Changing the Management of Public Land Forests: The Role of the Spotted Owl Injunctions

by

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CHANGING THE MANAGEMENT OF PUBLIC LAND FORESTS: THE ROLE OF THE SPOTTED OWL INJUNCTIONS

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I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)[1] is one of the oldest and most often-used weapons in the arsenal of environmental litigants.[2] Yet environmentalists hold differing views regarding the effectiveness of this twenty-three year old law. Some claim NEPA's impact has been limited by the Supreme Court's restricted view of the statute;[3] others argue that NEPA has forced public involvement and eliminated those projects with the greatest environmental impact and the least political support.[4] At the very least, NEPA has established court-enforced procedures for assessing the environmental impacts of major federal actions.[5] But injunctive relief spurred by NEPA may have a far-reaching effect on the executive branch's management of federal forest lands as well, by forcing the Clinton Administration to go beyond the piecemeal approach toward public land management favored for generations to an ecosystem approach that examines the impact of individual agency actions in a broader context.

Two recent decisions from the Ninth Circuit Court of Appeals confirm that courts will take federal agencies to task for violations of NEPA's procedural requirements. In *Portland Audubon Society v. Babbitt*[6] and *Seattle Audubon Society v. Espy*[7] the Ninth Circuit held that the Forest Service and the Bureau of Land Management (BLM) violated NEPA's requirement to evaluate all new, reliable, and significant information to determine the need

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1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70d (1988 & Supp. IV 1992).

2. *See Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990).

3. *See* Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 539-40 (1990); Antonio Rossman, *NEPA: Not So Well at Twenty*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,174 (1990).

4. *See* SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 251 (1984).

5. *See* David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 567 (1990).

6. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

7. Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

for a Supplemental Environmental Impact Statement (SEIS) when the two agencies refused to update their studies on the environmental impact of federal timber sales.[8] Because the two land management agencies failed to evaluate newly acquired information to determine if the human environment would be significantly affected to an extent not already considered, the court enjoined federal timber sales until the agencies complied with NEPA.[9]

This Chapter examines the impact of *Portland Audubon Society* and *Seattle Audubon Society* on the controversy surrounding the management of Pacific Northwest old growth forests. Section II provides a brief overview of the relevant ecological and statutory background. Section III summarizes the lengthy judicial history of *Portland Audubon Society* and *Seattle Audubon Society*, and Section IV examines the basis for the Ninth Circuit rulings. Section V concludes that *Portland Audubon Society* and *Seattle Audubon Society* confirm the courts' willingness to require federal agencies to consider new, scientifically reliable information before deciding if a SEIS is necessary. Section VI concludes that the NEPA injunctions have forced the Clinton Administration to reconsider public forest management on the basis of best available scientific information and that the result in terms of timber management will be far-reaching and dramatic.

II. THE OLD GROWTH CONTROVERSY

A long and complicated legal history precedes the present controversy surrounding federal management of old growth forests and spotted owl habitat on federal lands.[10] Understanding the issues confronted by the Ninth Circuit requires understanding the term "old growth" and some background on the federal environmental statutes that inextricably weave through every old growth legal battle.

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8. *Id.* at 704-05; Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708-09 (9th Cir. 1993).

9. Seattle Audubon Soc'y v. Espy, 998 F.2d at 704-05; Portland Audubon Soc'y v. Babbitt, 998 F.2d at 709-10.

10. *See generally* Victor M. Sher, *Travels With Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993).

A. Ecology of an Old Growth Forest

"Old growth" is a late successional forest comprised of mature conifers that are at least 200 years old and undergrowth consisting of fallen logs and "snags" (standing dead trees) capable of supporting certain plants and vertebrate species.[11] Old growth forests contain some conifers that are at least 500 years old and have a life span of up to 1200 years.[12] Once considered "biological deserts,"[13] old growth forests are now known to provide habitat for over two hundred vertebrate species including the northern spotted owl.[14] They also generate rich soil and provide protection from erosion and flooding.[15]

The roots of old growth conifers are infected by mycorrhizzal fungi,[16] which spread from one tree to another through the droppings of small mammals that depend on the fungi for food.[17] Many vertebrate species within the old growth habitat, including northern spotted owls, prey on these small mammals, and therefore indirectly depend upon mycorrhizzal fungi and old growth conifers.[18] The fungi are also essential in helping the conifers reproduce and reach old age.[19]

Sixty to ninety percent of the Pacific Northwest old growth forest has been logged at least once.[20] Only ten percent of the

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11. *See generally* Jeb Boyt, Comment, *Struggling to Protect Ecosystems and Biodiversity Under NEPA and NFMA: The Ancient Forests of the Pacific Northwest and the Northern Spotted Owl*, 10 PACE ENVTL. L. REV. 1009 (1993).

12. *See* ANCIENT FORESTS OF THE PACIFIC NORTHWEST 21 (Elliot A. Norse ed., 1990).

13. Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605, 608 (1991).

14. David S. Wilcove, *Of Owls and Ancient Forests, in* ANCIENT FORESTS OF THE PACIFIC NORTHWEST 76-83 (Elliot A. Norse ed., 1990).

15. *See* U.S. FISH AND WILDLIFE SERVICE, CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL 66-70 (1992) (describing functions and benefits of old growth forests).

16. Andy Feeny, *The Pacific Northwest's Ancient Forests: Ecosystems Under Siege, in* AUDUBON WILDLIFE REP. 102-03 (1989-1990).

17. Catherine Caufield, *The Ancient Forest*, NEW YORKER, May 14, 1990, at 52.

18. *Id.* at 46.

19. Blumm, *supra* note 13, at 609.

20. Alyson C. Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261, 281 (1993). *See also*

United States' forests now contain old growth conifers. Nearly all of this remaining old growth is found on public lands.[21] The vast majority of old growth forests suitable for spotted owl habitat are located on Forest Service and BLM lands, which are managed by the federal government for "multiple-use" purposes, including timber harvesting.[22] As a result, old growth not otherwise set aside for protection will disappear in twenty to fifty years.[23]

The continuing discoveries of the value of old growth[24] and the rapid disappearance of the forests prompted organizations such as Portland Audubon Society and Seattle Audubon Society to fight further destruction of old growth habitat. These groups challenged the land management practices of the Forest Service and BLM by asserting that the agencies violated several federal laws.

B. Statutory Background

The Forest Service and BLM must comply with federal environmental laws before selling timber from public lands. Applicable federal statutes include the National Environmental Policy Act of 1969,[25] the National Forest Management Act,[26] the Endangered Species Act of 1973,[27] and the Oregon and California

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Kathie Durbin & Paul Koberstein, *Forests in Distress, in Special Report, Northwest Forests: Day of Reckoning*, THE OREGONIAN, Sept. 16, 1990 at A26 (estimating that 12-15% of old growth in western Oregon and Washington remains, and contrasting Forest Service data reporting that four million acres of old growth remain on Forest Service land west of the Cascades with Wilderness Society data concluding that only 2.8 million acres remain).

21. Blumm, *supra* note 13, at 607.

22. INTERAGENCY SCIENTIFIC COMMITTEE, A CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL 14 (1990) [hereinafter THOMAS COMMITTEE REPORT].

23. Caufield, *supra* note 17, at 46.

24. For example, the National Cancer Institute reported that the bark of the Pacific Yew, also found within old growth habitat, is the principal source of the chemical taxol, which has proven effective in treating ovarian cancer. Gary D. 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, 624 (1991).

25. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70d (1988 & Supp. IV 1992).

26. Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-14 (1988 & Supp. V 1993).

27. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1988 & Supp. V

Lands Act.[28] Plaintiffs alleged in *Portland Audubon Society*[29] and *Seattle Audubon Society*[30] that the Forest Service and BLM violated both the National Environmental Policy Act and the National Forest Management Act. The following is a brief summary of the relevant federal statutory provisions at issue.

1. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)[31] requires federal agencies to prepare Environmental Impact Statements (EIS) for all proposed federal actions that will significantly affect the human environment.[32] An EIS must list alternatives to the proposed federal action,[33] disclose the potential environmental effects of the action and each alternative,[34] and provide an opportunity for public comments on the proposal.[35] After an agency prepares an EIS, if new information relevant to the project's environmental impact comes to light, the agency must examine and evaluate that new information.[36] If the agency determines that the new information reveals that the federal "action will affect the quality of the human environment in a significant manner or to a significant extent not already considered," the agency must prepare a Supplemental Environmental Impact Statement (SEIS).[37] Although this obligation is not specifically addressed in the statute, the NEPA regulations promulgated by the Council on Environmental Quality require supplementation of an EIS.[38]

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28. Oregon & California Lands Act, 43 U.S.C. §§ 1181a-j (1988 & Supp. IV 1992).

29. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

30. Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

31. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70d (1988 & Supp. IV 1992).

32. *Id.* § 4332(2)(c); 40 C.F.R. § 1502.3 (1993).

33. 42 U.S.C. § 4332(2)(C)(iii) (1988).

34. *Id.* § 4332(2)(C)(i), (ii).

35. 40 C.F.R. § 1503.1(a)(4) (1993).

36. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989).

37. *Id.* (citation omitted).

38. 40 C.F.R. § 1502.9(c)(1)(ii) (1993). *See also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370-71 (1989).

NEPA does not impose substantive requirements for environmental protection, but is merely procedural, requiring federal agencies to consider and publicize the significant environmental effects of major federal actions.[39] However, NEPA's procedural requirements do promote rational decisionmaking by forcing government agencies to develop and consider complete information on the environmental consequences of their actions.[40]

In *Portland Audubon Society* and *Seattle Audubon Society*, plaintiffs alleged that the BLM and the Forest Service violated NEPA by failing to consider new information concerning the habitat needs of the spotted owl before determining that SEISs were unnecessary.[41] Plaintiffs claimed that the agencies failed to follow NEPA's procedural directive that new information must be examined before a federal agency decides whether or not to supplement an EIS.[42]

2. National Forest Management Act

The National Forest Management Act (NFMA)[43] requires the Forest Service to prepare a land resource management plan (LRMP) for each national forest. The LRMP must, among other things, insure the diversity of plant and animal communities and maintain "viable populations" of existing and desired species "where appropriate" and "to the degree practicable."[44] NFMA also requires LRMPs to provide for "outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish."[45] This

39. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978).

40. Flournoy, *supra* note 20, at 281. *See also* 42 U.S.C. § 4332(2)(A) (1988).

41. Plaintiff's Complaint for Declaratory and Injunctive Relief at 14-15, Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992); Plaintiff's Complaint for Declaratory and Injunctive Relief at 15, Portland Audubon Soc'y v. Hodel, 712 F. Supp. 1456 (D. Or. 1988).

42. Plaintiff's Complaint for Declaratory and Injunctive Relief at 14-15, Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992); Plaintiff's Complaint for Declaratory and Injunctive Relief at 15, Portland Audubon Soc'y v. Hodel, 712 F. Supp. 1456 (D. Or. 1988).

43. National Forest Management Act, 16 U.S.C. §§ 1600-14 (1988 & Supp. V 1993).

44. *Id.* § 1604(g)(3)(B) (1988). *See also* Symposium, *Federal Forest Law and Policy*, 17 ENVTL. L. 365 (1987).

45. 16 U.S.C. §§ 1604(g)(3)(A) (1988). *See also* 36 C.F.R. § 219.18-26 (1993)

list of specific uses goes beyond the vague multiple-use mandate of previous law[46] by requiring the Forest Service take environmental and economic factors into consideration.[47] Although the Forest Service has broad discretion to determine how the national forests will be managed, NFMA's requirements ensure greater preservation of biological diversity than under the previous statute.

In *Seattle Audubon Society*, plaintiffs alleged that the Forest Service violated NFMA by adopting a forest management plan that would not maintain a viable population of spotted owls or other old-growth dependent species.[48] The Forest Service's Final Environmental Impact Statement (FEIS) acknowledged that it had only a "low to medium-low probability of providing for viable populations of late-successional forest-associated wildlife species other than northern spotted owls."[49] Seattle Audubon Society contended that the Forest Service's decision to adopt a forest management plan that guaranteed only a low to medium-low probability of maintaining viable populations violated NFMA.

(detailing factors that the Forest Service should take into consideration when initiating land management plans).

46. *See* Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-31 (1988 & Supp. IV 1992), which provides only a general multiple-use mandate to the Forest Service.

47. 16 U.S.C. § 1604(a)(3)(A) (1988).

48. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1476 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

49. U.S. DEP'T OF AGRICULTURE, U.S. FOREST SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT FOR THE NORTHERN SPOTTED OWL IN THE NATIONAL FORESTS, at 3 & 4-140 (1992).

3. Endangered Species Act

The Endangered Species Act[50] (ESA) protects species threatened with extinction because of their "aesthetic, ecological, educational, historical, recreational, and scientific value."[51] The ESA protects both the individual members of the species[52] and the species 'critical habitat' from physical harm.[53]

According to the Supreme Court, the ESA's purpose is to "halt and reverse the trend toward species extinction, whatever the cost."[54] However, the ESA has since been amended to consider economic interests through an informal cost-benefit analysis that requires critical habitat to be designated only after "taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[55] The Secretary of the Interior is to designate critical habitat only "to the maximum extent prudent and determinable,"[56] and may avoid designation if the costs of designating the habitat as "critical" outweigh the benefits.[57] Yet economic considerations are not a factor in deciding whether to list a species as threatened or endangered.[58]

The amendments also created an Endangered Species Committee[59] that can exempt federal agencies from complying

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50. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1988 & Supp. V 1993). *See generally* James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991); DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION (1989).

51. 16 U.S.C. § 1531(a)(3) (1988).

52. *Id.* § 1538.

53. *Id.* §§ 1533, 1536. *See* Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988); *but see* Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

54. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).

55. 16 U.S.C. § 1533(b)(2) (1988).

56. *Id.* § 1533(a)(3).

57. *Id.* § 1533(b)(2). The Secretary's discretionary exclusion of critical habitat cannot be exercised if "the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

58. *Id.* § 1533(a)(1).

59. *Id.* § 1536(e)(ii)-(iii).

with the ESA on a case-by-case basis if "the benefits of [the federal] action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat," and if the federal action is of "regional or national significance."[60]

As early as 1973, an interagency committee concerned with marked decreases in northern spotted owl populations recommended listing the spotted owl be under the ESA.[61] In 1987, the United States Fish and Wildlife Service (FWS) denied a citizen petition to list the spotted owl as endangered.[62] However, FWS was unable to counter scientific evidence that showed the spotted owl was in danger of extinction.[63] In fact, a FWS population viability expert recommended in 1987 that the owl be listed.[64]

The FWS decision spurred a judicial challenge by twenty-five environmental groups.[65] In 1988, a federal court held that the FWS decision was arbitrary and capricious due to a complete lack of scientific analysis supporting its position.[66] The court ordered FWS to reconsider its decision, and, in June 1990, the agency designated the northern spotted owl as threatened under the

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60. *Id.* § 1536(h)(1)(A).

61. *See* Victor M. Sher & Andy 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).

62. Finding on Northern Spotted Owl, 52 Fed. Reg. 48,552 (1987).

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

64. Letter from Dr. Mark Shaffer, U.S. Fish and Wildlife Service, to Jay Gore, U.S. Fish and Wildlife Service (Nov. 18, 1987) (attached to Final Assessment of Population Viability Projections for the Northern Spotted Owl). *See* Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 481 (W.D. Wash. 1988).

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

66. *Id.* at 483.

ESA.[67] Consequently, all federal agencies must now comply with ESA when pursuing any activity that might affect the spotted owl.

Under section 7 of the ESA, the Forest Service and BLM must consult with FWS before selling timber to insure that the sales will not jeopardize the spotted owl's continued existence.[68] Because approximately ninety percent of remaining spotted owl habitat is located on Forest Service and BLM lands,[69] federal land management decisions will have a significant effect on the spotted owl.

4. Oregon and California Lands Act

The 1937 Oregon and California Lands Act[70] (OCLA) required 2.5 million acres of federal land[71] to be managed under the sustained-yield principle and sold at reasonable market prices.[72] Fifty percent of the gross receipts from OCLA timber sales are given to western Oregon counties.[73] Congress intended OCLA to ensure permanent support for dependent communities and local industries.[74] Thus, OCLA focuses not on the environment, but on generating revenue and jobs through timber sales.[75]

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67. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (codified at 50 C.F.R. § 17 (1993)). "Endangered species" include any species "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (1988). "Threatened species" include species "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Critical habitat is to be established for both endangered and threatened species. *Id.* § 1533(a)(3). Also, federal actions must not be likely to jeopardize the continued existence of any endangered or threatened species, or result in adverse modification of critical habitat of endangered or threatened species. *Id.* § 1536(a)(2).

68. *See id.* § 1536(a)(2).

69. *Protection Proposed for the Northern Spotted Owl*, ENDANGERED SPECIES TECHNICAL BULL., July 1989 at 1.

70. Oregon & California Lands Act, 43 U.S.C. §§ 1181a-1181j (1988 & Supp. IV 1992).

71. This land was initially part of a 3.7 million acre grant to the Oregon & California Railroad in 1887. The land was returned to Congress in 1916.

72. 43 U.S.C. § 1181a (1988).

73. *Id.* § 1181f(a).

74. *Id.* § 1181a.

75. Flournoy, *supra* note 20, at 283. *See* Paul G. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17

In *Portland Audubon Society*, BLM argued that the federal court ignored the OCLA when it enjoined federal timber sales pending appeal.[76] According to BLM, that injunction halted the harvest of the OCLA-mandated minimum of 500 million board feet of timber per year.[77]

III. JUDICIAL HISTORY

The debate over logging in spotted owl habitat has occupied federal courts for nearly a decade.[78]

A. Seattle Audubon Society

The Seattle Audubon Society challenged the Forest Service's 1992 EIS for violating NEPA.[79] Seattle Audubon Society argued that the Forest Service violated NEPA by refusing to consider new information regarding the effect of old growth timber harvests on spotted owl viability prior to deciding not to prepare a SEIS.[80]

1. Forest Service EIS

In 1984, the Forest Service issued an EIS on the environmental impact of timber harvests in the Pacific Northwest.[81] This EIS incorporated environmentalists' recommendation to restrict timber harvesting in a 300-acre radius around known spotted owl habitat.[82] Despite this, environmentalists seeking more protection

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ENVTL. L. 739 (1987).

76. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 709 (9th Cir. 1993).

77. *Id.*

78. Litigation concerning old growth began on Oct. 22, 1984, when the Oregon Wildlife Federation, the Lane County Audubon Society, and the Oregon National Resources Council administratively appealed the Forest Service's Pacific Northwest Regional Guide and accompanying EIS. *See* U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT SUPPLEMENT TO THE EIS FOR AN AMENDMENT TO THE PACIFIC NORTHWEST REGIONAL GUIDE, SPOTTED OWL GUIDELINES AT S-1 TO S-2 (1986).

79. Plaintiff's Complaint for Declaratory and Injunctive Relief at 14-15, Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

80. *Id.*

81. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PACIFIC NORTHWEST REGIONAL GUIDE (May 1984).

82. *Id.* at 2-29. *See also*, Blumm, *supra* note 13, at 611-12.

for the spotted owl contended that the EIS violated NEPA because the Forest Service did not adequately consider the environmental impacts of limiting the restricted harvest area to a 300-acre radius.[83] In response, in 1986 the Forest Service prepared a Draft Supplemental EIS (DSEIS), which proposed creating 550 habitat protection areas of 2200 acres each.[84] However, the DSEIS also acknowledged that under this proposed plan, only 1000 acres of spotted owl habitat would be guaranteed to remain within fifteen years because logging would be allowed in the habitat protection area.[85] The Washington Departments of Game and Natural Resources opposed the Forest Service DSEIS, arguing that it failed to meet NFMA requirements.[86]

In response to the state agencies' concerns, the Forest Service's Final Supplemental EIS (FSEIS), released in 1988, increased spotted owl habitat protection areas within the Olympic Peninsula from 2200 acres to 2700 acres.[87] Environmentalists, including Seattle Audubon Society, again protested that the FSEIS failed to consider current scientific information regarding spotted owl habitat.[88] In March 1989, Washington District Court Judge William Dwyer issued a preliminary injunction halting 144 timber sales until the environmentalists' petition could be heard on its merits.[89]

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83. *Id. See* U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT SUPPLEMENT TO THE EIS FOR AN AMENDMENT TO THE PACIFIC NORTHWEST REGIONAL GUIDE, SPOTTED OWL GUIDELINES at S-1 to S-2 (1986) [hereinafter 1986 DSEIS] (noting that the National Wildlife Federation, the Oregon Wildlife Federation, the Lane County Audubon Society, and the Oregon Natural Resources Council administratively appealed the Regional Guide and accompanying EIS on Oct. 22, 1988).

84. 1986 DSEIS, *supra* note 83, at 2-20 to 2-22. *See also* Feeny, *supra* note 16, at 129.

85. 1986 DSEIS, *supra* note 83, at 2-20 to 2-22.

86. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL SUPPLEMENT TO THE ENVIRONMENTAL IMPACT STATEMENT FOR AN AMENDMENT TO THE PACIFIC NORTHWEST REGIONAL GUIDE, VOLUME 2, APPENDICES, SPOTTED OWL GUIDELINES, at G3-10 to G3-18 (1988). *See also* Feeny, *supra* note 16, at 129.

87. Blumm, *supra* note 13, at 612; FINAL SUPPLEMENT TO THE ENVIRONMENTAL IMPACT STATEMENT FOR AN AMENDMENT TO THE PACIFIC NORTHWEST REGIONAL GUIDE, SPOTTED OWL GUIDELINES, at II-24 (1988).

88. Blumm, *supra* note 13, at 613.

89. Seattle Audubon Soc'y v. Robertson, No. C89-160-WD (W.D. Wash. Mar. 24, 1989) (order on motions for preliminary injunction and for change of venue).

2. Congressional Appropriations Rider, Section 318

In October 1989, six months after Judge Dwyer issued the preliminary injunction, and before he decided whether to make the injunction permanent, Congress enacted an appropriations "rider" in section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990.[90] Although the rider expanded protection of the spotted owl for one year by instructing the Forest Service and BLM to minimize fragmentation of old growth and by establishing citizen advisory boards to assist agencies in making timber sale decisions, it also set the national federal lands timber sale level for 1990 at 7.7 billion board feet, 5.8 billion of which came from Oregon and Washington public lands.[91] In addition, the rider declared that it provided "adequate consideration for the purpose of meeting the statutory requirements" at issue in *Seattle Audubon Society*.[92]

In response to section 318, Judge Dwyer dissolved his preliminary injunction and dismissed Seattle Audubon Society's complaint.[93] On appeal, the Ninth Circuit held the rider to be unconstitutional,[94] and reversed Judge Dwyer's decision that section 318 withdrew the court's jurisdiction over Seattle Audubon Society's litigation.[95] On remand, the district court again dis-

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90. Dept. of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 (Hatfield-Adams Northwest Timber Compromise), Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

91. *Id.* § 318(a)(1).

92. *Id.* § 318(b)(6)(A) ("[M]anagement of areas according to [current EIS] . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society and Washington Contract Loggers Association . . . [these EIS] guidelines . . . shall not be subject to judicial review by any court of the United States.").

93. Seattle Audubon Soc'y v. Robertson, No. C89-160-WD (W.D. Wash. Nov. 6, 1989). *See also* Portland Audubon Soc'y v. Lujan, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20,018 (D. Or. 1989) (dismissing Portland Audubon Society's complaint against BLM due to the language of § 318) (Portland Audubon Society lawsuit is discussed *infra* Part III.B).

94. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

95. *Id.* In the same decision, the Ninth Circuit also reversed an Oregon district court's ruling that the rider withdrew the court's power of judicial review necessary to Portland Audubon Society's litigation (discussed below). *Id.*

missed Seattle Audubon Society's claim, this time ruling that the petition was untimely.[96] The Ninth Circuit again reversed and remanded, finding that the doctrine of equitable tolling excused the Seattle Audubon Society's untimely filing.[97]

On March 25, 1992, the Supreme Court reversed the Ninth Circuit ruling and held the rider to be constitutional.[98] Section 318(b)(6)(A) did not violate Article III of the U.S. Constitution because it did not preordain certain results under existing public lands law, but only amended existing law, albeit temporarily.[99] Therefore, section 318 was within Congress' constitutionally enumerated law-making powers.[100] However, because the rider expired at the end of Fiscal Year 1990, the Supreme Court's decision did not have significant or long-lasting effects.

3. Interagency Scientific Committee Report

While the constitutionality of section 318 was litigated, the northern spotted owl was listed as threatened pursuant to the Endangered Species Act.[101] Also, the Interagency Scientific

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at 1317; see *infra* Part III.B.

96. Portland Audubon Soc'y v. Lujan, 1990 WL 169703 (D. Or. Oct. 30, 1990), *rev'd*, 931 F.2d 590 (9th Cir. 1991). The Ninth Circuit reversed the Oregon district court's finding that Portland Audubon Society's petition was untimely before the Washington district court reached consideration of a similar timeliness issue with regard to Seattle Audubon Society's petition. Therefore, the Washington district court never reviewed the timeliness of Seattle Audubon Society's petition.

97. Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 598 (9th Cir. 1991). Although plaintiffs' challenges were not filed within 15 days of the initial advertisement of the timber sales, as required by § 318, plaintiffs were excused from this requirement under the doctrine of equitable tolling due to extraordinary circumstances, namely, the district court's erroneously upholding an unconstitutional statute. Further, petitioners had not lacked diligence because they had been diligently pursuing their challenge to the constitutionality of the rider in the appellate court, and respondents had not suffered prejudice. *Id.* at 596-98.

98. Seattle Audubon Soc'y v. Robertson, 112 S. Ct. 1407 (1992).

99. *Id.* See Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check for Appropriation Riders*, 43 WASH. U. J. OF URBAN AND CONTEMPORARY L. 35 (1993).

100. Seattle Audubon Soc'y v. Robertson, 112 S. Ct. 1407, 1413 (1992).

101. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (codified at 50 C.F.R. § 17 (1993)).

Committee to Address the Conservation of the Northern Spotted Owl (ISC) was convened.[102] The Committee, chaired by Jack Ward Thomas[103] and comprised of representatives of the Forest Service, BLM, FWS, and the Park Service, was established in October 1989 to develop a scientifically credible conservation strategy for the spotted owl.[104] In May 1990, the ISC released its report,[105] which stated that the spotted owl was "imperiled" due to habitat destruction caused by logging.[106] The ISC also concluded that current Forest Service and BLM management plans constituted a "prescription for the extinction of spotted owls."[107]

The ISC recommended a conservation strategy that included "habitat conservation areas" (HCAs).[108] HCAs consist of blocks of old growth capable of supporting owl populations. Where possible, they would protect a minimum of twenty owl pairs.[109] At least eighty acres were to be protected in each area where spotted owls were known to live.[110] Under the plan developed by the ISC, most logging operations within HCAs would cease, and habitat corridors between HCAs would be retained to allow spotted owls to migrate between the HCAs.[111]

In response to the ISC Report, the Forest Service vacated its 1988 FSEIS on October 3, 1990, and stated that it would conduct timber management activities in a manner "not inconsistent with" the ISC Report.[112] Seattle Audubon Society contested this decision because the Forest Service never prepared an EIS that considered or revealed the environmental impacts of the agency's decision.[113] In 1991, Judge Dwyer found that the Forest Service

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102. THOMAS COMMITTEE REPORT, *supra* note 22.

103. Jack Ward Thomas was subsequently appointed by President Clinton in 1993 as chief of the United States Forest Service.

104. THOMAS COMMITTEE REPORT, *supra* note 22, at 57.

105. *Id.*

106. *Id.* at 1.

107. *Id.* at 18.

108. *Id.* at 23-25.

109. *Id.* at 28-29.

110. *Id.* at 29.

111. *Id.* at 25-29.

112. 55 Fed. Reg. 40,412, 40,413 (1990).

113. Memorandum in Support of Seattle Audubon Society's Motion to Amend Complaint at 3, Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991).

had violated NFMA[114] and entered a permanent injunction against timber sales until the Forest Service complied.[115] The Ninth Circuit upheld this decision after rejecting the Forest Service's argument that its compliance with the Endangered Species Act nullified its obligation to comply with NFMA.[116]

After the injunction, the Forest Service drafted a new spotted owl management plan EIS in September 1991.[117] Its FEIS, released in January 1992, incorporated the ISC Strategy.[118] The Seattle Audubon Society again filed suit against the Forest Service, alleging that the Forest Service violated NEPA and NFMA by failing to consider any alternative actions to those recommended in the ISC Strategy; failing to consider new, intervening information regarding the status of the spotted owl; by failing to adequately protect other old-growth dependent species; and by failing to adopt measures to prevent the destruction of critical habitat.[119] It was this case that eventually reached the Ninth Circuit in *Seattle Audubon Society v. Espy*.[120]

4. Seattle Audubon Society Litigation

On May 28, 1992, Judge Dwyer granted Seattle Audubon Society's motion for summary judgment, ruling that the Forest Service violated NEPA by failing to adequately report the environmental impacts of its management plan in its FEIS.[121] The FEIS, which incorporated the Thomas Committee ISC Report, acknowledged that if other federal agencies (including BLM) failed to adopt the ISC Report in full,[122] or if the Endangered Species

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114. Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

115. *Id.* at 1096.

116. Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

117. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT FOR THE NORTHERN SPOTTED OWL IN THE NATIONAL FORESTS (1991).

118. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT FOR THE NORTHERN SPOTTED OWL IN THE NATIONAL FORESTS, at 2-39 (1992).

119. *See* Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

120. Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

121. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1482-83.

122. *Id.* at 1479. *See also* THOMAS COMMITTEE REPORT, *supra* note 22, at 3,

Committee exempted any spotted owl habitat from the provisions of the Endangered Species Act, the FEIS' assessment of environmental impacts would no longer be accurate.[123]

BLM subsequently failed to adopt the ISC Report in full,[124] and the Endangered Species Committee exempted thirteen BLM timber sales from the ESA.[125] Judge Dwyer therefore ruled that the Forest Service's FEIS no longer accurately disclosed the known and likely environmental consequences of federal actions within spotted owl habitat.[126] Further, new information concerning accelerating rates of spotted owl population decline came to light after the Thomas Committee released the ISC report, which the court interpreted as requiring a revision of the ISC's environmental assessment of the spotted owl's viability.[127]

Judge Dwyer stated that when an agency receives new information, it must evaluate that information to determine whether it reasonably merits discussion in its FEIS.[128] The agency cannot

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27, 29, 42

123. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1480. *See also* U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL, at 3 & 4-51, 3 & 4-94, L-A-2 (1988).

124. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1479. *See also* Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992).

125. ENDANGERED SPECIES COMMITTEE, APPLICATION FOR EXEMPTION BY THE BUREAU OF LAND MANAGEMENT TO CONDUCT 44 TIMBER SALES IN WESTERN OREGON 6-7 (May 15, 1992).

126. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1480 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Epsy, 998 F.2d 699 (9th Cir. 1993).

127. *Id.* at 1481-83. This new information included the Anderson and Burnham report which Dr. Anderson summarized before the Endangered Species Committee on Jan. 28, 1992:

> Substantial and accelerating rates of population decline raise serious questions about the adequacy of the ISC Conservation Strategy . . . . The very high degree of fragmentation of the remaining habitat may be the most likely cause of the declining populations. It seems questionable if further harvest of remaining suitable habitat is possible without risking, at least, local extinctions.

Id. at 1481. Forest Service employee Dr. O'Halloran wrote in an internal "Reassessment on the Viability Rating" on Feb. 1, 1992, that she agreed that the new information "brings into question the viability rating for the EIS on the ISC strategy." *Id.* at 1481-82.

128. *Id.* at 1482.

merely proclaim that the new information has no significant environmental impact, but must give a "reasoned analysis and response" before deciding whether or not to include it.[129] Judge Dwyer ruled that the Forest Service failed to adequately consider new, significant information regarding spotted owl habitat needs, thereby violating NEPA.[130] The Forest Service's decision not to incorporate the new reports would have been valid only if it had first considered the new information and adequately explained why the information was neither significant nor reliable enough to merit a revision of its EIS. Finally, Judge Dwyer ruled that the FEIS was flawed because it failed to discuss and disclose a major consequence of the ISC Report: jeopardy to other native old growth species.[131]

B. Portland Audubon Society

At the same time that Seattle Audubon Society was suing the Forest Service, Portland Audubon Society was challenging BLM's timber management plans.[132] Portland Audubon Society alleged that BLM violated NEPA when it decided not to supplement its timber management plans after receiving new and significant information concerning the plan's impact on spotted owl viability.[133]

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129. *Id.* at 1483.

130. *Id.* at 1482-83.

131. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1480 (W.D. Wash. 1992), *aff'd sub nom.* Seattle Audubon Soc'y v. Epsy, 998 F.2d 699 (9th Cir. 1993). Judge Dwyer dismissed Seattle Audubon Society's NFMA claims without prejudice because, due to the Forest Service's NEPA violations that demanded corrective action, there was no need for Seattle Audubon Society to pursue the NFMA claims. *Id.*

132. BLM is charged with managing the timber on the O & C lands, pursuant to the Oregon & California Lands Act of 1937 (43 U.S.C. § 1181a-f (1988 & Supp. IV 1992)). Congress first granted the O & C lands to railroads in the 1860s, in an attempt to encourage the construction of an Oregon to California railroad line. Subsequent abuses by the railroads caused Congress to pass the Chamberlain-Ferris Act in 1916, which revested all unsold O & C lands to the federal government. Congress vested the BLM with management authority when it enacted the Oregon & California Lands Act twenty-one years later. *See* Paul G. Dodds, *The Oregon and California Lands: A Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739, 747-55 (1987).

133. *See* Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1493 (D. Or. 1989).

1. BLM Timber Management Plans

From 1979 to 1983, BLM prepared a ten-year Timber Management Plan (TMP) for each of its western Oregon timber districts.[134] Developing these plans required BLM to prepare an EIS that outlined the environmental impacts, including the impact on spotted owls, of several possible timber management alternatives. Each TMP designated BLM forest land for one of several uses: intensive timber management, modified area control, or withdrawal from timber production.[135] The TMPs did not determine which specific stands would be cut, but did set "annual allowable harvest" levels.[136] BLM's timber sales were based on these TMP guidelines.[137]

In 1986, BLM determined that all western Oregon TMPs needed to be updated by 1990.[138] Each updated TMP required an updated EIS.[139] Because the revised TMPs would take approximately four years to complete, BLM considered whether, due to the recent publication of new information regarding spotted owl habitat needs, SEIS for the existing TMPs was necessary in the interim.[140] This new information included: a 1982 FWS status review of the spotted owl; the 1986 Forest Service DSEIS that analyzed the habitat requirements of the spotted owl; the 1986 study of the spotted owl conducted by a panel of scientists for the National Audubon Society; a 1985-87 analyses of population demographics and viability of the spotted owl; and an analyses of the spotted owl prepared by BLM biologists from 1986-87.[141]

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134. 43 C.F.R. § 1610.1 (1993). *See* Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1491 (D. Or. 1992), *modified*, 1992 WL 176353 (D. Or. July 16, 1992), *aff'd sub nom.* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

135. Portland Audubon Soc'y v. Lujan, 795 F. Supp. at 1491-92.

136. *Id.*

137. *See* Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

138. *Id.*

139. *Id.*

140. BUREAU OF LAND MANAGEMENT, SPOTTED OWL ENVIRONMENTAL ASSESSMENT (1987).

141. *See* Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1492 (D. Or. 1992).

On April 10, 1987, BLM decided that the new information was too preliminary to justify preparing an SEIS.[142] In response, Portland Audubon Society challenged BLM's refusal to prepare an SEIS.[143] This challenge began the litigation that culminated in the Ninth Circuit's July 8, 1993 decision in *Portland Audubon Society v. Babbitt*.[144]

2. Congressional Appropriations Rider, Section 314

In December 1987, before the district court ruled on Portland Audubon Society's challenge to BLM's finding that an SEIS was unnecessary, Congress attached a "rider" to the Department of the Interior Appropriations Act that prohibited judicial review of agency land management plans that allegedly failed to incorporate all relevant information.[145] The appropriations rider allowed judicial review only of challenges to individual agency activities, such as individual timber sales, during fiscal year 1988.[146]

3. Portland Audubon Society Litigation

Pursuant to the appropriations rider, District Court Judge Helen Frye granted summary judgment to BLM and dismissed Portland Audubon Society's challenge to BLM's refusal to prepare an SEIS on the environmental impact of timber harvests in spot-

142. BUREAU OF LAND MANAGEMENT, RECORD OF DECISION 3 (1987).

143. Portland Audubon Soc'y v. Hodel, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21,210, 21,211 (D. Or. Apr. 20, 1988), *aff'd*, 866 F.2d 302 (9th Cir. 1989). Portland Audubon Society also appealed BLM's decision not to prepare a SEIS to the Interior Board of Land Appeals and requested an immediate stay on timber sales near identified owl breeding areas. On February 28, 1988, the appeals board upheld BLM's decision. *Id.* Headwaters, Inc. et al., IBLA 87-477 (Feb. 29, 1988).

144. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

145. Dept. of the Interior and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, § 314, 101 Stat. 1329-214, 1329-254 (1987) ("Nothing shall limit judicial review of particular activities of these lands: *Provided, however*, that there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of [BLM], solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, that any and all particular activities to be carried out under existing plans may nevertheless be challenged.").

146. *Id.*

ted owl habitat.[147] On January 24, 1989, the Ninth Circuit reversed Judge Frye because the rider prohibited only challenges to timber management "plans," and Portland Audubon Society argued that its challenge concerned "particular activities" of the Forest Service, such as individual timber sales.[148] On remand, Judge Frye found that Portland Audubon Society's claims concerned timber management "plans," and therefore again dismissed the NEPA violation claim as barred by the appropriations rider.[149] Judge Frye also dismissed Portland Audubon Society's other allegations under the doctrine of laches because those claims were not timely pursued.[150]

The Ninth Circuit affirmed the district court's decision to dismiss Portland Audubon Society's allegations of NEPA violations, but reversed and remanded Judge Frye's decision to dismiss

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147. Portland Audubon Society v. Hodel, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21,210 (D. Or. Apr. 20, 1988), *aff'd* 866 F.2d 302 (9th Cir. 1989) (ruling that the appropriations rider withdrew the court's jurisdiction to consider the Portland Audubon Society claim).

148. Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 304 (9th Cir. 1989), *cert. denied*, 490 U.S. 911 (1989). Portland Audubon Society claimed that its complaint pertained only to particular timber sales, and that timber sales constituted "particular activities." *Id.* at 304. The appropriations rider banned judicial review only of timber management plans as a whole, but allowed judicial review of "particular activities" conducted under the authority of the management plans. *Id.* at 314. Therefore, if Portland Audubon Society's complaint alleged only that a "particular activity" violated NEPA—not that the timber management plan as a whole violated NEPA—judicial review of its complaint was not precluded by the appropriations rider. *Id.* at 305-07. The Ninth Circuit remanded the case to the district court and instructed the district court to determine whether Portland Audubon Society's complaint that particular timber sales constituted a violation of NEPA pertained to "particular activities" or to a timber management plan. *Id.* at 307.

149. Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1489, 1489 (D. Or. 1992) (ruling that the Portland Audubon Society complaint concerned a timber management "plan," not a "particular activity," and was therefore precluded by the appropriations rider).

150. *Id.* at 1484. The district court dismissed Portland Audubon Society's non-NEPA claims based on the doctrine of laches: "[T]he APA does not provide a basis for a challenge by [plaintiffs] to administrative decisions made over five years ago and upon which the BLM has operated without objection." On this basis, the district court determined that Portland Audubon Society had "failed to pursue its claims under Oregon & California Lands Act, Federal Land Planning and Management Act, and Migratory Bird Treaty Act in a timely manner." *Id.*

Portland Audubon Society's non-NEPA claims.[151] After examining whether the district court properly found lack of diligence by Portland Audubon Society and prejudice to BLM, the Ninth Circuit determined that the district court had made no specific finding of prejudice.[152] With regard to due diligence, the court accepted Portland Audubon Society's explanation that, "while the legal basis for [its] non-NEPA claims may have been available sooner, the motivation for this litigation came from the later revelation that the northern spotted owl may be endangered."[153] Because the Ninth Circuit found no prejudice or lack of due diligence, it reversed the district court's summary judgment in favor of BLM.[154]

The section 314 rider expired on September 30, 1990, and Portland Audubon Society renewed its NEPA claims in 1991. After Judge Frye held that no valid NEPA claim existed because the Ninth Circuit had upheld her dismissal of the NEPA claims,[155] Portland Audubon Society moved for leave to file an amended complaint.[156] Judge Frye denied the motion to amend, ruling that section 314 constituted permanent legislation and had not been repealed, and therefore Portland Audubon Society's NEPA claims were still barred from judicial review.[157] The Ninth Circuit, finding that Congress had not intended section 314 as permanent legislation, again reversed.[158]

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151. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

152. *Id.* at 1241.

153. *Id.*

154. *Id.* at 1242.

155. Portland Audubon Soc'y v. Lujan, 21 Envtl. L. Rep. (Envtl. L. Inst.) 21,341, 21,343 (D. Or. May 8, 1991).

156. Plaintiff's Motion for Leave to File Amended Complaint, Portland Audubon Soc'y v. Lujan, No. 87-1160-FR (D. Or. July 16, 1991).

157. Portland Audubon Soc'y v. Lujan, No. 87-1160-FR (D. Or. July 16, 1991) (order and opinion denying Portland Audubon Society's motion for leave to file an amended complaint), *rev'd sub nom.* Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

158. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303-04 (9th Cir. 1991). The court held that the applicability of an appropriations act beyond the fiscal year in which it was enacted was a matter of congressional intent. *Id.* at 303. Congress intended for this appropriations rider to be effective for only one year at a time, as demonstrated by the fact that Congress reenacted the provision twice, at the expiration of each of the next fiscal years, but did not reenact the provision for fiscal year 1991. If Congress had intended for § 314 to stay in place for more than one year at a time, it could have so provided in

Without the bar imposed by the appropriations rider, Portland Audubon Society amended its complaint and moved for a preliminary injunction and a temporary restraining order.[159] Judge Frye ruled on June 8, 1992 that BLM's decision not to supplement its EIS was arbitrary and capricious "in light of the new, significant, and probably accurate information that the planned logging of spotted owl habitat raise[d] uncertainty about the ability of the spotted owl to survive as a species."[160] This "new information" included population ecology experts' findings that further spotted owl habitat loss would severely damage the spotted owl's chances for survival.[161] Judge Frye stated that because BLM had not examined the environmental impact of the TMPs, it must prepare a SEIS.[162] Under the "rule of reason," an agency must consider relevant information to the extent necessary to make a reasoned decision on which alternatives to consider, what constitutes "significant" environmental harm, and how to adequately balance the risks of environmental harm against the benefits of the proposed federal action.[163] Therefore, when determining whether an SEIS is appropriate, BLM must carefully consider new information that might indicate that its timber sales could have significant effects on the quality of the human environment.[164] Here, the court found that BLM failed to consider such information before deciding not to complete an SEIS.[165] Consequently, Judge Frye permanently enjoined BLM federal timber sales on lands suitable

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permanent, substantive legislation, instead of considering the provision on an annual basis for three years in a row. *Id.* at 304.

159. Plaintiffs' Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, and for Renewal Preliminary Injunction, Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D. Or. 1989) (No. 87-1160-FR). Judge Frye granted the temporary restraining order on Jan. 30, 1992 (Portland Audubon Soc'y v. Lujan, No. 87-1160-FR (D. Or. Jan. 30, 1992)) and granted the preliminary injunction on Feb. 19, 1992 (Portland Audubon Soc'y v. Lujan, 784 F. Supp. 786 (D. Or. 1992)).

160. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1500 (D. Or. 1992), *modified in part*, No. 87-1160-FR, 1992 WL 176353 (D. Or. July 16, 1992) (citing Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1485 (D. Or. 1989)).

161. *Id.* at 1501.

162. *Id.*

163. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989).

164. Portland Audubon Soc'y v. Lujan, 795 F. Supp. at 1500.

165. *Id.* at 1510.

for spotted owl habitat (as defined by FWS) until BLM submitted an SEIS to the court that examined the impact of the new information on the expected effect of BLM timber sales within spotted owl habitat.[166]

IV. NINTH CIRCUIT RULINGS ON FOREST SERVICE AND BLM NEPA AND NFMA VIOLATIONS

On July 8, 1993, the Ninth Circuit upheld the lower court rulings that the Forest Service and BLM had violated NEPA by failing to supplement their environmental impact statements in light of significant, scientifically reliable information concerning the effect of continued logging on the spotted owl's ability to survive.[167] The court affirmed the lower court injunctions of Forest Service and BLM timber sales on old growth habitat until the agencies prepared SEISs that adequately considered the new information.[168]

A. Standing

The Forest Service and BLM first challenged Portland Audubon Society's and Seattle Audubon Society's standing to pursue these cases under the 1992 Supreme Court decision in *Lujan v. Defenders of Wildlife*.[169] The plaintiffs in *Lujan* had maintained that their desire to observe endangered species in Egypt and Sri Lanka would be adversely affected by the Secretary of the Interior's refusal to mandate consultation under section 7 of the ESA for certain funded activities abroad.[170] The Supreme Court found that the environmental groups did not meet the three requirements of standing.[171]

First, the Supreme Court held that a plaintiff must have suffered an "injury-in-fact" that is concrete and "actual or

166. *Id.*

167. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993).

168. Portland Audubon Soc'y v. Babbitt, 998 F.2d at 709-10; Seattle Audubon Soc'y v. Espy, 998 F.2d at 704-05.

169. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992).

170. *Id.* at 2135.

171. *Id.* at 2146.

imminent," as opposed to hypothetical.[172] The Supreme Court ruled that, although the desire to observe an animal species constitutes a cognizable interest, the fact that individual plaintiffs had observed the species in the past and intended to observe the species at some unspecified time in the future was insufficient to establish that the species' extinction would cause an injury-in-fact.[173]

Second, the Court ruled that a petitioner must also establish a causal connection between the injury and the complained-of conduct.[174] And third, the Court decided that it must be likely and not merely speculative that the complained-of injury could be adequately addressed by a favorable court decision.[175] Four Justices in *Lujan* found plaintiffs were unable to establish redressability because the only relief that could be accorded would be an order to the Secretary of the Interior to revise his regulations regarding the applicability of section 7 of the ESA.[176] Moreover, the plurality noted that modified regulations would not remedy plaintiffs' alleged injury unless the funding agencies were bound by the Secretary's regulation. In that case, it was questionable whether the Secretary could bind the funding agency.[177]

In contrast to the *Lujan* plaintiffs, the Ninth Circuit held that the Audubon Societies established injury-in-fact because of their members' proximity to owl-inhabited forests. The court determined that the Audubon Societies' members used and continued to regularly use forest lands suitable for owl habitat.[178] Because the *Audubon* plaintiffs lived near the old growth forests at issue, and because they testified in affidavits that they used those forests in the past and would definitely continue to use them, their injury-in-fact was not so hypothetical as the plaintiffs in *Lujan*, who had only stated that they planned to travel "some time in the future" to view the endangered species of Egypt and Sri Lanka.[179]

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172. *Id.* at 2136.
173. *Id.* at 2138.
174. *Id.* at 2136.
175. *Id.*
176. *Id.* at 2140.
177. *Id.*
178. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993).
179. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

The Ninth Circuit also found that plaintiffs' alleged injury was concrete and imminent because the Forest Service and BLM intended to sell old-growth timber for harvest and there was no dispute that these sales would adversely affect the spotted owl population.[180] The court stated: "Speculation that logging might not occur because of as yet unknown intervening circumstances, or because redrafting the EIS might not change the Secretary's decision to adopt the [chosen proposal] is not relevant to standing."[181] Finally, the Ninth Circuit determined that the *Audubon* plaintiffs' alleged injury could be redressed by a favorable court decision because the Secretary could be enjoined to comply with NEPA.[182]

The court dismissed the Forest Service and BLM contentions that the challenge was not be ripe for review until specific timber sales were authorized, because plaintiffs' grievance was based on the overall timber management plan, and not just on the specific sales that would occur pursuant to the plan.[183] Because the timber management plans had already been completed and because implementation was imminent, the plans themselves were ripe for review.

B. Forest Service Violations

After disposing of the standing challenges, the Ninth Circuit addressed the Seattle Audubon Society claim that the Forest Service violated NEPA. First, the Ninth Circuit held that the Forest Service's failure to adequately identify the environmental impacts of the proposed forest management plan in its FEIS violated NEPA.[184] The Forest Service had identified five alternatives in its DSEIS, one of which was the ISC report, which it eventually adopted as the preferred action in its FEIS.[185] However, to achieve its goal, the ISC option needed to be adopted by other

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180. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993).

181. Seattle Audubon Soc'y v. Epsy, 998 F.2d at 703.

182. Portland Audubon Soc'y v. Babbitt, 998 F.2d at 707.

183. *Id. See also* Seattle Audubon Soc'y v. Epsy, 998 F.2d at 703.

184. Seattle Audubon Soc'y v. Epsy, 998 F.2d at 704.

185. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT FOR THE NORTHERN SPOTTED OWL IN THE NATIONAL FORESTS 2-39 (1992) [hereinafter FEIS].

agencies, as well as by the Forest Service.[186] If other agencies failed to adopt the ISC report, or if the Endangered Species Committee allowed BLM to proceed on timber sales which had been identified by the Forest Service as jeopardizing the continued existence of spotted owls or adversely affecting their critical habitat, then the Forest Service conceded that the viability analysis contained within the ISC option would no longer be accurate.[187]

BLM subsequently failed to adopt the ISC Report in full,[188] and the Endangered Species Committee did allow BLM timber sales in spotted owl habitat areas.[189] Based on the provisions contained in the FEIS, the FEIS was no longer accurate and no longer satisfactorily identified all of the environmental impacts of the Forest Service's land management plan.[190]

The Ninth Circuit also held that the Forest Service violated NEPA because its EIS relied on scientific uncertainties and because its FEIS failed to address contradictory, scientifically reliable information concerning spotted owl viability.[191] Specifically, the court ruled that the Forest Service failed to take into consideration a FWS report released after the ISC report but before its FEIS was issued.[192] According to the court, all of the information within the report was new, reliable, and contradictory to the conclusions reached by the Forest Service in its FEIS.[193]

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186. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1479 (1992). *See also* THOMAS COMMITTEE REPORT, *supra* note 22, at 3, 27, 29, 42.

187. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1480. *See also* FEIS, *supra* note 185, at 3 & 4-51, 3 & 4-94, L-A-2.

188. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1479.

189. ENDANGERED SPECIES COMMITTEE, APPLICATION FOR EXEMPTION BY THE BUREAU OF LAND MANAGEMENT TO CONDUCT 44 TIMBER SALES IN WESTERN OREGON 6-7 (May 15, 1992). *See* Portland Audubon Soc'y v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993) (holding that the Endangered Species Committee, the President, and the White House staff are subject to the Administrative Procedure Act's prohibition on ex parte communications and remanded the case to the Committee for evidentiary hearing, instead of granting environmental groups' motion for leave to conduct discovery).

190. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993). *See also* Seattle Audubon Soc'y v. Moseley, 798 F. Supp. at 1480.

191. Seattle Audubon Soc'y v. Espy, 998 F.2d at 704.

192. *Id.*

193. *Id.* New information that came to light after the ISC report was issued indicated that the spotted owl population was nearing extinction much more quickly than the Forest Service had originally thought. New information also

Therefore, the Forest Service had an obligation to at least examine the new information and explain why incorporating it "was not necessary or feasible."[194] The Ninth Circuit determined that "[i]t would not further NEPA's aims for environmental protection to allow the Forest Service to ignore reputable scientific criticisms that have surfaced with regard to the once 'model' ISC strategy."[195]

Finally, the Ninth Circuit ruled that the Forest Service FEIS violated NEPA because it failed to adequately address the proposed action's effect on other old growth dependent species.[196] In order to allow for the sort of reasoned decision-making contemplated by NEPA, a plan "destined to be the driving force behind various land-use decisions" must discuss the effects of the plan on other species within the old growth habitat.[197] The Forest Service failed to satisfy this requirement when it ignored the impact of timber harvests on other old-growth dependent species.[198]

The Ninth Circuit affirmed the district court's injunction of federal timber sales on affected Forest Service lands until the Forest Service considered intervening information and re-examined its chosen alternative.[199] The Forest Service must contemplate the impact of BLM's failure to adopt the ISC report, the Endangered Species Committee's decision to allow BLM timber sales in forests containing spotted owl habitat, the recently revealed scientific uncertainties surrounding designation of spotted owl habitat, and any other new, relevant, significant information.[200] The Forest Service must also rectify the FEIS' failure to address the effect of reduced spotted owl viability on other old growth-dependent species.[201]

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indicated that the high degree of spotted owl habitat fragmentation was the likely cause of declining spotted owl populations, and that additional harvest of remaining spotted owl habitat risked at least local extinctions. *See* Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1481 (W.D. Wash. 1992).

194. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 703-704.

201. *Id.*

C. BLM Violations

The Ninth Circuit also held that BLM violated NEPA, ruling that the agency failed to take a "hard look" at new information concerning the spotted owl and spotted owl habitat.[202] BLM admitted in its opposition to Portland Audubon Society's Statement of Material Facts Not in Dispute that "some responsible experts . . . believe that new information shows that the [strategy employed in the TMPs and articulated in the current EIS] is inadequate to preserve the northern spotted owl."[203] Under the Ninth Circuit's "rule of reason" standard,[204] BLM was obliged to carefully consider detailed information and allow public comment before deciding whether to supplement its EIS. The Ninth Circuit ruled that an SEIS should have been prepared because the scientific evidence available to BLM in 1987 contained significant new information relevant to environmental concerns.[205]

The Ninth Circuit dismissed BLM's attempt to invalidate timber sale injunctions on 2.5 million acres of land controlled by OCLA.[206] The court ruled that OCLA does not explicitly require the sale of 500 million board feet per year, but instead grants BLM discretion in setting timber harvest requirements.[207] BLM therefore could comply with both the injunction and with OCLA by harvesting less than 500 million board feet.[208]

The Ninth Circuit let stand the district court injunction against BLM timber sales contained in spotted owl habitat until

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202. Portland Audubon Soc'y v. Babbitt, 998 F.2d, 705, 708-09 (9th Cir. 1993).

203. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1501 (D. Or. 1992).

204. *Id.* at 1501. *See also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989) (application of "rule of reason" standard).

205. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993).

206. *Id.* at 709. For a discussion of the OCLA, see *infra* Part II.B.4.

207. *Id. See also* 43 U.S.C. § 1181a (1988).

208.

> [T]imber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

43 U.S.C. § 1181a (1988).

BLM completed an SEIS. The district court granted an injunction because the threatened harm to the environment would be irreparable and the balance of equities favored the injunction.[209] Once BLM's land was logged, there would be no opportunity for BLM to comply with NEPA by preparing an SEIS in response to significant and reliable new scientific information, so the Ninth Circuit affirmed the injunction.[210] However, the appellate court later modified the injunction on July 16, 1992 to allow the sale of downed timber and to allow an additional 750,000 board feet to be felled in order to remove that downed timber.[211]

V. THE *AUDUBON* RULINGS AND NEPA PRECEDENT

Portland Audubon Society and *Seattle Audubon Society* follow previous federal court decisions determining that agencies violate NEPA when they fail to consider whether current, reliable scientific information necessitates an SEIS.[212] While courts stop short of mandating an SEIS every time new information comes to light,[213] they insist that federal agencies examine the new information and fully explain whether that information merits an SEIS.[214] If an agency decides not to prepare an SEIS after reasonable consideration of any new, reliable, and significant information, its decision will be overturned by the courts only if the decision was arbitrary and capricious.[215]

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209. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D. Or. 1992) (quoting Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1158 (9th Cir. 1988)), *modified*, 1992 WL 176353 (D. Or. July 16, 1992), *aff'd sub nom.* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

210. Portland Audubon Soc'y v. Lujan, 998 F.2d at 708. The district court ordered BLM to submit a timetable for completion of an SEIS within 30 days of the district court's ruling. At that time, Portland Audubon Society would be allowed fifteen days to comment on the timetable. The court would then promulgate a final timetable for BLM's development of an SEIS. 795 F. Supp. at 1509-10.

211. Portland Audubon Soc'y v. Babbitt, 1992 WL 176353, at 1.

212. *See* Sierra Club v. Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983).

213. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

214. *Id.*

215. *See generally* Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569, 584-91 (1990).

The Supreme Court has stated that the primary function of an EIS under NEPA is "to insure a fully informed and well-considered decision."[216] In order to fulfill this role, an EIS must "set forth sufficient information for the general public to make an informed evaluation."[217] If the agency is presented with new, scientifically reliable information, it must at least consider whether that information merits an SEIS.[218] This assures that the agency and the general public possess enough information to assess the environmental impacts of the agency's proposed action.

The Supreme Court defers to agency decisions regarding whether or not to prepare an SEIS as long as the agency takes a "hard look" at the new information.[219] In *Marsh v. Oregon Natural esources Council*,[220] for example, the Corps of Engineers' decision to not compile an SEIS did not violate NEPA because the Corps did not ignore new information, but carefully scrutinized it and determined that the information did not necessitate an SEIS due to its lack of reliability.[221] The Court stated that "[t]here is little doubt that if all of the information contained in the [reports of new information] was both new and accurate, the Corps would have been required to prepare a second supplemental EIS,"[222] but it determined that the Corps fulfilled its NEPA duty by taking "a hard look at the proffered evidence" and determining "based on careful scientific analysis that the new information was of exaggerated importance."[223]

However, the Corps did violate NEPA when it failed to even consider significant and reliable new information. In *Sierra Club v. United Army Corps of Engineers*,[224] construction of the

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216. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978).

217. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011, 1029 (2d Cir. 1983) (citations omitted).

218. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 370-71 (1989); 40 C.F.R. § 1502.9(c) (1993).

219. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

220. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

221. *Id.* at 364-65.

222. *Id.* at 385.

223. *Id.*

224. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983).

Westway project, a proposed Manhattan highway, was under consideration.[225] The Corps, which had to determine whether to issue a dredge or fill permit for the project's construction, based its draft EIS (which endorsed the project) on findings that the area where the construction was to take place was a biological wasteland, devoid of fish life.[226] However, comments by FWS and EPA refuted this claim, and a subsequent study showed that a substantial amount of fish life occupied the project area.[227] The Corps neither examined the new information nor responded to the concerns of the comment agencies: it performed no new studies, collected no additional information, made no further inquiries.[228]

According to the Second Circuit, the Corps violated NEPA by failing to take a "hard look" at the new information, and failing to compile adequate information regarding the environmental impacts of the proposed project, given that the studies upon which the Corps' EIS were based were known to be flawed even before the new information was released.[229] The court made clear that where "new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives [arise] . . . [t]here must be a good faith, reasoned analysis in response."[230] The court therefore affirmed the district court's injunction of the Westway project until the Corps completed an SEIS.[231] The Corps eventually dropped the project from consideration, and the highway was never completed.

NEPA's procedural obligations therefore allow the court to find an agency in violation where significant new, scientifically reliable information is not at least examined by that agency in determining whether an EIS completed prior to the introduction of the new information must be supplemented. The Ninth Circuit adhered to this standard in *Portland Audubon Society* and *Seattle Audubon Society* when it determined that the Forest Service and BLM violated NEPA by acting arbitrarily and capriciously in failing to examine new, reliable, and scientifically significant information

225. *Id.* at 1017.
226. *Id.* at 1018.
227. *Id.* at 1022-23.
228. *Id.* at 1030-31.
229. *Id.* at 1031.
230. *Id.* at 1030.
231. *Id.* at 1049.

before determining that an SEIS was unnecessary.[232] Unlike the Corps in the *Marsh* case, neither the Forest Service nor BLM disputed the claim that the new information at issue was both relevant and reliable. The Forest Service EIS itself stated that the "new information" (i.e., BLM's failure to adopt the ISC report) would invalidate the FEIS assessment of environmental impacts.[233] BLM admitted that new information, not considered when the current EIS was prepared, had been generated by reliable experts and showed that BLM's current management plan inadequately protected the spotted owl.[234]

NEPA demands that federal agencies assemble, analyze and publicly disclose accurate, up-to-date information regarding environmental impacts and consequences of a proposed project before implementing such a project. In *Portland Audubon Society* and *Seattle Audubon Society*, the Ninth Circuit affirmed the courts' willingness to enforce this obligation. Agencies may underestimate the importance of NEPA because the statute does not allow the courts to reverse substantive agency decisions on their merits. This attitude toward NEPA's impact is a mistake, however. If an agency fails to consider new, reliable, significant information before deciding whether to supplement its EIS, or if an agency's consideration of the new information is arbitrary or capricious, judicial challenges to the agency's EIS may succeed by enjoining agency actions. *Portland Audubon Society* and *Seattle Audubon Society* successfully insist that federal agencies not ignore information regardless of whether the information comes out before or after the EIS.

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232. Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703-04 (9th Cir. 1993); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708-09 (9th Cir. 1993).

233. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1480 (W.D. Wash. 1992).

234. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1501 (D. Or. 1992).

VI. "EXECUTIVE REMAND": IMPACT OF THE CLINTON ADMINISTRATION'S ENDORSEMENT OF OPTION 9

In *Portland Audubon Society* and *Seattle Audubon Society*, the Ninth Circuit affirmed injunctions issued by district courts, which halted Forest Service and BLM timber sales on land inhabited by the spotted owl until the agencies complied with NEPA and NFMA by completing SEISs that consider new, scientifically reliable information.[235] The injunctions do more than simply delay the timber harvest. The court's willingness to use injunctive relief has caused an "executive remand," forcing the executive branch to reconsider its approach toward public forest land management. Consequently, the results of *Portland Audubon Society* and *Seattle Audubon Society* in terms of timber management will be far-reaching and dramatic.

This substantive change in the executive's approach to forest management is demonstrated by the Clinton Administration's response to the Ninth Circuit decisions. Following the injunction, the Clinton Administration ordered preparation of one final supplemental EIS (FSEIS) designed to satisfy all of the measures required by the Ninth Circuit.[236] If the Clinton Administration's FSEIS adequately considers the information highlighted by the Ninth Circuit, preparing the court-ordered SEISs by the Forest Service and BLM will no longer be necessary,[237] and the executive's approach to federal forest land management will substantially change in focus.

Prior to the Ninth Circuit decisions in *Portland Audubon Society* and *Seattle Audubon Society*, President Clinton convened a "Forest Summit" to address the continuing and seemingly unresolvable conflict between environmental concerns and timber harvest levels on federally-owned Pacific Northwest forest

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235. *See supra* notes 6-9 and accompanying text.

236. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (FSEIS) ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994) [hereinafter 1994 FSEIS].

237. The Clinton Administration's FSEIS applies to the land management decisions of both the Forest Service and the BLM. By preparing one document, the Administration answers both the Forest Service and the BLM procedural defects raised by the Ninth Circuit.

land.[238] The Forest Summit attempted to reach a compromise acceptable to all parties to the conflict: a harvest level that would both provide sufficient timber industry employment and sufficient protection of old-growth habitat, the northern spotted owl, and other old growth-dependant species. President Clinton met with scientists, economists, representatives from environmental groups and the timber industry, and others on April 2, 1993 in Portland, Oregon to field concerns, comments, and proposals regarding management of the Pacific Northwest and northern California federal lands.[239]

Following President Clinton's highly publicized Forest Summit, the Clinton Administration assembled the Forest Ecosystem Management Assessment Team (FEMAT) to compile and evaluate management alternatives. After considering thirteen different options in a DSEIS, the Clinton Administration announced its support of "Option 9."[240] Option 9 proposes to reduce harvest levels to one-fourth of the 1980s levels.[241] Option 9 also puts 1.7 million acres off limits to logging, places limits on logging in seven million additional acres, allows timber sales in 4.9 million acres, and sets aside 1.5 million acres for experimental harvesting.[242] Additional provisions include: 300-600 foot-wide no-logging buffer zones along rivers to protect watersheds and salmon,[243] diminished tax subsidies for log exports,[244] and $1.2 billion for retraining programs, economic development, and watershed restoration over the next five years.[245]

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238. U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (DSEIS) FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL, at 1-2 (1993).

239. *Id.*

240. *Id.*

241. *Id.* at S-16.

242. *Id.* at 2-40 to 2-42.

243. *Id.* at 2-41.

244. Jon Jefferson, *Timmmber! How Two Lawyers and a Spotted Owl Took a Cut Out of the Logging Industry*, A.B.A. JOURNAL 81, 83 (Oct. 1993); U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (DSEIS) FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL, at 1-1 (1993).

245. Jefferson, *supra* note 244, at 83; U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (DSEIS) FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL, at 1-1 (1993).

On February 24, 1994, in an attempt to ensure that the court injunction on federal timber sales will be lifted, the Clinton Administration announced a revised FSEIS that provided some additional protection for natural resources.[246] Specifically, the revised version of the FSEIS sets aside an additional ten million acres to create buffers along intermittent streams and around owl sites within logging areas, and to provide reserves on the Olympic Peninsula to protect the threatened marbled murrelet.[247] While the environmental community expressed reserved enthusiasm over the revision, the timber industry was not at all reserved in voicing its criticism.[248] Following a thirty-day public comment period and possible further revisions, the Administration submitted a final record of decision to the Ninth Circuit.

On June 6, 1994, Judge Dwyer lifted the three year long logging ban that had been affirmed by the Ninth Circuit in *Seattle Audubon Society*.[249] The federal government had petitioned Judge Dwyer to dissolve the injunction, arguing that Option 9 fulfilled the requirements set forth in the *Seattle Audubon Society* ruling.[250] Eleven of the original environmental plaintiffs, including Seattle Audubon Society and Portland Audubon Society, did not object to the proposed lifting of the ban because the environmental groups planned to pursue the legality of Option 9 in another lawsuit.[251] None of the parties anticipated that the dissolution

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246. 1994 FSEIS, *supra* note 236.

247. *Id.*

248. "This plan is an evolutionary step in the right direction, but it still stumbles when it comes to adequately protecting the fragile, disappearing ancient forests of the Northwest and all the species that depend on it," stated Brock Evans, vice president of the National Audubon Society. "This proposal gives the environmentalists everything they have ever asked for, and lacks any resemblance of a balanced solution for the hard-working citizens of the Northwest," stated James Geisinger, president of the Northwest Forestry Association. Kathie Durbin, *Forests: New Plan, Old Fight*, THE OREGONIAN, Feb. 24, 1994, at C1.

249. Eric Pryne, *Dwyer Lifts Logging Ban in Northwest's National Forests, But Lawsuits Still Loom*, SEATTLE TIMES, June 7, 1994, at A1, A9.

250. *Judge Urged Not To Lift His Timber-Sale Injunction*, ASHLAND MAIL TRIBUNE, June 1, 1994, at A1.

251. Eric Pryne, *Group to Seek New Logging Ban*, SEATTLE TIMES, June 7, 1994, at B1, B2. *See* Plaintiffs' Supplemental Complaint for Declaratory and Injunctive Relief, Seattle Audubon Soc'y v. Espy and Babbitt, No. 92-479-WD (W.D. Wash.) (filed May 19, 1994).

of the injunction would have much effect, however, because new legal challenges to Option 9 were already pending.[252]

On May 19, 1994, Portland Audubon Society and Seattle Audubon Society filed a complaint in the Western District of Washington, alleging that the adoption of Option 9 by the Forest Service and BLM violated the National Environmental Policy Act and the National Forest Management Act.[253] Plaintiffs echoed their original claims and argued that Option 9 failed to ensure that "viable populations" of northern spotted owls and other old growth dependent species would be maintained in the Pacific Northwest and Pacific Southwest Forest Regions, in violation of section 1604(g)(3)(B) of NFMA and implementing regulations 36 C.F.R. §§ 219.8 and 219.19.[254] With regard to their NEPA claim, plaintiffs alleged that Option 9: (1) failed to disclose all known and likely environmental consequences of the continued logging allowed to the northern spotted owl and other old growth dependent species; (2) failed adequately to respond to contradictory scientific facts and opinions; (3) failed to disclose the cumulative effects of the actions allowed under Option 9 when combined with past and reasonably foreseeable actions on non-federal lands that would affect old growth dependent species; and (4) failed to assess of disclose the economic consequences of the actions allowed under Option 9, including the economic benefit of leaving old growth forests in place.[255]

In all likelihood, Judge Dwyer will hear oral argument concerning the plaintiffs' allegations during the fall of 1994 and rule shortly thereafter as to whether Option 9 complies with NEPA and NFMA, and whether Option 9 satisfactorily fulfills the requirements set forth by the Ninth Circuit in *Seattle Audubon Society*. If the Audubon Societies' challenge is unsuccessful, Option 9 will be fully implemented as the governing land management plan for all pacific northwest Forest Service and BLM public lands, and the

252. Doug Conner, *Timber Sales Ban Lifted; Little Impact Seen*, L.A. TIMES, June 7, 1994, at A4.

253. Plaintiffs' Supplemental Complaint for Declaratory and Injunctive Relief, Seattle Audubon Soc'y and Portland Audubon Soc'y v. Espy and Babbitt, No. 92-479-WD (W.D. Wash.) (filed May 19, 1994).

254. *Id.*

255. *Id.*

injunction dissolved by Judge Dwyer in June 1994 will not be reimposed.

Option 9 is intended to go beyond the spotted owl, to encompass an ecosystem-wide forest management process. Its stated purpose is to "take an ecosystem approach to forest management; maintain and restore biological diversity as it applies to late-successional and old-growth forest ecosystems; maintain a sustained yield of renewable natural resources, including timber, other forest products, and other forest values; and maintain rural economies and communities."[256] Thus the NEPA injunctions on federal timber sales are forcing the Clinton Administration to reconsider public forest management on the basis of best available scientific information, and the result will eventually be a significant change of focus for federal timber management.[257] In effect, NEPA, through the courts, seems to have performed an important educational function for the executive branch. While NEPA injunctions have in the past forced Congress to take action,[258] here, the statute seems to have prompted important rethinking on the part of the executive—in effect, an "executive remand" of the issue of public forest land management. Consequently, although enforcement of anything but NEPA's procedural provisions has been rejected by the judiciary,[259] the statute has influenced federal

256. DSEIS FOR THE MANAGEMENT OF THE NORTHERN SPOTTED OWL, *supra* note 238, at 1-3.

257. *See* Phil Cogswell, *The Changing Guardians: The Administration's Approach to Natural Resources is Nothing Short of a Revolution*, THE OREGONIAN, Mar. 13, 1994, at J1, J4.

258. NEPA injunctions have caused "congressional remands," including passage of specific legislation authorizing the Alaska Oil Pipeline and the enactment of a new system for Pacific Northwest electric power planning. Similarly, a NEPA injunction arising out of California v. Block, 690 F.2d 753 (9th Cir. 1982) prompted Congress to short circuit the Roadless Area Review and Evaluation III process and pass nineteen wilderness bills in 1984 alone, adding nine million acres to the National Wilderness Preservation System. Environmental conflicts concerning forest management have also led to "congressional remand," as demonstrated by the disputes at issue in Sierra Club v. Hardin, 325 F. Supp. 99, 121-22 (D. Alaska 1971); West Virginia Div. of Izzak Walton League of America, Inc. v. Butz, 552 F.2d 945 (4th Cir. 1975); and Zieske v. Butz, 406 F. Supp. 258 (D. Alaska 1975). These disputes eventually led Congress' to enact the National Forest Management Act in 1976. *See* Michael C. Blumm, *The Origin, Evolution and Direction of the United States National Environmental Policy Act*, 5 (AUSTRALIAN) ENVTL. L. AND PLANNING J. 179, 193 n.139 (1988).

259. Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense

environmental policy in other, perhaps even more far-reaching ways, by providing the impetus for Congress or the executive branch to rethink its approach toward public land management.

VII. CONCLUSION

The *Portland Audubon Society* and *Seattle Audubon Society* decisions do not mark a departure from courts' current interpretation of when NEPA imposes a duty to consider information in preparing an EIS or in deciding whether to prepare an SEIS. Nevertheless, they are significant. The Ninth Circuit rulings and the Clinton Administration's response signal a change in our approach to management of forests on public lands. For over a decade, the Portland and Seattle Audubon Societies have fought to force the Forest Service and BLM to consider information indicating that current forest management plans would incur significant risk of spotted owl extinction. After almost ten years of litigation, the Ninth Circuit issued a directive to the federal agencies that such information cannot be ignored or categorically dismissed. The Clinton Administration's reaction signals a change in approach for the Forest Service and BLM, and indeed for the entire executive branch, from attempting to sidestep the requirements of NEPA to a greater willingness to prepare EISs that fairly and accurately reflect reliable scientific information, whether or not that information may adversely affect allowable yearly timber harvests. The impact of this change in the executive branch's approach toward management of forests on public lands will be far-reaching, affecting federal agencies' approach to management of public forest land even after the injunctions are lifted and timber harvests resume in the Pacific Northwest federal forests.

Council, 435 U.S. 519, 558 (1978).