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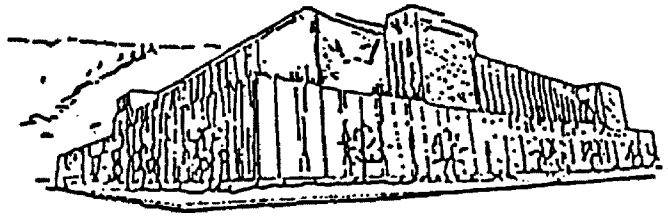
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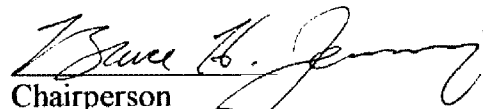
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**Appeals Denied: Organizational Values of the US Forest Service**  
**Reflected by**  
**Changes in the Administrative Appeals Process**

By  
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B.B.A. The University of Iowa, 1989  
presented in partial fulfillment of the requirements  
for the degree of  
Master of Science  
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1995

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Dean, Graduate School

July 11, 1995

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Organizational Values of the US Forest Service Reflected by Changes in the Administrative Appeals Process (88 pp.)

Director: Bruce H. Jennings

The United States Forest Service is responsible for managing the 190 million acre national forest system. Defining priorities of each national forest is ostensibly based on a comprehensive resource inventory and plan that includes input from the public for achieving purposes ranging from recreation to biodiversity. The agency, however, remains substantially committed to commodity extraction.

This study examines the historical roots of the Forest Service and how those roots affect its practices. It then explores the process of public involvement - which was lauded by academics, Congress, and the agency as the solution to ending the adversarial relationship the agency has with non-commodity based constituency groups. The study analyzes the administrative appeals process and the appeal record of the last five years in Forest Service Region One. Along with a review of literature on the history of the agency and its use of public involvement, this study utilized Forest Service data bases and appeal records as primary sources of information. The paper also relies heavily on a limited number of interviews with timber sale appellants and agency personnel.

While the appeals process has advanced the agenda of environmentalists, the success of appellants is declining. This trend is exemplified by a twenty percent increase in the number of timber-related decisions affirmed under appeal from 1990 to 1994. Conversely, the number of decisions reversed under appeal has dropped over fifteen percent during the same time period. This decline in appeals success is due to the agency's response to that success and is predictable given the commodity-output value orientation of the agency. The Forest Service's response to the successful use of appeals by environmentalists is evident in its attempt to drop the appeals process entirely, the increased tendency to affirm appealed decisions with further instruction and the nature of the appeal review process itself.

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## **Chapter I**

### **Setting the Stage for Forest Policy Conflicts of the 1990's**

#### **Origins of the Forest Service**

In 1877 an amendment was attached to a civil appropriations bill which authorized the Secretary of Agriculture to hire one person to study the present and future supply of, and demand for, timber and "the means best adapted to their preservation and renewal" and report his findings to Congress (Dana and Fairfax p.50). Thus, the Division of Forestry was established in the Department of Agriculture. In 1886 the Division was statutorily recognized by Congress and Bernard Fernow appointed its chief. Bernard Fernow, a European-trained forester and the first professional forester in this country, spearheaded an effort to "conserve" forest resources. The conservationists of the time looked to the government for the needed resource protection. In 1891 Congress granted the president authority to designate forest reserves out of the public domain by executive order through "an obscure rider to an act designed mainly to make various revisions in the public land laws." (Robinson, Glen, O. p.6) (26 Stat. 1103, Sec. 24[1891] amended at 16 USC 471). President Harrison designated the first forest reserve the same year. By 1893, nearly 13 million acres has been set aside. In 1897, Congress passed the Forest Service Organic Act which defined three basic purposes of the forest reserves: (1) to "preserve and protect the forest within the reservation"; (2) "for the purpose of securing favorable conditions of water flows"; and (3) "to furnish a continuous supply of timber for the use and necessities of the people of the United States." (USCA sec. 472-81).

Another European-trained forester, Gifford Pinchot, succeeded Fernow as chief of the Division of Forestry in 1898. At that time, the division fell within the Department of Agriculture, while the forest reserves were administered by the Interior Department's General Land Office. As Division of Forestry Chief, Pinchot lobbied heavily for the transfer of the Forest Reserves to the department of Agriculture and in 1905, with the support of Pinchot's friend President Theodore Roosevelt, Congress authorized this transfer. At the time of the transfer, there were 85.6 million acres in the forest reserve system. As President, Roosevelt added 109 million acres, bringing the national forest

system to 194.5 million acres. The size of the National Forest system is slightly smaller than that today, due in large part to transfers to the National Park Service.

Gifford Pinchot was not alone in the woods at the turn of the century. Other men, with similar training and philosophy contributed to the formation of twentieth century American forest policy. Pinchot, however, was the most influential. He was the first man to head the consolidated agency that set forest policy and administered the public forest land. Unlike other foresters of his time, Pinchot was in the perfect position to apply his ideas. This he did, and the new Forest Service grew up with Pinchot as its father. An examination of Pinchot's philosophy toward resource management must certainly have at its core the concept of utilitarian forestry. Pinchot believed that the forests should be managed for the people of this country, both present and future. His maxim was management "for the greatest good for the greatest number over the long run" (Dana and Fairfax p.1). European forestry assumed a hands on approach to management. That is, that men, not nature, could best regulate a forest to implement the utilitarian ideal, and that human manipulation of a forest would better provide resources that people needed. Early notions of multiple use of national forests such as Roosevelt's call for free campgrounds were dismissed by Pinchot, who "disparaged 'sentimental and philanthropic forest protection'" (Twight p.7).

### **The Foundations of Forest Management Questioned**

The progressive view of conservation, championed by Pinchot, was soon to be disputed by a once allied political force, the preservationists. When the bulk of the forest reserves were being carved out of the public domain, conservationists were unanimous that it was beneficial (Dana and Fairfax p.45). However, when it came time to manage those reserves, there were differences of opinion. John Muir, first president of the Sierra Club, was good friends with Gifford Pinchot until the management question came into play. The two experienced a falling out beginning with a controversy over the grazing of sheep on National Forest land (Dana and Fairfax p.45). Muir viewed sheep as "hoofed locusts" who would surely denude the landscape. Pinchot, on the other hand, viewed grass as a resource that could be utilized by sheep and subsequently by humans. Later, the

well known controversy over a proposal to dam Hetch Hetchy valley brought this issue to the public eye. Though it was not a direct confrontation between Muir and Pinchot, this controversy illustrates the issue: a magnificent valley could be dammed in order to supply water to the city of San Francisco, or it could remain in its natural state forever. John Muir compared its grander and spiritual value to the cathedrals of Europe. Though Hetch Hetchy was dammed the controversy did much to define the preservationist ideal as distinct from progressive conservation and was instrumental in the subsequent establishment of the Park Service, which the Forest Service opposed (Dana and Fairfax, p.109).

The cases above are useful to illustrate a long-standing debate over natural resources. However, it would be misleading to assert that the issue occupied a prominent position in the political thinking of our nation over the first half of this century. Though laws affecting the agency were passed prior to WWII, the Forest Service was going about its business of managing the land relatively unscrutinized by the American public. The agency was anxious to sell timber, but there was no market demand (Wolf, personal communication). “The governing fact was that standing timber was then in oversupply ... Until the mid-1940’s, in fact, national forest timber provided less than two percent of the wood consumed in the United States” (Wolf p.1041). It wasn’t until the 1950’s, when America’s economic expansion provided a market for public timber, that the Forest Service truly came under widespread scrutiny.

### **The Public Takes Notice**

By 1950 the Forest Service had had forty-five years to internalize their approach to forest management. The agency had not been inactive for all those years. Though the Forest Service’s role was primarily steward and guardian of the public forest, it had administered the sale and harvest of trees since Pinchot took the helm. Prior to WWII, the service had more timber to sell than there was demand for the product. Only with the post-war economic expansion however, was there truly market pressure for Forest Service timber and when there was, the Forest Service was well equipped to provide the material that the market demanded. (Wolf, personal communication, 1/95) As a result, when

criticism was directed toward them during the 1950's, their attitude was defensive. With the affluence of the post-war era and the resulting recreation boom, the American people ventured into the forests to hunt, fish, ski and hike (Dana and Fairfax p.191). There they found foresters who were busy clearcutting the National Forests in order to supply wood for houses that a growing economy and population demanded. The burgeoning number of recreationists, who demanded space and facilities to pursue their varied activities, criticized the seemingly dominant silvacultural program. As a result, new recreation and preservation groups pushed for new national parks and statutorily protected wilderness, both of which stood in opposition to the Forest Service's traditional management philosophy (Dana and Fairfax p.194).

The foresters, when questioned about methods and priorities, responded with professional pride and an attitude that they knew what was best. The forester, after all, had his roots in Europe, where he was on a social and intellectual level of a doctor or a professor, professionals whose' opinions the public didn't often question. (Behan p.398) As a forester of "considerable professional status" reported to a 1960's freshman forestry class at the University of Montana: "We must have enough guts to stand up and tell the public how their land should be managed. As professional foresters, we know what's best for the land." (Ibid.) Thus, the "Myth of the Omnipotent Forester." The proper role of a forester, on the other hand, is to be a professional who manages the forests and related wildlands for the various social purposes. "It is when the professional forester arbitrarily determines those ends (or even clumsily tries to) that he most seriously violates our classless sociology and our democratic politics. Then is displayed the omnipotent forester."(Ibid.).

The omnipotent forester yielded slightly in 1960 when the purposes of the National Forests were broadened by the Multiple Use Sustained Yield Act of 1960. (16 USC 528-31) This legislation broadened the defined purposes of the National Forests to include "outdoor recreation, range, timber, watershed, and wildlife and fish..." The act was primarily a response to the public conflict over limited resources and unprecedented questioning of the agency's management priorities. The reaction, by the professionals in the agency, was "one of containment, defining and limiting the assertion of new goals.

This strategy is illustrated by the Multiple Use Sustained Yield Act." (Dana and Fairfax p.181).

The attitude of the omnipotent forester was reflected in the collective attitude of the US Forest Service. Business as usual at a Forest Service office of the late 1960's was to act defensively when criticized; environmentalists were viewed as the enemy and the objective was to beat them, or to carry on with whatever action the agency deemed appropriate. (Frear, 1970) But the agency's detractors were growing in number as it faced a public empowered by the civil rights and anti-war movements. Outcry against the Forest Service focused on one action: clearcutting. The public saw clearcuts, and didn't like them. This first public grumbling over clearcuts which resulted in specific action occurred in West Virginia in the 1960's. Because of intense public pressure concerning clearcutting on the Monogahela National Forest, the West Virginia legislature adopted three resolutions opposing clearcutting (Robinson, Glen p.77).

From a forester's point of view, clearcutting is a very rational practice. Clearcutting is highly advantageous for the cultivation of shade intolerant tree species and the successful stocking of "desirable" species. It is often the most efficient means of harvest and can be helpful in controlling insect and disease infestation by eliminating the pest from the immediate environment. (Robinson, Glen O, p.80) Foresters were emphasizing clearcutting because they were practicing utilitarian forestry as they knew it: they maximized the flow of timber from land over the long term. Public resistance started with visceral reaction to clearcuts: they are ugly. There were deeper issues though; clearcuts are generally recognized to be ecologically harmful in a number of ways (Robinson, Glen, 82-84, and Robinson, Gordon) and, whether the timber program dominate the other purposes of the national forests. By the late 60's public protest reached a level of sophistication reflected by increasing legal challenges to the Forest Service.

In 1968, responding to widespread pressure from local constituents, Montana Senator Lee Metcalf commissioned the University of Montana School of Forestry to study the forest practices of the Bitterroot National Forest. The resulting paper, *A University View of the Forest Service* (commonly known as the *Bolle Report* after the U of M's Forestry School Dean Arnold Bolle) concluded; "Multiple use management does not exist

on the Bitterroot National Forest..." and went on to point out the Forest's overriding concern was for sawtimber production. Although the report was largely centered around the economics of harvest and regeneration, the public focused on the conclusion that timber was the dominant use of the Forest (Dana and Fairfax p.228).

### **Dominant Use vs. Multiple Use**

By 1970, the overriding issue had been defined: Was the Forest Service biased toward the production and harvest of timber to the point that other forest values were being sacrificed? A starting point of the discussion is the implementation of the Multiple Use Sustained Yield Act (MUSYA).

Though the MUSYA declares: "It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."(sec. 528), the Act does nothing to mandate the 'production' of these values in equal proportion. Indeed, section 531 of the act states that "Multiple use means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services...(and)...that some land will be used for less than all of the resources..." Though it does go on to state that production of resources from the land will "not necessarily (be) the combination of uses that will give the greatest dollar return or the greatest unit output" the net effect of the act is to allow broad discretion by the Forest Service in managing the land for certain ends. The service went on to subdivide the National Forests according to 'primary value'. "Following that principle, a tract that offered a lot of timber was perforce regarded as primarily valuable for timber and was managed accordingly. The Forest Service was reluctant to use the word, but where timber was present, timber management tended to be the 'dominant' use." (Clary, p.170). Furthermore, timber harvest was not limited to areas considered of primary value for timber. Recreation areas were also subject to timber harvest. In short "The Forest Service (from the time of the act's passage) beat the drums for multiple use throughout the next two decades, using it as a shield against extreme demands from any one segment

of the public. At the same time the agency pressed ahead with revisions of timber-management plans to increase and attain the allowable cut” (Clary, p. 169).

In addition to the Bolle report, a prime example of the ineffectiveness of the MUSYA at mandating balanced resource ‘production’ and the timber orientation of the Forest Service is the case *Sierra Club v. Hardin*. (325 F.Supp. 99 (D. Alaska 1971) In that case the Sierra Club contested the sale of 8.7 billion board feet of timber from the Tongass Forest in Southeast Alaska. The timber was to be sold to one corporation and harvested over a fifty year period. The plaintiffs alleged that the Forest Service had violated the MUSYA. The court denied relief, and continued the tradition of deferring to the agency’s discretion:

Plaintiffs introduced substantial testimony ... to show that the Tongass National Forest is being administered predominantly for timber production. While the material undoubtedly shows the overwhelming commitment of the Tongass National Forest to timber harvest objectives in preference to other multiple use values, Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service (*Sierra Club v. Hardin* p.3).

The bottom line is that the MUSYA gave the Forest Service broad discretion to manage lands as they saw fit. The service generally resisted attempts to limit its authority to manage a landscape. This policy is evident in the agency’s opposition to statutorily protected wilderness. The Forest Service opposed the wilderness legislation even though it had its own ‘primitive area’ regulations in place for two decades prior to passage of the Wilderness Act. It eventually dropped its opposition in exchange for congressional ratification of MUSYA. (Robinson, Glen, p.16) In essence, the Forest Service had traded opposition to a law that would limit its authority on a small part of its jurisdiction for support for a law which would ensure agency discretion on the majority of its jurisdiction.



Why the bias toward timber when the public has clearly demanded at least a balanced treatment of various forest values? As discussed above, the Forest Service was founded by foresters and it was the science of silviculture which dominated early forest policy. Methods and philosophy of forest management had become so internalized by the 1950's, that the Forest Service literally did not have the policy context to respond to criticism. The utilitarian roots of the Forest Service, as defined by Gifford Pinchot, led to organizational values which strongly support a commodity orientation.

### **The Agency's Human Resource**

An examination of the Forest Service's organizational values must include a close inspection of its personnel. After all, what is a bureaucracy if not a collection of people? The Forest Service has often been characterized as having an exemplary esprit de corps. One natural resource professional who served in the army during WWII and returned home to work for the Forest Service described the agency as being "more military than the military" (Wolf, personal communication, 1/95). A starting point for the discussion is the composition of the agency. The foresters were products of professional training in forestry schools where students began to identify with each other more than with people outside the profession, that is, foresters become the individual's reference group (Twight p.17). Academic training is usually augmented by summer work with a practicing organization such as the Forest Service or a timber company (ibid.). By graduation, the student has learned to identify with the values of the profession which can lead to fear of rejection if those values are not adhered to and subsequently to the internalization of the expected behavioral pattern (Ibid.). These values of the profession are then strengthened when the individual enters forestry as a professional. Along with the German and Prussian origins of forestry schools and faculty, Twight cites two other factors leading to internalization of values in the Forest Service: (1) promotion from within and (2) the number of years over which all decision-making positions of consequence have been staffed by forestry school graduates.

"Promotion from within has been an enculturation technique employed by the Forest Service since the agency's inception in 1905. Chief Forester Gifford Pinchot observed this

policy in practice in the Prussian Forest Service...” (Twight p.18) A 1958 survey reported that over 90 percent of Forest Service professionals were Foresters, by 1973, that number was 53 percent (Robinson, Glen p.34). That number may be even less today, but Robinson reports that “the [non-forester] specialist within the Forest Service is very likely to have somewhat closer ties to his colleagues in the Forest Service than to his professional counterpart in another organization such as the Park Service” (p.35). An additional identification reinforcement technique is transfer. Traditionally, Forest Service professionals have been frequently transferred among various operational units. Transfers are not always mandatory, but without serving in a variety of positions a Forest Service officer is not likely to make it to the top (Robinson, Glen p.36). These factors combined tend to lead Forest Service employees to identify primarily with their co-workers as peers and accept agency values as their own. Utilitarian forestry is at the heart of those values.

There is additional evidence to suggest that these values predominate in the Forest Service to this day. As recently as 1988, Twight and Lyden concluded that there was “a high level of homogeneity among USDA Forest Service district rangers resembling that found by Kaufman in the 1950’s, suggesting a current organizational culture committed primarily to one constituency group rather than the multiple constituencies implied by the Multiple Use-Sustained Yield Act.” (Forest Science, Vol.34 No.2 pp.474-486.)

The following chapter will discuss the agency’s response to public criticism. Allowing the public a forum to air their grievance with agency proposals was viewed as a mechanism to decrease the controversy surrounding the agency’s action. The culture of the bureaucracy, discussed in this section, not only ensures that the Forest Service remains devoted to the production of timber, but contributes to the fact that public input may not be fully heard. Twight and Lyden continue, “Such strong commitment to a single-constituency perspective may preclude agency sensitivity to other public perspectives obtained through citizen participation” (Ibid.).

## Chapter II

### Public Involvement: The Forest Service Responds

It was clear by 1970 that the Forest Service was beginning to acknowledge its low standing in public opinion and that the public demanded change. In that year, the agency published *Framework For the Future* which listed goals and promised "a better balanced future." Implementation of the *Framework* was impossible because the document called for no specific actions. The agency, though never coming forward and admitting that they had made mistakes in the past, did, by promising a different program in the future, admit that they were acting outside of collective public values (Dana and Fairfax p.307).

Public criticism did not subside, and the Forest Service tried again in 1971 to smooth rough waters with the publication of *Timber Management for a Quality Environment*. This is an informative piece, designed to educate the public about what the Forest Service was doing and why. It employed a question and answer format with photographs, dealing with subjects such as harvest techniques and road construction. The document was an effort to educate the public about the things it didn't like, with the assumption that people did not like clear-cuts because they did not understand them. Public dissatisfaction at being treated with a show and tell approach only increased the hostility toward the Forest Service (Dana and Fairfax p.307).

Arnold Bolle, drawing on his study of the Bitterroot National Forest, *A University View of the Forest Service*, went on to publish an article in 1971 which was critical of the Bitterroot National Forest for its failure to include input from local people in its planning and management decisions. He reported "they (local people) felt left out of any policy or decision-making and resort to protest as the only available means of being heard" (Bolle, 1971). Bolle was critical of the entire political/legal environment in which administrators made decisions. He stated "There appears to be a breakdown in the normal democratic process through which the public need is translated into law by the legislature and, in turn carried out by administrative agencies" (p.497), and that "The local ranger is denied the flexibility to meet local issues and problems on an ad hoc basis....his decisions are always

predetermined, at least with respect to major issues and problems” (p.498). Bolle continues:

The professional forester apparently accepts certain assumptions which would give him certain fundamental truths believed by him to be beyond the comprehension of the ordinary mortal. These truths are good for people in spite of what they as people might think or feel. These assumptions were found to be at the root of the professional attitude toward the public in the Bitterroot case. They lay in the belief of the primacy of timber as a use of the forest, based on the fear of a wood famine, interwoven with a puritan ethic that utilitarian or commodity uses are always more important than any amenity values (p.500).

The proposed solution to this dilemma is a more open system, whereby local resource managers are exposed to public sentiment. Bolle calls for full public participation in forest management and, most importantly, that involvement occur at the earliest possible stage, when problems are first identified.

The first acknowledgment of public involvement on the local level by the Forest Service, was with the publication of *The Environmental Program for the Future*. This document was an attempt to translate *Framework for the Future* goals into specific management programs. It was meant to be implemented by a unit planning process. In this process, "The public was to participate in priority setting and land use planning rather than simply be accounted for or educated by agency personnel" (Dana and Fairfax, p308).

It is clear that by 1974 the Forest Service had acknowledged the need for public involvement. In that year, John Heandee, Roger Clark and George Stankey, all of whom were Forest Service employed researchers, co-authored the paper *A framework for agency use of public input in resource decision making*. This paper serves as an academic guide to public involvement of the time. It is an articulation of public involvement; how to do it, and how to utilize the input collected. To a great extent, the process of public

involvement and the issues surrounding it remain the same today. The process is spelled out in *A Framework for agency use* as consisting of five steps:

1) Issue definition: This "is the process or stage in resource planning during which managers, working within legal, fiscal, political, resource capability, and environmental constraints, identify the range of alternatives that might require additional public input."

2) Collection: This stage involves all activities that may result in citizen input. "The objective of the process is to secure the full range of views from all who are interested or affected. It often begins with efforts to inform the public about issues, alternatives, and consequences."

3) Analysis: "Analysis describes (summarizes and displays) the nature, content, and extent of public input so the input reflects public ideas, opinion, and values. Whenever possible, analysis should be systematic, objective, and quantitative. It should use processes that can be replicated by independent analysis."

4) Evaluation: Evaluation "is the interpretation and weighing of all data collected and analyzed - relative to a decision or recommendation."

5) Decision implementation: Here, obviously, a decision is made, but the authors point out that a decision can tap previously unstated opinions. (p.61).

The authors go on to discuss significant issues surrounding the use of public involvement. The first rule spelled out states that public involvement must be traceable, that is, independent observers must be able to "examine how public input influenced development of alternatives, decisions, and overall management direction. Administrators should be able to demonstrate how the input related to their decision...This pressure for accountability will require public agencies to develop systems for public input analysis that are not only visible and traceable but also objective and reliable...(p.63). Next, the article points to a need for "Professionalism." Here, the authors describe a professional decision-

maker who is unaffected by personal biases, who has put forth a proposition with well reasoned alternatives, based on resource and legal constraints.

### **Recent Forest Service Efforts in Public Involvement**

In 1992 the Forest Service established a National Public Involvement Task Group for Forest Planning consisting of representatives “from District, Forest, Regional, and National levels in the areas of public affairs, planning and management. The goals of the task group were: 1) to review current public involvement processes, and 2) to develop a model for managers’ use in forest planning and decision-making...The model is guided by objectives, and emphasizes the ongoing nature of public involvement and the building of long-term relationships with the public” (Forest Service, 1993). The task force recognized that the public has high expectations as to the degree of influence it can have on natural resource management. The document highlights open communication, access to decision-making, group deliberation and action, collaboration and joint problem solving and the building of long-lasting relationships (p.2). Yet, when regarding the measurement of the effectiveness of public involvement, the task force asks the question “Do people feel their issues and concerns were identified, considered, and addressed in the process?” but makes clear that “*addresses* does not mean resolved in their favor, but that they understand how issues were handled” (p.17). It appears that the agency wants the best of two worlds: it wants an informed public who is willing to share information relevant to a project. It wants to build long term public support for it’s programs. However, at the same time, it wants to maintain autonomy in decision-making.

### **Legislative Mandates for Public Involvement**

Three laws guide Forest Service planning and provide a public avenue into agency decision-making: the Multiple Use Sustained Yield Act of 1960 (16 U.S.C.A. sec.528-31), the National Environmental Policy Act of 1969 (42 U.S.C.A. sec.4321-61), and the National Forest Management Act (16 U.S.C.A. sec. 1600-14). “Taken together these statues provide both a conceptual basis and a firm legal mandate for public involvement in the forest planning process. Common among these laws is the implicit recognition that

planning and managing public resources is not solely a function of technical expertise and scientific decision-making. It is inherently a subjective process, dominated by social, political, and cultural questions” (Office of Technology Assessment (OTA) p.78). One other law, the Federal Advisory Committee Act (PL 92-463, 86 Sts. 770) limits certain forms of public participation.

### **The Multiple Use Sustained Yield Act of 1960**

The Multiple Use Sustained Yield Act did not mandate that the Forest Service directly involve the general public in planning and management decisions. It did, however, open the door to citizen involvement by expanding the purposes of the national forests. As discussed above, the MUSYA left to the agency’s discretion the choice of which multiple uses any particular area would be allocated. However, individuals and constituent groups which favored a particular use of the forests found, at least theoretically, that their favored purpose was on an equal legal footing with others.

### **The National Environmental Policy Act**

The National Environmental Policy Act (NEPA) was signed into law by President Nixon in 1969 with little fanfare. It was merely “intended as a gesture of good will to the growing environmental movement” (Dana and Fairfax p.209). The act centers on full disclosure of environmental impacts of any federal project that would “significantly affect the quality of the human environment” (NEPA, sec 4332). These impacts were to be disclosed in environmental impact statements.

The Act does not directly mandate that agencies involve the public in decision-making. Rather, it “treats the public as recipients of information” and assumes that “public awareness of potential environmental consequences of proposed programs or actions makes agencies more accountable to public concerns and more sensitive to the environment” (OTA p.78). For explicit orders to involve the public in decision-making one must look to the NEPA’s implementing regulations written by the Council on Environmental Quality (CEQ). No regulations existed until 1978, when the CEQ issued them under President Carter. However, President Nixon did direct the CEQ to issue

guidelines to the implementation of NEPA, which instructed agencies to obtain the views of interested parties, and where appropriate, provide for public hearings and information on alternative courses of action.

When regulations were finally promulgated in 1978, the mandate that agencies involve the public in decisions affecting the human environment had become definitive:

Federal agencies shall to the fullest extent possible...encourage and facilitate public involvement in decisions which affect the quality of the human environment (40 CFR 1500.2(d)).

Agencies shall:

- (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
- (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents...
- (c) Hold or sponsor public hearings or public meetings whenever appropriate...
- (d) Solicit appropriate information from the public.
- (e) Explain... where interested persons can get information or status reports on environmental impact statements...and
- (f) Make environmental impact statements, the comments received, and any underlying documents available to the public (40 CFR 1506.6).

Further provisions require: 1) that information is available to citizens before decisions are made and actions taken and 2) that scoping take place (scoping is defined as “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action” (40 CFR 1501.7). Finally, the NEPA process is to be “integrated with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts”(40 CFR 1501.2). Courts have further defined



the public participation process. In *California v. Block* (690 F.2d 753 9th Cir. 1982) the court ruled that the Forest Service must provide a range of alternatives for the public to review and comment upon and that information collected from the public is to be considered in decision making. Though it is beyond the scope of this paper to present case law in detail, it should be noted that the full disclosure requirement of NEPA has been determined judicially. The resulting disclosure documents are far more involved than were originally envisioned by the authors of the Act.

### **The National Forest Management Act of 1976**

The National Forest Management Act (NFMA) was passed in 1976 much to the relief of the forestry community. The act, a compromise between the timber industry and environmentalists, was largely prompted by the famous Monongahela Decision (*Izaak Walton League v. Butz*). In that case, plaintiffs alleged that the Forest Service had violated the Organic Act by cutting and removing immature and unmarked trees. The court agreed. Though the widespread opinion that the decision banned clearcutting is not technically true (Fairfax and Achterman, 1977) it rendered the continued pursuit of the agency's even aged management program all but impossible: every tree to be cut would have to be marked and no timber that was not large growth or mature could be harvested.

After *Izak Walton league v. Butz*, Congress moved quickly to reinstate the authority the Forest Service needed to continue an aggressive timber program, however, the environmental community gained ground in a number of areas. Among those gains certainly must be counted the further mandate that the Forest Service include public input in its planning and decision-making. First, though it is important to discuss the main thrust of NFMA. The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA) requires the Forest Service to conduct resource assessments and inventories for all units of the National Forest System. NFMA amended RPA to require the agency to promulgate plans for the management of each national forest which correspond to the assessments and inventories developed under RPA. These plans were to be updated every ten to fifteen years. Today, project activities are "tiered" to the management direction and land allocation set forth in the forest plans, i.e. implementing the forest plan may mean

conducting a timber sale, but that sale must meet all “standards and guidelines” in the plan. NFMA’s public participation provisions were originally geared toward the formulation of the forest plans. The Act directs that the Forest Service “provide for public participation in the development, review and revision of all land management plans, and to hold public meetings, or comparable processes, in locations that foster public participation”(16 USC 1604(d) (1976). The act further directs that the Forest Service promulgate planning regulations which comply with NEPA. The result has been companion EISs to every forest plan and compliance with public participation provisions.

The original NFMA regulations “contained a comprehensive explanation of the role of participation in the planning process” (Fortenberry and Harris p.55). Under the Reagan administration, the public participation provisions of the regulations were weakened. ‘Inform and involve’ style language was retained, but the requirement that the agency “demonstrate that public issues and input are considered and evaluated in reaching planning decisions” (Fortenberry and Harris) was dropped. As we have seen though, NEPA case law has been interpreted to require the agency to consider information collected from the public in decision-making (California v. Block, 690 F2d 753 (9thCir. 1982)).

### **The Federal Advisory Committee Act**

Whereas NFMA and NEPA mandate some degree of public involvement in Forest Service management decisions, The Federal Advisory Committee Act (PL 92-463, 86 Sts. 770) (FACA) places a limit on the use of one form of public involvement. FACA was passed in 1972 because Congress perceived that “established committees were making decisions, rather than providing advise, committees were making biased proposals, and many committees were considered wasteful expenditures” (FS FACA memo). The fire under the act’s passage was largely fueled by the power of grazing advisory boards’ over the Federal Grazing Service. The Service was established by the Taylor Grazing Act of 1934 to oversee the previously unregulated public domain grazing lands. An amendment in 1939 made mandatory a clause in the Grazing Act which allowed “cooperation with local associations of stockmen” (Dana and Fairfax p.161). The advisory boards, which

were made up predominantly of stockmen from the local grazing district “became the vehicle for domination of the Grazing Service by the livestock users” (Ibid. p161).

Judicial interpretation of FACA has begun to define the scope of the law, ie. which groups are subject to FACA and which are not. A group more likely to come under FACA is one which:

- Gives advice to Federal officials,
- Has a formal structure and meets on a scheduled basis with a scheduled agenda,
- Is selected by a Federal agency or Federal officials,
- Is utilized by a Federal agency directly to obtain advice or recommendations,
- Participates in consensus-type decisionmaking with Federal agency or Federal officials,
- Is collaborative,
- Provides advise or wishes to influence government policy or decision-making (US Office of General Council, ‘White Paper’ on FACA).

In 1993 President Clinton issued Executive Order 12838 which called for a one third reduction in existing non-statutory advisory committees “and specified that no new advisory committees be created without compelling considerations” (FS FACA memo).

For the purposes of this discussion, it is not necessary to articulate the case law which clearly defines what citizen groups are or are not legal under FACA. However, it should be understood that FACA provides a limit on one form of public involvement. Basically, it says that groups of citizens, organized around one particular issue, can not write federal agencies’ policy concerning that issue. Whether or not FACA will limit an agency such as the Forest Service’s collaboration with a particular citizen group must be explored on a case-by-case basis.

### **Theoretical Framework for Public Involvement**

Public involvement has two major functions. First, it is informational. Resource managers are able to gain information and experienced opinion regarding a proposed action which is not readily available on paper. Second, is the “social or political function, that of permitting the public some measure of influence over decisions affecting their interests” (Robinson p.272). These functions are consistent with representative democracy; decision-makers are brought closer to those people whom their decisions will affect. However, as discussed above, the public was not satisfied with the mere information dissemination proposed by early public involvement efforts (Dana and Fairfax, p.307). Rather, the public has demanded some degree of influence over the Forest Service’s decisional processes.

Hendee, Clark and Stankey (1974) deal with the ultimate question of public input: weighing the information collected for purposes of incorporating it into a decision. How will public inputs eventually be incorporated into the decision and who's opinions will be valued? “Any time a decision is made, varying degrees of importance are implicitly or explicitly assigned to all available input”(p.64). “Importance” is not just between different attitudes and values expressed through public input. It is also between information and values received through public input and other decisional factors. Legal direction, politically influenced output goals, and personal biases all enter into a decisional process. Whatever the decision, “The balance of opinion about an issue should be supplemented with qualitative information, such as supporting reasons”(p.66).

The Office of Technology Assessment grapples with the same question: “What is the role of the public (vis-a’-vis agency responsibility) in Forest Service decision-making (p.79)? The answer to this question may vary as much as opinion over forest management itself. However, it is not difficult to frame the debate so it is easily understood. Our form of government implies that people delegate authority to legislators who pass laws, and to an executive branch which administers those laws. Administrators, such as Forest Service line officers are granted authority to make decisions which carry out laws such as NFMA. The NFMA implies scientific planning and management, yet mandates that the public be consulted and involved with the same planning and management decisions. In performing

his or her duties the Forest Ranger or Supervisor must either rely on his or her professional judgement (or that of the staff), input from the public or some combination of both. In essence, the question is: will decisions be made technocratically or democratically? In reality, the answer is both. It is easy to recognize when one form of decision-making dominates the other, as authors such as Bolle have pointed out, but more difficult is to prescribe (much less administer) the optimal combination. OTA concludes its discussion of the issue by simply restating important functions of public involvement.

Forest Service managers are, ultimately, responsible for making decisions. nonetheless, public involvement can help managers: 1) determine important public values and priorities, 2) define critical issues and the relevant information to address them, 3) identify emerging issues and possibly avoid crises, and 4) assess how well they have fulfilled the 'public interest' (p.88).

OTA asks a second, and perhaps more important, question: "How must the Forest Service demonstrate its response to public comments in its final forest plans and decisions?" (p.79). Aside from finding the optimal role for public input, it is the lack of a clear answer to this second question which has plagued the agency. Hendee, Clark and Stankey stated in 1974 that agencies use of public input must be traceable. As we shall see in subsequent chapters, the agency is now required to explicitly respond to public input.

As we have seen, there is no mandate in law or regulation that predominant public opinions expressed through comment dictate the outcome of a decision. Indeed, evidence suggests that the public has good reason to distrust the agency's use of public comment. The second Roadless Area Review and Evaluation (RARE II) decisional process provides an excellent example. During the RARE II process, the Forest Service set out to evaluate each and every roadless area within the National Forest System for its wilderness suitability as defined by the Wilderness Act. A massive public involvement effort was conducted in small towns and cities near potential wilderness areas across America. Inputs, of course, ranged from one extreme to another in many different locations. Some

people wanted the Forest Service to recommend as much wilderness as possible, others would have preferred none. However, the comments from local areas tended to express attitudes about those areas. In the end, after collecting reams of public input, the agency weighted existing planning goals more highly than public opinion (Karr, 1983). In other words, if a forests' plan called for a quantity of timber harvest which exceeded the currently developed areas' yield capacity and a roadless area had a significant timber resource, that wild land was not likely to be recommended for Wilderness even if public opinion in the area favored Wilderness protection.

There can be no doubt that the US Forest Service tries very hard to gain input from the public for both planning and project decisions. If there is a failure in the public involvement program though, it is that the agency is still not accountable for showing the public how their involvement eventually influenced a decision. This lack of accountability is likely a source of continued public disgruntlement with the Forest Service which results in appeals and litigation of decisions. Avoiding public controversy and appeals was one of the earliest reasons recognized for public involvement. As an assistant secretary of agriculture stated in 1978, "The amount of citizen litigation to block unacceptable decisions relates directly to the opportunities, or lack of opportunities, for public participation"(Cutler, 1979).

Simultaneously though, a defensive attitude still exists within the agency. This attitude shows itself once a decision moves up the line from gathering initial responses toward a proposed action, to public review of a proposal or draft Environmental Impact Statement (EIS), to final EIS or Environmental Assessment and subsequent appeals. The Forest Service does not like appeals, it perceives them as slowing down the actions and plans of the agency and involving the public in decision-making. Public involvement continues to be utilized in hopes of reducing the controversy surrounding Forest Service projects. Yet, as Wondolleck (1988) writes "The agency's efforts to obtain input from 'the public' do not always satisfy groups that their best interests have indeed received a fair hearing. Although official Forest Service directives now require that field staff listen to the public and keep it informed, these directives do not explain what the field staff should do with this input once they have acquired it" (p.175). The result has been a

proliferation of appeals and litigation which challenges agency decisions and authority.

The following chapters will present the regulatory environment of the appeals process and document the increase in the use of appeals by disgruntled agency constituents.

## **Chapter III**

### **Legal Framework of the Appeals Process**

#### **History of the Appeals Process**

In the 1993 Interior and Related Agencies Appropriations Act, Congress mandated a system whereby the public could comment upon and appeal Forest Service management decisions. The resulting law is the Appeals Reform Act (the Act) (16 USC 1612). Until the time of this law's passage there was no statutory requirement that the agency provide the public the opportunity to challenge its decisions. The Forest Service proudly states: "at its own discretion and initiative, the agency, since 1906, has provided some kind of process by which permittees and the general public could challenge forest officer decisions. In fact, until the enactment of several environmental statutes in the 1960's and 70's the appeal process was about the only formal mechanism the public could utilize to influence agency decision-making. Appeal procedures were first codified in 1936..." (Federal Register (FR), Vol.54, No13,1989 p.3342). These early regulations existed primarily for those who had a contract relationship with the Forest Service such as a grazing allotment permittee, though they do not specifically exclude the general public (Robinson p.46).

By 1975 the appeals process worked on a three class system. Class one and two appeals differed little and were both based on breach or "effect on the enjoyment of" a written instrument such as a contract or lease (Robinson p.53). Class three appeals, which were those originally used by environmentalists, "required no relationship between the appellant and the agency and thus provided a procedure for airing general grievances by the public..." (Ibid.). Since 1965, the appeal regulations have been revised five times, with several changes taking place prior to that. It would be tedious and unnecessary to recount all the changes in appeal regulations. Rather, this paper will highlight the important points of the new legislative mandate for an appeals process, then make a more detailed presentation of recent changes in the regulations.

The most recent change in the appeals process was prompted by an act of Congress. The previous two changes, in 1983 and 1989 occurred "after the agency conducted a major review of the then current regulation(s)... to comply with Executive Order 12044,



the first Executive Order to require review of existing regulations on a 5-year cycle” (FR Vol.54, No.13). The result of the first review was a revised appeal procedure at 36 CFR 211.18. The regulations at 36 CFR 217, which preceded the current regulations at 36 CFR 215 took affect on February 22,1989. Even at that time the Forest Service was beginning to feel that their programs were being constrained by appeals.

### **Forest Service Opposition to the Appeals Process**

During the recent controversy over the spotted owl the Forest Service proposed dropping the appeals process entirely (57 FR 1044). In its place the agency wanted an up-front, pre-decisional public involvement process in which the public was required to spell out any concerns with the proposed project. The Forest Service claimed the resulting rule would foster greater economic stability in communities dependent on a flow of commodities from the National Forests, would decrease costs and allow energy to be shifted back to “on the ground” forest management (Ibid.). Environmentalists, of course objected strongly. But the issue wasn’t resolved administratively. The US Congress took matters into its own hands and in the 1993 Interior and Related Agencies Appropriations (P.L. 102-831, Section 322) it mandated a system whereby the public could comment on and appeal National Forest management decisions. The agency received the requirement of a pre-decisional comment process it had asked for, but was also required to retain an appeals process.

Forest Service criticism of the appeals process has centered on it’s cost in terms of time, energy and money, and it’s effect on timber supply. F. Dale Robertson, Chief of the Forest Service under the Bush administration, stated in a congressional hearing:

The bottom line is that our appeals process has evolved so that it is not the simple, quick, informal process that the Forest Service originally intended it to be. Instead, it has become a significant generator of paperwork and a time-consuming, procedurally onerous, confrontational, and costly effort, trading off resources and energies that otherwise might be directed to substantive on-the-ground resource management needs.....

The major impacts of appeals on our timber sale program are delay and disruption. A few years ago, we could turn to other prepared sales to replace those that were delayed by appeals. We now find ourselves without adequate “shelf volume” to make replacement sales. (Hearing before the Senate Subcommittee on Public Lands, National Parks and Forests, Committee on Energy and Natural Resources, Nov. 21, 1991)

More recently, Robertson stated that it cost the Forest Service \$8,000 to respond to each appeal or \$6 million to \$8 million per year to process the paper. “That does not include the reworking of timber sales or the lost revenue because we didn’t make timber sales.” (Hearing before the House Subcommittee on Specialty Crops and Natural Resources of the Committee on Agriculture, April 20, 1993).

There were, of course, different opinions regarding the appeals process. Environmentalists claim that the appeals process is nearly the only venue for influencing Forest Service decisions at a local level. Congress appears to have agreed.

### **Changes in the Appeal Regulations**

Congress acted to maintain the appeals process, but in doing so they attempted to reform it. There were three major goals: (1) tighten time-frames so the appeals process didn't take so long, (2) provide for resolution of disputes and (3) limit the number of appeals by requiring exhaustion of other remedies (Chris Worth, personal communication, 1/95). A closer look at legislative direction for each of these three points is provided below.

**1. Time-frames.** The Act allows the public 30 days to comment on a pre-decisional environmental analysis and 45 days to file an appeal once a decision has been issued. Disposition of the appeal i.e., the ruling on the appeal by the appropriate official, must be complete within 30 days (extendible to 45) of the close of the appeal period.

**2. Dispute resolution.** The Act requires that “a designated employee of the Forest Service shall offer to meet with each individual who files an appeal in accordance with subsection (c) and attempt to dispose of the appeal.” This meeting is to take place within

15 days after the closing date for filing an appeal at a location in the vicinity of the lands affected by the decision.

**3. Limit appeals by requiring exhaustion of other remedies.** Section (c) of the Act limits the right to appeal a Forest Service decision to “a person who was involved in the public comment process ... through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action...”

Many changes took place between the old appeals regulations and the new ones. These changes are summarized below. They are treated in the order in which they appear at 36 CFR 215.

- **215.2 Definitions.** “The Appeal Deciding Officer is the Forest Service line officer having the delegated authority and responsibility to render a decision on an appeal...” Under the older regulations, you will also find a “Deciding Officer”. However, the 217 Deciding Officer is the person who made the decision that could be appealed, whereas the 215 project decision maker is the “Responsible Official.” The 215 regulations state “Appeal reviewing Officer is an agency official who reviews an appeal and makes a written recommendation to the Appeal Deciding Officer on the disposition of the appeal.
- **215.3 Proposed actions subject to notice and comment.** These regulations specify that the notice and comment procedures apply to actions implementing National Forest Land and Resource Management Plans for which an environmental assessment is prepared or any project requiring an environmental assessment or environmental impact statement. The comment period is also required for proposed timber harvest described in Paragraph 4, section 31.2 of Forest Service Handbook 1905.15 for which a project or case file and decision memo are required. That section of the Handbook specifies that in cases where an EA or EIS are not required certain timber sales still require a project file and decision memo to proceed. Timber harvest which falls in this category includes sales of 250,000 board feet or less and salvage sales of one million board feet or less (FR vol.57,no.182, Sept. 18, 1992). If a proposed action would result in a “non-significant” amendment to a forest plan that amendment is subject to notice and comment. The

previous regulations did not contain provisions for a comment period, however, 217.5 required that “Deciding Officers shall promptly mail the appropriate decision document to those who, in writing, have requested it, and to those who are known to have participated in the decision-making process.” Provisions are also provided for publication of notice in the Federal Register and local newspapers.

- 215.4 Actions not subject to notice and comment. The section 215 regulations leave the comment period for draft environmental impact statements (45 days) under the authority of the existing NEPA regulations at 40 CFR 1506.10d. Actions categorically excluded from NEPA documentation are also exempt from the notice and comment requirement except for timber harvest actions mentioned under 215.3. Other exemptions include any action not subject to NEPA and non-significant amendments of forest plans which are not made in conjunction with a specific project (these are still appealable under the 217 rules). Rules and policies associated with the Administrative Procedures Act or Forest Service Manuals and Handbooks are generally not subject to notice and comment.

- 215.5 Notice and comment on proposed actions. These are instructions to the Responsible Official. The officer must give annual notice in the Federal Register as to the newspapers in which the public in a given area will be notified of proposed actions. The Responsible Official must publish notice of proposed actions in specified newspapers. The official is then instructed to give the public opportunity to comment on a proposed action by mailing the environmental assessment and a letter identifying the proposed action to any person who has requested it, and to persons “who are known to have participated in the environmental analysis process”. For categorically excluded timber harvest the Responsible Official shall mail a description of the proposed project to those who have requested it, and known interested parties. The notice of a proposed action must contain the title, a brief description, location, how to get more information, the proper address for sending comments and must specify the close of the comment period. As mentioned, the 217 regulations contain no provisions for a comment period.

- 215.6 Response to comments received on proposed actions. Oral and written comments shall be accepted for 30 days following the date of publication of the notice for public comment. Input must include the commentor's name and address, the title of the document on which comment is being submitted, specific facts or comments along with supporting reasons that the person believes the Responsible Official should consider in reaching a decision. When comments are received, the Responsible Official shall clearly identify the date of receipt. That official must consider all timely oral and written comments and "address comments received from the public during the comment period in an appendix to the environmental assessment." For categorically excluded timber harvest, public comments must be placed in a project file.

- 215.7 Decisions subject to appeal. Project and activity decisions documented in a Record of Decision or Decision Notice, including those which as part of the project decision contain a non-significant amendment to a forest plan and timber harvest related decision as described in paragraph 4, Section 31.2 of Forest Service Handbook 1900.15 which are documented in a decision memo are subject to appeal. EIS's are appealable under this rule. Everything appealable under the old regulations is appealable under the new ones except the approval, amendment, and revision of a forest plan. This has been left under the 217 regulations because most forest have completed their plans and will be revising them within five years.

- 215.8 Decisions not subject to appeal. Any project which includes a significant amendment to a forest plan is subject to appeal under 217 regulations. Preliminary findings made prior to a decision document being issued are not appealable. If no comment was received, no appeal can be filed. Actions categorically excluded from the NEPA process are not subject to comment and appeal with the exception of timber sales mentioned in 215.7. Implementing actions that result from an already affirmed project decision are not subject to appeal. The significant portion of the 217 regulations reads "Decision related to rehabilitation of additional Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires,

severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and give notice in the Federal Register that good cause exists to exempt such decisions from review under this part...” are not subject to appeal. Under the new regulations, these “emergency decisions” are subject to appeal, but the project may be implemented during the appeal period (see 215.10).

- 215.9 Notice of decisions. Notice of decisions must conform to the same basic procedures for notice of opportunity for public comment. Except for projects which received no comment, notice of decision must include the name and address of the Appeal Deciding Officer with whom an appeal should be filed, and specify the appeal period. The Responsible Official must mail the decision document to those who filed comments and those who request the document.

- 215.10 Implementation of decisions. If no appeal is filed, the project may be implemented five days from the close of the appeal filing period. If an appeal is filed, implementation may not occur for 15 days following disposition of the last appeal. If the project was not appealable due to lack of comment, it may be implemented immediately upon publication of the notice of decision. If the Chief determines that an emergency situation exists with respect to a decision, that decision is not subject to a stay (it may be implemented during the appeal period). An emergency is defined as “an unexpected event, or a serious occurrence or a situation requiring urgent action. Examples of an emergency include, but are not limited to: vegetation loss which presents and immediate threat of flooding or landslide, hazardous or unsafe situations as a result of wildfire or other circumstances, damage to water quality caused by siltation due to fire or flooding, potential loss of wildlife habitat due to windstorms and blowdowns and sudden outbreaks of forest pests and diseases.” The Responsible Official must notify the public that an action is to be handled as an emergency.

- **215.11 Who may participate in appeals.** Paramount to this topic is the issue of exhaustion of available remedies before an appeal is filed. Section 215.11 states "an appeal... may be filed by any person who, or any non-Federal organization or entity that has met either of the following criteria: (1) Submitted written comment in response to a project draft Environmental Impact Statement; or (2) Provided comment or otherwise expressed interest in a particular proposed action by the close of the comment period specified in 215.6. Federal agencies or Forest Service employees may not participate. The 217 regulations simply stated "Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level" (217.6). The idea of this change is that the agency can gather information and identify relevant issues before investing too much time and effort in the analysis and that the public should be required to spell out disagreements with an environmental analysis before a decision is made.

- **215.12 Where to file appeals.** Under the new regulations: The Appeal Deciding Officer with whom appeals may be filed are as follows:

If the responsible official who made the decision is:

Regional Forester.....

Forest Supervisor or District Ranger...

Then the appeal deciding officer is:

Chief of the Forest Service.

Regional Forester.

Under the 217 appeal regulations:

If the Deciding Officer is:

Chief of the Forest Service

Regional Forester

Then the Reviewing Officer is:

Secretary of Agriculture  
(discretionary review only)

Chief of the Forest Service (one level of review)

Forest Supervisor	Regional Forester (one level of review)
District Ranger	Forest Supervisor (two levels of review exist, the second level of review is with the Regional Forester)

As indicated in the table above, under the old regulations, only one level of review is available if the decision is made by either a Forest Supervisor or Regional Forester but a second level of appeal was available for decisions made by a District Ranger. However, under the 215 regulations, there is only one level of review no matter who made the decision.

- 215.13 Appeal time periods and process. The appeal filing deadline is 45 days from the time public notice of the decision is published with no time extensions permitted. A post mark serves as evidence of timely filing. (The Forest Service attempted under the draft regulations to require that an appeal be received within the appeal period.) Interested parties (formerly intervenors) must submit written comments to the Appeal Reviewing Officer within 15 days after the close of the appeal filing period. Unless an appeal is resolved through informal disposition as described in 215.16, the Responsible Official has 15 days to transmit the appeal record to the Appeal Reviewing Officer. The Reviewing Officer has 30 days from the close of the appeal filing period to review the appeal and forward it to the Appeal Deciding Officer along with a written recommendation on the disposition of the appeal(s). That recommendation is released upon issuance of an appeal decision. The Deciding Officer has 45 days from the close of the appeal filing period to issue a written decision concerning the disposition of the appeal. Importantly, “The decision or notice shall briefly explain why the Responsible Official’s original decision was affirmed or reversed, in whole or in part.” On project decisions, the appeal filing period under the 217 regulations was also 45 days with the post mark serving as evidence of timely filing and no extensions allowed. The reviewing officer was to issue a decision on the appeal within 100 days from the date the notice of appeal was filed. A second level



appeal of a District Ranger's decision was to be decided upon within 30 days of receipt of the first level appeal record.

- 215.14 Content of an appeal. There has been only one significant change in the required content of an appeal. In addition to listing his or her name and address, an appellant must state that the appeal is filed pursuant to the appropriate regulations, properly identify the decision being appealed, identify specific changes her or she is seeking, explain how the decision violates law, regulation, or policy and, importantly, "state how the Responsible Official's decision fails to consider comments previously provided, either before or during the comment period." The last point is a new feature.

- 215.15 Dismissal of appeal without review. The appeal Deciding Officer is to dismiss an appeal without review when: the appeal has not been post marked by the end of the appeal period, when the requested relief cannot be granted under law, fact or regulation, if the appellant is simultaneously appealing the decision under another administrative proceeding, when the decision is excluded from appeal under 215.8 or when "the appellant did not express an interest in the specific proposal at any time prior to the close of the comment period specified in 215.6". A minor departure from 217 is that the old regulations specify that an appeal is dismissed when a deciding officer withdraws the decision or the appellant withdraws the appeal. The major departure is the notion of exhaustion of remedies, which did not appear in the 217 regulations.

- 215.16 Informal disposition. The old regulations, at 217.12 directed that "Reviewing Officers may, on their own initiative, request the Deciding Officer to meet the participants to discuss the appeal and explore opportunities to resolve the issues... by means other than review and decision on the appeal" and provides for a "reasonable duration to allow for conduct of meaningful negotiations." The new regulations state "When a decision is appealed under this part, the Responsible Official must contact the appellant(s) and offer to meet and discuss resolution of the issues raised in the appeal." If the appellants and Responsible Official agree on disposition of the appeal the Responsible

Official must notify the Deciding Officer and the appellant must withdraw the appeal by written notice to the Deciding Officer.” Basically, the only change in the regulation is that the offer to meet is no longer optional.

- 215.17 Formal disposition. “The Appeal Deciding Officer shall issue a written appeal decision either affirming or reversing the Responsible Official’s decision, in whole or in part, and may include instructions for further action. All parties to the appeal record must be notified. If a formal decision is not issued (by the deciding officer), the appeal deciding officer shall notify appellants of the disposition of their appeal.” (215.17)

- 215.18 Appeal Deciding Officer authority. In cases involving more than one appeal, a Deciding Officer may issue one consolidated appeal decision. That officer is responsible for making all procedural determinations under the appeal rules. These determinations are not subject to review. The Deciding Officer’s decision is the final determination of the Department of Agriculture.

- 215.19 Appeal Reviewing Officer authority. An agency official at the Regional Office level designated by the Chief is the Appeal Reviewing Officer for appeals of District Ranger and Forest Supervisor decisions.”

- 215.20 Policy in event of judicial proceedings. The regulations at this part state “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.” The same language is used under the 217 regulations. The department of Agriculture may not have the authority to determine what cases the courts will or will not hear, but courts have generally agreed that a plaintiff must first exhaust his administrative remedies.

This chapter outlines recent changes in law and regulation governing the Forest Service’s appeals process. A “nuts and bolts” command of changes in the regulations is an

important prerequisite for understanding the significance of information presented in the following two chapters. Chapters IV and V present trends in the numbers of timber sale appeals received by the USFS Northern Region, the manner in which those appeals were disposed of, significant policy changes and perceptions of environmental activists and Forest Service personnel toward the appeals process. The discussion focuses on changes in policy since the new regulations took effect. The changes in the regulations, and policy changes which were not expressly mandated in law, have curtailed the successful use of appeals as a tool to challenge timber sales.

## **Chapter IV**

### **Trends in Northern Region Timber Sale Appeals**

In this chapter I examine trends in the number of timber sale appeals on the US Forest Service Northern Region (Region One), the disposition of those appeals, issues raised under appeal and their effect on the National Forest timber harvest. The Northern Region encompasses thirteen national forests. Ten of these forests are in Montana (there are no national forests in Montana which are not in Region One), and three are in Northern Idaho. One of the Idaho Forests, the Idaho Panhandle National Forest (IPNF) is actually a consolidation of three national forests which have been combined under one administrative unit. Functionally, the IPNF is one national forest.

This section documents and discusses trends in timber sale appeals on decisions issued from 1990 to 1994. It is worthwhile, however, to glimpse existing information on trends prior to 1990. Some information in this chapter was gathered by interviewing environmental activists (appellants) and agency personnel. However, the next chapter relies more heavily on interview results, therefore, interviewees are introduced at the beginning of chapter five.

#### **Number of Appeals**

In 1989 the General Accounting Office (GAO) released a report entitled *Information on the Forest Service Appeals System*, compiled at the request of Montana Senator Max Baucus. The GAO summarized that “the number of appeals filed annually (nationwide) more than doubled between fiscal year (FY) 1983 and 1988, increasing from 584 to 1,298...”(p.1). A significant portion of this increase can be attributed to a sharp rise in forest plan appeals, from 0.3% of the total in 1983 to 26.1% in 1988. Nevertheless timber sale appeals increased from 245 to 438 in the same period.

Funsch (1989) compiled figures on the number of timber sale appeals filed in Region One from FY 1984 to FY 1988. His figures, which appear in Table 4.1, note a substantial increase in the number of appeals filed.

Table 4.1 Total Number of Timber Sale Appeals on Region One (Funsch, 1989).

	FY 84	FY 85	FY 86	FY 87	FY 88
Region One Timber Sale Appeals	9	16	30	11	56

The trend which Funsch observed generally continued until 1992. The gross number of appeals then began to wane although more appeals continued to be filed at level two. The number of appeals filed in the last five years is presented in table 4.2. This data is listed by the fiscal year in which the appeal was filed. Appeal numbers from 1989 were not available.

Table 4.2 Total Number of Timber Sale Appeals Received by Region One, FY1990-1994.

Fiscal Year	Number of appeals filed		Appeals/decision appealed	
	Level 1	Level 2	Level 1	Level 2
1990	41	3	1.4	1.5
1991	89	8	2.5	1
1992	310	18	6	1.1
1993	154	26	1.9	1.2
1994 (217 regs)	43	29	1.3	1.5
1994 (215 regs)	79		3.3	

### Processing Delays

Critics of the appeals process have often cited the delays it causes to the timely processing of projects (see testimony of FS Chief F. Dale Robertson, Chapter III). The GAO quantified the total processing time for appeals. The analysis of 151 timber sale appeals processed in Regions 1 and 6 from Oct 1, 1985 to May 31, 1988 show:

Timber sale appeals that were resolved (130 of 151) took an average of 184 days to be processed, or 30 percent longer than the basic level 1 time frame (140 days allowed under the 211 regulations) (p.16).

In the same regions, appellants used an average of 9 days beyond the end of the appeal period to complete their appeals whereas the Forest Service used an average of 60 days beyond it's time limits (p.17). The GAO concludes: "Accordingly, the Forest Service was responsible for 87 percent of the total time overruns beyond the 140 days generally provided for" (p.17). I did not compile data on processing time during the 1990's. However, insight into that trend can be gained by examining a related issue: the number of unresolved appeals on the books at years-end.

Delays in processing have caused a backlog of appeals, i.e. until 1994 more appeals were being filed annually than were being decided upon. Nationwide, the number of unresolved appeals increased from 64 at the end of FY 1983 to 830 at the end of FY 1988 (GAO p.2). By the end of FY 1993, that number had climbed to 3068. During FY 1994 the Forest Service was able, for the first time, to process more appeals than it received so that by fiscal year-end 1994 there were 2887 unresolved appeals nationwide (USFS, Servicewide Appeal Activity FY1994, Year-End Report). Since the 215 regulations took affect, appeals are being processed in a more timely manner. The 45 day limit on the agency's processing time is being strictly adhered to.

### **Disposition of Appeals**

Since the regulation at 40 CFR 217 took effect in 1989, there have been four ways in which appeals have be disposed of. That is, the ruling on the appeal will take one of the following forms:

- **Affirm:** Here, the decision of the Deciding Officer (217 regulations) or the Responsible Official (215 regulations) is affirmed in whole or in part. If the decision is affirmed in whole, the stay is lifted and the project is free to go forward. If the decision is affirmed in part, or with instructions, the project may go forward without an additional

decision document being prepared. However, the conditions imposed by the Reviewing Officer must be met. An affirmed decision means the appeal is denied.

- **Close:** When an appeal is closed, either the appellant has withdrawn the appeal (perhaps through negotiation) or the Deciding Officer/Responsible Official has withdrawn his or her decision. For the project to go forward a new decision document must be issued.

- **Dismiss:** An appeal is dismissed when it is untimely, when the appellant did not file comments in the specified comment period (215 regulations) or for other procedural reasons. No decision on the merits of the appeal is made, a stay is not granted and the project may be implemented.

- **Reverse:** A decision is reversed when an appeal is found to have sufficient merit. That is, the appeal has demonstrated that the proposal cannot go forward without the Forest Service violating a law, regulation or a forest plan, or that analysis and disclosure of the projects environmental effects is inadequate. A new decision document must be prepared and signed for the project to go forward. Since the 215 regulation took effect, a decision may be reversed if the analysis did not respond adequately to public comment.

Funsch reviewed 50 timber sale appeals from appeal decisions issued in FY 1988. He found that 24 of the initial decisions were affirmed at level one, 16 were remanded (reversed), 6 decisions were withdrawn (the appeals file was closed), 3 appeals were withdrawn and 1 was still pending. Of 20 second level appeals, 10 decisions were affirmed, 2 decisions were remanded, 2 decisions were withdrawn, 2 appeals were withdrawn, 1 appeal was dismissed and 3 were pending (p.15). The GAO wrote of timber sale appeals received in Regions One and Six from FY 86 through mid-FY 88: “The FS reversed, or made some modification in, its prior decisions in 40 percent of the resolved appeals” (p. 16).

My own analysis of appeal data on the Northern Region from calendar year 1990 through 1994 is presented in Table 4.3. The information illustrates the fate of timber sale decisions. Multiple appeals of one decision are counted as one appeal decision. That is, when a decision was affirmed, multiple appeals may have been filed, but none were sufficient to overturn the decision. Similarly, with a reversed decision, only one of several

appeals need have been sufficient to reverse the decision. If a decision is listed as closed either the agency withdrew the decision or all appeals were withdrawn. If a decision is listed as dismissed, all appeals of that decision were dismissed. This data was compiled from two Forest Service data bases. The first data base listed all appeals received by the Northern Region from 1984 to the present, sale name, associated timber volume (if any) and disposition or appeal decision. The second listed every timber sale in the Northern Region in the same time period, the date in which the decision was signed and the associated volume. Information below is listed by the calendar year in which timber sale decisions were signed. If, under the 217 regulations, a decision was appealed at level two, the decision at that level was taken as the final decision on the appeal. Note that this system clearly distinguishes between decisions appealed under the 215 rules and those under the 217 rules. All decisions signed prior to 1994 fall under the 217 rules, those of 1995 fall under the 215 rules.



Table 4.3 Region One Timber Sale Statistics (by calendar year).

Year in which a timber sale decision was signed	Ruling on the appeals of a decision	Number of signed decisions appealed	Percentage of appealed decisions	Volume (mmbf)	Total Volume with signed decisions	% of volume with signed decisions
1990	Affirm	14	40	218.9	535.1	40.9
	Close	12	34.3	68.1		12.7
	Dismiss	2	5.7	12.1		2.3
	Reverse	7	20	54.1		10.1
	Total	35		353.2		66
1991	Affirm	18	40	142.5	418.2	34.1
	Close	8	17.8	17.5		4.2
	Dismiss	5	11.1	21		5
	Reverse	14	31.1	61.6		14.7
	Total	35		242.6		58
1992	Affirm	30	65.2	76.3	291.8	26.1
	Close	9	19.6	34.2		11.7
	Dismiss	1	2.2	1		0
	Reverse	6	13	43.9		15.1
	Total	46		155.4		53.3
1993	Affirm	60	69.8	110.1	215.9	51
	Close	8	9.3	36.7		17
	Dismiss	6	7	8		3.7
	Reverse	11	12.8	43.2		20
	pending	1	1.2	6		2.8
	Total	85		204		94.5
1994	Affirm	17	60.7	96	139.6	68.8
	Close	3	10.7	4.9		3.5
	Dismiss	7	25	12.3		8.8
	Reverse	1	3.6	6.7		4.8
	Total	28		119.9		85.9

\*This table denotes the fate of signed timber sale decisions for calendar years 1990-1994. For example, in 1990, there were a total of 35 timber sale decisions signed. Fourteen were affirmed under appeal, or 40% of those appealed (numbers were not available for the total number of signed decisions). Volume affirmed under appeal was 218.9 mmbf. Total volume appealed was 353.2 mmbf. Total volume with signed decisions for the year was 535.1 mmbf. Sixty-six percent of the volume with signed decisions was appealed.

Typically, a sale which is wholly affirmed will contain rationale in the appeal decision which points out that all potential environmental effects were adequately disclosed and public comment was integrated into the decision. The review will state that the decision was consistent with the purpose and need for the project and was well supported. Appendix I presents information on the disposition of appeals and the rationale of the reviewing officer for purposes of example. These decisions were reviewed in detail.

The most profound trend in appeal disposition between 1993 decisions and 1994 decisions was the tendency for the Responsible Official's decision to be affirmed with instructions. Though the agency has always had the power to dispose of appeals in this manner, the tendency for it do so has risen dramatically. The trend is quantified in Table 4.4.

Table 4.4 Timber Decisions Affirmed with Instructions

Calendar Year	Decisions Affirmed	Number of Affirmed Decisions Reviewed	Number of Reviewed Decisions Affirmed With Instruction	Percentage of Reviewed Decisions Affirmed With Instructions
1993	57	28	3	11%
1994	17	13	6	46%

Note that Table 4.3 clearly shows that the number of decisions reversed has dropped dramatically. In fact, only one decision filed under the 215 regulations in 1994 was reversed. The critical question is whether decisions affirmed with instruction under the 215 regulations would have been reversed under the 217 regulations. No external analysis can prove this conclusively, because the decision lies with the Reviewing Officer. However, a comparison of decisions affirmed with instructions in 1994 to decisions reversed in 1993 (reversed decisions always carry instructions as to what must take place if the project is to go forward) tends to support an answer in the affirmative. For example,

compare the 1993 reversal of the Fly Round timber sale on the Flathead National Forest with the 1994 affirmation of the Savant Sage project on the Idaho Panhandle National Forests. Fly Round was reversed with orders that if the project is to go forward an appropriate cumulative effects analysis must be completed or reasons for setting the existing cumulative effects analysis boundary must be disclosed. The Savant Sage project was affirmed with instructions that the cumulative effects on wildlife be analyzed and the project's effects on sensitive wildlife species be disclosed.

Similarly the 1993 decision on the Boulderover project on the IPNF was reversed with the one requirement that a cumulative effects analysis must be performed if the project is to proceed. The decision on the appeal of the 1994 Bear Vegetation Management project on the Bitterroot National Forest affirmed the Responsible Official's decision but instructed him to complete a biological evaluation documenting the analysis of the project's effect on cutthroat and bull trout and an analysis of regeneration rates for similar habitat types based on the date of harvest. Further comparison of this type can be made by reviewing Appendix I, which summarizes appeal decisions. In total, I reviewed 13 of 17 affirmed decisions for 1994, six of which included instruction. I also reviewed six of twelve reversed decisions of 1993. Often it is very hard to detect a qualitative difference in the decision rationale.

While it can be argued that from an environmental perspective that a decision affirmed with instructions may be better than a decision that is affirmed in whole, more significant is the fact that a project that is reversed with instructions is subject to a new round of public review before it can be implemented. Unless a project is contested in court, those that are affirmed with instruction are not subject to any further public scrutiny, even for the analysis performed under order. This has been confirmed under appeal of the 1994 Prichard Creek Timber Sale decision on the IPNF. That project was affirmed with the instruction that cumulative effects on the watershed be analyzed and the impact to water quality from potential roads on private land and potential effects to sensitive fish be disclosed. A party who appealed the original decision then filed a "supplemental appeal" which challenged the adequacy of analysis performed under order. This appeal was dismissed under the reasoning that there is no provision in the 215

regulations for appeal of supplemental analysis. In conclusion, the amount of review allowed the public has decreased.

A significant question for environmental activists is: when does a project affirmed with instructions become a new project? This question has not been tested in court. Stemve Solemn claims that Projects are affirmed with instruction only if the instructions won't change the decision (1/23/95). Yet, Debbie Norton admits that it is still unclear when a decision has actually been changed (4/13/95). Clearly, the answer will depend on the quality and extent of the instructions, but defining the threshold will likely take place in court.

For this study, it was impossible to determine exactly why appeals were dismissed. A decision to dismiss an appeal takes place at the Forest Level. If this occurs, a Reviewing Officer at the regional office will not see the appeal. However, interviewees indicate that the increase in dismissals can be partially attributed to the rule change. The 215 rules are "very legalistic," that is, they are precise on time frames (Dick Seitz, personal communication, 4/10/95). This decrease in flexibility comes from how the rule is being applied, rather than the rule implying less flexibility.

Forest Service officials were asked why the number of decisions affirmed with instructions has risen dramatically. Lolo Forest NEPA Officer Richard Seitz (4/5/95) and Reviewing Office Richard Bacon (4/5/95) both cited the affirm with instructions feature. Bacon explains that there is a "fatal flaw" test being used (personal communication, 4/5/95). That is, reviewers look for a problem that would jeopardize the entire project. He maintains that the instructions are a way to hold a unit accountable. Solberg explains "When we were briefed on how to review appeals we were told that this (affirm with instructions) is an option." Seitz admits that there has been a shift: "it was brought about over time with people realizing that it was handy," he explains "affirming with instruction really started with the 215 rules. Under 217 we looked at compliance under NEPA only, under 215 we now look at the decision as well as compliance with NEPA." Reviewer Beryl Johnston maintains "there was no directive to use the (instruction) tool" (4/13/95). Yet the use of this tool became so much more frequent in one year's time that the question

of whether or not reviewers were instructed to use it becomes moot. Affirming decisions with instructions is now policy.

Reviewers are unanimous that the number of appeals of one decision do not affect the review in a political way, that is, “votes” are not counted. The number of appeals do affect the review in so far as they may bring up different issues.

When appellants were asked why the percentage of appeals dismissed has increased they tended to go into responses which covered all the recent trends. That is, they talked about the number of reversals and the affirm with instructions feature. Denise Boggs explains that the environmental community has done “a hell of a job educating the Forest Service” (4/6/95). That is, the agency has learned from past appeals and litigation the procedural hoops that it must jump through. Regarding dismissals themselves, the general feeling is that the Forest Service will dismiss an appeal on any technicality.

When questioned specifically about the decrease in reversals, activists name the affirm with instructions feature. Keith Hammer explains that in all the years he’s been writing appeals, he has never had a decision reversed. Instead, he feels the Forest Service will pull the decision if they know there’s a problem, and sign the decision if they are sure it will be upheld. Yet, drawing from his knowledge of appeals in general, Hammer is confident that decisions affirmed with instruction in 1994 would have been reversed under the old rule. He states, “Generally the process isn’t used to review the decision and the merits of the appeal. It is used to make sure that the decision is defensible. The analysis is performed to stand up to a judge” (4/10/95).

Steve Solemn explained his response to appellants who are dissatisfied with their success: “Were doing what you asked us to do 3 or 4 years ago. Accordingly, our success has gone up. We are doing more EIS’s and better analysis (3/3/95).” Environmental impact statements are more defensible than environmental assessments. He notes that there have only been three EISs ever reversed on the Northern Region. Environmental impact statements prevail over EA’s in court because the Forest Service doesn’t have burden of proof. The agency doesn’t have to demonstrate the mitigation effectiveness because there is an inherent admission of significant impact. Solemn sums up the situation by admitting “The only decisions reversed are when the Forest Service hasn’t done public

involvement or responded to comment. Reversals are not being made on technical issues” (Solemn 1/31/95).

### **Issues Raised Under Appeal**

Appendix II represents a review of issues raised under timber sale appeals for decisions signed in calendar years 1990, 93 and 94. It is a cursory review at best. However it does provide some indication of the types of issues being commonly raised. It is interesting to note the appearance of new issues in 93 and 94 compared to 1990. In the last two years, arguments relating to the field of conservation biology such as habitat fragmentation, edge effects and biological corridors are being raised frequently whereas in 1990, such concerns were not mentioned.

Keith Hammer reports that the appearance of new appeal issues has mainly been a response to new information or policy, the substance of issues raised has changed very little (4/10/95). He notes, “On the ground nothing has changed, the issues are the issues.” However, administrative changes such as forest plan amendments or the change in the status of bull trout have changed the way the arguments are presented. Boggs reports that her organization is doing more work with sensitive plants and small animals, the “salamanders and snails” (4/6/95). Jule reports that he has changed his arguments to reflect new scientific information (4/5/95).

New issues will likely be seen in timber sale appeals. Hammer says that the concept and implementation of ecosystem management and historic range of variability must be pursued as well as the conservation of bull trout. He also mentioned biological evaluations for sensitive plant species (4/10/95). Boggs mentioned new wildlife issues in general (4/6/95).

Agency officials report seeing some new issues raised in the last four years. Concepts relating to conservation biology such as landscape linkage are fairly new to appeals (Seitz 4/10/95, Bacon 4/5/95). Bull trout was also mentioned by name (Seitz 4/10/95). Yet, their feeling is that the appellants approach is static. “Appellants arguments haven’t changed substantially since 1991, nor has way they are proceeding” (Solemn

3/3/95). My review indicates that predominately, the issues raised recently are very similar to those raised in 1990.

### **Impact of Appeals on Timber Supply**

A primary concern of the agency, industry and some members of Congress has been the impact of appeals on timber supply. The GAO generally concludes that in the late 1980's appeals had a minimal impact on the timber volume offered:

About 6 percent of the total volume offered for sale in regions 1 and 6 was appealed, ... (and)... less than one percent of the total offered volume was delayed by these appeals. The Forest Service contributed to some of these delays by not issuing environmental analyses in time for appeals to be processed without delaying sales. Forest plan appeals do not delay timber sales because the Forest Service requires appellants to file separate appeals on specific timber sales (p.23).

Table 4.3 displays the volume of timber for which decisions were signed in calendar years 1990 through 1994. The Region One volume for which decisions were signed decreased from 535.1 million board feet (mmbf) in 1990 to 139.6 mmbf in 1994. The actual sale of timber on Region One was 301 mmbf in FY 1990, down to 165.5 mmbf in FY1993 (USFS Region One Timber Sale Program Statistics). Another closely watched figure is the volume under contract. This is timber for which environmental analysis has been conducted, the appeals process has run its course, and the timber has been sold but not yet harvested. It is the timber "freely available" to supply market demand. Historically, most Forest Supervisors have tried to keep twice the annual sale volume on contract (Grove 12/6/94). At year-end 1990, Region One had 678.5 mmbf under contract and by year-end 1993 that volume had decreased to 438.8 mmbf (Timber Sale Program Statistics). Comparison of these figures with Allowable Sale Quantity (ASQ) provides some perspective. ASQ is "The quantity of timber that may be sold from the area of suitable land covered by the Forest Plan for a time period specified by the plan. This

quantity is usually expressed on an annual basis as the ‘average annual allowable sale quantity’,” (Flathead National Forest Land and Resource Management Plan). Since 1987, the annual Allowable Sale Quantity of the Northern Region has been 559 mmbf .

A significant question, and one that is difficult to answer conclusively is whether the drop in volume for which decisions are signed can be attributed in whole or in part to the increase in the number of appeals. Conceivably, other factors may influence the agency’s ability to sign timber sale decisions: timber inventory levels may be too low to allow continued non-declining harvest levels, budgets may not allow the preparation of timber sales or the agency may be emphasizing programs other than timber.

Activists generally agree that their program, in which appeals play a significant role, have played a part in the drop in volume. Of course, appeals themselves do not stop timber from being cut but that is the net result. Appeals do two things: they slow down the process of making timber available by increasing the time and effort that goes into environmental analysis and the disposition of appeals and they help to ensure that environmental laws are complied with.

What factors aside from appeals have affected the timber volume? That question was asked of activists and agency personnel. Denise Boggs says that President Clinton’s initiatives did factor in initially. There were buyouts and trimming done that left the agency with less people to do the work, therefore less got done. She adds, “For a while when ecosystem management came out some forests became a bit more discerning about where to cut. Attention from the environmental public has continued to increase. Some of this can be attributed to the spotted owl” (4/6/95). Keith Hammer says that cuts have come down because the places they have left to cut are more sensitive. Activities there require more analysis. He also notes: “The budget is a big factor. On the Flathead (National Forest), Congress funded 18 mmbf for this year, they only got one million cut last year. Congress is less willing to spend money on timber that won’t be cut” (4/10/95). Jeff Jule notes that the delay in sales should not be only attributed to appeals. He remarks, “The comment period forces the agency to do a better job with their analysis before the decision is even made. This slows down the whole process” (4/5/95).



Agency personnel I spoke to are unanimous that appeals do affect timber supply. Lolo National Forest NEPA coordinator Dick Seitz states, "Appeals have caused some of the drop, they have greatly increased the amount of time that it takes to put out a project decision" (4/10/95). Along with appeals, rare and endangered species were mentioned (Bacon 4/5/95) along with lawsuits. Seitz also attributed the drop mainly to appeals and suits. No one from the agency responded that timber volume is a factor in the declining cuts. Typically, the agency employee remarked "We are growing more trees now that we ever have" (Seitz, Solemn, Bacon). When asked about timber volume Dick Seitz (4/10/95) responded that if the Lolo National Forest were managed strictly for timber, up to 200 mmbf/year could be harvested. He claims that the volume of harvestable timber is growing steadily. As it is, the Lolo only plans sales of 53 mmbf this year.

Reviewer Beryl Johnston pointed out that peeled or chipped wood fiber is now being utilized in great quantity (4/13/95). Smaller trees can fulfill the demand for such manufacturing processes, therefore, rotation ages are shortened because trees can be used at a younger age. Johnston claims there was a point when inventory was a concern. As the forest was converted to a managed stand, at points there was a shortage in salable volume. Now there is more of a concern that we are growing fiber 7 to 8 times faster than we are harvesting. Johnston continues "The rules are different. We are operating under considerable constraints now. There are now tradeoffs in the values of resources. Appeals and litigation has had an effect. The cost of planning has gone up. The whole process has been lengthened and made more complex. A lot is based on new data on current conditions" (4/13/95). Norton notes that people new to the area notice visual and other impacts and have different expectations of how a national forest should look (4/13/95).

The degree to which appeals have affected the volume of timber being supplied from the national forests is impossible to pinpoint vis-a-vis other factors. However, it is possible to explore factors which are not responsible for that decline. For example, the price paid for national forest timber has been documented by the University of Montana's Bureau of Business and Economic Research. In 1985, the price paid per thousand board feet of timber in Montana was less than \$100 (1993 dollars). By 1994, nearly \$400 (1993

dollars) was paid per thousand board feet. These figures indicated that national forests in Montana can easily sell timber, ie. the market for timber has not softened.

A second indicator that appeals have likely had an effect on the ability of national forests to market timber are budget figures. Table 4.5 displays Region One's timber budget versus timber volumes for which decisions were signed. The budget figures presented below represent all the money available to the Regional Office, National Forest headquarters and Ranger Districts for timber activities in the stated year.

Table 4.5: Change in Region One Timber Budget v. Timber Volume for Which Decisions Were Signed.

	1990	1994	Change
Volume of timber for which decisions were signed (mmbf)	535.1	139.6	- 74 %
Region One Budget (thousands of dollars)	31659	16439	- 48%
Percentage of volume appealed	66	86	+ 20%

Source of budget information: USFS Region one Funding Summary, 2/3/95

The table above clearly indicates that there is a decreasing efficiency with which monies are being utilized in the Northern Region's timber program. Appeals, and the workload associated with them are a likely source of this inefficiency.

Appeals have had an impact on the Forest Service's ability to market timber. Along with the change in the regulations, the agency has made policy shifts which have curtailed the successful use of appeals by environmental activists. Formost among these policy shifts is the agency's tendency to affirm timber sale decisions with further instructions rather than reversing the decision. The following chapter will discuss changes in the appeals process which have origins in the new regulations themselves, and, most importantly, changes in the way a decision is reviewed.

## **Chapter V**

### **Application of New Appeals Regulations and Other Changes In The Appeals Process**

In this chapter, I discuss several significant issues surrounding the use of administrative appeals. Some of this discussion revolves around major changes in the appeal regulations and how the new regulations are being applied. However, I also present agency and appellant views on the influence of appeals and information on the writing of appeals. Most of the data supporting this chapter was obtained through personal interviews of appellants and agency personnel. Interview questions to both groups are presented in Appendix III. Accordingly, I first introduce the interviewees.

#### **The Activists**

For this study, I interviewed several environmental activists to gain insight into who they are, why they do what they do, and to get their perspective on changes and trends in the appeal process. The people I spoke to were the “frequent filers” of timber sale appeals. They work out of offices. Most have made involvement in land management policy their full time work. Their names are well known to agency personnel. There are other people who have filed appeals, but I chose to speak to the appeal “professionals” because they have been involved in multiple projects and issues. Some of them have been writing appeals since 1990, when my quantitative look at appeal disposition begins. Further, a handful of environmental groups are responsible for the majority of timber sale appeals in the Northern Region.

Activists take part in the comment and appeals process because they perceive it to be the only way to affect the change they desire. They and their groups attempt to give voice to interests that cannot represent themselves such as wildlife and biodiversity in general. Jeff Jule, who represents the Ecology Center and Inland Empire Public Lands Council, reports that the appeals process is an avenue to affect change which he can be involved in full time, whereas before he became involved in the appeals process, his efforts

were more scattered (4/5/95). “[Activists’] ultimate goal is to correct an imbalance in the Forest Service budget and energy allocation” (Hammer 4/10/95).

### **The Bureaucrats**

I also spoke to several agency employees. Three interviewees were Reviewing Officers from the regional office, one was the appeals coordinator at the region, one was the acting appeals coordinator, and from Lolo National Forest, I interviewed the NEPA coordinator and the forest hydrologist, who has served on several appeal review teams. Agency employees believe that the mission of the Forest Service is to meet the needs and demands of the majority of the public and to act as stewards of the land and its ecological processes. They also sincerely believe that the agency fulfills that mission. They respond unanimously that their own philosophical approach to their work is perfectly consistent with the agency’s mission. Dick Bacon, Reviewing Officer and director of aviation and fire management, states with pride that he is a second generation Forest Service employee and that his commitment to public service is very high. “I believe that vegetation manipulation is necessary and I am a proponent of multiple use”(4/5/95). Dick Seitz, NEPA coordinator of the Lolo National Forest characterizes himself as dedicated to the mission of the Forest Service and “a moderate who doesn’t care much for extremes”(4/10/95).

Interviewees’ experience with the appeals process is variable. Katherine Solberg, director of personnel management has been an appeal reviewing officer for one year, prior to that, she had no experience with appeals (4/4/95). Bacon, a self-proclaimed student of public participation and public relations strategy has been exposed to public participation and appeals for most of his career with the Forest Service. Beryl Johnston, the director of engineering at the regional level has served both as Reviewing Officer and Deciding Officer over the last 3 1/2 years.

Forest Service staff definitely feel there is a decreasing emphasis on commodity production within the agency. Bacon says that ecosystem management objectives are making the difference. Seitz states “there is still an emphasis on commodity production but it is being driven with a greater sensitivity to competing interests. There is more

attention paid to social issues” (4/10/95). He is clear that commodity production is not merely a side effect of other programs, that it is still a goal in and of its self. However, the approach to commodity production is being tempered by more constraints. Solberg seems to echo this, she believes that commodity production and amenities are balanced, and the pendulum is swinging toward amenities (4/4/95). Dick Bacon points out that there are now no penalties for failure to meet timber targets (4/5/95).

### **Time Constraints**

The new appeal regulations have tightened time frames for both appellants and the agency. Appellants now have thirty days to comment on analysis and 45 days to appeal a decision. Not only are the appeal and review periods shorter but the agency is sticking to the letter of the law, something it did not do under the 217 regulations. The agency has only 45 days to issue a ruling on an appeal. Generally, neither appellants or agency personnel feel that the time frames have severely impacted their abilities to write or review appeals, although Boggs reports that 30 days for filing comments is unreasonable (4/6/95). Appellants feel that the time constraints are adequate as long as there are not too many decisions coming out at the same time. As Jule says, “If you follow a project from the start it shouldn’t be hard to file comments and bring issues under appeal” (4/5/95). Forest Service officials agree with this statement. Generally, agency officials believe that if the appellants have been involved throughout the public involvement process they should know the issues well and there should be more than enough time to submit an appeal.

Agency officials maintain that the time allowed for review and disposition of an appeal is adequate and that the shorter time allowance actually helps the agency focus, although Seitz says that at times, when the workload really piles up, the time limit can affect the quality of review (4/10/95). Johnston and Norton indicate that the tighter time frame has been a mixed blessing (4/13/95). “We are under the gun” says Johnston, meaning that it’s a race to complete the review, “but much more expertise has been brought to bear on the issues of an appeal.” Overall, he feels the quality of review has

gone up. Activists, on the other hand, simply state that they never got a fair review of their appeals before the new regulations and don't get one now.

What the tighter time frame has accomplished is a reduction in the delay and disruption of timber flow. Now, when a decision is signed, there is a finite period of time until the associated timber has cleared the appeal process. Barring a court injunction, the agency is then free to advertise the sale.

### **Dispute Resolution**

A major component of Congress' attempt at appeals reform was the requirement that Deciding Officers offer to meet with appellants in an attempt to resolve issues raised under appeal. Although a similar process was allowed under the 217 regulations, there often was no sincere offer to meet (Seitz 4/10/95). When the offer was made, there was often poor turn-out, unless there was something unique about the project (Bacon 4/5/95). Under the new regulations, the Responsible Official must make the offer to meet. Seitz reports that appellants of decisions of the Lolo Forest will agree to meet 50 to 60 percent of the time (4/10/95). Officials at the Regional level report meetings occurring from 30 (Solberg 4/4/95) to 50 percent of the time (Norton 4/13/95). Exact figures on the frequency with which a meeting takes place are not available.

No appellants reported having a positive experience with the resolution meeting. Activist Jeff Jule concludes that in his experience meetings have been "a total waste of time" (4/5/95). Deniese Boggs echoes this sentiment, she no longer responds to the offer to meet (4/6/95). Hammer has experienced only one meeting under the 215 regulations during which he feels that the Forest Service used an intimidation tactic. He attended the meeting to find that the Flathead Forest Supervisor had invited members of the wood products industry and the local chamber of commerce, none of whom had either appealed the decision being discussed or filed for interested party status (4/10/95).

Appellants and agency officials have similar perceptions of their own and each other's attitudes towards the resolution meeting. Activists, while saying that they come to the meeting in good faith, maintain the agency is unwilling to make any substantive changes. Jule explains that the Forest Service uses the negotiation solely as one more

chance to convince appellants why they should drop an appeal. Lolo Forest NEPA Coordinator Dick Seitz affirms the first allegation. He reports that changes as a result of the meeting come in the analysis performed, not on-the-ground modification of the project (4/10/95). In spite of this, agency personnel believe that they come ready to negotiate on certain items. Bacon reports that it is in the agency's best interest to negotiate, for it is the best way to avoid a lawsuit. He states "If the other side is willing to negotiate, we will be too" (4/5/95). Seitz says that the agency will negotiate some things, but some issues are philosophical such as development of roadless lands. As an example of adjustment the Forest Service is willing to make, Norton pointed out a situation where appellants only concern with a project was how the sale was to be marked. That concern was accommodated through the meeting (4/13/95). Reviewer Beryl Johnston states "it's not a matter of giving something up," rather "the meetings are constructive as a clarifier of issues" (4/13/95).

The bottom line is that the Forest Service is not willing to drop a project through the negotiation meeting, nor are they likely to modify the project in any substantial way. What they may do is agree to supplement the environmental analysis or some other non-substantive modification of the project. Forest Service Review Officers Dick Bacon (4/5/95) and Dick Seitz (4/10/95) conclude that both sides have things they will negotiate on and some they won't. However, they maintain the process can still have value in the information flow. The resolution meeting can work with those appellants whom the agency "likes," that is, those people with one or two site specific concerns, but it has done nothing to resolve issues between the agency and appellants with a basic difference in management philosophy.

### **Review of the Appeal**

Several factors underlie the trends in disposition of appeals. Quality of environmental analysis and the quality of appellants' work certainly affect the rulings. Perhaps most significant though is the appeal review process. It is during review that the appellants "case" is administratively tried. The change in regulations altered the review of appeals in a variety of ways, but they were not entirely responsible for the present review

method. It is the policy of the agency, which is not articulated in the regulations, which has affected the appellants prospects for success.

Review of all appeals is now conducted at the regional level by a Reviewing Officer and an interdisciplinary team of six or seven specialists made up roughly evenly of regional and forest level staff. Specialists “borrowed” from the forest level come from a forest different than the one responsible for the decision (Solberg 4/4/95). Reviewing Officer Katherine Solberg commented that these people learn a lot, and they take the knowledge of how to write quality analysis back to the forest with them. It is the Reviewing Officer’s job to assemble the team and assign various aspects of the review to the appropriate specialist. Review Officer Richard Bacon will spend “maybe five hours, maybe an hour” reading the decision notice and appeal “to get the gist of it” (4/5/95). Solberg reports that prior to meeting the specialists she will spend “at least a few hours” reading the decision notice and appeal. The specialists may work for three or four days. With the time that Bacon does spend reviewing a decision he will look at 1) purpose and need for the action, 2) whether the proposed action is appropriate given the stated purpose and need, 3) the issues identified during scoping and whether these were dealt with adequately, 4) the range of alternatives developed, and 5) very specifically, at the documentation on how the forest responded to comment. Importantly, he notes “I will look at the appeal for issues that demonstrate an on-site concern” (4/5/95).

This bias for on-site concern among reviewers should not be understated. Bacon comments, “from some appellants, you read one appeal, you have read them all” (4/5/95). Among agency personnel I interviewed, there is unanimous sentiment that on-site concerns are of high value while general concerns, which do not tie directly with the project site and the action being proposed are of very low value. Interviewees seem to sincerely appreciate issues of an on-site nature and appear to loath an argument, no matter how technical, that does not reference the site or some aspect of the project directly. Site specific issues are perceived to help the agency do a better job with environmental analysis and lead to better decisions. General arguments, on the other hand, are perceived as a hindrance. They frustrate the reviewers and the writers of decisions.



Chapter four discusses the fact that decisions are often affirmed with instruction. That is a major policy shift. But just as significant is the way in which appeals are reviewed. In February of 1995 the Forest Service published *“Review and Recommendation Guidelines For The Appeal Reviewing Officer.”* This document specifies that the review “will focus on and evaluate the basic elements of the project decision and the appeal. The following review elements are designed to provide “checkpoints” to assist the (Appeal Reviewing Officer) in conducting the evaluation and develop a foundation for making a recommendation.”

- 1. Clarity of the Decision and Rational--The Responsible Official’s rationale and logic for making the project decision and the clarity of the information presented are the focus of this element...
- 2. Comprehension of the Benefits and Purpose of the Proposal-- Understanding the need for deciding to take action and the purpose of the project are the focus of this element.
- 3. Consistency of the Decision with Policy, Direction, and Supporting Information-The focus of this element is an evaluation of the decision’s consistency with Agency policy, LRMP (forest plan) goals and direction, and supporting information contained in the decision documentation.
- 4. Effectiveness of Public Participation Activities and the use of Comments--This element focuses upon the effectiveness of public participation activities and the use of comments from the public and agencies in shaping the environmental analysis as well as assisting the Responsible Official in making a decision.
- 5. Requested Changes and Objections of the Appellant and Interested Party Comments--This element consists of a critical review of the clarity and consistency of the arguments presented by the Appellant or comments from Interested Parties to determine how compelling or

convincing these are in contrast to information relied upon by the Responsible Official in making the project decision.

Review of a decision is prompted by an appeal but not driven by it. The review is primarily conducted with an eye toward the flow of decision rationale. Issues raised by the appellant are reviewed by the resource specialists. Even then, however, evidence brought by appellants is not weighed against evidence brought by the agency in their analysis. Instead, reviewers make sure that data used in making the decision is adequate and that the decision flows logically from that data. Hence, if the decision is defensible the appeal will not be upheld, no matter how credible it's evidence and logical its analysis.

As stated previously, appellants' feelings toward the review which their appeals receive is unanimous. They feel there is no fair review on the merits of issues raised under appeal. The way the agency integrates comments into the analysis and decision is commonly thought to have improved. Steve Solemn and others indicate that reviewers are holding the Rangers to be accountable for the comment (1/23/95). Johnson and Norton make a significant point: "Now the review team can bring up a problem even if the appellants don't" (4/13/95).

Little change occurs when the appeal record passes from the Reviewing Officer to the Deciding Officer. "The deciding officer looks at legal technical questions. In almost every case the recommendation of the Reviewing Officer is upheld" (Solemn 1/23/95).

### **Writing Appeals**

Most activists write appeals independent of others' input. Deniese Boggs of the Native Ecosystems Council reports that when writing an appeal her office partner will occasionally examine some issues while she addresses others, but for the most part, she does her own work (4/6/95). The notable exception is John Grove who is vice-president of Friends of the Bitterroot. That group will split a project into component issues. They have their own team of specialists, each of whom will examine issues in the decision which relate to their field (12/6/94).

Activists generally report that their coordination with other groups is improving. Statistics on the number of appeals filed support that assertion. In fiscal year 1992 there were 310 level one timber sale appeals filed on the Northern Region, while 53% of volume for which decisions signed in calendar year 1992 was appealed. The analogous figures for 1994 are 72 timber sale appeals and an appealed volume of 86%. These numbers also support the conclusion that appellants have determined that multiple appeals of the same decision do not mean anything in the eyes of reviewers. Reviewers I spoke to were unanimous that the number of appeals received on a decision had no bearing on their determination. However, there are still multiple appeals being filed on each project decision (see table 3.2).

I asked appellants how often they were able to visit a project site before writing an appeal. Most people responded that they were almost always able to make a personal visit to a project site. When they were not able to get to the site, appellants state that they were so familiar with the area that it did not matter.

Some activists spend the bulk of their time and efforts commenting on and appealing timber sales. Denise Boggs, with the Native Ecosystem Council spends nearly all her time on comment and appeals (4/6/95). Keith Hammer of the Swan View coalition reports at one time spending 75 percent of his time on such activities but that he is now shifting his focus more towards forest plan concerns and litigation (4/10/95).

### **Eligibility To Appeal**

Appellants report that eligibility to file an appeal has not been a problem. Appellants have been diligently commenting on environmental documents (which is required in order to file an appeal) . In my review of appeal records, I found one appeal that was dismissed because the appellant had not commented during the comment period. I also inquired whether eligibility has been broken down into component issues, that is whether an appellant must have raised a certain issue during the comment period in order to raise that issue under appeal. Thus far, eligibility has not been broken down into component issues, that is, people do not have to have commented upon a certain issue in order to raise that issue under appeal. Evidence suggests, however, that this could happen in the future.

Reviewing Officers are directed to “Compare requested changes and objections raised in the Appeal to determine the consistency of the Appellant’s arguments in the Appeal and during the course of the analysis...(by asking)...Are new objections raised in the Appeal that were not raised by the Appellant during scoping (or) during comment on the DEIS, EA, or proposed DM? ( USFS, Review and Recommendation Guidelines For The Appeal Reviewing Officer). Steve Solemn, may have hinted at the future of this issue when he provided me a recent court decision. In *Friends of the Bitterroot v. Robertson* the court dismissed one of the plaintiff’s arguments because they did not bring the issue under comment or appeal. This action is at the judicial level but it is relevant because the Forest Service builds their analysis and rules on appeals in a manner that is defensible to a judge.

### **Judicial Action**

Activists report that they will be equally or more likely to bring cases to court in the future. Litigation is as significant a component of their overall direct action program as the use of appeals. That program integrates comment and appeal with judicial action. Indeed, these action components depend on one another.

Steve Solemn maintains that there is simply not enough data to suggest a trend in appellants’ likelihood to sue since the change in regulations. He states “only one percent of appeals ever go to court. What has changed is the foundation for decision. The system is now set up to consider issues early. It is more difficult to litigate issues because “all the cards get turned over earlier” (3/3/95). What he is saying is that the new appeals regulations and review policy will lead to more defensible decisions. While there is insufficient data to establish a trend in a change of appellant’s likelihood to take judicial action now that the new regulations are in place, there is existing data on the number of lawsuits pending at fiscal year end. At the end of FY 1992 there were 35 timber sales in litigation in Region One, in 1993 there were 46 and by the end of FY 94 there were 52 timber sales in litigation (USFS, Year End Report on Servicewide Appeal Activity, 1992, 93 & 94).

When a case does go to court, it places a tremendous burden on the Forest Service. Agency personnel are required to spend time talking to lawyers and providing information.

Of course, the results of court action can be more substantive, decisions may result in further restrictions to agency activity.

One reviewer is optimistic that the Forest Service will spend less time in court in the future. He says he “likes to think that public opposition will drop off eventually, that people will be happier with the direction of the agency”(Bacon 4/5/95). Conversations with activists suggests that in the near future, this result is unlikely. Lawsuits are an integral part of a larger program which includes comment and appeal. Without the threat of a lawsuit, an appeal means nothing because there is no check on the agency’s decision.

### **Quality and Scope of Environmental Analysis**

Agency officials unanimously feel that the quality of environmental analysis has improved. Activists expressed mixed reviews. Jule stated that the analysis has generally improved, but the decisions are the same as ever (4/5/95). Boggs reports that “the quality of analysis is the same as ever, pathetic” (4/6/95). Every agency official interviewed felt the quality of analysis has improved as the agency learned what steps need to be taken to produce a defensible decision. Solemn points out that there has been additional money and training for people doing the analysis (1/23/95). An independent evaluation of the quality of analysis was not performed.

Perhaps my most enlightening conversation on the topic was with Chris Worth, who at one time served as an assistant with the NEPA review at the Regional Office and is now based out of the Boise National Forest. I asked Chris if the Forest Service's method of analysis has "improved" to the point that fewer appeals are being won. His response is that both the analysis and in particular, the way the analysis is framed have contributed to the fact that the Forest Service is now "better" at putting together the environmental documentation (1/18/95). Specifically, the understanding of physical processes and the historic range of vegetative conditions is allowing the agency to frame site disturbance within a historical range. Thus, cutting trees is now viewed as having different ramifications because the vegetative conditions that the cut produces may be similar to what fire would have produced under natural conditions. The ramifications of this change in analysis could be far-reaching. Worth states, “In the future, biodiversity will be a null

issue, old growth will be a null issue.” As an example, Chris cites *Marble Mountain Audobon v. Rice* (No. 90-15389, US Court of Appeals of the 9th Circuit, 1990). In that case the Forest Service proposed fire salvage timber harvest in a biological corridor which linked two roadless areas. The Forest Service lost the case because “(they) did not take a ‘hard look’ at the impact of the selected salvage and harvest alternative on the drainage biological corridor in question. The FEIS did not contain a significant discussion of the corridor issue”(Ibid.). Chris says that today the FS would probably not lose that case. They would be taking a different approach to the environmental analysis which put that disturbance into the historical context of vegetative conditions.

### **Perceptions of Influence**

Activists are unanimous that their efforts are effective at curbing the amount of national forest timber cut. They take credit for the decrease in annual harvest on the Northern Region. Hammer says his (and others’) efforts have brought the cut on the Flathead National Forest down from one hundred to one million board feet per year (4/10/95). Activists feel that their efforts have slowed down actions in roadless and other sensitive areas. Deniese Boggs reports that there is also increased monitoring of sensitive species and that botanist positions have been filled on a number of forests (4/6/95). On the project level, influence varies with the individual project and Boggs reports that this influence is decreasing.

Hammer points out that true influence comes through judicial action, but that in order to have standing to sue you must have appealed a decision (4/10/95). One appellant felt that activists’ ability to influence timber harvest is only limited by money for lawyers. Hammer, Boggs and Jule all reported that the new regulations themselves haven’t changed their prospects for success. Rather, it is the policy of disposition that has had an impact. Specifically, activists name the policy of affirming decisions with instructions and the low tolerance of technical error. Overall, however, appellants believe that their efforts are successful.

One reviewer mentioned that comment and appeals sharpen the proposed actions and analysis but comments must be pertinent to the proposed action. In other words,

comment and appeals do not change the types of actions proposed. Bacon admits that the quantity of appeals has had an effect on the agency's ability to deliver timber, but it has not influenced policy (4/5/95). Solberg agrees, she says that the net result may change the quantity of outputs but there is no coalescing of opinion (4/4/95). That is, policy is not affected. When asked whether appellants' influence has changed with the new appeal regulations, only Dick Seitz answered directly: no (4/10/95). Others mention that comment and appeals gives the Forest Service cause to think through the action better and do a better analysis.

### **Other Issues**

The new regulations at 36 CFR 215 suggest that two other issues would need to be closely watched. The first is the provision that automatically affirms a project decision if no ruling is made on the appeals within the required time period (215.17). This "pocket veto" has not been used on Region One (Wisnburger, 2/15/95). Another provision which has not been used is the exemption from a stay (even in the event of appeal) if the Chief of the Forest Service determines that an emergency situation exists (Norton, 4/24/95).

### **Conclusions**

Forest Service Staff feel that the entire process of public involvement and appeals does raise legitimate concerns which results in better decisions being made (Solberg 4/4/95, Seitz 4/10/95). Bacon states that the process is a success because the public deserves an opportunity to disagree in a friendly manner (4/5/95). Seitz reports that the process is a failure when one group or person is written off as invalid or insincere (4/10/95). Every agency employee I spoke to expressed dissatisfaction with people who use the involvement and appeals process to bring an entire program to a halt, but overall, they feel the appeals process has resulted in better decision making. Among agency personnel, there appears to be a strong feeling that the appeals process has its benefits, but there is frustration with those who "misuse" it. That sentiment is echoed by the one timber industry representative I spoke to, who insisted that the appeals process is being abused by "cookbook" appeals. He states "The concept of public involvement is necessary.

However, appeals are not accomplishing the purpose for which the system was set up which was resolution of issues. The appellants are using it to accomplish an agenda that it wasn't intended for" (Diamond 4/12/95).

Activists are clear that the appeals process is only successful as part of a larger program. Hammer explains "Many of us feel the appeals process means nothing. At one level it is tempting to do the minimum of work in order to bring issues under a lawsuit later. But on the other hand, you want to do your best. I always do my best. Besides, the judges are more willing to review the issues closely if you did a diligent job with the appeal" (4/10/95).



## **Chapter VI**

### **The Future of the Appeals Process, Conclusions and Recommendations**

#### **The Future of the Appeals Process**

The appeals process faces an uncertain future. Even though the process received the congressional scrutiny which resulted in the 215 regulations, more changes seem likely. The most immediate threat is legislation that would exempt up to six billion board feet of “salvage” timber harvest from appeal over the next two years. At the time of this writing, the House of Representatives has passed the Taylor Amendments to the 1995 recisions bill which would mandate appeal-proof salvage logging. The Senate has passed the similar Gorton Amendments (though only the house version sets a timber volume target). Staff of Senators Max Baucus and Conrad Burns and Representative Pat Williams (all of Montana) confirm that the measures on salvage and its exemption from appeals exemplify the new Congress’s attitudes toward the appeals process.

For those who value the appeals process, there is cause for alarm and guarded optimism. Kurt Rich, of Senator Baucus’ staff explains that Senator Larry Craig (R, ID), chairman of the Subcommittee on Forests and Public lands of the Senate Energy Committee, has indicated an intention to hold field hearings on NFMA and NEPA (4/12/95). Appeals probably will be examined more closely as part of those hearings. If the appeals process is attacked further, it is likely that it will happen through a “back door,” like it has in the recessions bill. Rich claims “There is a good chance that we will see it in an appropriations bill.”

Art Noonan, of Representative Pat Williams’ staff explains “Industry’s focus has been on exempting things from appeal. They have targeted other laws...(and)...they will continue to try to limit the appeals process” (4/12/95). However, it appears that a frontal attack, on the NFMA or the merits of the appeals process as a whole is unlikely. “Industry doesn’t want to open NFMA because they think it might get worse.” Noonan explains that the Republicans have a problem, “They have a coalition. One piece of it is Western and anti-government, which still wants its subsidies. There are certain issues which will tear that coalition.” He uses the example of gun control. “Westerners are

absolutely opposed, but urban representatives are largely for it. It's not a partisan issue, it's an urban-rural issue. Many environmental issues are much the same." Noonan cites the recent reauthorization of the Federal Land Policy and Management Act (The Bureau of Land Management's governing legislation) as an example of industry's unwillingness to tackle big issues (4/12/95).

Doubts about another general review of the appeals process are only speculative. The threat, whether of a general review or a piecemeal approach to limiting appeals is real. What is certain is that just as the use of appeals is part of a larger agenda to move the Forest Service away from timber primacy, the movement to curtail the appeals process is part of a larger agenda to remove environmental constraints from the harvest of timber. Art Nunan explains "The bottom line is that the Industry and Western Republicans would like to get away from NFMA and make the cut level a more political process like it was prior to planning. The heart of the struggle is: will Congress allow for vision under NFMA with scientific information determining activities or will they go back to playing county commissioner?" Seth Diamond of the Intermountain Forest Industry Association confirms that it is likely that further, piece-meal attacks on the appeals process will occur (4/12/95).

### **Conclusions**

The United States Forest Service, throughout its 90 year history has been committed to the production and supply of timber. Public demands for the supply of amenities such as recreation and wildlife habitat, have been resisted. Providing these amenities is now an integral part of the agency's mission but only within the framework of multiple use which, on the ground, combines amenity production with the production of timber. It is the production of timber and other commodities which largely dominates the program of the agency. To find out why, one must look to the origins of the agency itself and the management philosophy of those people who founded and shaped the agency. The United States Forest Service has, to a large degree, kept its original shape, at least in terms of its management philosophy. The current Flathead National Forest Land and Resource

Management Plan confirms that that philosophy is still the use oriented one of Gifford Pinchot:

A. Management Philosophy: The word conservation was a term that Gifford Pinchot brought into everyday usage. As first Chief of the Forest Service, and America's leading advocate of environmental conservation for over fifty years, Pinchot defined conservation as "the foresighted utilization, preservation, and/or renewal of forests, water, lands, and minerals, for the greatest good of the greatest number for the longest time." ...

Within the scope of the Forest Service mission, as defined by the legislative record and administrative regulations, the goals of this Forest Plan are to realize and carry forward these principles of conservation and our commitment to what Pinchot termed "the public interest". The Forest Plan goals, as outlined below, have their origins in the early forestry and conservation movement. Their underlying principles are as valid today, as when Pinchot formulated his definition of conservation 80 years ago. These goals provide current and future land managers with guidance and direction that is consistent through time. How they are realized by this generation is our challenge, our obligation, our legacy (p.II-1).

By the late 1960's the Forest Service was in trouble. A disgruntled public perceived that timber extraction was the agency's mode of operation. The aesthetic qualities of clearcuts contributed to this perception. Public disgruntlement resulted in two things: the passage of laws which called for scientific planning and management (while maintaining the legitimacy of timber production) and the inclusion of the public in the management of the forest.

The appeal process did not grow directly out of new efforts to involve the public. It was a feature designed to aid in the resolution of grievances between individuals (usually with a contract relationship with the agency) and the Forest Service. The appeals process was "discovered" by environmentalists in the mid-1980's. It was used by activists wishing

to influence forest management activities on a broad scale, but who were dissatisfied that the agency's public involvement programs allowed them to affect change. Since that time it has been utilized to dispute forest plans and project decisions alike. By the late 1980's the appeal process was used extensively, and successfully enough that the process of approving timber for sale was being slowed down. The agency responded in 1988 by changing the regulations which govern the appeals process to those at 36 CFR 217 in an attempt to expedite the process. Appeals continued to have an impact on the timber program and by 1992 the agency had called for the elimination of administrative appeals hoping to substitute a mandatory system of public comment before a decision is signed. Congress reacted to the proposal and mandated that the appeals process remain intact, but also called for reform. The reforms were a further attempt to expedite the process and provide further opportunity for resolution of conflict.

Congressional scrutiny resulted in publication of new rules governing the appeal of project decisions at 36 CFR 215. A combination of the new regulations and the manner in which the regulations themselves have been implemented have eroded the appellants' prospects for successfully challenging timber sales. The rule and the implementing policy of the agency does allow the public to identify potential problems with a project and ensures that the public's comments will be considered. Ultimately, however, most of the appeals filed come from those with a management philosophy that is different from the agency. It is this philosophy difference which precluded the success of public participation programs outside the appeals process and has resulted in the use of the citizen appeal to challenge the agency's timber program.

Environmentalists assert that they act on behalf of wildlife or biodiversity. They give voice and representation to life which depends upon healthy ecosystems to persist by utilizing laws such as the Endangered Species Act and provisions of the National Forest Management Act. Agency personnel believe that the mission of the Forest Service is to fulfill the demands of the majority of society, and they firmly believe that the agency as a whole does this. The Forest Service, no doubt, feels that they do consider biological diversity. Yet, the agency has the latitude to set its priorities with broad legal discretion. This may not be the case on a project level. During the design of an individual project the

agency certainly must pay attention to certain constraints. However, environmental laws are only constraints. They do not bind the agency to affirmative action, nor does the Forest Service generally take action on its own accord. Instead, the Forest Service plans projects based on commodity output. The laws limit the scope and magnitude of the project.

The environmental community may have reason for hope. NEPA Coordinator Debbie Norton (4/13/95) and Skip Rosequist (4/20/95), hydrologist on the Lolo Forest, both testify that there are projects now going on that are not integrated with timber. Norton also explains that non-timber departments are now operating under their own budgets rather than under the timber budget. Every agency official I spoke to confidently states that the emphasis on commodity production is decreasing and non-commodity outputs such as wildlife habitat are becoming more of a priority. However, the timber program goes on, the Forest Service continues to propose projects in roadless areas and to operate under the assumption that vegetation must be manipulated by humans if we are to have healthy ecosystems.

The bottom line in forest management is that there are tradeoffs. To borrow a basic lesson from economics, there is a production possibilities frontier, or a combination of outputs which, to some degree are mutually exclusive. The Forest Service can choose between maximum timber production and maximum wildlife/biodiversity or some combination in between. Of course, as with the classic guns versus butter model, there are more outputs possible. If one includes recreation (motorized and non-motorized), domestic livestock grazing or certain tradeoffs *between* wildlife species the picture becomes cloudier. However, the theory stands: choices must be made that will favor one use of the land over another. With the Forest Service, this use is largely timber. It is true that the agency is scaling back the timber harvest, and that the emphasis placed on non-commodity values has increased. However, that growing emphasis has come about not through a voluntary shift along the production possibilities frontier but rather, it has been imposed on the agency by the public. Part of that imposition has been the passage of laws such as the National Forest Management Act and the Endangered Species Act. But a law does nothing if it is not enforced. Appeals, as part of a larger program that includes

comment and litigation have resulted in the enforcement of such laws. The constraints have been forcefully applied. Given the historic value orientation of the agency, it should come as no surprise that the agency attempts to curtail the influence of programs like the appeals process, which serve to limit their autonomy and ability to produce timber.

### **Recommendations**

I offer the following recommendations to the environmental community.

Appeals should be filed on all commodity based decisions. Until there is consensus among activists and scientists that the Forest Service has truly changed, that is until the management of our national forests is no longer tree farming, all commodity related decisions should be appealed. In spite of the fact that issues raised under appeal are not analyzed on their merit but trigger a review of countering evidence, in spite of the fact that appeals are affirmed with instruction rather than reversed and given further review, in spite of the fact that review takes place on only one level, appeals should be filed. Filing an appeal is the only way to trigger a review of a project decision. Though the review is entirely intra-agency it is a form of peer review. The review of integration of comments is good, and is also worthwhile to trigger. As one reviewer explained, “sometimes things are caught which are not brought up under appeal.”

Leave the appeals to the professionals. I do not recommend that anyone who feels motivated to write an appeal be discouraged from doing so. However, environmental organizations should encourage everyone to take part in comments but utilize most peoples’ energy in avenues other than appeals. Increasingly, the writers of appeals are environmental technocrats, who, like lawyers are in exclusive possession of the knowledge it takes to write effective appeals. These people perform a valuable service to the environmental community. They, by working through groups, represent not only themselves but a broad constituency. Appellants should make clear in their correspondence with the agency that they represent not only a group’s name, but a group’s members.

Coordinate better with other activists. Data indicates that on 1994 decisions, there were 4.3 appeals filed per decision appealed. Energy spent in redundant appeals could be better spent policing unappealed sales or in other activities.

Ignore the political backlash. Industry people consider the appeal process to be abused (Diamond) and agency employees express frustration at appeals that challenge the timber program, they claim it was never set up to serve people with a different management philosophy. Being more selective in appeal writing, or intentionally holding back in order to calm the political waters will be a waste of time. The Forest Service need the scrutiny in order to uphold environmental laws, and, employees agree that scrutiny results in better analysis and decisions. Industry will not be satisfied if some of the pressure is off. They will pursue their agenda, environmentalists should pursue theirs.

Be site specific. I do not view this recommendation as retreat, I view it as practical. The agency does respond better to site specific criticism, it triggers a far more meaningful review from the trained specialist. The only drawback to abstaining from general arguments is the fact that it will not consume quite as much of the agency's time. However, with the change in time frames the effect of delaying tactics has diminished. The benefits of being site-specific are great. It may help to build relationships with the agency, not as friends, but as respected critics, who's words may not be taken lightly or passed off as frivolous. Reviewers, especially the specialists, will do a better job.

Scrutinize every timber sale on a national forest. The forest is the basic administrative unit of the Forest Service. Harvest may be shifted from ranger district to ranger district, but harvest may not be shifted from forest to forest. Therefore, all districts must be equally policed to insure that every sale is being held to the same legal standard.

Prioritize. This advice may appear to be opposed to the first recommendation. However, if every timber sale cannot be appealed due to time constraints comment on all of them then look for ones which will prove a point, i.e. there is a significant issue to be tested. This strategy is also necessary for setting up litigation where specific issues can be judicially tested

Challenge emerging policies.

I) Historical range of variability within a landscape. Today's greatest disturbances come in the form of development, not fire. Human development has drastically changed the habitat available to species not compatible with human development. The wisdom of always looking back toward historic condition as the indicator of acceptability of today's demand for habitat conditions should be challenged.

II) Ecosystem management. This concept is emerging as the new management paradigm. Appeals can help force the agency to define the concept and create implementation guidelines that incorporates public opinions and values.

III) Forest health. Appeals should be used to focus scientific attention on this largely political issue and define actions that the forest health "crisis" will or will not prompt.

IV) Affirmation of decisions with instruction. When is a decision changed enough from further instructions to constitute a new decision? That question needs to be answered. The appropriate place to do it is in court.

Popularize the issue. Clearly, outreach is one avenue in which more attention is needed. However, this does not mean just education in high-school classes. It means outreach to everyday individuals in the mainstream of American life. Lions club, Garden clubs etc.

This point appears academic on the surface, but keep in mind that citizen pressure is responsible for changes that have occurred. Outreach should be emphasized by every environmental group that participates in comment and appeal.



Redefine the mission of the agency. This recommendation may also sound academic, but ultimately a new mission is needed if the Forest Service is to be diverted away from timber primacy. Agency staff often point out that they follow orders, they say “talk to Congress, they give us our orders.” This paper makes the point the agency has great discretion to implement Congress’ directives. The directives must be clear that commodity production is not the primary activity of the agency. Obviously this strategy cannot be pursued without tremendous popular support. Previous legislation such as the NFMA and the MUSY have assumed a timber harvest. Yet, it is these very laws which must be replaced with one that clearly dethrones the production of timber as the Forest Service’s top priority.

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### Appendix I Appeal Disposition and Rationale

	Decision on Appeal	Instructions and Rationale
Year/Decision		
1994 Dromedary Lolo NF	Affirm	Reviewing officer stated “the decision is informed and rational”. It was reportedly consistent with the forest plan, national policy and it “clearly shows that the Lolo NF is implementing ecosystem principles and designing project that promote and maintain forest health... and the analysis was particularly strong in using historical range of variation, the ecological process of fire and insect and disease and patch size and pattern on the landscape. Review also praised the public involvement effort.
1994 Teepee Salvage Kootenai NF	Affirm with Instructions	Reviewing officer instructed the responsible official to a) to analyze the validity of the watershed model used, b) analyze travel management, c) analyze the cumulative effects of reasonable foreseeable action on private lands, and d) to analyze potential effects on threatened and management indicator species.
1994 Middle Fork Ecosystem Flathead NF	Closed	Responsible official withdrew the decision. No reason given.

<p>1994 West Fork Papoose Clearwater NF</p>	<p>Closed</p>	<p>Responsible official withdrew the decision after receipt of notice from the US Fish and Wildlife Service that their concurrence with “no effect” determination for grizzly bears had been withdrawn. Formal consultation with F&amp;WS was to start immediately.</p>
<p>1994 Prichard Creek IPNF</p>	<p>Affirmed with instructions. Dismissed appeal on supplemental information.</p>	<p>Decision was affirmed with instructions. Appellant then filed appeal on supplemental analysis performed under instruction. Appeal was dismissed because regulations contain no provision for review of such analysis.</p>
<p>1994 Fishtrap Salvage Beaverhead NF</p>	<p>Dismiss</p>	<p>Appeal was dismissed because appellant did not comment during comment period.</p>
<p>1994 White Pine Creek Clearwater NF</p>	<p>Reverse with Instructions</p>	<p>To proceed the following must be performed: a) cumulative effects analysis (water and wildlife) b) analysis of old growth, c) range of alternatives considered. Rational used to support decision is inadequate. The assertion that the sale will restore forest health declining due to root diseases, missile toe , heart rot, bark beetles and blister rust is not shown to be affected by the proposed harvest. The responsiveness to public comments is inadequate or incomplete. Project does not comply with water standards. The project file</p>

		does not clearly show that the project will comply with Forest Plan standards for old growth and does not disclose effects to old growth. The range of alternatives does not support the rejection of un-even age management.
1993 Woodrat IPNF	Affirm	Affirmed at level one and two. All issues raised reported to be adequately discussed.
1993 Mid Skull-Upper Bear Clearwater	Affirm	All issues raised reported to be adequately discussed.
1993 Lava Mountain Helena	Affirm	Decision affirmed at level one and two. All issues raised reported to be adequately discussed.
1993 Sterling Edge Kootenai NF	Dismissed	Lack of substantive content.
1993 Beaver Dry Helena	Reverse	Reviewing Officer wrote “ the argument to provide a clear analysis of project or cumulative impacts by selecting a wide range of analysis units may have merit. Failure to provide cumulative effects analysis for sensitive animal species leaves the public and Deciding Officer without sufficient detail to make an informed decision.
1993 Callis Stewart	Reverse	Decision was affirmed at level two but reversed at level two. Effectiveness of

IPNF		mitigation techniques proposed (obliterating and deep ripping roads) to modify the hydrograph was not adequately analyzed. Inadequate disclosure on the offset of water yield increase.
1990 Dick Creek Lolo	Affirm	Affirmed at level one and two. Reported to have adequate public involvement, analysis of environmental effects, alternatives, and Forest Plan goals.
1990 Three Sisters IPNF	Affirm	All analyses reportedly adequate for the size and scope of the project.
1990 Lolo Yoosa Clearwater	Reverse	Decision should include site specific analysis for the mitigation measures selected for implementation (should document effectiveness of selected mitigation measures in reducing sediment movement throughout the streams and how the trapping of sediment will actual maintain or improve the substrate condition for fish habitat. Provide greater opportunity for public involvement.
1990 Big Boundary IPNF	Reverse	Reviewing officer ordered cumulative effects analysis for this sale combined with two other timber sales in the area.



### Appendix II Issues Raised Under Appeal

Year	9 0				9 3					9 4				
Decision	1	2	3	4	1	2	3	4	5	1	2	3	4	5
<u>Substantive Issues</u>														
Adversely affect: fish habitat			x	x	x							x		
wildlife habitat	x		x				x	x		x				x
Indicator species	x	x	x		x	x		x	x					x
Biodiversity		x	x					x	x	x		x		x
Failure to conserve wildlife species (ESA)							x						x	
Conservation biology					x			x	x	x			x	x
Economic analysis (public benefit?)								x						
Evaluation of T&E or sensitive species	x	x					x	x	x	x		x		x
Water quality (NFMA or state)	x	x	x				x	x						
Regeneration					x				x					
Visual Impact	x	x						x						
Recreational Resource	x													
Monitoring	x													
<u>Procedural Issues</u>														
Cumulative Effects Analysis			x	x	x	x			x	x	x	x	x	x
Inadequate fish and wildlife analysis			x	x	x				x	x				
Inadequate analysis of road			x							x	x		x	

density or impacts															
Poor or biased EA or EIS (needed)	x	x	x		x			x				x		x	
Roadless area impacts	x	x						x			x			x	
Economics (quality of analysis)	x	x						x	x						
Range of alternatives			x		x								x		
Public involvement										x		x			
Mitigation			x	x	x				x					x	
ESA (consultation)									x						
<u>Violation of Forest Plan or other FS standards</u>			x	x	x				x	x		x			

## **Appendix III Interview Questions**

### **Questions to the Environmental Community**

#### **Personal Information**

- 1) What is your job with .....
- 2) What is your training/background?
- 3) How have you been involved with the Forest Service's public involvement and appeals process?

#### **Mission/Group**

- 4) What do you or your group represent?
- 5) What percentage of this group's time and budget is spent on comment and appeal of timber sales?
- 6) Why are you (is this group) involved in the public involvement programs or appeals process?

#### **Influence**

- 7) Do you and your group's comments and appeals influence agency timber policy?
  - 8) What positive effects has your (group's) involvement in the appeals process produced?
- Other comments?

#### **Time Constraints**

- 9) Appellants are now held to a 30 day comment period and a 45 day appeal period. Are these time limits adequate for you to research and write high quality comments and appeals? (If not, how much time would you need?)
- 10) Do you think the time allowed the agency (45 days) for review and disposition of appeals is adequate to conduct a fair review of issues?
- 11) Other comments?

#### **Dispute Resolution**

- 12) What has been your experience with the informal meeting to negotiate an appeal before the rule change? After the rule change?
- 13) How has the process changed with the change in regulations?

- 14) Has the contact resulted in decision modification?
- 15) Describe the FS employee's attitudes toward the process. Do they come to the meeting ready to change a project or give anything up?

### **Writing/Review of Appeals**

- 16) When you write an appeal do you write certain components or the whole document?
- 17) Does anyone review your work?
- 18) Does your group coordinate with other groups so efforts are not being duplicated?
- 19) Do you feel that your appeals are reviewed by the agency impartially with sufficient attention to the merits of issues raised?

### **Disposition of Appeals**

- 20) The number of appeals dismissed has increased since the rule change. Can you offer some explanation for this?
- 21) The number of decisions reversed has dropped significantly (only one 1994 decision compared to 11 1993 decisions). Can you offer an explanation?
- 22) The number of decisions reviewed with instructions has risen dramatically in the last year. What is responsible for this increase?

### **Impact of Appeals on Timber Supply**

- 23) In Region One, timber related decisions were signed in 1990 for 535 mmbf. In 1994 that figure was down to 140 mmbf. What is responsible for that drop in volume? Does timber volume have anything to do with that drop.

### **Standing**

- 24) Has standing been an issue for you or your group in appealing a timber sale?
- 25) Do you raise any issues under appeal which you did not raise during the comment period?

### **Issues Raised Under Appeal**

- 26) Are you raising new issues under appeal that you were not raising four years ago?
- 27) Are there certain issues you don't raise under appeal any more? Why?
- 28) Are there any issues which you feel are ripe to be tested by the appeals process?

### **Judicial**

29) Will your organization be more or less likely to take timber sales to court in the future?

### **General**

30) Do you feel the new regulations have changed your (prospects for) success? How?

31) In general, how is your effort in the public comment and appeals process successful? How is it a failure?

32) Will your organization spend more/less/ same amount of time on appeals in the future?

33) Other comments?

### **Questions for Agency Employees**

#### **Personal**

1) What is your job with the FS? How long have you held that position?

2) What is your training/ professional background?

3) How have you been involved with public involvement and the appeals process?

#### **Mission**

4) What is the overriding mission of the USFS?

5) Can you briefly describe the philosophical context in which you approach your job?

6) Do you feel the management direction of the agency is changing? How?

7) Is there an increasing or decreasing emphasis on commodity production?

#### **Influence**

8) How has the increase in the number of appeals over the last five years affected your job?

9) Do you feel that the public comment and appeals process influences the timber policies of the agency? How?

10) Has this influence increased or decreased with the change in the appeals regulations?

#### **Time Constraints**

11) Appellants are now being held to a 30 day comment period and a 45 day appeal period. Do you have any sense of whether or not these time frames are adequate for them to research and write high quality comments and appeals?

12) Is this time allowed the agency reasonable for conducting an adequate review of issues raised under appeal? How much is needed?

13) Has the time limit influenced the quality of the review?

14) Has the change in time frames had any other affects on the appeals process?

### **Dispute Resolutions**

15) How has the approach to the resolution (informal disposal) meeting changed?

16) How frequently did the meeting occur under the old regulations?

17) How frequently does a meeting actually take place under the new regulations?

18) How successful is it now, how successful was it?

19) Does the meeting usually result in modification to the project?

20) What are the appellants attitudes toward the process? Do they come ready to negotiate?

21) What are the Forest Service's attitudes toward the process? Is the agency willing to make modifications or pull the decision?

### **Review of the Appeal**

22) How much time do you spend reviewing an appeal and the associated decision document?

23) What exactly is your role in the process?

24) Who actually reviews the issues raised in the appeals?

25) Are the reviewers based on the Region or the Forest level?

26) Do the reviewers ever come from the same Forest as the decision?

### **Disposition of Appeals**

27) The number of appeals dismissed has declined in the last year. Could you offer some explanation for this?

28) The number of decisions reversed has dropped significantly (only one 1994 decision compared to 11 1993 decisions). Can you offer an explanations?

29) Do the number of appeals of a project decision have any bearing on your review/decision on the appeals?

30) The number of decisions which are affirmed with instructions has risen dramatically. What is responsible for this increase?

**Impact of Appeals on Timber Supply**

- 31) On Region One, timber related decisions were signed in 1990 for 535 mmbf. In 1994 that figure was down to 139.6 mmbf. What is responsible for the drop in volume? Does timber volume have any thing to do with this drop?

**Standing**

- 32) Is standing broken down into component issues? That is, if I were to write comments, then an appeal, could I only appeal on issues that I raised in my comments?

**Issues Raised Under Appeal**

- 33) Have issues raised under appeal changed in the last four years? What new issues do you see? What issues do you no longer see?

**Judicial**

- 34) Have you seen an increase/ decrease in the number of appeals which are then taken to court?
- 35) How is the FS affected when an appealed case does go to court?

**General**

- 36) Do you feel the new regulations have changed appellants (prospects for) success? How?
- 37) In general, how is the public comment and appeals process successful? How is it a failure?
- 38) Other comments?