Judicial Review of Agency Noncompliance with Public Land Manuals

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A large body of literature addresses the circumstances under which federal agencies must employ APA § 553 procedures in order to make their policies binding on private parties. However, recent developments present a converse question: having gone through the notice-and-comment procedure, are the resulting policies and interpretations binding on agencies? Even if short of binding, what role should such policies play in judicial review of agency noncompliance with its manuals.

Public land manuals generally need not go through informal rulemaking because they fall under the “public property” exception of APA § 553(a). Some public land statutes, such as the National Forest Management Act, waive the exception and affirmatively require informal rulemaking for certain matters. For the vast majority of resource management guidance, notice-and-comment is not required for another reason—agency manual provisions typically are interpretive rules, rather than legislative rules. Interpretive rules state what the agency thinks a statute means, in contrast to legislative rules, which create new rights or duties. Though the APA does not require the notice-and-comment procedure for such rules, neither does it prohibit the practice.

In public land administration, where Congress typically provides vague objectives with few substantive criteria, manuals guiding how agencies should manage natural resources have long played an important role. The predecessor to the Forest Service Manual, the “Use Book,” dates back to 1905. But recent years have seen the controversy over agency public land manuals increase. First, more manual revisions now go through notice-and-comment rulemaking. This has promoted greater public involvement and hence investment in the content of manuals. Second, a controversial 2005 draft revision of the National Park Service (NPS) “Management Policies” manual attracted national media attention and heightened sensitivity about the legal status of manuals. Third, the U.S. Fish and Wildlife Service (FWS) promulgated 2006 manual provisions with novel disclaimers of intent for judicial enforceability. And, fourth, in 2006 the D.C. Circuit reversed its 2000 determination that the “Management Policies” provisions are binding.

I. Do Manuals Directly Bind Agencies?

Courts deciding whether manuals are binding look at both substantive and procedural aspects of the administrative material. The substantive dimension concerns whether the content of a manual establishes duties an agency must meet through particular standards, methods, and mandatory language. Directives that are imprecise or written in discretionary terms will not bind agencies. The procedural dimension is the manner in which the agency promulgates the manual provision.

The majority of courts that examine the question closely find agency manuals to be non-binding, internal guidance unless some special circumstance raises the legal status of the policy. The most common special circumstance is promulgation under the notice-and-comment procedure. A rule of thumb for predicting the outcome of cases is that notice-and-comment procedure corresponds with binding status. In general, manual provisions are not promulgated under APA § 553 procedures, but the practice is becoming more common.

In 2006, the D.C. Circuit held that the NPS “Management Policies” manual is not binding on the agency. As the latest word from the nation’s preeminent administrative law court, Wilderness Society v. Norton, 434 F.3d 584, (D.C. Cir. 2006), is particularly significant because it contains an extended analysis of the issue. The case involved policies that the Park Service did not promulgate under notice-and-comment procedures. In that respect, the outcome is not surprising. But, the court’s analysis raises some difficult questions about the role of manuals.

Wilderness Society dealt with a challenge to the NPS’s failure to create wilderness management plans for several parks. No statute compels the creation of these plans. But the “Management Policies” stated that each relevant park “will develop and maintain” the plans. 434 F.3d at 594. In considering whether manual or policy provisions bind resource management agencies, the opinion purports to examine two issues: the effects of the agency promulgation and the intent of the agency. But a close reading reveals that it actually considers four factors—publication and procedure, binding content, intent, and congressional mandate—which all have roots in other public land management policy cases. Here, then, are the factors courts consider in determining whether to bind a public land agency to its manual.

a. Publication and procedure.

The first factor looks at where the material is published and whether it is promulgated in conformance with APA informal rulemaking. The closer a policy’s publication and procedure comes to the standards for legislative rules, the

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more likely it will bind an agency. In recent times, agencies have generally promulgated significant manual provisions through informal rulemaking procedures. For instance, Forest Service manual provisions involving a “substantial public interest or controversy” go through notice-and-comment. 36 C.F.R. § 216.6.

Wilderness Society v. Norton noted the importance not simply of employing the notice-and-comment process but also of publishing a final version in the Federal Register and codification in the Code of Federal Regulations. The court regarded the failure to codify the policy in the C.F.R., as signifying an intention to make a general policy, not a binding rule.

Unfortunately, the D.C. Circuit appears to confuse two different issues here: promulgation procedure and the standard for including a rule in the C.F.R. The first issue is the effect of a past procedure on subsequent agency behavior. The notice-and-comment process engages the public and fully vets the merits of a policy. Employing section 553 procedure ought to limit agency discretion in exchange for the attention of the public and Chevron deference. This is the implicit trade-off reflected in the predictive rule of thumb. But, it is a separate issue from the standard for including a rule in the C.F.R., which turns on whether an agency statement prescribes a penalty or course of conduct; confers a right, privilege, authority, or immunity; or imposes an obligation relevant to an open-ended class of the public. 1 C.F.R. § 1.1. The procedures under which a policy should bind an agency should not turn on a codification standard that hinges on the policy’s effect on private parties.

b. Binding content.

The second factor used by courts to determine the binding effect of policies is whether the manual provisions employ generally advisory and policy-oriented language. In order to be binding on the agency, the policy should “prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice.” W. Radio Serv. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996). A substantive rule is one that would, according to the D.C. Circuit, have a binding effect on private parties or on the agency. Thus, the standard for whether a rule binds an agency returns, via inquiry into whether it is “substantive,” to ask whether the rule binds a private party or the agency. The first question is not the subject of this particular controversy. The second is, but employs circular logic to ask whether a policy establishes a substantive rule as a means of determining whether an agency should be bound by the policy.

The use of the word “will” (or “should”), rather than unambiguous terms such as “shall” or “may” to indicate either binding intent or discretion, respectively, is a characteristic shared by many public land manual provisions. It raises an issue of agency intent to compel rather than to allow certain actions. Different courts, using different formulations of this factor in the test to determine whether an agency is bound by a manual provision, might fairly arrive at different conclusions, as courts do when interpreting these words in contracts.

c. Intent.

The third factor is agency intent. If an agency states that it means to circumscribe its own discretion through manual guidance, courts are apt to hold the agency to its word. Unfortunately, agencies often send mixed messages in stating their intent. That is the case with the 2006 FWS Refuge System policies which, as manual provisions, are intended to bind refuge managers but were promulgated with disclaimers seeking to prevent judicial enforcement in the face of agency noncompliance.

The NPS “Management Policies” stated that “[a]dherence by NPS employees to policy is mandatory unless specifically waived or modified by the Secretary, the Assistant Secretary for Fish and Wildlife and Parks, or the Director.” In 2000, the D.C. Circuit found that statement sufficient to constitute requisite intent to bind the Park Service, Davis v. Latschar, 202 F.3d 359, 366 (D.C. Cir. 2000), but then reached the opposite conclusion in Wilderness Society. The 2000 decision focused on the “mandatory” aspect of the provision, while the 2006 decision focused on the reservation of discretion on the part of political appointees to waive the policy. In neither of the cases did the higher agency officials invoke a waiver.

The FWS manual “contains the standing and continuing directives of the Service with which Service employees must comply. It has regulatory force and effect within the Service. . . . It establishes the requirements and procedures for employees to follow in carrying out the Service’s authorities, responsibilities, and activities.” 010 FSM § 1.4(B) (emphasis added). Therefore, absent any contrary indications in specific provisions, the agency intent factor should lead a court to find the manual policy provisions binding.

However, the FWS promulgated the 2006 policies with prefatory disclaimers in the Federal Register. The boilerplate disclaimer states the policy “is intended to improve the internal management of the Service, and it is not intended to, and does not, create any [judicial enforceable] right or benefit, substantive or procedural.” 71 Fed. Reg. 34,040. The disclaimer’s wording tracks closely the common disclaimer of judicial enforcement in executive orders. Its use in manual promulgations, however, is novel. The disclaimer does not abrogate the mandatory language of the FWS manual that binds agency officials to manual policies. Rather, the disclaimer attempts to deal only with outside enforcement of the terms of the manual to the FWS. The disclaimer expresses an intent about the agency’s susceptibility to judicial review of its decisions. It does not disclaim the manual’s statement that employees are bound by the terms of manual policy. As to the disclaimer of judicial review, it seems unlikely that an agency, through a Federal Register statement, can override the statutory rights accorded in the APA. In this respect, the disclaimer is different from those in executive orders creating policies that are not part of legislative frameworks.

d. Congressional mandate.

The fourth factor is whether the policy emanates directly from legislation. The two cases discussing this factor as a significant component of their decisions
found no basis to force an agency to comply with a policy requirement if the requirement was not mentioned in a statute. No statute mentions the special management plans for wilderness-quality lands discussed in the policy at the center of the Wilderness Society dispute. Similarly, McGnail & Rowley v. Babbitt, 986 F. Supp. 1386, 1394 (S.D. Fla. 1997), attached some significance to the absence of any reference to the FWS manual, generally, in legislation or existing rules. The greatest uncertainty in this factor is how direct the legislative connection must be.

II. Do Manuals Restrict Inconsistent Agency Behavior?

Even if manuals are not binding, they still may serve as a basis for judicial review. For notice-and-comment rules, courts regard the APA procedure as a kind of ratchet. Once an agency has engaged the public through the process, it is obliged to follow the result until it reverses itself employing the same process. This is the underlying principle of Motor Vehicle Manufacturers Association v. State Farm, 463 U.S. 29 (1983).

The State Farm Court rejected the Reagan administration’s argument that an agency could deregulate more easily than it could regulate in the first place. The administration argued, in other words, that it could revoke a rule under the same low standard of review that a court would employ to review refusal to promulgate in the first place. The Court found that revocation of a rule is different from an initial decision to forego promulgating a rule. An agency does not have a very high hurdle to justify failure to promulgate (or, interpret) a rule—in fact, such a decision is close to non-reviewable. But, having established an agency position or interpretation, an agency faces a higher standard to justify reversal.

Under the State Farm rationale, an agency faces a higher burden to explain its variance from a notice-and-comment promulgated policy than it would a decision not to make an official interpretation in the first place. Even if a court refuses to enforce the terms of a manual policy, they may indirectly restrict land management through the APA’s general standard of judicial review. A court may find an unexplained or insufficiently supported departure from manual provisions arbitrary and capricious.

Moreover, agencies may receive Chevron deference under the Mead test for notice-and-comment promulgated policies, especially those that interpret public land legislation. But, this comes at the price of binding the agency to its published determinations. If courts will not bind agencies to their manual interpretations, then courts should refuse to grant Chevron deference to the definitions and interpretations in the policies.

III. Conclusion

Courts deciding whether a policy or interpretation binds an agency ought to focus on the procedure through which the provision was vetted. The presence or absence of notice-and-comment has the merit of being easy to determine, where the substantive nature of the promulgated policy can be difficult to pin down precisely. Unfortunately, even when concerning itself with procedure, the Wilderness Society opinion goes beyond the promulgation to ask whether the outcome is codified in the C.F.R. Alas, this is a back-door invitation to reconsider the substantive nature of the policy because the test for codification relates to substantive attributes: i.e., whether the policy confers a right, privilege, authority, immunity, or obligation on private parties. Most manual provisions are appropriately excluded from the C.F.R. because they do not intend to establish a standard of behavior for private parties. That determination should have no bearing on whether the policies were properly promulgated to bind the public agency.

Wilderness Society concluded that binding the Park Service to follow its land management policies would “chill efforts by top agency officials to gain control over their bureaucratic charges through internal directives.” 434 F.3d at 596. On the facts, the court’s conclusion seems evidently wrong: the NPS “Management Policies” explicitly allowed top agency officials to waive provisions without needing to justify their actions. Contrary to the D.C. Circuit’s reasoning, officials may find it worthwhile to make the drawn-out effort to promulgate policy only if there is some assurance that the payoff will be something that binds successors absent a waiver or formal policy reversal.

Moreover, incentives for agency officials ought to be only part of the calculus in determining what is good administrative law. Another consideration is the incentive for citizen involvement. One would expect people to contribute less time and energy to policymaking when the final result is merely discretionary for the agency. Binding the agency vindicates public investment in the notice-and-comment process. It also helps resource managers resist powerful local and long-standing interests that conflict with national agency objectives.