The Spotted Owl Saga Continues:
LANE COUNTY AUDUBON SOCIETY v. JAMISON

by Rebecca J. Fisher

The controversy over the northern spotted owl has been endless. Numerous government agencies have dealt blows to the species' existence through circumvention of legal guidelines and regulations. Agencies such as the U.S. Fish and Wildlife Service (FWS) and the Bureau of Land Management (BLM) have ignored fairly clear violations of the Endangered Species Act (ESA) in the past. If not for environmentalists' diligent efforts on behalf of the spotted owl, the agencies purporting to protect the species might have indirectly forced it into extinction. The latest 9th Circuit Court of Appeals battle concerning the preservation of the northern spotted owl typifies this practice. On March 4, 1992, the Ninth Circuit issued its decision in favor of the spotted owl in Lane County Audubon Society v. Cy Jamison.[1]

Background Caselaw

Prior to the Lane County Audubon decision, several parties had brought suit against the BLM and FWS for failing to perform their legal obligations of protecting the owl and its habitat. Under the Bush Administration, timber interests, lawmakers, and administrative agencies tried to minimize the detrimental economic effects of protecting the owl and its habitat on the Northwest timber industry. The administration's resulting policies manifested themselves in actions taken by several government agencies and officials in several cases.

Northern Spotted Owl v. Hodel,[2] was one of the earliest examples of spotted owl litigation. Various environmental organizations brought suit against the FWS to challenge the agency's failure to list the owl as a threatened or endangered species. FWS's population viability expert, Dr. Mark Schaffer, testified that "the most reasonable interpretation of current data and knowledge indicate continued old growth harvesting is likely to lead to the extinction of the subspecies in the foreseeable future, which argues strongly for listing the subspecies as threatened or endangered at this time." A number of experts in the field all agreed with Dr. Schaffer's resultant findings.[3]

By taking BLM timber off the market, a decision in favor of the spotted owl could cause a loss of up to 31,000 jobs.

Under §1533 (a)(1) of the ESA, criteria for the listing of a species as endangered or threatened requires the "present or threatened destruction, modification, or curtailment of its range." Moreover, the definition of an endangered species is "any species which is in danger of extinction in all or a significant portion of its range."[4] A threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[5] The spotted owl fits under each of these definitions according to Dr. Schaffer's conclusions. However the FWS, even after receiving Dr. Schaffer's report, decided not to list the spotted owl at that time. The district court ruled against the FWS, finding the agency's action arbitrary and capricious; the agency failed to articulate a satisfactory factual explanation for its decisions and action.

Another example of arbitrary FWS decisionmaking is found in Headwaters, Inc. v. BLM.[6] In this case, the court held that logging sales could take place in owl habitat, even though the court acknowledged that the owl had been listed as a threatened species two months prior to the court's decision. This opinion was clearly at odds with FWS's analysis and listing of the spotted owl as a threatened species under the ESA. The listing, however, mooted Headwaters' holding because the ESA affected the legality of timber sales in owl habitat. BLM indefinitely halted the sales in question prior to the trial court's decision.

The trend of administrative agencies making borderline arbitrary decisions arose again in Northern Spotted Owl v. Lujan.[7] Under the ESA, the designation of critical habitat should occur concurrently with the listing of a species as endangered or threatened.[8] The FWS failed to designate critical habitat for the owl concurrently with the listing of the bird as an endangered species. Again, litigation ensued. The trial court essentially held that the FWS again abused its discretion in failing to designate critical habitat for the owl.

These cases again illustrate the distressing manner in which agencies and lawmakers deal with the issue of spotted owl protection. For instance, the FWS is responsible for issuing a biological opinion after consulting with the designating agency.[9] According to the ESA, if the biological opinion finds that the action in question may jeopardize the species' habitat, then the action may not continue unless FWS sets forth some alternative to the action that will avoid the danger.[10] If the danger cannot be avoided, the action cannot proceed.

The Lane County Audubon Decision

In Lane County Audubon Society v. Cy Jamison, historical events should have deterred the BLM's hasty issuance and implementation of its Management Guidelines for the Conservation of the Northern Spotted Owl, or the "Jamison Strategy." In October of 1989, for example, the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl (the ISC) was established to develop a scientific conservation strategy for the northern spotted owl. The ISC's Final Report, issued in May 1990, stated that "the lack of a consistent planning strategy has resulted in a high risk of extinction for the owl."[11] After much pressure, the FWS finally decided to list the owl as a threatened species under the ESA in June of 1990, noting that "existing regulatory mechanisms are insufficient to protect either the spotted owl or its habitat."[12]

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The issue of the BLM's use of its Jamison Strategy was paramount to the outcome of the decision. The BLM, which is in charge of managing the forestlands in question, never submitted the Jamison Strategy to the FWS for approval prior to implementation. Disregarding the ISC's conclusions, the BLM proceeded to devise its Jamison Strategy for the management of logging and timber sales in the forestlands of Washington, Oregon, and northern California. BLM implemented the Strategy without first submitting it to the FWS for consultation as required under section 7 (§1536) of the ESA.

Shortly thereafter, Lane County Audubon sought an injunction barring the BLM from conducting timber sales until the Strategy was reviewed by the FWS to determine the effects of the Strategy on the spotted owl and its habitat.

The district court agreed with Lane County Audubon that the "Jamison Strategy" constituted an agency action and therefore violated section 7 of the ESA. The court also found that BLM failed to obtain an opinion on the Strategy by FWS prior to implementation of that strategy. The court enjoined BLM from using the Strategy until it met the guidelines established under section 7. The district court did not, however, enjoin the 1991 timber sales provided for under the Jamison Strategy.

Lane County Audubon appealed the district court's decision not to stop the 1991 timber sales and sought to halt all 1992 sales as well. Lane County argued that BLM's action had not satisfied the consultation process required under the ESA since the FWS found the Jamison Strategy did not address criteria to adequately protect the northern spotted owl's habitat. Thus the timber sales designated by the BLM using its Jamison Strategy should not proceed.

Lane County sought an injunction to save old growth forests and ultimately spotted owl habitat. Sales conducted under the Jamison Strategy could have caused "irreversible or

irretrievable commitment of resources" which may have had a serious impact on the owl population. Through attaining the court's decision to halt the BLM's timber sales, the environmentalists effectively bought more time for the spotted owl. How much time, however, is uncertain. If the Endangered Species Committee grants the BLM an exemption under 16 U.S.C. §1536 (g) and (h), then the sales in question could be approved regardless of the Ninth Circuit court's decision. If an exemption is granted, section 7 of the ESA would cease to apply to the 1991 timber sales.[13]

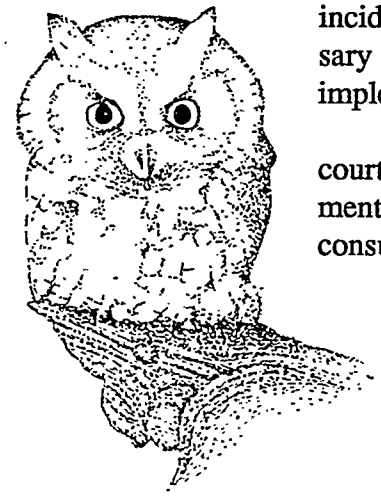
BLM countered Lane County's argument claiming that the Jamison Strategy did not constitute an agency action and thus was not required to be submitted to the FWS for consultation. BLM further argued that the Strategy was a voluntary "policy statement." The Strategy's intended use was as an "interim standard" designated for use while the BLM developed new Timber Management Plans (TMPs).[14]

BLM and timber industry officials claimed that preventing sales from occurring under the Jamison Strategy may seriously hamper the operating ability of small timber companies. They predict that by taking BLM timber off the market, a decision in favor of the spotted owl will cause a loss of up to 31,000 jobs. Bill Hubbell, president of the International Woodworkers of America, said that the Ninth Circuit's decision "drove another nail in the coffin of borderline outfits."[15] In a March 5, 1992 *Sacramento Bee* article, FWS responded that the majority of the jobs lost would invariably happen due to other factors in the industry such as automation and exportation of unfinished lumber.

These timber sales would eliminate spotted owl habitat and would likely eliminate the owls as well.

The key provision of the Endangered Species Act at issue in this controversy is §1536. Section 7 of the ESA deals with interagency cooperation and consultation. §1536 (a)(1) declares that "all federal agencies shall, in consultation with and with the assistance of the [FWS] Secretary, utilize their authorities in furtherance of the purposes of this chapter (the ESA) by carrying out programs for the conservation of endangered or threatened species."[16] It goes on to state that an agency, through the use of the consultation process (with FWS) must insure that its actions are "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the habitat of such species."[17]

Under §1536 (c)(1) the federal agency involved must conduct a biological assessment of the action's possible effects upon the endangered or threatened species. These regulations must be met before the action is implemented. Each agency must also use the best scientific and commercial data available in conducting analyses. If after completion of the consultation process as required by §1536 (a)(2), "the Secretary concludes that the agency action will not violate the Act, FWS will provide the Federal agency with a written statement that specifies such things as (i) the impact of such incidental taking, (ii) the reasonable and prudent measures necessary to minimize the impact, and (iii) terms and conditions to implement these mitigating measures.[18]



§1536 (d) is important to this case as well in that the court found BLM's timber sales to involve irretrievable commitments of resources. §1536 (d) states that "after the initiation of the consultation process, the agency involved shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which would not violate subsection (a)(2) of the ESA." This subsec-

tion of §1536 weighed heavily upon the Ninth Circuit court's decision to stop sales in spotted owl habitat. If the court failed to enjoin the timber sales while the agency action was under review, irreversible damage could have occurred to the spotted owls' habitat, violating §1536 (d) because much of the majestic old growth forest could have been destroyed. If BLM's actions of implementing the Jamison Strategy did not fall under these areas of the statute, the court probably would not have enjoined the BLM's timber sales.

The Headwaters, Inc. Case

An example of a different statutory interpretation can be seen in Headwaters, Inc. v. BLM.[19] In Headwaters, the court was aware of the threatened species listing of the spotted owl. However, instead of remanding the case back to the district court level, the majority opinion ignored the section 7 regulations governing agency actions. The FWS defines an agency action broadly to include "all activities of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies."[20] However, in Sun Exploration and Production Co. v. Lujan,[21] "the Supreme Court held that Congress had explicitly foreclosed the exercise of discretion by courts faced with a violation of section 7 (§1536) of the ESA."[22]

The timber sales that the Headwaters appeals court approved were in clear violation of the agency action requirements under 16 U.S.C. §1536. It was well documented that these sales would eliminate spotted owl habitat and would likely eliminate the owls as well.

Unlike Lane County, the statute at issue in Headwaters was the National Environmental Policy Act (NEPA). Although it dealt with environmental impact statements, the overriding concern of the ESA should have been evident to the court. This should have prompted the court to remand the case, but the court failed to do so. Judge Ferguson's scathing dissent pointed out this judicial impropriety;[23] The court simply turned a blind eye toward the spotted owl.

While he court in Headwaters failed to address the legal requirements imposed by the ESA on the timber sales, the Lane County court carefully took into account the legality of each part of the action. The 9th Circuit was careful with each detail of the case, grounding each reason in fact and statute.

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Lane County's Implications

Lane County Audubon Society v. Jamison stands in stark contrast to the Headwaters decision. The court agreed with Lane County's characterization of the BLM's "Jamison Strategy" as more than just a policy statement; it was a judicially reviewable agency action. The court affirmed in part and remanded in part for an injunction prohibiting "future announcement or conduct of additional sales and for the reconsideration by the district court of whether the 1991 sales already announced but not awarded should be enjoined."[24] The court also decided that all future sales, even individual sales, proposed by the BLM are agency actions and are, therefore, subject to consultation prior to implementation.

The rationale for this decision stems from the court's interpretation of the definition of an agency action. The court agreed with the FWS definition of an agency action: "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies."[25] The Jamison Strategy clearly met this standard. By using the same reasoning, the court also managed to go back and invalidate the prior management plans.

Rebecca Fisher is a senior at U.C. Davis in Environmental Studies.

Conclusion

This ruling makes it possible for prior management policies to be updated by forcing them to go through conformation just as new strategies must under the ESA. An old strategy may not accommodate the changes needed for a newly listed (as threatened or endangered) species. Through the decision of the 9th Circuit, environmentalists can gain some new ground in getting established (and outdated?) management plans updated to contemporary standards required for a species' survival.

This philosophy does not allow an agency to fall back on previous management plans if their new strategies are sufficiently challenged and ruled inadequate. For example, the BLM stated that if the sales in question were enjoined under the Jamison Strategy, the sales would go forward using the TMP's established between 1979 and 1983. The court, however, thought otherwise, ruling that since the previous TMPs were instituted prior to the listing of the spotted owl as a threatened species, those TMPs were also required to undergo section 7 consultation.

The fact that an agency can end up with no operation strategy (in this case, for conducting timber sales) may deter agencies from behaving as BLM did, hastily devising a management plan. Failing to go through the required legal channels of implementation was rather costly to the BLM; hopefully, other agencies will take notice and comply with the ESA without a court order.

ENDNOTES

[1] — F. 2d —, 1992 WL 38183 (9th Cir., 1992).
[2] 716 F. Supp. 479 (W.D. Wash. 1988).
[3] *Id.*
[4] 16 U.S.C. §1532 (6).
[5] 16 U.S.C. §1532(20).
[6] 914 F. 2d. 1174 (9th Cir. 1990).
[7] 758 F. Supp. 621 (W.D. Wash. 1991).
[8] 16 U.S.C. §1533 (a)(3).
[9] 16 U.S.C. §1536 (b).
[10] 16 U.S.C. §1536 (b)(3)(A).
[11] — F. 2d ——, 1992 WL 38183 (9th Cir., 1992).
[12] *See* Fed. Reg. 26189, 26190.
[13] BNA-ELU 3/6/92, 16 U.S.C. §1536 (h).
[14] TMPs are "10-year plans that designate commercial forestland under BLM management in each district for one of several uses." *See* Portland Audubon Society v. Lujan, 884 F. 2d. 1233 (9th Cir. 1989).
[15] BNA-ELU 3/6/92.
[16] 16 U.S.C. 1536 (a)(1).
[17] 16 U.S.C. §1536 (a)(2).
[18] 16 U.S.C. §1536 (4)(A) and (B).
[19] 914 F. 2d. 1174 (9th Cir. 1990).
[20] 50 CFR §402.02.
[21] 489 U.S. 1012 (1989) citing Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
[22] 1992 WL 38183.
[23] 914 F. 2d. 1174 (9th Cir. 1990).
[24] 1992 WL 38183 (9th Cir. 1992).
[25] 50 C.F.R. 402.02.