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TRAVELS WITH STRIX: THE SPOTTED OWL'S JOURNEY THROUGH THE FEDERAL COURTS

Victor M. Sher*

INTRODUCTION

The courtroom journeys of the northern spotted owl (*strix occidentalis caurina*) have both a text and a subtext. The text concerns what the parties have alleged and what the courts have decided in a series of cases involving several different statutes over the past five years. The story told by this text concerns what one federal judge in 1991 called a "remarkable series of violations of the environmental laws"¹ by the federal agencies entrusted with administering our public forests and protecting species against extinction. The text continues to unfold at all levels of the federal judiciary, and we are still some distance from its end, although the arrival of a new Administration holds some promise for a final resolution to both the court proceedings and the broader controversy over the future of the Northwest's ancient forests.²

The subtext involves a shadowy political battle in Congress in which the Bush Administration sought for the last half-decade to obtain exemptions from laws the courts found federal agencies were violating. In no other context since the passage in 1969 of the National Environmental Policy Act (NEPA)³ has Congress acted so frequently to limit citizen enforcement of federal environmental laws against federal agencies in federal courts as it has concerning the spotted owl.⁴ Between 1988 and 1992, the Ninth Circuit considered two court-stripping measures embodied in annual appropriations bills in six published opinions, and even the Supreme Court stepped in to resolve one case. How Congress and the new Administration deal with proposed legislation on spotted owls and ancient forests will provide a strong indication of the current health of, and future

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1. Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1089 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

2. See Tom Morganthau, et al., *A Lighter Shade of Green*, NEWSWEEK, Apr. 12, 1993, at 24; Ken Miller, *Owl Shows Successes, Failures of ESA*, GANNET NEWS SERVICE, Apr. 2, 1993.

3. Pub. L. No. 91-190, 83 Stat. 852 (1969)(codified as amended at 42 U.S.C. §§ 4321-4370c (1988 & Supp. II 1990)).

4. See generally Victor M. Sher & Carol S. Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HAR. ENVTL. L. REV. 435 (1991)(discussing congressional exemptions from environmental laws over the past twenty years, including in the spotted owl controversy).

prospects for, environmental law in this country.⁵

This article provides an overview of the spotted owl's journey through the federal courts. Section I discusses the owl's significance as an indicator of the health of old-growth forest ecosystems in the Pacific Northwest, and the failure of previous federal land management strategies to protect the species from potential extinction.

Section II analyzes lawsuits brought under the Endangered Species Act (ESA).⁶ This set of lawsuits has in just over five years invoked more provisions of the ESA — and uncovered more violations of that law by federal agencies — than any previous litigation effort on behalf of any species or group of species. The courts have considered (and corrected) the federal government's failures to perform its responsibilities to add the northern spotted owl to the list of species protected under the ESA; to designate critical habitat for the owl; to engage in inter-agency consultation to avoid conduct likely to jeopardize the continued survival of the owl; and to comply with NEPA in connection with the decision to designate the owl's critical habitat. The courts have also been called on to examine the scope of the ESA's prohibition against "harm" to a protected species. Furthermore, the Ninth Circuit recently faced a challenge to the only decision by the Endangered Species Committee to grant an exemption from the ESA's prohibition against federal actions likely to jeopardize the continued survival of a species.

Section III examines citizens' efforts since 1987 to compel the federal Bureau of Land Management (BLM) to address current information about the spotted owl's plight. While for several years Congress deprived the courts of jurisdiction to hear plaintiffs' claims that BLM had ignored new, significant and probably accurate information in violation of NEPA, today BLM cannot sell timber from spotted owl habitat until it discloses, analyzes and considers current information about the owl's plight in an Environmental Impact Statement.

Section IV analyzes litigation against the U.S. Forest Service seeking to preserve the owl's viability on the national forests in Oregon, Washington and northern California. Since legislation aimed at foreclosing plaintiffs' access to the courts in this litigation expired, the Forest Service has been enjoined from selling timber in spotted owl habitat until it complies with the National Forest Management Act, as well as NEPA.

Finally, Section V discusses the lessons to be learned from the spotted owl's experience in the courts. In many ways, the ancient forest controversy

5. See, e.g., Victor M. Sher, *Ancient Forests, Spotted Owls, and the Demise of Federal Environmental Law*, 20 ENVTL. L. REP. 10,469 (1990).

6. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1988 & Supp. 1991)).

in the Pacific Northwest represents an important negative role model, one that federal agencies should strive to avoid in future decisions on managing the public lands. The spotted owl's experience can — and must, if the new Administration is to avoid the mistakes of its immediate predecessors — serve as a valuable guide for approaching issues raised by other species and other ecosystems around the country.

I. BACKGROUND: THE SPOTTED OWL'S IMPORTANCE AS AN INDICATOR OF THE HEALTH OF ANCIENT FOREST ECOSYSTEMS, AND THE FAILURE OF EARLIER MANAGEMENT STRATEGIES TO PRESERVE THE SPECIES

The northern spotted owl is a medium-sized owl with dark eyes, dark to chestnut brown coloring, whitish spots on the head and neck, and white mottling on the abdomen and breast. Though a secretive, nocturnal owl, it is relatively unafraid of humans. The owl is monogamous, long-lived, highly territorial, and site tenacious; it lives in the forests of southwestern British Columbia, western Washington and Oregon, and northwestern California.⁷ Because it is closely associated with old-growth forests, federal agencies have considered the owl an "indicator species" for the health of that ecosystem since the mid-1970s.⁸

As the court explained in *Seattle Audubon Society v. Evans*:

The fate of the spotted owl has become a battleground largely because the species is a symbol of the remaining old growth forest. As stated in the [Interagency Scientific Committee for the Conservation of the Northern Spotted Owl (May 1990)] Report:

'Why all the fuss about the status and welfare of this particular bird? The numbers, distribution, and welfare of spotted owls are widely believed to be inextricably tied to mature and old-growth forests. Such forests have been significantly reduced since 1850 (mostly since 1950) by clearing for agriculture, urban development, natural events such as fire and windstorms, and most significantly, by logging in recent decades. Nearly all old growth has been removed on private lands. Most of the remainder is under the management of the BLM, [U.S. Forest Service], and [National Park Service] on Federal lands. As its habitat has declined, the owl has virtually disappeared from some areas and its numbers are decreasing in others.'⁹

7. See generally Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (1990) (final rule) (codified at 50 C.F.R. § 17) [hereinafter Final Rule].

8. See 36 C.F.R. § 219.19 (1992).

9. 771 F. Supp. 1081, 1088 (W.D. Wash.) (citing INTERAGENCY SCIENTIFIC COMMITTEE, A

Federal agencies manage nearly ninety percent of the remaining owl habitat, the vast majority of it on Forest Service and BLM lands.¹⁰ The Forest Service, which controls about seventy-four percent of the remaining habitat, sold about 71,000 acres of owl habitat each year during the late 1980s; the BLM, which controls another twelve percent of the owl's habitat, historically has logged an additional 15,000 acres each year.¹¹ Moreover, the vast majority of owl habitat on both Forest Service and BLM lands is available for logging.¹²

In the mid-1980's scientists expressed concern about the long-term viability of the owl as a species resulting from the cumulative adverse effects of continued logging of its habitat. In particular, scientists increasingly questioned the ability of established management policies — which depended on establishing a network of isolated spotted owl habitat areas, each capable of supporting one to three pairs of owls — to preserve the species.¹³ By mid-1990, population viability experts definitively rejected this existing paradigm. Indeed, the April 1990 Report of the Interagency Scientific Committee on the Conservation of the Northern Spotted Owl (ISC Report) described previous federal management policy as “a prescription for the extinction of spotted owls . . .”¹⁴

CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL 7 (1990)), *aff'd* 952 F.2d 297 (9th Cir. 1991). *Accord, e.g.*, *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1235 (9th Cir. 1989) (“The northern spotted owl is heavily dependant on old-growth timber for its habitat. The owl is considered an ‘indicator species’ for old-growth forest, meaning that the presence and number of northern spotted owls give an accurate indication of the health of the old-growth forest and the presence of other old-growth dependent species. As go the owls, naturalists say, so go the other species.”), *cert. denied*, 494 U.S. 1026 (1990).

10. Final Rule, *supra* note 7, at 26,118. The owl “may have been nearly extirpated on private land . . . due to the reduction of old-growth habitat.” *Id.* at 26,130.

11. *See, e.g.*, INTERAGENCY SCIENTIFIC COMMITTEE, A CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL 14 (1990) [hereinafter ISC REPORT]; U.S. FISH & WILDLIFE SERVICE, THE NORTHERN SPOTTED OWL: A STATUS REVIEW SUPPLEMENT 2.26 (table of owl habitat by land ownership) (Apr. 21, 1989) [hereinafter FWS SUPP.]; Final Rule, *supra* note 7, at 26,130.

12. ISC REPORT, *supra* note 11, at 14; Final Rule, *supra* note 7, at 26,114.

13. This system of habitat reserves was called Spotted Owl Management Areas (SOMAs) or Spotted Owl Habitat Areas (SOHAs). ISC REPORT, *supra* note 11, at 17. The federal agencies developed their SOHA systems based on the recommendations of an interagency task force from the late 1970s, which called for providing SOHAs of 300 acres of old-growth habitat for each of 400 owl pairs on all land ownerships in Oregon (290 on Forest Service lands, 90 on BLM, and 20 on state and private); the Forest Service ultimately planned to protect 551 SOHAs on its lands in Oregon and Washington. ISC REPORT, *supra* note 11, at 52, 54. *See, e.g.*, *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456, 1462-76 (D. Or.) (overview of the concerns that led scientists to question the adequacy of the SOHA system to preserve the spotted owl), *aff'd in part, rev'd in part*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *see also* FWS SUPP., *supra* note 11, at 2.16; Final Rule, *supra* note 7, at 26,127. *See generally* 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 NW. ENVTL. J. 361, 363 (1990); ISC REPORT, *supra* note 11, at 3, 39; Final Rule, *supra* note 7, at 26,188-89.

14. ISC REPORT, *supra* note 11, at 39. The U.S. Fish & Wildlife Service agreed. In a 1990

II. LITIGATION UNDER THE ENDANGERED SPECIES ACT

Litigation on the owl's behalf promises to address virtually every provision affecting federal agency decisions under the Endangered Species Act (ESA). Cases have already addressed the U.S. Fish & Wildlife Service's (FWS) obligation to list a species under the Act (*Northern Spotted Owl v. Hodel*);¹⁵ FWS' duty to designate critical habitat concurrently with listing (*Northern Spotted Owl v. Lujan*);¹⁶ FWS' duties in issuing biological opinions in the absence of designated critical habitat (*Northern Spotted Owl v. Lujan*);¹⁷ and BLM's duty to consult with FWS concerning its guidance for timber sales in owl habitat (*Lane County Audubon Society v. Jamison*).¹⁸ Meanwhile, the timber industry has

review of the owl's status prepared in connection with its decision to list the owl under the ESA, FWS concluded that the SOHA system was:

clearly not an effective way to guarantee the persistence of a predator [like the owl] that relies upon thousands of acres of the forest environment for its year-round survival We concur [with the ISC] that it is inherently very risky to reduce a geographically widespread species to a constellation of habitat islands, most of which contain a single pair separated from one another by intensively-managed commercial forest that may or may not contain suitable habitat for short periods of time. Even if all SOHAs were occupied and capable of supporting single pairs, the system would still be subject to an unacceptably high probability of failure with the passage of years.

DAVID R. ANDERSON ET AL., FWS, 1990 STATUS REVIEW, NORTHERN SPOTTED OWL *Strix Occidentalis Caurina* 55-56 (Apr. 30, 1990) [hereinafter FWS 1990 STATUS REVIEW]; see also Final Rule, *supra* note 7, at 26,189-90 (discussing SOHA system, and concluding that "[e]xisting regulatory mechanisms are insufficient to protect either the northern spotted owl or its habitat").

The ISC recommended that federal agencies adopt a very different land management strategy to conserve the owl — one that preserves significantly greater amounts of spotted owl habitat. The keystone of the ISC's conservation strategy is the designation of Habitat Conservation Areas (HCAs). HCAs are "large blocks of habitat capable of supporting multiple pairs of owls and spaced closely enough to facilitate dispersal between blocks." ISC REPORT, *supra* note 11, at 3. Activities detrimental to owls — particularly logging — would be forbidden within the HCAs. *Id.* at 4. In addition, the ISC's recommended strategy calls for measures to aid juvenile owl dispersal, including (1) maintaining at least 50 percent of the forest landbase outside of HCAs in stands of timber with an average diameter at breast height of 11 inches or greater and at least 40 percent canopy closure (50-11-40 rule); (2) allocation of additional lands for riparian corridors and other species; and (3) protecting acreage around activity centers of all known pairs of owls. *Id.* at 4, 23-27. Finally, the ISC emphasized that its plan hinged on complete implementation of all its component parts by state and federal agencies. *Id.* at 5.

While the ISC Report is widely recognized as "the first scientifically respectable proposal regarding spotted owl conservation to come out of the executive branch," Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1092 (W.D. Wash.), *aff'd* 952 F.2d 297 (9th Cir. 1991), it has commanded far from universal acceptance in the scientific community. *Id.* at 1093 (stating that ISC Strategy "may or may not prove to be adequate. While it is endorsed by well-qualified scientists, it is criticized by others, equally well-qualified, as over-optimistic and risky."); see also Seattle Audubon Soc'y v. Mosely, 798 F. Supp. 1473, 1481-83 (W.D. Wash. 1992) (describing recent scientific criticisms).

15. 716 F. Supp. 479 (W.D. Wash. 1988).

16. 758 F. Supp. 621 (W.D. Wash. 1991).

17. Northern Spotted Owl v. Lujan, No. C88-5732 (W.D. Wash. Aug. 1, 1991) (order denying motion for permanent injunction).

18. 958 F.2d 290 (9th Cir. 1992).

challenged FWS' inclusion of habitat modification in the Act's definition of "taking" (*Sweet Home Chapter of Communities for a Great Oregon v. Lujan*),¹⁹ and certain counties in Oregon that receive revenue from federal timber sales have complained about FWS' failure to prepare an Environmental Impact Statement concerning its designation of critical habitat for the owl (*Douglas County v. Lujan*).²⁰ Finally, the Ninth Circuit faced the first challenge to the only decision ever made by the Endangered Species Committee to allow federal actions likely to jeopardize a listed species.²¹

A. Obtaining Listing Protection

In early 1987 FWS received a citizen petition requesting the listing of the owl under ESA section 4(b).²² In December 1987, FWS determined that listing was not warranted.²³ Environmental organizations filed suit challenging the determination under the ESA and the Administrative Procedure Act. On November 17, 1988, federal district court Judge Thomas Zilly voided FWS' decision, holding:

[T]he Service disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions. The Service has failed to provide its own or other expert analysis supporting its conclusions. . . . Accordingly, the [FWS'] decision not to list at this time the northern spotted owl as endangered or threatened under the Endangered Species Act was arbitrary and capricious and contrary to law.²⁴

A subsequent report by the General Accounting Office (GAO) questioned "FWS' thoroughness and objectivity" in considering the owl's condition.²⁵ Among other things, GAO concluded that "FWS management substantively changed the body of scientific evidence presented" in

19. 806 F. Supp. 279 (D.D.C. 1992).

20. 810 F. Supp. 1470 (D. Or. 1992).

21. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993). In 1979, the ESC voted to allow the Grayrocks Dam to proceed. However, the ESC conditioned its approval on the project complying with a FWS biological alternative that would not jeopardize the whooping crane. See ESC, Application for Exemption for Grayrocks Dam and Reservoir (Feb. 7, 1979)); Comment, *The 1978 Amendments to the Endangered Species Act: Evaluating the New Exemption Process Under § 7*, 9 ENVTL. L. 10,031, 10,033 (1979) [hereinafter ELR Comment]; *infra* note 66.

22. 16 U.S.C. § 1533(b)(3) (1988) (providing that if substantial scientific or commercial information warrants the petition to list a species, the Secretary of the Interior must make a timely decision to list or not to list the species and publish the finding in the Federal Register).

23. 52 Fed. Reg. 48,552 (1987).

24. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988).

25. U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: SPOTTED OWL PETITION EVALUATION BESET BY PROBLEMS I (1989).

FWS' report, in an effort to support a decision not to list.²⁶ Furthermore, "factors in addition to the owl's biological condition were considered in deciding to deny the listing petition. FWS consideration of such factors is inconsistent with the decision-making process provided for in the [ESA] and its implementing regulations."²⁷

On April 25, 1989, FWS reversed itself and recommended listing the owl as a threatened species.²⁸ FWS concluded that listing was warranted because of new concerns about the survival of the species in the face of continued logging of its old-growth habitat. On June 26, 1990, the listing decision became final.²⁹

B. Critical Habitat

Although FWS added the spotted owl to the list of threatened species in June 1990, the Service failed to take a crucial step the Act requires the agency to take concurrently with listing — designating habitat critical to the owl's survival. Section 4(a)(3) exempts FWS from the obligation to designate critical habitat "concurrently" with listing only where it is neither prudent nor determinable; in such circumstances, FWS may take up to an additional year to make its critical habitat decision.³⁰ FWS stated in its final listing rule that critical habitat for the owl was not determinable.³¹

In *Northern Spotted Owl v. Lujan*,³² Judge Zilly determined that FWS' failure to designate critical habitat in June 1990 violated the ESA. Granting plaintiffs' motion for summary judgment, the court held:

this Court is unable to find any support for the federal defendants' claim that critical habitat for the northern spotted owl was not determinable in June 1989 when the Service proposed to list the species, or when the Service issued its final rule one year later. . . . The federal defendants fail to direct this Court to any portion of the administrative record which adequately explains or justifies the decision not to designate critical habitat for the northern spotted owl. Nowhere in the proposed or final rules did the Service state what efforts had been made to determine critical habitat. Nowhere did the Service specify what additional biological or economic information was necessary to complete the designation. Nowhere did the Service explain why critical

26. *Id.*

27. *Id.* at 2.

28. 54 Fed. Reg. 26,666, 26,670 (1989).

29. Final Rule, *supra* note 7, at 26,114.

30. 16 U.S.C. § 1533(a)(3) (1988).

31. Final Rule, *supra* note 7, at 26,124-25.

32. 758 F. Supp. 621 (W.D. Wash. 1991).

habitat was not determinable. . . . Whatever the precise contours of the Service's obligations under the ESA, clearly the law does not approve such conduct.³³

The court ordered FWS to submit a plan for completing its review of critical habitat for the owl by March 15, 1991, and to publish its proposed critical habitat rule no later than forty-five days thereafter, which was by April 29, 1991.³⁴ Finally, the court ordered that "[t]he final rule shall be published at the earliest possible time permitted under the appropriate regulations."³⁵

FWS' response to the court's order was to issue a proposed rule on May 6, 1991.³⁶ However, FWS announced that it intended to accept public comments, then issue a second proposed rule, then accept more public comments,³⁷ and matters stalled there. Although the ESA requires FWS to designate critical habitat "concurrently" with listing, for approximately 18 months after listing, FWS still refused to commit to any date for reaching a final decision.

In August 1991 Judge Zilly denied plaintiffs' request for an injunction prohibiting FWS from issuing biological opinions under ESA section 7(a)(2) until the Service designated critical habitat.³⁸ Also in August, FWS stated that it intended to publish a final designation by December 14, 1991.³⁹ However, in late November 1991 the Service asked for permission to defer the designation until June 1992.⁴⁰ FWS based its request on the anticipated release of a recovery plan during the spring of 1992.⁴¹

Holding that defendants "have not adequately shown that further delays [in designating critical habitat] are justified," the court denied FWS' request for more time.⁴² On January 15, 1992, FWS issued its final designation of critical habitat.⁴³ However, the owl's critical habitat situation remains far from final. On December 22, 1992, the district court

33. *Id.* at 627-28.

34. *Id.* at 629-30.

35. *Id.* at 630.

36. 56 Fed. Reg. 20,816 (1991).

37. *Id.*

38. *Northern Spotted Owl v. Lujan*, No. C88-5732 (W.D. Wash. Aug. 1, 1991)(order denying motion for permanent injunction).

39. Declaration of Jean E. Williams In Support of Motion to Shorten Time at 1, *Northern Spotted Owl v. Lujan*, No. C88-573Z (W.D. Wash. Nov. 29, 1991); *see* 56 Fed. Reg. 40,002 (1991)(second proposed designation of critical habitat).

40. *Northern Spotted Owl v. Lujan*, No. C88-573Z, slip. op. at 2 (W.D. Wash. Dec. 23, 1991)(order denying request for more time).

41. *Id.* at 2-3. *See* 16 U.S.C. § 1533(f) (1988)("secretary shall develop and implement [recovery plans] for the conservation and survival of endangered species and threatened species . . . unless he finds that such a plan will not promote the conservation of the species.").

42. *Northern Spotted Owl*, No. C88-573Z, slip. op. at 4 (order denying request for more time).

43. 57 Fed. Reg. 1796 (1992)(to be codified at 50 C.F.R. § 17)(effective Feb. 14, 1992).

in Oregon held that FWS must — but failed to — comply with NEPA procedures in designating critical habitat.⁴⁴ The court accordingly “set[] aside the designation of critical habitat,”⁴⁵ but reserved the issue of appropriate relief.⁴⁶

C. Failure To Consult

In September 1990, following FWS’ decision to list the owl as threatened, the BLM announced by press release that it had adopted what it called the “Jamison Strategy,” to protect the owl and provide for continued logging of its habitat.⁴⁷ The Jamison Strategy contained “management guidelines” for the spotted owl for Fiscal Years 1991 and 1992, including a program to offer 750 million board feet of timber for sale in each of the next two years.⁴⁸ While the Strategy left in place current land use allocations for uses other than logging, it substantially changed existing BLM timber management guidelines.⁴⁹

BLM never consulted with FWS under ESA section 7(a)(2) concerning whether sales offered pursuant to the Jamison Strategy might jeopardize the spotted owl.⁵⁰ Instead, in January 1991, BLM submitted a set of

44. *Douglas County v. Lujan*, 810 F. Supp. 1470 (D. Or. 1992).

45. *Id.* at 1484 n.7.

46. *Id.* at 1485.

47. BUREAU OF LAND MANAGEMENT, MANAGEMENT GUIDELINES FOR THE CONSERVATION OF THE NORTHERN SPOTTED OWL FY 1991 THROUGH FY 1992 (1990) [hereinafter JAMISON STRATEGY]. Cy Jamison was the Director of BLM under former President Bush.

48. *Id.* at 1.

49. BLM stated that it intended the Jamison Strategy to “respond” to FWS’ listing of the owl under the ESA. According to the Bureau, BLM “has called for the immediate implementation of [the Jamison Strategy], which will direct BLM management of western Oregon forest lands into FY 1994 and beyond.” *Id.* As the Ninth Circuit explained in *Lane County Audubon Society v. Jamison*:

The BLM itself described its Jamison Strategy as an ‘interim strategy’ to be carried out while new management plans are prepared. The Strategy outlines in detail the various criteria that will be used to develop the 1991 and 1992 timber sales. It develops a ‘detailed management strategy’ to be carried out in four phases to cover fiscal years 1990 through 1994 ‘and beyond.’ Like the [existing Timber Management Plans], it establishes total annual allowable harvests. The impact of each individual sale on owl habitat cannot be measured without reference to the management criteria established in the TMPs and the Jamison Strategy.

958 F.2d 290, 294 (9th Cir. 1992). See also JAMISON STRATEGY, *supra* note 47, at app. A (guidelines for managing lands previously allocated to timber production).

Although the owl management component of the Jamison Strategy was based largely on the ISC’s recommendations, it rejected at least three key components of the ISC plan. Cf. *supra* note 14 (elements of ISC plan). First, the Jamison Strategy was a far cry from the comprehensive, long-term owl management strategy called for by the ISC; indeed, the Strategy only committed BLM to protect owl habitat “over the next two years. . . .” Second, the Jamison Strategy abandoned the ISC’s guidelines for protecting dispersal habitat for spotted owls, i.e., the “50-11-40 rule.” Third, although the ISC called for no logging in Habitat Conservation Areas established under its plan, the Jamison Strategy contemplated salvage sales in such areas. See JAMISON STRATEGY, *supra* note 47, at 5.

50. See 16 U.S.C. § 1536(a)(2) (1988). That section of the ESA provides that each federal

more than 170 individual timber sales that it determined "may affect" the owl to FWS, and requested formal consultation with FWS on these *individual* sales.⁵¹ In early 1991 environmental groups sued BLM to compel consultation on the underlying Strategy.⁵²

FWS' Biological Opinion concluded that the Jamison Strategy "does not sufficiently protect spotted owls."⁵³ Even so, when FWS examined the sales individually (as BLM had insisted), FWS found that about one-third of the sales would likely jeopardize the owl, one-third would not, and the remaining one-third would not if modified.⁵⁴

BLM contended that its adoption of the Jamison Strategy did not constitute a federal "action" that would trigger ESA section 7(a)(2)'s consultation requirement. However, on September 11, 1991, federal district court Judge Robert Jones disagreed. He held that BLM violated section 7 by failing to consult on the Jamison Strategy, and enjoined implementation of the Strategy.⁵⁵ However, reasoning that individual timber sales were offered under preexisting management plans, the court declined to enjoin individual sales.⁵⁶

On appeal, the Ninth Circuit agreed with Judge Jones that "'without a doubt,' the Jamison Strategy . . . was . . . an agency action [that] falls squarely within the definition of agency action" requiring consultation under ESA section 7(a)(2).⁵⁷ The court also held that BLM's attempt to rely on the preexisting management plans for individual timber sales "is not a tenable position," because "the BLM's reinstatement of the TMPs would also constitute" agency action under section 7(a)(2).⁵⁸ The court concluded:

In sum, neither the underlying TMPs nor the Jamison 'interim management strategy' has ever been submitted to FWS for

agency must consult with the Secretary of the Interior to determine that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . unless such agency has been granted an exemption."

51. FWS, FORMAL CONSULTATION ON 174 BUREAU OF LAND MANAGEMENT FISCAL YEAR 1991 TIMBER SALES (June 17, 1991)(as amended July 3, 1991) [hereinafter FWS 1991 OPINION].

52. See *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

53. FWS 1991 OPINION, *supra* note 51, at 18.

54. *Id. passim*.

55. *Lane County Audubon Soc'y v. Jamison*, No. 91-6123-JO, 1991 WL 354885, at *2 (D. Or. Sept. 11, 1991).

56. *Id.* at *3.

57. *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992). FWS regulations define "action" broadly to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . ." 50 C.F.R. § 402.2 (1992). Examples include "actions intended to conserve listed species or their habitat, . . . actions directly or indirectly causing modifications to the land, water, or air." *Id.*

58. *Lane County*, 958 F.2d at 295.

consultation pursuant to the mandate of the ESA. Accordingly, the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development.⁵⁹

The Ninth Circuit issued an injunction halting all further BLM sales that may affect the spotted owl pending BLM's compliance with its consultation obligations.⁶⁰ Moreover, the court of appeals reiterated its desire that BLM undertake such consultation forthwith.⁶¹ Finally, the court remanded to Judge Jones to determine whether remaining fiscal year 1991 sales should be enjoined permanently.⁶² On January 21, 1993, Judge Jones permanently enjoined *all* of BLM's unoffered sales that might affect spotted owls.⁶³

D. *The God Squad*

In September 1991 the BLM asked the Secretary of Interior to convene the Endangered Species Committee (ESC) (also known as the "God Squad") under ESA section 7 to consider an exemption for 44 BLM Fiscal Year 1991 timber sales under the Jamison Strategy.⁶⁴ FWS had determined these sales would likely jeopardize the continued survival of the northern spotted owl. In May 1992 the ESC granted BLM's exemption as to thirteen of the sales.⁶⁵ The decision, the first ever to allow the federal government deliberately to jeopardize a listed species under the ESA following a contested proceeding before the ESC,⁶⁶ was challenged by

59. *Id.*

60. *Lane County Audubon Soc'y v. Jamison*, No. 91-36019 (9th Cir. Mar. 4, 1992)(order).

61. *Id.*

62. *Lane County*, 958 F.2d at 295.

63. *Lane County Audubon Soc'y v. Jamison*, No. 91-6123-JO (D. Or. Jan. 21, 1993)(opinion and order).

64. *See generally* *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993)(describing exemption process).

65. 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).

66. Until its decision in May 1992 to grant an exemption to the BLM, the ESC had only been convened twice since its creation in 1978. The ESC considered both previous applications under the procedures that preceded the current provisions in 16 U.S.C. § 1536(e)-f(1988), *see* Pub. L. No. 95-632, 92 Stat. 3751 (Nov. 10, 1978) (adding original exemption procedures to 16 U.S.C. § 1536), and the ESC never granted an exemption following a contested proceeding. The first time Congress directed the ESC to consider an exemption was for the Tellico Dam and Reservoir, a project that had been halted as a result of the famous "snail darter" litigation culminating in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which led directly to creation of the ESC in the 1978 amendments. *See* ELR Comment, *supra* note 21, at 10,032. Congress short-circuited the application, threshold determinations and adjudicatory processes, and also told the ESC to consider only two of the three criteria otherwise applicable to exemption decisions. *Id.* at 10,033. Despite the greased wheels, the ESC unanimously denied the application. *Id.* (citing Endangered Species Committee, Application for Exemption for Tellico Dam and Reservoir (Feb. 7, 1979)). Congress, however, ultimately

environmental groups (petitioners) in the Ninth Circuit in *Portland Audubon Society v. Endangered Species Committee*.⁶⁷

Petitioners challenged the ESC's decision on a plethora of both procedural and substantive flaws in the BLM's application for an exemption, the Secretary of Interior's decision to convene the ESC, and the ESC's decision, only three of which will be discussed here. First, petitioners alleged that BLM violated the predicate requirements of ESA section 7(g)(3)(A)(i), which requires an agency to engage in good faith consultation with FWS before applying for an exemption from the God Squad.⁶⁸ In particular, petitioners asserted that BLM failed to examine the effects of its timber sale program as a whole, instead improperly segmenting its intended conduct by focussing exclusively on individual timber sales for a single year.

Ironically, BLM submitted its God Squad application, which rested on the Jamison Strategy, on September 11, 1991—the same day Judge Jones declared BLM in violation of the ESA's consultation requirement for the Jamison Strategy.⁶⁹ Indeed, in *Lane County Audubon Society v. Jamison*,⁷⁰ the Ninth Circuit firmly and definitively rejected BLM's approach, and enjoined future BLM timber sales (including those at issue in BLM's exemption application), precisely because BLM never consulted with FWS on its overall timber sale program.⁷¹ While the ESC refused to reexamine the adequacy of BLM's consultation,⁷² *Lane County Audubon Society* established conclusively that BLM never complied with this crucial, statutory pre-condition to obtaining an exemption.⁷³ Petitioners

overturned the ESC's decision by way of an obscure provision in an appropriations bill. See Sher & Hunting, *supra* note 4, at 441-44.

The second time Congress directed the ESC to consider an exemption was for the Grayrocks Dam project on the Platte River. The ESC ultimately issued a decision allowing the project to proceed. See ELR Comment, *supra* note 21, at 10,033 (citing Endangered Species Committee, Application for Exemption for Grayrocks Dam and Reservoir (Feb. 7, 1979)). However, as with the Tellico Dam, Congress short-circuited the application process and threshold adjudication, and, in addition, expressly required that the project be modified to avoid jeopardizing the endangered whooping crane. *Id.* Moreover, litigation over the dam settled while the application was pending before the ESC, and so the exemption "was a foregone conclusion." *Id.* Although the ESC granted the exemption, conditioned on adoption of the conditions of the settlement agreement, it is questionable whether an exemption was even necessary given the modified nature of the project. *Id.*

67. 984 F.2d 1534, 1537 (9th Cir. 1993)(petition filed June 10, 1992).

68. 16 U.S.C. § 1536(g)(3)(A)(i) (1988).

69. *Lane County Audubon Soc'y v. Jamison*, No. 91-6123-JO, 1991 WL 354885 (D. Or. Sept. 11, 1991)(order granting summary judgment). See *supra* text accompanying notes 55-62.

70. 958 F.2d 290 (9th Cir. 1992).

71. *Id.*; see *supra* text accompanying notes 57-62.

72. See *Bureau of Land Management v. U.S. Fish & Wildlife Service*, ESA 91-1, at 5 (U.S. Dep't of the Interior, Dec. 11, 1991)(order removing question of BLM's consultation performance from ESC consideration "because the question is already at issue before the Court of Appeals.").

73. 958 F.2d at 294-95. See *supra* notes 57-62 and accompanying text.

contended that the exemption must therefore be reversed as a matter of law.

Second, petitioners asserted that BLM violated ESA section 7(k), which requires that "an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted."⁷⁴ The inadequacy of BLM's consideration of the effects of its timber sale program on the spotted owl has been in federal court since 1987.⁷⁵ In 1989, federal district court Judge Helen Frye determined that BLM lacked such an EIS, but held that the courts could not grant relief because Congress had temporarily deprived them of jurisdiction over such claims.⁷⁶ In 1992, however, the same court granted summary judgment for the plaintiffs, holding that BLM's existing EISs were not adequate, and that the issue of the effects of BLM's Timber Management Plans on the long-range survival of the northern spotted owl subspecies should be addressed by BLM under NEPA.⁷⁷ As with BLM's failure to consult properly on its timber sale programs, BLM's failure to satisfy a mandatory statutory prerequisite to an exemption has already been established by the federal courts.

Third, petitioners asserted that the entire ESC hearing suffered from fundamental procedural flaws. From the outset, the Secretary of Interior characterized the proceeding as a "rule making," rather than an "adjudication" under the Administrative Procedure Act.⁷⁸ Accordingly, as a direct result of applying the wrong APA standard, the Secretary failed to take steps to protect against improper *ex parte* contacts between decisional staff, individuals involved in closely related litigation, and third parties.⁷⁹

74. 16 U.S.C. § 1536(k) (1988).

75. See *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR (D. Or.)(complaint filed Oct. 19, 1987). In 1992, the court granted summary judgment to plaintiffs on their NEPA claim. *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992).

76. *Portland Audubon Soc'y v. Lujan*, 712 F. Supp. 1456, 1461, 1485 (D. Or.), *aff'd in part, rev'd in part*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

77. *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1501-02. See *infra* note 116 and accompanying text.

78. See, e.g., Memorandum from Tom Sansonetti, Counsel, Endangered Species Committee, to Harvey C. Sweitzer, Administrative Law Judge 4 (Jan. 13, 1992)(copy on file with author). Accordingly, the Secretary concluded that the procedural requirements for the exemption process "are much less stringent than those required in an adjudication." *Id.* at 6.

79. The two key elements of formal adjudicatory hearings under the Administrative Procedure Act are (1) assuring an absence of *ex parte* communications with decisionmakers so that the decision can be made "on the record," 5 U.S.C. §§ 554(a), 557(d) (1988); and (2) assuring that there is a clear separation of functions between investigative and prosecutorial staff, on the one hand, and decisionmakers on the other. § 554(d)(2). Under the first of these standards, an agency employee "engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review, except as a witness or counsel in public proceedings." § 554(d). In enacting this provision, Congress

Similarly, petitioners alleged, the ESC blurred "prosecutorial" and "decisional" functions among and within affected federal agencies.

Petitioners pointed to a number of significant irregularities in the ESC's consideration of BLM's exemption application. For example, then-Solicitor of Interior Thomas Sansonetti wore at least four different hats during the proceeding: He was simultaneously counsel for BLM in closely-related pending litigation involving BLM's NEPA duties (*Portland Audubon Society v. Lujan*) and BLM's ESA duties (*Lane County Audubon Society v. Jamison*), counsel for the ESC, counsel for the administrative law judge conducting the evidentiary hearing, and chief counsel for the U.S. Fish & Wildlife Service (an Interior agency which opposed BLM's application for an exemption).⁸⁰ The multiple roles played by Solicitor Sansonetti exacerbated the confused procedural posture of the

intended to preclude from decision-making in a particular case not only individuals with the title of "investigator" or "prosecutor," but all persons who had, in that or a factually-related case, been involved with *ex parte* information or who had developed by prior involvement a "will to win." *Utica Packing Co. v. Block*, 781 F.2d 71, 76 (6th Cir. 1986); *Grolier, Inc. v. Federal Trade Comm'n*, 615 F.2d 1215, 1220 (9th Cir. 1980), *cert. denied*, 464 U.S. 891 (1983). As the court explained in *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), "the appearance of bias or pressure may be no less objectionable than the reality." *Accord, e.g., Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 591 (D.C. Cir. 1970) ("an administrative hearing 'must be attended not only with every element of fairness but with the very appearance of complete fairness.'").

The prohibition on *ex parte* communications, in turn, stems from the APA's requirement that decisions be based on "the whole record." 5 U.S.C. § 706 (1988). The *ex parte* prohibition is set forth in 5 U.S.C. § 557(d)(1) (1988), which is a "broad provision that prohibits any *ex parte* communications relevant to the merits of an agency proceeding between 'any member of the body comprising the agency' or any agency employee who 'is or may reasonably be expected to be involved in the decisional process' and any 'interested person outside the agency.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1539 (9th Cir. 1993). The purpose of the *ex parte* communications prohibition "is to ensure that 'agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.'" *Id.* In *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547 (D.C. Cir. 1982), the court emphasized the pernicious nature of *ex parte* communications:

We think it a mockery of justice to even suggest that judges or other decisionmakers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudications are viable only so long as the integrity of the decisionmaking process remains inviolate. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decisionmakers through *ex parte* contacts.

Id. at 570.

80. Solicitor Sansonetti conferred frequently — and secretly — with the administrative law judge (ALJ) charged under 16 U.S.C. § 1536(g) (1988) with conducting an impartial evidentiary hearing to compile the record for the ESC's ultimate decision. *See* Transcript of Evidentiary Hearing at 20, Bureau of Land Management, ESA 91-1 (U.S. Dep't of Interior, Dec. 3-4, 1991) (ALJ would "be in conference from time to time" with Solicitor); *id.* at 53-60, 272-76 (concerns by Portland Audubon Society regarding improper tainting of record from such contacts). By playing these multiple schizophrenic roles in both the ESC's deliberations and closely related litigation against BLM, the Solicitor seriously undercut any separation between advocacy and decisional functions within the Department of the Interior.

evidentiary hearing on BLM's application. They also led to some highly questionable rulings by the Administrative Law Judge (ALJ),⁸¹ outright reversals in positions taken by FWS in the exemption proceeding to protect BLM's position on closely-related issues in pending litigation,⁸² and even apparent interference with the intervention by the U.S. Environmental Protection Agency.⁸³

These events called into question the fundamental fairness of the

81. For example, the ALJ removed the question of whether the BLM should have consulted on the overall Jamison strategy from the proceeding. Bureau of Land Management, ESA 91-1 at 5 (U.S. Dep't of Interior, Dec. 11, 1991). This decision rested directly on the Secretary's (and Solicitor's) litigation position on behalf of the BLM in *Lane County Audubon Society*: "Said question may not be considered in this proceeding because the question is already at issue before the Court of Appeals, Ninth Circuit, on appeal of *Lane County Audubon Society v. Jamison*, Civ. No. 91-6123-HO (D. Or. Sept. 11, 1991)." *Id.* Of course, when the ALJ entered this order, BLM was enjoined from implementing the Jamison Strategy because the district court in *Lane County Audubon Society* explicitly held that BLM's failure to consult on the Strategy violated 16 U.S.C. § 1536(a)(2) (1988). These circumstances raised the possibility that BLM's litigation situation may have influenced the ALJ's decision on certain key threshold issues in the ESC proceedings.

82. In early December 1991, FWS filed a motion with the ALJ to certify certain issues to the ESC itself. FWS argued, among other things, that BLM's failure to consult on the Jamison Strategy required the ESC to deny BLM's application. See Memorandum in Support of FWS Motion to Certify Two Jurisdictional Questions to the Endangered Species Committee (Dec. 9, 1991) (copy on file). Shortly thereafter, plaintiffs in *Lane County Audubon Society* attached a copy of FWS' papers to their reply brief in the pending appeal in the Ninth Circuit. FWS subsequently filed with the ESC a Notice stating that the "legal argument" made in the December 9 FWS Motion to Certify "is in conflict with the position of the Department of the Interior in both the District Court and the Court of Appeals in *Lane County Audubon Society v. Jamison*." Bureau of Land Management, ESA 91-1, at 1 (U.S. Dep't of the Interior, Dec. 20, 1991) (Notice of Limited Withdrawal of Jurisdictional Issue). FWS therefore "withdr[ew] that portion of the December 9 brief subject to a decision by the Court of Appeals." *Id.*

83. EPA's Office of Federal Activities (OFA) intervened in the ESC proceedings. OFA's participation carried special significance, since it is the office within EPA delegated the responsibility for carrying out EPA's charge under 42 U.S.C. § 7609 to review the adequacy of federal agencies' compliance with NEPA. This issue was central to the ESC's deliberations (under 16 U.S.C. § 1536(k) (1988)), as well as to BLM's litigation position on its NEPA compliance at issue in *Portland Audubon Society v. Lujan* (then pending in Oregon district court). On December 27, 1991, EPA submitted testimony concluding, among other things, that BLM's refusal to address significant new information about the spotted owl in a supplemental EIS failed to satisfy its NEPA obligations. See Letter from Richard E. Sanderson, Director, Office of Federal Activities, to D. Dean Bibbes, Oregon State Director, Bureau of Land Management 2 (Dec. 27, 1991) (copy on file with author) ("there is significant new information bearing directly on the [BLM's timber] sales' potential environmental impacts, including but not limited to effects on the northern spotted owl, which warrants preparation of one or more supplemental EISs. Based on our review of the [existing] timber management EISs, . . . the present documentation prepared for the proposed sales is inadequate to satisfy NEPA requirements.").

On January 8, 1992, however, literally as the evidentiary hearing was about to start, OFA moved to withdraw from the proceedings. The purported basis for the withdrawal was an arrangement between *decisional* staff — EPA's acting General Counsel and the Solicitor of Interior — regarding a "process" that would supposedly address the *prosecutorial* staff's concerns that led to OFA's intervention in the first place. See Transcript of Evidentiary Hearing, at 548, Bureau of Land Management v. U.S. Fish & Wildlife Service, ESA 91-1, (U.S. Dep't of the Interior, Dec. 3-4, 1991) (referencing letter from counsel for ESC to Acting General Counsel of EPA (Jan. 3, 1991)) (copy on file with author).

ESC's deliberations. As an editorial in the Portland *Oregonian* put it:

When it comes to confusing the spotted owl issue, the federal government is on a roll it just can't stop. . . .

Most recently, the Environmental Protection Agency removed itself as a participant in the proceedings. That came after the agency submitted, then withdrew, testimony highly critical of BLM's assessment of the risk its logging would pose to the owl. Earlier, high-level officials ordered the lawyer for the U.S. Fish and Wildlife Service to drop one of its legal arguments against the BLM position.

All this increases the suspicion that the Bush administration is manipulating the input before a federal hearings judge so the output will be favorable to the timber industry, irrespective of the facts of the matter. . . .

[T]he committee should not accept as an option a timber harvest strategy that makes the extinction of the owl or other species a significant probability.

And it most assuredly should not play God with the proceedings by allowing the facts to be slanted before they ever get to a decision.⁸⁴

When citizens challenged the ESC's exemption decision in *Portland Audubon Society v. Endangered Species Committee*,⁸⁵ BLM would not have been able to sell the sales exempted by the ESC anytime soon.⁸⁶ Moreover, in February 1993, the Ninth Circuit granted petitioners' request for a formal evidentiary hearing into whether members of former President Bush's staff engaged in improper *ex parte* contacts intended to persuade members of the ESC to grant BLM's exemption.⁸⁷ In granting the request for an evidentiary hearing, the court squarely held that the ESC's decisions "are adjudicatory in nature."⁸⁸ This ruling demolished the entire procedural framework under which the ESC considered BLM's application.

On April 19, 1993, BLM threw in the towel. In a letter to Secretary of Interior Bruce Babbitt, BLM's Acting Director stated: "Upon further consideration, the BLM has decided to abandon its plan to go forward with

84. PORTLAND OREGONIAN, Jan. 12, 1992, at C-8.

85. 984 F.2d 1534 (9th Cir. 1993).

86. Court injunctions in two other cases enjoined BLM from proceeding with these and other sales in spotted owl habitat because of violations of the ESA and NEPA. See *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290 (9th Cir. 1992)(ESA); *supra* notes 57-63 and accompanying text; *Portland Audubon Soc'y v. Lujan*, 795 F.Supp. 1489 (D. Or.), *modified in part*, No. 87-1160-FR, 1992 WL 176353 (D. Or. July 16, 1992)(NEPA); *infra* notes 129-132 and accompanying text.

87. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536 (9th Cir. 1993).

88. *Id.* at 1541.

the 13 proposed sales that the Committee voted to exempt from the ESA. Accordingly, BLM hereby withdraws its request for exemption for timber sales from the Committee."⁸⁹ BLM promised it would "offer to sell timber from the lands we manage only when consistent with the ESA and the other requirements of law . . ."⁹⁰ Finally, BLM stated its hope that "by sweeping away any impact [of the ESC's decision] BLM has cleared the decks for constructive, forward-looking consideration of the complex issues arising out of old growth forest management."⁹¹ The same day, Secretary Babbitt, in his role as chairman of the ESC, acknowledged BLM's withdrawal of the exemption application,⁹² and the ESC immediately moved to dismiss Portland Audubon Society's petition for review as moot.⁹³ On June 3, 1993 the Ninth Circuit granted the ESC's motion,⁹⁴ closing this chapter of ESA implementation.

E. Other Pending or Potential Litigation

More spotted owl litigation is either underway or forthcoming under the ESA. First, the timber industry filed a lawsuit seeking to invalidate FWS' regulations defining "harm" to listed species to include significant habitat modification, a contention rejected by the district court,⁹⁵ and currently on appeal to the D.C. Circuit.

Second, in *Douglas County v. Lujan*,⁹⁶ certain counties in Oregon that receive revenues from federal timber sales seek to invalidate FWS' designation of critical habitat for the spotted owl for failing to prepare an Environmental Impact Statement under NEPA. On December 22, 1992, federal district court Judge Michael Hogan granted the counties' motion for summary judgment, holding that FWS violated NEPA by failing to

89. Letter from Michael Penfold, Acting Director, BLM, to Bruce Babbitt, Chair, ESC (Apr. 19, 1993) (copy on file with author).

90. *Id.*

91. *Id.* BLM's press release noted that the Ninth Circuit's ruling would have required an ALJ to "hold hearings on whether the Bush Administration improperly meddled in the deliberations of the so-called 'God Squad.'" *BLM Withdraws Exemption Request*, NEWS RELEASE (Dep't of the Interior, Wash. D.C.), Apr. 19, 1993 (copy on file with author). BLM, however, explained that the new Administration "is not interested in looking backwards or in resurfacing allegations about the previous Administration." *Id.* Rather, "the more important move was to forge greater consensus in forest management practices of the BLM and the U.S. Forest Service." *Id.*

92. Letter from Bruce Babbitt, Secretary of Interior and Chairman, ESC, to Michael Penfold, Acting Director, BLM (Apr. 19, 1993) (copy on file with author).

93. See Respondents' Motion to Dismiss, *Portland Audubon Soc'y v. Endangered Species Comm.*, No. 92-40736 (9th Cir.) (filed Apr. 19, 1993).

94. *Portland Audubon Soc'y v. Endangered Species Comm.*, No. 92-40736 (9th Cir. June 3, 1993) (order granting motion to dismiss).

95. See *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 806 F.Supp. 279 (D. C.C. 1992).

96. 810 F. Supp. 1470 (D. Or. 1992).

determine whether an EIS was necessary or not in connection with its designation of critical habitat.⁹⁷

The courts have either examined or are now examining virtually all facets of federal implementation of the ESA in connection with the spotted owl. This judicial legacy will provide important guidance for future conduct regarding other species, from initial listing to God Squad determinations.

III. THE BLM, § 314, AND NEPA

A. 1987-1991

In October 1987, environmental groups filed suit in Oregon challenging BLM's on-going timber sales in spotted owl habitat under the National Environmental Policy Act (NEPA),⁹⁸ the Migratory Bird Treaty Act (MBTA),⁹⁹ the Oregon & California Lands Act (OCLA),¹⁰⁰ and the Federal Land Policy & Management Act (FLPMA).¹⁰¹ This discussion focuses on plaintiffs' NEPA claims.¹⁰²

In February 1987, following requests from environmental groups to prepare a supplemental environmental impact statement (SEIS) under NEPA to address new information about the spotted owl, BLM prepared an Environmental Assessment (EA) to consider the need for an updated analysis.¹⁰³ BLM, however, declined to prepare an SEIS.¹⁰⁴ While the EA revealed the Agency's plans to offer more than 200 timber sales within known owl habitat over the next three years,¹⁰⁵ BLM failed even to mention any of the new information reflecting the scientific community's increased concerns about the owl's situation. In October 1987 environmental groups filed suit, seeking to enforce NEPA.¹⁰⁶

97. *Id.*

98. 42 U.S.C. §§ 4321-70c (1988).

99. 16 U.S.C. §§ 703-12 (1988).

100. 43 U.S.C. § 1181 (1988).

101. 43 U.S.C. §§ 1701-82 (1988).

102. Plaintiffs' claims under OCLA and FLPMA concerned whether the BLM had discretion under those statutes to protect species *not* listed under the ESA. When the owl became listed in 1990, plaintiffs abandoned these claims. Plaintiffs' claims under the MBTA were essentially the same as those raised in *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991). See *infra* discussion sec. IV. B.

103. *Portland Audubon Soc'y v. Lujan*, 712 F.Supp. 1456, 1460 (D. Or.), *aff'd in part, rev'd in part*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); BUREAU OF LAND MANAGEMENT, SPOTTED OWL ENVIRONMENTAL ASSESSMENT (1987)(copy on file with author) [hereinafter SPOTTED OWL EA].

104. BUREAU OF LAND MANAGEMENT, RECORD OF DECISION 3 (1987)(copy on file with author).

105. SPOTTED OWL EA, *supra* note 103, at app. C.

106. See *Portland Audubon Soc'y v. Hodel*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,210, 21,211 (D. Or. Apr. 20, 1988)(complaint filed Oct. 19, 1987), *aff'd* 866 F.2d 302 (9th Cir. 1989); *Portland*

Within two months after the lawsuit was filed, Congress enacted a "rider" to the Department of the Interior Appropriations Act for fiscal year 1988.¹⁰⁷ This provision, section 314, which Congress reenacted without change each of the next two years, allowed the BLM to continue managing its lands under existing timber management plans, and stated:

Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan . . . [with respect to 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.¹⁰⁸

This contradictory language, which the court of appeals later called "anything but clear,"¹⁰⁹ has been the subject of five published Ninth Circuit opinions.¹¹⁰

In April 1988, district court Judge Helen Frye relied on section 314 to dismiss plaintiffs' complaint, holding that section 314 prevented the federal courts from hearing the case.¹¹¹ The Ninth Circuit reversed.¹¹² The

Audubon Soc'y v. Lujan, 795 F.Supp. 1489, 1492-96 (D. Or.) (setting forth procedural history of case), *modified in part*, No. 87-1160-FR, 1992 WL 176353 (D. Or. July 16, 1992).

107. Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, § 314, 101 Stat. 1329-254 (1987), *reenacted without change in* Department of the Interior and Related Agencies Appropriations Act for fiscal year 1989, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988), and for fiscal year 1990, Pub. L. No. 101-121, § 312, 103 Stat. 701, 743 (1989).

108. *Id.*

109. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1236 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (9th Cir. 1990).

110. Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991); *Headwaters v. Bureau of Land Management*, 914 F.2d 1174 (9th Cir. 1990), *reh'g denied*, 940 F.2d 435 (9th Cir. 1991); Oregon Natural Resources Council v. Mohla, 895 F.2d 627 (9th Cir.), *cert. denied*, 496 U.S. 926 (1990); Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989). Two of these cases did not involve new information about spotted owls. In *Mohla*, plaintiffs challenged a single Forest Service timber sale on the grounds that the agency had ignored significant new information concerning the ecological significance of old-growth forests. The district court dismissed, holding the claim was barred by section 314. Oregon Natural Resources Council v. Mohla, 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,177 (D. Or. May 25 1989). The Ninth Circuit affirmed, holding that if ONRC won this case, it could use that victory as a basis for a challenge to other sales on the forest, and that such challenges "would amount to an attack on the entire plan as outdated," a result forbidden by section 314. *Mohla*, 895 F.2d at 630.

In *Headwaters*, plaintiff alleged that logging on certain BLM lands would increase fire hazards by removing fire-resistant old-growth. Relying on its earlier opinion in *Mohla*, the Ninth Circuit held that section 314 barred this claim, since the complaint raised issues "which also could be equally applicable to all sales under the management plan." 914 F.2d at 1179. See generally Sher & Hunting, *supra* note 4, at 452-70 (discussing *Hodel*, *Lujan*, and *Mohla*).

111. Portland Audubon Soc'y v. Hodel, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,210 (D. Or. Apr. 20, 1988).

112. Portland Audubon Soc'y v. Hodel, 866 F.2d 302 (9th Cir.), *cert. denied*, 490 U.S. 911

Had Congress intended to keep the restrictions of section 314 in place more than a year at a time, it could have so provided or enacted the instructions as part of permanent, substantive legislation. It would not have proceeded to consider the provision on an annual basis for three years in a row.

The plaintiffs should have been granted leave to amend their complaint to allege NEPA claims no longer barred by the annual appropriations act restrictions originally adopted as Section 314.¹²⁵

The Ninth Circuit's ruling finally cleared the way for plaintiffs to present the merits of their claims — albeit more than four years after they filed their complaint.

B. *BLM Finally Faces the Music*

Following the Ninth Circuit's ruling, plaintiffs filed an amended complaint and moved for a temporary restraining order and preliminary injunction. Judge Frye granted the temporary restraining order on January 30, 1992,¹²⁶ and the preliminary injunction on February 19, 1992.¹²⁷ On June 8, 1992, the court granted plaintiffs summary judgment and issued a permanent injunction against further BLM timber sales in spotted owl habitat unless and until the Bureau complies with NEPA.¹²⁸

The court explained:

This court has heretofore reviewed the decision of the BLM . . . not to prepare a Supplemental Environmental Impact Statement and has ruled that that decision was an arbitrary and capricious decision. The BLM has known since May 18, 1989 that, in this court's opinion, the existing Environmental Impact Statements were not adequate, and the issue of the effects of the [BLM's] Timber Management Plans on the long-range survival of the northern spotted owl subspecies should be addressed by the BLM under NEPA.¹²⁹

The court rejected BLM's contention that its experts were entitled to deference in deciding whether or not current information about the spotted owl required updating the agency's EISs:

125. *Id.* at 304.

126. *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR (D. Or. Jan. 30, 1992)(temporary restraining order).

127. *Portland Audubon Soc'y v. Lujan*, 784 F. Supp. 786 (D. Or. 1992)(order and opinion granting motion for preliminary injunction).

128. *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992), *modified in part*, No. 87-1160-FR, 1992 WL 176353 (D. Or. July 16, 1992).

129. *Id.* at 1505.

It is not up to the court to evaluate or to discount the opinions of responsible experts in a scientific field. It is the duty of the BLM [under NEPA] to identify, evaluate and address the new information, allow public comment, and formulate its plans accordingly. The only credible conclusion to be reached in this controversy, regardless of which "responsible experts" the court chooses to believe, is that NEPA requires the public to be involved, and the BLM has not followed procedures to allow the public to be involved.¹³⁰

Finally, the court also rejected BLM's argument that the Bureau should nonetheless be allowed to proceed with timber sales, notwithstanding its violations of NEPA:

This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies using the existing Timber Management Plans which do not address the issue of the long-range survival of the northern spotted owl subspecies or contain any plan for long-range management of the northern spotted owl subspecies on BLM lands

. . . This court cannot do what the process of preparing the Timber Management Plans and an Environmental Impact Statement is intended to accomplish

. . . The purpose of requiring a Supplemental Environmental Impact Statement is to 'ensure[] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.' *Marsh v. ONRC*, [109 S.Ct. 1851, 1858 (1989)]. Going forward with timber sales without the preparation of a Supplemental Environmental Impact Statement . . . is directly contrary to that purpose

There is no defense for the BLM's failure to comply with NEPA, and there will be no opportunity for the BLM to comply with NEPA after the agency's proposed actions are taken. . . .

On December 21, 1987, Congress explicitly directed that '[t]he . . . Bureau of Land Management [is] to continue to complete as expeditiously as possible development of . . . Resource Management Plans to meet all applicable statutory requirements.' Section 314 of the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329 (1987). Congress allowed the BLM to continue its operations without court scrutiny while this legislation was in effect. Four years and five months have passed, and Congress has withdrawn its protection. The BLM must now complete its

130. *Id.* at 1502.

court of appeals held that "substantial doubt about the congressional intent [to bar this lawsuit] exists,"¹¹³ and that section 314 neither explicitly nor implicitly repealed any existing law.¹¹⁴ However, the court left open whether plaintiffs' challenges to BLM's upcoming 200 timber sales constituted challenges to "particular activities" or to plans.¹¹⁵

On remand, the district court concluded that BLM's failure to consider "new, significant and probably accurate information" about the risk of extinction facing the spotted owl was "arbitrary and capricious" and violated NEPA.¹¹⁶ However, the court again concluded that section 314 barred plaintiffs' NEPA claim.¹¹⁷ This time, the Ninth Circuit affirmed.¹¹⁸ The court of appeals acknowledged that plaintiffs' NEPA claim was "not phrased as a direct challenge to the existing plans."¹¹⁹ Nonetheless, the court concluded that a victory for plaintiffs would mean that BLM would be required to "suspend its management plans and prepare a supplemental EIS," and that this constituted a challenge to the plans within the meaning of section 314.¹²⁰

Congress reenacted section 314 for fiscal year 1990, but the provision expired on September 30, 1990, and was not replaced.¹²¹ In 1991, plaintiffs renewed their NEPA claims in the litigation. Judge Frye first held that because the Ninth Circuit had upheld her dismissal of the case, there was no NEPA claim before her.¹²² When plaintiffs moved for leave to file an amended complaint, she held that section 314 constituted permanent legislation that had not been repealed, and therefore still barred any NEPA claim based on new information. Accordingly, she denied the motion to amend.¹²³

On December 23, 1991, the Ninth Circuit reversed.¹²⁴ The court explained:

(1989).

113. *Id.* at 306.

114. *Id.* at 307.

115. *Id.* at 307-08.

116. *Portland Audubon Soc'y v. Lujan*, 712 F.Supp. 1456, 1485 (D. Or.), *aff'd in part, rev'd in part*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

117. *Id.* at 1489.

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

119. *Id.* at 1237.

120. *Id.* at 1239.

121. *See Sher & Hunting*, *supra* note 4, at 487-90 (discussing the efforts to enact a similar restriction on existing environmental laws for fiscal year 1991).

122. *Portland Audubon Soc'y v. Lujan*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 21,341, 21,343 (D. Or. May 8, 1991).

123. *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR (D. Or. July, 16, 1991)(order and opinion denying plaintiffs' motion for leave to file an amended complaint).

124. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303-04 (9th Cir. 1991).

statutory duties.¹³¹

BLM and the timber industry appealed. The Ninth Circuit heard oral argument on the appeals on November 4, 1992, but has not yet issued a decision.

IV. THE FOREST SERVICE, § 318, NFMA, AND NEPA

In December 1988, the Forest Service adopted a Record of Decision (ROD) and Final Supplemental EIS (FSEIS) for a new plan to manage the spotted owl on the National Forests in Oregon and Washington as part of the Regional Guide for Forest Service Region Six. The ROD and FSEIS were strongly criticized by many scientists as scientifically insupportable.¹³² The Secretary of Agriculture declined to accept administrative appeals of the ROD and FSEIS. Accordingly, in early 1989 a coalition of environmental organizations filed suit, alleging the Forest Service had violated NEPA, the National Forest Management Act (NFMA) and the Migratory Bird Treaty Act (MBTA).

A. § 318

District Court Judge William Dwyer granted a preliminary injunction in March 1989 forbidding 140 imminent timber sales and set a trial date for June.¹³³ However, before the case could be resolved on the merits, FWS proposed to list the owl under the ESA.¹³⁴ In addition, Congress stepped in with a second appropriations rider, section 318.¹³⁵ The statute sought to insulate Forest Service and BLM actions from judicial review for twelve months.

Section 318, Congress' first recognition of spotted owls and ancient forests, required the Forest Service to minimize fragmentation of the most ecologically significant old-growth stands.¹³⁶ Portions of section 318 also designated extra acres for spotted owl habitat in lands under Forest Service

131. *Id.* at 1508-10.

132. For example, Dr. Daniel Goodman, an expert in population dynamics, concluded that the FSEIS "does not constitute a scientifically acceptable [population] viability analysis. Quite the contrary, it is rife with elementary errors in statistics, mathematics and population dynamics. These errors are of sufficient magnitude to invalidate the conclusions of the entire process [of evaluating the owl's status]." Declaration of Dr. Daniel Goodman at 3, *Washington Audubon Soc'y v. Robertson*, No. C89-160-WD, 1991 WL 180099 (W.D. Wash. Mar. 7, 1991) (copy on file with author).

133. *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).

134. 54 Fed. Reg. 26,666, 26,670 (1989).

135. Dep't of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

136. *Id.*

and BLM management¹³⁷ and established citizen advisory panels to make recommendations to both federal agencies.¹³⁸

The heart of section 318, subsection (b)(6)(A), provided that "[w]ithout passing on the legal and factual adequacy" of existing Forest Service and BLM plans,

Congress hereby determines and directs that management of areas according [to the sections designating certain BLM and Forest Service lands as protected for the owl] . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated [spotted owl] cases.¹³⁹

Based on this provision, Judge Dwyer dissolved his preliminary injunction in November 1989.¹⁴⁰ Judge Frye, ruling in the *Portland Audubon Society* litigation, followed suit and dismissed the complaint against the BLM.¹⁴¹

In September 1990 the Ninth Circuit reversed both district courts in *Seattle Audubon Society v. Robertson*.¹⁴² The court of appeals held that section 318 was an unconstitutional intrusion into the decisionmaking process of Article III courts, as articulated by the Supreme Court's decision in *U.S. v. Klein*.¹⁴³ At the time, all but approximately sixteen timber sales from the Forest Service's fiscal year 1990 program — and all of the BLM's timber sales — had already been sold.

The Supreme Court granted certiorari¹⁴⁴ and, in March 1992 reversed the Ninth Circuit's decision.¹⁴⁵ The Court avoided "any broad question of Article III jurisprudence," holding instead that Congress "*did*

137. *Id.*

138. *Id.*

139. § 318, 103 Stat. at 747. The provision refers specifically to "Seattle Audubon Society et al. v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civ. No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al. v. Manuel Lujan, Jr., Civil No. 87-1160-FR." *Id.*

140. *Seattle Audubon Soc'y v. Robertson*, No. C89-160-WD (W.D. Wash. Nov. 6, 1989)(order).

141. *Portland Audubon Soc'y v. Lujan*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,018 (D. Or. Dec. 21, 1989)(order, opinion and judgment).

142. 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

143. *Id.* at 1316 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)). In a related decision, *Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir. 1991), the court held that the 15-day limitations period for challenging timber sales previously offered pursuant to section 318 during Fiscal Year 1990 was equitably tolled while the statute's unconstitutional provisions barred access to the courts. However, plaintiffs later waived their challenges to all but a few of these sold sales in connection with their request for prospective injunctive relief. *See* Transcript of Evidentiary Hearing, Vol. I at 15, 24, *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash.), *aff'd* 952 F.2d 297 (9th Cir. 1991).

144. *Seattle Audubon Soc'y v. Robertson*, 111 S. Ct. 2886 (1992).

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

amend applicable law" in section 318.¹⁴⁶

Ultimately, the Supreme Court's decision is likely to become a minor footnote in the spotted owl controversy. Because it dealt with a statute that expired by its own terms at the end of fiscal year 1990; because it affected only sixteen timber sales; because both the *Seattle Audubon Society* and *Portland Audubon Society* cases have proceeded to judgment on the merits; and because Congress is unlikely to repeat section 318 for political reasons, *Robertson* has little importance to either the current litigation or legislative proposals now pending in Congress.

B. *SAS v. Evans: A Court Finally Reaches The Merits Of The Forest Service's Owl Management Strategy*

During 1990, while the constitutionality of section 318 was being litigated in the Ninth Circuit and both the *Seattle Audubon Society* and *Portland Audubon Society* cases were otherwise quiet, the owl's listing under the ESA became final.¹⁴⁷ In addition, the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl issued its Report.¹⁴⁸ The ISC Report concluded that the owl is "imperiled" across its range as a result of logging, and that existing owl management strategies of both the Forest Service and BLM (which were based on the SOHA network system) were "a prescription for the extinction of spotted owls."¹⁴⁹ The ISC concluded that the "best management" for the owl would be to "preserve all stands of mature and old-growth timber within the range of the species and to grow more such stands as soon as possible,"¹⁵⁰ but proposed an alternative land management strategy that would still allow substantial logging to proceed under new guidelines.¹⁵¹

On October 3, 1990, the Forest Service published an announcement in the Federal Register, declaring it was "vacat[ing]" the 1988 ROD and FEIS, and amending all existing forest plans under NFMA "to incorporate this vacation."¹⁵² Finally, the Forest Service stated that it "will conduct timber management activities in a manner not inconsistent with the" ISC recommendations.¹⁵³

The plaintiffs in *Seattle Audubon Society* amended their complaint and moved for summary judgment, charging that (1) the Forest Service had *still* never prepared an adequate EIS on the owl; (2) the agency had

146. *Id.* at 1414 (emphasis added).

147. Final Rule, *supra* note 7, at 26,114.

148. ISC REPORT, *supra* note 11.

149. *Id.* at 39.

150. *Id.* at 11.

151. *Id.* See *supra* note 14.

152. 55 Fed. Reg. 40,412, 40,413 (1990).

153. *Id.*

violated the National Forest Management Act (NFMA) by failing to follow the procedures specified for amending forest plans and had failed to assure the viability of the owl pursuant to NFMA's diversity provision¹⁵⁴ and implementing regulations;¹⁵⁵ and (3) the Migratory Bird Treaty Act (MBTA) and the Administrative Procedure Act prohibit the Forest Service from killing or otherwise "taking" spotted owls in the absence of appropriate regulations consistent with applicable international treaties. The Forest Service countered that the owl's listing under the ESA relieved it of any obligation under NFMA to maintain viable populations and that its Federal Register notice constituted a set of guidelines and standards indistinguishable from a regional guide, and that the MBTA did not apply.

1. *The ruling on summary judgment*

In March 1991 Judge Dwyer granted summary judgment to the plaintiffs on their NFMA claim.¹⁵⁶ First, the court held that NFMA and the ESA impose related, but distinct, obligations on the Forest Service:

NFMA, passed three years after ESA, directs the Secretary of Agriculture to promulgate regulations to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. 16 U.S.C. § 1604(g)(3)(B). To that end, a regional guide is required for each administratively designated Forest Service region to provide standards and guidelines for forest planning. . . . A minimum requirement is that [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. §§ 219.13, 219.19. . . . To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals.

The duty to maintain viable populations of existing vertebrate species requires planning for the entire biological community — not for one species alone. It is distinct from the duty, under the ESA, to save a listed species from extinction.

. . . NFMA was enacted three years later than ESA, and nothing in its language or legislative history suggests that Congress intended to exclude endangered or threatened species from NFMA's procedural and substantive requirements. The regulations under NFMA explicitly address endangered and threatened species. They do not suggest that ESA alone governs,

154. 16 U.S.C. § 1604(g)(3)(B) (1988).

155. 36 C.F.R. §§ 219.13, 219.19 (1992).

156. *Seattle Audubon Soc'y v. Robertson*, No. C89-160WD, 1991 WL 180099 (W.D. Wash. Mar. 7, 1991) (order on motions for summary judgment and for dismissal).

or imply any conflict between the two statutes.

The record shows that the Forest Service has understood at all times that NFMA continues to apply after a species is listed under ESA.¹⁵⁷

Second, the court held that the Forest Service violated NFMA's procedures by changing its management plan (via the Federal Register notice) without providing for public participation.¹⁵⁸ The Forest Service, the court concluded, lacks "the power to omit procedures required by law when it believes they would be unnecessary or inconvenient."¹⁵⁹

NFMA mandates a thorough process with participation by the public, the government, and the scientific community. The aim is to ensure both an informed public and an informed agency. See 36 C.F.R. § 210.6(a)(1), (2). The Forest Service here did not follow any of the procedures required before publishing the notice and announcing that it would act 'not inconsistently' with the ISC report.¹⁶⁰

Third, because NFMA procedures require an EIS when the Forest Service amends a regional guide, the court held it need not reach the merits of plaintiffs' NEPA claim.¹⁶¹

Finally, the court held that the MBTA's prohibition against "taking" owls "at any time, by any means or in any manner" in the absence of appropriate regulations, did not apply to harm caused by habitat degradation.¹⁶² The district court did not address the MBTA's concurrent prohibition against "killing" listed birds.

2. *The ruling on injunctive relief*

Plaintiffs sought a permanent injunction barring further Forest Service timber sales in spotted owl habitat, pending the agency's adoption of a legally valid management plan and EIS. Following the court's ruling granting summary judgment to plaintiffs, the timber industry asked for an evidentiary hearing on the scope of injunctive relief. After an extensive evidentiary hearing at which experts on extinction and economics from all sides testified, the court issued its ruling on May 23, 1991.¹⁶³

The court made several significant findings. First, the court found "a

157. *Id.* at *6.

158. *Id.* at *13.

159. *Id.* at *9.

160. *Id.*

161. *Id.* at *13.

162. *Id.* at *12.

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

remarkable series of violations of the environmental laws" by FWS and the Forest Service.¹⁶⁴ The court noted the testimony of agency scientists that earlier owl management plans had been subject to "a considerable — I would emphasize considerable — amount of political pressure to create a plan . . . which had a very low probability of success and which had a minimum impact on timber harvest,"¹⁶⁵ and that the Forest Service had, at the express direction of the Secretaries of Interior and Agriculture, abandoned efforts to prepare an EIS in 1990 following the owl's listing and issuance of the ISC report.¹⁶⁶ The court found:

More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest service and the FWS to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.¹⁶⁷

Second, the court concluded that the owl "is now threatened with extinction."¹⁶⁸ Moreover, the ISC Strategy, while "the first scientifically respectable proposal regarding spotted owl conservation to come out of the executive branch," has not been adopted by *any* federal agency, and has "not been put to the test of public comment and hearings."¹⁶⁹ The Strategy "may or may not prove adequate. While it is endorsed by well-qualified scientists, it is criticized by others, equally well-qualified, as over-optimistic and risky."¹⁷⁰ Finally, "[t]o log tens of thousands of additional acres of spotted owl habitat before a plan is adopted would foreclose options that might later prove to have been necessary."¹⁷¹ Indeed, "[t]here is a substantial risk that logging another 66,000 acres, before a plan is adopted, would push the species past a population threshold from which it could not recover."¹⁷²

Third, the court concluded that the economic effects of enjoining Forest Service timber sales in owl habitat would be "temporary and can be minimized in many ways."¹⁷³ In particular, the court noted the availability

164. *Id.* at 1089.

165. *Id.*

166. *Id.* at 1090.

167. *Id.*

168. *Id.* at 1091.

169. *Id.* at 1092.

170. *Id.* at 1093.

171. *Id.*

172. *Id.* at 1093-94.

173. *Id.* at 1096.

of a supply of timber under contract (but uncut) that would last about nineteen months at 1990 logging rates that would be unaffected by the injunction,¹⁷⁴ and the availability of additional timber supplies from private lands that "can reasonably be expected to enter the market."¹⁷⁵ Moreover, the court noted that "[j]ob losses in the wood products industry will continue regardless of whether the northern spotted owl is protected."¹⁷⁶

Finally, the court determined that the Forest Service could complete a new owl plan that would comply with NFMA by March 1992.¹⁷⁷ The court concluded:

The Forest Service here has not taken the necessary steps to make a decision in the first place — yet it seeks to take action with major environmental impact.

The loss of an additional 66,000 acres of spotted owl habitat, without a conservation plan being in place, and with no agency having committed itself to the ISC strategy, would constitute irreparable harm, and would risk pushing the species beyond a threshold from which it could not recover.

Any reduction in federal timber sales will have adverse effects on some timber industry firms and their employees, and a suspension of owl habitat sales in the national forests is no exception. But while the loss of old growth is permanent, the economic effects of an injunction are temporary and can be minimized in many ways . . .

To bypass the environmental laws, either briefly or permanently, would not fend off the changes transforming the timber industry. The argument that the mightiest economy on earth cannot afford to preserve old growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today. It would be even less so a year or a century from now.¹⁷⁸

On December 23, 1991, the Ninth Circuit affirmed.¹⁷⁹ The court rejected the government's contention that listing of a species under the ESA relieved the Forest Service of its obligations under NEPA:

The effect of the Forest Service's position in this litigation, were it to be adopted, would be to reward the Forest Service for its own failures; the net result would be that the less successful the Forest

174. *Id.* at 1094.

175. *Id.*

176. *Id.* at 1095.

177. *Id.* at 1096.

178. *Id.*

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

Service is in maintaining viable populations of species as required under its regulations, the less planning it must do for the diversity of wildlife sought by the statute. This is directly contrary to the legislative purpose of the National Forest Management Act . . .

... The ESA list is not a list of animals to be written off. It is a mandate for all agencies involved to take aggressive steps to avoid a species' extinction and preserve its viability . . .

... The Agency's systematic refusal to follow the law in the past, as chronicled by the district court, is not an excuse for its avoiding the concurrent requirements of the NFMA and ESA in the future.¹⁸⁰

Finally, the Ninth Circuit rejected plaintiffs' claims under the Migratory Bird Treaty Act (MBTA). The court distinguished between the definitions of "take" in the MBTA and in the ESA,¹⁸¹ noting that only the latter explicitly prohibits habitat modifications.¹⁸² The court held that "the differences in the proscribed conduct under ESA and the MBTA are "distinct and purposeful." "¹⁸³ Accordingly, the court concluded that "[h]abitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA."¹⁸⁴ Like the district court, the Ninth Circuit ignored both the MBTA's separate proscription against "killing" listed species, and the record establishing that logging killed spotted owls.

The Ninth Circuit's opinion left in place a sweeping multi-state injunction against timber sales in spotted owl habitat on national forests. The injunction dwarfed the earlier court rulings that had prompted Congress to protect the BLM and Forest Service from judicial review with section 314 (in 1987) or section 318 (in 1989). Yet, when the Bush Administration and the timber industry tried again to override the courts through special legislation, Congress demurred.¹⁸⁵ Nothing illustrates

180. *Id.* at 301-02.

181. The MBTA makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any listed bird species, except as permitted by a valid permit issued pursuant to regulations. 16 U.S.C. § 703 (1988); 50 C.F.R. § 21.11 (1992). FWS' regulations implementing the MBTA, in turn, define "take" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12 (1992).

In contrast, "take" under the ESA is much broader. It includes habitat modification and destruction. 16 U.S.C. §1532(19)(1988) ("harass, harm, pursue, hunt, shoot, wound, kill . . ."); 50 C.F.R. §17.3 (1992) (defining harm as including "significant habitat modification or degradation . . .").

182. *Evans*, 952 F.2d at 303 (citing 50 C.F.R. § 17.3 (1992)).

183. *Id.*

184. *Id.*

185. See *Sher & Hunting*, *supra* note 4, at 485-90 (discussing the political battles that eliminated sections 314 and 318 from the legal landscape).

better how far the political debate over the ancient forests had moved since the first filing in 1987 than Congress' refusal to bail out the federal agencies in 1991.

C. *Seattle Audubon Society v. Moseley: The Forest Service Fails to Cure The Problem*

The Forest Service issued its draft EIS for a new owl management plan in late September 1991 and a final EIS in January 1992. In early March 1992 the Forest Service issued a new Record of Decision (ROD), adopting the ISC Strategy as its new management plan for the spotted owl on Forest Service lands.

Citizens' groups challenged the new EIS and ROD in *Seattle Audubon Society v. Moseley*,¹⁸⁶ asserting that (1) the EIS violated NEPA by inadequately disclosing uncertainty and risks associated with the Strategy, and by ignoring significant scientific criticism; (2) the ROD violated NFMA because it inadequately protected other old-growth dependent species for which the owl is an indicator by knowingly adopting an owl management plan for which the FEIS gave only a "low to medium-low" likelihood of protecting the viability of those other species; and (3) the Forest Service violated NFMA by failing to adopt measures for preventing the destruction or adverse modification of critical habitat designated by the FWS under the ESA.¹⁸⁷

1. *The ruling on summary judgment*

On May 28, 1992, the court granted plaintiffs' motion for summary judgment.¹⁸⁸ The court held generally that the Forest Service's new EIS failed to address "[a] chief concern of scientists of all persuasions . . . whether the owl can survive the near-term loss of another half-million acres of its habitat."¹⁸⁹ In particular, the court held first that the EIS failed to address the implications of the decision of the BLM and the Endangered Species Committee to proceed with sales likely to jeopardize the continued survival of the spotted owl, as determined by FWS. Indeed, the EIS itself stated that a decision by the ESC to exempt jeopardy sales for BLM would render the viability rating for the Forest Service's decision "optimistically high," and concluded that "[i]f the Endangered Species Committee were to grant BLM an exemption . . . this viability assessment would need to be reconsidered."¹⁹⁰

186. 798 F. Supp. 1473, 1476 (W.D. Wash. 1992)(complaint filed Mar. 25, 1992).

187. *Id.*

188. *Id.* at 1484.

189. *Id.* at 1478.

190. *Id.* at 1480 (quoting FEIS).

Second, the court examined demographic information developed since the ISC's report, notably, an assessment by Doctors Anderson and Burnham of FWS. That study concluded that the owl's population decline was even more serious than previously believed, throughout its range, and that the rate is increasing. As Dr. Anderson summarized the concerns:

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.¹⁹¹

Other experts, including those within the Forest Service, agreed that this information "brings into question the viability rating for the EIS on the ISC strategy."¹⁹² However, the EIS neither mentioned nor discussed this information. As the court concluded:

The agency's explanation [of its failure to address this information] is insufficient under NEPA — not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to adverse opinions held by respected scientists The agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information The Anderson and Burnham report is important enough that highly qualified experts, including some in the employ of the Forest Service, believe it means the ISC Strategy must be revised. This being so, the agency cannot merely say that the report and the criticisms arising from it make no difference; to comply with NEPA, it must give a reasoned analysis and response.¹⁹³

Third, the court approached the Forest Service's treatment of other old-growth dependent species under NEPA, not NFMA. Noting that the only discussion of these species in the entire EIS was an assertion that they would have only a "low to medium-low" prospect of surviving under the plan adopted by the Forest Service, the court concluded:

The FEIS has thus mentioned what appears to be a major consequence of the plan — jeopardy to other species that live in the old growth forests — without explaining the magnitude of the

191. *Id.* at 1481 (quoting Dr. Anderson).

192. *Id.* at 1482 (quoting Forest Service's Dr. O'Halloran).

193. *Id.* at 1482-83.

risk or attempting to justify a potential abandonment of conservation duties imposed by law. An EIS devoid of this information does not meet the requirements of NEPA.¹⁹⁴

Finally, the court rejected the plaintiffs' contention that NFMA imposed any obligation to develop guidelines for protecting habitat designated as critical under the ESA beyond complying with opinions issued by FWS in consultations under ESA section 7(a)(2). The court concluded: "In the interaction between [the Forest Service and FWS], the Forest Service satisfies its duty under [NFMA regulations 36 C.F.R.] §§ 219.27(a)(8) and 219.19(a)(7) if it and the FWS comply fully with the consultation requirements of [ESA § 7(a)] 16 U.S.C. § 1536(a)."¹⁹⁵

2. *The ruling on motion for permanent injunction*

On July 2, 1992, the court issued a permanent injunction stopping the Forest Service from proceeding with timber sales in spotted owl habitat until it cures the NEPA defects identified in the court's summary judgment ruling.¹⁹⁶ At the outset, the court elaborated on its holding regarding the agency's obligations to other old-growth dependent species. The court noted that NFMA requires the Forest Service to manage its federal lands to "provide for diversity of plant and animal communities,"¹⁹⁷ and that the NFMA implementing regulations provide that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species. . . ."¹⁹⁸ The court held that "[t]his duty 'requires planning for the entire biological community — not for one species alone.' . . . To adopt a plan that would preserve a management indicator species . . . such as the spotted owl, in a way that exterminated other vertebrate species would defeat the purpose of monitoring to assure general wildlife viability."¹⁹⁹

The court explained:

These public lands belong to the entire nation. In enacting NFMA Congress viewed them from the perspective not of a day but of generations. Many observers have noted the Forest Service's habit of maximizing timber production at the cost of the other statutory values. . . . But such a practice, no matter how

194. *Id.* at 1483. The court elaborated on this issue in its order granting plaintiffs' motion for permanent injunction, discussed below. *See infra* text accompanying notes 196-203.

195. *Moseley*, 798 F. Supp. at 1484.

196. *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1484 (W.D. Wash. 1992) (Memorandum Decision and Injunction).

197. *Id.* at 1488 (quoting 16 U.S.C. § 1604(g)(3)(B)).

198. *Id.* at 1489 (quoting 36 C.F.R. § 219.19).

199. *Id.*

long it may have gone on, cannot change what the statute requires.

NFMA and the regulations direct that the forests be managed so as to preserve animal and plant communities. Millions of acres of national forest lands in Regions Five and Six do not consist of spotted owl habitat and are suitable for logging . . . Congress's mandate for multiple uses, including both logging and wildlife preservation, can be fulfilled if the remaining old growth habitat is left standing; it cannot be if the old growth in any national forest is logged to the point where native vertebrate species cease to exist there.

The records of this and other reported cases show that management of the national forests in compliance with NFMA is vital because other measures are inadequate for many species. Parks and wilderness areas alone are too small to permit the spotted owl to survive . . . The efforts of the [FWS] under the [ESA] come only after a species is threatened or endangered and fall short of systematic management of a biological community . . . In this sense the national forests offer a last chance.²⁰⁰

Finally, the court rejected the Forest Service's defense that the low viability rating for other old-growth dependent species merely reflected the opinions of others — and was not the government's own view of the situation:

That is what makes this a NEPA question rather than one under NFMA at this stage. If the 'low to medium-low' viability rating were admittedly the Forest Service's own rating, summary judgment under NFMA would be entered now. Full NEPA compliance may or may not lead to a plan different from [the alternative adopted by the Forest Service]. Whatever plan is adopted, it cannot be one which the agency knows or believes will probably cause the extirpation of other native vertebrate species from the planning areas.²⁰¹

With respect to injunctive relief, the court determined that little had changed from its previous decision in *Seattle Audubon Society v. Evans*:

The Forest Service now seeks to do the same thing it sought a year ago — to sell further logging rights in spotted owl habitat areas, consistent with the ISC Report, while the agency is in the process of arriving at a conservation plan. . . . While some of the statistics have changed in the past year, the basic facts remain: Irreparable harm will occur if more owl habitat is logged without

200. *Id.* at 1490.

201. *Id.*

a plan in place; timber volume under contract but uncut in the seventeen national forests at issue still exceeds three billion board feet; the FEIS states that the agency can sell more than 800 million board feet annually from lands that are not spotted owl habitat; raw log exports from Washington and Oregon ports in 1991 totalled about 2.5 billion board feet and could be reduced in a variety of ways; demand for wood products remains flat; and if demand rises a corresponding rise in stumpage prices will probably make more private timber available.

. . . The Forest Service's request that it be allowed to sell logging rights without a legally-adopted plan in place must be considered in light of the agency's past statements that its proposals would allow the spotted owl to survive, followed by its later admissions that they would not.²⁰²

Thus, the court enjoined all upcoming timber sales in spotted owl habitat, while the Forest Service revisits the issues identified in the court's opinion. Judge Dwyer gave the agency until August 1993 and required quarterly reports to disclose its progress.²⁰³

3. *What next?*

Attention now shifts to two other fora. First, the Forest Service and the timber industry have appealed both the district court's summary judgment and injunction rulings. Plaintiffs, in turn, have cross-appealed the court's ruling on the relationship between NFMA and ESA critical habitat, as well as the court's treatment of other old-growth dependent species as a NEPA, rather than a NFMA problem. The Ninth Circuit heard oral argument on these issues on November 4, 1992, but no decision has issued yet.

Second, the Clinton Administration held a Presidential Forest Conference in Portland, Oregon, on April 2, 1993.²⁰⁴ At the end of the Conference, the President directed his agencies to develop and adopt a plan for the ancient forests that is "scientifically sound, ecologically credible, and legally responsible."²⁰⁵ As of this writing it is too early to tell whether the agencies will comply with the President's directive.

202. *Id.* at 1491-92.

203. *Id.* at 1499 (order on compliance schedule).

204. See, e.g., The White House, *Forest Conference Agenda, Background and Participants* (Apr. 2, 1993)(copy on file with the author).

205. *Clinton Remarks Stress Unity*, *THE REGISTER-GUARD* (Eugene, Or.), Apr. 3, 1993, at 5A col. 4.

V. LESSONS FROM THE OWL EXPERIENCE

Both the text and the subtext of the spotted owl litigation contain important lessons about how federal agencies have abdicated their responsibilities toward the environment in the past, and what they must do to avoid repeating these mistakes in the future. The public — and future Administrations — must learn these lessons if federal agencies are to effectively address the problems of failing ecosystems around the country.

The cases highlight both the limits of the judiciary and the importance of litigation in reviewing actions of federal agencies. They illustrate the need for a holistic approach by federal agencies to both the law and the land. Finally, the agencies should learn these lessons quickly, because Congress is unlikely to relieve federal land managers of their duty to comply with the law again.

A. *The Limits of Litigation*

The first lesson concerns the limits of litigation. Environmental groups have often been accused of seeking, through the spotted owl litigation, to have the courts manage federal lands. This charge seriously misses the mark. The courts are institutionally incapable of making management decisions delegated by Congress to the discretion of executive agencies, and none of the spotted owl litigation has sought to undercut the appropriate role played by the agencies and the courts.

Litigation plainly cannot require federal agencies to exercise their lawful discretion in the wisest or most environmentally protective manner, nor, for that matter, in any particular way. Rather, courts intervene only to correct misconduct so egregious as to constitute an abuse of the discretion vested by Congress in the Executive Branch. Institutionally, the judiciary can only enforce the irreducible minimum requirements of a statute. The dramatic series of court rulings finding agency violations of environmental laws concerning the spotted owl illustrates how far below that irreducible minimum federal conduct fell during the past decade.

Courts can correct serious abuses of the laws, like the "deliberate and systematic refusal by [federal agencies] to comply with the laws protecting wildlife"²⁰⁶ found in the spotted owl cases. The courts cannot, however, require good or wise — much less the best or wisest — stewardship of the public's lands, where Congress only sets the lower boundaries of executive discretion.

206. *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1090 (W.D. Wash.), *aff'd*, 952 F.2d 97 (9th Cir. 1991).

B. *The Role of Litigation*

The second lesson is that despite the institutional limitations of the judiciary, progress has occurred over the last six years regarding the spotted owl and federal land management in the Northwest only following lawsuits. As a direct result of environmental lawsuits, the spotted owl now enjoys the protection of the Endangered Species Act. The Forest Service is finally developing a new spotted owl management plan, and is now addressing the national forests as communities of species, only after being found in violation of both the National Forest Management Act and NEPA. The BLM has been enjoined from offering timber sales in spotted owl habitat in two lawsuits — in one for violating the Endangered Species Act and in the other for violating NEPA.

Ideally, each of these lawsuits should have been unnecessary. Most involved no novel or complicated questions of law; all involved clear, well-established obligations under existing laws that the FWS, BLM, and Forest Service understood but chose to ignore. Both the public and the environment would have been better served if the government had simply complied with the law from the outset.

C. *The Need For Holistic Ecological And Legal Approaches To Public Land Management*

The third lesson is that agencies should integrate all applicable legal standards and plan for the survival of all affected species at the outset. The spotted owl cases have involved the conduct of four federal agencies — the Fish & Wildlife Service, the BLM, the Forest Service, and the Endangered Species Committee — under several different statutes — the Endangered Species Act, NEPA, NFMA, and others. Frequently, legal problems have arisen because the agencies tried to proceed under only one legal mandate, while ignoring other applicable duties. Thus, for example, the BLM strove to comply with the timber dominant purposes of the Oregon & California Lands Act, to the exclusion of NEPA.²⁰⁷ Similarly, the Forest Service asserted that once a species was listed under the ESA, the agency's own viability regulation under NFMA no longer applied.²⁰⁸

The agencies' legal myopia, moreover, has accompanied a similarly narrow management approach that has focussed on crisis management for individual species, rather than integrated management of whole biological communities. The shortcomings of this approach are evident both in the

207. See *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489 (D. Or. 1992) (rejecting BLM argument that O&C Act overrode NEPA's obligation to update environmental documentation), modified in part, No. 87-1160-FR, 1992 WL 176353 (D. Or. July 16, 1992).

208. See *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991) (rejecting Forest Service position).

most recent spotted owl rulings, which for the first time order the Forest Service not to delink its indicator species (the spotted owl) from other old-growth dependent species,²⁰⁹ as well as in other litigation focussing on other species, like the marbled murrelet.²¹⁰

A more sensible approach to both the legal and ecological issues would have been for the agencies to plan systemically, and to address all applicable legal standards — and all affected species on the public's lands — at the outset. Such an approach would have avoided litigation, and would have served the agencies, the public, and the environment far better.

D. *An End To Court-Stripping Legislation*

The final lesson is that placing federal agencies above the law will not solve ecological and legal crises. The early years of the spotted owl controversy focused largely on congressional efforts to close the courthouse doors to citizens seeking to enforce federal environmental laws against federal agencies. The Supreme Court ultimately upheld the constitutionality of this practice. Indeed, the Bush Administration made attacks on the existing environmental laws a cornerstone of its federal land management policy.

Fortunately, Congress has evidently kicked the habit of short-term, temporary fixes to environmental issues. Congress, therefore, is unlikely to try to resolve long-term or whole-ecosystem problems by exempting federal agencies from judicial scrutiny. Thus, federal agencies should not look to Congress for relief from their own misconduct.

CONCLUSION

The significance of environmental litigation can be judged by its effects on both governmental conduct and public debate. By these standards, litigation over the spotted owl has played a crucial role. Litigation catalyzed public agencies to abandon outdated management strategies now viewed as a "prescription for the extinction of spotted owls." Litigation compelled those agencies to stop selling timber from spotted owl habitat until they develop and adopt scientifically responsible management strategies. Litigation brought to public attention a "remarkable series of violations of the environmental laws." For the first time, the biological and economic arguments of the environmental community, the government, and the timber industry have been aired in a public forum on a level playing

209. See *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473 (W.D. Wash. 1992) (ruling on summary judgment); *id.* at 1494 (ruling on motion for stay).

210. In *Marbled Murrelet v. Lujan*, environmental groups challenged the failure to protect murrelet's viability in existing forest plans. *Marbled Murrelet v. Lujan*, No. C91-522R (W.D. Wash. Sept. 17, 1992) (memorandum opinion granting plaintiffs' second motion for summary judgment).

field.

In addition, litigation has focused judicial and public attention on Congress' use of short-term court-stripping provisions as substitutes for solutions to important long-term environmental problems. Litigation has catalyzed Congress to finally consider long-range solutions for the Northwest's ancient forests, and helped inspire the upcoming forestry summit sponsored by the new Administration.

The best legacy of the litigation over the spotted owl would be wise management of the public lands. Management that strives to comply with — rather than avoid — the requirements of all applicable federal laws at an ecosystem level would better serve government agencies, the public, and the species that reside on the nation's lands. It would also make future litigation unnecessary — or, if brought, unsuccessful.

