public access to the creeks would be maintained at legal access points. The

951 P.2d 29, 286 Mont. 108, Skyline Sportsmen's Ass'n v. Board of Land Com'rs, (Mont. 1997)

Defendants also point out the "world-class hunting opportunities" on the Snowcrest Ranch, now privately-owned, but which would become state land. The Defendants explain that a multitude of factors entered into the evaluation of whether the exchange serves the interests of the school trust beneficiaries and provides recreational opportunities for the public.

Similarly, the Intervenors argue that the Board's fiduciary duty to the trust beneficiaries mandates approval of this proposed land exchange because the exchange will result in greater income to the beneficiaries, which the Intervenors argue is the only purpose of the trust. As a result of the exchange, the trust corpus would gain $217,438 in value plus a projected additional $6,577 in annual income from hunting fees and agricultural and grazing leases.

[5] [286 Mont. 114] However, neither the Board's fiduciary duty to the trust beneficiaries nor the other factors which entered into its decision on this proposed land exchange relieves the Board of its constitutional obligation to follow the "regulations and restrictions" imposed by the Legislature on proposed land exchanges, ***33** including those found in § 77-2-203(2), MCA. We must presume that the Montana Legislature understood the effect of its action in passing § 77-2-203(2), MCA, a "regulation and restriction" which may constrict the Board's discretion in managing state trust land. See *Rider v. Cooney* (1933), 94 Mont. 295, 310, 23 P.2d 261, 264 ("[t]he legislature is presumed to act, so far as mere questions of policy are concerned, with full knowledge of the facts upon which its legislation is based, and its conclusions on matters of policy are beyond judicial consideration"). The Board cannot ignore the requirements set forth at § 77-2-203(2), MCA, simply because it believes that it otherwise received a "good deal" from the proposed exchange.

The Board based its finding that Robb Creek and Ledford Creek have "the potential to provide significant public use value" on the following factors:

(a) The exchange would result in additional mileage of stream ownership than currently owned by the State;

(b) These creeks can provide good sport fisheries to the public; and

(c) Robb Creek contains a highly pure strain of native cutthroat trout which is largely absent in either Cherry Creek or Spanish Creek.

As a preliminary matter, we note that § 77-2-203(2), MCA, refers to "significant public use value," not *potential for* significant public use value.

The statement that Robb Creek and Ledford Creek had the potential to provide significant public use value was buttressed first by the Board's finding that the lands to be received in the proposed exchange had more miles of streams. Additional stream mileage alone does not equate to significant public use value.

The Plaintiffs point out that the EA of Robb Creek and Ledford Creek indicated high levels of erosion and siltation, low fish numbers, and almost no public use. The EA discussed electroshock surveys undertaken by the Department of Fish, Wildlife & Parks (DFWP). According to the DFWP's 1991 electroshock survey, Ledford Creek contained approximately ten brown trout and five rainbow trout for every 1,000 feet of stream and Robb Creek contained thirty-seven [286 Mont. 115] brook trout and five westslope cutthroat trout per 1,000 feet of stream. In contrast, an electroshock survey undertaken on upper Cherry Creek showed 237 rainbow trout and twenty-five brown trout; and on lower Cherry Creek, 164 brown trout, 128 rainbow trout, and twenty-six mountain whitefish per 1,000 feet of stream.

Further, while the EA asserted that Robb Creek and Ledford Creek were important spawning areas for fish living in the Ruby River, the Plaintiffs presented contrary testimony at the District Court hearing. The two DFWP fisheries biologists upon whose study this assertion in the EA was based, Messrs. Brammer and Oswald, testified that their studies did not cover Ledford Creek and Robb Creek but had focused instead on areas of the Ruby River upstream. Brammer, to whom the EA attributed a statement that these creeks were important spawning areas, stated that he could not agree with the statement attributed to him "because I don't have any evidence that would suggest that's the case." Oswald testified that he did not find any evidence of spawning from Ruby River into Robb Creek and that any claim that Ledford Creek and Robb Creek are important spawning areas "could not be supported by the current evidence that we have."

The EA described Ledford Creek as "a good sport fishery with management potential." However, both Brammer and Oswald testified before the District Court that significant problems, including sedimentation, may prevent the development of Robb Creek and Ledford Creek as sport fisheries. Furthermore, Oswald testified that DFWP had absolutely no evidence from field reports or otherwise of anyone fishing in Robb Creek or Ledford Creek.

The Plaintiffs presented several witnesses who testified that Spanish Creek and Cherry Creek are excellent sport fisheries but that Robb and Ledford Creeks are not. Among others, William Fairhurst, a retired military pilot and avid outdoorsman, stated by affidavit that both Spanish Creek and Cherry Creek are

"pristine blue ribbon trout streams with as good of fishing as can be found in the state." ***34** He stated that, in contrast,"Ledford Creek and Robb Creek contain insignificant water flow compared to Spanish Creek and Cherry Creek, and, in fact, they are not reliable for fishing and water throughout the year."

The Board's supplemental findings further stated that Robb Creek contains a highly pure strain of westslope cutthroat trout largely absent in either Cherry Creek or Spanish Creek. The Plaintiffs presented evidence to the District Court on this point as well. Brammer testified that a recovery program for westslope cutthroat trout in Robb Creek would be speculative because of habitat degradation [286 Mont. 116] and a relatively higher density of the competitive brook trout. DFWP had no management plan in place for developing thewestslope cutthroat trout population in Robb Creek, and none was proposed at the time of the hearing.

Additionally, at the hearing before the District Court, the Plaintiffs' witnesses raised valid questions about the extent to which access to Cherry Creek and Spanish Creek would be available to the public under the stream access law. All of the above factual issues must be viewed against the backdrop of a Board which maintained during its decision making process that § 77-2-203(2), M[illegible], did not apply to this proposed exchange, but when faced with this lawsuit abruptly changed its position and belatedly adopted findings relating to significant public use of the waters involved.

We conclude that Plaintiffs should be accorded an opportunity through full discovery to explore the factual basis, or lack thereof, for the Board's finding that Robb Creek and Ledford Creek constitute bodies of water with significant public use values. The Plaintiffs have raised genuine issues of material fact as to whether Robb Creek and Ledford Creek are streams with significant public use value, including: whether a "potential to" provide significant public use value is equivalent to providing significant public use value; the weight, if any, to be accorded an increase in stream mileage understate ownership as a result of the land exchange; the significance of the Robb Creek westslope cutthroat trout population in light of the other facts and circumstances; and the truth of the claim in the EA that Ledford Creek can provide a good sport fishery to the public. Because of these issues of fact, we hold that a material issue of fact exists as to whether the Board's decision approving the proposed land exchange was arbitrary,capricious, and unlawful. Summary judgment was therefore improper.

Having determined that the District Court erred in granting summary judgment f[illegible] the Board, we need not reach the other issues raised on appeal. We vacate

the summary judgment and remand to District Court for further proceedings consistent with this Opinion.

HUNT, NELSON, REGNIER and TRIEWEILER, JJ., concur.

MARC G. BUYSKE (FN*), District Judge, specially concurring.

I concur in the result of the majority opinion, but not in all that is stated in that opinion. I believe the path the majority chose to take to that result runs too broadly through a factual analysis and invites [286 Mont. 117] future litigants to view district court proceedings as a means to do what should have been done at the administrative agency level--develop the record. I would hold the District Court erred as a matter of law in concluding, in effect, the decision of the Board of Land Commissioners approving the land exchange at issue here was not arbitrary.

Although the matter was put before the District Court via a motion for summary judgment, the District Court chose to consider and rule on the matter as a judicial review of the administrative decision of the Board. The District Court could not make factual findings as those would be beyond the purview of t proceeding, hence its decision to uphold the decision of the Board is one of law. This Court's review of legal decisions is plenary as no exercise of discretion is necessary to those decisions--the legal conclusion is either correct or not. *Hicklin v. CSC Logic, Inc.* (1997), 283 Mont. 298, ----, 940 ***35** P.2d 447, 449, 54 St.Rep. 675, 676; *Erickson v. State ex rel. Bd. of Medical Examiners* (1997), 282 Mont. 367, ----, ----, 938 P.2d 625, 628, 54 St.Rep. 395, 396. When conducting its plenary review of a district court's review of an informal administrative decision, this Court follows the same standard as the district court, namely, does the record before the administrative body establish it acted arbitrarily, capriciously, or unlawfully. *North Fork Pres. v. Department of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867. The administrative decision is arbitrary and capricious if it was not based upon a consideration of all relevant factors and if there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971), 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136, 153.

The authority of the Board of Land Commissioners is established by the Montana Constitution:

> The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell school lands

> and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.
>
> Article X, Section 4, Mont. Const.

Section 77-1-202(1), MCA, echoes the constitutional authority of the Board when it states:

> The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of [286 Mont. 118] those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held 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 as provided in The Enabling Act. The board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state.

A further "regulation" or "restriction" provided by law with respect to the actions of the Board is enumerated in § 77-2-203(2), MCA:

> If the requirements of subsection (1) and 77-2-204 are met, state lands bordering on navigable lakes and streams or other bodies of water with significant public use value may be exchanged for private land if the private land borders on similar navigable lakes, streams, or other bodies of water.

The record before the District Court and this Court makes clear the Board did not believe the requirements of § 77-2-203(2), MCA, applied to this proposed land exchange transaction. Obviously, § 77-2-203(2), MCA, *does* apply to this land exchange transaction, and the conclusion of the Board to the contrary is a clear error of legal judgment. This error necessarily affected the development and consideration of the record upon which the Board based its April 15, 1996, decision to approve the exchange. The Board could not have considered the elements of § 77-2-203(2), MCA, when its decision was made as the Board did not understand § 77-2-203(2), MCA, to apply to the proposed transaction.

Applying the review standards noted above to this situation, I hope I restate the obvious when clarifying that an administrative board must consider relevant factors prior to reaching its decision and not after that decision has been made. In this case it is undisputed that the Board approved the land exchange

and then considered the similarity of the significant public use values of the waterways in question. The supplementary adoption of relevant evidence, when that evidence is statutorily required for lawful decision making, is unacceptable.

The Board is entrusted by the public with fiduciary control over Montana's public trust land. To disregard a statute governing the maintenance of that trust in reaching a decision affecting the trust corpus, and then to provide after-the-fact-of-the-decision findings to justify compliance with the previously disregarded statute, is a not insignificant breach of the Board's obligation to the public. Regardless of the manner in which the supplementary ***36** findings were adopted or [286 Mont. 119] the validity of facts supplemented to the record, the process is of such unseemly appearance as to be arbitrary as a matter of law. The statute ignored by the Board in making the decision to approve this land exchange is a direction from the citizens of this State that certain factors need be considered, and certain assurances confirmed, with respect to the exchange of their public trust lands for private lands. The citizens of this State can demand nothing more, and expect nothing less, than to have the governmental entities of the State follow the valid directions of the governed.

The Board has a statutory obligation to make certain, when it trades public lands that contain navigable lakes and streams or other bodies of water with significant public use value, the State of Montana receives lands with similar bodies of water. The Board's refusal to consider § 77-2-203(2), MCA, during its decision making process and its attempt to justify its decision to approve the land exchange with supplementary hearings regarding § 77-2-203(2), MCA, constitutes an arbitrary failure of this statutory obligation.

I would remand this matter to the District Court for its return to the Board of Land Commissioners with instructions to reconsider its decision regarding this land exchange and to properly hear and consider evidence as to the significant public use values of the bodies of water upon the lands to be exchanged.

GRAY, Justice, dissenting.

I respectfully and reluctantly dissent from the Court's opinion. While it is clear that the Board of Land Commissioners and its legal advisers did not cover themselves in glory via their conduct in these proceedings, I cannot join the Court's sweeping effort to reconstitute the administrative record on which the Board made its decision in order to provide the plaintiffs a "second bite at the

apple" in their late effort to impact on that record and the ultimate decision in this case. I would affirm the District Court's conclusion that the Board's decision was not arbitrary, capricious or unlawful.

The issue of whether the Board's decision was unlawful is not a difficult one. Late or not, the Board ultimately concluded that § 77-2-203(2), MCA, applies to this land exchange. When it did so, it made special findings relating to the statutory requirements on the basis of the record before it, provided opportunities for public input and comment on those findings, and ratified its earlier approval of the land exchange on the basis of those findings. Thus, it cannot fairly be said that the Board's decision was unlawful.

[286 Mont. 120] Moreover, while I agree with the Court and with Judge Buyske's thoughtful special concurrence that the procedures by which the Board's ratified decision was made were undoubtedly unseemly from the standpoint of the public's rightful expectations of the Board, the question before us is not whether the *procedures* were arbitrary or capricious. The question is whether the Board's *decision* was arbitrary or capricious, and I submit that it was not. The District Court concluded, and I agree, that sections 3.2.8 and 4.1.8 of the EA provided a sufficient basis--that is, substantial evidence--to support the Board's findings and conclusions that the land exchange meets the requirements of § 77-2-203(2),MCA. Beyond that, we cannot properly go in this case.

The Court, however, approaches this case as if it were a direct challenge to the EA, notwithstanding that all parties agree it is not. In its sweeping consideration and evaluation of the evidence the plaintiffs submitted to the District Court after the EA was long completed, this Court essentially upends the EA process and the right of agencies who must use EAs in decision-making to rely on them. It does so by essentially allowing the plaintiffs--who either sat out the EA process or whose views were not accepted during that process--to make a "new" record relating to matters addressed in the EA, after the fact and absent a legal challenge to the EA or the process by which the EA was developed. If the plaintiffs wanted to impact the EA, they were obliged to do so during that process. Since the evidence presented to the District Court was not offered during that process, it cannot properly be considered now in this indirect attack on the EA via a challenge to the Board's decision.

***37.** Moreover, the plaintiffs could have presented the evidence at issue to the Board prior to the Board's conclusion that § 77-2-203(2), MCA, applied or during the public comment and input opportunities provided on the Board's special findings ratifying and approving the land exchange. They did not do

that either. Thus, I cannot agree with the Court's determination that this evidence can now be used to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious.

Finally, the Court's approach to the use of late-offered evidence to create genuine issues of material fact regarding whether the Board's decision was arbitrary or capricious essentially allows this Court--or any court--to intrude directly into the decision-making responsibilities of the Board. No matter how the Court couches it, its decision in this case means that every administrative agency decision can be [286 Mont. 121] challenged on "arbitrary or capricious" grounds if a mere evidentiary conflict in the record can be raised--or created after the fact--and every such challenge will allow courts to both intrude into agency decision-making and substitute their judgment for that of the agency. Notwithstanding the rumored discontent in many quarters over the extent to which the legislature has delegated authority to administrative agencies, I cannot agree that the Court can properly vest that authority in itself.

I dissent.

FN* Sitting in place of Justice W. WILLIAM LEAPHART.