Colorado Environmental Coalition v. Dombeck: Industrial Recreation Meets the Lynx . . . and Wins

I. OVERVIEW

This case concerns the growing tension arising between the preservation of the central Colorado wilderness and the increasing demand for commercial development. In 1996, the United States Forest Service approved a proposal by Vail Associates, Inc. (Vail) to expand its existing ski area into an area designated Category III, a previously undeveloped section of the White River National Forest.[1] The expansion included the construction of three ski lifts, two ski patrol huts, and three bridges.[2] This expansion encroached into the habitat of the endangered Canada lynx (lynx).[3] In its approval of the expansion, the Forest Service concluded: (1) it was consistent with the applicable forest plan;[4] (2) it would significantly improve the recreational experience for visitors to the Vail Ski Area and the White River National Forest by providing more reliable and dependable skiing conditions; (3) it would increase skier visitation during nonpeak periods, thus making more efficient use of existing

1. *See* Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1165 (10th Cir. 1999); *see also* FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, U.S. FISH & WILDLIFE SERVICE CONFERENCE OPINION: VAIL SKI AREA CATEGORY III EXPANSION 11 (1999) [hereinafter FWS CONFERENCE OPINION].

2. *See* FWS CONFERENCE OPINION, *supra* note 1, at 12.

3. *See id.* at 4. In 1996, the lynx was not yet listed as a federally endangered species. It was not until 1997 that the United States Fish and Wildlife Service (FWS) was compelled by court order to list the lynx. *See* Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 (D.C. Cir. 1997). However, the actual listing was precluded by a backlog of species also waiting for listing review, and therefore the lynx was not listed in time to prevent the Category III expansion. *See* 62 Fed. Reg. 28,653, 28,657 (1997).

4. *See Dombeck*, 185 F.3d at 1166 n.1. The 1984 White River National Forest Plan designated the Category III area for ski development and contemplated completion of development by 1999. *See id.*; *see also* National Forest Management Act (NFMA), 16 U.S.C. § 1604 (1994) (directing the Forest Service to develop land and resource management plans for each forest unit in the National Forest System).

infrastructure; and (4) would have an acceptable level of impact on other resources.[5]

In a 1996 biological assessment, the Forest Service concluded that the project would not adversely affect any federally listed species.[6] However, in a revision of the original evaluation, the Forest Service concluded that implementation of the project could adversely affect designated sensitive species,[7] including the lynx.[8] In response to the evaluations, the Colorado Environmental Coalition (Coalition) challenged the project's approval by appealing to the Deputy Regional Forester.[9] Although the Deputy Regional Forester denied the appeal, he commanded the Forest Service to prepare further documentation concerning the proposed forest amendments and the cumulative environmental impacts of the project.[10]

The Forest Service followed the Deputy Regional Forester's directive, but nevertheless approved the expansion.[11] The Coalition then filed another administrative appeal, which was denied.[12]

In June 1997, the Coalition sought a preliminary injunction from the United States District Court for the District of Colorado to enjoin the Category III expansion, claiming that the Forest Service violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA).[13] The district court denied the motion for an injunction, entered final judgement in favor of the

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5. *See Dombeck*, 185 F.3d at 1166.

6. *See* FWS CONFERENCE OPINION, *supra* note 1, at 4.

7. *See id.*; FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL § 2670.5(19) (1995) [hereinafter FOREST SERVICE MANUAL]. Sensitive species are plants and animals identified by the Regional Forester for which population viability is a concern, as evidenced by significant, current, or predicted downward trends in population numbers or density, or habitat capability. The sensitive species identification and management is an outgrowth of NFMA's mandate that guidelines be developed to provide for diversity of plant and animal communities in the national forests. *See* 16 U.S.C. § 1604(g)(3)(B) (1994). The sensitive species program is designed to develop and implement management practices which ensure that viable populations of sensitive species are maintained and "do not become threatened or endangered because of Forest Service actions." FOREST SERVICE MANUAL, *supra*, § 2670.22.

8. *See Dombeck*, 185 F.3d at 1167 n.4.

9. The Coalition challenged not only the expansion of the existing ski area, but also the Forest Service's decision not to review the impact of Vail's adjacent real estate development, known as the "Gilman Tract." *See id.* at 1177.

10. *See id.* at 1166; 16 U.S.C. § 1604(f)(5) (1994). Changes to the forest plan may be made when conditions in a forest significantly change or when policies or objectives of the Forest Service would have a significant impact on forest projects. *See id.* Public notice must be given at the time the amendments are proposed. *See id.*

11. *See Dombeck*, 185 F.3d at 1166.

12. *See id.*

13. *See id.* at 1167; *see also* NFMA, 16 U.S.C. § 1604 (1994); NEPA, 42 U.S.C. § 4332 (1994).

Forest Service, and dismissed the case.[14] In a three-part opinion, the United States Court of Appeals for the Tenth Circuit affirmed the district court's holding.[15] The Tenth Circuit held that: (1) the Forest Service's lynx habitat analysis did not contravene NMFA, (2) the Forest Service's final environmental impact statement (EIS) satisfied NEPA standards, and (3) the Forest Service was not required to prepare a supplemental EIS to address the development of an adjacent tract of land, the "Gilman Tract."[16] *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999).

II. BACKGROUND

This case involves the application of two major environmental statutes, NFMA and NEPA. Generally, NFMA directs the Forest Service in its implementation of forest plans.[17] Such plans must be prepared in compliance with NEPA.[18] NEPA dictates that all major federal actions must be accompanied by an EIS that details alternatives to the proposed project and provides a reasonable discussion of mitigation measures that could be implemented to counter the environmental consequences of the project.[19] NEPA also requires that a project's goal not be so narrowly construed so as to prevent the consideration of viable alternatives.[20]

The Coalition sought judicial review of the Forest Service's final decision pursuant to the Administrative Procedure Act (APA).[21] Under the APA, a court reviews an agency decision under a *de novo* standard of review in order to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[22] The agency must have considered all relevant factors and must not have made a clear error in judgement.[23]

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14. *See Dombeck*, 185 F.3d at 1167.
15. *See id.* at 1178.
16. *See id.* at 1165; *see also* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).
17. *See* 16 U.S.C. § 1604(a) (1994).
18. *See id.* § 1604(g)(1).
19. *See* 42 U.S.C. § 4332(C) (1994).
20. *See* Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 666 (5th Cir. 1997).
21. *See Dombeck*, 185 F.3d at 1167; APA, 5 U.S.C. § 706(2)(A) (1994).
22. 5 U.S.C. § 706(2)(A) (1994).
23. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Forest Service's enabling statute, NFMA, directs the Forest Service to create management plans for each forest unit in the National Forest System.[24] Each plan must incorporate multiple forest uses and balance the management of recreational activities, timber sales, and wildlife.[25] However, each plan must also provide for the preservation of viable and diverse plant and animal communities.[26]

Projects such as the Category III expansion must be consistent with the relevant forest plan and NEPA.[27] Litigation concerning the implementation of forest plans usually falls into one of two categories: (1) cases concerning the general legality of the plan or (2) cases concerning the Forest Service's specific activities such as resource allocation or special use permits.[28]

NEPA claims generally challenge an EIS's consideration of individual forest plans and specific Forest Service activities.[29] Specific attacks may challenge the agency's failure to prepare an EIS when one may have been required, or the agency's failure to sufficiently explore alternative proposals and impacts.[30]

NEPA does not prohibit a federal agency from considering other factors that outweigh environmental considerations when making a decision regarding a forest plan, so long as adverse effects to the environment are properly addressed and evaluated under NEPA's "action-forcing procedures."[31] Congress intended these procedures to guarantee that agencies take a "hard look"[32] at the environmental

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Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

24. *See* 16 U.S.C. § 1604(a) (1994).

25. *See id.* § 1604(e).

26. *See id.* § 1604(g)(3)(B).

27. *See Dombeck*, 185 F.3d at 1168; 16 U.S.C. § 1604(i) (1994); Ohio Forestry Ass'n , Inc. v. Sierra Club, 523 U.S. 726, 728 (1998).

28. *See* Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223, 227 (1996) (citing Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994); Resources Ltd. v. Robertson, 35 F.3d 1300 (9th Cir. 1994); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir.1993)).

29. *See id.* at 227.

30. *See id.*

31. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); *see also* 42 U.S.C. § 4332(C) (1994). Federal agencies contemplating actions that could significantly affect the quality of the human environment must complete an EIS that details: (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. *See id.*

32. Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

consequences of proposed actions by inviting public comment[33] and by considering the best available scientific information.[34] However, NEPA does not mandate particular results; it only prescribes the necessary process.[35] Therefore a court will only review the procedures that an agency followed; it will not conduct any kind of substantive review of an agency decision.[36] Consequently, "if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[37]

If significant new information arises regarding the impacts of the proposed project, then agencies are required to prepare a supplemental EIS before issuing a record of decision.[38] The determination of a supplemental EIS's necessity mirrors the standard applied in the determination of the need for the original EIS.[39] An attack on an agency's failure to supplement an EIS must: (1) "present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned"[40] and (2) show that "with respect to the substantial environmental issue, the agency did not act reasonably."[41]

The interrelationship of NFMA, NEPA, and commercial development is best understood after considering three fundamental cases. *Robertson v. Methow Valley Citizens Council* is the seminal case interpreting NEPA's requirement of mitigation measures in an EIS.[42] Another, *Holy Cross Wilderness Fund v. Madigan*, supports *Methow Valley* by holding that an EIS must thoroughly discuss

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33. *See* 40 C.F.R. § 1503.1 (1999).

34. *See Dombeck*, 185 F.3d at 1171; *see also* Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1994). The determination of whether an agency action will jeopardize any endangered or threatened species will be based on the best scientific and commercial data available. *See id.*

35. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980).

36. *See id.*

> [O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"

Id. (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

37. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

38. *See* 40 C.F.R. § 1502.9(c)(ii) (1999).

39. *See* Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).

40. Wisconsin v. Weinberger, 745 F.2d 412, 421 (7th Cir. 1984).

41. Louisiana Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1052 (5th Cir. 1985).

42. 490 U.S. 332 (1989).

mitigation measures.[43] However, *Holy Cross* also expands *Methow Valley* by stating that a supplemental EIS will not be required when an agency modifies a project to encompass those mitigation measures.[44] A third case, *Simmons v. United States Army Corps of Engineers*, holds that an agency may not declare too narrow a goal in its EIS.[45]

In *Robertson v. Methow Valley Citizens Council*, the United States Supreme Court overruled the Ninth Circuit and held that NEPA requires an EIS to include a discussion of the extent to which the adverse affects of a proposal cannot be avoided.[46] *Methow Valley* involved the issuance of a special use permit for the construction of a ski area in the middle of a mule deer migration pattern.[47] The court held that while an agency is not required to incorporate mitigation measures into its project, it is required to include a reasonable discussion of mitigation measures in the EIS.[48]

In *Holy Cross Wilderness Fund v. Madigan*, the Tenth Circuit broadly interpreted *Methow Valley* to hold that when there are conflicting expert opinions as to the environmental impacts of a project and mitigation measures are implemented, a supplemental EIS will not be required.[49] In *Holy Cross*, the Army Corps of Engineers (Corps) issued a permit to allow the construction of a water project in the White River National Forest prior to the development of any plan to mitigate adverse environmental impacts.[50] In its discussion of the necessity for a supplemental EIS, the Tenth Circuit held that "courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance, or lack of significance, of the new information."[51] The court upheld the agency's issuance of the construction permit because, instead of preparing a supplemental EIS, the Corps decided to modify the project and to implement the mitigation measures contained in the original EIS.[52] Because the agency fully considered the impact of the project and decided to

43. 960 F.2d 1515, 1523 (10th Cir. 1992).
44. *See id.* at 1527.
45. 120 F.3d 664, 666 (7th Cir. 1997).
46. 490 U.S. at 332 (citing 42 U.S.C. § 4332(C)(ii)).
47. *See id.* at 340.
48. *See id.* at 352.
49. *See* Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1518 (10th Cir. 1992).
50. *See id.* at 1520-21.
51. *Id.* at 1524.
52. *See id.* at 1528-29.

implement the mitigation measures, the court held that the agency's decision not to supplement the EIS was not arbitrary and capricious.[53]

The heart of NEPA is the alternatives analysis.[54] The Seventh Circuit established this principle in *Simmons v. United States Army Corps of Engineers*.[55] In *Simmons*, the Corps narrowly construed a project purpose so that no alternative could meet its stated goals.[56] The court declared that an agency must not be able to slip past the strictures of NEPA by "contriving a purpose so slender as to define competing 'reasonable alternatives' out of consideration."[57] The court also stated that, "the public interest in the environment cannot be limited by private agreements," thereby setting one of the standards by which alternatives are to be measured.[58] Thereafter, the Forest Service must rigorously compare all reasonable alternatives and give each alternative substantial treatment in the EIS.[59] Agencies need not consider environmental consequences of alternatives rejected in good faith as "too remote, speculative, or . . . impractical or ineffective."[60] Therefore, an alternatives analysis is highly dependent upon the stated purpose of the project. If the purpose is stated too narrowly, many alternatives will be eliminated because they do not meet the applicant's basic purpose.

This is not to say that a private applicant's objectives cannot be considered at all. In fact, projects that significantly impact federal lands and require an EIS are often completed by private parties. In *Louisiana Wildlife Federation, Inc. v. York*, the Fifth Circuit held that the Corps had a duty to consider the objectives of the applicant's project.[61] The plan was (1) to clear several acres of wetlands in order to convert them to agricultural lands and (2) build a levee for a federal flood control program.[62] Because the stated goal was a federal water project commissioned by the Corps, which analyzed six separate permit applications, the stated purpose was not authored by a private

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53. *See id.* at 1518.
54. *See* 40 C.F.R. § 1502.14 (1999).
55. 120 F.3d 664 (5th Cir. 1997).
56. *See id.* at 670.
57. *See id.* at 666. The agency also has a duty to take into account the objectives of an applicant's project, so long as the objective is not so narrowly construed that alternatives to the project cannot be found. *See* Louisiana Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5th Cir. 1985).
58. *Simmons*, 120 F.3d at 670.
59. *See* 40 C.F.R. §§ 1501.1, 1502.14(a) (1999); *see also* 42 U.S.C. § 4332(C)(ii), (E) (1994).
60. All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992).
61. *See Louisiana Wildlife Fed'n, Inc.*, 761 F.2d at 1048.
62. *See id.* at 1046.

party and therefore was not overly narrow.[63] However, the Court remanded the case and required the Corps to reexamine whether a supplemental EIS was required.[64]

III. THE COURT'S DECISION

In the noted case, the Tenth Circuit first examined each of the Coalition's NEPA claims. The Coalition challenged the adequacy of the final EIS, arguing that the Forest Service did not obtain and analyze all available information concerning the lynx.[65] However, the court held that the Forest Service did not violate NEPA because its analysis constituted "a reasonable, good faith presentation of the best information available under the circumstances," and that the Coalition failed to show how additional, site-specific lynx data was essential to a reasoned decision.[66]

The Coalition also attacked the final EIS claiming that while the Forest Service listed several mitigation plans, the mitigation analysis failed to completely evaluate the effectiveness of each of the measures.[67] The court disagreed, reasoning that the Forest Service's identification and separate analysis of nearly 150 project-specific mitigation measures was "adequate to foster an informed decision."[68]

After a subtle quip aimed at the Coalition's "zealous advocacy" of a wilderness philosophy, the court employed the "rule of reason" in its evaluation of the adequacy of the Forest Service's alternatives analysis in an effort to ensure that the EIS sufficiently considered all relevant issues.[69] It was the Coalition's assertion that the Forest

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63. *See id.* at 1048.

64. *See id.* at 1046.

65. *See* Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1172 (10th Cir. 1999). The court also briefly examined the Coalition's claims that the Forest Service failed to adequately address the potential socioeconomic effects of the project on the town of Vail. *See id.* at 1176. However, it concluded that the argument amounted to a disagreement with the Forest Service's decision; the court's job was not to question the Forest Service's final conclusion regarding those impacts. *See id.*

66. *Id.* at 1172.

67. *See id.* at 1173.

68. *Id.*

69. *Id.* at 1174; *see* Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972) (stating that a rule of reason is implicit in the discussion of environmental impacts of a proposed action). In *Environmental Defense Fund, Inc. v. Andrus*, the Tenth Circuit held that:

> [T]he test the agencies must meet in dealing with the environmental aspects of proposed action is anchored to the "rule of reason" which, broadly stated . . ., may be said to be this: If the environmental aspects of proposed actions are easily identifiable, they should be related in such detail that the consequences of the action are apparent. If, however, the effects cannot be readily ascertained and if the alternatives are deemed

Service acted in an arbitrary and capricious manner by refusing to consider the alternative proposed by the Coalition, and that the district court erred by allowing Vail's stated purpose and need for the expansion to "categorically preclude" consideration of the Coalitions alternative.[70]

Surprisingly, the court also held that no conflict existed with cases such as *Simmons*, that have prohibited a narrow construction of a projects goals, and cases such as *Louisiana Wildlife Federation, Inc.*, that have held that agencies must not completely ignore a private applicant's objectives.[71] The Tenth Circuit then created its own standard, reasoning that these cases "simply instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes."[72] The court further claimed that the Forest Service was fully authorized to limit consideration to expansion alternatives designed to "substantially meet the recreation development objectives of the Forest Plan."[73]

The court last addressed the Coalition's claim that the Forest Service had failed to prepare a supplemental EIS in order to analyze the impacts of potential development on land adjacent to the Category III expansion.[74] The court referenced the record and found that the Forest Service had received a letter from the Coalition notifying it of Vail's potential interest in developing the area as a residential property.[75] The court found that the Forest Service knew of Vail's interest prior to receiving the letter, had considered it in the previous EIS, and was not required to complete a supplemental EIS.[76] Consequently, the court held that the record supported the Forest Service's assertion that they had reviewed all of the relevant information, evaluated its significance, and had justified the choice not to supplement the existing analysis.[77] In the court's view, this was

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> remote and only speculative possibilities, detailed discussion of environmental effects is not contemplated under NEPA.

619 F.2d 1368, 1375 (1980).

70. *Dombeck*, 185 F.3d at 1174.

71. *See id.*; *see also* Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997); Louisiana Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5th Cir. 1985).

72. *Dombeck*, 185 F.3d at 1175.

73. *Id.*

74. *See id.* at 1177.

75. *See id.*

76. *See id.* at 1178.

77. *See id.*

sufficient to prove that the agency did not act in an arbitrary and capricious manner.[78]

IV. ANALYSIS

The Forest Service's decision was arbitrary and capricious and can be challenged on both procedural and substantive levels. Additionally, the Tenth Circuit belied its opinion of the Coalition by selective citing of the administrative record, faulty reasoning, and unwarranted characterization of the Coalition as fanatics. It declined to recognize that the Coalition had legitimate legal claims and patronized them by describing them as "zealously advocating a wilderness conservation philosophy."[79] The court elevated Vail's "need" for expansion of its ski resort above the protection of an threatened species' habitat.

On a factual and procedural level, the Forest Service's decision to approve the Category III expansion was arbitrary and capricious because it "entirely failed to consider an important aspect of the problem."[80] Specifically, it failed to consider the imminent listing of the lynx as a threatened species,[81] as well as the Colorado Division of Wildlife's (the "Colorado DOW's") attempts to reintroduce the lynx.[82] The court naively accepted Vail's claim that no ascertainable lynx population inhabited Category III, or the White River National Forest, and alternatively, Vail's claim that the expansion would not affect such a population if it actually existed.[83] Logically, it is impossible to evaluate the degree of species loss without knowing how many lynx inhabit Category III and its surrounding areas.

Further, the court referenced select portions of the record. For instance, it stated that "there is no existing lynx population in

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78. *See id.* It should also be noted that the court briefly addressed the issue of whether the Forest Service was required to conduct a viability analysis as provided by 36 C.F.R. § 219.19. However, the court stated that since there was no existent lynx population and the Forest Service did not select the lynx as a management indicator species, it was not obligated to conduct any kind of viability analysis. *See Dombeck*, 185 F.3d at 1168. A management indicator species is a species selected within a habitat, whose "population changes are believed to indicate the effects of [forest] management activities." 36 C.F.R. § 219.19(a)(1) (1999).

79. *Dombeck*, 185 F.3d at 1175.

80. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

81. *See* Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 (D.C. Cir. 1997) ("The FWS decision not to list the Canada Lynx and grant it the protections of the ESA is arbitrary and capricious, applied an incorrect legal standard, relied on glaringly faulty factual premises, and ignored the views of its own experts. Consequently, it must be set aside.").

82. *See* USFSW Conference Opinion, *supra* note 1, at 53 ("[T]his program will transplant an estimated 100 animals into the Colorado Rockies over the next two winters, hoping that through augmentation, lynx populations can be rebuilt to viable, self-sustaining levels.").

83. *See Dombeck*, 185 F.3d at 1168-69.

Category III or the White River National Forest from which to gather census or distribution data."[84] In the footnote following that statement, the court stated that the last confirmed lynx sighting was on the Vail Ski Area, between 1973 and 1974, and the last probable lynx tracks were recorded in the area in 1991.[85] In fact, Colorado DOW biologists confirmed the lynx presence at the Vail Ski Area during the 1989 and 1990 winters, and reported that "credible sighting reports continue to be received from various parts of the state, providing additional evidence that lynx likely still persist in low numbers in the Colorado mountains."[86] Further, "the Vail region has accounted for a comparatively large proportion of lynx sightings and track observations over the past 30 years," including tracks sighted in 1997.[87] Moreover, the Fish and Wildlife Service, in its Conference Opinion, stated that some of the most recent credible sightings of lynx include two 1998 sightings in the Vail vicinity, one by a National Park biologist, and one by a Forest Service biologist.[88]

Finally, the decision fails on a procedural basis because the court rejected the Coalition's NFMA claim based on the faulty premise that the Forest Service should not be required to determine the precise amount of habitat necessary to maintain a nonexistent population.[89] Contrary to the court's contention, the Fish and Wildlife Service acknowledged the existence of the lynx population and stated that further development would jeopardize it.[90] The Forest Service was also aware of the Colorado DOW's plans to reintroduce a number of lynx that would potentially create a more viable population.[91] Considering these facts, the Forest Service cannot justifiably maintain that the expansion would not adversely affect the lynx population.

Legally, the decision fails because the court summarily dismissed the Coalition's NEPA claims, particularly those in regards to the sufficiency of the EIS. The court should have followed the *Simmons* court's decision to require a broad statement of a project's goals in an EIS. Rather, the Tenth Circuit stated that "the Forest Service was fully authorized . . . to limit its consideration to expansion alternatives

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84. *Id.* at 1169.
85. *See id.* at 1169 n.7.
86. FWS Conference Opinion, *supra*, note 1, at 21.
87. *Id.* at 29-30.
88. *Id.*
89. *See Dombeck*, 185 F.3d at 1170.
90. *See* FWS Conference Opinion, *supra* note 1, at 21.
91. *See id.* at 16 ("The State of Colorado has begun a program intended to reestablish viable, self-sustaining populations of lynx throughout the Southern Rockies by augmenting any remaining populations with transplants from Canada and Alaska.").

designed to substantially meet the recreation development objectives of the Forest Plan."[92] In its narrow application of the law, the court noted that while the Coalition's Conservation Biology Alternate Proposal would have permitted 130 acres of ski-area expansion, it would not have achieved the goal of "needed intermediate skiing."[93] This rationale represents a break from well-established precedent and fails as a policy matter. While the provision of recreation and the maintenance of natural resources are both forest plan goals, limited construction of the former at the cost of the latter is unacceptable, especially when the two goals are easily compatible.

If the court accepts such a narrow interpretation of the forest plan's recreation objectives, and states the goal as to "enhance the quality of skiing opportunities within [Vail's] existing [special use permit] area by [specified] means," then effectively, only Vail's proposal may be adopted.[94] In this case, the court would have made the same mistake as the agency in *Simmons*. As in *Simmons*, the stated goal of the project in the EIS was too narrow because the analysis should have focused on the general goal, rather than the specific needs of a particular applicant. "An agency cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals,'" and "if NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives."[95] If the court had adopted the *Simmons* test, then the Coalition's alternative expansion plan would have satisfied the forest plan without committing irretrievable damage to resources. The general goal would have been to increase recreational skiing, and not some overly narrow derivative thereof.

Finally, the decision fails legally because of its misapplication of *Holy Cross*. Citing to *Holy Cross*, the court concluded that the Forest Service had the right to make a reasoned evaluation about the significance of the new information and that the agency was not required to supplement its EIS in light of new information. But in a supplemental EIS, the Forest Service had a final opportunity to acknowledge the environmental impact that the development of the Gilman Tract would have on the lynx. The Coalition informed the Forest Service that a supplemental EIS would be required because it

92. *Dombeck*, 185 F.3d at 1175.
93. *Id.* at 1176 n.16.
94. *Id.* at 1175.
95. Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669-70 (7th Cir. 1997).

had just come to light that not only did Vail have an interest in the property, which the Forest Service already knew, but that Vail had purchased fifty percent of the tract, which is estimated to be worth between forty-eight and seven-hundred-fifty million dollars.[96] The Fish and Wildlife Service stated that "development of this tract could further degrade or eliminate potentially important habitats on the west side of Vail Ski Area," which could contribute to further habitat fragmentation, a main threat to the lynx population.[97]

Yet, *Holy Cross* is distinguishable from the present case and the court's reliance on it is completely unwarranted. The *Holy Cross* court did not require a supplemental EIS for entirely different reasons. In that particular case, the court did not deem a supplemental EIS necessary because the agency assumed that negative environmental impacts would occur, and thus, it required the applicants to mitigate those impacts under a conditional permit. Therefore, a supplemental EIS was not necessary to determine losses that the Corps insured would never occur. In the noted case, there were no required mitigation measures or even assurances that the expansion would not endanger the lynx.

Once it is established that *Holy Cross* is distinguishable, it becomes clear that the Forest Service violated NEPA through its failure to supplement the EIS and examine Vail's financial interest in the Gilman Tract. A supplemental EIS was obviously needed to examine the fact that Vail's real estate development served an underlying purpose and need for the project, and that development of the Gilman Tract had potential environmental impacts which would occur in conjunction with the Category III development.[98] Under *Holy Cross*, the Forest Service was required to evaluate the impact of Vail's purchase of the Gilman Tract, and a determination that the new information regarding the purchase was insignificant should only have come after a full evaluation.

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96. *See* FWS Conference Opinion, *supra* note 1, at 54-55.

97. *Id.* ("With the loss of diurnal security habitat in Category III, development of the Gilman tract and associated secondary effects could eliminate much of the remaining security habitat potential" and "the consequences may be loss of . . . most of Vail Mountain as functional lynx habitat.").

98. For instance, in a scoping letter to the Forest Service regarding Vail's Keystone Ski Resort expansion, Colorado Wild quoted Vail Resort Inc.'s 1997 annual report which stated: "'To facilitate real estate development, Vail Resorts Development Corporation invests significant capital for on-mountain improvements, such as ski lifts, trails, and snowmaking. These improvements enhance the value of the Company's real estate holdings . . . .'" Letter from Jeff Berman, President, Colorado Wild, to Tere O'Rourke, Dillon Ranger Dist. Ranger, White River Nat'l Forest, United States Forest Serv. 2 (last modified Dec. 30, 1998) <http://www.wildwilderness.org/wi/scoping.htm>.

V. CONCLUSION

The Tenth Circuit's decision in *Dombeck* is extremely relevant because it illustrates a growing trend in the issuance of special use permits for recreational construction in National Forests. It also represents a paradigm shift. The Forest Service used to issue recreational special use permits to improve skiing in National Forests. Now the ski areas have become vehicles for the sale and development of real estate, and the Forest Service rarely sees an expansion proposal it does not like. That is not an acceptable goal for the use of the National Forests. Further, it becomes an unrestrained and dangerous goal when courts uphold agency decisions that are not only arbitrary and capricious, but that endanger threatened species and violate the public trust.

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