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Round Table Discussion: Science, Environment, and the Law

Victor Sher, First Panelist*

Thank you, Judge Kozinski. I would like to talk about spotted owls, science, the political process, and the courts—all in seven minutes. Was science abused in the northern spotted owl controversy? Certainly it was. But that abuse occurred in the federal agencies and the Congress. Government agency scientists, testifying in court, told us time and again that science was being distorted for political reasons. In addition, Congress passed laws that explicitly kept our challenges to forest management actions out of the courts for many years.

Did science suffer similar abuse in the courts when we were finally allowed to litigate the merits of the cases? No, it did not. Indeed, the courts emerged as the one forum in which efforts to abuse science failed.

The controversy over the northern spotted owl boils down to a major paradigm shift in how land needs to be managed in order to preserve a species. By 1990, even the Bush administration’s Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl had concluded, along with every other reputable expert, that the government’s old approach represented a “prescription for the extinction of spotted owls.” But federal agencies, including the U.S. Fish and Wildlife Service, the Bureau of Land Management (the BLM), and the Forest Service tried to suppress this revolution in scientific thought, and Congress aided and abetted this effort.

Let me give you just four quick examples. First, Dr. Eric Forsman, one of the leading spotted owl biologists for the Forest Service, testified in one of our recent cases that starting in the mid-1970’s, spotted owl management plans on federal lands 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 of preserving the owl and which had a minimum impact on timber harvest.” It is difficult to imagine a more direct intrusion of politics

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into the Federal Government's "scientific" approach to the preservation of the northern spotted owl.

Second, in 1987, the Fish and Wildlife Service denied a petition to add the spotted owl to a list of species under the Endangered Species Act. In *Northern Spotted Owl v. Hodel*, the court found that the service had "disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction." A subsequent report by the General Accounting Office on the government's treatment of the petition questioned its thoroughness and objectivity and concluded that the service had "substantially changed the body of scientific evidence" in an effort to support a decision not to list the owl.

Third, in October 1987, we filed suit in the Federal District Court of Oregon seeking to compel the BLM to address significant new information about the owl in relation to its ongoing timber management program, that is logging, as required by the National Environmental Policy Act (NEPA). Congress responded immediately by passing a law, as a rider to the Department of Interior's annual appropriations bill, which stated: "there shall be no challenges to any existing plan . . . [with respect to management of BLM land] solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan." This political maneuver by Con-

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6. NEPA is codified at 42 U.S.C. §§ 4321-4370c (1988). NEPA requires federal agencies to prepare an environmental impact statement (EIS) for any proposed major federal action that would have a significant effect on the environment. *Id.* § 4332(2)(C). The NEPA implementation regulations require that a federal agency prepare a supplement to an EIS when there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1) (1993). In our lawsuit, we argued that new scientific information about the habitat needs of the northern spotted owl required the BLM to prepare a supplemental EIS. *See Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1500 (D. Or. 1992), aff'd, 998 F.2d 705 (9th Cir. 1993).

gress kept our lawsuit against the BLM, which we ultimately won in 1992.\(^8\) out of the courts for years.

Finally, in 1989, Congress passed another appropriations rider that also stripped the courts of the ability to hear our cases against the Forest Service and the BLM for another year.\(^9\) This bill also directed the Forest Service to revisit its analysis of the owl’s plight, reexamine its management plan, and complete any new environmental documentation by September 1990.\(^{10}\) The Deputy Chief of the Forest Service, George Leonard, testified in 1991 that the Agency actually started to prepare an environmental impact statement to comply with this directive, but stopped at the express political direction of the then Secretaries of Interior and Agriculture.\(^{11}\)

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

More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation . . . exemplifies a deliberate and systematic refusal by the Forest Service and the Fish and Wildlife Service (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.\(^{12}\)

Now the courts’ treatment of the northern spotted owl issue, once we were allowed to proceed in the courts, stands in stark contrast. I only have time to illustrate my point with one of our cases, *Portland Audubon Society v. Lujan*.\(^{13}\) Our case claimed that the BLM was violating NEPA by failing to examine, in a supplemental environmental impact statement (EIS), the scientific revolution that had occurred across the 1980’s regarding the habitat needs of the northern spotted owl and the serious risk of extinction facing the species.\(^{14}\) The BLM had refused consistently to address any of this new information in any public document, much less the supplemental EIS required by NEPA.

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9. This appropriations rider was enacted as part of the Department of Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989). It required the Federal Government to sell a certain amount of timber in national forests in Washington and Oregon and provided that management of these forests “is adequate consideration for purposes of meeting the statutory requirements that are the basis of [pending litigation].” *Id.* § 318(b)(6)(A), 103 Stat. at 747. This withdrawal of jurisdiction was upheld by the Supreme Court in *Robertson v. Seattle Audubon Soc’y*, 112 S. Ct. 1407 (1992).
12. *Id.* at 1090.
14. *Id.* at 1500.
The court was faced with conflicting expert testimony. Significantly, the only experts who had published peer reviewed articles on population viability and the northern spotted owl testified for us. The court, faced with this testimony, concluded that its role under NEPA was not to choose between the experts or to resolve the substantive scientific issues. As Judge Frye stated in her opinion:

It is not up to the court to evaluate or to discount the opinions of responsible experts in the scientific field. It is the duty of the BLM 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.15

This is exactly what NEPA requires, and Judge Frye properly ordered the BLM to prepare a supplemental EIS.16 But the court case did not end there. The BLM also asked the court to allow it to continue to sell timber even after the judge concluded that the Agency was violating the law.17 Judge Frye refused to make the substantive scientific judgments that the BLM asked her to make, especially in light of the existing controversy. As she put it:

The BLM admits that “responsible experts in population ecology and related disciplines believe that new information shows that the . . . [current habitat preservation strategy] is inadequate to preserve the northern spotted owl subspecies.” . . . This court cannot do what the process of preparing the Timber Management Plans and an Environmental Impact Statement is intended to accomplish. This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies when the BLM has no plan that addresses the survival of the northern spotted owl subspecies.18

Based on this finding and the court’s balancing of the equities, Judge Frye enjoined the BLM from further timber sales that may affect spotted owls pending compliance with the law.19

In my view, Judge Frye’s approach is the only one that makes sense under the circumstances of these cases. Federal judges, at least most of them, are not scientists and should not be asked to choose among competing, responsible scientific experts. Nor are the judges federal land managers, and they should not become the guarantors of the future viability of species on public lands.

15. Id. at 1502.
16. Id. at 1507.
17. Id. at 1508.
18. Id. at 1509.
19. Id. at 1510.
As our cases demonstrate, the law requires public agencies to disclose, analyze, and consider competing scientific views themselves. Thus, the law requires open debate among scientists. Agencies that fail to consider competing scientific views should be ordered to follow the law and to provide full disclosure and analysis to the public and to the officials charged with making tough public policy decisions. Fortunately, in the spotted owl cases, this is exactly what happened.

I would like to conclude with three quick lessons that I think should be drawn from the spotted owl cases. First, I agree that courts are not the proper forum for making substantive decisions between competing scientists. Nor are they the proper place to make decisions for managing the public's lands in these kinds of cases. But that is not what the courts were asked to do in the spotted owl cases, and that is not what happened.

Second, the courtroom was the only forum where politics did not corrupt science regarding the spotted owl. Third, our spotted owl cases were brought to correct bad science, bad public process, and bad decisions. The result of the cases has been to require the government to open up the science by addressing new information, significant new uncertainties, and disagreements among experts.

In short, the court cases have been victories for good science, for open debate, and for better decisionmaking by public officials. Science was abused in the spotted owl controversy, but not in the courts.

Thanks.