Making the Grade: The Role of Conservation Agreements in Complying with Environmental Law Mandates. Selkirk Conservation Alliance v. Forsgren

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CASENOTE

MAKING THE GRADE: THE ROLE OF CONSERVATION AGREEMENTS IN COMPLYING WITH ENVIRONMENTAL LAW MANDATES

Selkirk Conservation Alliance v. Forsgren

I. INTRODUCTION

The dispute in the instant case involved the United States Forest Service’s (“Forest Service”) and the United States Fish and Wildlife Service’s (“Fish and Wildlife Service”) approval of a road building project for Stimson Lumber Company (“Stimson”). The agencies granted Stimson an easement across part of the Colville National Forest, relying heavily on a private Conservation Agreement in making its decision. Selkirk Conservation Alliance challenged the federal agencies’ use of the Conservation Agreement in this manner. The Ninth Circuit ultimately dismissed Selkirk’s claims and recognized the methodology of heavy reliance on Conservation Agreements between federal agencies and private parties as proper under federal environmental laws.

II. FACTS AND HOLDING

The dispute in this case arose when collectively the agencies approved a road building project for Stimson. The agencies conveyed an easement across the LeClerc Bear Management Unit (“BMU”) of the Colville National Forest allowing Stimson access to its inholdings. The Selkirk Conservation Alliance, in cooperation with other environmental groups, appealed the decision of United States Federal District Court for the District of Oregon granting summary judgment to the Forest Service and the Fish and Wildlife Service and dismissing Selkirk’s claims challenging the agencies’ decisions. Selkirk claimed that the agencies’ granting of an easement to the Stimson Lumber Company was arbitrary and capricious because the Forest Service and the Fish and Wildlife Service did not consider the cumulative impacts of the roads and timber harvesting on the grizzly bear population and that the Fish and Wildlife Service did not utilize the best information available in determining the probable harm to grizzly bears in the region. Selkirk further contends that the agencies’

1 336 F.3d 944 (9th Cir. 2003) [hereinafter Selkirk Conservation Alliance].
2 id. at 948.
3 id. at 950.
4 id. at 948.
5 id. at 955-956.
6 id. at 948. The Forest Service approved the construction of 1.88 miles of new road and reconstruction of .81 miles of old road on U.S. Forest Service land within the Colville National Forest. Stimson also had future plans to construct at a minimum 15.4 miles of inholding road and harvest 1,577 acres on Stimson’s own lands to be accessed by the easements. id. at 949.
7 id. Stimson’s inholdings were the six parcels of land in the LeClerc Creek watershed in northeast Washington State totaling in excess of 2,000 acres. The only sensible route of access to Stimson’s sixth parcel required traveling over Colville National Forest lands because Colville land surrounded the other five parcels. id. at 948.
8 id. at 953.
9 id. at 948. The LeClerc BMU is home to about 50 grizzly bears and “contains about 6 percent of the grizzly-bear-occupied range in the continental United States.” The Selkirk Mountains are broken into ten Bear Management Units (BMU’s) as part of an effort to monitor, analyze, and promote the grizzly bear population. The lands to be affected by the approval of the project lie within the LeClerc BMU. id. at 949.
actions were in violation of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).\textsuperscript{10}

Selkirk presented several issues to the court on appeal, including the claim that the agencies had violated federal environmental laws.\textsuperscript{11} Selkirk contended that both agencies violated the ESA when they relied on a conservation agreement to mitigate the effects of the easement granted to Stimson.\textsuperscript{12} The ESA requires “that the biological opinion and the agency action be based on ‘the best scientific and commercial data available.’” Selkirk argued that the conservation agreement between the agencies and Stimson did not qualify as the “best scientific and commercial data available” and that the agencies’ reliance on the conservation agreement to mitigate the concerns brought forth in Fish and Wildlife’s draft biological opinion was arbitrary and capricious.\textsuperscript{13}

Next, Selkirk raised three separate claims of the agencies’ violation of NEPA.\textsuperscript{14} These violations include the agencies’ unreasonable limitation of the Environmental Impact Statement’s geographic scope, failure to consider Stimson’s future activities in its cumulative impacts analysis, and unreasonably limiting the temporal scope used in the EIS analysis.\textsuperscript{15} Selkirk argued that the Forest Service violated NEPA by unreasonably limiting the geographic scope considered in its cumulative effects analysis in the Environmental Impact Statement (“EIS”).\textsuperscript{16} Selkirk claimed that the Forest Service’s decision not to fully consider the impact of a project proposed in the nearby Idaho Panhandle National Forest (“IPNF”), which bordered the LeClerc BMU, violated NEPA.\textsuperscript{17} The Forest Service, on the contrary, claimed “that including the IPNF project in the EIS would have been an ‘arbitrary increase’ and that ‘the magnitude of the effects would actually appear to be less as they would be spread over a larger area.’”\textsuperscript{18}

Selkirk also raised the issue that the Forest Service violated NEPA by failing to consider Stimson’s activities that were reasonably foreseeable in the cumulative effects analysis within the EIS.\textsuperscript{19} NEPA requires the Forest Service to take “all past, present, and reasonably foreseeable future actions” into consideration in its cumulative effects analysis.\textsuperscript{20} It also mandates that the EIS contain a “meaningful analysis of the cumulative impacts” for future projects.\textsuperscript{21} Selkirk argued that the EIS did not adequately “describe, locate, or analyze” numerous other “road building and projects identified by Stimson in state forest practices applications.”\textsuperscript{22}

\textsuperscript{10} Id. at 953.
\textsuperscript{11} Id.
\textsuperscript{12} Id. at 949. Stimson and the agencies entered into a final Conservation Agreement after Fish and Wildlife found that the original proposal would have a negative impact on some endangered or threatened species. Id. The agreement set out the terms by which all Stimson lands in the LeClerc BMU would be managed. Id. The stated goal of the agreement was to “minimize displacement of grizzly bears from spring range, to maintain functional female grizzly bear home range in the BMU and to reduce the potential for human-caused mortality.” Id. The agreement implemented numerous requirements and restrictions on the management of Stimson lands located in the LeClerc BMU, including restrictions on harvesting and road building. Id. Stimson and the agencies also “agreed that the monitoring results and the Agreement guidelines will be reviewed by the Parties annually . . . and the guidelines will be appropriately revised.” Id. at 949-50.
\textsuperscript{13} Id. at 954 (quoting 16 U.S.C. § 1536(a)(2) (2000)).
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 958.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 959 (internal punctuation omitted).
\textsuperscript{20} Id. at 961.
\textsuperscript{21} Id. (quoting 40 C.F.R. § 1508.7 (2002)).
\textsuperscript{22} Id. at 961 (quoting City of Carmel-By-The-Sea v. Dept. of Transp., 123 F.3d 1142, 1161 (9th Cir. 1997)).
\textsuperscript{23} Id.
Another argument presented to the court by Selkirk is that the Forest Service violated NEPA by unreasonably limiting the temporal scope used in its EIS analysis. Selkirk contended that the Forest Service did not meet this obligation because it considered the effects of granting the easement for only a three year period. Selkirk further contended that the Forest Service’s decision to utilize only a three year timeframe was arbitrary and capricious when the Forest Service had two other rational choices from which to choose a temporal analysis period.

Finally, Selkirk argued that the Fish and Wildlife Service violated the ESA by failing to consider the reasonably foreseeable activities of Stimson in its 2001 biological opinion. The ESA states that the Fish and Wildlife Service is required to review the information gathered by the Forest Service and prepare a biological opinion on whether the Forest Service action would jeopardize any species. Selkirk argued that the Fish and Wildlife Service did not sufficiently consider the cumulative effects of the grant of the easement to Stimson because the Fish and Wildlife Service’s biological opinion did not analyze the forest practices applications submitted by Stimson. By not analyzing the aforementioned application, the Fish and Wildlife Service breached its duty “to use the best available commercial data.”

The Ninth Circuit Court of Appeals declined to adopt the arguments raised by the Selkirk Conservation Alliance and affirmed the district court’s grant of summary judgment against Selkirk. The Ninth Circuit held that the Forest Service and the Fish and Wildlife Service adequately followed the procedures laid out by NEPA and ESA and that the decisions made in this case by the agencies were not arbitrary and capricious. Specifically, the Court found that it was not unreasonable for the agencies to rely on the conservation agreement in their environmental and biological assessments because the agreement “qualifie[d] as a reasonable source of data” within the meaning of the statutes and as such its promises of mitigation would be enforced.

III. LEGAL BACKGROUND

In the instant case, the National Environmental Policy Act, the Endangered Species Act, and the manner in which they are applied are at issue. Specifically, the court is being called upon to “judicially review” federal agencies’ decisions and determine whether the agencies met the mandates and/or guidelines set out by the statutes.

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24 *Id.* at 962.
25 *Id.*
26 *Id.*
27 *Id.* The Forest Service could have analyzed for a ten year period, the original timeframe chosen by the Forest Service’s biologist, or a five year timeframe, which was the length of the Conservation Agreement between the agencies and Stimson. *Id.*
28 *Id.* at 963.
29 *Id.*
30 *Id.* at 964.
31 *Id.*
32 *Id.* at 965
33 *Id.*
34 *Id.* at 956-65.
35 *Id.*
A. National Environmental Policy Act

NEPA, an important piece of environmental legislation, was enacted by Congress on January 1, 1970. NEPA aimed to ensure that federal agencies would consider significant environmental impacts of proposed actions. It also obligates federal agencies to disclose to the public the agency’s consideration of environmental impacts in making decisions on proposed actions. NEPA established the Council of Environmental Quality (“CEQ”). The CEQ is the agency possessing primary responsibility for the administration of NEPA. The CEQ is authorized to establish regulations regarding the administrative procedures all federal agencies must follow in order to comply with NEPA. CEQ regulations have controlling effect when they come under judicial review by the courts. Federal agencies determine for themselves how CEQ regulations should be applied in the environmental assessment process and will come under judicial review if challenged. The authority delegated to the CEQ pursuant to NEPA is advisory, and the CEQ has the power to review and evaluate federal programs and activities for compliance with NEPA policy.

CEQ regulations specify the exact administrative procedures the federal agencies must follow to lawfully begin a “major federal action.” CEQ regulations require federal agencies to consider the “cumulative impacts” of such a proposed action. NEPA requires federal agencies to prepare an EIS before rendering a decision on a proposed federal action. An environmental impact statement requirement “ensures” that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made

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37 Id. NEPA has the following purposes: “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.” Id.
40 42 U.S.C. § 4344.
41 Id. The CEQ’s duties include promulgating regulations that agencies use for the implementation of the procedural provisions of NEPA and reviewing the procedures used in the development and enforcement of Federal standards for environmental quality. Exec. Or. 11514, § 3(a) and (h), 35 Fed. Reg. 4247 (Mar. 5, 1970).
43 Id.
44 Id.
45 Id.
46 40 C.F.R. § 1507.3 (2003). “Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18.
47 40 C.F.R. § 1508.25(c). “Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other action. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.
48 42 U.S.C. § 4332(C) (“... all agencies of the Federal Government shall... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of human environment, a detailed statement by the responsible office on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented”).
available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

The environmental review process established by the CEQ involves several steps once a proposal is submitted. First, the federal agency must ascertain whether the proposed major action is exempt from the environmental review process. If a proposed action is not one that is normally excluded from the process, then the agency is required to prepare an environmental assessment. The purpose of the environmental assessment is to determine whether the agency should prepare an environmental impact statement. If the environmental assessment renders a finding of no significant impact, the agency is relieved from preparing an environmental impact statement. If the environmental assessment reveals that the proposed major federal action will or may have a significant environmental effect, an environmental impact statement must be prepared by the agency. If the agency is required to prepare an environmental impact statement, the agency must give a "notice of intent," and it must begin the "scoping process." The agency then prepares draft and final environmental impact statements and, where applicable, a supplemental environmental impact statement.

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50 40 C.F.R. § 1508.23 ("Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.").
51 40 C.F.R. § 1501.4(a) ("In determining whether to prepare an environmental impact statement the Federal agency shall: (a) determine under its procedures supplementing these regulations whether the proposal is one which: (1) normally requires an environmental impact statement, or (2) normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion). ").
52 40 C.F.R. § 1501.4(a)(2). "Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.
53 40 C.F.R. § 1501.4(b). "Environmental assessment means a concise public document for which a Federal agency is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).
54 40 C.F.R. § 1508.9(a).
55 40 C.F.R. § 1508.13. ("Finding of No Significant Impact' means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.").
56 See id.
57 Mandelker, supra n. 42, at § 1.3.
58 See 40 C.F.R. § 1506.6. "Notice of intent means a notice that environmental impact statement will be prepared and considered. The notice shall briefly: (a) describe the proposed action and possible alternatives" and "(b) describe the agency's proposed scoping process . . . " 40 C.F.R. § 1508.22.
59 40 C.F.R. § 1501.7(a) ("As part of the scoping process the lead agency shall: (1) invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action and other interested persons . . . (2) determine the scope (§ 1508.25) and significant issues to be analyzed in depth in environmental impact statement, (3) identify and eliminate from detailed study the issues which are not significant . . . ").
60 40 C.F.R. § 1502.9 ("Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping . . . The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action. Final [EISs] shall respond to comments. The agency at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised... ").
B. Endangered Species Act

The ESA was enacted by Congress on December 28, 1973. ESA’s goal was the “conservation, protection and propagation of endangered species of fish and wildlife by Federal action and by encouraging the establishment of State endangered species conservation programs.” Congress enacted this piece of legislation following alarming findings regarding fish and wildlife species.

ESA provides for the protection of fish, wildlife, and plants that are “endangered species” or “threatened species.” It also called for the creation and maintenance of an endangered species list. The Secretary of the Interior and the Secretary of Commerce are jointly responsible for the determination of endangered and threatened species. The Secretary of Commerce informs the Secretary of the Interior when a species should be listed as an endangered species or threatened species or if the species status should change from threatened to endangered. The Secretary of the Interior will list the species accordingly. If the Secretary of Commerce makes the determination that that a species should be removed from the list or that the species classification should be downgraded from endangered to threatened, the Secretary of Commerce recommends this action to the Secretary of the Interior. The Secretary of the Interior may not list, remove, or change the status of any species “without a prior favorable determination made pursuant to this section by the Secretary of Commerce.”

Similar to NEPA, ESA applies to all federal agencies. Federal agencies are required to comply with the requirements of the Act.

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62 Sen. Rpt. 93-307 (July 6, 1973) (reprinted at 1973 U.S.C.A.A.N. 2989). “The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate . . .” 16 U.S.C. § 1531(b).
63 16 U.S.C. § 1531(a) (“The Congress finds and declares that—(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; (2) other species of fish, wildlife, and plants have been so depleted in numbers, that they are in danger of or threatened with extinction; (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational and scientific values to the Nation and its people . . .”).
64 16 U.S.C. § 1531(b). “Endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under this provision of this Act would present an overwhelming and overriding risk to man.” 16 U.S.C. § 1532(6). “Threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).
65 16 U.S.C. § 1533(a) (“The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over utilization for commercial, sporting, scientific, or educational purposes; (3) disease and predation; (4) then inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.”).
68 Id.
It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Chapter.\(^\text{72}\)

Further,

Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat which is determined by the Secretary, after consultation with the appropriate States, to be critical, unless such agency is granted an exemption for such action...\(^\text{73}\)

If a federal agency concludes that a proposed action will likely jeopardize a species or habitat listed as endangered or threatened, it must engage in formal consultation as well as prepare a biological opinion.\(^\text{74}\) The determination that a proposed action will have an adverse effect of an endangered or threatened species is commonly made through the preparation of a biological assessment.\(^\text{75}\) Formal consultation begins when the agency in charge of the proposed action submits a written request to initiate formal consultation to the Fish and Wildlife.\(^\text{76}\) ESA requires the written request to include:

1. a description of the action to be considered;
2. a description of the specific area that may be affected by the action;
3. a description of any listed species or critical habitat that may be affected;
4. a description of the manner in which the action may affect any listed species or critical habitat and the analysis of any cumulative effects;
5. relevant reports, including any environmental impact statement, environment assessment, or biological assessment prepared;
6. any other relevant available information on the action, the affected listed, or critical habitat.\(^\text{77}\)

In preparing the biological opinion, Fish and Wildlife is required by ESA to use the “best scientific and commercial data available.”\(^\text{78}\) Regulations adopted pursuant to ESA impose several requirements regarding what the biological opinion must contain.\(^\text{79}\) These “include: (1) a summary of the information on which the opinion is based; (2) a detailed discussion of the effects of the action on listed species or critical habitat; and (3) [Fish and Wildlife’s] opinion on whether the action is likely to jeopardize the

\(^\text{72}\) 16 U.S.C. § 1531(c).
\(^\text{73}\) 16 U.S.C. § 1536(a)(2).
\(^\text{74}\) 50 C.F.R. § 402.14 (2003) (“Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section.”).
\(^\text{75}\) 50 C.F.R § 402.12(k). “Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning the listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects on such species and habitat.” 50 C.F.R. § 402.02.
\(^\text{76}\) 50 C.F.R. § 402.14.
\(^\text{77}\) Id.
\(^\text{78}\) 50 C.F.R. § 402.14(d). “The Federal agency requesting formal consultation shall provide the [Fish and Wildlife] Service with the best scientific and commercial data available or which can be obtained during the consultation...”
\(^\text{79}\) 50 C.F.R. § 402.14(h).
continued existence of a listed species or result in the destruction or adverse modification of critical habitat. 80

C. Judicial Review of Agency Action

Judicial review of federal agency decisions on proposed major federal action under both NEPA and ESA is directed by the Administrative Procedure Act. 81 The court is authorized to overrule an agency decision if the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 82 Generally the court is not allowed to substitute its judgment for that of the agencies. 83 “This holds true so long as the agencies ‘[have] considered the relevant factors and articulated a rational connection between the facts found and the choice made.” 84 The courts give great deference to the decisions of the federal agencies. 85 When analysis requires a high level of expertise, the court must defer to “the informed discretion of the responsible federal agencies.” 86 Thus, NEPA and ESA were enacted “to ensure a process, not to ensure any result.” 87

Federal agencies are required to “use the best scientific and commercial data available” in rendering their decisions. 88 “The obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the [applicable statute] not be implemented haphazardly, on the basis of speculation or surmise.” 89

The Ninth Circuit Court of Appeals had previously upheld agencies’ decisions where the agencies relied on private conservation agreements in the decision making process. In Friends of Endangered Species, Inc. v. Jantzen, the court held that Fish and Wildlife’s reliance on a conservation plan prepared by the developer, state, and local agencies did not violate the requirement to use the best scientific and commercial data available. 90 The court also held that Fish and Wildlife’s reliance on the conservation plan in their decision not to draft a full EIS was appropriate. 91 Additionally, the court stated that the federal agency responsible for approving or denying a major federal action must evaluate a conservation plan and determine whether the conservation agreement will sufficiently “minimize and mitigate” the impact of the proposed action. 92 “So long as significant measures are taken to mitigate a project’s effects, they need not completely compensate for adverse environmental effects.” 93

In Jantzen, an environmental group challenged the issuance of a permit by the Fish and Wildlife Service for the “taking of” an endangered species of butterfly and Fish and Wildlife’s decision not to prepare a full EIS as a violation of ESA. In this case, a conservation agreement was entered into by the agency and the San Bruno

80 Id.
82 Id. (“To the extent necessary to decision and when presented, the reviewing agency shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions of law found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).
83 Wash. Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990).
84 Id.
86 Id.
87 Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996).
89 Bennett v. Spear, 520 U.S. 154, 176 (1997)
90 760 F.2d 976, 985 (9th Cir. 1985).
91 Id. at 984.
92 Id.
93 Id. at 987 (internal citations and emphases omitted).
Mountain Steering Committee. As a condition to the approval of a development project, the conservation agreement provided for privately owned land to serve as an open space for the endangered butterfly species in question. San Mateo County was to supervise the conservation plan. The agreement stated that only 14 percent of the butterfly habitat would be disturbed by the development. The plan also provided funding to help preserve the habitat. Fish and Wildlife relied on this agreement in their decision not to prepare a full EIS. Subsequent to the review of the details of the agreement, the court concluded that the mitigation measures contained within the agreement and the agency’s reliance upon them were proper. The court found that Fish and Wildlife’s conclusion “that the permit and the Plan would be likely to enhance, not reduce, the chances for survival of the endangered species” to be reasonable even they did not fully compensate for the negative environmental effects and justified the agency’s decision not to prepare a full EIS.

IV. INSTANT DECISION

In the instant case, Selkirk Conservation Alliance presented the Court of Appeals with several issues for the Ninth Circuit to consider in its challenge of the Forest Service’s and the Fish and Wildlife Service’s decision to grant an easement across the Colville National Forest to a lumber company for a road-building project. Selkirk argued that the Forest Service and Fish and Wildlife Service violated various environmental laws, contending that both agencies violated ESA by relying on the Conservation Agreement to mitigate the damaging effects of the road building project on grizzly bears. Selkirk also argued that the Forest Service violated NEPA by: (1) not using an adequate geographic area in its cumulative effects analysis in the EIS; (2) not taking Stimson’s reasonably foreseeable activities into consideration in its cumulative effects analysis in the EIS; and (3) not using a reasonable time frame for the EIS analysis. Finally, Selkirk contended that Fish and Wildlife violated ESA by not taking Stimson’s reasonably foreseeable activities into consideration when preparing the agency’s 2001 biological opinion.

Selkirk argued that the agencies violated the ESA when they relied on the Conservation Agreement to mitigate the risks to grizzly bears associated with the grant of the easement. The ESA requires “that the biological opinion and the agency action be based on ‘the best scientific and commercial data available.’” Selkirk claimed that the Conservation Agreement between the Stimson Lumber Company and the agencies did not meet this requirement. The court rejected this argument stating that the court had previously held that an agency may satisfy the duties mandated by environmental laws if the agency relies on private mitigation

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94 Id. at 980.
95 Id.
96 Id.
97 Id.
98 Id. at 984.
99 Id. at 987.
100 Id.
101 Id.
102 See Selkirk Conservation Alliance, 336 F.3d at 954.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. Selkirk contended that the best available science contradicted the finding that the provisions of the Conservation Agreement would sufficiently mitigate the harm caused to the grizzly bears as a result of the road building project. Id.
agreements when conducting environmental assessments. The court also noted that the Conservation Agreement actually imposed obligations on Stimson that exceeded the state and federal obligations and that these obligations were enforceable against the parties ensuring that the proposed mitigations measures would be followed. Therefore the court concluded that it was proper for the Forest Service and Fish and Wildlife to rely on the Conservation Agreement in making their decision to grant the easement.

Regarding the agencies' reliance on the Conservation Agreement, Selkirk contended that the agencies did not fulfill their duties when the agencies concluded that the Conservation Agreement sufficiently addressed the concerns raised in a 1994 draft biological opinion that found that the proposed road building project posed risks to the grizzly bears. The court found that the agencies did not violate their responsibility to rely on the best scientific knowledge available when the agencies concluded that these effects would be properly mitigated by the Conservation Agreement. The court stated that although another decision maker may have come to a different conclusion, the agencies analyzed the relevant information reasonably and made a decision that, although debatable, was not "arbitrary and capricious."

The next issue presented on appeal to the court by Selkirk was that the Forest Service violated NEPA by unreasonably limiting the geographic scope considered in its cumulative effects analysis in the EIS. Selkirk claimed that the Forest Service's decision not to sufficiently consider the impact of a project proposed in the nearby IPNF, which bordered the LeClerc BMU was an unreasonable geographic limitation. The Forest Service, on the contrary, claimed that including the IPNF project in the EIS would have resulted in a less accurate EIS.

The court rejected Selkirk's contention, noting that while NEPA does not specifically mandate that an EIS include a discussion of cumulative impacts, it does require that agencies to "consider cumulative impacts in determining the scope of an EIS.

110 Id. at 955-56. The court referred to their decisions in Jantzen, 760 F.2d 976, and Edwardsen v. Dept. of Interior, 268 F.3d 781 (9th Cir. 2001). Id.
111 Id. at 955. While Stimson owned thousands of acres in the LeClerc BMU, only a fraction of it would be assessed by the Stimson Project. Id. The Conservation Agreement required Stimson to follow the standards of timber management for all of their lands. Id. Without this agreement, Stimson would be able to manage the lands at their discretion, as long as they met state and federal timber regulations. Id.
112 Id. at 956.
113 Id. The Forest Service and Fish and Wildlife found that the road building project posed serious potential risks including the harsh effects that roads have on the survival of grizzly bears "and the disruptions caused by harvesting timber in grizzly bear habitat." Id.
114 Id. The court found that Fish and Wildlife had established the required connection between the best available science concerning the potential threats to the grizzly bears and its decision to rely on the Conservation Agreement to adequately mitigate these threats. Id. at 957.
115 Id. The court stated that when there is a dispute over issues of fact, the court will favor the expert agency as long "as the agency's decision was based on a reasoned evaluation of relevant factors." Id. at 955.
116 Id. at 958.
117 Id.
118 Id. at 959.
119 Id. at 958 (quoting Kern v. Bureau of Land Mgt., 284 F.3d 1062, 1076 (9th Cir. 2002)).
120 Id. In this case, the cumulative effects section of the EIS began with a discussion on how to treat the IPNF project. Id. The EIS stated that there would be no additional cumulative effects attributed to the IPNF project due to the topographical make-up of the lands. Id.
court held that because the Forest Service evaluated the cumulative impacts of the IPNF project in determining the scope of the EIS, the agencies had satisfied its duty under NEPA.\textsuperscript{121}

Selkirk also raised the issue that the Forest Service violated NEPA by not considering the impact of Stimson’s future projects in its EIS as required by NEPA.\textsuperscript{122} Specifically, Selkirk contended that the EIS failed to adequately “describe, locate, or analyze” numerous other “road-building and logging projects identified by Stimson in state forest practices applications.”\textsuperscript{123} Unconvinced by this argument, the court found that the Forest Service requested and received updated Washington State forest practice applications during the agency’s drafting of the EIS.\textsuperscript{124} The court also stated that the EIS specified the locations of other Stimson activities available at the time the EIS was drafted.\textsuperscript{125} The court concluded that “[t]o the extent that consideration of specific forest practices would duplicate the thorough consideration of the operational plan set forth in the Conservation Agreement,” the Forest Service was justified in its decision not to include detailed descriptions of all forest practice applications.\textsuperscript{126} As a result of these findings, the court held that the EIS sufficiently addressed the probable environmental consequences of Stimson’s other projects.\textsuperscript{127}

Selkirk also argued that the Forest Service violated NEPA by unreasonably limiting the temporal scope used in its EIS analysis.\textsuperscript{128} Selkirk contended that the three year time frame utilized by the Forest Service in its analysis was arbitrary and capricious because the Forest Service had two other rational choices from which to choose a temporal analysis period.\textsuperscript{129} The court pointed out that NEPA does not require the Forest Service to use a particular time frame for its impact analysis.\textsuperscript{130} The Forest Service is obligated to consider the relevant factors and espouse “a rational connection between the facts found and the choice made.”\textsuperscript{131} After taking all factors into consideration, the court found that they could not say that the Forest Service’s decision to use a three year period in its analysis was arbitrary and capricious.\textsuperscript{132}

The final argument advanced by Selkirk was that the Fish and Wildlife Service violated the ESA by failing to consider the reasonably foreseeable activities of Stimson in its 2001 biological opinion.\textsuperscript{133} Selkirk argued that the Fish and Wildlife Service did not sufficiently consider the cumulative effects of the grant of the easement to Stimson because the Fish and Wildlife Service’s biological opinion: (1) did not analyze the forest practices applications submitted by Stimson and (2) by not analyzing the aforementioned application resulted in a breach of the Fish and Wildlife Service’s duty “to use the best available commercial data.”\textsuperscript{134} The court found that Fish and Wildlife was free to use any method that adequately considers cumulative impacts and that the

\textsuperscript{121} Id. at 959.
\textsuperscript{122} Id. at 961.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. The court resolved this issue in response to Selkirk’s argument that the Forest Service did not specify the locations of all the harvest projects planned by Stimson. Id.
\textsuperscript{126} Id. The court stated that as long as Stimson followed the terms of the Conservation Agreement, the Forest Service’s evaluation of the effects of the Agreement decreased the necessity to detail every pending harvest plan. Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 962.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. (quoting Wash. Crab Producers, 924 F.2d at 1441).
\textsuperscript{132} Id. at 962. These factors included the expiration in three years of the state regulations essential to analyzing Stimson’s harvesting activities, the provision by Stimson of information for a three year period, and the presence of a mandatory analysis and revision of the Conservation Agreement when new information became available. Id. at 963.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 964.
agency is not required under ESA to detail every single forest practice application. The court noted that Fish and Wildlife was under a duty to use a method "that considered the impact of future Stimson activities." The court concluded that the Conservation Agreement served as an appropriate method and that Fish and Wildlife’s decision to analyze the impact of Stimson’s proposed projects through the Conservation Agreement sufficiently considered the impact of Stimson’s future harvesting plans. Finally, the court concluded that they could not say that Fish and Wildlife failed to use best commercial information available.

As a result of the above finding, the court ultimately concluded that the Forest Service and Fish and Wildlife sufficiently followed NEPA and ESA procedures and that it was not unreasonable for the agencies to rely on the Conservation Agreement in making their biological and environmental assessments.

V. COMMENT

In the instant case, the court transitioned from sanctioning the use of a private mitigation agreement as one of various factors in making a final agency decision to legitimizing heavy reliance on private mitigation agreements. The Ninth Circuit’s holding in this case will have a significant effect on ability of NEPA and ESA to reach its purported goals. ESA’s purpose was “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” However as previously discussed, the court noted that NEPA and ESA does not require a particular substantive result, but rather exists to ensure that proper procedure is followed.

The Court of Appeals previously concluded that it was not unreasonable for the agencies to rely in part on the Conservation Agreement in conducting their biological and environmental assessments. In reaching this holding, the court will make it more difficult for individuals or groups who challenge agency decision to make a showing that said agency decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” A certain category of agency decisions that could have previously been found by the court to violate the arbitrary and capricious standard will more likely be upheld as a result of the instant case holding.

When conducting judicial review of agency decisions, the courts accord agencies a high level of deference regarding their decision making. However, the relevant statutes and the courts required that the agencies “consider the relevant factors and articulate a rational connection between the facts found and the choice made.” In the instant case, the agencies relied heavily on their private conservation agreement with

135 Id.
136 Id.
137 Id.
138 Id. at 965.
139 Id.
140 Id.
141 16 U.S.C. § 1531(b) (The purposes of NEPA was “to declare a national policy which will encourage productive and enjoyable harmony between man and his environmental; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.”).
142 Selkirk Conservation Alliance, 336 F.3d at 961.
143 Jantzen, 760 F.2d at 985.
145 Selkirk Conservation Alliance, 336 F.3d at 954.

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the lumber company. It was not until *Jantzen*, that the court first recognized the private conservation agreement as an acceptable source of information upon which the agencies could rely to make their final decision. In *Jantzen*, the Ninth Circuit held that the agency had met the requirement “to use the best scientific and commercial data available” in their reliance on the conservation agreement in concluding that the proposed action would result in no significant impact. The court also concluded that the agency acted properly when they relied on the conservation agreement in their decision not to prepare a full environmental impact statement. Specifically, the court stated that they had acknowledged that other “courts [had] permitted the effect of mitigation measures to be considered in determining whether the preparation of an [EIS was] necessary.” In essence, the *Jantzen* court concluded that a private conservation agreement could be considered in making the final agency decision.

In the instant case, the court legitimized heavy reliance by federal agencies on private mitigation agreements in their decision making. Specifically, the court concluded that if a private conservation agreement existed, the agencies reviewing the proposed action “ought consider it when evaluating the impact of the proposed action.” As a result of the court’s holding, agencies were no longer required to list, detail, or analyze the impacts of future projects. If the future projects were addressed in the process through which the conservation agreement was created, then the courts do not require that they be separately addressed. The court is not mandating that agencies rely on conservation agreements, but is saying that it is a reasonable and beneficial for the agencies to do so. The court found it convincing that the conservation agreement was a binding agreement between the agencies and the private entity. The fact that the conservation agreement was enforceable by law probably played a part in the court’s willingness to accord it with legitimacy as a major factor to be relied on in the decision making process. The main effect of the instant case’s holding is that the agencies in conjunction with the private entity wishing to act will have significantly more discretion and power to approve major actions without fearing interference of successful challenges from individuals or environmental groups. The court approved the methodology of relying on the agreement in making the agency decision and accorded the private mitigation agreement a level of deference that did not previously exist. As a result, individuals or groups challenging agency decisions in which a private mitigation agreement exists will have a more difficult time convincing the court to invalidate a decision the challenging entity believes is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”

The holding of the court has both positive and negative impact. The holding of the court according legitimacy to private conservation agreements in the making agency determinations will most likely prove to be more efficient. The agency and the private party negotiate and come to agreement on the “best” way to adequately mitigate negative environmental effects. Efficiency will be increased by the limiting of the parties whose views, input, and evaluations are required to render the final agency decision. On the other hand, the holding in the instant case takes much of the power of input and the entitlement of disclosure away from the public which is one of the main purposes of the relevant environmental statutes. The Court has found a workable middle ground where balancing the interests of the federal agencies and private parties. However, it is important that the court refrain from expanding its holding in *Selkirk* and court continue to exercise vigilance.

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146 *Id.* at 955.
147 *Id.*
148 *Id.*
149 *Id.* at 956 (quoting *Jantzen*, 760 F.2d at 987).
150 *Id.* (emphasis added).
151 *Id.* at 961.
152 *Id.*
153 *Id.* at 956.
when reviewing conservation agreements to ensure that they do in fact adequately meet the requirements of the environmental legislation enacted to protect us all.

VI. CONCLUSION

In Selkirk, the Ninth Circuit approved of the use of a private mitigation agreement as one of various factors in making a final agency decision. The court legitimized heavy reliance on private mitigation agreements by federal agencies, holding that such use adequately met NEPA and ESA requirements and was not arbitrary and capricious. While both administrative and judicial economy support a certain level of judicial deference to federal agencies decisions, the court must continue to exercise sufficient judicial review of challenged agency decision to ensure that the spirit of both NEPA and ESA are not forsaken in the name of institutional efficiency.

R. MARISSA ALBERT