Oregon Natural Resources Council Action v. United States Forest Service

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Environmentalists won an important battle in Oregon Natural Resources Council Action v. United States Forest Service when Judge Dwyer of the Western District of Oregon temporarily enjoined nine federal timber sales, representing over 100 million board feet of timber. In addition to the victory on the environmental front, Oregon Natural Resources exposes the danger of blind application of the substantial deference standard to agencies' interpretations of their own regulations. The substantial deference standard almost requires the court to give controlling weight to these types of interpretations. In order to come to the most appropriate decision in this case, Judge Dwyer applied the substantial deference standard lightly and utilized what appeared to be a more common-sense standard of review. This case exemplifies the problems underlying the foundation of the substantial deference standard and strengthens the argument that the Supreme Court should revisit the issue of blind deference to agency regulatory interpretation.
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INTRODUCTION

On August 4, 1999, in one of the most significant recent victories for conservationists, United States District Judge Dwyer of the Western District of Oregon temporarily enjoined nine federal timber sales, representing over 100 million board feet of timber. In Oregon Natural Resources Council Action v. United States Forest Service, Judge Dwyer rules in favor of thirteen environmental groups who claimed that the Forest Service and the Bureau of Land Management (BLM) entered into timber sales in violation of the Northwest Forest Plan, the Clinton Administration's extensive forest management plan adopted in 1994. The court decrees the federal agencies' actions to be "arbitrary and contrary to the plain language" of the forest plan and halts the timber sales pending further order of the court.

In addition to prevailing on the environmental front, the case stands as a challenge to the oft-accepted idea that agencies are uniquely qualified to interpret their own regulations. Although not unprecedented, the decision in Oregon Natural Resources, invalidating an agency's interpretation of its own regulation, certainly suggests that courts can have an important impact on regulatory decisionmaking. In reviewing an agency's interpretation of its own regulation, courts are held to a

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2. See Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Spotted Owl (ROD) at 1, Apr. 13, 1994.
3. Id. at 1093.
4. See id. at 1097.
standard of strict deference and must accept a "plausible construction of the regulation, even if it is not the 'best or most natural one by grammatical or other standards." The Supreme Court, in Bowles v. Seminole Rock & Sand Co., illustrated this standard of review, holding that "the administrative interpretation...becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In 1997, the Supreme Court reaffirmed the deference standard in Auer v. Robbins.

In Oregon Natural Resources, Judge Dwyer denounces the Forest Service's interpretations as contrary to the intent of the Northwest Forest Plan. Given the great deference afforded to agency interpretations, the outcome of this case comes as a surprise. The decision, however, seems appropriate under the circumstances. Oregon Natural Resources, therefore, suggests that the Seminole Rock/Auer standard of deference should not be absolute. The case recognizes the dangers in taking a highly deferential stance toward agency interpretation due to the potential for agencies to interpret their own regulations in self-serving ways. If the standard of deference had been woodenly applied in this case, the Forest Service and BLM may very well have been able to sell the timber without the necessary monitoring. Fortunately, Judge Dwyer's unique relationship to the Northwest Forest Plan and his involvement in the logging battles since the 1980s gave him a deeper understanding of the situation, enabling him to detect abuses in the agency interpretation that another judge might have overlooked.

This Note first outlines the complex history of Oregon Natural Resources, which is an outgrowth of litigation brought under the Endangered Species Act to protect the spotted owl; it then summarizes the Northwest Forest Plan, which is the end product of the multi-year struggle. A synopsis of Oregon Natural Resources follows. Finally, the Note argues that Judge Dwyer's decision in that case exposes the danger of conferring uncritical deference to agency interpretation of its own regulations and

7. Id. at 414; see also United States v. Larionoff, 431 U.S. 864, 872-73 (1977) (holding that an agency's interpretation is controlling unless "plainly inconsistent with the wording of the regulations").
9. 59 F. Supp. 2d at 1093.
10. See infra Part IV.C.
asserts that, in light of that danger, courts should retreat from the Seminole Rock/Auer standard of review.

I

BACKGROUND

A. History Leading to the Northwest Forest Plan

This case had its genesis in the late 1980s when environmental efforts to preserve northern spotted owls collided with efforts to protect the economic growth of the Pacific Northwestern logging industry. Reductions in both wildlife habitat and lumber mill output had increased the stakes for both sides of the conflict. One of the earliest defining moments in the history of this case, as well as in the overall conservation movement, came in 1990 when, after years of ardent demands and a successful lawsuit by environmental groups, Fish and Wildlife Services listed the northern spotted owl as a threatened species under the Endangered Species Act. As a result, the Forest Service announced plans to adopt management measures for its timber sales that would protect the spotted owl. The promised measures, however, never came to fruition. Instead, the Forest Service sought leave to go forward with eleven timber sales without taking any remedial actions.

Meanwhile, Congress passed an appropriations bill that included a provision supplying timber to mills on a short-term basis, thus avoiding the necessity of agency action that would be subject to judicial review. Among its conditions, the provision directed the Forest Service and BLM to prepare and put in place a new spotted owl plan by September 30, 1990.

16. See id. at 1084.
The September deadline passed without a revised plan in place to ensure the viability of the spotted owl.\textsuperscript{19} Due to the agency's failure to implement standards and guidelines for spotted owl viability, in December 1990, the district court enjoined the Forest Service from proceeding with the twelve timber sales planned for fiscal year 1990.\textsuperscript{20} In March 1991, Judge Dwyer declared unlawful the Forest Service's plan to log spotted owl habitat without complying with the statutory requirements of the National Forest Management Act (NFMA).\textsuperscript{21} The court enjoined Forest Service timber sales within the owl's habitat pending the adoption of a management plan in compliance with NFMA.\textsuperscript{22}

Litigation involving BLM-managed forests followed a comparable course. In 1992, following a challenge by environmental groups, the District Court of Oregon found that BLM's failure to prepare a supplemental environmental impact statement (SEIS) regarding a plan to log spotted owl habitat violated the National Environmental Policy Act (NEPA).\textsuperscript{23} Accordingly, the court enjoined the agency from making further timber sales pending completion of a new SEIS.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{19} See 771 F. Supp. at 1085.
\item \textsuperscript{20} See \textit{id.} at 1086 (Order on Motions (9th Cir. 1990)(No. 757)).
\item \textsuperscript{21} See \textit{id.} at 1096; see also, 16 U.S.C. § 1604 \textit{et seq.} The NFMA, adopted in 1976, directs the Forest Service to develop and maintain land and resource management plans for each unit of the National Forest system. The land management plans developed under NFMA must be prepared in accordance with the National Environmental Policy Act (NEPA). The NFMA requires that the national forests are managed in such a way as to "provide for diversity of plant and animal communities...[and] to meet overall multiple use objectives.... Where appropriate... steps [are] to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan." \textit{id.} § 1604(g)(3)(B). All "resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." \textit{id.} § 1604(i). Under this language, timber sales must be consistent with the land management plan, in this case the Northwest Forest Plan. Once a forest plan is adopted, the Forest Service must evaluate proposed forest activities by ensuring that they are consistent with the plan, as well as with all other applicable laws (such as the Endangered Species Act or NEPA).
\item \textsuperscript{22} See 771 F. Supp. at 1096.
\item \textsuperscript{23} See 42 U.S.C. §§ 4321-4370d (Supp. 1999). NEPA requires each federal agency to prepare a comprehensive environmental impact statement before undertaking a proposed action. A supplemental EIS is required if an "agency makes substantial changes in the proposed action that are relevant to environmental concerns," or if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c) (1996).
\item \textsuperscript{24} See Portland Audubon Soc'y \textit{v.} Lujan, 795 F. Supp. 1489, 1496 (D. Or. 1992), aff'd \textit{sub nom.} Portland Audubon Soc'y \textit{v.} Babbit, 998 F.2d 705 (9th Cir. 1993).
\end{itemize}
As a result of these decisions, in January 1992, the Forest Service published a SEIS and adopted a record of decision (ROD)\textsuperscript{25} that established guidelines for the management of spotted owl habitat. The Seattle Audubon Society challenged the new SEIS and ROD in Washington district court, arguing that they violated NEPA.\textsuperscript{26} Judge Dwyer agreed and once again enjoined the Forest Service to prepare a new SEIS and to halt all additional timber sales in the areas suitable for the northern spotted owl until the agency cured the defects.\textsuperscript{27}

B. The Northwest Forest Plan

In 1993, the Clinton administration convened the Northwest Forest Conference in Portland, Oregon, promising to end the gridlock over logging in the Pacific Northwest by developing a balanced management plan for the old-growth forests.\textsuperscript{28} The conference consisted of a broad range of political decisionmakers and stakeholders, including the President, Vice-President, several Cabinet members, mill owners, loggers, labor leaders, environmentalists, scientists, economists, Native American Tribal representatives, and local government officials.\textsuperscript{29} The administration wanted the management plan to utilize an ecosystem based approach that would manage the entire spotted owl range rather than individual tracts demarcated by survey lines.\textsuperscript{30}

After the conference, the administration established the Forest Ecosystem Management Assessment Team (FEMAT) to conduct a conservation and management assessment of the federal forests within the spotted owl range.\textsuperscript{31} FEMAT, which

\textsuperscript{25} The Council on Environmental Quality (CEQ), created by NEPA, requires agencies to prepare a ROD that states whether all feasible mitigation measures were adopted in the EIS, and if not, why not. See 40 C.F.R. § 1505.2(c). When an agency adopts a ROD, they must implement those mitigation measures identified as part of the agency's decision in the ROD. See id. § 1505.3.


\textsuperscript{27} See id. at 1483-84.

\textsuperscript{28} See ROD, supra note 2, at 1.


\textsuperscript{31} See 871 F. Supp. at 1303.
consisted of scientists, economists, sociologists, and other experts, developed a set of options for the management of the forests that would comply with existing laws and maintain biological diversity, as well as provide sustainable timber harvests and support rural economies. FEMAT ultimately developed ten options for management of the forests in Western Washington, Western Oregon, and Northern California.

FEMAT assessed the predicted effects of the ten options on over one thousand species of plants and animals. The ten options varied in the quantity of timber harvested, the amount of land set aside as reserve areas, and the types of activities that could occur inside and outside the reserve areas. The probable timber sale quantities of the ten alternatives ranged from 100 million board feet to 1.8 billion board feet.

The Forest Service and BLM, in conjunction with Fish & Wildlife Services, the National Park Service, and the Environmental Protection Agency, published a SEIS that selected Alternative Nine. Alternative Nine allowed timber harvest amounting to 1.1 billion board feet over the first decade. The Department of Interior and the Department of Agriculture adopted Alternative Nine in the April 13, 1994, ROD. The interagency effort was unprecedented; this was the first time the Forest Service and the Bureau of Land Management would share a common management plan for the areas within each separate agency. The Northwest Forest Plan allowed the "highest sustainable timber levels" possible from Forest Service and BLM lands while still meeting the requirements of applicable statutes and policies, such as NEPA, ESA, and NFMA.

Environmental groups and the timber industry opposed certain aspects of the new Northwest Forest Plan; the groups

32. See ROD, supra note 2, at 1-3.
33. The ten options are summarized in the ROD. Id. at 17-28.
34. See ROD, supra note 2, at 17.
35. See id. at tbl. ROD-1.
36. See id. at 26.
37. See id. at tbl. ROD-1.
38. See id. at 26.
39. See id. at 1.
40. The Forest Service and BLM must comply with ESA, which establishes a program to protect threatened and endangered species. One purpose of ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Federal agencies must insure that their actions are not likely to jeopardize the continued existence of a species listed as threatened or endangered, or to result in destruction of habitat critical to the survival of listed species. See id. § 1531(a)(2).
41. 59 F. Supp.2d at 1091 (quoting ROD at 61).
brought numerous challenges, both procedural and substantive, to the plan. In Seattle Audubon Society v. Lyons, Judge Dwyer upheld the plan as lawful, stating that the Northwest Forest Plan was "the result of a massive effort by the executive branch of the federal government to meet the legal and scientific needs of forest management. [The Northwest Forest Plan represents] unprecedented thoroughness in doing this complex and difficult job." The decision did not, however, grant judicial approval without cautionary safeguards. Judge Dwyer noted that "any more logging sales than the plan contemplates would probably violate the laws." He also stated that while he would find the plan lawful at that point in time, future events and conditions would determine if the plan and/or its implementation remained legal.

The Northwest Forest Plan recognizes over 400 species at risk in the area covered and establishes four categories of survey and management requirements to minimize the impact of timber harvesting on those species. Category One requires the Forest Service and BLM to manage sites where at-risk species are known to be located. This category covers approximately 260 species, including, among others, types of fungi, mollusks, amphibians, and vascular plants. Under Category Two, the Forest Service must conduct surveys prior to "implementation of ground-disturbing activities" for 77 rare species especially at risk from old-growth logging in the Western Cascade Mountains. (The failure of the agencies to complete surveys in this category was the impetus for this case.) In Category Three, the Forest Plan requires the agencies to conduct regional surveys to find high priority sites for species management. Category Four requires the agencies to conduct general regional surveys.

43. Id. at 1303.
44. Id. at 1300.
45. See id.
46. See ROD, supra note 2, at C-4.
47. See id.
48. See id.
49. Id. at C-5.
50. See 59 F. Supp.2d at 1091.
51. See ROD, supra note 2, at C-5.
52. See id.
STATEMENT OF THE CASE

A. Facts of the Case

Four years after the adoption of the Northwest Forest Plan, thirteen environmental organizations sued the Forest Service and the BLM under the Administrative Procedures Act (APA) for failure to lawfully implement the requirements of the plan. The timber industry intervened on behalf of the federal agency defendants. The plaintiffs first claimed that the Forest Service violated the Northwest Forest Plan by failing to conduct Category Two surveys before selling timber.

The Northwest Forest Plan pronounces that agencies should immediately start to design protocols and implement Category Two surveys. After completing the surveys, the information gathered should be used to develop management standards to manage Category Two species' habitat. The Category Two survey requires two stages of implementation. First, in known or suspected ranges of five salamander species and the red tree vole, surveys "must precede the design of all ground-disturbing activities that will be implemented in 1997 or later." For the remaining 71 species, the plan requires that development of survey protocols begin in 1994 and proceed as soon as possible thereafter. The plan obligates the agency to complete these surveys "prior to ground-disturbing activities that will be implemented in F.Y. 1999 or later."

The Forest Service and BLM issued interpretive memoranda that equated "implementation" of ground-disturbing activities with the issuance of an environmental impact statement (EIS). The November 1, 1997 memorandum, issued jointly by BLM and the Forest Service, stated that for the first six species listed under Category Two, the "interagency interpretation is that the NEPA decision [an EIS or a finding of no significant impact (FONSI) equals implemented.]" Interpreting NEPA decisions as

54. See 59 F. Supp.2d 1085.
55. See id. at 1086.
56. See ROD, supra note 2, at C-4 to C-5.
57. Id. at C-5.
58. Id.
59. See 59 F. Supp.2d at 1092.
60. The species listed were five salamander species and the red tree vole.
61. If an agency decides that an action would not significantly affect the environment, it issues a FONSI, which represents the end of the process. See 40
equivalent to implementations of ground-breaking activities meant that, for all those areas for which a FONSI or ESI had been issued prior to October 1996, and for which contracts had been offered prior to January 1997, the survey requirements of the Northwest Forest Plan did not apply. A September 1, 1998 memorandum by the two agencies extended the interpretation to all 71 Category Two species by concluding that surveys need not be undertaken for any timber sale for which an EIS was completed before October 1, 1998, thus effectively removing much of the timber from the protective reach of the Northwest Forest Plan. Relying on these memoranda, the Forest Service and BLM entered into the nine challenged timber sales without conducting Category Two surveys because environmental impact statements for those areas had been completed prior to the cut-off dates set forth in the plan.

In addition to the memoranda equating "implemented" with the creation of an EIS, the agencies issued a memorandum that specifically addressed the red tree vole (the primary food for spotted owls, and a species, along with the five types of salamander, given special protection under the Northwest Forest Plan). The November 4, 1996 memorandum stated that site-specific surveys need not be completed in areas with abundant red tree vole habitat, or in areas with habitat isolated in non-federal watersheds. The result of this interpretation was to exempt about ninety percent of the red tree vole's habitat from the survey requirements. The plaintiffs argued that the defendants violated NFMA and the Federal Land Policy and Management Act (FLPMA) because the memoranda unlawfully exempted many timber sales from the plan's survey requirements.

C.F.R. §§ 1508.9, 1508.13 (1996).
62. 59 F. Supp.2d at 1092.
63. See id.
64. See id.
65. See id.
66. See id. at 1094.
67. See id.
68. 16 U.S.C. §§ 1600-1687 (Supp. 1999), requiring that the national forest be managed so as to "provide for diversity of plant and animal communities . . . ." id. § 1604(g)(3)(B), and "to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." 36 C.F.R. § 219.19 (1999).
69. 43 U.S.C §§ 1700-1785 (Supp. 1999). This requires that BLM land be managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." Id. § 1701(a)(8).
70. 59 F. Supp.2d 1087.
Oregon Natural Resources

In their second claim, the plaintiffs alleged that, because significant new information had come to light since the development of the Northwest Forest Plan, the defendants must issue a new SEIS,\(^71\) as required under the NEPA.\(^72\) To succeed in this claim, the law required the plaintiffs to show that the decision not to complete a SEIS was arbitrary and capricious,\(^73\) and that the agencies have refused to prepare a SEIS in spite of a clear legal duty to do so.\(^74\)

**B. The Court's Decision**

Judge Dwyer first found that the plaintiffs met the three-pronged test of standing proclaimed in *Lujan v. Defenders of Wildlife*\(^25\): (1) the invasion of a legally protected interest, (2) a causal connection between the injury and the defendant's conduct, and (3) redressibility of the injury by a favorable decision.\(^76\) Under the APA, a party "adversely affected or aggrieved by an agency action within the meaning of a relevant statute" has a "legally protected interest" and may seek judicial review thereof.\(^77\) Because members of the plaintiffs' organizations showed that they use the forest and that the defendants' action threatened these interests, they met the legally protected interest requirement.\(^78\) The plaintiffs also met the second standing requirement, that a causal connection exist between the injury and the defendants' conduct, because logging the forests without proper surveying would cause permanent harm to species in the area, and therefore to the plaintiffs' interests.\(^79\) Finally, the plaintiffs met the third requirement because the court found that the injury was redressible in court.\(^80\).

Judge Dwyer also found that the plaintiffs successfully

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71. See id.
72. See 42 U.S.C. §§ 4321-4370d (Supp. 1999). The changed circumstances the plaintiffs are claiming are: (1) the defendants sold timber without conducting surveys; (2) fish populations have declined; (3) water quality is worse than expected; (4) lynx have been found in area of spotted owl; and (5) a higher than expected amount of old growth has been harvested because of the 1995 Recission Act by Congress.
74. See Oregon Natural Resources Council v. BLM, 150 F.3d 1132, 1137 (9th Cir. 1998).
76. See 59 F. Supp. 2d at 1089.
78. See 59 F. Supp. 2d at 1089.
79. See id.
80. See id.
established standing under the APA, which requires that the plaintiffs' injury be within the "zone of interests" of the statute.\footnote{81} The Northwest Forest Plan was intended, in part, to preserve the rights of people to use and enjoy the forests managed by the defendants. Judge Dwyer held, therefore, that the plaintiffs satisfied the "zone of interest" test.\footnote{82} Judge Dwyer also held that the defendants' decision to authorize the nine timber sales was a "final agency action" under the APA.\footnote{83} Finally, because the complaint challenged specific timber sales, the court found the claim ripe for review.\footnote{84}

Regarding plaintiffs' first claim, the court held that the exemptions of timber sales from the required Category Two surveys was an unlawful action by the agencies that must be set aside under the APA.\footnote{85} According to Judge Dwyer, the defendants' interpretation of the plan ignored the clear, unmistakable requirement that surveys precede groundbreaking.\footnote{86} The court held that, by equating the completion of the environmental impact statement with the implementation of groundbreaking activity, the federal defendants arbitrarily exempted large tracts of forest from the plan's survey requirements.\footnote{87}

The court also found that the defendants' decision to forego red tree vole surveys in areas with abundant or isolated habitat had "no basis in law."\footnote{88} Judge Dwyer held that the protocol adopted by the defendants does exactly the opposite of what the Northwest Forest Plan requires: that the agencies conduct surveys within the species' "known or suspected ranges and within the habitat types or vegetation communities associated with [it]."\footnote{89}

Judge Dwyer rejected, however, the plaintiffs' claim that significant new information warranted a SEIS.\footnote{90} Judge Dwyer found that the plaintiffs failed to show that the defendants' duty to act was "ministerial and so plainly prescribed as to be free from doubt . . . ."\footnote{91}

\footnote{81}{See id. at 1089-90; see also Bennett v. Spear, 520 U.S. 154, 163 (1997).}
\footnote{82}{59 F. Supp.2d at 1090.}
\footnote{83}{59 F. Supp.2d at 1090; see also 5 U.S.C. § 704 (1998).}
\footnote{84}{See 59 F. Supp.2d at 1090.}
\footnote{85}{See id. at 1094.}
\footnote{86}{See id.}
\footnote{87}{See id.}
\footnote{88}{Id. at 1094-95.}
\footnote{89}{Id. at 1095 (quoting ROD, supra note 2, at C-5).}
\footnote{90}{See id. at 1096.}
\footnote{91}{Id. (quoting Oregon Natural Resources Council v. Harrell, 52 F.3d 1499,}
The decision resulted in injunctions on nine timber sales, totaling more than 100 million board feet of timber,92 pending further order of the court. The ruling also required defendants to provide ten-days notice of any decision to award a sale of timber that had been identified by the plaintiffs in the pleadings.93 After handing down the decision, Judge Dwyer placed injunctions on 25 additional national forest timber tracts pending completion of surveys on the tracts.94 The agencies then voluntarily suspended an additional 95 timber sales.95 Judge Dwyer approved a settlement agreement between the agencies and environmental groups in December 1999.96 The settlement requires the agencies to survey the area; however, nine of the 77 species for which surveys were originally required were dropped from the list because they were more abundant than previously thought.97

III
JUDICIAL DEFERENCE TO AGENCY REGULATORY INTERPRETATIONS

The principle in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.98 that requires a reviewing court to accept an agency’s “reasonable” interpretation of a statute it is charged with administering, is deeply entrenched in federal administrative law jurisprudence and has been the subject of a torrent of academic scholarship.99 On the other hand, the standard applied by reviewing courts to an agency interpretation

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93. See 59 F. Supp.2d at 1097.


95. See John Hughes, Settlement of Environmentalists' Suit Will Free Up Timber, MORNING NEWS TRIB. (TACOMA), Nov. 25, 1999, at B5.

96. See Hughes, supra note 92, at B2.


of its own regulation, as opposed to a Congressionally enacted statute, has received far less scholarly interest. In 1945, in Bowles v. Seminole Rock and Sand Co., the Supreme Court formulated the highly deferential standard of review under which an agency interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." As later stated, the standard meant that a court must accept "a plausible construction of the . . . regulation" even if it is not "the best or most natural one by grammatical or other standards." In 1997, the Supreme Court reaffirmed the Seminole Rock standard in Auer v. Robbins.

The Seminole Rock/Auer standard is based upon much of the same rationale and public policy that underlies Chevron. The foundational argument of Chevron is that Congress delegates broad legislative powers to agencies. Implicit in that delegation is the authority to resolve ambiguities in the statutes the agencies administer. The Supreme Court is also concerned with political accountability—judges do not have political constituencies, therefore, they should respect the policy choices of those who do. Finally, agencies are generally assumed to be

100. See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 614 (1996) (stating that the Seminole Rock principle "has long been one of the least worried-about principles of administrative law"). Academic literature has recently begun to turn more focus toward the regulatory interpretation deference standard, however. Professor Manning and Professor Russell Weaver are the two major contributors of academic commentary on this topic. See, e.g., Russell L. Weaver & Thomas A. Schweltzer, Deference to Agency Interpretations of Regulations: A Post-Chevron Assessment, 22 MEM. ST. U. L. REV. 411 (1992); Russell L. Weaver, Deference to Regulatory Interpretations: Inter-Agency Conflicts, 43 ALA. L. REV. 35 (1991); Russell L. Weaver, Judicial Interpretation of Administrative Regulations: The Deference Rule, 45 U. PIT. L. REV. 587 (1984); see also, Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 ADMIN. L.J. AM. U. 1 (1996); Melanie E. Walker, Congressional Intent and Deference to Agency Interpretations of Regulations, 66 U. CHI. L. REV. 1341 (1999).


102. Id. at 414.


106. See Chevron, 467 U.S. at 843-44.

107. See id. at 865. The premise that judges are necessarily free from political accountability (and influence) is not universally agreed upon. See, e.g., Einer R. Elhauge, Does Interest Group Theory Justify More Intensive Judicial Review?, 101
"experts" in their particular fields and are well positioned to fill in any gaps Congress may have left in a statute. This argument is extended to the interpretation of agency-promulgated regulations—the assumption is that the agency is in the best position to determine the meaning of a regulation that the agency itself created. The Supreme Court has stated that broad deference to regulatory interpretations is especially warranted when the regulation concerns a "complex and highly technical regulatory program" that requires both significant expertise and the exercise of policy judgment.\textsuperscript{108}

The legitimacy of the underlying rationale, as applied to agency interpretations of their own regulations was, for many years, uncontroversial. It was presumed to be common sense that the agency itself should resolve any ambiguities in its own regulations due to its heightened ability to understand and explain its own regulations. Nevertheless, some recent academic commentators, most notably Professor Manning, have challenged the legitimacy of the \textit{Seminole Rock/Auer} standard.\textsuperscript{109} It is, according to these commentators, the fact that an agency is in such close proximity to the regulation that makes its interpretation suspect.\textsuperscript{110} The risk of agencies interpreting their own regulations in self-serving ways, outside the bounds of usual administrative lawmaking, greatly concerns these scholars.\textsuperscript{111} Those who make the law, they argue, should not interpret it.\textsuperscript{112}

\textbf{IV}

\textbf{CASE ANALYSIS}

Given the strict deference courts must afford an agency's interpretation of its own regulations, it is rare that a court will overturn those interpretations. Indeed, one commentator describes the standard of deference to agency regulatory interpretation as "indulgent if not downright abject."\textsuperscript{113} Nevertheless, the plaintiffs in this case successfully convinced

\begin{footnotes}
\item 108. \textit{Bethenergy Mines Inc.}, 510 U.S. at 697.
\item 109. \textit{See generally} Manning, \textit{supra} note 100.
\item 110. \textit{See id.; see also} articles cited \textit{supra} note 100.
\item 111. \textit{See id.}
\item 112. \textit{See Manning, supra} note 100, at 654; Anthony \textit{supra} note 100, at 9-10.
\item 113. Anthony, \textit{supra} note 100, at 4.
\end{footnotes}
the court that the interpretations by the Forest Service and BLM so thoroughly skewed the meaning of the Northwest Forest Plan that the court had to enjoin the challenged timber sales. Although Judge Dwyer based his decision upon the grounds that the interpretation was plainly erroneous, the facts of the case did not necessarily require that outcome. Rather, the opposite outcome seems to be more fitting with the great deference generally given in these situations. This case serves as an example of the insufficiency of the Seminole Rock/Auer standard as an adequate safeguard against self-serving agency interpretations. In order to come to the "right" decision in this case, Judge Dwyer had to avoid a strict application of the deference standard that would have upheld an agency interpretation which was counter to the spirit of the regulation itself, the Northwest Forest Plan.114

A. How the Forest Service and BLM's Interpretation is a "Plausible Construction" of the Northwest Forest Plan

It is when policy is at issue that the justification for deference to agency interpretation is especially material; an agency is in a unique position to make policy judgments. The Forest Service and BLM, at least theoretically, understood the policy reasons for the plan's implementation, and as agents of an elected arm of government— the executive branch— the agencies are subjected to political accountability in a way the judiciary is not. In addition, the fact that the Forest Plan falls within the class of complex and highly technical regulations justifying broad deference also bolsters the argument that the Forest Service is in the best position to interpret the plan's minutiae.115

Looking at the specific text interpreted by the agencies, it is relatively easy to create an argument, utilizing the Seminole Rock standard, for upholding the agencies' interpretation. One major issue in this case was the interpretation of the term "implementation of ground-disturbing activities." The agencies determined that a finding of no significant impact (FONSI) under NEPA equaled implementation of ground-disturbing activities.116 On its face, this interpretation has at least some validity. The

114. The case cited by Dwyer for the standard of review was Thomas Jefferson University v. Shalala, 512 U.S. 503 (1994). The Thomas Jefferson case tracks the language of Seminole Rock in all relevant respects and for the purposes of this Note, references to the deference standard will continue as "Seminole Rock/Auer."
115. See 501 U.S. at 697.
116. See 59 F. Supp.2d at 1092.
word "implement" means "to put into effect according to a definite plan or procedure." If a FONSI constitutes the first step toward ground-disturbing activity, under an extreme deference standard, the agency memorandum could have passed scrutiny. The language of the case law clearly indicates that what is at issue is not whether the interpretation is the one the court would prefer, but whether the interpretation is reasonable or plausible. The agencies argued that their interpretation was reasonable because the Northwest Forest Plan allowed a maximum of four full fiscal years (FYs 1995-1998) to develop and apply survey plans for the species.

One could also analyze the agencies' decision to exempt from survey requirements certain red tree vole habitat as falling within the range of reasonable agency action under substantial deference. By specifically interpreting the management component dealing with the red tree vole, the Forest Service and BLM made a technical interpretation of the requirements that they were in a unique position to understand. Due to the agencies' extensive expertise in dealing with forestland, they, arguably better than anyone, understand the scientific requirements and usefulness of site-specific surveys.

B. The Danger of Self-Serving Interpretation and the Need to Reevaluate the Seminole Rock/Auer Deference Standard

Despite the arguments above, which seem to support upholding the agencies' own interpretation of the regulation, in this case, the outcome reached is the most appropriate one. Commentators have expressed concern that the deferential Seminole Rock/Auer standard, which leaves agencies "free to write a law and then to 'say what the law is' through its authoritative interpretation of its own regulations," gives agencies incentive to promulgate vague rules and then "interpret" the gaps to their own benefit. In Oregon Natural Resources, this risk seems especially vibrant given the long history of the less-than-conservationist minded policies of the Forest Service and BLM.

117. WEBSTER'S COLLEGIATE DICTIONARY 583 (10th ed. 1993).
119. See 59 F. Supp.2d at 1093.
120. Manning, supra note 100, at 618; see also Anthony supra note 100, at 9-10.
1. The Self-Serving Aspects of the Agencies' Interpretation of the Northwest Forest Plan

Given the character of the legal and political situation that gave rise to the creation of the Northwest Forest Plan, upholding the agencies' interpretation of sections of the plan, which exempts vast tracts of land from the survey requirements, would have been perilous. The Forest Service and BLM reluctantly created the Northwest Forest Plan only after a decade-long legal battle. The agencies' tendencies to sell more timber than the ecosystem could bear became abundantly apparent in the late 1980s. These factors, combined with the fact that extensive survey and management requirements of the Northwest Forest Plan are extremely expensive and time consuming, and the fact that regulations decrease the profitability of timber sales immensely, provide incentives to the agencies to interpret the Northwest Forest Plan in such a way as to avoid the costly requirements. Given these circumstances, the agencies' interpretations of the Northwest Forest Plan should be not be given controlling weight. Yet a strict application of the Seminole Rock/Auer deference standard would likely accept those interpretations as not plainly erroneous.

Wedded to this argument is the often-articulated concern that interests groups can "capture" agencies and influence their decisionmaking in ways that do not benefit the public. Numerous public choice theory scholars, including Chemerinsky, Mashaw, and Sunstein, have argued that the susceptibility of agencies to pressures from interest groups justifies heightened judicial review. The Forest Service and BLM have often been accused of being "captured" by the timber industry and of making policy decisions that reflect the economic relationship with the lumber mills more than any environmental concerns. In this instance, the agencies' interpretation of the Northwest Forest Plan seems to suggest untoward interest group


122. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 745-46 (1972) (Douglas, J. dissenting) ("The Federal Agencies of which I speak... are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working conditions, or who have a natural affinity with the agency which in time develops between the regulation and the regulated.").
influence, and therefore exposes the inappropriateness of highly deferential review.123

2. Interpretative Rules' Exemption from Notice and Comment Serves as an Additional Incentive for Agencies to Make Law Through Regulatory Construction

When courts give substantial deference to an agency's interpretation of its own rules, an additional concern arises. Normally, when an agency makes a binding law, rather than just interpreting existing law, the agency must engage in notice and comment procedures.124 Section 553 of the APA exempts interpretive rules from the conventional notice and comment process.125 This exemption significantly lessens the ability of the public to raise concerns and offer suggestions to the agency before it promulgates a rule.126 The agencies in this case never made their interpretive memoranda available for public comment, and they gave no advanced notice of their decision. Despite the lack of public comment, had these interpretations survived challenge, they would have significantly altered the operation of the Northwest Forest Plan.

By issuing a regulation, the agency performs a legislative act.127 The law should permit the public to analyze and review significant changes to the regulation, just as they are able to do when the regulation is promulgated.128 One commentator has argued that, because agency interpretations will often have at least as much binding force as the regulation itself, which is

123. It is important to recognize, however, that the Forest Plan is not a traditional self-created agency regulation. A broad, interagency group created the Forest Plan with input from interest groups on both sides of the issue. This may mitigate against some concern that an agency would intentionally create a vague regulation to later "interpret" in politically expedient ways. Nevertheless, in general the arguments articulated above are no less apropos due to inter-agency consultation during the creation of the Plan.
124. See Anthony, supra note 100, at 7.
125. 5 U.S.C. § 553. The APA requires notice and comment for rules promulgated by agencies, however § 553(b)(3)(A) explicitly exempts interpretive rules from the requirement, stating that "[e]xcept when notice or hearing is required by statute, § 553 does not apply (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice . . . ." Id. § 553(b)(3)(A).
126. See Anthony, supra note 100, at 4.
127. See id. at 6. Anthony argues that the Supreme Court's deference standard undermines the principles of the APA by granting great deference to agency interpretation of regulation. He argues for stricter judicial review to combat the ease with which agencies can avoid public scrutiny under the Seminole Rock standard. But see Walker, supra note 100 (arguing that the rationales underlying Chevron support deference to agency interpretation of regulations).
128. See Anthony, supra note 100, at 6.
subject to notice and comment, the agency should not be able to circumvent public oversight by issuing and interpreting regulations in ways that might not have been able to pass public scrutiny. As discussed above, the development process of the Northwest Forest Plan was multi-layered and took years to complete. Political wrangling, compromise, and multi-agency bargaining accompanied every aspect of the plan. Interpretations of the plan at issue in this case, on the other hand, were derived and announced through informal agency actions. They never faced the normal, stringent APA notice and comment process, nor were they part of the plan that Judge Dwyer approved as meeting the requirements of NEPA, ESA, and NFMA. Despite the informal manner in which the interpretations were promulgated, their effects would have been enormous. If the interpretations had withstood judicial review, as one would have expected under the Seminole Rock/Auer deference standard, the agencies would have been able to extrajudicially rewrite the Northwest Forest Plan in a devastating way.

A recent Supreme Court holding hints at an awareness of the dangers inherent in allowing an agency too much leeway in interpreting regulations. In Christensen v. Harris County, the Supreme Court reaffirms the use of the Seminole Rock/Auer deference standard for an agency interpretation of its own regulation. The Court stresses, however, that "Auer deference is warranted only when the language of the regulation is ambiguous." Because the Court in Christensen found the Fair Labor Standards Act (the regulation at issue in this case) to be unambiguous, the Court did not apply the deference standard. The Court emphasized that "to defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." Although the Court does not seem prepared to wholly abandon the deference standard applied to agency interpretation of their own regulations—the awareness of the inherent risks in

129. See id. at 10 (stating that "if the agency can count on its interpretations being given 'controlling weight,' it can issue self-serving interpretations with impunity... Reasonable contrary interpretations favoring other parties are trampled."). But see Walker, supra note 100, at 1355 (emphasizing that "Section 553 of the APA provides strong evidence that Congress intends agencies to have great latitude in interpreting the regulations they have promulgated.").
130. 120 S. Ct. 1655 (2000).
131. Id. at 1663.
132. Id.
its application moves the Court one step closer to reinventing the Seminole Rock/Auer jurisprudence.

C. Judge Dwyer's Unique Role in the Ongoing Forest Plan Litigation and the Effect of Judicial Expertise

Many commentators maintain that neutral judicial review can dampen the dangers of allowing an agency to interpret its own regulations. They argue that the judicial branch can provide "an independent judicial check upon agency interpretative authority [that] would insert a layer of security against unwise or oppressive agency lawmaking." Judges are generally thought of as unaffected by politics and less likely to succumb to "capture" than are agencies. Because of this political insulation, judges are believed to make superior lawmakers. By refusing to accept the agencies' interpretation of the Northwest Forest Plan, Judge Dwyer provided a necessary judicial check. However, due to Judge Dwyer's close relationship with the litigation, his decision was not totally independent or neutral. When Oregon Natural Resources Council Action and the other environmentalist plaintiffs brought this case against the Forest Service and BLM, Judge Dwyer was already firmly established in the controversy. Dwyer had been deeply entangled in the "spotted owl" battle between environmentalists, the timber industry, and federal agencies since its inception in the late 1980s. Judge Dwyer's 1991 ruling in Seattle Audubon Society v. Evans was the impetus for the creation of the Northwest Forest Plan and Judge Dwyer himself upheld the plan as lawful in 1994. The extended duration of the relationship between Dwyer and the Northwest Forest Plan placed the Judge in a unique position in regard to this case. Rather than being a totally neutral outsider, Dwyer was in strikingly intimate territory.

Generally, the argument for adding a judicial check into an

133. See, e.g., Manning, supra note 100; Anthony, supra note 100.
134. Manning, supra note 100, at 682-83.
135. Einer Elhauge challenges this popular notion, however. He argues that judges are less politically insulated than generally assumed. See Elhauge, supra note 107, at 80. He argues that "interest groups can influence judicial appointments and are more likely to do so if we convert judges into more general regulators by expanding judicial review." Id. at 80-81.
agency's interpretation of its own regulation is that a neutral judicial interpreter promotes the separation of powers and decreases the possibility of unwise agency lawmaking. The presumption of having a truly independent judge underlies that argument, however. Judge Dwyer's connection to the Forest Plan and the spotted owl lawsuits reveals that his relationship with the controversy was far from an independent, neutral one. But in this case, Judge Dwyer's detailed, first-hand knowledge of the background of the case and the legal requirements of the Northwest Forest Plan gave him the expertise he needed to resolve the difficult issues inherent in the agencies' interpretation. Although ideally a judicial check will be an unbiased, neutral third party review of the case, it would be illogical to find that a judge's personal expertise in an area of the law should preclude him from reviewing cases within that area. Judge Dwyer's expertise, acquired from presiding over the battle between the environmentalists and the agencies, led him to initially require the creation of the Northwest Forest Plan. Only by presenting a management plan that met all the legal requirements would Judge Dwyer lift the injunctions on the timber sales in spotted owl habitat. Indeed, in Seattle Audubon Society v. Lyons, Judge Dwyer cautioned that although he found the plan legally adequate, it had barely passed the threshold of legality. He stated that "any more logging sales...would probably violate the laws." Clearly if the Northwest Forest Plan exempted from the survey requirements those forests that already had environmental impact statements, Dwyer would have found that the agencies had acted outside the bounds of the law and would not have upheld the plan.

Given the background leading up to this case, Judge Dwyer's knowledge and prior influence makes him especially qualified to review the agencies' interpretation. Because of his in-depth understanding of the legal issues and the policies, politics, and predilections of the parties involved, he could more easily push aside the posturing of the parties and look at the legal issues at hand. He, better than anyone, knew what to look for and how to analyze its impact.

CONCLUSION

Environmentalists won an important battle in Oregon

139. See id. at 1089.
140. See 871 F. Supp. at 1300.
141. id.
Natural Resources Council Action v. United States Forest Service. By finding the actions of the Forest Service and BLM "arbitrary, capricious, and contrary to the plain language" of the Northwest Forest Plan, the case prevented the agencies from ignoring the environmental impact of timber removal in fragile habitat. In addition, Oregon Natural Resources exposes the danger of blindly applying the substantial deference standard to an agency interpretation of its own regulations.

This case involved agencies with a history of evading applicable environmental laws. The agencies interpreted provisions of the Northwest Forest Plan in disingenuous, politically motivated ways, and without providing the opportunity for public notice or comment. Nevertheless, the substantial deference standard almost requires the court to give controlling weight to these types of interpretations. In order to come to the most appropriate decision in this case, Judge Dwyer was forced to turn away from the substantial deference standard and to apply what appeared to be a more common sense standard of review. This case exemplifies the problems underlying the foundation of the Seminole Rock/Auer standard and strengthens the argument that the Supreme Court should revisit and reexamine the issue of blind deference to agency regulatory interpretation. Also, because of Judge Dwyer's long involvement in the legal controversy surrounding the Northwest Forest Plan, the argument asserting that agencies possess a unique understanding that courts lack fails to ring true in this case. This case challenges the notion that agencies are always the party in the best position to interpret their own regulations.