Patterns in U.S. Forest Service Northern Region timber sale appeals

Daniel J. Funsch

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PATTERNS IN U.S. FOREST SERVICE
NORTHERN REGION TIMBER SALE APPEALS

By
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B. A., State University of New York
at Binghamton, 1983

Presented in partial fulfillment of the requirements
for the degree of
Master of Science
1989

Approved by
Chair, Board of Examiners
Dean, Graduate School

June 3, 1989
Date
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CHAPTER 1
INTRODUCTION

The U.S. Forest Service (F.S.) administrative appeals process is an unique form of conflict resolution among federal agencies. It allows the public to request a formal administrative review of F.S. decisions, as well as a stay (cessation) of related activities until the review is completed. Because of this, the process can be used to measure public satisfaction with agency decisions.

The appeals process is not intended to be a grievance-oriented adjudication process similar to the court system, but rather a way for citizens to request an internal review of agency decisions. The process is the last administrative step in the public involvement arena before implementation or legal action.

The appeals process is one focal point in the heated debate over the allocation of roadless areas (to Wilderness or multiple use) and the future of the timber industry. By filing appeals and citing California v. Block,\(^1\) which held that the F.S.'s RARE II study was inadequate to justify releasing roadless areas to development, conservationists have halted development in many roadless areas in the Northern Region. The timber industry claims that access to these roadless areas is critical to our economic future.

In addition, the industry alleges that abuse of the process through "frivolous" appeals is holding up timber on multiple use lands and causing a timber supply crunch that they maintain is now facing mill operators in the region. The industry supports legislative attempts to "streamline" the appeal process by requiring filing fees or allowing the F.S. to reject "frivolous" appeals.

To counter, many conservationists blame large private companies. By liquidating their

\(^1\) California v. Block, 690 F.2d 753 (9th Circuit, 1982)
own timber assets and then aggressively bidding for public timber some claim the large companies are forcing small operators out of business. Conservationists also say that mechanization and raw timber exports are costing jobs, and that shifting to primarily selective timber harvest is the only way to ensure future economic stability.

1. Legal Context

The F.S. is responsible for managing 191 million acres of land known collectively as the National Forest System. Region One (All of Montana and parts of Idaho, Washington and the Dakotas) contains 13 National Forests. The planning and management of activities on these forests is guided by a multitude of legislation, regulations and case law, but those most relevant to the appeals process are the National Environmental Policy Act (NEPA) of 1969, the National Forest Management Act (NFMA) of 1976 and the Endangered Species Act (ESA) of 1973. The F.S. is also required to meet State water quality standards. Of these laws, the NFMA provides the most substantive and binding requirements for management activities, but it does not in fact impose its provisions on project level decisions (like timber sales) until a National Forest's "Forest Plan" has been adopted under the law. NEPA guides public involvement throughout the planning process, and the ESA dictates measures to list and protect threatened and endangered species. In addition to these laws, the F.S. operates in accordance with codified regulations and the F.S. Handbook (FSH) and F.S. Manual (FSM).

NEPA provides opportunity for public involvement in agency decision making. However, the appeals process ensures formal public participation in many management

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2 42 USC 4321, 1969
3 16 USC 1604, 1976
4 16 USC 1531, 1973
decisions (especially district level decisions) where NEPA does not usually require Environmental Impact Statements (EISs) with formal comment periods. Since the process allows citizens to request specific relief to address their concerns, it can also lead to substantive changes in management after decisions have been rendered. An administrative review initiated by an appeal either affirms or remands the initial agency decision, unless the decision or the appeal is withdrawn first. Appeal decisions rely on the facts of the case, approved management documents, and often statutory or case law. This point makes the process seem like a formal clarification of law even if that is not the intent.

The process functions as a precursor to litigation by incorporating two aspects of administrative law: establishing a record, and exhausting administrative remedies. The appeal record contains the disclosure and decision documents, the appellant's arguments, F.S. responses and supporting evidence, and is used by reviewing officers and judges in making a decision. In addition, the foreclosure doctrine prevents plaintiffs from raising issues in court that were not raised in an earlier administrative proceeding.

The appeals process embodies the exhaustion of administrative remedies, a doctrine of comity between agencies and the courts which prevents premature judicial interference with administrative proceedings. The appeal regulations state that:

...any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part.\(^5\)

Appeals provide the F.S. an opportunity to resolve conflicts and hence avoid lawsuits. This is an important function, with it comes a great responsibility. As W.H. Rodgers

\(^5\) 36 CFR 217.18 Policy in event of judicial proceedings.
commented, "A remedy that must be exhausted should be taken seriously by the agency that offers it if it is to be given credence by the courts that enforce it."

The administrative appeals process is not required by any statute, but is codified in federal regulations. The F.S. has used some type of dispute hearing process since 1906, and appeal procedures were first codified in 1936\(^7\). They have changed periodically with law and policy, shifting in degree of formality and between wholly internal and external review. The regulations were revised in 1965, in 1977, and again in 1983\(^8\) as a result of an executive order to review regulations every five years. The most recent change was published January 23, 1989.

2. Objectives, Organization and Methodology

The objective of this professional paper is to identify patterns in timber sale appeals in the F.S. nationwide and in the Northern Region from 1983 to 1988, and to examine one, the Lairdon Gulch appeal (Bitterroot National Forest), in relation to these patterns. After identifying trends I will try to answer specific questions about timber sale appeals and the process itself, from the standpoints of policy analysis and conservation efforts.

The first Chapter includes an introduction to the appeals process and its legal context. In Chapter Two I discuss how the process works, the recent change in the regulations and their anticipated effect on the accessibility and usefulness of the process to conservationists. In Chapter Three I provide an overview of timber sale appeals at the national, regional and forest levels, explore the effect of appeals on timber volume and summarize the data from an appellants' questionnaire. In Chapter Four I identify recurring issues raised in appeals,

\(^7\) 1 CFR 1092, August 15, 1936
\(^8\) 48 FR 63 March 31, 1983, p.13420
and measure consistency in agency responses to these recurring issues. In Chapter Five I
discuss the Lairdon Gulch appeal (in which I was an appellant) in the context of the
foregoing analysis. In the sixth and final Chapter I examine "successful" appeals from the
standpoint of both the process itself and conservation efforts and make recommendations to
the F.S. and conservationists.

I researched this paper using appeal records on file at the Northern Region office of the
F.S., appeals data compiled by F.S. regional and national offices, and other government
and non-government sources. I did not consider any appeals filed by the timber industry.
I also sent a questionnaire to appellants of timber sales in the region.
CHAPTER 2

THE APPEALS PROCESS AND RECENT CHANGES

1. Decision-Making in the Forest Service

All decisions made by the F.S. (with a few exceptions, eg. personnel decisions) are subject to administrative appeal. Examples include decisions to approve a Forest Plan, grant a grazing lease, allow surface occupancy for mineral exploration, build a road or trail, improve wildlife habitat by prescribed burning, or sell timber. I am only concerned with timber sale appeals in this paper.

Depending on their nature, decisions are made at different administrative levels within the agency. The decision to approve a Forest Plan, for example, is made by the Regional Forester, while timber sale approvals are made by Forest Supervisors or District Rangers. Northern Region policy grants District Rangers authority to approve timber sales up to 2 or 5 Million Board Feet (MMBF), depending on the District's workload. Sales up to 25 MMBF (west of the Continental Divide) and 15 MMBF (east of the Divide) can be approved by Forest Supervisors, and sales over 25 and up to 50 MMBF must be approved by the Regional Forester.9

When an appeal is filed it initiates an internal review of the disputed decision. A review under the process either affirms or remands the initial project decision, unless the appeal or the decision itself is withdrawn first. Figure One (following page) illustrates the levels of review and decision-making in the appeals process under the new regulations.

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9 FSM 2430.41
Figure 1. Levels of Appeal and Decisions in the Appeal Process.

<table>
<thead>
<tr>
<th>Type of Decision</th>
<th>Deciding Officer</th>
<th>Reviewing Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1st Level</td>
<td>2nd Level</td>
</tr>
<tr>
<td>Timber Sale (up to 5 MMBF)</td>
<td>District Ranger</td>
<td>Supervisor</td>
</tr>
<tr>
<td>Timber Sale (5 - 25 MMBF)</td>
<td>F. Supervisor</td>
<td>Reg. Forester</td>
</tr>
<tr>
<td>Forest Plan (or sale &gt;25 MMBF)</td>
<td>Reg. Forester</td>
<td>F.S. Chief</td>
</tr>
</tbody>
</table>

2. The Regulation Changes

In April, 1987, the F.S. published its intent to review the appeal regulations.\(^{10}\)

Shortly thereafter F.S. Chief Dale Robertson said:

> We will study the performance of the appeals process and determine how its operation and management meets public and agency needs. Based on this study, we will decide whether the appeals regulations should be continued without change, revised, or rescinded.\(^{11}\)

The review concluded that the process "...is not the simple, quick, informal process that the agency originally intended it to be. Instead, it has become a significant generator of paperwork and a time consuming, procedurally onerous, and costly effort."\(^{12}\) The number of appeals filed had increased over the past 5 years and the cost of handling appeals

\(^{10}\) 52 FR 14144

\(^{11}\) May 20, 1987, Press Release

\(^{12}\) 54 FR Part VI, Jan. 23, 1989
soared from $2.6 million in 1984 to $5.7 million in 1987.

To address the issues identified in the review, proposed changes were drafted and published,\(^{13}\) comment was solicited, and the regulations were revised.\(^{14}\) "...[T]he intended effect of the [new] rule is to simplify the appeals process and to provide appeal procedures that are commensurate with the nature and type of decision being disputed."\(^{15}\) In effect, the appeal regulation at 36 CFR 211.18 was replaced with two new regulations: 36 CFR 251, which covers appeals of decisions concerning the issuance of written instruments (contracts, special permits, etc.) for occupancy and use, and 36 CFR 217, which covers appeals of planning and project decisions made according to NEPA and NFMA implementing regulations (Forest Plans, timber sales, etc.). Since I am only concerned with timber sale appeals, I will address only the revisions codified in Section 217. In addition, I will discuss only the final regulations adopted and not those initially proposed.

The revisions addressed eleven major areas: purpose and scope, notice of decision, appealable and non-appealable decisions, levels of review, filing procedures, responsive statements, stays, communications, intervention, oral presentations and filing fees. While filing fees were rejected in the final regulations, substantial changes were made in many areas.

The revisions (Part 217) define the purpose and scope of the regulations: "...[T]he rules do not provide an adjudication, grievance-oriented process. Rather, they provide an expeditious, objective review of NEPA derived decisions by an official at the next administrative level."\(^{16}\) This is the first time the regulations have explicitly stated a

\(^{13}\) 53 FR 17310, May 16, 1988
\(^{14}\) 54 FR Part VI, Jan. 23, 1989
\(^{15}\) Id.
\(^{16}\) Id at 3358
purpose.

The new regulations (at 217.4 [11]) allow the F.S. to exempt from appeal any decisions relating to the rehabilitation of lands and the recovery of resources resulting from natural disasters (wildfire, wind, flooding, etc.). Such decisions were always subject to appeal under the old regulations (eg. Moore Blowdown appeal, Flathead N.F.), and some activists fear this provision will be invoked to prevent appeals of salvage sales planned after the fires of 1988, particularly in the Greater Yellowstone Ecosystem (GYE). Under the rule, the Regional Forester or F.S. Chief must "determine and give notice in the Federal Register that good cause exists to exempt such decisions from review under this part."\(^\text{17}\)

This policy is relevant to Region One, as salvage sales are planned in roadless areas that burned along the Rocky Mountain Front (Canyon Creek, Lewis and Clark N.F.).\(^\text{18}\)

Public notification requirements are expanded under the new rules (217.5), which include a provision to notify "...those who are known to have participated in the decision-making process,"\(^\text{19}\) in addition to those who request decision documents. This policy ensures greater opportunity for public participation.

One of the most fundamental and controversial changes in the regulations dealt with levels of appeal and review (217.7). Under the old regulations, District Ranger and Forest Supervisor decisions were subject to two levels of review. For example, in an appeal of a District Ranger's decision, the Forest Supervisor would be the reviewing officer. The Supervisor's appeal decision could then be appealed to the Regional Forester. In cases where the Supervisor made the initial decision, the reviewing officer would be the Regional Forester, and his/her appeal decision could be appealed to the F.S. Chief. Initial decisions by the Regional Forester and the Chief were subject to only one level of review.

\(^{17}\) Id at 3359
\(^{18}\) 11/28/1988, Rocky Mountain Ranger District, scoping letter
\(^{19}\) Id note 17 at 3359
Under the new regulations, only District Ranger decisions are subject to two levels of review. Forest Supervisor and Regional Forester decisions can be appealed to the Regional Forester or Chief, respectively, but the reviewing officer's determination is then final. The rules provide for discretionary review in some cases, which must be initiated within 15 days of the decision.

Conservationists vigorously opposed this change, arguing that it would erode the impartiality of the process (decisions would not likely be remanded by an official who works in the same office, they said) and inspire more litigation. The final rule is in fact a compromise in that it provides two levels of review for Ranger decisions, whereas the initial proposal would have granted only one level.

Filing procedures for and content of appeals underwent small but significant changes. Appeals must now include the appellant's phone number, must identify specific parts of the decision and how they violate law, regulation or policy, and must identify specific changes sought for relief. The degree of specificity may be a factor in dismissing appeals (see below) and will certainly be of import to reviewing officers' decisions. It could thereby weaken the process.

Appellants must still file within 45 days of project decisions but now have 90 days to file on Forest Plans. Stay requests must be included with Notices of Appeal (they could be made at any time under the old rules), and the appellant must send the appeal to both the deciding and reviewing officers.

Appeal decision deadlines were adopted for the first time in order to address the problem of procedural delays. Decisions on project appeals must be made within 100 days, while Forest Plan appeals must be decided within 160 days. I would like to note that many appeals in this study were not decided this quickly.

Under the new rules, stays of Forest Plans may not be granted. While this is new, no
Forest Plan has ever been stayed in the process. Stay requests on project decisions will be considered where the project could be implemented before an appeal decision, and requests must contain the same information as the old regulations required (impacts on the appellant and on resources if the activity were to proceed). Stay decisions must be ruled on within 10 days (21 days under the old rules) and stay decisions are not subject to appeal (they were) or discretionary review (except when the Forest Supervisor is the reviewing officer).

The new rules provide for the dismissal of appeals that are late or deficient in content, or appeals where the requested relief could not be granted. This section is entirely new.

The new rules eliminate the oral presentation, but allow meetings and negotiation between the deciding officer and appellant. Reviewing officers can allow time extensions to accommodate negotiation, and deciding officers can still withdraw decisions. There were three appeals in this study where negotiation resulted in the withdrawal of the appeal. The oral presentation represented the best chance to persuade officials of the merits of an appeal, according to some conservationists.

Instead of responsive statements, which were sent to an appellant to directly address their statement of reasons, appeal records will now rely on "transmittal letters" from the deciding officer to the reviewing officer. Those letters will explain where issues have been addressed, and will be sent to all parties to the appeal. This reduces the direct dialogue between appellants and the F.S., and may diminish opportunities for resolving appeals.

A completely new section (217.13) establishes the authority of the reviewing officer to establish procedures to "ensure orderly and expeditious conduct" of the process. How this could be used is unclear, but it has an ominous sound to conservationists.

Intervention, whereby people other than the appellant can submit comments to the appeal record, will still be allowed under the new rules, but only at the first level of appeal.

The effective date of the changes was February 22, 1989.
CHAPTER 3
AN OVERVIEW OF NORTHERN REGION APPEALS AND APPELLANTS

This chapter presents information on the number of appeals filed with the F.S. nationwide and in Region One, on outcomes and procedural issues associated with these appeals, and on the appellants of timber sales in Region One. Because of the lack of complete and comprehensive data at the Northern Region office much of this chapter cites correspondence and reports done by the Congressional Research Service (CRS)\textsuperscript{20} and the General Accounting Office (GAO)\textsuperscript{21} for the U.S. Senate and House of Representatives.

1. Number of Appeals

Nationwide, the number of appeals filed annually, the number of pending (unresolved) appeals, and the time taken to process appeals have all increased in the past six years.

The number of appeals filed annually with the F.S. nationwide has more than doubled through this period, from 584 appeals in fiscal year (FY) 83 to 1,298 in FY 88. While those numbers include all types of appeals, timber sale appeals have also increased dramatically, from 245 in FY 83 to 448 in FY 88, and have remained a fairly constant percent of the total (see Table 1).

Among the regions over this time period, Region Six received the most timber sale appeals (832), followed by Region Five (334) and Region One (122, excepting FY 83). These figures include appeals of salvage sales and "buy-back" sales (re-offered after being bought back), which were omitted from the nationwide statistics.

\textsuperscript{20} memos from Ross W. Gorte, Environment and Natural Resources Policy Division
\textsuperscript{21} Information on the Forest Service Appeals System. GAO/RCED-89-16BR, Feb. 89
Table 1. Total appeals (nationwide) and timber sale (T.S.) appeals (nationwide and Regions Six, Five and One).

<table>
<thead>
<tr>
<th></th>
<th>FY 83</th>
<th>FY 84</th>
<th>FY 85</th>
<th>FY 86</th>
<th>FY 87</th>
<th>FY 88</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nationwide</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total #</td>
<td>584</td>
<td>439</td>
<td>581</td>
<td>1081</td>
<td>874</td>
<td>1298</td>
</tr>
<tr>
<td>T.S. #</td>
<td>245</td>
<td>133</td>
<td>118</td>
<td>295</td>
<td>251</td>
<td>448</td>
</tr>
<tr>
<td>T.S. %</td>
<td>42%</td>
<td>30%</td>
<td>20%</td>
<td>27%</td>
<td>29%</td>
<td>34%</td>
</tr>
<tr>
<td>By Region</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>T.S., R-6</td>
<td>75</td>
<td>56</td>
<td>33</td>
<td>93</td>
<td>72</td>
<td>403</td>
</tr>
<tr>
<td>T.S., R-5</td>
<td>50</td>
<td>34</td>
<td>35</td>
<td>66</td>
<td>63</td>
<td>86</td>
</tr>
<tr>
<td>T.S., R-1</td>
<td>?</td>
<td>9</td>
<td>16</td>
<td>30</td>
<td>11</td>
<td>56</td>
</tr>
</tbody>
</table>

The Northern Region received 122 timber sale appeals from FY 84-88, but only 50 appeal records (41% of the total) were found in the Regional office. This is simply due to bureaucratic inefficiency. The F.S. employs only one person to oversee appeals for the entire Region, and Supervisors' Offices do not regularly submit appeal records unless the Regional Forester is a reviewing officer in the appeal. At any rate, the available appeal records formed the qualitative basis of this study, and their distribution among the Region's forests is shown in Table 2.

In FY 88 Region One received a total of 289 appeals: 90 on Forest Plans, 78 on recreation projects, 56 (about 20%) on timber sales, 28 on "lands", 26 on "minerals and geology", 8 on "range" and 2 on engineering. The 56 timber sale appeals were filed on 35 different sales.
Table 2. Distribution of 50 timber sale appeals among Region One forests.

<table>
<thead>
<tr>
<th>Forest Number</th>
<th>Forest</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho Panhandle (IPNF)</td>
<td>16</td>
<td>Helena (HLNA)</td>
</tr>
<tr>
<td>Beaverhead (BVHD)</td>
<td>7</td>
<td>Kootenai (KOOT)</td>
</tr>
<tr>
<td>Bitterroot (BRRT)</td>
<td>5</td>
<td>Nez Perce (NZPR)</td>
</tr>
<tr>
<td>Flathead (FTHD)</td>
<td>4</td>
<td>Deerlodge (DRLG)</td>
</tr>
<tr>
<td>Lewis and Clark (L&amp;C)</td>
<td>4</td>
<td>Lolo</td>
</tr>
<tr>
<td>Gallatin (GALL)</td>
<td>3</td>
<td>Custer (CSTR)</td>
</tr>
<tr>
<td>Clearwater (CLRW)</td>
<td>3</td>
<td></td>
</tr>
</tbody>
</table>

2. Effect of Appeals on Timber Volume

According to both the GAO and CRS, only about six percent of the total timber volume offered for sale in Regions One and Six in fiscal years 86-87 was appealed, and less than one percent of the volume was delayed by appeals. A delay was defined as a timber sale that was not offered when planned when the appeal was found to be without merit. If an appeal was upheld, then it was assumed that the F.S. was responsible for the delay, not the appeal. The GAO report cited the F.S. as contributing to some of the delays by not issuing EAs in time to allow for the processing of appeals. It also noted that forest plan appeals did not delay any sales because appellants are required to file separate appeals on timber sales.

Planned FY 88 sale volumes for Region One appear to be affected more significantly by appeals. According to the F.S. there are 24 FY 88 timber sales in Region One currently stayed due to appeals, three times the number and over twice the volume of stayed sales in either FY 86 or 87. Six of the 24 are scheduled in roadless areas. There are 11 more sales under appeal that have been allowed to proceed. Senator Max Baucus (D-Mont.) requested of GAO a follow-up report addressing the entire FY 88.
In addition to sales currently under appeal, 4 FY 88 sales have been remanded and since modified or cancelled, and the decisions for 6 FY 88 sales have been withdrawn or not offered because of the threat of appeal. Until appeal decisions have been rendered, it is inappropriate to speculate on the real reasons for this growing number of appeals and likely delays.

3. Appeal Decisions and Outcomes

The number of annual appeal decisions nationwide increased from 681 in FY 86 to 882 in FY 88 (no data for 83-85) but has not kept pace with the number filed. Hence, the backlog of pending appeals continues to grow (from 64 in FY 83 to 830 at the end of FY 88). The increase in pending appeals is also found in Region One: 289 appeals were received in FY 88 but only 119 appeal decisions were issued.

In its review of the appeals process leading to the proposed regulation changes, the F.S. revealed that 15% of appealed decisions are reversed or remanded nationwide. This does not include withdrawn decisions.

Figures for Region One decisions are only available for FY 88, and include all types of appeals, but at seven percent, the percentage of remands was much lower (8 remands out of 119 decisions). There were 25 "closed" cases (21%), in which appeals or decisions were withdrawn without deciding the merits of the appeal. It is hard to interpret these cases; they could represent negotiated settlements or imminent remands.

Of the 50 timber sale appeals I studied, 24 initial decisions were affirmed at the first level, 16 decisions were remanded (11 of these involved roadless areas), 6 decisions were withdrawn, 3 appeals were withdrawn and 1 was still pending. If roadless area sales are omitted, these figures approximate national and Regional figures. Table 3 shows first level appeal decisions for several forests.
Table 3. First level appeal decisions for selected forests.
DN W/D = decision withdrawn, App. W/D = appeal withdrawn

<table>
<thead>
<tr>
<th>Forest</th>
<th>Affirmed</th>
<th>Remanded</th>
<th>DN W/D</th>
<th>App. W/D</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beaverhead</td>
<td>6</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Bitterroot</td>
<td>4</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Flathead</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Gallatin</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Idaho Panhandle</td>
<td>4</td>
<td>10</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Lewis &amp; Clark</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Out of 20 second level appeals (from the 50), 10 decisions were affirmed, 2 decisions were remanded, 2 decisions were withdrawn, 2 appeals were withdrawn, 1 appeal was dismissed and 3 appeals are pending.

Of the five revised NEPA documents (resulting from remands) that were appealed (and studied herein), two (Lairdon Gulch and Hope) have been affirmed at the Chief's level, one (Andrus) was remanded, and two appeals (Willow Butte and Lower Quartz) were negotiated. It appears that revising decision documents strengthens the agency's position in the appeals process.

While the number of remanded decisions (7-15%) seems low, it does not represent a vote of confidence for the F.S. Indeed, since remands are often due to violations of law or policy, the number of remands is disturbing to conservationists. And since many decisions are probably withdrawn because of an anticipated remand (negotiations usually result in the withdrawal of the appeal, not the decision), the figures understate the problem.

4. Processing Delays

The appeal regulations provide 140 days for processing appeals, unless oral
presentations, intervention or filing extensions are granted. The average processing time for appeals is, however, much greater. In fact, nationwide this time increased from 201 days in FY 86 to 363 days as of March 31, 1988, over twice the time generally provided by regulation. The processing time for the average forest plan appeal increased from 211 to 424 days, while that for the average timber sale appeal increased from 162 to 294 days. The reasons for increasing processing times and the growing backlog of appeals were principal areas of concern in the GAO report. The report summarized:

The increases in appeals processing times and in the backlog of unresolved appeals do not appear to be due to problems with the appeals system itself. Rather, they most often occurred because the Forest Service has experienced difficulties in resolving complex environmental issues raised in the increasing number of timber sale and forest plan appeals.22

Some conservationists have suggested that success in resolving these issues should be used to evaluate Forest Service personnel.

5. Stays

The appeals process grants an appellant the right to request a stay of activities pending the outcome of the appeal. In most cases stays are granted; only five out of 26 stay requests in this study were denied. In denying the five, the F.S. argued either that the appeal process would be completed before sale implementation, or that the request did not show that the appellant's interests would be harmed by not granting a stay.

22 Id. at p. 2
6. Threat of Appeal

In some cases, the F.S. realizes before a decision is issued that a project is controversial and may be appealed. The implicit threat of appeal forced F.S. officials to withhold decisions on 6 projects in FY 1988, according to the F.S. The White Stallion timber sale, Bitterroot N.F., was one such project.

7. Appellants

The 50 appeals in this study were filed by 55 different appellants (some sales were appealed by more than one appellant) from the years 1984 to 1988. I sent questionnaires to these appellants (see Appendix 1) and asked them to describe themselves, their thoughts on the appeal experience and the time and assistance they needed to file. I also asked them about the (then) impending changes to the regulations and how they would suggest improving the process.

I received 35 responses but noticed few trends. Most respondents (27) considered themselves "environmentalists," many in addition to another perspective. The second most common response was "sportsman" (12), followed by "property owner" (9) and "recreationist" (4). Two conservation organizations, one state agency and one "commercial" appellant responded. Again, I did not study any timber industry appeals.

Appellants were almost evenly divided between those who did and did not use professional assistance to file the appeal (16 did, 19 did not). Some probably had access to professional opinions without actually employing assistance. Appellants spent an average of about ten hours per week on their appeals, and total time ranged from 20 to 200 hours.

A slight majority (20 of 35) of the respondents felt that F.S. responses were neither sincere nor adequate, but that did not affect their judgement of success, however, as 22 said their appeal was at least partly successful. The actual number of remanded or
withdrawn and negotiated decisions was only 14, excluding roadless area appeals, indicating that many appellants had a broad definition of success.

The most conclusive survey result was that all 23 respondents who knew of the upcoming rules changes disliked them. Many had other ideas about how to improve the process, the most common of which was to impose more strict deadlines on the F.S. for responding to and deciding on appeals. Creating an impartial hearing board was suggested by some.

Some respondents appeared to be bitter:

This entire appeal is the record of USFS deceit, indifference to others' concerns and outright evil....Resolution will require an infusion of integrity into this morally, scrupulously bankrupt agency.
The USFS, like the military, possess the time, resources, smugness, and willingness to bully un-powerful citizens. Had we been public figures (e.g. congressmen) our treatment would have been much different.23

23 Comments received from confidential questionnaire.
CHAPTER 4
ISSUES COMMON TO TIMBER SALE APPEALS

The concerns of timber sale appellants in the Northern Region center around wildlife, water quality, economics and procedural issues. In this chapter, I briefly discuss each issue and its legal context, present statistics on the issue's frequency of occurrence, present appellants' contentions and F.S. responses, and speculate on the potential for dispute resolution. Appeal records in the Regional office were my main source.

I make two distinctions in this analysis: that between issues of procedure and substance, and that between philosophical and factual contentions. Factual disputes can be discussed and settled, while philosophical differences will not be resolved through an appeal process. The distinction between substance and procedure also has implications for the appeal process. Courts can change agencies' decisions based on substantive laws, but seldom consider the merits and only ensure the decision process was followed based on procedural laws.

In the interest of brevity, I limit my discussion to the most prominent issues, and where complex issues have both substantive and procedural aspects that are difficult to isolate, I discuss them in a single section. I will not try to recommend methods to resolve issues that represent recurring philosophical differences, but I will identify issues where factual disputes are common, as these are ripe for improved public or agency education.

The most valuable statute for affecting F.S. decisions is largely procedural: NEPA. Although early court decisions on NEPA acknowledged a substantive requirement,\(^\text{24}\) in 1980 the Supreme Court held (seemingly) that it was solely a procedural mandate.\(^\text{25}\)


any event, after Strycker's Bay, substantive review under NEPA became nominal, with courts giving cursory treatment to the merits of an agency's decision, if any treatment was given at all."26 A later Supreme Court decision,27 however, addressed the issue conclusively:

The court remedied the ambiguity of Strycker's Bay, and affirmed what most lower courts had held since the middle 1970's -- that courts should perform a substantive review under NEPA.28

The standard for this review, however, is the "arbitrary and capricious" test, making it extremely difficult for conservationists to win a NEPA case on substantive grounds. Instead, conservationists rely on the extensive body of judicially enforceable doctrine concerning NEPA procedures.

Substantive laws concerning F.S. land management are of limited value to conservationists without legal assistance. The most comprehensive, NFMA, has had little court interpretation, obscuring its usefulness. NFMA does not become enforceable at the project level until "Forest Plans" have been adopted under the law, so many of the appeals in this study (filed before the release of final plans) could not rely on its detailed directives.

F.S. Chief Dale Robertson testified in June, 1987, that timber sale appeals usually charged the agency with not following proper NEPA procedures, or with violating the Endangered Species or Clean Water Acts.29 Table 4 lists the issues most common to the timber sale appeals I studied.

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26 Weinstein at P. 839
28 Weinstein at P. 840
29 testimony before the U.S. House Committee on Agriculture, June 18, 1987
Table 4: Frequency of issues raised in 50 timber sale appeals. Totals exceed 50 because most appeals raise more than one issue.

<table>
<thead>
<tr>
<th>substantive issue</th>
<th>frequency</th>
<th>procedural issue</th>
<th>frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>wildlife and fish</td>
<td>31</td>
<td>cumulative effects</td>
<td>21</td>
</tr>
<tr>
<td>economics</td>
<td>18</td>
<td>poor or biased EA</td>
<td>18</td>
</tr>
<tr>
<td>water quality</td>
<td>16</td>
<td>roadless lands</td>
<td>16</td>
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<tr>
<td>regeneration</td>
<td>12</td>
<td>economic analysis</td>
<td>14</td>
</tr>
<tr>
<td>visual impact</td>
<td>8</td>
<td>range of alternatives</td>
<td>5</td>
</tr>
<tr>
<td>timber harvest</td>
<td>8</td>
<td>public involvement</td>
<td>3</td>
</tr>
<tr>
<td>recreation</td>
<td>4</td>
<td>mitigation</td>
<td>3</td>
</tr>
<tr>
<td>transportation</td>
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</tbody>
</table>

SUBSTANTIVE ISSUES

1. Wildlife/Fisheries

Wildlife and fisheries are protected by NFMA and ESA, and invoke both substantive and procedural concerns. NFMA regulations restrict timber harvest where it would "seriously and adversely" affect water conditions or fish habitat, a substantive mandate, and direct Forests to identify wildlife "indicator species,"\(^\text{30}\) a procedural requirement. National forests must maintain and improve habitat for these species, which are usually chosen for their recreational value or special habitat needs, and must also maintain well distributed, viable populations.\(^\text{31}\) Examples of indicator species in the Northern Region are elk, cutthroat trout and the goshawk.

\(^\text{30}\) 36 CFR 219.19 (a)
\(^\text{31}\) 36 CFR 219.19
ESA is most important as a procedural mandate, and protects species in danger of extinction by requiring consultation on the effect of developments, prohibiting the "taking" of listed species and requiring the use of all practical methods to conserve them. Among others, the grizzly is listed as "Threatened" and the gray wolf as "Endangered" in many forests in the Northern Region.

It is no surprise that wildlife issues were raised 31 times in the 50 appeals in this study (61%), more than any other issue. Of the 31, 15 appeals specifically raised elk security or habitat, 7 mentioned wildlife in general, 6 addressed Threatened or Endangered species and 3 addressed fisheries.

Elk security was raised as an issue in six of the seven appeals filed on the Beaverhead N.F., reflecting both the quality of habitat and the importance of hunting in the area. Other forests where wildlife issues are prominent in appeals are the Bitterroot (4 of 5 appeals), Gallatin (2 of 3 appeals) and Helena (2 of 3 appeals).

The link between road construction, sedimentation and fisheries impacts is well-documented, but there is considerable debate over the effect of roads and timber harvest on both game and non-game wildlife species.

Appellants commonly argue that hiding and thermal cover losses are detrimental to elk and decrease long-term hunter opportunity, while F.S. responses usually contend that clearcutting improves forage (often identified as a limiting factor), and that road closures mitigate security effects. The F.S. has also argued that "Individual timber sales are limited in time and scope and the effects on forest-wide hunting and recreation are

32 Northern Region Forest Plans
indeterminable."\textsuperscript{34}

In reality, elk population limiting factors and road closure effectiveness vary locally. Therefore, resolving such differences depends on a common understanding of local ecology, incorporating local concerns into well-documented analyses and in the case of appeals, negotiation. In the absence of conclusive data, however, the effects of clearcutting and patterns of elk use in an area may be philosophical disagreements that may never be resolved.

2. Economics

Public concern over road building and timber harvest economics has grown dramatically in recent years. Because logging operations have been forced into more sensitive, remote areas, many timber sales are sold at a net loss to the F.S. Service-wide, road building costs exceed commercial timber values over one-third of the time.\textsuperscript{35} I distinguish between the process of economic analysis and the substance, or results of these analyses, dealing only with results in this section. Process issues, such as assessing in-place values (values currently produced by the land in its undeveloped state), are dealt with in the procedural issues section.

NFMA allows the F.S. to sell timber "at not less than the appraised value,"\textsuperscript{36} and requires the F.S. to identify lands not suited for timber production, "considering physical, economic and other pertinent factors."\textsuperscript{37} A Senate report elucidated Congress' intent:

\begin{flushleft}
\textsuperscript{35} Our National Forests: Lands In Peril, The Wilderness Society, June 1985
\textsuperscript{36} 16 USC 472(a)(d)
\textsuperscript{37} Id at section 6(k)
\end{flushleft}
...The Act's restrictions ... are to ensure that public lands are not invested in growing timber for commercial purposes where the anticipated economic return is less than the cost of production.\textsuperscript{38}

The law's implementing regulations expanded on these policy objectives and introduced the term "Net Public Benefit" (NPB), which refers to monetary and non-monetary factors.

In a consolidated Forest Plan appeal decision Deputy Assistant Secretary of Agriculture Douglas W. MacCleery remanded the Plans and ruled that:

A particularly strong obligation is imposed on the F.S. to explain the economic, social and environmental tradeoffs which are likely to occur when resource objectives... are proposed which would reduce economic efficiency (reduce present net value).\textsuperscript{39}

F.S. regional policy addresses this issue as well. An April, 1985, memo directs Forest Supervisors to ensure that below cost sales are in the public interest, and to consider deferring such sales, documenting their other important benefits, using sealed bids and re-evaluating sale economics.\textsuperscript{40}

Over one third of the appeals in this study (18) argued that a net economic loss (the cost to the F.S. of road construction and administering the sale exceeded the value of the timber) was reason enough to halt or modify the project. On the Beaverhead, four out of seven appeals raised substantive economic issues. This is not surprising as the Beaverhead contains mostly marginal growing sites, where economic returns are low.\textsuperscript{41} Two of five

\textsuperscript{38} S. Rep. No. 94-905, 94th Cong. 2nd Sess. 2 (1976)
\textsuperscript{39} August 6, 1985 decision on the San Juan and Grand Mesa, Uncompahgre and Gunnison (GMUG) Forest Plan appeals.
\textsuperscript{40} Regional Forester's 2430 memo, April 19, 1985. (since rescinded)
\textsuperscript{41} See the Missoulian, March 16, 1989. The Beaverhead N.F. lost approximately $2
Bitterroot appeals raised the below cost issue.

Appellants' statements of reasons generally cite one or more of the provisions of law or policy cited above, but F.S. interpretations of these factors almost always support initial project decisions. (Only one remanded sale, Wicked-Snowbank, Gallatin N.F., cited economic concerns -- and they were procedural in nature.)

There is often a factual dispute over whether or not the sale in question will actually be below cost. A common response when the F.S. admits a below cost sale is to rely on defining NPB to include such things as providing "community stability," reducing insect infestation risks and providing big game forage. Said one responsive statement: "A primary factor in the NPB analysis was to maintain a stable local economy by providing jobs." Alternatively, the Regional Forester has decided "The term 'Net Public Benefit' relates to the Forest Plan process. Project EAs are not required to display environmental consequences in terms of net public benefit."

Another common response to NFMA claims is that the suitability determinations (under NFMA, Forests must identify lands suitable for timber harvest, based on economic and environmental factors) do not apply directly to individual projects. "Assessment of economic suitability must be considered in relation to Forest-wide management goals and objectives and not on a site-specific basis" is one standard response.

The Regional Forester clarified the regional policy issue by stating that the April, 1985, memo provided only interim direction until Forest Plans were adopted and has since been rescinded. The Forest Plan management prescriptions are considered sufficient to direct

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timber harvest.

Appeal decisions concerning economic suitability and Net Public Benefit often defer responsibility to Forest Plans. It is unlikely, therefore, that future timber sale appeals will provide an effective forum for resolving them. Litigation could change this by asserting the applicability of NFMA provisions on individual projects.

When reviewing officers do accept the onus of demonstrating NPB for timber sales, NPB is defined broadly enough to support these projects on economic grounds, unless extremely compelling facts can be presented.

3. Water Quality

Both state and federal laws recognize non-point source threats to water quality from road construction and timber harvest (primarily sediment), but substantive management requirements addressing this threat in the Northern Region simply do not reflect its severity.

NFMA contains explicit, substantive direction. Timber is to be harvested only where "...watershed conditions will not be irreversibly damaged..." and only where "protection is provided ...from deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat..." NFMA's implementing regulations stipulate similar protections, and also require that "special attention" be given to riparian areas, but as with other provisions of the law, project level applicability has not been tested and remains unclear. The use of "serious and adverse" as qualifiers restricts the act's usefulness to conservationists, as these words intimate a great deal of discretion.

A recent Ninth Circuit Court case confirmed that the F.S. is required to meet state
water quality standards, and that Best Management Practices (BMPs) are not to be considered standards in themselves, but a means to achieve the appropriate state standard. The states in the Northern Region, however, rarely enlist quantifiable standards for non-point sources like sediment.

Idaho and Montana water quality laws frame protection in terms of stream classifications and beneficial uses. The Montana Water Quality Standards have a non-degradation provision but exempt non-point sources where "reasonable" conservation measures have been taken. The standards also restrict turbidity increases. The Montana Water Quality Act defines natural water quality as "runoff or percolation ... from developed land where all reasonable land, soil and water conservation practices have been applied." The F.S., State government and industry generally agree that BMPs constitute reasonable conservation measures, but the state asserts that monitoring should be in place to ensure that beneficial uses are protected.

Idaho water quality standards have been revised several times, most recently by the Nonpoint Source Interagency Team (NPSI) in 1987. The standards protect water quality from "imminent and substantial danger" and they use a feedback loop to monitor the effectiveness of BMPs, but they provide little in terms of quantitative, enforceable standards for controlling nonpoint sources. Turbidity is only enforceable as a numeric criteria for point sources, and sediment is only restricted in quantities where it would impair beneficial uses. After years of debate, Idaho has finally enacted an anti-degradation provision (the ink is still drying) consisting of two bills. Idaho does have a forest

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46 16.20.701
47 MCA 75-5-306
49 House Bill 295, signed in late March, 1989.
practices act\textsuperscript{50} that mandates water quality protection during road construction and timber harvest, but it does not specify measurable criteria to accomplish this.

Water quality or sedimentation was raised 16 times among the 50 appeals. Six out of seven Idaho Panhandle appeals (excepting 10 roadless area appeals), two out of five on the Bitterroot and two out of three on the Gallatin raised the issue. Much of the Panhandle is characterized by erosive granitic soils, and abundant rainfall makes runoff erosion a significant problem.

Appellants typically contend that road-caused erosion and sediment deposition will degrade water quality and fisheries and impair existing beneficial uses. F.S. responses generally claim that beneficial uses will be protected and describe water quality impacts as "acceptable." Decisions rely on BMPs and Forest Plan objectives and standards to support project activities. One appeal responsive statement from the Panhandle said that a 245\% sediment increase over baseline met fisheries and watershed objectives and that beneficial uses would be protected.

With the use of BMPs and "reasonable" conservation practices weighing so heavily, it is not surprising that few water quality contentions are settled in appeals. W.H. Rodgers wrote about the concept of BMPs, "One reason for its appeal is its utter vacuity."\textsuperscript{51} The facts of a case must be overwhelming to remand or modify a decision based on state water quality laws, while NFMA's "on-the-ground" instructions for water quality protection are at this time effectively unenforceable at the project level due to the discretion in the provisions.

\textsuperscript{50} Idaho Code, Title 38, Chapter 13, 1974.
4. Regeneration

Reforestation is important not only to ensure a future timber supply, but also to establish vegetative cover on exposed slopes to protect soil and water quality. NFMA, and before it the Church Guidelines, required that regeneration be assured within five years of timber harvest. Under NFMA, land is not suitable for harvest if this condition cannot be met. NFMA regulations dictate that "research and experience" should be used to estimate the likelihood of regeneration success.

Regeneration was raised 12 times in the appeals in this study. Appellants commonly contend that environmental assessments do not provide assurance that trees will be adequately restocked at all elevations and on all slope aspects within five years. The F.S. counters in its responses, claiming that "assurance" is provided by the professional judgement of silviculturalists. and experience on similar habitat types.

Regeneration contentions are rarely resolved through appeals. A preponderance of facts must support an appellant's claim for it to be upheld, due to statutory and regulatory ambiguity. Revealing regeneration success rates would allay (or confirm) the fears of conservationists in this area, and is probably the only way to reduce the occurrence of this issue in appeals.

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53 36 CFR 219.27(c)(3)
PROCEDURAL ISSUES

1. Cumulative Effects

In many cases federal actions cause individually negligible but cumulatively significant impacts. For example, timber sales may be planned adjacent to past or future sales on public or private land. NEPA recognized this, and requires agencies to study the "direct, indirect and cumulative effects" of projects. The regulations define a cumulative impact as:

the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes such actions.\(^{54}\)

"Connected actions," which often have cumulative impacts, are those that trigger other actions, are dependent on other actions or are parts of a larger action. NEPA regulations require connected actions to be considered together in a single EIS.\(^{55}\) In a recent Ninth Circuit decision\(^{56}\) (binding on Region 1) the court held that a road reconstruction project and associated timber sales were "connected actions" with potential cumulative impacts and that the decision not to prepare an EIS (the F.S. had done separate EAs for the road and timber sales) was unreasonable.

Cumulative effects were raised more than any other procedural issue (21 times) in this study. They were raised in all four Lewis and Clark appeals, four out of seven on the Beaverhead and four out of six on the IPNF (excluding roadless area appeals).

Appellants usually contend that cumulative effects were not addressed in EAs, and the

\(^{54}\) 40 CFR 1508.7 (1987)


\(^{56}\) Save the Yaak Committee v. Block 840 F.2d 714 (9th Circuit, 1988)
F.S. usually disagrees. Since the science of cumulative impact analysis is in its infancy, there is no standard model or data base that the F.S. can point to in its responses, other than asserting that cumulative effects were considered by staff scientists. Contentions over this issue are rarely resolved through appeals.

2. Other NEPA issues

NEPA requires that agencies take a "hard look" at the consequences of their actions. A full range of alternatives should be presented, and the consideration of these is not to be prejudiced. Some actions are insignificant enough to warrant a "categorical exclusion" of these discussion and documentation requirements. Others can be sufficiently documented in an Environmental Assessment (EA). Major federal actions significantly affecting the quality of the human environment require a full Environmental Impact Statement (EIS).

About one half of the appeals in my study cited a NEPA issue other than cumulative effects. Some sales were decided upon without any EA or EIS. Appeals claimed that other EAs were biased, considered a limited range of alternatives, or did not follow public involvement procedures.

F.S. responses to the appeals typically denied the contentions of appellants, the main exception being cases where no NEPA document was prepared. These cases were always remanded. Responses usually referred to the analysis process, assessment team meetings, and professional judgement to defend initial decisions. Facts supporting a violation of law or policy are difficult to establish in these situations. Thus, appeals provide a forum for hearing these issues, but rarely for resolving them. The agency should improve documentation of the analysis process and make this information available to the public.
3. Roadless Lands

Roadless lands in Idaho and Montana await Congressional action to settle the question of Wilderness designation or release. The Wilderness Act\(^{57}\), in addition to designating 9 million acres of Wilderness, directed the F.S. to study "primitive areas" and manage them as Wilderness until Congress decided whether or not to designate them as Wilderness. The Parker decision\(^{58}\) included in this category roadless areas contiguous to these "primitive areas," but there was no prohibition on developing other roadless areas, so long as decisions satisfied NEPA and other laws. Later decisions restricted Parker to apply to Primitive areas classified by the date of the Wilderness Act.

In the late 1970's, realizing that NFMA forest plans were years from completion, and hoping to expedite the evaluation of the roadless resource, the F.S. conducted two studies, known as RARE I and RARE II (Roadless Area Review and Evaluation). Following this, in 1980, the State of California filed suit \((\text{California v. Block})^{59}\) over the RARE II Final EIS, claiming it was conducted without sufficient public involvement and lacked adequate site-specific information.

The District Court ruled, and the Ninth Circuit Court of Appeals agreed, that RARE II did not meet the requirements of NEPA. Specifically, it lacked site-specific detail in describing the areas, assessing wilderness values and the impacts of non-wilderness designation, assessing the effects on opportunities for future wilderness designation and balancing economic benefits with the loss of wilderness values.

The F.S. had argued that RARE II did not constitute an irretrievable commitment because future project assessments could still consider managing for wilderness values, but the courts disagreed. Central to their decision was a F.S. regulation: "Lands reviewed for

\(^{57}\) 16 USCA 1131, 1964

\(^{58}\) \text{Parker v. U.S.}, 448 F 2d 793 (10th Circuit Court of Appeals, 1971)

\(^{59}\) upheld in Ninth Circuit Court of Appeals, 690 F 2d 763, 1982
wilderness designation under (RARE II) ... but not designated as wilderness or further planning ... will be managed for uses other than wilderness ..."\textsuperscript{60} California v. Block effectively invalidated RARE II, and has been oft-cited by conservationists to halt activities planned in roadless areas.

The F.S. turned its hope back to NFMA Forest Plans to provide the detail necessary to release roadless lands for multiple use, and in 1983 revised the NFMA regulation to which the courts had objected.\textsuperscript{61} In the Forest Plans, management allocations assign lands, including roadless lands, to various uses. So the question then became: Would these Forest Plans provide sufficient site-specific detail to satisfy NEPA?

A 1986 court decision, Tenakee Springs, answered this question in the negative. A concurring opinion agreed:

\begin{quote}
...after promulgation of the Forest Plan, NEPA documents for projects proposed for roadless areas assigned to a non-Wilderness management prescription must examine the issue of whether to develop, not just how to develop.\textsuperscript{62}
\end{quote}

A recent F.S. Chief's decision\textsuperscript{63} on the Idaho Panhandle (IPNF) Forest Plan appeal cited the Tenakee Springs case and stated that complete site-specific analyses will occur prior to final decisions to proceed with projects in roadless areas. The ruling also reminded the appellants, however, that no absolute prohibition on developing roadless lands existed, except for those contiguous to primitive areas designated as of September 3, 1964.

A F.S. "Desk Reference" prepared by the Regional Office summarizes the status of

\begin{itemize}
\item \textsuperscript{60} 36 CFR 219.12(e) (1981)
\item \textsuperscript{61} 36 CFR 219.17 (1987), 48 FR 40381, Sept. 7, 1983
\item \textsuperscript{62} City of Tenakee Springs v. Block. 778 F 2d 1402 (9th Circuit, 1986)
\item \textsuperscript{63} August 15, 1988 Idaho Conservation League, et al appeal of IPNF Plan.
\end{itemize}
roadless area evaluation in the planning process:

The Forest Plan decisions on roadless areas are not irreversible or irretrievable because management prescriptions that "allow" future development do not mandate documentation, a reasonable range of alternatives must be considered, including a "No-Action" alternative that would preserve the roadless character and wilderness features of the area.\(^{64}\)

Based on these developments, the F.S. seems to have admitted that NFMA Forest Plans do not constitute the site-specific analyses needed to release roadless areas. The implications are crucial, as the site-specific disclosure of environmental impacts of releasing roadless areas for development may reveal "significant" impacts within the meaning of NEPA. If this is the case, the F.S. must prepare EISs rather than EAs for roadless area activities.

Of the 50 appeals I reviewed, 16 raised the roadless issue. Ten of these appeals were filed on the IPNF, and nine of these ten were filed by one appellant. The Panhandle proposed entering ten roadless areas, while the Clearwater, Nezperce, Kootenai, Helena, Beaverhead and Gallatin planned sales in one roadless area each.

Appellants all cited the California v. Block decision, or the need for an EIS to address the consequences of release. Twelve out of the 16 decisions were withdrawn or remanded. In cases where the decisions were affirmed, the F.S. argued that Forest Plan prescriptions provided sufficient documentation to release roadless areas. "Forest Service direction is to continue planning and implementation of projects, such as the Wasson timber sale, in roadless areas which are not recommended for Wilderness."\(^{65}\)

Given that Wilderness legislation is still far from reality in Montana and Idaho and that many forests assume NFMA planning settled the release question, in direct contradiction to

\(^{64}\) *Our Approach*, Nov. 23, 1988, F.S. Region 1, Programming, Planning & Budgeting

\(^{65}\) Responsive statement to appeal of Wasson timber sale, Helena N.F.
the IPNF Plan appeal ruling and case law, timber sale appeals will be a common forum for resolving roadless release issues in the near future. Appellants will likely insist that decision documents fully address whether or not to develop (i.e. the no-action alternative) and, I speculate, will have a compelling case for requiring full Environmental Impact Statements.

4. Economic Analyses

Aside from the results of economic calculations presented in decision documents, methods of economic analysis and factors quantified in them are gaining increasing attention in timber sale appeals. NEPA requires that all environmental amenities be quantified to the fullest extent possible, and that the no-action alternative be considered in all projects.

Appellants raised procedural economic issues 14 times in the 50 appeals. Every Lewis and Clark appeal raised the issue, as did five out of seven on the Beaverhead and two out of three on the Clearwater and the Helena.

Typical arguments by appellants assert that the no-action alternative did not consider in-place values in calculations of the area's "present net value." Values such as hunting, water quality, aesthetics and recreation are commonly mentioned in the appeals.

The F.S. responds in some cases by invoking NEPA, which also says that some values may not be quantifiable. Other responses claim that monetary figures are unnecessary for in-place values, or as one response put it: "There aren't established values or a means to quantify how these values vary by alternative."

Until methods for computing in-place values are developed (in itself a controversial topic), F.S. decisions that purportedly consider the values are unlikely to be overruled. The appeals process, therefore, is not an effective arena for settling this issue. It is almost
impossible to prove that non-quantifiable values were not considered in an analysis. Resolving contentions over in-place values, a philosophical issue, can best be handled by incorporating local concerns into management priorities.
CHAPTER 5

CASE STUDY

In this chapter, I review the Lairdon Gulch timber sale appeal and compare it to trends in other appeals in the Northern Region. I examine the development of issues and responses through the appeals process, which lasted over two years and resulted in a revised EA. The appeals of the initial and revised EAs are included as appendices to this paper.

The Lairdon Gulch timber sale proposed harvesting 6.6 MMBF of timber and building 11.5 miles of roads. The White Stallion timber sale, which proposed harvesting 12-15 MMBF and building 18 miles of roads, adjoined the Lairdon Gulch assessment area. The EA's for both sales were prepared and released at the same time, October 1985.

The Decision Notice (DN) and Finding of No Significant Impact (FONSI) for the Lairdon Gulch EA were released on April 21, 1986. I appealed the decision, and after the Northern Region Forester affirmed the Forest Supervisor's decision to proceed with the project, I filed a second level appeal to the F.S. Chief. Prior to an appeal decision by the Chief, Bitterroot Forest Supervisor Robert Morgan withdrew his initial decision. A DN was never issued for White Stallion.

The Bitterroot Forest expanded the scope of analysis and revised the EA to address the issues raised in my appeal. Shortly after the April 22, 1987, DN and FONSI were issued, they were appealed by myself and another person. The Regional Forester affirmed the Supervisor's decision on Dec. 22, 1987, and we appealed to the F.S. Chief. On February 9, 1989, the F.S. Chief affirmed the Forest Supervisor's decision, constituting the final administrative determination of the Department of Agriculture.

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1. Initial Lairdon Gulch EA

The issues raised in the initial Lairdon Gulch appeal were cumulative effects (CE), the sale's impacts on elk, regeneration, fisheries and range of alternatives. These issues were common in other appeals, but responses to them were considerably different than other responses.

The Lairdon Gulch appeal claimed that the cumulative effects of the timber sale, combined with the adjacent White Stallion sale, had not been addressed in the EA. Of primary concern were detrimental impacts to water quality and elk. Whereas most responses claim the F.S. did indeed address cumulative effects, the Lairdon Gulch response contended that such an analysis was either unneeded or impossible. With regard to water quality, the F.S. argued that since the two watersheds were separated by a hydrologic divide and both streams were heavily impacted by irrigation, no CE analysis was required. The F.S. claimed that CE to elk were "...impossible to analyze ... because foreseeable future actions of several (private) landowners are unpredictable." 66

Concerning the effects of the sale on elk thermal cover (which was reported in the EA as below optimum and to be further reduced in every alternative), the F.S. argued that additional cover reduction would have a negligible impact. The EA relied on guidelines in the Bitterroot National Forest Guides For Elk Habitat Objectives. 67 To quote from the response:

This resulted in an area for Lairdon Gulch of approximately 5,300 acres and was determined to be of sufficient size to satisfy needs of the animals present....Aggregating cover/forage ratios for several study areas, including White Stallion in the general vicinity of the Lairdon Gulch study area, quickly shows much more favorable ratios than any individual study area. This is why current instructions stress limiting the study area to only one

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66 F.S. response to Statement of Reasons, 8/20/86 at p.2
67 F.S. Northern Region, April 1978
large enough to reflect effects on the elk present, which is usually confined to a third-order stream. I feel the area studied for elk on Lairdon Gulch is the correct size.68

The appeal questioned regeneration success and cited the Church Guidelines, which require the F.S. to assure restocking within five years. While the F.S. claimed to have implemented the intent of the guidelines, the response said "The Church Guideline provisions for regeneration which were issued in 1972 have not been determined by a court to be applicable."69 The reply to this responsive statement cited two court cases70 which point out that the guidelines were in fact applicable.

Despite the reluctance of the F.S. to conduct a CE analysis (for two sales that shared a common boundary and were prepared simultaneously), the failure to recognize legal precedent in documenting expected regeneration success, and the habitat implications of reducing elk thermal cover even farther below standards, the Regional Forester affirmed Supervisor Morgan’s initial decision to proceed with the sale. This prompted the second level appeal to the F.S. Chief, which became moot when Supervisor Morgan withdrew his initial decision on January 16, 1987.

In his letter to the Regional Forester withdrawing the decision, Supervisor Morgan said:

As a result of the extensive correspondence generated by public reaction to the EA and of the resulting statements and responses to the appeal, I have decided to expand the scope of the analysis to thoroughly address the issues raised by the appellant and other concerned people.71

68 F.S. response to Statement of Reasons, 8/20/86 at p.2
69 id. at p.3
70 Texas Committee on Natural Resources v. Bergland, 573 F2d 201 (5th Circuit, 1987) and California v. Block, 690 F2d 753 (9th Circuit, 1982)
No further explanation was given, nor were any substantive issues addressed in this letter. A decision notice for the White Stallion EA still had not been issued.

Further insight into Morgan's decision comes from a February 12, 1987, letter the Supervisor wrote to Rep. Bernie Swift (R.- MT House District 64). Mr. Swift had written Morgan earlier expressing his disappointment with the withdrawal. "The public had their opportunity to comment, in accordance with procedures, when the EA was previously completed.", wrote Mr. Swift, and "Why don't you allow the appeal to continue?"72

Morgan, in his response, pointed out the "risks" to consider in going forward with the second level appeal:

Second level appeals take time.
There was a strong risk of remand due to some court precedents I was not aware of at the decision point.
The nature of the appeal and involvement of another sale in the appeal put 17 MMBF at stake in the next 2 years representing considerable investment and prime timber for local mills.
Even if successful in the appeal process, there was a strong possibility of legal action.
Remand or litigation would be extremely expensive.
My decision to withdraw the appeal gave me a chance to reconsider the decision with the best information and court record available at much less cost than the potential remand and/or litigation.73

71 Robert Morgan to Regional Forester, January 16, 1987
73 Robert Morgan to Bernie Swift, Feb. 12, 1987
The appeal of the initial Lairdon Gulch EA is a prime example of a case where a decision is withdrawn because of an imminent remand. It is interesting to note that under the new regulations, no second level appeal would have been allowed and the sale would have proceeded.

2. Revised Lairdon Gulch EA

The appeal of the revised Lairdon Gulch EA addressed many more issues than did the initial appeal. The core of the statement of reasons still included cumulative effects, effects of the sale on elk, and regeneration, but other issues emerged: whether or not the sale met the coordinating requirements of the Bitterroot Multiple Use Plan (the document setting management direction for the area, since no Unit Plan had ever been completed and the Forest Plan had not been approved), whether the EA demonstrated a Net Public Benefit for the sale, the justification of harvest methods, effect of the sale on the spread of noxious weeds, and, other lesser issues such as alternatives, mitigation, EIS, visuals, and water quality standards.

The F.S., in the revised EA and in its responsive statement, claimed to have addressed the cumulative effects of the sale on elk and water quality. The response also insisted that regeneration success would be assured based on experience. Conflicting opinions within the agency regarding the need for artificial shade were defended as a refinement in information.

The F.S. reiterated its position that elk would not be adversely effected by the sale, saying that road closures were effective and thermal and hiding cover were sufficient, but had a new charge to respond to. The revised EA included in the assessment area about 1700 acres of additional winter range thermal cover, which boosted the cover/forage ratio up to an acceptable level (in the initial EA it was reported below optimum). The appeal
charged that this habitat information was contrived in bad faith to improve ratios and justify timber harvest. No management activity was scheduled in the additional area, but the F.S. defended its inclusion as needed to assess the effects of the sale. The appeal contrasted this position with the earlier one (see above), but the F.S. rejected that argument in the responsive statements and appeal decisions.

Contrary to assertions in the appeal, the F.S. claimed that the sale did meet the coordinating requirements of the Bitterroot Multiple Use Plan, specifically, documentation of a land capability analysis and the identification of the needs of hazard areas.

The appeal questioned the sale's economics, claimed that the analysis was unreadable, and charged that in-place values were not assessed. Like other forests, the Bitterroot responded that NEPA did not require important qualitative considerations to be represented in a cost/benefit analysis. They also claimed that amenity values could not be assessed on a project level, and that the economic discussion was concise and readable. Finally, the F.S. said that the sale would be likely to sell according to the analysis, and neither admitted nor denied that it was below-cost.

To justify the use of harvest methods (clearcutting and shelterwood) the F.S. responded that the EA tiered to Regional and forest guidelines which showed that such methods were "optimal" or "appropriate" as required by law.

The water quality issue centered around defining the term "reasonable," as such conservation measures are sufficient to meet the requirements of State law. The use of BMPs would constitute reasonable and sufficient measures.

The forest was directed, in the Regional Forester's decision, to take measures to prevent the spread of noxious weeds, although the issue was never raised in scoping, in comments or in the EA.

In the F.S. Chief's decision on the second level appeal, the responses and decision of
the Forest Supervisor and Regional Forester were relied upon and determined to be sufficient, and the decision to implement the sale as documented in the revised EA was affirmed. At the time of this writing, the sale had not yet been sold.
CHAPTER 6
SUCCESSFUL APPEALS, RECOMMENDATIONS AND CONCLUSIONS

In this chapter I identify successful appeals (from the standpoints of the process itself and an activist), make recommendations for the F.S. and conservationists, and make conclusions about the appeals process.

1. "Successful" Appeals

A. Procedural Success. I define "procedural successes" as appeals that are withdrawn before an administrative decision, indicating resolution of the appellant's concerns, and "conservation successes" as appeals resulting in withdrawn, modified or remanded decisions. The factors I consider in this analysis are the level of detail in the appeal, the issues raised and the nature of these issues (ie. procedural or substantive, philosophical or factual).

It is hard to draw conclusions about what contributes to procedural success because there have been so few appeals successfully negotiated in this Region (at least among my sample). This is most likely due to the nature of the process itself: appeals are filed only after public involvement efforts have failed to reconcile contentions. Of the three appeals in this study that were withdrawn at the first level, two were based primarily on visual concerns. The addition of a buffer strip in one case, and the clarification of project design in another led to procedural success. In the third case, clarifying the project in relation to Forest Plan standards was enough to satisfy the appellants.

Withdrawing an appeal can be compared to an out of court settlement in litigation,
where both parties agree, through negotiation and compromise, to drop their contentions. While this outcome is successful in the procedural sense (the process, with its incumbent delays and expenses, is not invoked), it has other, substantive implications (see below).

In dropping the provision for oral presentations, I speculate that the new regulations will make procedural success harder to achieve. The F.S. will have to make an extra effort to pursue a negotiated settlement.

B. Conservation Success. I identify three outcomes of "successful" timber sale appeals filed by conservationists. The first is the abandonment of the sale, and it is quite rare. Among the appeals in this study, only one (Sourdough timber sale, Gallatin N.F.) caused the F.S. to drop the sale, and a public meeting (where citizens expressed strong disapproval) was probably more important to the decision than the substance of the issues raised in the appeal process. A more likely, but still not common result is modification of the sale to lessen its impact. Examples include dropping harvest units for environmental or economic reasons, or requiring additional mitigating measures. The prominent result among the "conservation successes" (23 out of 26 appeals) in this study is the sale's delay, to expand documentation of its impacts (11) or to await resolution of the roadless issue (12). In a sense these are shallow victories for conservationists.

From a conservationist's standpoint, there is at least one reason why withdrawn decisions (or in litigation, for example, out of court settlements) may only be considered partially successful: withdrawn decisions make appeals moot and pre-empt a reviewing officer's decision on the merits of an appeal. This can frustrate a conservationist who is seeking clarification on the law or F.S. policy and may increase the likelihood that he or she will file other appeals to test the same question. In most cases, a conservationist's preference would be to allow appeals to run their course.
Processing appeals costs the F.S. a good deal of time and money; resources from a limited budget that cannot then promote development activities. This could be considered a favorable result of appeals by conservationists, unless resources are diverted from research, habitat acquisition or monitoring (for example) to make up the losses. It can also be considered useful to exercise legal rights through the process and maintain a watchdog function on the F.S.

Table 5 (following page) lists the appeals that resulted in withdrawn or remanded decisions, or "conservation successes."

The level of detail in the "conservation successes" varied greatly. Far more important was the extent to which the appeals relied on facts and could connect these facts to specific violations of law or policy. Factual arguments are more persuasive and contribute to a more substantiated administrative record than philosophical arguments. Few, if any, philosophical issues (for instance valuing a hunting experience or a scenic view) can be administratively or judicially appraised in the context of either procedural or substantive laws governing public lands management.
Table 5 Withdrawn and Remanded Decisions.
Forest abbreviations same as Table 2 in Chapter 3. T&E = threatened & endangered species; FWS = U.S. Fish & Wildlife Service.

**Decision Withdrawn**

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<td>Dog Ridge, CLRW</td>
<td>Consult FWS on T&amp;E, show clearcutting to be optimal harvest method (NFMA)</td>
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Looking at the cases in Table 5, it is apparent that procedural issues prevail in the reasoning for remanded and withdrawn decisions, and that NEPA violations are the most oft-cited reason for these decisions. This makes sense for two reasons. First, procedural issues (especially cumulative effects and the general sufficiency of environmental analyses) are raised more frequently than almost any other issue. Second, NEPA's regulations and case law are well developed, relatively easy to understand and carry great legal weight.
Procedural contentions center around factual disputes and allow a simple interpretation of the facts; either the F.S. followed proper procedures or they did not. This is one reason why these issues form the basis for a majority of remanded or withdrawn decisions.

Of the 14 cases not involving the roadless issue, 10 were "won" based on NEPA claims (insufficient analysis, documentation or range of alternatives, or no NEPA document prepared). It appears that procedural claims hold the most potential for conservationists wishing to modify, slow or halt development through timber sale appeals.

It is also apparent from the table that few substantive issues are cited in decisions to remand or withdraw an initial project decision. (Again, the analysis of substantive issues is itself a procedural matter.) This is most likely because substantive laws (NFMA and State Water Quality Standards, for example) have not been effectively applied to project level decisions like timber sales. Conservationists have not been able to assert NFMA's provisions regarding water quality protection or the identification of lands unsuitable for harvest (where regeneration cannot be assured, or where costs exceed economic returns, for example) at the project level. Likewise, State Water Quality Standards generally lack measurable criteria to apply.

2. Agency and Activist Recommendations

A. F.S. Recommendations. The F.S. needs to understand better the implications of withdrawing project decisions midway through the appeals process (before a reviewing officer has decided the merits of an appeal). Since the process is at least perceived as a means to clarify law and policy as they relate to individual projects, the effect of this practice may be to increase the number of appeals as conservationists look for clarification.
This phenomenon is similar to an out of court settlement that avoids a confrontation over a crucial issue. While each part to the suit may be relieved, interested onlookers can be frustrated.

Likewise, appeal decisions to remand a project should specify the reasons for the remand. To remand a project and justify this decision "Due to the need for more analysis" fails to recognize the role appeal decisions can and should play in reducing the need for future appeals. As one appellant put it:

...the final decision should have specifically clarified and explained which points we won and why. Instead, the decision was brief and vague, so we have to appeal the same issues again in the future.74

The F.S. should ensure that timber sale analyses are initiated far enough in advance of target offering dates to allow for the resolution of appeals, a recommendation also supported by GAO's report. Similarly, appeal processing should respect deadlines imposed by the regulations. Since the new regulations impose stricter deadlines, this may be more difficult, but its importance cannot be overemphasized.

Finally, the F.S. must diligently follow the procedural requirements of NEPA. There is simply no room for procedural errors in planning activities and disclosing their expected consequences. Improving involvement in the steps leading up to decisions would certainly reduce the number of appeals in the Region. Project or "Interdisciplinary Team" leaders should be sensitive to the issues and concerns most often raised in appeals (especially hunter opportunity, sale economics, regeneration and water quality) and must be willing to modify and occasionally abandon initial proposals based on them.

74 Comment received from the confidential questionnaire
B. Activist Recommendations. In an article for the conservation journal *Forest Watch*, Andy Stahl recommends using the facts of a case rather than citing laws when challenging F.S. decisions. Facts are more persuasive and more useful in court, while law is difficult to understand and apply, he says. My review suggests that while the "facts" of a case are important, "successful" appeals connect them to specific violations of law or policy. While it is true that the myriad of public lands legislation, regulation and case law is intimidating to the average conservationist, few appeals are likely to be convincing if they rely exclusively on an appellant's opinions.

Mr. Stahl did not distinguish between issues of substance and procedure, but my review indicates that at least until NFMA case law is better developed and Idaho and Montana adopt enforceable water quality criteria for non point sources, conservationists will achieve more success through appeals by looking for procedural errors in timber sale assessments. Conservationists should check to see that NEPA documents are commensurate with the level of impact ("significant" impacts require an EIS), that cumulative impacts are always addressed, that economic analyses are understandable and that a reasonable range of alternatives is considered. For roadless area activities, the No-Action alternative must be seriously and adequately addressed.

By far the most important thing conservationists can do to improve the value and utility of the appeals process is to pursue legal challenges of the NFMA to clarify the project level applicability of some key provisions. What are "serious and adverse" effects on water quality? How should "research and experience" be conveyed to the public in predicting regeneration success? Does "Net Public Benefit" relate only to Forest Planning and not

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project planning? Did Congress intend to prohibit below-cost timber sales? It is clear that timber sale appeals are not an appropriate forum for addressing these questions, and that they should be taken up by the courts. Conservationists must set aside the fear of losing such cases, as the NFMA's current ambiguity makes it effectively worthless in these areas.

C. State Government Recommendations. The States of Montana and Idaho have been exceedingly lax in promulgating water quality standards with measurable and enforceable criteria for non point source pollution. Turbidity is one such criteria currently advocated by conservationists. Considering the prominent threat to water quality constituted by sediment, the time for this type of action is long past due.

The state of Montana should formalize (through rulemaking) its position that monitoring should be in place to ensure the effectiveness of BMP's. Without legal weight, this position is commonly overlooked in the Region.

3. Conclusions

After reviewing timber sale appeals in the Northern Region, I conclude that, despite the common perception, the appeals process does not effectively clarify law or F.S. policy. Unfortunately, appeal rulings rarely specify why and how project decisions deviate from legal mandates. Conservationists should look to the courts for clarification of key NFMA questions, and to state governments for the articulation of enforceable water quality criteria.

Far more important is the role of the appeals process in formalizing public involvement through the creation of an administrative record, and in reducing the likelihood of litigation of F.S. decisions. It is obviously preferable to address disgruntled citizens in the appeals process than through costly and time consuming litigation. Unfortunately, this function
has been almost totally overlooked in the ongoing debate over the role of appeals in timber supply and roadless area release issues.

A review of the issues raised in Northern Region timber sale appeals shows that deficiencies in implementing the public involvement and disclosure requirements of NEPA still plague the Forest Service. The degree to which substantive disagreements over resource management are due to philosophical differences or the F.S.'s failure to meet requirements of substantive laws is still unclear as these laws are largely untested at the project level.
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APPENDIX TWO: APPELLANT'S QUESTIONNAIRE

1. What was your perspective on the _________ appeal:
   one of a property owner, environmentalist, sportsman, etc.?

2. How many hours per week did you spend on the appeal (writing, researching, phone calls, meetings, etc.)?
   a. less than 4      c. 8 to 12      e. over 16
   b. 4 to 8       d. 12 to 16

3. Did you use professional assistance in filing the appeal?

4. Do you believe that your appeal was addressed:
   a. sincerely?
   b. adequately?

5. The appeal records show that the status of this appeal is _________. Is this correct?
   If not, what is the current status of the appeal?

6. Do you consider this outcome successful?
   If not, how should the issue have been resolved?
7. If your appeal was denied, did you appeal to the next level? Why or why not?

8. How do you think the appeals process could be improved?
   a. making it easier to file an appeal?
   b. restricting the right to file appeals?
   c. making deadlines shorter or longer (which)?
   d. creating separate processes for different types of appeals?
      (for example timber industry vs. environmental)
   e. other suggestions?

9. Are you familiar with the Forest Service's proposed changes in the appeals process? If so, what do you like or dislike about them?

10. Do you have any additional comments?