PRELIMINARY INJUNCTION

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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SKYLINE SPORTSMEN'S ASSOCIATION, Plaintiff, v. BOARD OF LAND COMMISSIONERS; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; and GOVERNOR MARC RACICOT; JOSEPH H. MESARAIC, ATTORNEY GENERAL; MIKE CONEY, SECRETARY OF STATE; NANCY CANAAN, SUPERINTENDENT OF PUBLIC INSTRUCTION; and MARK O'KEEFE, STATE AUDITOR, in their capacities as Members of the State Land Board, Defendants.	Cause No. BDV 99-146 **PRELIMINARY INJUNCTION**

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A trial in this matter was held on July 26 and 27, 1999. Prior to the trial, this Court had issued a Temporary Restraining Order on July 12, 1999.

Upon hearing the evidence at the trial, the Court concludes that it would be just to all parties to issue a preliminary injunction until this Court finally rules on this matter. Specifically, this Court feels that the preliminary injunction should be issued for

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1 the same reasons stated in the Temporary Restraining Order.

2 This Court will be able to dispose of this matter within the next few weeks.
3 This Court has seen no evidence that such a delay would prejudice anyone, since the
4 length of this contract extends over the next few years. Thus, there is plenty of time to
5 harvest the timber if the Court should ultimately rule in Defendants' favor.

6 If the Court does not grant the preliminary injunction, it appears that
7 Defendants will proceed to begin harvesting, or begin building roads in the area, all of
8 which could tend to render Plaintiff's request for relief moot if they should eventually
9 prevail in this case.

10 Therefore, this Court hereby enters its Preliminary Injunction as follows:

11 1. Defendants, their agents, officers, employees, attorneys, and all
12 persons acting in concert and participation with them, are enjoined from taking steps to
13 implement the West/Middle Fork Blacktail Creek Timber Sale, including road building
14 activities, construction of work areas, or cutting or harvesting of any trees until this Court
15 issues a ruling on the merits of this matter.

16 2. Unless a preliminary injunction is granted, the Court concludes that
17 members of Plaintiff organizations will suffer immediate and irreparable injury by limiting
18 their ability to fish, hunt and recreate in the West and Middle Forks of the Blacktail Creek
19 drainage. This injury is irreparable as the harvesting of trees in this area likely will be
20 begun before this Court has an opportunity to assess the merits of the case.

21 3. This Preliminary Injunction will remain in full force and effect until
22 further order of the Court. The Court anticipates being able to address the merits of this
23 case within the next few weeks.

24 4. Next, the Court must determine whether a bond should be required
25 pursuant to Section 77-1-110, MCA, which provides:

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

5 Although Section 77-1-110, MCA, requires a written undertaking, it is clear that the
6 sponsor of the bill enacting this statute, and some of those voting for it, felt that the
7 undertaking could be waived pursuant to Section 27-19-306(1), MCA, which provides that
8 an undertaking may be waived in the interest of justice. See Hearing on HB 501, Senate
9 Jud. Committee, at 17 (Mar. 9, 1995).

10 In this case, this Court feels that it is in the interests of justice to waive the
11 undertaking. First, this Court has serious questions about the constitutionality of Section
12 77-1-110, MCA. But, in the interests of judicial conservatism, the Court will not address
13 those issues.

14 In this case, the Court feels that the interests of justice do require a waiver
15 of the undertaking requirement. Plaintiff has not presented a frivolous presentation.
16 They are well meaning Montana sportsmen who reasonably question the actions of the
17 state of Montana. They presented expert witnesses supporting their position. They may
18 eventually lose this case, but their position cannot be deemed frivolous.

19 Further, Plaintiff organization is a non-profit organization that would, in all
20 likelihood, find it impossible to raise the funds to fund a written undertaking. To require
21 such groups, when they have a reasonable prospect of prevailing in a lawsuit, to provide
22 a bond that they financially cannot provide, would deny them their constitutional right to
23 have their grievance aired in court. That alone tells this Court that the interests of justice
24 mandate that the written undertaking be waived.

25 Finally, it is not at all clear what the amount of that undertaking should be.

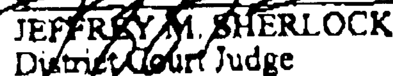
Pat Flowers testified at the hearing. He is the Chief of the Department of Natural Resources and Conservation Forest Management. Mr. Flowers indicated that the State anticipated making $540,000 on this sale. He indicated that a one month delay in letting the contract would damage the School Trust Fund to the extent of $5,700. However, using Mr. Flowers' figure of a 4 percent return would yield an annual return of $21,600. This comes out to less than $2,000 a month. Therefore, this Court concludes that it is impossible to determine the amount of a bond that would be fair to all parties.

Based on the above, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

1. A Preliminary Injunction shall be issued until further order of the Court as specified above.

2. The Court hereby waives the requirement for an undertaking to be filed on behalf of Plaintiffs.

DATED this 28 day of July 1999.



JEFFREY M. SHERLOCK
District Court Judge

pc. Brian M. Morris
Tommy H. Butler/Michael J. Mortimer

T/JMS/SKYLINE.PI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

SKYLINE SPORTSMEN'S ASSOCIATION, Plaintiff, v. BOARD OF LAND COMMISSIONERS, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; and GOVERNOR MARC RACICOT; ATTORNEY GENERAL JOSEPH MARZUREK; SECRETARY OF STATE MIKE COONEY; SUPERINTENDENT OF PUBLIC INSTRUCTION NANCY KEENAN; and STATE AUDITOR MARK O'KEEFE, in their capacities as Members of the State Land Board, Defendants.	Cause No. BDV 99-146 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The trial in this matter was held on July 26 and 27, 1999. Plaintiff Skyline Sportsmen's Association (hereinafter Skyline) was represented by Brian M. Morris. Defendants Board of Land Commissioners (hereinafter Commissioners), Department of Natural Resources and Conservation (hereinafter DNRC), and members of the State Land

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1 Board (hereinafter Land Board) were represented by Tommy H. Butler and Michael J.
2 Mortimer.

3 The Court will enter Findings of Fact and Conclusions of Law that are
4 somewhat intertwined because the complex nature of this case makes it more appropriate
5 that the Findings of Fact not be totally segregated from the Conclusions of Law.

6 **BACKGROUND**

7 Skyline is a registered non-profit organization of citizens created for the
8 purpose of protecting wildlife and wildlife habitat and promoting hunting, fishing and
9 recreational activities in Montana.

10 Defendant Commissioners are an agency of the state of Montana with
11 headquarters in Helena, Montana. The Commissioners are comprised of Governor Marc
12 Racicot, Attorney General Joseph P. Mazurek, Secretary of State Mike Cooney,
13 Superintendent of Public Instruction Nancy Keenan, and State Auditor Mark O'Keefe.

14 Defendant DNRC is a state of Montana agency headquartered in Helena,
15 Montana.

16 Skyline and its members regularly hunt, fish and recreate on state trust lands
17 in the West and Middle Forks of the Blacktail Creek drainage, which is located about 25
18 miles southeast of Dillon, Montana, in the Gravelley Range in Beaverhead County. This
19 drainage is located a few miles south of the Blacktail Game Range.

20 This case concerns the adequacy of a Final Environmental Impact Statement
21 (FEIS) issued by the DNRC on September 19, 1997, on the proposed West/Middle Fork
22 Blacktail Creek Timber Sale. (Pl.'s Ex. 2.) The Commissioners approved the proposed
23 timber sale in July 1998. This suit is brought by Skyline seeking declaratory and
24 injunctive relief. Skyline seeks this Court's declaration that various of the Defendants'
25 actions are void and further seeks injunctive relief against the timber sale.

The West/Middle Fork Blacktail Creek Timber Sale (hereinafter Project) comprises an area of 10,560 acres of school trust land. Of the total acreage, some 2,722 are forested. After the Commissioners approved the timber sale, a contract was entered into with RY Timber on or about August 13, 1998. The contract term is to last until December 2003.

The FEIS looked at four alternatives for logging the Project area. The "Preferred Alternative" was helicopter logging. The FEIS estimated that the Preferred Alternative would harvest some 3,005 thousand board feet (MBF) in 40 separate cutting units located over 1,100 acres of the Project area. The fallen timber would be hauled to landing areas by helicopter. The Preferred Alternative included the construction of 3.4 miles of new road which, at the conclusion of the contract, would be closed and revegitated. At the time the FEIS was approved, it was estimated that the Preferred Alternative would bring in approximately $300,000 in income for the School Trust Fund.

After the FEIS was approved, an actual ground "cruise" was performed on the timber and the volume estimates were ratcheted up to 5,100 MBF on the same 1,129 acres. The proceeds to the School Trust Fund were estimated to be $540,000.

Other alternatives were also mentioned in the FEIS; a "Skidding Alternative," a "Winter Range Alternative," and a "No Action Alternative". Skyline was a proponent of the Winter Range Alternative. Under the terms of the FEIS, the Winter Range Alternative was anticipated to produce 1,731 MBF of timber from 803 acres. The main difference between the Winter Range Alternative and the Preferred Alternate was that the Winter Range Alternative excluded cutting units that were close to the Blacktail Game Range, especially Unit 4. However, the Winter Range Alternative was not preferred because of the lesser volume harvested, the area treated, and the reduced income when compared to the Preferred Alternative. After the creation of the FEIS, the cruise

data indicated that the Winter Range Alternative would actually produce 3,593 MBF of timber with an estimated value of $300,000.

In addition to the FEIS, another document will be mentioned throughout this decision. It is the State Forest Land Management Plan (hereinafter SFLMP) which was issued by the DNRC on or about May 30, 1996. According to the executive summary of the FEIS:

> The [SFLMP] outlines the management philosophy of DNRC in the management of state forested trust lands, as well as sets out specific Resource Management Standards for ten resource categories.
>
> The Department will manage the lands involved in this project according to the philosophy and standards in the [SFLMP]. . . .

(Pl.'s Ex. 2.) Part of the SFLMP was received into evidence as Plaintiff's Exhibit 12.

The complaint in this action suggests that the DNRC's actions in this particular case violated the law in several respects; to wit, 1) that the DNRC did not properly evaluate the cumulative impact on old-growth trees in the area; 2) that the DNRC did not properly evaluate and enumerate the old-growth in the Project area; 3) that the DNRC should have issued a supplemental environment impact statement when it appeared that the harvest volume would be greater than originally anticipated; and 4) that the actions of the various Defendants violated their duty to manage state trust lands for multiple uses.

Supplemental EIS

This issue primarily concerns Skyline's contention that the various Defendants should have insisted on a supplemental EIS when the cruise data showed that the Preferred Alternate was actually producing more significant amounts of harvested timber than in the original FEIS, and that the Winter Range Alternative, when actually subjected to cruise data, would have produced as much income in harvested timber as was originally anticipated for the Preferred Alternative in the FEIS.

ARM 36.2.533 provides as follows:

> (1) The agency shall prepare supplements to either draft or final environmental statements whenever:
> (a) the agency or the applicant makes a substantial change in a proposed action;
> (b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; . . .

The Court concludes that a supplemental EIS was not required under ARM 36.2.533.

Brian Long, a DNRC forester with 24 years of experience, testified that it was not unusual for variations in timber volume and income stream to occur such as occurred here between the preparation of the FEIS and the actual cruising of the timber. Long testified that if the area being harvested is the same, the silvacultural prescription is the same, and the number of "leave" trees is the same, there will be no changes to the environment. This evidence was supported by Pat Flowers, a 16-year DNRC employee who is the chief of the Forest Management Bureau. Further, this contention was supported by Dr. Richard Harris, a former forester for the DNRC.

State's Exhibit F is a schematic diagram showing how harvest volumes for DNRC timber sales change from the time the DNRC estimates the initial timber volume to the time the Montana Environmental Procedure Act (MEPA) document is prepared and then to the time the timber sale preparation phase of the work is done.

The United States Supreme Court has considered the circumstances under which an agency must supplement an existing EIS. Marsh v. Oregon Nat'l Resource Council, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). The Marsh court held that:

> These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always

> awaiting updated information only to find the new information outdated by the time a decision is made.
>
> On the other hand, and as petitioners concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect[,] the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: [i]f there remains "major Federal action" to occur, and if the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh, 490 U.S. at 373-74, 109 S.Ct. at 1859, 104 L.Ed.2d at 392-93 (internal citations omitted) (citations omitted).

Here, the evidence that the Court accepts - the testimony of Mr. Long, Mr. Flowers and Dr. Harris - shows that the environment will not be affected by the increase in timber volume cut nor the fact that more money will be received. Thus, this Court concludes that a supplemental EIS is not required.

Elk

A major issue of contention between the parties is the affect of the Project on the area's elk herd. Testifying for the Plaintiffs was Terry Lonner, a retired long-time employee of the Department of Fish, Wildlife and Parks (FWP). Lonner is one of the authors of the authoritative Montana Cooperative Logging Study (1970-85). (See Pl.'s Ex. 6.) Lonner testified as to the redistribution of elk in response to logging. He indicated that elk frequent the Project area in the spring and fall, which he characterized as a transition area between winter and summer ranges.

One of Lonner's conclusions was that the logging activities will cause elk to leave the area, but that elk are very adaptable as long as they have room and movement choices. One of Lonner's major conclusions was that the Project will have an impact on hunting opportunity. It should be noted that the FEIS does alert the decision makers that

1 the Project may well reduce hunter opportunity. (See FEIS at 91, 92.)

2 Two of the major mitigation factors suggested for the Project area are the
3 use of helicopter logging and the physical closure of roads currently in the area and
4 proposed to be built for the Project. However, Lonner criticized the Project for not
5 mentioning or even addressing the 11 suggested mitigation measures set forth in the
6 Montana Cooperative Logging Study, which he suggested was the most definitive study
7 of its kind in North America.

8 Lonner indicated that part of this area, especially Cutting Unit Number 4,
9 can be elk winter range which might be disturbed by the Project. Further, Lonner
10 indicated that the whole Blacktail area is among the most productive of all elk habitat in
11 North America. Further, it should be noted that the FWP opposes the Project. (See FEIS
12 at 111-114.) Despite this concern, the DNRC and the FWP were unable to reach an
13 agreement concerning payment for a possible conservation easement on the state trust
14 lands.

15 Another criticism of Lonner and the FWP is the DNRC's use of a study by
16 Ken Hamlin. Hamlin created some telemetry data in the area. However, both Lonner and
17 the FWP suggest that this telemetry data is not designed or adequate enough to make any
18 conclusions about the usage by elk of the Project area as habitat. (See FEIS at 113.)

19 Defendants counter this information with their assertion that the Project area
20 is infrequently used by elk in the winter. The DNRC also concurred that the Hamlin data
21 is not necessarily appropriate for a specific habitat evaluation. (See FEIS at 116.)
22 However, the DNRC counters that the Hamlin data was the best available information
23 indicating general patterns of use by elk. The Court notes that the FEIS addressed the elk
24 situation at pages 3, 10 and 16, and an extensive discussion is addressed at pages 48
25 through 61, 90 through 92, and 111 through 116.

The Court concludes that the DNRC did not violate any of its duties concerning the elk population in the area. This Court notes that the whole purpose of the Montana Environmental Protection Act is procedural. It is not to dictate a certain result. Thus, if the decision makers (here the Commissioners) have been fully informed, they are allowed to make a decision with which others may not agree. Here, one of Plaintiff's main concerns was the reduction in hunter opportunity. This matter was fully disclosed to the decision makers in the FEIS.

The other concern advanced by Plaintiff was the suggested impact on the winter range of elk in the Blacktail area, specifically on Cutting Unit Number 4. The Court would agree that the Hamlin telemetry data is perhaps not the best tool available to assess this situation, but this fact was also acknowledged in the FEIS. The Court feels that although there may have been better ways to address the area's habitat use by elk in the winter, the telemetry data, although not the best in the world, is a scientifically acceptable procedure to assess the elk habitat situation. Further, the Court must stress that the Plaintiff has the burden of showing by clear and convincing evidence that a mistake has been made. Although Plaintiff may suggest some usage of Cutting Unit Number 4 by elk in the winter, there has been no evidence shown to this Court that the Project area is a critical elk winter range. All indications are that elk use the area in the winter, but probably infrequently. In conclusion, the Court rules that the DNRC did not violate any law and did not act arbitrarily and capriciously in approving this sale as is it relates to elk.

Since this Court concludes that there is insufficient evidence to determine that the Project area is a critical elk wintering range, there is no need for this Court to address Plaintiff's contention that the DNRC has violated its mandate to manage state lands for multiple use purposes. See Section 77-1-203, MCA.

This Court cannot help but mention in passing that it does not necessarily

agree with the DNRC in its suggestion that its duties as trustee require it to be governed by monetary factors alone. The Montana Supreme Court has held that: "Income is 'a' consideration - not 'the' consideration regarding school trust lands: Maximizing income is not paramount to the exclusion of wildlife or environmental considerations in the MEPA context." Ravalli Co. Fish and Game v. Department of State Lands, 273 Mont. 371, 384, 903 P.2d 1362, 1370 (1995). If Plaintiff had demonstrated that the Project area was, in fact, an important winter range for elk, then the Court would have to balance the need of the School Trust Fund for income and the State's duty to manage its land for non-income producing purposes. However, the Court would note that in the future the DNRC should carefully read Ravalli Co. to temper its suggestions that its sole duty in administering the trust is the raising of money.

Cumulative Impact

ARM 36.2.525(3)(d) requires that an environmental impact statement consider the cumulative impacts on the physical environment of the proposed action. ARM 36.2.522(7) defines cumulative impact as:

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

In this regard, it is Skyline's contention that a 66-acre sale in 1988 which occurred somewhere between Units 32 and 36 of this Project was not properly categorized as an old-growth harvest.

Initially, the Court notes that the 1988 sale was mentioned in the FEIS at pages 8, 28, 39 and 61. However, Skyline suggests that the mere mention of this earlier sale is insufficient since it does not categorize the prior harvest as an old-growth harvest.

In this regard, Plaintiff presented the testimony of Jane Adams. Adams has a master's degree in wildlife biology and worked for the DNRC as a biologist. She has worked on approximately 40 environmental reviews and feels that one of her areas of expertise is evaluation of sensitive species and old-growth. Adams reviewed Plaintiff's Exhibit 11 which is harvest records for the 1988 sale. In addition, Adams visited the site of the 1988 harvest and produced several photos of stumps. (Pl.'s Exs. 21a - h.)

However, Dr. Harris, who has a Ph.D. in forestry, indicated that the DNRC did consider the 1988 harvest in its evaluation. Dr. Harris testified that he did not feel that you can use harvest records, such as Plaintiff's Exhibit 11, to determine retroactively whether or not a prior timber sale was an old-growth sale. According to Dr. Harris, you would need to see the area prior to the sale to visually evaluate the area and see if the qualitative criteria of old-growth, such as snags and large woody debris, were to be found in the area. Further, Dr. Harris presented State's Exhibit K which was a schematic showing the proportion of old-growth within the various cutting units. By and large, the amount of old-growth in these cutting areas ranges from 38 percent of old-growth in Unit 7 to 8 percent in Unit 36. According to Dr. Harris, it would be highly unlikely that 100 percent of the 1988 sale would have been old-growth when nearby cutting areas have a far smaller percentage of old-growth on them. Further, Dr. Harris presented State's Exhibit J which showed that even if the entire 1988 sale was to be considered old-growth, the DNRC was still retaining 54 percent of the old-growth in the Project area when including the 1998 sale which meets the requirements of the SFLMP. This will be discussed later in greater detail.

In sum, this Court concludes that the DNRC did not error in not considering the 1988 sale to be old-growth. Further, the Court concludes that the FEIS properly made reference to the cumulative impact of the 1988 sale by references to that sale at pages 8,

1 28, 39 and 61 of the FEIS.

2 **Old-Growth**

3 The parties do not dispute that there is old-growth in the Project area.
4 However, the parties do dispute how much old-growth is in the area. The FEIS suggests
5 that there are 78 acres of old-growth in the area. (FEIS at 40.) In determining the amount
6 of old-growth, all of the parties agree that a paper authored by P. Green in 1992
7 (hereinafter Green) is authoritative. (Pl.'s Ex. 14.) According to all of the parties, the
8 trees here in question are East-Side Zone Type 2 Old-Growth. This type of old-growth
9 is typified by Douglas Fir growing on warm to cool and dry to wet environments. (FEIS
10 at 40.) In Green, there are certain quantitative measurements that are used to determine
11 if such growths are to be classified as old-growth. The Green characteristics for old-
12 growth for the type of trees here involved are: 1) five trees per acre, 19 inches DBH [1] or
13 more; 2) large trees 200 years old or more; and 3) basal area 60 square feet per acre or
14 more. In addition to these quantitative criteria there are certain qualitative criteria that
15 must be used to determine if an area is old-growth. These include the presence of snags
16 and large coarse woody debris on the forest floor. According to Defendants, using the
17 Green quantitative criteria alone indicates there may be 600 acres of old-growth in the
18 Project area. However, using the qualitative criteria requires the use of professional
19 judgment. In this case, Ken Bowman, an experienced DNRC forester under the direction
20 of Dr. Harris, applied the qualitative criteria to the potential 600 acres of old-growth.
21 Although Bowman did not record or collect any particular data, he determined that 78
22 acres in the Project area was old-growth using the Green quantitative and qualitative
23 criteria. These 78 acres are shown on State's Exhibit K as existing in Cutting Units 5, 7,
24

25 [1] Diameter at Breast Height.

1 11, 30, 32, 36 and 42. According to State's Exhibit J, even after harvesting occurs in the
2 old-growth area, all of the area will still be classifiable as old-growth. According to
3 Defendants, the areas to be harvested will still classify as old-growth by using the Green
4 qualitative and quantitative criteria. The DNRC's position in this regard is supported by
5 experienced foresters including Mr. Long, Mr. Flowers, Mr. Bowman and Dr. Harris.

6 Plaintiff's expert, Jane Adams, criticized Bowman for not keeping any
7 records. However, the Court should note that Adams has never categorized old-growth
8 on the east side of the Continental Divide, in particular this type of timber. Further, she
9 has never calculated the basal area of old-growth timber alone before. And, although she
10 criticized Bowman for not keeping records, she kept none herself; she did not actually
11 measure the diameter at breast height of any tree; and she did not calculate the basal area
12 of old-growth trees. Further, she did not bore samples into any trees to determine if they
13 were 200 years old or older.

14 Therefore, the Court concludes that Defendants properly calculated, using
15 the qualitative and quantitative criteria in Green, the amount of old-growth in the Project
16 area.

17 The Court's major concern, however, focuses on how much old-growth can
18 be removed. At page 80 of the FEIS, Defendants suggest that by harvesting no more than
19 one-half of the existing old-growth, they expect to meet the standards set forth in the
20 SFLMP. Portions of the SFLMP are contained in Plaintiff's Exhibit 12. In a portion of
21 that document entitled Record of Decision, it is stated that the "DNRC would seek to
22 maintain or restore old-growth forest in amounts of at least half the average proportion
23 that would be expected to occur with natural processes on similar sites. (Pl.'s Ex. 12 at
24 ROD-13.) The DNRC then suggests that since it is keeping over 50 percent of the old-
25 growth in the area, that it has complied with the SFLMP. However, Defendants are

somewhat selective in their use of the SFLMP and they have ignored important parts of that document. The balance of the paragraph quoted above goes on to provide that: "[p]rocedures such as those described in 'Biological Diversity Strategies for Forest Type Groups' or other technical reference would be used for designating and managing old-growth blocks and replacement areas." (Id.) Thus, according to the SFLMP, certain procedures are to be used for designating and managing old-growth blocks. The SFLMP references a document entitled Biological Diversity Strategies for Forest Type Groups - a paper prepared by former DNRC employee Dave Remington (hereinafter Remington Study). The crucial portion of the Remington Study provides:

> Management activities: These areas are being retained to provide intact old-growth characteristics, so partial cutting should not be done except as described below. Sanitation and salvage cutting are inappropriate because they remove snags and decadent trees, which are key old-growth components. However, if 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. If stands are in a state of rapid breakup, and suitable substitute blocks are available, then harvest may be considered. . . . and mature trees should not be removed.

(Pl.'s Ex. 12 at RMS-31.)

Defendants attempt several methodologies to escape the requirements of the Remington Study that would indicate that old-growth should not be cut and that mature trees should not be removed. All of these attempts are unsuccessful. First, Defendants suggest that the Remington Study is only a "guide." However, the specific reference to the Remington Study in Plaintiff's Exhibit 12 states that the Remington Study "would be used for designating and managing old-growth blocks and replacement areas." This says nothing about merely guiding the DNRC. Further, if the DNRC were to use the Remington Study as a "guide," it is interesting to note that there is no mention in the FEIS whatsoever as to what guidance the Remington Study provided. Indeed, this Court has read the FEIS and finds no reference to the Remington Study. In the Executive Summary

1 of the FEIS, the reader is informed that the "Department will manage the lands involved
2 in this project according to the philosophy and standards in the Plan [SFLMP]. . . ." (Pl.'s
3 Ex. 12 at p. 1.) It appears that the DNRC has been selective in those portions of the plan
4 by which it will be guided.

5 Next, the DNRC points out that in referring to the Remington Study, it is
6 stated that the State could also be guided by other technical references in designating and
7 managing old-growth blocks. (See Pl.'s Ex. 12 at ROD-13.) However at trial, DNRC's
8 witnesses were unable to identify any other "technical references" that were used by them
9 in designating and managing old-growth blocks.

10 The Remington Study does allow partial cutting if stands are breaking up
11 rapidly with heavy fuel accumulations. However, DNRC's witnesses indicated that the
12 stands in question here are not breaking up rapidly and do not have heavy fuel
13 accumulation. Further, DNRC's witnesses admitted that their old-growth cutting did call
14 for the cutting of mature trees which, as noted above, the Remington Study suggests
15 should not be done.

16 The SFLMP states that the plan "provides policies and guidelines for
17 managing state-owned forest lands." (Pl.'s Ex. 12 at ROD-1.) Defendants have not
18 shown this Court that the Remington Study is not binding upon them. Further, if the
19 Remington Study is only a "guide" as suggested by the Defendants, why aren't they using
20 the study as a guideline in this case? If Defendants choose to ignore their guidelines, then
21 it appears to this Court that they should explain why they are doing so and what justifies
22 using some guidelines (cutting old-growth timber so that 50 percent is left) to the
23 complete avoidance of other guidelines (not cutting old-growth unless it is required for
24 forests that are breaking up rapidly with heavy fuel accumulations).

25 Thus, since the DNRC has adopted the Remington Study as part of the

policy it is to follow and has then totally ignored it, the Court concludes that the DNRC failed to follow its own rules in preparing the FEIS and thus acted unlawfully. Further, in failing to adequately explain why the Remington Study was totally ignored, the DNRC has acted arbitrarily and capriciously.

In so holding the Court does not mean to be too critical of the DNRC or its employees who were faced with a herculean task of preparing a very complicated environmental impact statement and complying with a very detailed and complicated State Forest Land Management Plan. Having read all of these documents, the Court is not surprised that astute counsel could not go through all of the documents and find an error. Be that as it may, such an error has been found. The question remains what remedy should be applied. The proper remedy would be to forbid the harvesting of the old-growth timber as identified in State's Exhibit K. Therefore, the remedy to be fashioned by this Court is that the DNRC, its agents and employees, will be allowed to go ahead with the Project. However, there shall be no cutting in the old-growth areas designated on State's Exhibit K - 8 acres in Unit 5; 10 acres in Unit 11; 10 acres in Unit 32; 10 acres in Unit 36; 15 acres in Unit 30; 10 acres in Unit 42; and 15 acres in Unit 7. The balance of the Project may go forward, but the Court will issue a permanent injunction as to cutting of the old-growth timber as indicated on State's Exhibit K.

CONCLUSIONS OF LAW

In evaluating this case, the Court has reached certain Conclusions of Law and they are as follows:

1. This Court has jurisdiction of this case.

2. Plaintiff has standing to bring this action.

3. In an action such as this seeking to hold that the FEIS is inadequate, the burden of proof is on Skyline on challenging Defendants' decision. This Court cannot

1 set aside the Defendants' decision unless there is clear and convincing evidence that the
2 decision was arbitrary, capricious or not in compliance with the law. Section 75-1-
3 201(3)(a), MCA.

4 4. In reviewing the DNRC's action, the Court will determine whether
5 it was arbitrary, capricious or unlawful. North Fork Preservation Assoc. v. Department
6 of State Lands, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989).

7 5. To determine if the agency action is unlawful, the Court must
8 determine whether the agency violated any statutes or regulations that were applicable to
9 it. In order to determine if a decision is arbitrary or capricious, the Court must determine
10 whether the decision was based on a consideration of the relevant factors and whether
11 there has been a clear error of judgment. In such an analysis, the Court is not to decide
12 if the agency reached the correct decision by substituting its judgment for that of the
13 administrative agency. Id., at 465, 778 P.2d at 871.

14 6. To determine if the agency followed the law, the Court notes that the
15 MEPA is essentially procedural. It does not demand that an agency make a particular
16 substantive decision. MEPA requires that an agency take procedural steps to review
17 actions of state government in order to make informed decision. Ravalli Co. Fish and
18 Game Assoc. v. Department of State Lands, 273 Mont. 371, 377-78, 903 P.2d
19 1362, 1367 (1995).

20 7. This Court is not to substitute its judgment for that of the agency by
21 determining whether the decision was "correct." North Fork, 238 Mont. at 465, 778 P.2d
22 at 871.

23 8. The Court concludes that the DNRC's actions in proposing to cut
24 identified old-growth timber was unlawful, arbitrary and capricious. In this regard the
25 Court concludes that the State failed to meet its legal obligation in analyzing the amount

of old-growth timber to be cut according to the State Forest Land Management Plan that it adopted and admitted was to govern this Project.

9. The Court concludes that the DNRC did meet its legal obligations in analyzing the other issues that have been addressed in this document and, in so acting, did not act unlawfully, arbitrarily or capricious as set forth above.

10. The DNRC's failure to properly analyze the amount of old-growth timber that could be cut failed to provide the Commissioners with a reason why part of the State Forest Land Management Plan was ignored and another part was given full credence to allow cutting of the old-growth timber mentioned above.

11. The Court further adopts as conclusions of law all of the Findings of Fact that were set forth earlier.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Except as herein specifically mentioned, the administrative decision of the State Board of Land Commissioners approving the West/Middle Fork Blacktail Creek Timber Sale is upheld as being in compliance with the Commissioner's constitutional and statutory duties.

2. The aforementioned timber sale Final Environmental Impact Statement produced by the Department of Natural Resources and Conservation complies, except as noted below, with the DNRC's duties under the Montana Environmental Policy Act; Section 77-1-201, et seq.; the 1972 Montana Constitution; the State's Enabling Act; and all applicable trust duties.

3. Except as herein specifically mentioned, Plaintiff's request for injunctive relief is DENIED.

4. Based on the above, the Court hereby orders that a permanent

injunction shall be issued preventing Defendants, or any of their agents, from harvesting any of the old-growth timber in the West/Middle Fork of Blacktail Creek as shown on State's Exhibit K - specifically 8 acres located in Unit 5, 10 acres located in Unit 11, 10 acres located in Unit 32, 10 acres located in Unit 36, 15 acres located in Unit 30, 15 acres located in Unit 7, and 10 acres located in Unit 42. Prior to any cutting of old-growth timber in the aforementioned areas, the Department of Natural Resources and Conservation shall prepare a new final environmental impact statement addressing the old-growth in the aforementioned areas and why it has chosen to ignore portions of its adopted State Forest Land Management Plan, specifically the Remington standards set forth in the State Forest Land Management Plan at page RMS-31.

5. Plaintiff's attorney is directed to prepare Judgment in conformity herewith.

DATED this 16 day of September 1999.

JEFFREY M. SHERLOCK
District Court Judge

pc. Brian M. Morris
Tommy H. Butler/Michael J. Mortimer

T/JMS/SKYLINE.FCO

NEWS ARTICLES

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SENATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE 3-3-99
BILL NO. HB 142

Sportsmen sue state over timber sale

By PERRY BACKUS
Lee News Network

DILLON – Butte's Skyline Sportsmen filed suit Thursday to challenge the state's decision to harvest timber near an elk winter range south of Dillon.

The suit, filed in Helena district court, asks the court to require the Department of Natural Resources and Conservation and the state Board of Land Commissioners to revisit their decision to sell about 5 million board feet of timber in the West/Middle Fork Blacktail Creek timber sale.

Controversy erupted over the timber sale because of its proximity to two Montana Department of Fish, Wildlife and Parks' wildlife game ranges – the Blacktail Wildlife Management Area and the Robb-Ledford Wildlife Management Area.

Sportsmen contend the DNRC didn't consider alternatives that would have limited impacts to the game ranges.

Following an unanimous decision by the Board of Land Commissioners in July to adopt the DNRC recommendations for the sale, RY Timber of Townsend purchased the timber last fall.

So far the sale hasn't been harvested, said Stan Vlahovich, manager of the DNRC Dillon District. Under the timber contract, RY Timber has five years to harvest the trees, Vlahovich said.

Vlahovich said he hadn't seen a copy of the lawsuit. A representative of RY Timber didn't return a phone call from The Montana Standard Thursday.

The sportsmen's lawsuit contends the DNRC failed to consider cumulative impacts of previous sales to old growth timber when it designed the current sale. It said the State Forest Land Management Plan – a 1996 document that outlines the DNRC's land management philosophy – calls for maintaining old growth timber at a minimum of 50 percent of historic levels.

When the DNRC developed the West/Middle Fork Blacktail Creek timber sale, it neglected to mention that 66 acres of old growth timber were harvested in the project area in 1988, according to the suit.

Those 66 acres added to the estimated 78 acres of old growth that would be harvested under the current proposal will push old growth harvest levels to nearly 69 percent in the project area, the suit said.

The state also discovered that there was more timber volume than what it had initially anticipated, according to the suit.

Initial estimates said the sale would provide 3 million board feet of timber for harvest. After actual tree marking was completed, the state discovered the volume would be closer to 5.1 million board feet, according to the suit.

The suit said the state rejected a "winter range" alternative because its estimated 1.7 million board feet of timber reduced potential for income to the state trust.

If a similar increase in volume could be yielded under the winter range alternative, which reduced the impact on elk habitat, the sportsmen estimated that about 2.9 million board feet could be harvested. That is close to the 3 million board feet originally sought by the DNRC, they said.

"We want the DNRC to go back to the land board with all the information," said Brian Morris, attorney for the Skyline Sportsmen Association. "Our argument is there is new, substantial information that needs to be considered."

Tom Bugni of Skyline Sportsmen said his group is worried about the future of the large elk herd in the area. If elk lose the security of the small patches of timber that dot the landscape of the lower Blacktail area, Bugni said the herd could suffer.

Perry Backus is a reporter for the (Butte) Montana Standard.

C.M. Russell Museum director resigns

GREAT FALLS (AP) — The executive director of the C.M. Russell Museum, Lorne Render, has resigned to accept a similar job in Kansas.

Render, who has headed the museum staff since 1991, is leaving his post April 30 to become director of the Marianna Kistler Beach Museum of Art on the Kansas State University campus in Manhattan, Kan.

He will be the Beach museum's first permanent director, and said he looks forward to the challenge of shaping a new museum.

His departure will follow the annual Russell Art Auction, scheduled in March.

John Stephenson, president of the Russell board of directors, said Render "will be sorely missed." The board's executive committee is meeting to begin a search for a successor.

Study: Bitterroot River flowing clean

HAMILTON (AP) ...

Judge upholds allegations against Shelby mayor

SHELBY (AP) — A district judge has upheld allegations by the state that Shelby Mayor Larry Bonderud filed false Medicaid claims in his optometry practice.

Barbara Hoffmann, staff attorney for the state, said the Department of Public Health and Human Services will impose a one-year suspension, and Bonderud's Medicaid patients will have to see another optometrist during that time.

He also will be subject to special claims reviews after he is allowed to rejoin the Medicaid program.

some patients were new to his office that he had treated before.

As a result, Bonderud received $11,058 more than he was entitled to get from Medicaid over a four-year period. Under Medicaid guidelines, compensation to doctors is higher for treating new patients and making repairs than for treating established patients and replacing eyeglasses.

Bonderud, who has offices in Browning, Conrad and Shelby, repaid the money in 1990, but has continued to fight the state's disciplinary measures.

like to make a single mistake, but mistakes are made and they're honest mistakes," he said.

Hoffmann, disagreed, saying the department gave Bonderud plenty of chances to correct his billing procedure. But she said he had a "pattern of incorrect billing even after he had been warned."

"The distinguishing feature of his case was that over a period of time he had failed to correct billing errors. Even before he was sanctioned, the records show that we sent, at our own expense, a med-

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A 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 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.

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