SELECTED NEPA CASES IN 1999

Does the Action Trigger NEPA?

*Mayaguezanos por la Salud y el Ambiente v. United States,*198 F.3d 297 (1st Cir. 1999) decided December 20, 1999.

In an effort to prevent the first ever shipment of high-level nuclear waste through the Mono Passage, a stretch of seas between the islands of Puerto Rico and Hispaniola, a group of fishermen and environmentalist from western Puerto Rico, filed for an injunction to stop shipment until the United States filed an EIS.

Plaintiffs argued that the federal courts have jurisdiction to consider this action under NEPA and the United States's failure to regulate the passage of such nuclear waste through its Exclusive Economic Zone (EEZ) waters is a "major federal action" within the meaning of NEPA. Plaintiff argues that there is a major federal action because the United States originally supplied the uranium to Japan for nuclear power generation and is required to play some role in the transport of this waste under various international agreements and customary international law. This complex of interests and responsibilities, they contend, suffices to establish "major federal action" under NEPA. The United States rejoins that the shipment of waste is the "action," it is not being carried out by a federal agency but by private parties, and the facts do not meet the tests to determine if there is federal action where the primary action is carried out by private players.

The court relied on domestic case law and CEQ regulations (40 C.F.R. §1508.18(a)) to determine when private activities may be deemed to be major federal actions under NEPA. Before determining when private activities may be deemed to be major federal actions under NEPA, the court first stated two situations when private activities may be deemed **not** to be major federal actions under NEPA: (1) federal government inaction, where that failure to act is not otherwise subject to review by the courts or administrative agencies under the Administrative Procedure Act or other laws. See 40 C.F.R. § 1508.18. (2) mere approval by the federal government of action by a private party where that approval is not required for the private party to go forward.

In its review of case law, the court found that the focus of inquiry should be on the "indicia of control over the private actors by the federal agency." 198 F.3d at 302. The court followed the same reasoning as did the Fourth Circuit and looked "to whether federal approval is the prerequisite to the action taken by the private actors and whether the federal agency possesses some form of authority over the outcome. n10 198 F.3d at 302-3.

> n10 The district court reasoned that because the United States had no power or discretion to regulate shipments of nuclear waste due to the right of innocent passage, it followed that there was no major federal action. A possible, but not necessary, inference from this reasoning is that if the United States had discretion to act, that would suffice to constitute a major federal action. We reject any such reasoning and doubt that this was what the district court intended.
>
> We also note that the CEQ definition of major federal action refers to activities that are "potentially subject to Federal control" and that a similar, but also not necessary, inference could be drawn from this.

> We also reject this inference. We understand the phrase to refer to situations in which the government inaction is subject to review under the APA or other laws, as set forth in 40 C.F.R. §1508.18.

Using this test the court found that "the United States has chosen not to regulate shipments of nuclear waste through its EEZ -- there is no requirement that it do so, nor is it immediately evident that it would have that authority if it so chose. Under these circumstances, there is no major federal action."(footnotes omitted) 198 F.3d at 305.

Southwest Williamson County Community Association, Inc., v. Slater (Southwest II), 173 F.3d 1033 (6th Cir. 1999) decided April 28, 1999.

In an effort to stop the construction of Route 840-South in Tennessee, plaintiffs sought injunctive and declaratory relief from defendant, state and federal agencies' (FHWA) failure to comply with NEPA in the construction of the highway. Plaintiffs argue that the highway corridor at issue is a "major federal action" despite the fact that so far only state funding has been involved. The plaintiffs suspect that the state intends to seek federal funding or reimbursement for the highway project at some later date, and the through its delay, the state agency is attempting willfully to evade federal law. They claimed they can prove that the highway is in fact a major federal action and that the FHWA therefore must take action.

Since the district court was "well situated to resolve this matter" the court remanded for a "determination as to whether the project is a 'major federal action' requiring FHWA to issue a FONSI or an EIS in response to the third EA." n1. 173 F.3d at 1037. Before remanded the case, the court noted that "the fact that a project has been designed in order to preserve the options of federal funding in the future is not enough, standing alone, to make it a federal project," it also cautioned that the "absence of federal funding is not necessarily dispositive in determining whether a highway project is imbued with a federal character." Quoting *Historic Preservation Guild of Bay View v. Burnley*, 896 F.2d 985, 990 (6th Cir. 1989).

> n1 Should the state do as the Association fears and apply for federal funds later, the state will gain the funds only if it obtains approval under 23 C.F.R. § 1.9(b), which allows the Federal Highway Administrator to approve "Federal-aid funds in a previously incurred cost" if a number of conditions obtain, including: "(1) That his approval will not adversely affect the public, (2) That the State highway department has acted in good faith, and that there has been no willful violation of Federal requirements," among others.

Southwest Williamson County Community Association, Inc., v. Slater (Southwest IV), 243 F.3d 270; (6th Cir. 2001) decided March 14, 2001.

Following remand *(Southwest II)* the district dismissed the plaintiff's action deciding plaintiff could not show a substantial likelihood of success on the merits of its claim for a preliminary injunction halting construction of the highway. The Sixth Circuit affirmed concluding that there are two alternative bases for finding that a non-federal project constituted a major Federal action: (1) when the non-federal project restricted or limited the statutorily prescribed federal decision-makers' choice of reasonable alternatives; or (2) when the federal decision-makers had authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project. The court stated that if either test was

satisfied, the non-federal project must be considered a major federal action. Based on the court's analyses under its alternative tests, it concluded that the district court did not abuse its discretion dismissing the suit.

Categorical Exclusions

Alaska Center For Environment (ACE) v. U.S. Forest Service, 189 F.3d 851 (9th Cir. 1999) decided September 7, 1999.

United States Forest Service issued a one-year special use permit authorizing helicopter-guided skiing and hiking tours in several areas of the Chugach National Forest in Alaska. The Forest Service classified the permit activity as falling within its categorical exclusion for minor short-term special uses of National Forest lands and therefore, did not conduct an EA or EIS. Under Forest Service policy, one-year special use permits are not subject to NEPA and can be renewed for up to one additional year. ACE challenged the issuance of the original one-year permit, arguing that NEPA required the Forest Service to conduct an EA or an EIS before issuing the Powder Guides permit because it was not properly within the categorical exclusion.

Forest Service, consistent with CEQ regulations, issued a series of categorical exclusions. Exclusion 8 provided that "approval, modification, and continuation or minor, short-term (one-year or less) special uses of National Forest System lands" are excluded from NEPA review. One of the examples of such short-term uses was the "approving, on an annual basis, the intermittent use and occupancy by State-licensed outfitter or guide." 189 F.3d at 857. ACE argued that the categorical exclusion, by its own terms, did not apply because helicopter (motorized) permits were beyond the intended scope of the exclusion. The Court applied the standard of deference the agencies is entitled as articulated in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 510-12 (1994)(when reviewing an agency's application of its own regulation, the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation) and held that "the agency's interpretation of its categorical exclusion to include short-term helicopter permits is not inconsistent or contrary to the language of the regulation. n5

> n5 ACE also contends that the Forest Service is avoiding NEPA review by breaking proposed actions down into one-year temporary actions so as to fit within the categorical exclusion and not complete an EA. The question of whether an action is temporary and fits within the categorical exclusion is a factual determination that implicates substantial agency expertise and is reviewed under the arbitrary and capricious standard. *Greenpeace*, 14 F.3d at 1324. The Forest Service's categorization of one-year helicopter permits as temporary is not unreasonable or does not rise to the level of arbitrary and capricious." 189 F. 3d at 858.

Even if a proposed action technically falls within a categorical exclusion, ACE argued that the exclusion should not apply because under CEQ regulations this is a major federal action having a significant effect on the environment. Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment. Under CEQ guidelines, any regulation adopting a categorical exclusion must "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. §1508.7; *Jones v. Gordon*, 792 F.2d 821,

827 (9th Cir. 1986). In determining whether an action will "significantly" effect the environment, the CEQ regulations provide certain factors that should be considered. The factors include, among others: (1) the degree to which the proposed action affects public health or safety, (2) the degree to which the effects will be highly controversial, (3) whether the action establishes a precedent for further action with significant effects, and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. 40 C.F.R. § 1508.27(b).

The Court employed a deferential standard of review, which it must when reviewing factual conclusions within the agency's expertise, and concluded that the Forest Service considered the relevant factors and determined that no extraordinary circumstances were present. Accordingly, the Forest Service did not violate NEPA.

Supplemental Environmental Impact Statement (SEIS) and Incomplete or Unavailable Information

South Trenton Residents Against 29 v. Federal Highway Administration, 176 F.3d 658 (3rd Cir. 1999) decided May 5, 1999.

Residents of South Trenton, New Jersey, who live near, use and enjoy the last remaining portion of the Delaware River waterfront in South Trenton, and various environmental groups sought declaratory relief and a permanent injunction against the Route 29 Riverfront Spur project claiming the project violated NEPA because the project proponents failed to conduct a SEIS.

The Third Circuit applied the U. S. Supreme Court's three part test to guide the review of an agency's decision that a SEIS is unnecessary: (1) whether any major federal action remains to occur; (2) whether any substantial changes have occurred or new information has come to light; and (3) whether these changes were significant enough to require preparation of a SEIS despite the defendant agency's conclusion to the contrary. See *Marsh*, 490 U.S. at 374. The court held that the plaintiff's failed to present any evidence establishing at least a possibility that the preferred design presents the problem they allege, and therefore concluded that New Jersey's failure to conduct an SEIS was not unreasonable.

Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) decided August 9, 1999.

In 1996, the Forest Service approved Vail's site-specific, detailed proposal to expand its existing ski area into roughly half of a 4,100 acre area south of the developed back bowls of Vail Mountain known as Category III. The Forest Service exercised jurisdiction over this matter because the existing ski area and the Category III area are within the White River National Forest. In approving the proposed expansion, the Forest Service concluded the expansion: (1) is consistent with the applicable Forest Plan; (2) will 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, and by adding needed intermediate terrain; (3) will build skier visitation during non-peak periods, thus making more efficient use of existing infrastructure; and (4) as modified and restricted, will not threaten the viability of lynx, will have minor socioeconomic effects, and will have an acceptable level of impact on other resources. Plaintiff's disagree with the last contention. They argue that the Forest Service violated the National Forest Management Act (NFMA) and NEPA because they failed to compile hard lynx population data and otherwise properly analyze the effects of expansion on the lynx population within the area. The Forest

Service contented that it is permissible to substitute a habitat analysis for population data where, as here, (1) population data or estimates are unavailable, and (2) even if such data existed it would not improve the overall analysis because the project will not result in species loss.

When agencies are evaluating reasonably foreseeable significant adverse effects and there is incomplete or unavailable information, Council on Environmental Quality regulations require agencies to include complete information in an environmental impact statement "if the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant." 40 C.F.R. §1502.22(a). The Tenth Circuit declined to read the CEQ regulation to mean that agencies must collect data where no such data exists or to require agencies to include a separate, formal disclosure statement in the EIS to the effect that lynx population data is incomplete or unavailable. The court further noted that the Forest Service did collect and utilized the best available data to analyze the impact on lynx habitat.

Plaintiffs' also contented that the Forest Service should have completed a SEIS analyzing the impact of potential development on land adjacent to the area of expansion. Agencies are required to prepare SEIS, before or after issuing a record of decision, if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii); *Marsh*, 490 U.S. at 372. This requirement is not interpreted to require a SEIS "every time new information comes to light." *Marsh*, 490 U.S. at 373. A SEIS comes into play only "if the new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered." (quotation marks and citation omitted). Because the relative significance of new information is a factual issue, the court reviewed the Forest Service's decision regarding the need for a SEIS under the "arbitrary and capricious" standard. Consequently, they upheld the Forest Service's decision to forego a SEIS because the record demonstrated the Forest Service reviewed the proffered supplemental information, evaluated the significance - or lack of significance - of the new information, and provided an explanation for its decision not to supplement the existing analysis. 185 F.3d at 1178-79.

What Constitutes A "Hard Look"?

Hughes River Watershed Conservancy v. Johnson, 165 F. 3d 283 (4th Cir. 1999) *(HRWC II)* decided January 13, 1999.

U.S. Army Corps of Engineers (CoE) drafted a plan to construct a multipurpose dam on the North Fork of the Hughes River, thereby creating a 305-acre lake in the North Fork area of northwestern West Virginia. The CoE in compliance with NEPA and after conducting a series of public meetings drafted an environmental impact statement (EIS) with respect to the Project. After circulating the draft EIS for public comment, the Sierra Club, the Department of the Interior, and the EPA informed the CoE that they considered the draft EIS deficient. In June 1994, the CoE released a final environmental impact statement (FEIS) that contained responses to the comments received on the draft EIS. One month later, the CoE issued a record of decision approving the Project. Plaintiff's sued and lost on summary judgement at the district court but had the projected stayed pending appeal. In HRWC I, the Fourth Circuit held that the CoE had: (1) violated

NEPA by failing to take a sufficient "hard look" at the problem of zebra mussel infestation resulting from the Project before deciding not to prepare a SEIS; and (2) violated NEPA because the EIS's use of an inflated estimate of the Project's economic benefits from recreational use of the Project impaired fair consideration of the Project's adverse environmental effects. Accordingly, the court vacated and remanded. Specifically, the court instructed the CoE to take a "hard look" at the problem of zebra mussel infestation and to determine, based on that "hard look," whether to prepare a SEIS addressing zebra mussel infestation. Additionally, the court remanded the case for the CoE to reevaluate the EIS's estimate of recreational benefits based upon net benefits rather than gross benefits. Further, they stated, "pending the [Agencies'] reevaluation of the Project in compliance with NEPA, further construction of the Project is stayed." See Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) (HRWC I). The CoE went back and conducted additional studies and analysis and concluded the following: (1) that zebra mussels are not expected to present a problem to the Project area because the pH and calcium levels in the proposed lake are not expected to be even marginally suitable for the growth of zebra mussels; and (2) that after a more detailed consideration of the Project, including an evaluation of all additional recreational benefits, the change in activity mix, and the consideration of non-use values, the estimated net recreational benefits resulting from the Project amount to $ 2,577,189 (1996 price base), which supports an overall positive benefit-cost ratio for the Project and, therefore, supports the Project's economic feasibility. This analysis was included in a Final SEIS and a ROD was issued in March 1998 recommending project approval. Plaintiff's continue to content that the CoE failed to follow the court's instruction to take a "hard look" at the issue in a SEIS.

In conducting a "hard look," the court indicated that agencies are not precluded from reaching contrary positions from those reached in certain studies regarding the project so long as on the whole record it is clear that the agency did not act in an arbitrary an capricious manner. As to the issue of methodology used for economic benefit analysis, the court indicated that agencies are entitled to select their own methodology as long as that methodology is reasonable and a reviewing court must give deference to the agency's decision. "See *Baltimore Gas & Electric v. Natural Res. Defense Council*, 462 U.S. 87, 100-01 (1983); *Webb v. Gorsuch*, 699 F.2d 157, 160 (4th Cir. 1983) (holding that where there is conflicting expert opinion, the agency and not the court is to resolve the conflict); see also *Sierra Club v. Froehlke*, 816 F.2d 205, 214 (5th Cir. 1987)(holding that an academic disagreement among experts is not enough to condemn an otherwise adequate EIS). Further, the mere fact that certain factors in a cost-benefit analysis are generally imprecise or non-quantifiable does not render the result inadequate. See *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974)." 165 F. 3d at 289-90.

The court affirmed the district court finding that the CoE had taken a "hard look."

Standing

Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115 (8th Cir.1999) decided January 7, 1999

The Boundary Waters Canoe Area (BWCA) Wilderness comprises more than a million acres of land and waterways in the Superior National Forest and was among the initial wilderness areas designated for

protection under the Wilderness Act of 1964. The Act generally prohibited the use of motorboats and motor vehicles within the designated wilderness, except as required for administration of the area. However the Act included a proviso which permitted the continuance within the BWCA of any already established use of motorboats.

In 1978, Congress provided additional guidance by enacting the Boundary Waters Canoe Area Wilderness Act (the BWCA Wilderness Act), Pub. L. No. 95-495, 92 Stat. 1649 (1978). In doing so, it eliminated the prior motorboat legislation and in its place legislated a ban on the use of motorboats in the BWCA Wilderness except on particular named lakes, portions of lakes, and rivers. See 92 Stat. at 1650, §4(c). Congress directed the Secretary to develop and implement entry point quotas to govern and restrict the use of motorboats on those particular lakes listed in section 4(c) where it had legislatively authorized their restricted use. 92 Stat. at 1651, §4(f). The only specific guidance given to the Secretary concerning these quotas was a statutory cap on motorboat use, which prescribes that motorboat use "shall not exceed the average actual annual motorboat use" during the years 1976 through 1978. 164 F.3d at 1120.

The Department of Agriculture and the Forest Service manage the BWCA Wilderness in accordance with a 1986 Land and Resource Management Plan for the Superior National Forest, amended by the BWCA Wilderness Management Plan and Implementation Schedule of 1993 (the Wilderness Plan), which is the challenged agency action in this suit. The Record of Decision accompanying the Wilderness Plan indicates that the Forest Service established these motorboat quotas after considering the pertinent legislation, Forest Service policy, the needs of the environment, the historic uses of the area, and the recreational needs of the visitors. Plaintiffs in this combined action are on both sides of the issue, Commercial Outfitters argue the quotas are too limiting and Environmentalist argue the quotas are too liberal.

Standing: Constitutional standing is not challenged in this case. The relevant prudential principle at play is the zone-of-interests test, which considers "'whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" 164 F.3d at 1125. The Outfitters claimed that they had standing because the Final EIS failed to consider adequately the economic impact on local economies and the Final EIS was based on flawed data or an incomplete analysis of alternative plans. These concerns were explicitly referenced in the provisions of NEPA, which the Forest Service applied in this case, and its implementing regulations. In several contexts, the Final EIS discussed the economic setting and the economic implications of the available alternatives. Thus, the court concluded that the Outfitters' claims were all arguably within the zone of interests protected by NEPA, and the Outfitters had prudential standing to assert their NEPA claims.

Outcome: The court was convinced that the Final EIS "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences," and concluded that the Final EIS adequately considered the environmental, recreational, social, and economic impacts of the Wilderness Plan, and that the Forest Service's use of methodologies, studies, and data was not arbitrary or capricious.

Purpose & Need/Reasonable Alternative

City of Alexandria v. Slater, 198 F.3d 862 (D.C.Cir., 1999) *cert. denied*, 531 U.S. 820, decided Dec. 17, 1999.

This action resulting from a proposed action to expand the Woodrow Wilson Memorial Bridge. The Bridge is a microcosm of the Washington, D.C. metropolitan area's traffic congestion problems. Built in 1961, the six-lane structure carries the Capital Beltway over the Potomac River, connecting the City of Alexandria, Virginia, to Prince George's County, Maryland.

The FHWA decided on a proposed action from among eight different options presented in the FEIS (all of the "build" options were for 12 lanes). A coalition of Alexandria organizations sued arguing the decision violated NEPA since the FHWA failed to consider a 10 lane alternative. The district court ruled in favor of the Alexandria Coalition. *See City of Alexandria v. Slater*, 46 F. Supp. 2d 35 (D.D.C. 1999). The court concluded that the FHWA had violated NEPA by not affording detailed consideration to a ten-lane river crossing as a "reasonable alternative" in the Final EIS, and that the Final EIS' treatment of the temporary environmental impact of the construction phase of the project was too cursory to satisfy NEPA. 198 F.3d at 865.

In reversing the district court, the D.C. Circuit Court resolved the difficult issue of properly determining what is a "reasonable alternative" by evaluating an agency's choice in light of the objectives of the federal action. Thus "the goals of an action delimit the universe of the action's reasonable alternatives." 198 F.3d at 867. Therefore the agency's choice of alternatives are to be evaluated in light of its stated objectives and an alternative is properly excluded from consideration in an EIS only if it would be reasonable for the agency to conclude that the alternative does not "bring about the ends of the federal action." 198 F.3d at 867. Here, the FHWA had data clearly indicating that the objective of the proposed project was to ease congestion on the bridge and that any alternative less than 12 lanes would not meet the goal.

Cumulative Impacts / Alternatives

Muckleshoot Indian Tribe v. United States Forest Service,177 F.3d 197 (1st Cir., 1999) decided October 1, 1999.

Plaintiffs challenged the USFS decision to exchange certain lands to Weyerhaeuser. The district court granted summary in favor of the USFS. The Ninth Circuit reversed judgement holding that the USFS violated NHPA and NEPA.

Huckleberry Mountain, the land subject to the dispute in this case, is located in the Green River watershed in the Mt. Baker-Snoqualmie National Forest in the state of Washington. The USFS sought to exchange these old-growth forest wilderness lands to Weyerhaeuser "for lands that were, for the most part, heavily logged and roaded." Weyerhaeuser intended to log the lands it received in the exchange. 177 F.3d at 804. The Indian ancestors to the present Muckleshoot Tribe included people from villages on the Green and White Rivers that form part of the drainage for Huckleberry Mountain. The Tribe alleged that for thousands of years, the ancestors of present tribal members used Huckleberry Mountain for cultural, religious, and resource purposes - uses that continue to the present day. The Forest Service lands exchanged to Weyerhaeuser were part of the Tribe's ancestral grounds.

The Tribe's claims under NHPA can be divided into three categories. The Tribe first contended that the USFS failed to consult adequately with it regarding the identification of traditional cultural

properties. The Tribe also contended that the USFS inadequately mitigated the harmful impact of the exchange on sites of cultural significance. Finally, the Tribe argued that the USFS violated NHPA by failing to nominate certain sites to the National Register. After reviewing the ROD, the court concluded that the USFS had not satisfied NHPA's mitigation requirements. The USFS had mapped and photographed significant features of the Huckleberry Divide Trail (a historic aboriginal transportation route which is eligible for listing on the National Register of historic places), but the court found that this mitigation did not properly preserve the trail's significant historic features.

Next the court considered the plaintiffs NEPA challenges. The Tribe contended that the identification and analysis of cumulative environmental impacts in the USFS's EIS did not meet the requirements of NEPA. They also contended that the EIS inadequately defined the purpose and need for the Huckleberry Land Exchange as required by NEPA, and did not identify or evaluate sufficient alternatives for the exchange.

The USFS urged that because the final EIS for the Huckleberry Exchange is tiered to their Forest Land Management Plan, it sufficiently analyzes the cumulative impacts of the Exchange. The court countered that the CEQ regulation on tiering (40 C.F.R. §1508.28) has always been interpreted to allow tiering only to another EIS not to a Forest Plan. Additionally, the court pointed out that the analysis the USFS did provide was a "very general and one-sided analysis of the cumulative impact information" that "merely provide very broad and general statements devoid of specific, reasoned conclusions." 177 F.3d at 811.

On the issue of alternatives the court disagreed with the plaintiff's contention that the purpose and need for the proposal was too narrow, but did agree that the USFS failed to consider an adequate range of alternatives. The court found that the EIS considered only a no action alternative along with two virtually identical exchange alternatives and failed to consider an alternative that would have placed deed restrictions on the land. The court stated: "Although NEPA does not require the Forest Service to "consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives," Seattle Audubon Society v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996), we are troubled that in this case, the Forest Service failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration. In this case, the applicable regulation controlling implementation of the Federal Land Policy Management Act, 43 U.S.C. § 1701 et seq., pursuant to which the Exchange was transacted, dictates that the agency officer authorized to conduct a land exchange "shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate." 36 C.F.R. 254.3(h). A detailed consideration of a trade involving deed restrictions or other modifications to the acreage involved is in the public interest and should have been considered." 177 F.3d at 813-14.