An Agricultural Law Research Article

Ancient Forests, Spotted Owls, and Modern Public Land Law

by

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Originally published in BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW
18 B.C. ENVTL. AFF. L. REV. 605 (1991)

ANCIENT FORESTS, SPOTTED OWLS, AND MODERN PUBLIC LAND LAW

*Michael C. Blumm**

There is a battle raging in the Pacific Northwest today. It is a battle that is not being fought with F-111s or Patriot missiles, but with concepts such as biodiversity, indicator species, and cumulative impacts. The Northwest's battlefields are court rooms and congressional offices. Although the stakes are not as high as those in the Persian Gulf, at issue is the very economic and environmental fabric of the Pacific Northwest.

The Northwest old-growth forests, recently rechristened by environmentalists as "ancient forests," have been a mainstay of the Northwest economy at least since the end of World War II. They also form essential habitat for a number of wildlife species and serve a variety of other important ecological functions.[1] Their apparently imminent liquidation has prompted civil disobedience, court suits, and a good deal of activity in the halls of the United States Congress.

This Paper briefly discusses the biology of the ancient forest resource, explains the role of the spotted owl in forest ecology,[2] sketches the legal framework in which the ancient forest legal battle is being fought,[3] and focuses on three recent cases that highlight the

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[1] *See generally* E. NORSE, ANCIENT FORESTS OF THE PACIFIC NORTHWEST (1990); Feeny, *The Pacific Northwest's Ancient Forests: Ecosystems Under Siege*, in AUDUBON WILDLIFE REP. 93 (1989–1990); *Symposium on Old Growth Forests in North America*, 6 NORTHWEST ENVTL. J. 217 (1990).

[2] *See infra* notes 19–29 and accompanying text.

[3] *See infra* notes 29–45 and accompanying text.

legal campaign to save the ancient forests.[4] These "famous cases" have changed the nature of the ancient forest battle and point the way toward the future. I conclude with a brief analysis of what the ancient forest campaign says about the nature of modern United States public land law.[5]

I. The Ancient Forests of the Pacific Slope

At the time of European colonization, North America was heavily forested, essentially a wilderness. The essence of what it meant to be a frontiersman in both Canada and the United States was to conquer that wilderness. Cutting trees was the means to produce wealth and security, a necessary aspect of homesteading and farming. The result was a successive cutting over of New England and New Brunswick, of the American South and Quebec, of the Middle West and Ontario.[6] Now, in the latter part of the twentieth century, we witness the cutting of the remnants of that wilderness on the Pacific slope, which houses the last great conifer forest on earth.

The Pacific forest stretches from the Alaska Panhandle to San Francisco Bay, possessing the largest, oldest trees in the world, some of which are three hundred feet in height and an incredible fifty feet in circumference.[7] Best known for its economically valuable douglas firs, the Pacific slope is actually comprised of eight or ten different forest communities where other species, like sitka spruce, western hemlock, and true firs, dominate.[8] The old-growth Pacific forests are home to a greater mass of life than the most productive tropical forest,[9] the protection of which (like Mid-East oil) has become a worldwide concern. It would not be a rash prediction to suggest that the protection of the remaining ancient forests of the Pacific soon will receive equivalent attention because the Pacific forest is crucial to both regional and global climate, causing up to one-third of the region's precipitation and storing more carbon dioxide than any terrestrial ecosystem.[10] The Pacific forest also supplies a breeding ground for some of the most productive salmon fisheries

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[4] *See infra* notes 62–110 and accompanying text.
[5] *See infra* notes 111–25 and accompanying text.
[6] *See* Caufield, *The Ancient Forest*, New Yorker, May 14, 1990, at 46.
[7] *See id.*; E. Norse, *supra* note 1, at 21–24.
[8] *See* E. Norse, *supra* note 1, at 20–24; Feeny, *supra* note 1, at 97–100.
[9] *See* Caufield, *supra* note 6, at 48.
[10] *See* E. Norse, *supra* note 1, at 137–47; Caufield, *supra* note 6, at 46.

in the world[11] and is home to at least six species protected under the Endangered Species Act,[12] one of which—the northern spotted owl[13]—is the focus of attention here because it requires much more extensive habitat than the others.

Unfortunately, most of the original Pacific forest, which once consisted of 70,000 square miles, now has been logged. Less than forty percent of the forest remains in Canada; only about ten percent in the United States.[14] Almost all of the remaining Pacific forest is on public lands, and nearly all of the logging on public lands has occurred since World War II. Under current harvest schedules, the United States forest not currently preserved will be liquidated within twenty to fifty years, depending upon whom you believe.[15] In Canada, the remaining seven million acres of old-growth are being cut at 125, 000 acres a year. At that rate, the Canadian old-growth forest will be gone within thirty years.[16]

I'm not an expert on public lands timber policy in British Columbia, but it appears that the overriding goal there is timber production.[17] Not only do timber companies harvest trees; they are also responsible for managing the forests on a long-term basis.[18] The apparent social contract recognizes timber harvesting as the dominant purpose of the Canadian Pacific forest because of the economic benefits the harvest provides. The United States operated under a

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[11] *See* Feeny, *supra* note 1, at 108. On the importance of salmon to the Pacific Northwest, see Blumm, *Why Study Pacific Salmon Law?*, 22 IDAHO L. REV. 629, 629–30 (1986).

[12] *See* Feeny. *supra* note 1, at 103–04 (listing—in addition to the northern spotted owl—the peregrine falcon, the brown pelican, the Aleutian Canadian goose, the northern bald eagle, and the Oregon silverspot butterfly); *see also* List of Endangered and Threatened Wildlife, 50 C.F.R. § 17.11(h) (1989); Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (to be codified at 50 C.F.R. § 17.11(h)).

[13] INTERAGENCY SCIENTIFIC COMMITTEE TO ADDRESS THE CONSERVATION OF THE NORTHERN SPOTTED OWL, A CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL 9 (1990) [hereinafter THOMAS COMMITTEE REPORT].

> The northern spotted owl [*strix occidentalis caurina*] is widely distributed in forested regions of western Oregon and Washington, and in northwestern California, primarily in mature and old-growth conifer forests. . . . The spotted owl is a medium-sized owl with dark eyes, dark brown coloring with whitish spots on the head and neck, and white mottling on the abdomen and breast. Mostly nocturnal, it forages in forests, consuming small mammals such as flying squirrels, mice, and woodrats. During the day, it roosts in trees, frequently close to the nest site.

Id.

[14] *See* Caufield, *supra* note 6, at 46; *see also infra* note 123.

[15] *See* Caufield, *supra* note 6, at 46.

[16] *Id.* at 65.

[17] *See, e.g.*, Klimka, Carter & Feder, *Cutting Old-Growth Forests in British Columbia: Ecological Considerations for Forest Regeneration*, 6 NORTHWEST ENVTL. J. 221 (1990).

[18] Caufield, *supra* note 6, at 58.

similar system until recently. However, the environmental community has successfully challenged the assumptions underlying that system by employing techniques of modern environmental law, in what has become known as the ancient forest campaign.

II. The Biology of Ancient Forests

Before I explain the law of the ancient forest campaign, permit me to attempt a non-expert overview of the biology of ancient forests and their most notorious indigenous species, the northern spotted owl. The spotted owl requires old-growth ecosystems, especially dead standing trees, for nesting and rearing.[19] Old-growth, however, is important not just for spotted owls. It is essential for preservation of the forest ecosystem itself, as old trees supply an important water source habitat for more than two hundred vertebrate species and sites for tree reproduction.[20]

The importance of old trees for the growth of the forest is a recent biological revelation. Until the 1970s, foresters viewed the old-growth forests as devoid of wildlife, the functional equivalent of biological deserts. Even environmentalists focused their concerns on the aesthetic and wilderness recreational values of old-growth, not its wildlife values.[21]

But recent biological studies confirm that old-growth trees are infected by mycorrhizzal fungi.[22] These fungi infect the roots of douglas firs. In fact, young trees without this infection do not seem to survive more than a few years. The fungi are spread from old trees to other parts of the forest by small mammals, such as mice and squirrels, who dig up and eat the fungi and spread it to other parts of the forest through their droppings.[23] Spotted owls feed on these small mammals that eat mycorrhizzal fungi.[24]

Biologists now believe that the decline of spotted owls in old-growth forests might mean that not enough fungi exist to support the mammals on which the owls feed.[25] If that is correct, the forest

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[19] *See* E. Norse, *supra* note 1, at 76–83.
[20] *See id.* at 67–75; Feeny, *supra* note 1, at 103–07.
[21] *See* Feeny, *supra* note 1, at 94.
[22] *See id.* at 102–03; Caufield, *supra* note 6, at 50–52.
[23] Caufield, *supra* note 6, at 52.
[24] *Id.*
[25] *Id.*

itself is in trouble because fungi are essential to prolong a tree's useful life and support tree reproduction. Some biologists do believe that artificial innoculation of mycorrhizzal fungi is possible, but that remains an untested biological theory.[26]

As a result of these revelations, the spotted owl has become an indicator, a barometer of the health of the forest as a whole. The ailing owl may be the signal of an ailing forest, a problem that could produce wide-ranging effects.[27] As long ago as 1973, an interagency committee recommended considering spotted owls for protection under the Endangered Species Act.[28]

III. THE LEGAL FRAMEWORK OF THE ANCIENT FOREST CAMPAIGN

This brings us to the legal framework for protecting ancient forests in the United States. There are three major statutory components to this framework: the National Forest Management Act of 1976 (NFMA),[29] the National Environmental Policy Act of 1969 (NEPA),[30] and the Endangered Species Act of 1973.[31]

A. The National Forest Management Act

Management of the United States national forest has, since 1960, been governed by principles of multiple use, in juxtaposition to the forests of British Columbia, which are managed under dominant use principles. In 1976, Congress rewrote national forest management

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[26] *See* Feeny, *supra* note 1, at 103.

[27] Meyers, *Old-Growth Forests, The Owl, and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act and Other Public Lands and Resources Laws*, 18 B.C. ENVTL. AFF. L. REV. 623, 631–38 (1991).

[28] *See* Sher & Stahl, *Spotted Owls, Ancient Forests, Courts and Congress: An Overview of Citizens' Efforts to Protect Old-Growth Forests and the Species That Live in Them*, 6 NORTHWEST ENVTL. J. 361, 363 (1990).

[29] 16 U.S.C. §§ 1600–1687 (1988).

[30] 42 U.S.C. §§ 4321–4370a (1988).

[31] 16 U.S.C. §§ 1531–1544 (1988). In addition to the statutes mentioned in the text, the plaintiffs have raised Migratory Bird Treaty Act claims, alleging unlawful "takings" of spotted owls and their nests. *See* 16 U.S.C.A. § 703 (West Supp. 1990). However, to date the only court to reach the issue concluded that because the Migratory Bird Treaty Act's prohibition against "takings" does not forbid "harming" the birds, the statute imposes no significant restraint against habitat modification or degradation. Seattle Audubon Soc'y v. Robertson, Civ. No. 89-160 (W.D. Wash. Mar. 7, 1991) (construing 50 C.F.R. § 10.12).

policy by passing the National Forest Management Act,[32] which requires each national forest to have a management plan.[33] There are thirteen national forests on the Pacific slope with spotted owl habitat.[34] These forests have been undergoing a planning process for the past fifteen years.[35] Many of those plans are still under appeal. When completed, all national forest plans must ensure "diversity" of plant and animal communities and maintain viable populations of existing and desired species.[36]

B. The National Environmental Policy Act

A second statutory requirement is compliance with NEPA[37] because national forest management planning is a federal activity. This requirement of compliance with a federal plan can be distinguished from Canadian forest practices. Nearly all the ancient forests of the Pacific Northwest are located on public lands, but most of the Canadian lands are provincial lands while nearly all of the United States old-growth forests are on federal lands.[38]

The application of NEPA to NFMA planning requires an evaluation of the environmental impacts of alternative planning scenarios and, importantly, the use of up-to-date environmental information, a point the Supreme Court confirmed just a year ago.[39] In fact, the Court indicated that new ecological information can require the preparation of a supplemental environmental impact statement (EIS) if that new information is of environmental significance.[40] The upshot is that the simple fact that the NFMA planning process began a decade and a half ago, when biologists thought old-growth was biologically insignificant, does not mean that the new plans can ignore new biological information. This reality has proved to be a continuous

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[32] 16 U.S.C. §§ 1600–1687 (1988); *see generally* C. WILKINSON & M. ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS (1987); *Symposium on the National Forest Management Act*, 17 ENVTL. L. 362 (1987).

[33] 16 U.S.C. § 1604 (1988).

[34] *See* THOMAS COMMITTEE REPORT, *supra* note 13, at 60–62; Durbin, *Forest Maps Give Basis for Debate*, Oregonian, Feb. 26, 1991, at B4, col. 2.

[35] *See generally* Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985).

[36] 16 U.S.C. § 1604(g)(3)(B) (1988).

[37] 42 U.S.C. §§ 4321–4370a (1988); *see generally Symposium on NEPA at Twenty*, 20 ENVTL. L. 447 (1990) [hereinafter *NEPA at Twenty*].

[38] *See* Caufield, *supra* note 6, at 46, 58.

[39] *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 384–85 (1989).

[40] *Id.* at 385. The Court eventually held, however, that the new information at issue in that case was of "exaggerated importance." *Id.*

problem for the Forest Service, as ecologists learn more about the values and functions of old-growth forests.

C. The Endangered Species Act

The third statutory basis for protecting old-growth forests is the Endangered Species Act,[41] a law of last resort, invoked when all else fails. Once listed, on the basis of best available biological information, species protected under the Endangered Species Act enjoy three principal protections. First, federal agencies must use their authority to conserve listed species.[42] Second, federal agencies must ensure that none of their actions are likely to jeopardize the continued existence of listed species or modify their critical habitat.[43] And third, all federal and state agencies, as well as private individuals, must refrain from harming or killing listed species.[44] The consultation procedure established by the Endangered Species Act seeks to ensure that no federal activity jeopardizes the continued existence of listed species.[45] This consultation procedure gives effective veto authority over federal activities to federal fish and wildlife agencies, a delegation of authority unprecedented in American environmental law.

IV. THE FOREST SERVICE'S ATTEMPT AT SPOTTED OWL PROTECTION

The ancient forest campaign of the late 1980s is a response to a perceived inadequacy of Forest Service efforts to protect spotted owl habitat. The first attempt to protect owl habitat began nearly twenty years ago, when an interagency committee recommended that timber harvesting be restricted around three hundred acres of known spotted owl habitat.[46] The federal land management agencies refused this recommendation until 1977, when it was adopted as interim protection until national forest management plans were implemented.[47] The rationale for the three-hundred-acre protection was

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[41] 16 U.S.C. §§ 1531–1544 (1988); *see generally* D. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATIONS (1989).

[42] 16 U.S.C. § 1536(a)(1).

[43] *Id.* § 1536(a)(2).

[44] *Id.* § 1538(a)(1)(A)–(F).

[45] *Id.* § 1536(b)(3)(A) (authorizing federal fish and wildlife agencies to specify alternative courses of action that would comply with the Endangered Species Act (ESA)).

[46] On the history of efforts to protect the spotted owl, see THOMAS COMMITTEE REPORT, *supra* note 13, at 51–57.

[47] *See* Sher & Stahl, *supra* note 28, at 363.

limited to two pages and contained virtually no biological justification. As a result, environmentalists appealed administratively, and the Forest Service promised to prepare a region-wide spotted owl guide that would specify protection for the thirteen relevant national forests.[48]

Seven years later, in 1984, the Forest Service finally produced an environmental impact statement (EIS) incorporating the 1977 recommendations of three-hundred-acre islands of protection. Because there appeared to be no biological justification for limiting protection to three hundred acres, environmentalists again appealed, asking for a revised EIS. This appeal was successful on an administrative level, and the Forest Service prepared a new supplemental draft EIS in 1986. The draft's preferred alternative specified 550 spotted owl habitat protection areas of around 2200 acres each, but in timber areas only 1000 acres were guaranteed not to be harvested after fifteen years.[49]

The draft EIS also revealed that the preferred course of action could assure spotted owl survival for only fifteen years. After fifteen years, the owl's fate was anyone's guess. And after 150 years, extinction was likely.[50] The draft completely overlooked a recent National Audubon Society study that indicated that the survival of the spotted owl species required 1500 mating pairs and between 2500 and 4500 acres per pair, as well as corridors between the pairs to ensure against biological isolation.[51] The Forest Service's draft EIS induced some 42,000 comments, including comments by both the Washington Departments of Game and Natural Resources, which complained that the proposal did not satisfy NFMA.[52]

Two years later, in 1988, the Forest Service produced a final EIS that made two important changes to the draft. First, it increased spotted owl habitat protection areas in the state of Washington up to 3000 acres. Second, the Forest Service promised to review the situation again within five years. Some commentators alleged that

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[48] *See id.* at 363–65. I leave aside the controversy on Bureau of Land Management lands in southern Oregon only for the purpose of convenience. *See id.* at 368–71 (discussing Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir. 1989), and Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989)). *See generally* Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739 (1987).

[49] *See* Feeny, *supra* note 1, at 129.

[50] *See id.* at 128.

[51] *See* THOMAS COMMITTEE REPORT, *supra* note 13, at 55.

[52] Feeny, *supra* note 1, at 129.

this latter promise allowed the Forest Service to escape the implications of its own long-term biological projections of its "island" approach.[53]

The final EIS on the spotted owl hardly settled the controversy, however. In fact, matters intensified when environmentalists were able to obtain injunctions blocking timber sales for failure to consider new biological information regarding spotted owl habitat needs.[54] As a result of the continuing controversy, the Forest Service induced several federal agencies to agree to form an interagency committee (the Thomas Committee) to develop "a scientifically credible conservation strategy for the northern spotted owl."[55]

The Thomas Committee's report, issued in May of 1990, recommended abandoning the "island" approach, which aimed to protect only one to three pairs of owls, in favor of larger blocks of protected old-growth, termed "habitat conservation areas."[56] These areas were designed where possible to protect a minimum of twenty owl pairs, and the maximum distance between each area was limited to twelve miles to facilitate migration between colonies.[57] Known owl activity sites were to be given at least eighty acres of protection.[58] And to facilitate migration, the committee recommended timber harvest restrictions between habitat conservation areas.[59]

The environmental community generally embraced the Thomas Committee's report while timber interests opposed it. The Fish and Wildlife Service has employed the report, in carrying out its consultation duties under the Endangered Species Act,[60] but whether it will influence the content of a recovery plan remains highly uncertain.[61]

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[53] *Id.* at 130–31.

[54] These cases did not involve the Forest Service, but rather Bureau of Land Management lands. *See supra* note 48.

[55] THOMAS COMMITTEE REPORT, *supra* note 13, at 57. The federal agencies included the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management, in addition to the Forest Service. *Id.*

[56] *Id.* at 23–25.

[57] *Id.* at 28–29.

[58] *Id.* at 29. Up to seven of these areas could be designated per township. *Id.*

[59] *Id.* These restrictions required that 50% of the lands outside the habitat protection areas be left with trees averaging 11 inches in diameter and with a 40% canopy closure. *Id.* This "50-11-40 rule" has been resisted by the Bureau of Land Management. *See* PUB. LANDS NEWS, Nov. 22, 1990, at 1.

[60] *See infra* note 81 and accompanying text.

[61] *See* Sonner, *Expert Named to Owl Panel Fears Bias Toward Logging*, Oregonian, Feb. 7, 1991, at C1, col. 2.

V. THE ANCIENT FOREST CAMPAIGN

This finally leads us to the first "famous case" I want to discuss, *Seattle Audubon Society v. Robertson*,[62] challenging the Forest Service's EIS on the spotted owl for violating both NEPA and NFMA. In March 1989, the District Court for the Western District of Washington issued a preliminary injunction that blocked 135 timber sales on twenty-nine square miles of spotted owl habitat.[63] The court reasoned that habitat that took two hundred years to create couldn't be replaced. Consequently, the balance of equities weighed on the plaintiffs' side, given their relatively strong NFMA and NEPA claims.[64] Shortly after the district court imposed the injunction, Congress enacted the Department of the Interior and Related Agencies Appropriations Act of 1989,[65] popularly known as the Timber Compromise Act, which, like similar laws enacted since the mid-1980s,[66] attempted to remove court jurisdiction from certain aspects of the ancient forest controversy.[67]

The 1989 law set a specified volume of timber sales that was higher than the Forest Service recommended.[68] Congress also increased the size of spotted owl habitat areas, where logging is forbidden, and required the Forest Service to identify ecologically significant stands of old-growth.[69] This was the first time a United States law gave recognition to old-growth as such.[70] The statute also directed the Forest Service to avoid fragmentation of old-growth in its timber sales[71] and established a process involving citizen advisory groups in scheduling timber sales.[72] Most importantly, however, the law attempted to remove the court injunction imposed by the district court in the *Seattle Audubon* case by declaring that the new statutory protection given spotted owl habitat areas was "adequate consideration" for the purpose of meeting the NFMA and NEPA challenges before the district court.[73] However, the statute did not purport to amend either NEPA or NFMA.

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[62] 914 F.2d 1311 (9th Cir. 1990).

[63] *Id.* at 1313.

[64] Seattle Audubon Soc'y v. Robertson, No. C89-160 (W.D. Wash. Mar. 24, 1989).

[65] Pub. L. No. 101-121, 103 Stat. 701 (1989); *see* Sher & Stahl, *supra* note 28, at 375–82.

[66] *See* Comment, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 ENVTL. L 329, 331 (1990).

[67] Pub. L. No. 101-121, § 318, 103 Stat. 701, 745–50 (1989).

[68] Sher & Stahl, *supra* note 28, at 376–77.

[69] *See* THOMAS COMMITTEE REPORT, *supra* note 13, at 57.

[70] Sher & Stahl, *supra* note 28, at 375.

[71] *Id.* at 377–78.

[72] *Id.* at 375.

[73] Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989).

The plaintiffs in the *Seattle Audubon* case claimed that the district court's injunction should not be dissolved because the statute that Congress passed was unconstitutional.[74] They argued that the statute commanded the courts to reach a particular result in a pending case, a power under the Constitution that Congress did not possess.[75] The district court did not agree, and dissolved the injunction, allowing timber sales to proceed.[76] But on September 18, 1990, an appeals court reversed the lower court, agreeing with the plaintiffs that Congress lacked the power to tell courts how to decide a pending case without changing the underlying statutory law.[77] In other words, Congress could have constitutionally repealed or amended NEPA or the NFMA so as to make them inapplicable to the timber sales at issue, but it could not tell courts how to decide a pending case without changing the law underlying the litigation.[78] To do so would be an impermissible invasion upon courts' constitutional authority to decide cases before them.[79] The upshot of this case is that timber sales still must satisfy requirements imposed by NEPA and NFMA, such as using up-to-date information and considering alternatives to proposed action.[80] District courts in both Oregon and Washington currently are considering whether Forest Service sales have satisfied these standards.[81]

The decision's long-run implications are that the Northwest's congressional delegation is likely to find it more difficult to use the congressional appropriation process to effectively exempt Northwest timber sales from federal environmental laws.[82] Such exemptions

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[74] Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1313 (9th Cir. 1990).

[75] *See id.*

[76] *Id.* at 1313–14.

[77] *Id.* at 1315.

[78] *Id.*

[79] *Id.*

[80] *See id.* at 1316.

[81] Portland Audubon Soc'y v. Lujan, Civ. No. 87-1160-FR (D. Or. Oct. 30, 1990); Seattle Audubon Soc'y v. Robertson, No. C89-160 (W.D. Wash. Mar. 24, 1989). On December 18, 1990, the *Seattle Audubon Society* court enjoined 12 timber sales because the Forest Service failed to comply with NFMA's requirement of ensuring the viability of all native vertebrate species. 16 U.S.C. § 1604(g) (1988); 30 C.F.R. § 219.19 (1989). On March 7, 1991, the same court granted the plaintiff's motion for summary judgment and declared the Forest Service could not log spotted owl habitat, even though the Service promised to act "in a manner not inconsistent with the Thomas Committee recommendations." *See supra* notes 56–59 and accompanying text. The court ruled that even if compliance with the Thomas Committee's recommendations satisfied the Endangered Species Act, NFMA's "viability" requirement imposed a separate, distinct obligation. Seattle Audubon Soc'y v. Robertson, Civ. No. 89-160 (W.D. Wash. Mar. 7, 1991). Further, the court held that any spotted owl protection plan promulgated to satisfy NFMA had to comply with "procedures required by law," including preparation of an EIS. *Id.*

[82] Senator Mark Hatfield and Congressman Les Au Coin, both of Oregon, have effectively

now must be made in a much more straightforward fashion, and many in Congress are not prepared to countenance special exemptions from NEPA and NFMA to maintain timber sale levels that arguably threaten the viability of the spotted owl and its habitat, the ancient forests.[83]

The result of subjecting timber sales to legal procedures and varied directives of NFMA to, for example, preserve "diversity" animal species is highly uncertain.[84] More certain results can be achieved by a statute with more substantive content, namely, the Endangered Species Act.[85] In 1987, the ancient forest campaign sought to have the spotted owl designated as a threatened species under the Endangered Species Act.[86] However, the United States Fish and Wildlife Service denied their petition in late 1987,[87] despite the fact that the Service could cite no scientific evidence indicating that the owl was not in trouble.[88] In fact, the Fish and Wildlife Service's own expert on population viability recommended listing,[89] and one Fish and Wildlife official admitted that the economic impact of a listing weighed heavily on the Service[90]—even though the Endangered Species Act commands the Service to act only on biological grounds.[91]

As a result, some twenty-five environmental organizations filed suit in the second "famous case" in this ancient forest campaign. In late 1988, in *Northern Spotted Owl v. Hodel*,[92] the court ruled that the Fish and Wildlife Service had acted arbitrarily in denying the environmental groups' petition because the decision lacked any expert analysis supporting its conclusion.[93] In fact, all expert opinion

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controlled the level of timber harvest on public lands in the Pacific Northwest through provisions in annual appropriations statutes. *See generally* Sher & Stahl, *supra* note 28, at 367–68; Comment, *supra* note 66. On dynamics of congressional deference to regional interests through the "power cluster" concept, see Balmer, *United States Federal Policy on Old-Growth Forests in Its Institutional Setting*, 6 NORTHWEST ENVTL. J. 331, 345–46 (1990).

[83] *See* PUB. LANDS NEWS, Nov. 8, 1990, at 1.

[84] 16 U.S.C. § 1604(g)(3)(B) (1988).

[85] 16 U.S.C. §§ 1531–1544 (1988).

[86] *See* Finding on Northern Spotted Owl, 52 Fed. Reg. 48,552 (1987).

[87] *Id.*

[88] *See* U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: SPOTTED OWL PETITION BESET BY PROBLEMS 8–12 (1989) [hereinafter GAO REPORT] (concluding that Fish and Wildlife Service management substantively changed the scientific evidence in a peer-reviewed study team's report to avoid a listing for non-biological reasons).

[89] Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 481 (W.D. Wash. 1988).

[90] *See* GAO REPORT, *supra* note 88, at 11.

[91] 16 U.S.C. § 1533(b)(1)(A); *see* D. ROHLF, *supra* note 41, at 44.

[92] 716 F. Supp. 479 (W.D. Wash. 1988).

[93] *Id.* at 482.

was entirely to the contrary.[94] The district court ordered a reconsideration of the decision,[95] and, in June of 1989, the Service reversed itself and issued a proposed rule designating the owl as a threatened species in Oregon, Washington, and northern California.[96] That status became effective in July of 1990.[97] The result of the listing is that the Forest Service now must consult with the Fish and Wildlife Service prior to selling timber to ensure that no sales jeopardize the continued existence of the owl.[98]

Thus far, in this consultation process, the Wildlife Service has produced a number of "biological opinions" that have allowed timber sales to proceed after concluding that there would be no jeopardy to the owl's continued existence.[99] The Service reached this conclusion even though many of the sales will destroy old-growth habitat suitable for owl nests, although not currently used as owl habitat.[100] The basic problem is that there exists a good deal of biological uncertainty as to whether a particular timber sale of old-growth will be necessary for the owl's survival in the future. Particularly controversial are sales that segment suitable owl habitat into islands.[101] With so much uncertainty, the predictions of the Fish and Wildlife Service are likely to be given considerable deference if challenged in court as arbitrary. In an effort to reduce some of this uncertainty, environmentalists recently secured a court order directing the Fish and Wildlife Service to define the owl's critical habitat.[102] Once defined, no federal action could affect this habitat adversely.[103]

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[94] *Id.*

[95] *Id.* at 483.

[96] Proposed Threatened Status for the Northern Spotted Owl, 54 Fed. Reg. 26,666 (1989).

[97] Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (to be codified at 50 C.F.R. § 17).

[98] *See* 16 U.S.C. § 1536(a)(2) (1988).

[99] *See, e.g.*, Letter from Regional Director, United States Fish and Wildlife Service, to John F. Butruille, Regional Forester, United States Forest Service (July 23, 1990) (providing biological opinion that timber sales awarded prior to the § 318 Timber Sale Program would not reduce appreciably the likelihood of survival for the northern spotted owl).

[100] *See id.*

[101] *See* THOMAS COMMITTEE REPORT, *supra* note 13, at 303–14.

[102] Northern Spotted Owl v. Lujan, No. C88-573Z (W.D. Wash. Feb. 26, 1991) (LEXIS, Genfed library, Dist file). "[D]esignation of critical habitat is a central component of the legal scheme developed by Congress to prevent the permanent loss of species." Only under limited circumstances not demonstrated here may the Service properly defer its habitat designation responsibilities. *Id.* at 19; *see* Meyers, *supra* note 27, at 666. On critical habitat designations, see Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990); Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990).

[103] 16 U.S.C. §§ 1532(5), 1536(a)(2) (1988). *See* 50 C.F.R. § 17.3 (1990); D. ROHLF, *supra* note 41, at 62–64.

The last case in the trilogy of "famous cases" I want to discuss concerns the biological corridor issue. This September, in a case brought by the Marble Mountain Audubon Society, the Court of Appeals for the Ninth Circuit enjoined a timber sale in northern California located between wilderness areas.[104] The court ruled that the Forest Service violated NEPA by not considering how the logging would affect animals that use the sale area as a corridor to travel between the two wilderness areas.[105] The decision did not permanently stop the Forest Service from selling the timber, but it does require explicit consideration of the effects of the sale on migratory wildlife populations before it can proceed.[106] It seems clear that this case gives environmentalists a new weapon in the ancient forest campaign and serves as a reminder of the continuing importance of NEPA to environmental plaintiffs.[107]

These three "famous cases" discussed above all represent significant victories for the ancient forest campaign. *Seattle Audubon Society* limits the ability of Congress to exempt timber sales from federal environmental laws.[108] *Northern Spotted Owl* effectively forced the Fish and Wildlife Service to give the spotted owl Endangered Species Act protection.[109] And *Marble Mountain Audubon Society* requires the Forest Service to consider the importance of maintaining biological corridors of importance to migratory species of wildlife.[110]

VI. Modern Public Land Law and Some Institutional Lessons

I conclude with some brief remarks about four institutional lessons that might be learned from the ancient forest campaign. First is the role of citizen environmental groups. The genesis of the ancient forest campaign is almost entirely due to citizen suits brought by these environmentalists. Their success in procuring court injunctions induced Congress to take action that supplied increasing statutory protection for ancient forests. This process of court injunction in-

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[104] Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182–83 (9th Cir. 1990).

[105] *Id.* at 182.

[106] *See id.*

[107] *See NEPA at Twenty*, *supra* note 37; Blumm & Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 Harv. Envtl. L. Rev. 277 (1990).

[108] *See supra* text accompanying notes 62–83.

[109] *See supra* text accompanying notes 92–98.

[110] *See supra* text accompanying notes 104–07.

ducing statutory responses is a familiar one to students of modern environmental law.[111]

What is perhaps peculiar about the ancient forest situation is that the subsequent statutory response has been one that the Northwest's congressional delegation could not control because the court injunctions effectively transformed spotted owl preservation and ancient forest protection from regional issues into national issues. In fact, the chief congressional sponsor of ancient forest legislation in the United States House of Representatives is from Indiana.[112] That is perhaps as it should be because these are quintessential public land issues in which all members of the United States public have a stake. Nevertheless, that widely dispersed, generally uninterested public would likely never have known about these issues without the willingness of environmental groups to challenge Forest Service decisionmaking in court.

The second institutional lesson to be learned from the ancient forest campaign has to do with the role of the courts themselves. Some judges worry that suits such as those discussed above essentially ask the court to become forest masters, displacing the Forest Service.[113] That, however, is not a fair characterization of what is going on. The courts are not enjoining timber sales because they believe as a policy matter that old-growth forests ought to be preserved. They are not demanding endangered species protection for the northern spotted owl because they like owls. They are, instead, simply ensuring that the law of the land means what it says, and that citizens have a right to enforce national environmental laws.[114] That is the courts' role, at least until Congress changes the laws.

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[111] *See, e.g.*, Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839–839h (1988) (enacted in response to Natural Resources Defense Council v. Hodel, 435 F. Supp. 590 (D. Or. 1977), *aff'd sub nom.* Natural Resources Defense Council v. Munro, 626 F.2d 134 (9th Cir. 1980)); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified at 16 U.S.C. §§ 1531–1544 (1988)) (enacted in response to TVA v. Hill, 437 U.S. 153 (1978)); Trans-Alaska Oil Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651–1655 (1988) (enacted in response to Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973)).

[112] Congressman Jim Jontz's latest bill is the Ancient Forest Act of 1991, H.R. 842, 102d Cong., 1st Sess. (1991).

[113] *See* Burns, *All They've Got to Say Is Three Little Words: "No Judicial Review,"* WILD OR., Fall 1988, at 26–28 (discussing Oregon Natural Resources Council v. United States, 659 F. Supp. 1441 (D. Or. 1987), *rev'd*, 834 F.2d 842 (9th Cir. 1988)); *see also* Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045, 1063 (D. Nev. 1985) ("I . . . resist the invitation to become western Nevada's rangemaster").

[114] Sher, *Ancient Forests, Spotted Owls, and the Demise of Federal Environmental Law*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,469, 10,470 (1990).

The *Seattle Audubon Society* case is a reminder that the role of Congress is to make the law, not to decide cases.[115] If Congress doesn't like the results its laws produce in the Pacific forest, it can change the laws to achieve other results. But it must change those laws, not tell courts how to decide the particular controversies before them.

The third institutional lesson coming from the ancient forest campaign has to do with the role of the United States Forest Service, the agency entrusted with protecting a substantial portion of the Pacific ancient forests. The ancient forest campaign reveals a Forest Service suffering from a decline of professionalism, a Forest Service that has been captured by the companies to which it sells timber and by local communities economically dependent on timber sales.[116] Frequently, environmentalists have been able to use the Forest Service's own data against it in court[117]—a product of the fact that the agency seems to have placed its own ecologists in the closet and under the control of political appointees more sensitive to the economic costs of forest protection than to the environmental costs of timber harvesting.

This "capture" of the Forest Service is a reflection of the old political atmosphere in which timber harvest decisions were made, an atmosphere quite sensitive to the economic effects those harvests had on local community economies and tax bases.[118] So long as local concerns remained an accurate reflection of the public's interest in national forest management, the Forest Service was able to ignore its ecologists and maintain high levels of harvests at the expense of non-economic resources like the spotted owl. However, the era in which the public's interest in forest management is a mirror reflection of local economic concerns is clearly over.[119] The stakes are now much broader. The people from Indiana who are members of the National Audubon Society are now vitally interested in the spotted

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[115] Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990). "Congress exists to write and change our laws. . . . But Congress cannot 'prescribe a rule for a decision of a cause in a certain way' . . . ." *Id.* (quoting United States v. Klein, 80 U.S. 128, 146 (1871)).

[116] *See* Wilkinson, *The Forest Service: A Call for a Return to First Principles*, 5 PUB. LAND L. REV. 1, 24–29 (1984).

[117] *See, e.g.*, National Wildlife Fed'n v. United States Forest Serv., 592 F. Supp. 931, 939–40 (D. Or. 1984), *appeal dismissed*, 801 F.2d 360 (9th Cir. 1986).

[118] *See* C. WILKINSON & M. ANDERSON, *supra* note 32, at 76–77; Schallau & Alston, *The Commitment to Community Stability: A Policy or Shibboleth*, 17 ENVTL. L. 429, 430–34 (1987).

[119] *See, e.g.*, G. COGGINS, PUBLIC NATURAL RESOURCES LAW 1-16, 6-5 to 6-7 (1990).

owl and its habitat. That may, coincidentally, enable the Forest Service to liberate its ecologists from the closet and reclaim some of its lost professionalism.

Finally, I want to address the role of Congress. Despite the result in the *Seattle Audubon Society* case, limiting the ability of Congress to tell courts how to decide cases,[120] Congress remains the ultimate decider of the fate of the Pacific slope's national forests. That much is clear from the United States Constitution, which entrusts management of the public lands unequivocally to Congress.[121] So the ultimate question about who has the authority to manage the forests is settled.[122]

But the question of who ought to manage the forests is not settled. Here, there are some questions about institutional competency. It seems clear that Congress cannot successfully manage the remaining four million acres of old-growth public forests on a tract-by-tract basis.[123] Congress simply does not have the institutional capability to take into account the myriad biological variations involved in public land management. It can, however, make broad decisions about how much of the remaining Pacific forest should be preserved and how much of it should be logged. It seems clear that in the next few years, it will do so. There are currently a number of bills in Congress that would resolve the ancient forests controversy in some fashion.[124] These bills are almost certain to be the subject of widespread controversy and lengthy public debate.

Frankly, I do not expect a quick congressional resolution of the matter. But that is perhaps as it should be if we acknowledge that public land management is a reflection of the wants, needs, and dreams of the democracy, and that democratic decisions take time if they are to be the product of intelligent debate and discussion. We don't know the fate of the ancient forests campaign,[125] but my bet is

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[120] Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990).

[121] U.S. CONST. art. IV, § 3, cl. 2.

[122] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). "The power over the public lands thus entrusted to Congress is without limitations." *Id.* (quoting United States v. San Francisco, 310 U.S. 10, 29 (1940)).

[123] *See* Durbin, *supra* note 34, at B4, col. 2. Less than 25% of what remains is protected from logging, of that, only 10% at low elevations. Even if the Thomas Committee's recommendations, THOMAS COMMITTEE REPORT, *supra* notes 55–61 and accompanying text, were to become the recovery plan for the spotted owl, half of the old-growth stands would remain available for logging. Durbin, *Mapping Shows Old Growth Unprotected*, Oregonian, Feb. 21, 1991, at B4, col. 1.

[124] *See, e.g.*, H.R. 842, 102d Cong., 1st Sess. (1991); H.R. 836, 102d Cong., 1st Sess. (1991).

[125] A potentially disquieting signal concerns the composition of the recovery team that will be responsible for developing a recovery plan for the spotted owl under § 4 of the Endangered

that the campaign has succeeded in ensuring that the results will be a consequence of an open debate in which both the national significance of the environmental and economic value of the Pacific slope forests are considered. I admit to some anxiety about the effect of ongoing logging in the interim while the fate of the ancient forests is decided. But if the Endangered Species Act consultation process can protect the ancient forests pending congressional action—a result of which I am not entirely confident—the debate will produce better public land management and improved prospects for preservation of the ancient forests and dependent wildlife like the spotted owl.

Species Act. 16 U.S.C. § 1533(f) (1988). In an unprecedented move, Interior Secretary Lujan took charge of appointing the team, instead of leaving that responsibility to the Fish and Wildlife Service. On February 5, 1991, Secretary Lujan appointed a 16-person team, only two of whom were not governmental employees and not one of whom was a member of the Thomas Committee, *supra* note 13. As a result, the vice-president of the Wilderness Society charged that the appointments encouraged the team to elevate politics over biology. *See* Ulrich, *Lujan Picks Team to Create Owl Plan*, Oregonian, Feb. 6, 1991, at C3, col. 5. Under § 4(f), recovery plans are to be based solely on biological considerations. H.R. CONF. REP. No. 928, 100th Cong., 2d Sess. 21 (1988). On recovery plans, *see generally* D. ROHLF, *supra* note 41, at 87–92.