Public Land & Resources Law Review

Volume 17 Article 8

June 1996

Douglas County v. Babbitt and the New Displacement Exemption: NEPA Loses More Ground

Erika Johnson

NOTE

DOUGLAS COUNTY V. BABBITT AND THE NEW DISPLACEMENT EXEMPTION: NEPA LOSES MORE GROUND

Erika Johnson*

I. INTRODUCTION

In 1969, Congress passed the National Environmental Policy Act (NEPA)[1] and made environmental protection a part of the mandate of every federal agency and department.[2] Specifically, NEPA was designed to ensure:

> that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts [of proposed federal actions]; [and] . . . that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.[3]

To carry out its over-arching policy of ensuring that agencies include an examination of environmental consequences in their decisionmaking processes, NEPA requires agencies to comply with a number of procedural requirements designed to assess the environmental impacts of their actions.[4] The heart of NEPA's procedural requirements is the environmental impact statement (EIS). NEPA requires that:

> to the fullest extent possible . . . all agencies of the Federal government shall . . . include in every . . . major Federal action(s) significantly af-

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* J.D. expected 1997, University of Montana School of Law.

1. 42 U.S.C. §§ 4321-4370d (1994).

2. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 1.04 (2d ed. 1992) (citing Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971)).

3. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

4. 42 U.S.C. § 4332(2).

> fecting the quality of the human environment, a detailed statement . . . on the environmental impact of the proposed action, . . . [and] alternatives to the proposed action . . . .[5]

NEPA does not explicitly exempt any federal agency action from its requirements.[6] However, over the years Congress and the courts have created exemptions for a limited number of circumstances.[7] For the most part, these exemptions represent an evolutionary process of defining and redefining NEPA in an effort to give it the utility and meaning Congress intended. However, recent cases suggest that this tinkering with NEPA may have gone too far. Environmentalists, county control proponents,[8] and the federal government alike have used various NEPA exemption arguments to either further their interests, or to obstruct actions adverse to their interests.[9] The granting of NEPA exemptions in these cases necessarily raises a difficult question: Are the exemptions part of the evolutionary process of strengthening and fine-tuning NEPA, or do the exemptions represent a whole new evolutionary process—the gradual erosion of NEPA by its numerous exemptions?

The Ninth Circuit recently faced this question in the case *Douglas County v. Babbitt*.[10] The issue in *Douglas County* was whether NEPA applied to critical habitat designation under the Endangered Species Act[11] (ESA).[12] The court built upon the reasoning underlying two prior NEPA exemption cases, *Merrell v. Thomas*,[13] and *Pacific Legal Foundation v. Andrus*,[14] and granted NEPA exemption for ESA critical habitat designations. The Court held that ESA critical habitat procedures "displaced" NEPA procedures, and therefore, NEPA did not apply to critical habitat

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5. 42 U.S.C. § 4332(2)(C). For a complete list of the required contents of an EIS, see 42 U.S.C. § 4332(2)(C)(i)-(v).

6. *See* 42 U.S.C. § 4332(2)(C).

7. For an indepth review of all statutory and judicial exemptions, see MANDELKER, *supra* note 2, § 5.03.

8. The county control movement is also known as the "wise use" movement, or "custom and culture" movement, and refers to attempts by landowners, logging companies, and families dependent on agriculture and the forest products industry to exert management authority and traditional uses on public lands by and through local governments. *See* John W. Hart, *National Forest Planning: An Opportunity for Local Governments to Influence Federal Land Use*, 16 PUB. LAND L. REV. 137 n.13 (1995).

9. *See* MANDELKER, *supra* note 2, § 11.02; *see also* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384 (D.C. Cir. 1973) ("An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance with any impact statement as a tactic of litigation and delay.").

10. 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996).

11. 16 U.S.C. §§ 1531-1544 (1994).

12. *Douglas County*, 48 F.3d at 1501.

13. 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

14. 657 F.2d 829 (6th Cir. 1981).

designation.[15] As a result of this holding the Secretary of the Interior (Secretary) is not obligated to draft an EIS when making critical habitat designations.[16]

The displacement rule has never before emerged in the progeny of NEPA exemption cases. This Note attempts to shed light on how the court reached the displacement exemption, whether the displacement exemption carved a new NEPA exemption or simply restated an existing exemption, and finally, how the displacement exemption might affect the future practice of NEPA law. Part II of this Note reviews the facts and procedural history of *Douglas County*. Part III provides a discussion of the legal background of NEPA exemptions. Part IV contains an analysis of how the displacement rule fits into the context of NEPA exemptions and how it might affect the future of NEPA law. Finally, Part V provides perspective on whether the *Douglas County* decision as a whole will advance or frustrate the purposes of NEPA.

II. FACTUAL AND PROCEDURAL HISTORY OF *DOUGLAS COUNTY*

Douglas County is one of many cases in the ongoing saga involving the Northern Spotted Owl (owl) and the timber industry. In 1987, a number of conservation organizations petitioned to list the owl as endangered or threatened both in the Olympic Peninsula in Washington and in the Oregon Coast Range.[17] Initially, the Secretary found that the petition was not warranted.[18] However, in response to litigation challenging this finding, the Secretary listed the owl as a threatened species on June 26, 1990.[19]

Upon listing the owl, the Secretary deferred concurrent designation of critical habitat on grounds that such critical habitat was not "determinable" at that time.[20] Again, litigation challenging this finding ensued and resulted in a court order compelling designation of critical habitat.[21]

On May 6, 1991, the Secretary issued his proposed regulation designating 11,639,195 acres of federal, state, tribal, and private lands as critical habitat, and announced he would hold public hearings and take com-

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15. *Douglas County*, 48 F.3d at 1502.

16. *Id.*

17. Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988).

18. *Id.* at 481. The ESA directs the Secretary to make a finding as to whether the petition is "warranted" based on the information presented. 16 U.S.C. § 1533(b)(3)(A).

19. 48 F.3d at 1498. The owl is listed at 50 C.F.R. § 17.11 (1994) (proposal for listing at 55 Fed. Reg. 26,194 (1990)).

20. Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991). The ESA requires "to the maximum extent prudent and determinable" critical habitat to be designated concurrently with the listing of a species. 16 U.S.C. § 1533(a)(3)(A).

21. 758 F. Supp. at 629-30.

ments on the proposal.[22] The ESA requires the Secretary to designate habitat "on the basis of the best scientific data available" and to take "into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[23] In making the proposed designation, the Secretary relied on a preliminary economic analysis prepared by the U.S. Fish and Wildlife Service (FWS).[24]

The Secretary included in his May 6, 1991 proposal an announcement that he did not need to prepare an environmental assessment[25] for the designation of critical habitat.[26] The Secretary cited two authorities on which he based his presumption. First, he cited *Pacific Legal Foundation* for the holding that NEPA did not apply to the listing of endangered species.[27] Second, he cited a letter from the federal Council on Environmental Quality (CEQ)[28] urging the Secretary to stop preparing EISs for actions under section 4 of the ESA.[29] On May 30, 1991, the plaintiff, Douglas County (County), submitted its formal comments to the Secretary, arguing that the Secretary was obligated to comply with NEPA by preparing an EIS.[30]

After the initial comment period, the FWS prepared a second economic analysis report in which it included an analysis of employment and revenue losses in the timber industry in each county affected by the designation.[31] Based on this analysis and comments received, the Secretary issued a revised designation proposal eliminating all private, tribal, and some state owned lands, reducing the critical habitat designation to 8,240,160 acres.[32] Upon issuing the revised proposal, the Secretary reopened the comment period and reaffirmed that no EIS was necessary.[33]

In January of 1992, after the close of the second comment period, the FWS prepared its final economic analysis and the Secretary issued the

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22. *Douglas County*, 48 F.3d at 1498 (citing 56 Fed. Reg. 20,816 (1991)).

23. 16 U.S.C. § 1533(b)(2).

24. Douglas County v. Lujan, 810 F. Supp. 1470, 1472 (D. Or. 1992).

25. An environmental assessment is a NEPA document used to determine whether the environmental impact of the proposed federal action is of such magnitude as to warrant preparation of an EIS. 40 C.F.R. § 1508.9 (1994). For purposes of this Note, EIS will be used to generically refer to NEPA compliance documents.

26. 48 F.3d at 1498 (citing 56 Fed. Reg. 20,824 (1991)).

27. *Id.*

28. The CEQ's interpretation of NEPA "is entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

29. 48 F.3d at 1498 (citing 48 Fed. Reg. 49,244 (1983)). Section 4 of the ESA provides for the determination and listing of endangered and threatened species and for the designation of critical habitat. 16 U.S.C. § 1533.

30. 48 F.3d at 1498.

31. Douglas County v. Lujan, 810 F. Supp. at 1473.

32. *Id.* (citing 56 Fed. Reg. 40,002 (1991)).

33. *Id.*

final regulation, reducing the designation of critical habitat to approximately 6.9 million acres of purely federal land.[34] On September 25, 1991, the County filed suit against the Secretary alleging he failed to comply with NEPA.[35] The County asserted that the Secretary must prepare an EIS because, it argued, designating critical habitat qualified as a "major federal action" to which NEPA's procedural requirements apply.[36] In response, the Secretary contended that NEPA did not apply to the designation of critical habitat "for the same reasons the court in *Pacific Legal Foundation* held" that NEPA did not apply to the listing determination.[37] Relying on *Pacific Legal Foundation*, the Secretary argued that Congress did not intend for NEPA to apply to "environment-enhancing agencies."[38]

The district court rejected the Secretary's arguments and granted summary judgment for the County.[39] The district court did not find determinative the Sixth Circuit's holding in *Pacific Legal Foundation* that Congress intended to exempt from NEPA agencies acting under environment-enhancing statutes.[40] The district court distinguished listing determinations from critical habitat designations and stated that "the rationales for the court's conclusion in *Pacific Legal Foundation v. Andrus*, are simply not present when the reasoning is examined in terms of critical habitat designation."[41] The district court declined to depart from the express language of NEPA and declined to follow the Sixth Circuit's holding stating, "[T]he Ninth Circuit has taken the position that NEPA applies to every major federal action absent a clear and unavoidable statutory conflict."[42] The district court ordered that the final designation of critical habitat be set aside until the Secretary complied with NEPA, but stayed the order pending appeal.[43]

On appeal, the Ninth Circuit reversed the district court's ruling on the NEPA issue and held that NEPA does not apply to critical habitat designation under the ESA because:

(1) Congress intended that ESA critical habitat procedures displace the NEPA requirements;[44]

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34. *Id.* (citing 57 Fed. Reg. 1796 (1992)).
35. *Id.* at 1474. The County raised several other claims beyond the scope of this Note against the Secretary.
36. *Id.* at 1477.
37. *Id.* at 1478.
38. *Id.* at 1478, 1481 (citing *Pacific Legal Foundation*, 657 F.2d at 838 n.11).
39. *Id.* at 1485.
40. *Id.* at 1481-83.
41. *Id.* at 1483.
42. *Id.* at 1482.
43. *Douglas County*, 48 F.3d at 1499.
44. *Id.* at 1503.

(2) NEPA does not apply to actions that do not change the physical environment;[45] and

(3) the ESA furthers the goals of NEPA without requiring an EIS.[46]

This holding can be best understood in the context of prior law exempting agencies from NEPA compliance.

III. LEGAL BACKGROUND OF NEPA EXEMPTIONS

A. *The Functional Equivalence Exemption*

The evolution of NEPA exemptions began with the functional equivalence exemption, first articulated in 1973 in *Portland Cement Association v. Ruckelshaus*.[47] In that case, the court concluded that the EPA's requirements under section 111 of the Clean Air Act—imposing emission standards reflecting "the best system of emission reduction" and "taking into account the cost of achieving such reduction"[48]—was the functional equivalent of the NEPA requirement that agencies consider the environmental impacts of their actions.[49] The court reasoned that complying with section 111 would necessarily require preparation of a statement similar to an EIS setting forth the environmental considerations.[50] Further, the court reasoned that the comments submitted by other agencies concerning the proposed emissions standards would be part of the public record and would thereby afford the public participation contemplated by NEPA.[51] In finding the necessary functional equivalence between NEPA and section 111 of the Clean Air Act, the court held:

> Although the rule-making process may not import the complete advantages of the structured determinations of NEPA into the decision-making of EPA, it does, in our view strike a workable balance between some of the advantages and disadvantages of NEPA.[52]

The *Portland Cement* court also addressed a corollary to the functional equivalence exemption. This corollary espouses the principle that specific statutes prevail over general statutes addressing the same subject.[53] In the context of environmental statutes, the corollary indicates that legisla-

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45. *Id.* at 1505.
46. *Id.* at 1506.
47. 486 F.2d 375 (D.C. Cir. 1973).
48. 42 U.S.C. § 7411(a)(1) (1994).
49. *Portland Cement*, 486 F.2d at 384 ("What is decisive . . . is . . . that section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement.").
50. *Id.* at 385.
51. *Id.* at 386.
52. *Id.*
53. *See* Alabama *ex rel.* Siegelman v. Environmental Protection Agency, 911 F.2d 499, 504 (11th Cir. 1990).

tion designed to address specific environmental concerns, such as the Clean Air Act, is not subject to legislation designed to address general environmental concerns, such as NEPA.[54]

In addressing this corollary, the court undertook a review of legislative history to determine whether Congress intended a broad NEPA exemption for agencies operating under specific environment-enhancing statutes.[55] However, finding the legislative history thoroughly ambiguous,[56] the court refrained from making any broad NEPA exemption for environment-enhancing statutes.[57] Instead, the court confined its holding to "a narrow exemption from NEPA applicable to determinations under section 111 of the Clean Air Act."[58] As support for this narrow exemption, the court discussed both the functional equivalence of NEPA and section 111 as outlined above.[59] The court further indicated that although NEPA was designed to protect the environment, it may actually hinder those agencies charged with protecting the environment as the EIS provides opponents of environmental protection a tactic of litigation and delay.[60]

In response to the *Portland Cement* holding, Congress subsequently provided the EPA a statutory exemption from NEPA compliance for certain actions taken under the Clean Air Act.[61] Congress has also provided similar statutory exemptions for other environmental regulatory programs including the Clean Water Act.[62]

In the functional equivalence exemption cases, it is difficult to ascertain whether the courts place more weight on the functional equivalence argument or on the broad corollary that NEPA need not apply to agencies already charged with protecting the environment. However, one court

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54. *See* 486 F.2d at 381 ("[T]here is a serious question whether NEPA is applicable to environmentally protective regulatory agencies."). *See also id.* at 383-84 ("[N]EPA operates, in protection of the environment, by a broadly applicable measure that only provides a first step. The goal of protecting the environment requires more than NEPA provides, i.e. specific assignment of duties to protection agencies, in certain areas identified by Congress as requiring extra protection.").

55. *Id.* at 381-84.

56. *Id.* at 383 & n.31.

57. *Id.* at 387.

58. *Id.*

59. *Id.* at 384-87.

60. *Id.* at 384.

61. MANDELKER, *supra* note 2, § 5.03[8]. The statutory exemption in the Clean Air Act is codified at 42 U.S.C. § 7411(a)(1) (1994) ("No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]."). *See also* the Energy Supply and Environmental Coordination Act at 15 U.S.C. § 793(c)(1) (restating Clean Air Act exemption).

62. 33 U.S.C. § 1371(c)(1) (1994) ("[N]o action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].").

emphatically stated its position that an agency's environment-enhancing nature should be given no weight in determining whether a functional equivalence exemption is warranted:

> The mere fact an agency has been given the role of implementing an environmental statute is insufficient to invoke the "functional equivalent" exception. To extend the doctrine to all cases in which a federal agency administers a statute which was designed to preserve the environment would considerably weaken NEPA, rendering it inapplicable in many situations.[63]

The functional equivalence exemption represented a departure from the strict interpretation that NEPA applies to all federal acts absent Congress' express statutory exemption. Since the 1973 *Portland Cement* decision, several courts have granted functional equivalence exemptions. However, as *Jones v. Gordon* and the cases discussed below indicate, courts are still divided on how to best interpret and apply the functional equivalence exemption. One legal scholar notes that courts have typically limited the functional equivalence exemption to programs administered by the EPA only.[64] Perhaps this is because courts acknowledge the warning expressed in *Jones*, that broadly interpreting and applying the functional equivalence exemption only serves to weaken and trivialize NEPA. Further, the exemption fails to give effect to Congress' express mandate that NEPA applies to all major agency actions significantly affecting the quality of the human environment.

B. *The Irreconcilable Conflict Exemption*

Aside from the functional equivalence exemptions, other judicial exemptions emerged out of the litigation following NEPA's enactment. Of particular significance is the irreconcilable conflict exemption, which courts have used to grant a NEPA exemption when an agency's statutory obligations preclude compliance with NEPA.[65] The irreconcilable conflict exemption first emerged from the United States Supreme Court's holding in *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma.*[66]

In *Flint Ridge* the Court considered whether the Department of Housing and Urban Development (HUD) was required to file an EIS in connection with actions under the Interstate Land Sales Full Disclosure Act[67]

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63. Jones v. Gordon, 621 F. Supp. 7, 13 (D. Alaska 1985).
64. MANDELKER, *supra* note 2, § 5.03[8].
65. MANDELKER, *supra* note 2, § 5.03[5][a].
66. 426 U.S. 776 (1976).
67. 15 U.S.C. §§ 1701-1720 (1994).

(Disclosure Act).[68] The Disclosure Act required developers of unimproved land subdivisions to disclose information to potential buyers regarding such information as a subdivision's access, utilities, and proposed improvements.[69] HUD argued that the Disclosure Act's thirty-day time limit for reviewing a developer's disclosure statement made preparation of an EIS impossible.[70] The Court agreed, finding that the thirty-day limit for HUD's review of disclosure statements was mandatory and was intended to protect developers from costly delays.[71] The Court held that activities under the Disclosure Act were exempt from NEPA because the time constraints under the Disclosure Act presented an "irreconcilable and fundamental conflict" with the EIS requirement.[72]

A later case, *Jones v. Gordon*,[73] qualified the irreconcilable conflict rule. In *Jones*, the court held that the ninety-day time limit for granting or denying a permit to capture whales under the Marine Mammal Protection Act[74] (MMPA) did not present an irreconcilable conflict with the EIS requirement and therefore did not warrant NEPA exemption.[75] Relying on language in MMPA giving the Secretary of Commerce authority to "prescribe such procedures as are necessary to carry out this section," the court found that the time period was discretionary and could be delayed in order to prepare an EIS.[76] The court distinguished *Flint Ridge*, stating that unlike the time period of the MMPA, the time period of the Disclosure Act, at issue in *Flint Ridge*, was mandatory once triggered, and could not be delayed because that statute was designed to "protect developers from costly delays" in HUD's approval process.[77]

Flint Ridge and *Jones* are significant because they not only established the irreconcilable conflict rule, but represented another departure from Congress' express mandate that NEPA applies to all major federal actions significantly affecting the quality of the human environment. Although *Flint Ridge* was the first articulation of the irreconcilable conflict exemption, *Jones* was especially important as it drew a distinction between mandatory and discretionary duties under a particular statute and narrowly confined the irreconcilable conflict exemption to be applicable only to those statutes in which mandatory actions conflicted with NEPA compli-

68. *Flint Ridge*, 426 U.S. at 778.
69. *Id.* at 779.
70. *Id.* at 787.
71. *Id.* at 790-91.
72. *Id.* at 788.
73. 792 F.2d 821 (9th Cir. 1986).
74. 16 U.S.C. § 1361-1421 (1994).
75. *Jones*, 792 F.2d at 825.
76. *Id.* at 826 (citing 16 U.S.C. § 1374(d)(1)).
77. *Id.*

ance.

However, a line of cases later emerged that expanded the reach of the irreconcilable conflict rule.[78] One of these cases, *Pacific Legal Foundation*, addressed whether the absence of agency authority to consider environmental factors when listing endangered species under ESA constituted an irreconcilable conflict precluding preparation of an EIS.[79]

C. *Expansion of the Irreconcilable Conflict Rule*

1. Pacific Legal Foundation v. Andrus

In *Pacific Legal Foundation*, the Sixth Circuit confronted whether NEPA applied to the process of listing threatened or endangered species under the ESA.[80] The plaintiff, Pacific Legal Foundation (PLF), argued that since Congress had not fashioned an exemption in the ESA, and since the ESA listing procedures contained no time constraints presenting an irreconcilable conflict, the Secretary must comply with NEPA.[81] Further, NEPA's language requiring compliance "to the fullest extent possible" was not a "loophole," but a mandate requiring federal agencies to comply absent a statutory exemption or an irreconcilable conflict.[82]

The Secretary argued that the ESA gave him no authority or discretion to consider environmental factors when listing a species, and thus presented an irreconcilable conflict warranting NEPA exemption.[83] To support this argument, the Secretary cited language in section 4 of the ESA requiring him to list a species only on the basis of the "best scientific and commercial data available," and upon a finding of at least one of five factors, which are: (A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range; (B) overutilization for commercial, sporting, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[84] Further, the Secretary made the policy argument that requiring an EIS for listing determinations defeated the purpose of the ESA since the species would not be protected and may even be destroyed during preparation of the EIS.[85]

The Sixth Circuit broadened the definition of irreconcilable conflict

78. *See, e.g.*, Environmental Defense Fund, Inc. v. Mathews, 410 F. Supp. 336 (D.D.C. 1976).
79. *Pacific Legal Foundation*, 657 F.2d 829, 831-32 (6th Cir. 1981).
80. *Id.*
81. *Id.* at 831-32.
82. *Id.* at 833.
83. *Id.*
84. *Id.* at 835 (citing 16 U.S.C. § 1533(a)(1), (b)(1)).
85. *Id.* at 832.

and held that regardless of the absence of a statutory exemption or time constraint, NEPA conflicted with the ESA for other reasons, therefore an EIS was not required when listing threatened or endangered species.[86] The reasoning on which the court based its broadened version of the irreconcilable conflict exemption is four-fold: (1) filing an EIS would not serve the purposes of ESA; (2) filing an EIS would not serve the purposes for filing such a statement under NEPA; (3) the Secretary's action in listing species furthers the purposes of NEPA even without filing an EIS; and (4) Congress did not intend that NEPA apply to agencies charged with protecting the environment.[87]

First, the court found that filing an EIS for listing determinations would not serve the purposes of the ESA.[88] The court agreed with the Secretary that he did not have the authority to consider any factors other than the five listed in section 4 of the ESA.[89] To support this assertion, the court cited both NEPA and a Supreme Court decision[90] for the rule that "nothing in [NEPA] shall affect the specific statutory obligations of any federal agency to comply with criteria or standards of environmental quality."[91]

Second, the court found that filing an EIS for listing determinations would not serve the purposes for filing such a statement under NEPA.[92] The court noted that NEPA was designed to ensure that agencies consider the environmental impact of their actions, yet "the statutory mandate of ESA prevents the Secretary from considering the environmental impact when listing" species.[93] Thus, the court reasoned, when an agency has no authority to consider environmental factors an EIS is useless and cannot serve the purposes of NEPA.[94] Additionally, the court stated that an EIS is not necessary to consider the priority of listing a particular species since Congress has already afforded endangered species preservation the highest priority.[95] This further persuaded the court that filing an EIS for the list-

86. *Id.* at 835.

87. *Id.* at 835-40.

88. *Id.* at 835.

89. *Id. See also id.* at 839 n.12 (citing legislative history indicating Secretary's duty to list species based on the five factors is mandatory, not discretionary).

90. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548 (1978) (stating that "NEPA was not intended to repeal by implication any other statute and thereby create powers not created in the agency's enabling legislation").

91. *Pacific Legal Foundation*, 657 F.2d at 836 (citing 42 U.S.C. § 4334). *See also* United States v. Students Challenging Regulatory Procedures, 412 U.S. 669, 694 (1973) ("NEPA was not intended to repeal by implication any other statute.").

92. 657 F.2d at 836.

93. *Id.*

94. *Id.*

95. *Id.* at 838. The United States Supreme Court has declared that "[t]he plain intent of Con-

ing of endangered species would not serve the purposes it was designed to serve.[96]

Third, the court found that listing endangered species furthers the purpose of NEPA even without filing an EIS.[97] The court cited NEPA's congressional declaration of policy and stated that NEPA's purposes were to preserve and enhance the environment and to make federal agencies "trustees of the environment."[98] The court reasoned that by listing endangered species, the Secretary was working to preserve the environment and acting in the spirit of NEPA as the trustee of a natural resource.[99] The court concluded with reasoning reminiscent of the corollary to the functional equivalence argument[100] stating that the Secretary is charged solely with protecting the environment, and that preparing an EIS would only hinder the Secretary's efforts in attaining this goal.[101]

Finally, the court in *Pacific Legal Foundation* found that Congress did not intend that NEPA apply to agencies charged with protecting the environment.[102] The court first relied on the legislative history of NEPA indicating Congress did not intend to have NEPA change the manner in which agencies charged with protecting the environment carry out their responsibilities.[103] The court next relied on the legislative history of the ESA, which indicated that Congress intended to make the listing of threatened or endangered species a mandatory act, not a discretionary one, and intended to make the listing dependent on the five factors found in section 4 of the ESA, not on the environmental impact concerns contained in an EIS.[104] Further, the court highlighted the legislative history of the 1978 amendments to the ESA indicating that although some witnesses wanted to introduce some flexibility into the ESA by imposing the EIS requirement on the Secretary, Congress declined to do so.[105] Instead, Congress chose to address concerns of the ESA's rigidity by creating a committee to grant exemptions,[106] and the Secretary's mandatory duty to list endangered

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gress in enacting [the ESA] was to halt species extinction, whatever the cost." Tennessee Valley Authority v. Hill, 437 U.S. 153, 154 (1978).

96. 657 F.2d at 838.

97. *Id.* at 837.

98. *Id.* (citing 42 U.S.C. § 4331(a)-(c)).

99. *Id.*

100. *See supra* notes 53-58 and accompanying text.

101. 657 F.2d at 837.

102. *Id.* at 838.

103. *Id.* at 838 n.11 (citing 115 CONG. REC. 40,925 (1969)).

104. *Id.* at 838-39 & n.12 (citing H.R. REP. No. 412, 93d Cong., 1st Sess. 4-5 (1973)).

105. *Id.* at 838-39 & n.13 (citing *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcommittee on Resource Protection of the Senate Committee on Environmental and Public Works*, 95th Cong., 2d Sess. 223 (1978)).

106. 16 U.S.C. § 1536(e).

species was left intact.[107]

Pacific Legal Foundation is significant because the court rejected the narrow interpretation of the irreconcilable conflict rule that statutory exemptions and time constraints afforded the only exemptions from NEPA. Rather, the court broadened the *Flint Ridge* meaning of irreconcilable conflict to include not only timetable conflicts, but also the absence of authority in an agency's enabling legislation to consider environmental impacts. *Pacific Legal Foundation* was primarily an irreconcilable conflict exemption case. However, both the court's comparison of the purposes served by NEPA and the ESA, and the court's reliance on congressional intent, hinted at the possibility of newly emerging grounds for NEPA exemption.

Merrell v. Thomas[108] soon followed and seemed to fulfill that prophecy. By comparing the purposes served by NEPA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[109] and by focusing on congressional intent, the *Merrell* court held that Congress intended to exempt FIFRA from NEPA because Congress purposefully designed FIFRA procedures to be materially different from those of NEPA.[110]

2. Merrell v. Thomas: *Congressional Intent*

The court in *Merrell* was asked to determine whether the EPA must comply with NEPA when registering pesticides under FIFRA.[111] To reach its conclusion that Congress did not intend NEPA to apply to FIFRA registration, the court traced the legislative history of FIFRA and its subsequent amendments.[112] The court noted that whenever Congress revisited FIFRA, it chose specifically to accommodate environmental concerns by amending the statute rather than requiring NEPA compliance.[113]

The court first considered the motives underlying the 1972 and 1978 amendments to FIFRA.[114] In 1972, the public became increasingly concerned over FIFRA's failures to adequately inform them of pesticide registration, and to adequately factor environmental concerns in pesticide registration standards and procedures.[115] However, the agricultural and chemi-

107. 657 F.2d at 839 (citing S. REP. No. 874, 95th Cong., 2d Sess. 3, 7, 10 (1978)).
108. 807 F.2d 776 (9th Cir. 1986).
109. 7 U.S.C. §§ 136-136y (1994).
110. *Merrell*, 807 F.2d at 778.
111. *Id.* at 776.
112. *Id.* at 777-81.
113. *Id.*
114. *Id.*
115. *Id.* at 778.

cal industries opposed any change to FIFRA on grounds that releasing certain information violated their rights to non-disclosure of essential test data and trade secrets.[116]

In the 1972 amendments to FIFRA, Congress struck a compromise, the essential elements of which follow: Congress (1) added two environmental criteria to its registration standards; (2) broadened the standard for denial of registration to include "unreasonable adverse effects on the environment;"[117] (3) required the EPA to publish in the Federal Register notice of applications for registration of pesticides containing a "new active ingredient" or "changed use pattern" before making its decision;[118] (4) required the EPA to act "as expeditiously as possible," expecting a decision within three months of application;[119] and (5) required the EPA to inform the public, within thirty days of the decision, the information on which it based registration of a pesticide, excluding test data and trade secrets.[120] This last provision, excluding essential data and trade secrets, induced much litigation, which motivated Congress to again revisit FIFRA in 1978.[121]

In the 1978 amendments, Congress responded to the flood of litigation by creating a "conditional registration procedure" that permitted the EPA to waive or postpone some data disclosure requirements.[122] In addition, Congress rewrote the trade secret disclosure section of FIFRA to accommodate the competing interests of the public and the pesticide industry.[123]

In reaching its decision in *Merrell*, the court emphasized that Congress established a comprehensive scheme for the registration of pesticides that was very different from NEPA in order to specifically accommodate the needs of competing interests.[124] Among several illustrations of how the FIFRA amendments conflicted with NEPA, the court in particular distinguished FIFRA's "unreasonable adverse effects on the environment" standard from NEPA's "significantly affecting the quality of the human environment" standard.[125] Most emphatically, the court hit home the idea that "[t]o apply NEPA to FIFRA's registration process would sabotage the

116. *Id.* at 778-79.
117. *Id.* at 780.
118. *Id.* at 778.
119. *Id.* (citing H.R. REP. No. 511, 92d Cong., 1st Sess. 20 (1971).
120. *Id.*
121. *Id.* at 779.
122. *Id.* (citing Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 6, 92 Stat. 819, 825-26)
123. *Id.* at 779 (citing H.R. REP. No. 663, 95th Cong., 1st Sess. 18-19, *reprinted in* 1978 U.S.C.C.A.N. 1988, 1991-92).
124. *Id.* at 778-81.
125. *Id.* at 780.

delicate machinery that Congress designed to register new pesticides."[126] The court indicated in dicta that FIFRA may have provided the "functional equivalence" of NEPA.[127] However, the court deemed it sufficient to base FIFRA's exemption from NEPA on congressional intent alone, stating "[w]hile we hesitate to adopt the 'functional equivalence' rationale, we are confident that Congress did not intend NEPA to apply to FIFRA registrations."[128]

Flint Ridge, *Pacific Legal Foundation*, and *Merrell* are significant milestones in the evolutionary process of defining how Congress intended NEPA to affect agency decisionmaking. *Douglas County* has emerged as another significant milestone, adding the displacement exemption to the list of NEPA exemptions.

IV. *DOUGLAS COUNTY* AND THE "NEW" DISPLACEMENT RULE

The application of NEPA to critical habitat designation was a question of first impression.[129] The court in *Pacific Legal Foundation* suggested in dicta that designation of critical habitat would be exempt from NEPA because the ESA's critical habitat designation procedures offered the functional equivalent of NEPA procedures.[130] However, the court in *Pacific Legal Foundation* did not rule on this question because the ESA's listing procedures, not habitat designation, were at issue. *Douglas County* presented an opportunity for the Secretary to fill in the blank that the *Pacific Legal Foundation* dicta left open and to make the position part of Ninth Circuit law.

The heart of the Secretary's argument to the district court was that the Secretary "is exempt from NEPA when designating critical habitat 'for the same reasons the Court in *Pacific Legal Foundation* held [the Secretary] was exempt from NEPA when [he] conducted a listing determination.'"[131] Recall that in *Pacific Legal Foundation* the court's reasons for exempting ESA listing determinations from NEPA were: (1) filing an EIS would not serve the purposes of ESA; (2) filing an EIS would not serve the purposes for filing such a statement under NEPA; (3) the Secretary's action in listing species furthers the purposes of NEPA even without filing an EIS; and (4) Congress did not intend that NEPA apply to agencies

126. *Id.* at 779.
127. *Id.* at 781.
128. *Id.*
129. *Douglas County*, 48 F.3d 1495, 1501 (9th Cir. 1995).
130. *Pacific Legal Foundation*, 657 F.2d at 835.
131. Douglas County v. Lujan, 810 F. Supp. 1470, 1478 (D. Or. 1992) (citing Defendant's Reply Memorandum at 12).

charged with protecting the environment.[132] Essentially, the Secretary utilized the reasoning in *Pacific Legal Foundation* and applied each of its points to *Douglas County* to argue for NEPA exemption for critical habitat designation.[133]

The district court's rejection of *Pacific Legal Foundation* as contrary to Ninth Circuit law called upon the Ninth Circuit to affirmatively state its position. The Ninth Circuit rejected the County's assertion that only statutory exemptions and time constraints afforded NEPA exemption, holding that other reasons justified NEPA exemption for critical habitat designation.[134] Those reasons are: (1) the ESA displaces NEPA; (2) NEPA does not apply to actions that preserve the physical environment; and (3) the ESA furthers the goals of NEPA without requiring an EIS.[135]

Given the dicta in *Pacific Legal Foundation*, one would expect the court to have resolved the question by granting the irreconcilable conflict exemption that emerged from *Pacific Legal Foundation*. This would have been easily accomplished through a direct, step-by-step grafting of the decision in *Pacific Legal Foundation* on to the situation in *Douglas County*. However, while the court did rely on *Pacific Legal Foundation* for its conclusion that the ESA itself furthers the goals of NEPA,[136] the court primarily relied on *Merrell* and congressional intent to hold that the ESA displaces NEPA and that NEPA does not apply to actions that preserve the environment.[137] The court made a lengthy comparison of the legislative histories of FIFRA and the ESA in an effort to analogize *Douglas County* to *Merrell*, and then advanced what appears to be a new NEPA exemption—the displacement exemption.[138] In short, it appears the court went through the back door when it could have easily gone through the front. It is peculiar that a court would favor *Merrell*, a case not directly on point, over *Pacific Legal Foundation*, a case closely on point.

How and why then did the court reach the displacement rule? Is the displacement rule a new ground for NEPA exemption, or simply a restatement of existing grounds? Will the displacement rule frustrate or advance the purposes of NEPA?

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132. *See supra* text accompanying notes 87-107.
133. *Douglas County*, 48 F.3d at 1477-83.
134. *Id.* at 1502.
135. *Id.* at 1502, 1505-06.
136. *Id.* at 1506-07.
137. *Id.* at 1502-06.
138. *Id.* at 1502-05.

A. *Why Displacement?*

In answering the first question, an examination of the court's *Merrell* analysis is helpful. The court analogized *Douglas County* to *Merrell* by drawing parallels between the legislative history of critical habitat designation under the ESA and the legislative history of pesticide registration under FIFRA.[139] The court found that, like FIFRA, Congress amended the ESA in 1978 to strike a compromise between competing interests.[140] Congress amended the ESA to specifically accommodate the interests by allowing the Secretary to consider economic impacts when designating critical habitat, and by imposing more stringent notice provisions.[141] The court compared the ESA to FIFRA and applied the "*Merrellism*" that Congress "carefully crafted" a solution within the ESA itself rather than require NEPA compliance for critical habitat designation.[142]

Continuing the analogy, the court lifted several other points from *Merrell*. For example, the court stated that the amended notice provisions for critical habitat designation made NEPA notice provisions "superfluous."[143] Likewise, the court seized on the notion that the 1978 ESA amendments represented "a compromise between disparate points of view,"[144] and that to apply NEPA to the ESA would "sabotage the delicate machinery that Congress designed" for the designation of critical habitat.[145] Finally, the court highlighted the fact that in 1988, seven years after *Pacific Legal Foundation* was decided, Congress revisited the ESA and specifically chose not to amend it to require NEPA compliance.[146] As in *Merrell*, the court inferred that Congress' inaction indicated that it accepted the *Pacific Legal Foundation* holding and did not intend to apply NEPA to actions taken under the ESA.[147]

A close reading of the opinion reveals the most plausible reason for the *Douglas County* displacement ruling. While the *Douglas County* court may have agreed with the dicta in *Pacific Legal Foundation*,[148] the court hit an obstacle—the *Pacific Legal Foundation* dicta rested upon the functional equivalence rule as a basis for NEPA exemption, but in *Douglas County* the Secretary did not raise the functional equivalence argu-

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139. *Id.* at 1503.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (quoting H.R. REP. No. 1625, 95th Cong., 2d Sess. 13-14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9463-64).
145. *Id.* (quoting *Merrell*, 807 F.2d at 779).
146. *Id.* at 1504.
147. *Id.*
148. *See* text accompanying note 130.

ment.[149] Thus, unable to rely on the dicta and apply *Pacific Legal Foundation* directly, the *Douglas County* court relied heavily on *Merrell* and supported its holding with the displacement rule.

B. *New Grounds for Exemption?*

In answering the second question, whether the displacement rule is new ground for NEPA exemption or simply a restatement of existing grounds, it is helpful to review the County's objections to the displacement argument. The County challenged the court's use of displacement, arguing that displacement was just another term for functional equivalence.[150] The County asserted that although *Merrell* did not explicitly reach a functional equivalence exemption, its reasoning essentially followed functional equivalence analysis.[151] The *Merrell* court stated:

> Our position that NEPA does not apply to pesticides registered under FIFRA has been taken by other courts as well. Speaking in terms of the "functional equivalence" of the EPA's procedures to NEPA's procedures, these courts conclude that formal compliance with NEPA would be wasteful and redundant.[152]

The County further asserted that other cases refer to *Merrell* as a functional equivalence case.[153] The County then argued that because displacement is essentially the same as functional equivalence, and because functional equivalence was never raised in the district court proceedings, the court was prohibited from addressing it on appeal.[154]

The County's arguments did not persuade the court. In an apparent attempt to gloss over the County's objections, the court narrowly distinguished the displacement rule from the functional equivalence rule. The court concluded that the first asserts that Congress intended to displace one procedure with another, while the second asserts that one process requires the same steps as another.[155]

The court's distinction between displacement and functional equivalence seems so minute and wanting of true substance as to warrant no distinction. The distinction is especially questionable when considering that the *Douglas County* court, in order to hold consistently with the dicta

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149. *Douglas County*, 48 F.3d at 1504 n.10.

150. *Id. See also* Appellee's Brief to the Ninth Circuit Court of Appeals at 23, *Douglas County* (Nos. 93-36013, 93-36016) [hereinafter Appellee's Brief].

151. Appellee's Brief, *supra* note 150, at 23 & n.13.

152. *Merrell*, 807 F.2d at 781.

153. Appellee's Brief, *supra* note 150, at 23 n.13 (citing Limerick Ecology Action v. United States Nuclear Regulatory Comm'n, 869 F.2d 719, 729 (1989)).

154. Appellee's Brief, *supra* note 150, at 25.

155. *Douglas County*, 48 F.3d at 1504 n.10.

in *Pacific Legal Foundation*, needed a rule similar to functional equivalence, but not the same as functional equivalence, because the Secretary did not place functional equivalence at issue. Subsequent litigants opposed to the displacement rule could capitalize on this tenuous distinction when advancing a position like the County's—that the displacement rule is nothing more than a restatement of the functional equivalence rule.

Although one may attack the displacement rule on grounds that it is a restatement of the functional equivalence rule, the fact remains that the Ninth Circuit affirmatively advanced the displacement exemption, and that the Supreme Court allowed the decision to stand.[156]

C. *How Will the Displacement Exemption Affect the Future Practice of NEPA Law?*

The purpose served by the displacement exemption will depend on how it is used by litigants and how it is controlled by courts. First, litigants may find a procedural advantage with the displacement exemption; its application in *Douglas County* implies that a party seeking NEPA exemption that neglects to raise the functional equivalence argument may be saved if it presents legislative history sufficient to warrant a finding that Congress intended to exempt a certain act from NEPA.

Second, litigants may find a substantive advantage with the displacement exemption. The holding implies that legislative history may warrant a finding of congressional intent to displace NEPA's procedures with those of another statute if the litigant can show the existence of the requisite *Merrellisms*, which are: the statute in question is an "environment-enhancing" statute, it arose out of a "compromise" between legitimate competing interests, and it represents Congress' choice to "carefully craft" an effective solution to a problem by amending the statute in question, rather than requiring NEPA compliance.

When litigants attempt to utilize this substantive advantage of the displacement exemption, it will necessarily be up to the courts to control the misuse of legislative history and the *Merrell* test. This is a formidable task for any court because it requires not only time and energy to exhaustively research the legislative history, but an evaluation of each litigant's interpretation of the legislative history. Making such an evaluation is a problem because legislative history is malleable and can be characterized to suit many needs.[157]

One need only to look as far as the instant case to see the problem of

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156. Douglas County v. Babbitt, 116 S. Ct 698 (1996).

157. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

evaluating legislative history. The County argued that the legislative history of the ESA was not comparable to that of FIFRA.[158] To support its assertion, the County cited a committee report for the 1978 amendments to the ESA requiring that "actual notice of the critical habitat designation and 'any environmental assessment or impact statement' be supplied to affected local governments."[159] The court addressed this piece of history by ruling that the statement did not affirmatively require preparation of an EIS, but simply stated that if an EIS was available it should be forwarded.[160] The court concluded that because the language did not become part of the final statute, and in light of the rest of the legislative history, the committee report cited by the County was not indicative of congressional intent.[161]

This Note does not suggest that the court's evaluation of legislative history and congressional intent is erroneous or unjustified; indeed, the court undertook a competent, considered review of the legislative history to support its holding. However, the inherent pitfall of using legislative history to buttress legal arguments is that there are no guidelines for discerning "good" legislative records from "bad" ones, or for placing more value on one litigant's interpretation of legislative history over another's.[162] Without such guidelines, judges inevitably construe legislative history as they wish, "lead[ing] to a jurisprudence in which statutory words become devalued."[163] This sets a dangerous precedent as it not only opens the door to litigants' manipulation of NEPA, but also undermines Congress' power in creating effective legislation.[164]

It is doubtful Congress intended the numerous NEPA exemptions that courts have interpreted under the rubric of congressional intent. Reluctant to actually speak for Congress, courts in the past have refrained from relying on congressional intent as a basis for their opinions with the hope of sending a message to Congress to affirmatively state its position on a particular matter.[165] Perhaps the *Douglas County* court should have followed suit. In a sense, the court has "opened the floodgates" and has placed on the shoulders of the lower courts the heavy burden of scrutinizing legislative history every time a new case involving the displacement

158. *Douglas County*, 48 F.3d at 1504.

159. *Id.* (quoting H. CONF. REP. No. 1804, 95th Cong., 2d Sess. 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9494).

160. *Id.*

161. *Id.*

162. Easterbrook, *supra* note 157, at 61-62.

163. Easterbrook, *supra* note 157, at 62.

164. *See* Easterbrook, *supra* note 157, at 65 ("[T]he search for these elusive intents so liberates judges that they become the law-givers in fact.").

165. *See* Easterbrook, *supra* note 157, at 66-67.

exemption appears.

V. CONCLUSION

The *Douglas County* decision may initially draw cheers from environmentalists and champions of efficient government. The Secretary's efforts to protect the environment by designating critical habitat for endangered species will no longer be hindered by what some consider needless and wasteful duplication of government documents.

However, as this Note suggests, the *Douglas County* decision could backfire and prove to be environmentalists' worst enemy. NEPA proponents risk the possibility that federal actions actually harmful to the environment will meet the *Merrell* test and be granted NEPA exemption. A further problem is the possibility that the multiple granting of NEPA exemptions will erode NEPA, rendering it ineffective for accomplishing its purpose of protecting the environment. The appropriate question might be: Is risking the eventual loss of NEPA's environmental protection policy worth the short-term gain of allowing the Secretary to proceed with critical habitat designation without preparing an EIS, thereby reducing "needless" duplication of government documents? It will be the courts' task to control misuse of the displacement exemption and to ensure that in seemingly taking one step forward, we do not end up taking two steps back.