

Forest Service Land Management Litigation 1989–2002

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ABSTRACT

The land management decisions of the USDA Forest Service have been challenged and appealed frequently in federal court, and the agency believes such litigation constrains its professional expertise and frustrates effective forest management. This study provides the first complete picture of Forest Service land management litigation. Previous litigation studies limited their examination to published cases and did not analyze final case outcomes. We document the characteristics and final outcomes of 729 Forest Service management cases filed in federal court from 1989 to 2002. The Forest Service won 57.6% of cases, lost 21.3% of cases, and settled 17.6% of cases. It won 73% of the 575 cases decided by federal judges. Plaintiffs seeking less resource use lost more than half the cases they initiated, and plaintiffs seeking greater resource use lost more than two of every three cases they initiated. Most litigation (1) was for less resource use, (2) was based on the National Environmental Policy Act, and (3) challenged logging projects. The data indicate that the agency is less vulnerable in some types of cases and more vulnerable in others. This study provides policymakers, land managers, and stakeholders with accurate data that can help guide policy debate and choices.

Keywords: Forest Service Litigation, national forests, forest policy, lawsuits, federal court

Historically, federal courts had a minimal impact on the USDA Forest Service's management of national forests (Coggins et al. 2001). These courts generally deferred to federal administrative agencies' expertise, and parties could not sue the Forest Service unless they established individualized economic injury (Shapiro 1995). The legal landscape changed with (1) the passage of major statutes in the 1960s and 1970s that codified environmental protection and broadened public input and involvement in land management decisions and (2) federal courts' expansion of citizens' and advocacy groups' rights to sue (Shapiro 1995). These changes facilitated the "emergence of a well-educated and highly motivated citizenry that has the energy, time and money to engage. . . [agencies, and uses] the judicial system as a tool to influence agency decisions" (Floyd 2004, 9). The Forest Service was first affected by these

changes in 1970, when a US district court in *Parker v. United States* (309 F. Supp 593, D.CO) overturned a Forest Service land management decision (Coggins et al. 2001). By the 1980s, "nearly every significant decision of a federal agency was litigated in the federal courts," and the Forest Service was a leading land management agency defendant (Shapiro 1995, 51, Thomas and Sienkiewicz 2005).

Forest Service land management litigation is contentious. Courts review the Forest Service's management decisions to ensure the agency "actually and adequately take[s] into account the various factors and policies Congress intended to be implemented" (Buccino et al. 2001, 2). As a result, the Forest Service, like other federal agencies, expends "enormous efforts to defend themselves against adverse court review" (Shapiro 1995, 51). Critics assert that judicial challenges to land management decisions hinder

the Forest Service's decisionmaking process and that many lawsuits are frivolous and brought for the purpose of frustrating, rather than improving, these decisions (Baldwin 1997). The Forest Service believes litigation constrains it from "using [its] professional expertise" and prevents "national forest management from being as efficient and effective as it should be" (USDA Forest Service 2002, 13, 15).

Although a few studies have examined national forest management litigation, little empirical evidence exists to inform the controversy, and none of the existing research is based on a nonbiased selection of cases. This study addresses this methodological defect and provides the first complete picture of Forest Service land management litigation. It documents the characteristics and final outcomes of all Forest Service land management cases filed in federal court from 1989 to 2002.

After describing previous studies and our methods, we examine litigation trends and the various factors that affect the Forest Service's success in these cases.

Previous Litigation Research

All previous studies of Forest Service litigation, whether they examined Forest Service litigation only (Jones and Taylor 1995, Carter et al. 2003, Snape and Carter 2003, Malsheimer et al. 2004) or Forest Service litigation as part of a broader examination of environmental litigation (e.g., Wenner 1982, Wenner and Dutter 1988, Wenner and Ostberg 1994, Alden and Ellefson 1997, Malsheimer and Floyd 2004) are based on published judicial opinions. This creates two problems.

First, not all judicial opinions are published. As Malmshiemer et al. (2004, 21) explain, judges publish their judicial opinions when they believe that a decision “establishes ‘a new rule of law or affect[s] an existing rule, involve[s] an issue of continuing public interest, criticize[s] or question[s] existing law, or constitute[s] a significant and nonduplicative contribution to legal literature.’” Forest Service litigation studies analyzing only published opinions are based on a nonrandom sample of a population of all Forest Service cases. Although these studies help us understand the most important judicial opinions, they do not provide a true account of Forest Service litigation because they fail to examine cases based on unpublished decisions and cases resolved without a final judicial decision, including settlements and withdrawals. When we considered both published and unpublished cases, the number of cases analyzed more than tripled.

Second, although judicial opinions can be the “final dispositive decisions that ultimately resolve a case, . . . [they can also be] decisions on motions resolving important procedural or substantive aspects of a case” that do not ultimately resolve the case (Carter et al. 2003, 10974). Previous studies of Forest Service litigation have analyzed some judicial opinions that did not represent or describe the case’s ultimate outcome. For example, many judicial opinions in national forest management cases decide whether to grant a plaintiff’s motion for a preliminary injunction to halt a management activity until the case is ultimately resolved. In this situation, the court decides only whether to issue the preliminary injunction; it does not address the merits of the plaintiff’s case or render a verdict, and thus one cannot tell from reading the opinion whether the plaintiff or the Forest Service ultimately prevailed. We address this problem by analyzing the final outcomes of cases, rather than judicial opinions.

Methods

We analyzed all federal court cases filed from Jan. 1, 1989, to Dec. 31, 2002, in which the Forest Service was a defendant in a lawsuit challenging a land management decision. This 14-year period allowed us to examine both physical and electronic court records, ensuring a complete case database. The end date provided time for cases initiated during the later years to conclude.

We included all cases in which the plaintiff (1) argued that a Forest Service de-

cision affecting the use, classification, or allocation of a resource violated the law and (2) sought a court order directing the Forest Service to change its management decision. We did not analyze cases in which the following obtained:

- The plaintiff’s lawsuit requested only monetary compensation, such as US federal claims court cases adjudicating the payment or terms of timber contracts.
- The plaintiff disputed only the federal government’s ownership of the land in a national forest or grassland, such as quiet-title actions.
- Forest Service employees challenged employment decisions.
- The plaintiff’s lawsuit was based solely on a violation of a state law.
- The lawsuit’s purpose was only to gain access to information or meetings, such as cases based on the Freedom of Information Act or the Federal Advisory Committee Act.
- The Forest Service did not have the discretion to make the final management decision, as when the Forest Service made recommendations to the Federal Energy Regulatory Commission (FERC) about the licensing of an FERC project located in a national forest, but FERC retained decision-making authority.

Locating cases that met our criteria was difficult. No one, including the Forest Service and the USDA Office of General Council (OGC), has a list of all Forest Service cases during this period, and the data required cannot be generated exclusively through the electronic legal databases. In addition, a list cannot be generated by physically visiting the court clerk offices in each of the nation’s 94 district courts and its 12 courts of appeals, because many of the court records for this time period have been moved to National Archives and Records Administration (NARA) records centers. To address this problem, we used a three-step crosschecking methodology.

First, the national litigation coordinator, who works in the Forest Service’s Ecosystem Management Coordination office, provided us with a list of all cases known to his office. Second, we used three electronic legal databases to add cases to this list. Two of these electronic legal databases, Westlaw and Lexis-Nexis, contain legal opinions from all published cases and a few unpublished cases during the study period. We searched these databases using search terms such as “Forest Service” and “national forest.” The third legal database, Public Access

to Courts Electronic Resources (PACER), contains information by court jurisdiction on all published and unpublished cases filed in US district courts and US courts of appeals. We searched PACER’s records for cases in which the Forest Service was a defendant and eliminated cases that did not meet our criteria. Third, the national litigation coordinator asked Forest Service and OGC employees to review the list for completeness and notify us of missing cases. Although this methodology does not ensure that we located every case that would meet our criteria, it used the best resources available and represents the most complete list of national forest land management cases assembled at this time.

We analyzed two documents for most cases: (1) its docket sheet and (2) for cases decided by the court, the judicial opinion; for settled cases, the court-approved settlement; or for cases withdrawn by one or both parties, the notice of withdrawal. The docket sheet contains the filing date, parties to the lawsuit, the name of the judge, and the case’s procedural history; however, it does not contain information about the purpose of the lawsuit, its statutory basis, or other case characteristics. We obtained the majority of the docket sheets through PACER; we located the remaining docket sheets directly from district court and court of appeals court clerks.

To understand the purpose of the suit and other case characteristics, we needed the court’s final decision, settlement agreement, withdrawal notice, or other documents. We obtained copies of documents for published cases and some unpublished cases from Westlaw and Lexis-Nexis. The Forest Service’s litigation coordinator provided us with documents for some unpublished cases, and we obtained copies of other unpublished cases’ documents from the court clerks. We were unable to obtain complete documentation for some cases because case folders were archived at NARA facilities, and the cost of obtaining additional documentation was prohibitive. This problem affected 19% of our cases and involved only three variables: case purpose, statutory basis, and type of management activity.

We read and coded the documents for each case. For cases that were appealed to the court of appeals (and US Supreme Court), we read and coded these documents at all court levels. We coded each case for its date, location, litigants’ characteristics, statutory basis, specific case characteristics, and final

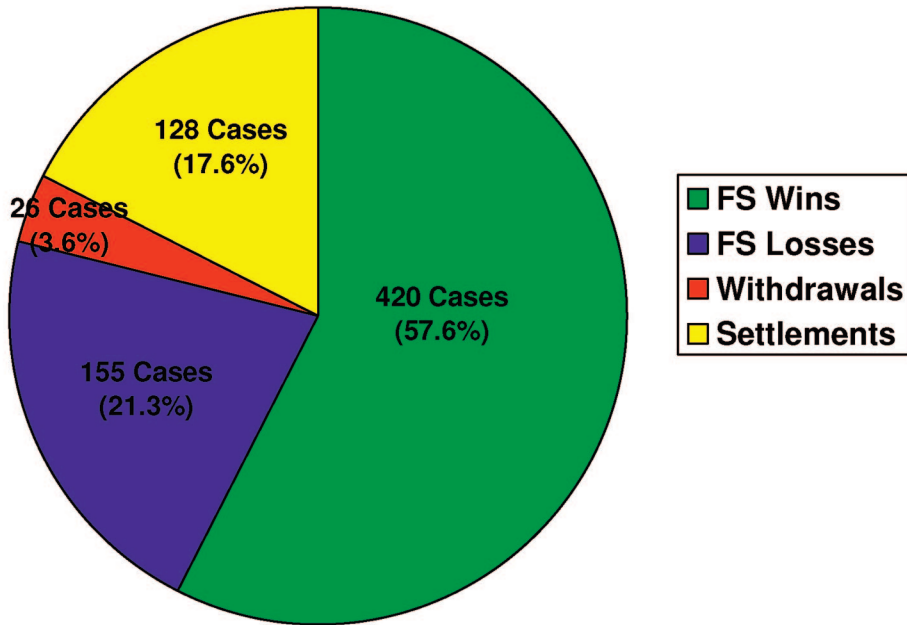


Figure 1. Number of land management cases from 1989 to 2002, by final case outcome.

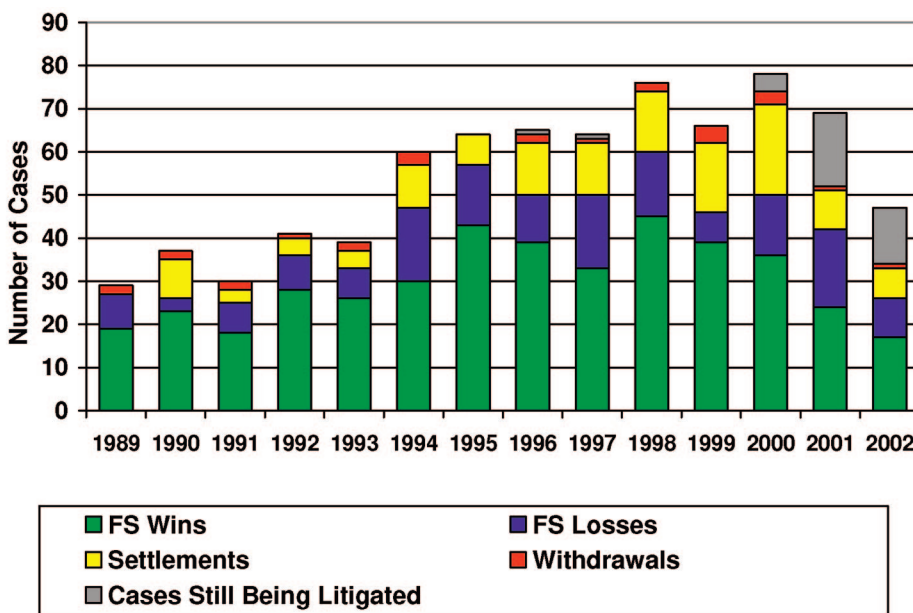


Figure 2. Number of land management cases from 1989 to 2002 and final case outcomes (as of Apr. 15, 2005), by the year the case was commenced.

disposition. We coded cases' final disposition into four categories. For cases in which the final disposition was a judicial decision (rather than a settlement or withdrawal), we coded cases in which the court found that the Forest Service had done anything incorrectly as a Forest Service "loss," because the case at least partially altered or delayed a Forest Service land management decision. We coded cases with judicial decisions finding that the Forest Service had not done anything incorrectly as a Forest Service "win." A

"withdrawal" was a case withdrawn by one of the parties before a judge decided the case on its merits. We coded the case a "settlement" if the parties agreed to a court-ordered stipulated agreement to settle their dispute.

Results

We identified 729 completed legal challenges to Forest Service land management during the 14 years examined (Figure 1). Twenty-six (3.6%) of the cases were

withdrawn by the plaintiffs before judges made decisions on the cases' merits. One hundred twenty-eight (17.6%) cases settled. Courts decided 575 (78.9%) cases; the Forest Service won 420 (57.6%) of these cases and lost 155 (21.3%). Thus, the Forest Service won 73.0% of the 575 cases where the final outcome was decided by a judge or panel of judges (i.e., cases not settled or withdrawn) and lost only 27.0% of these cases.

Litigants appealed 257 (44.7%) of the 575 cases decided by a US district court judge to the US courts of appeals. The Forest Service won 190 (73.9%) of these cases in the courts of appeals. Litigants asked the US Supreme Court to review the courts of appeals' decisions in 21 cases. The Supreme Court denied the certiorari petition in 20 cases and decided for the Forest Service in one case (*Ohio Forestry Association v. Sierra Club*, 523 US 726 [1998]).

Trends over Time. An analysis of cases by date of initiation shows that land management litigation generally increased from 1989 to 2000 and then decreased during the first two years of President George W. Bush's administration (Figure 2). Only 36 cases initiated during this time had not been resolved as of Apr. 15, 2005; we did not include these cases in any analyses. The Forest Service averaged 52 cases per year, with a high of 76 cases in 1998. The Forest Service experienced its highest percentage of losses in 1994, 1997, and 2000.

Location of Cases. Litigation varied greatly by Forest Service region (Figure 3). Region 6 (Washington and Oregon) experienced the most litigation. Region 6 represents 12.8% of total National Forest System (NFS) acreage but accounted for 22.8% of all cases. Region 9 (Northeast) also experienced a disproportionate number of cases in comparison with its percentage of national forest acreage: the region represents only 6.3% of the total NFS but was responsible for 12.1% of all cases. Regions 2, 8, and 10 experienced the least litigation. The Forest Service was more likely to lose challenges in Region 1 (North Dakota, Montana, and northern Idaho), and it also settled the most cases in this region (28.7%). The Forest Service was most likely to win in Region 2, the Intermountain West (68.5%), and in Region 8, the Southeast (67.9%).

Case Characteristics

We were unable to obtain complete documentation for 137 (18.8%) cases be-

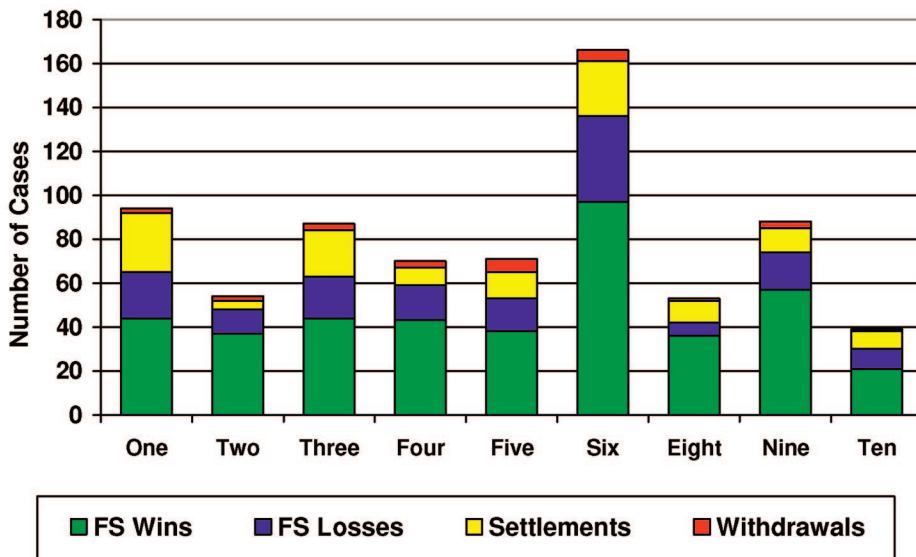


Figure 3. Number of land management cases from 1989 to 2002 and final case outcomes, by Forest Service region (note: There is no region 7).

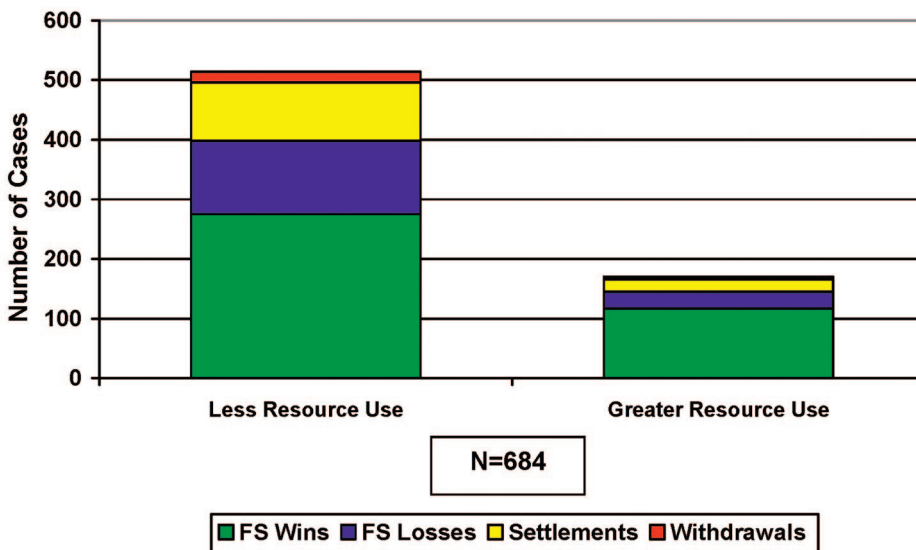


Figure 4. Number of National Forest management cases from 1989 to 2002 and final case outcomes, by purpose of litigation.

cause these cases' folders were archived at the NARA facilities and the cost of obtaining further documentation was prohibitive. This problem affected three characteristics to varying degrees because we had additional documentation for some of the cases. It affected 45 (6.2%) cases for our analysis of case purpose, 104 (14.3%) cases for the activity challenged, and between 118 and 137 (16.2–18.8%) cases for our analyses of statutory basis.

Purpose of Cases. To understand the purposes of land management litigation, we classified each case's purpose as either for less resource use or for greater resource use. For example, if a recreation outfitter brought a

lawsuit to prevent the Forest Service from conducting a timber sale in an area used by the outfitter, we classified the purpose of the lawsuit as "less resource use." If a recreation outfitter brought a lawsuit to prevent the Forest Service from decreasing the number of special-use permits available to outfitters, we classified the purpose of the lawsuit as "greater resource use."

Most litigants (75.1%) sued the Forest Service for less resource use (Figure 4). The Forest Service won 275 (53.5%) of these cases, lost 123 (23.9%) cases, and settled 98 (19.1%) cases; 82.4% of all settlements were in less resource use cases. Cases seeking greater resource use accounted for 24.9% of

all cases, of which the Forest Service won 117 (68.8%), lost 28 (16.5%), and settled 21 (12.4%) cases. The Forest Service won 80.7% of cases where the final outcome was decided by a judge or panel of judges (i.e., cases not settled or withdrawn) where plaintiffs sought greater resource use and development.

Management Activity Challenged. We coded cases into 17 mutually exclusive management activity categories, based on the primary purpose of the land management activity. For example, if a logging project included some road building to gain access to the project site, we coded the case as a logging case. Figure 5 shows the 11 categories containing more than 3% of cases. The remaining categories were land exchanges between the Forest Service and government or nongovernmental organizations (2.6%), access to private in-holdings or right-of-ways (2.3%), commercial development (1.6%), roadless areas (1.5%), herbicide or pesticide use (1.3%), and oil and gas development (1.1%).

Planning cases (involving a challenge to a national forest's land and resource management plan) and logging cases each accounted for more than 10% of all cases. Combined, salvage and logging cases represented 37.8% of all cases. The Forest Service win, loss, and settlement rates in cases involving these activities were close to its overall percentages during this time. The Forest Service won more than 65% of cases involving mining, road (construction or decommission), and special-use permits (issued at the Forest Service's discretion for a wide range of activities, such as concessions, ski areas, facility use, and tour guides). It lost more than a quarter of its wilderness and wildlife cases. It was more likely to settle water cases (including dams, water diversion, and riparian zone management) than any other category of case.

Statutory Basis. To understand how litigants challenged national forest management activities, we coded cases for all the statutes that plaintiffs argued the Forest Service had violated (Figure 6). Because plaintiffs often contended that the Forest Service had violated more than one statute, our statutory categories were not mutually exclusive, except for the Administrative Procedures Act (APA). The APA addresses judicial review of agency actions and therefore serves as the standard of judicial review in every case. Because the APA is the legal basis for courts' reviews of every case, we coded the

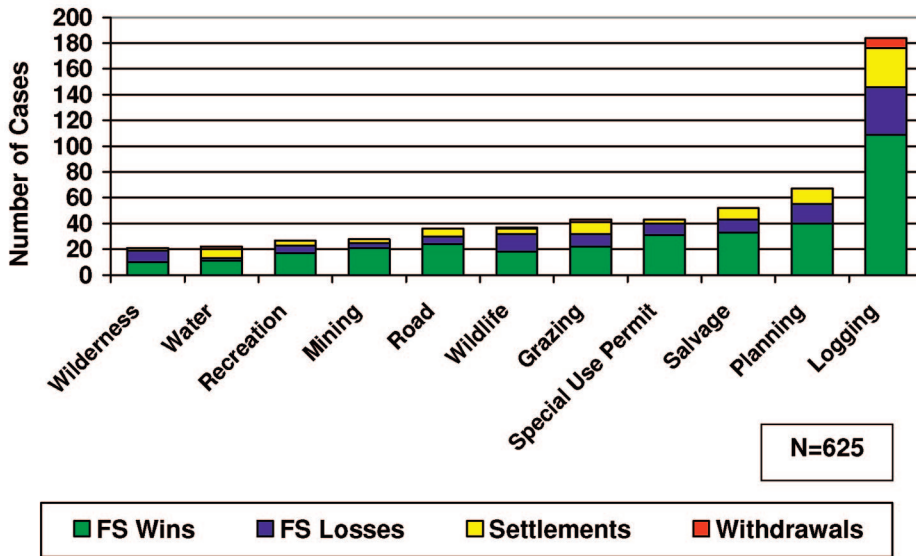


Figure 5. Number of National Forest management cases from 1989 to 2002 and final case outcomes, by management activities involved in more than 3% of cases.

APA as a case's statutory basis when it was the only statute that plaintiffs said the Forest Service had violated.

Litigants said the Forest Service had violated more than 30 statutes, but three dominated the cases: the National Environmental Policy Act of 1969 (NEPA), 68.6% of all cases; the National Forest Management Act of 1976 (NFMA), 43.5%; and the Endangered Species Act of 1973 (ESA), 17.9%. Forest Service wins, losses, and settlements in NEPA and NFMA cases generally reflect our study's overall data. However, the Forest Service won only 50.0% of ESA cases and settled 21.3%—a lower win percentage than the study's average and a higher settlement rate.

The Forest Service was most successful in litigation involving the 1995 Salvage Rider (84.2%) and the National Historic Preservation Act (77.8%). The Forest Service won the fewest cases defending itself against challenges based on the Alaska National Interest Lands Conservation Act (1980, 36.4%) and the Wilderness Act (TWA) (44.4%).

Discussion

Our results show why studies of Forest Service land management litigation must analyze more than just published judicial opinions if they are to be useful to policymakers, land managers, and stakeholders. Of the 729 cases we identified, only 220 had published judicial opinions. By identifying and studying an additional 509 cases, we found that the Forest Service won almost

58% of cases, and it prevailed in 73% of cases where the final outcome was decided by a judge or panel of judges (i.e., cases not

settled or withdrawn). Previous research based on published opinions underestimated the Forest Service's success rate. For example, our previous estimate (Malmsheimer et al. 2004) of Forest Service success decided at the court of appeals was only 57.1%.

The Forest Service settles almost as many land management cases as it loses. There are many reasons why the Forest Service would settle; one obvious reason is that the plaintiff's case has some merit. However, as Thomas and Sienkiewicz (2005) point out, settlements are often the choice for (1) time-sensitive cases, (2) cases in which judges actively broker settlements, and (3) "sue and settle" cases, in which the agency makes policy changes by encouraging legal actions. Regardless of the reason for the prevalence of settlements, our findings indicate that settlements are an important dispute-resolution tool.

Litigation generally increased during the study's first 12 years. However, the trend was reversed during the first two years of

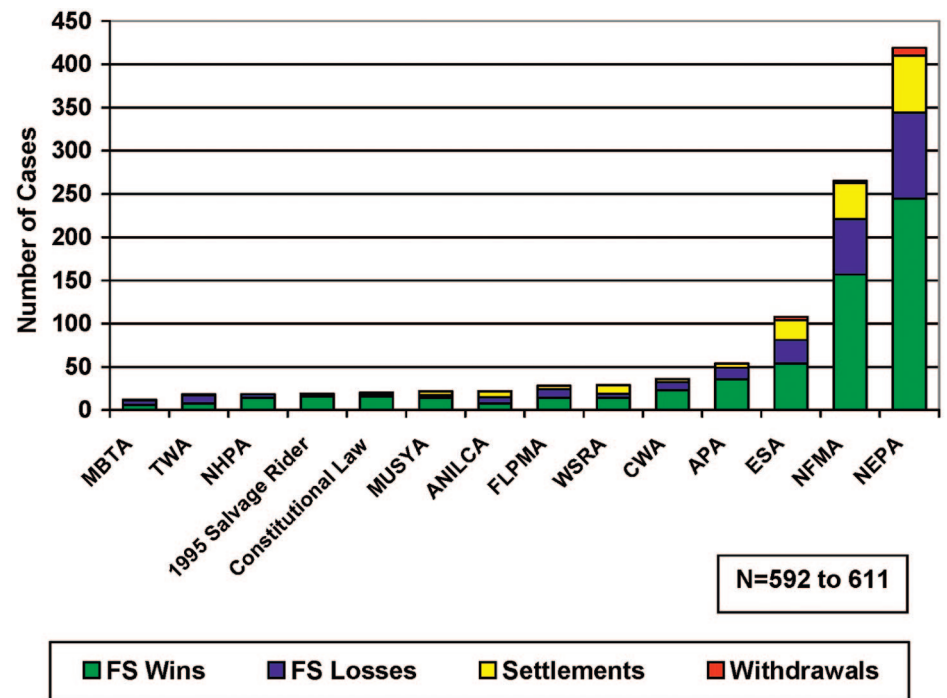


Figure 6. Number of National Forest management cases from 1989 to 2002 and final case outcomes, by statutes involved in more than 2% of cases. MBTA, Migratory Bird Treaty Act; TWA, The Wilderness Act; NHPA, National Historic Preservation Act; 1995 Salvage Rider, Emergency Salvage Timber Sale Program Salvage Rider (part of the Emergency Supplemental Appropriations and Rescissions Act [P.L. 104-19]); Constitutional Law, a provision of the US Constitution; MUSYA, Multiple Use and Sustained Yield Act; ANILCA, Alaska National Interest Lands Conservation Act; WSRA, Wild and Scenic Rivers Act; FLPMA, Federal Land Policy and Management Act; CWA, Clean Water Act; APA, Administrative Procedures Act; ESA, Endangered Species Act; NFMA, National Forest Management Act; NEPA, National Environmental Policy Act.

President George W. Bush's administration. Increasing litigation was not unique to the Forest Service: other natural resource agencies experienced similar increases over time (Malmsheimer 1999), and this research corroborates previous national forest management litigation studies that found a general increase in cases over the past three decades. This increase "coincides with the growing availability of legal expertise and resources among interest groups, particularly environmental organizations, and is indicative of the growing demand for public involvement in Forest Service decisionmaking (Tipple and Wellman 1991)" (Jones and Taylor 1995, 317).

We expected variation in the number of cases by Forest Service region. Other research reported similar findings. However, the large volume of Region 6 cases was unforeseen, despite the public focus on the spotted owl and the Northwest Forest Plan. The underlying cause of this volume may involve the region's large number of both endangered species and advocacy organizations.

Although our analysis of case characteristics revealed that most challenges involve plaintiffs wanting less resource use and using NEPA and NFMA to challenge logging activities, it also uncovered a few surprises. Plaintiffs seeking less resource use lost more than half the cases they initiated, and plaintiffs seeking greater resource use and development lost more than two of every three cases they initiated. This confirms Malmsheimer et al.'s (2004) observation that continued litigation (despite low chances for success) suggests that the indirect benefits of litigation, such as publicity and delay of Forest Service action, may be as important to litigants as the direct benefits of winning a case. Our results add to this observation by documenting that even if they do not often win cases, plaintiffs can expect to receive the benefits of a settlement in one of every six cases.

Our research indicates that plaintiffs sue the Forest Service over logging more than any other activity; nevertheless, logging cases represented less than 40% of cases. It is also important to remember that many Forest Service projects are multifaceted, and other land management objectives, such as weed control, may be forestalled or forgone in logging cases. The Forest Service's win, loss, and settlement variability among activities indicates that the Forest Service is less vulnerable in some types of cases.

The legal basis of most lawsuits challenging Forest Service management is major legislation passed in the 1960s and 1970s that codified protection of the environment and broadened the role of public input and involvement in land management decisions. Our research indicates that although most lawsuits are based on NEPA and NFMA, litigants have attempted to use many statutes to challenge Forest Service land management decisions. Interestingly, our findings contradict Malmsheimer et al.'s (2004) research that found that of the six statutes they examined, the Forest Service was most successful (68.8%) in cases involving TWA.

Conclusion

This study analyzed a census of legal challenges to Forest Service national forest management initiated from 1989 to 2002; it represents the most complete picture of national forest litigation assembled to date. The results confirm many policymakers' and stakeholders' perceptions: three of every four cases involve parties seeking less resource use; Region 6, the Pacific Northwest, experienced almost a quarter of all litigation; and NEPA was the statutory basis in nearly 7 of every 10 cases.

Our study did not address the overall impact of litigation on Forest Service land management decisions, but it is important to remember that the 729 cases we examined did not represent 729 land management projects or plans. Many lawsuits involved multiple projects, and many cases established a legal precedent that directed future Forest Service land management decisions. The Forest Service makes thousands of management decisions each year (the precise number for our period is unknown). We still cannot estimate the total percentage of projects that were subject to litigation.

Our findings also revealed some unexpected results. Litigation increased during these 14 years; however, a decrease occurred after 2000. Although logging was the focus of most lawsuits, other management activities accounted for more than 60% of cases. Many statutes besides NEPA, NFMA, and ESA provided the statutory basis for plaintiffs' challenges. Forest Service success varied widely based on the statute involved in the lawsuit and the Forest Service activity litigated. Most importantly, this study documented the prevalence of settlements in national forest management cases. More than one of every six cases resulted in a settlement between the Forest Service and the party

bringing the lawsuit. It appears, then, that both the Forest Service and its litigant adversaries view settlements as an important dispute-resolution tool.

This study informs the contentious issues surrounding the use of litigation to influence land management decisions on the national forests and grasslands and provides policymakers, land managers, and stakeholders with an accurate account of 14 years of litigation. Good policy decisions are data driven, not based on anecdotal information. This study provides a foundation for Forest Service land management litigation discussions that can help guide policy choices.

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