

Forest Service Land Management Litigation 1989-2005:

A Report to the USDA Forest Service

By

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December 30, 2008



Abstract

This report documents the characteristics and final outcomes of 949 Forest Service management cases filed in federal court from 1989 to 2005 and completed by May 15, 2008. It updates and expands the analysis provided in Keele, Malsheimer, Floyd, and Perez's (2006) analysis of Forest Service litigation from 1989 to 2002. The Forest Service won 54.8 percent of these cases, lost 21.4 percent, and settled 23.8 percent. It won 70.0 percent of the 656 cases decided by federal judges. Plaintiffs seeking less use of national forest resources lost more than half the cases they initiated, and plaintiffs seeking greater use of resources lost more than 65 percent of the cases they initiated. Most litigation 1) was for less resource use, 2) was based on the National Environmental Policy Act, and 3) challenged logging, harvesting, and timber sale projects. The findings indicate that the Forest Service is less vulnerable in some types of cases, more in others. Additional, more detailed analysis is available upon request.

Introduction

This report documents the characteristics and final outcomes of 949 Forest Service management cases filed in federal court from 1989 to 2005 and completed by May 15, 2008. It updates and expands the analysis provided in Keele, Malmshheimer, Floyd, and Perez's (2006) *Journal of Forestry* article describing Forest Service litigation from 1989 to 2002. While important trends such as the prevalence of plaintiffs requesting less use of national forest resources forest and the pervasiveness of litigation based on the National Environmental Policy Act remained similar to the previous findings, there was a slight increase in the percentage of cases that were appealed and cases courts classified as projects primarily concerned with logging, harvesting, and timber sales (hereinafter "logging"). Our updated findings highlight the importance of continuously tracking and updating results with newly closed cases in order to accurately reflect the Forest Service's litigation activity and outcomes.

Methods

We analyzed all federal court cases filed from January 1, 1989, to December 31, 2005, and completed by May 15, 2008, in which the U.S. Forest Service was a defendant in a lawsuit challenging a land management decision. The case completion provided time for cases initiated during the later years of this 17-year period to conclude.

We defined land management cases as cases in which the plaintiff 1) argued that a Forest Service decision 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 the following types of cases:

- 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; and
- 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 a FERC project located in a national forest, but FERC retained decision-making authority.

We analyzed two documents for most cases: its 1) docket sheet, and 2) one of the following: a) for cases decided by the court, the judicial opinion, b) for settled cases, the court-approved settlement, or c) 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 opinions’ documents from the court clerks. We were unable to obtain complete documentation for some cases because case folders were archived at the National Archives and Records Administration facilities.

We read and coded the documents for each case. For cases that were appealed to the US 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 disposition. We coded cases’ final disposition into three categories:

- *Forest Service Win*: We coded a case as a Forest Service “win” if: 1) the court found that the Forest Service had *not* done anything incorrectly, 2) the court dismissed the case on procedural grounds, 3) the case was withdrawn by the plaintiff before a judge decided the case on its merits, 4) the plaintiff terminated the case after a judge denied the plaintiff’s

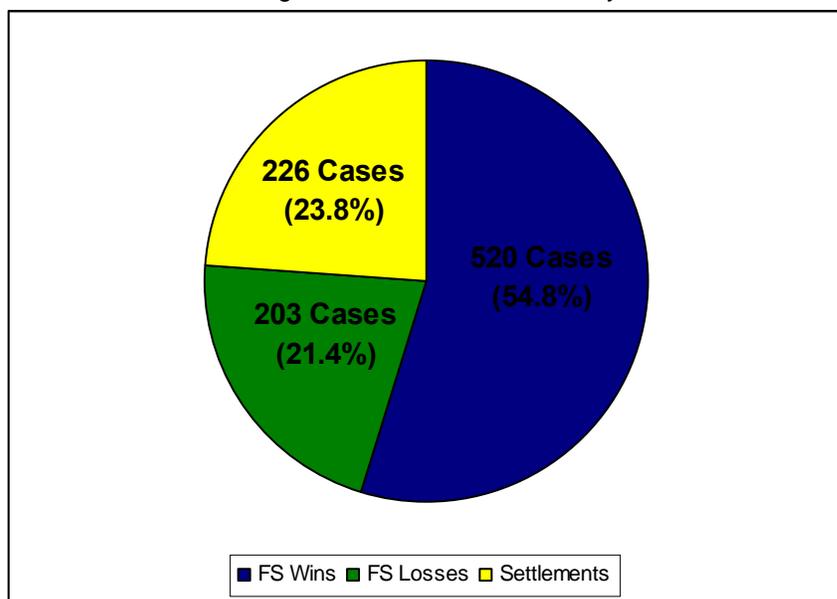
request for a preliminary injunction, or 5) the court dismissed the case after plaintiff and defendant agreed to a stipulation for voluntary dismissal.

- *Forest Service Loss*: We coded case a case as a “loss,” since the case at least partially altered or delayed a Forest Service land management decision, if: 1) the court found that the Forest Service had done anything incorrectly, or 2) the Forest Service withdrew its plans for a project/forest plan.
- *Settlement*: We coded the case a “settlement” if the parties agreed to a court-ordered stipulated agreement to settle their dispute.

Results

We identified 949 completed legal challenges to Forest Service land management during the 17 years examined (Figure 1). Two hundred twenty-six (23.8%) cases settled. The Forest Service won 520 (54.8%) of these cases and lost 203 (21.4%).

Figure 1: Number of land management cases 1989-2005, by final case outcome.

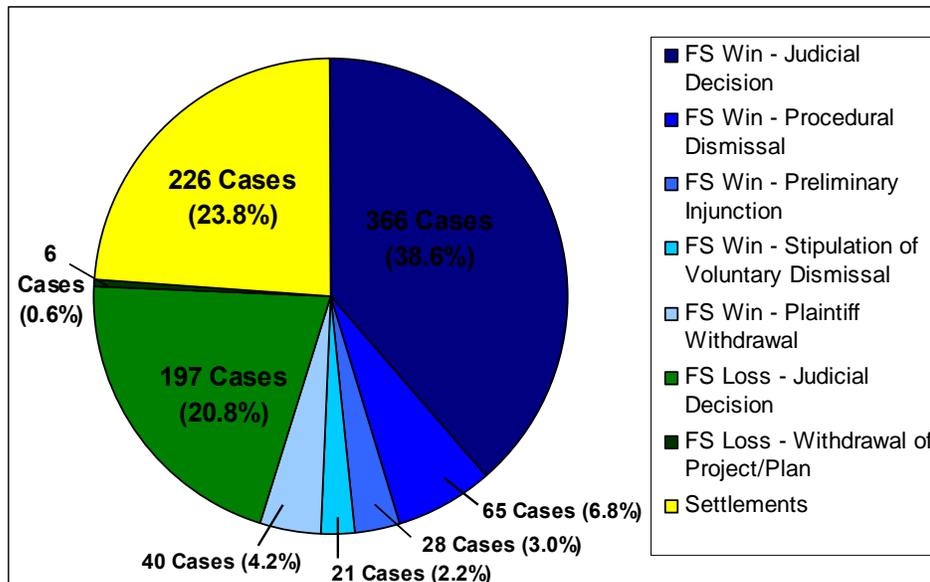


To further understand case outcomes, we analyzed the two types of Forest Service “losses” by the sub-categories mentioned above, namely cases where: 1) the court found that the Forest Service had done anything incorrectly, and 2) the Forest Service withdrew their plans for a project/forest plan (Figure 2). We did the same thing with Forest Service “wins”; classifying them into five sub-categories, cases where: 1) the

Malmsheimer and Anderson – Forest Service Land Management Litigation 1989-2005

court found that the Forest Service had *not* done anything incorrectly, 2) the court dismissed the case on procedural grounds, 3) the case was withdrawn by the plaintiff before a judge decided the case on its merits, 4) the plaintiff terminated the case after a judge denied the plaintiff’s request for a preliminary injunction, or 5) the court dismissed the case after plaintiff and defendant agreed to a stipulation for voluntary dismissal.

Figure 2: Number of land management cases 1989-2005, by final case outcome.



This analysis allows us to better understand the 656 cases where the final outcome was decided by a judge or panel of judges. These cases include:

- The 197 Forest Service losses where the court found that the Forest Service had done anything incorrectly, and
- The 459 Forest Service wins where:
 - the court found that the Forest Service had not done anything incorrectly (366 cases),
 - the court dismissed the case on procedural grounds (65 cases), and
 - the plaintiff terminated the case after a judge denied the plaintiff’s request for a preliminary injunction (28 cases) – under the theory that the judge’s decision on the preliminary injunction gave the plaintiff a “preview” of the judge’s view of the plaintiff’s case.

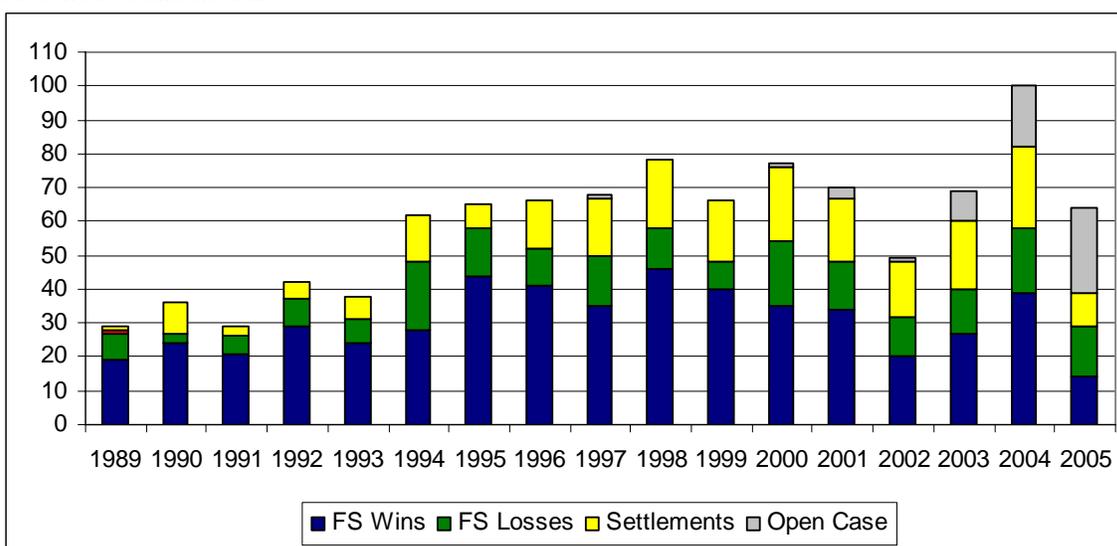
The Forest Service won 70.0 percent of these cases. If we compare the 197 Forest Service losses where the court found that the Forest Service had done anything incorrectly to the 366 cases where the court found the

Forest Service had not done anything incorrectly – cases where a judge or panel of judges made a final decision on the case’s merits – the Forest Service still won nearly of two (65.0%) of every three of these cases.

Litigants appealed 345 (52.6%) of the 656 cases decided by a U.S. district court judge to the US courts of appeals. The Forest Service won 184 (71.2%) of these cases, and lost 76 (28.8%). Thirteen cases (3.8%) were settled at the appellate level and 72 (20.6%) cases were withdrawn before a court of appeals court could render a decision. Litigants asked the US Supreme Court to review the court of appeals’ decision in 32 cases, and only one Forest Service land management cases was reviewed in a full Supreme Court opinion: *Ohio Forestry Association, Inc.v. Sierra Club* (523 U.S. 726 (1998)).

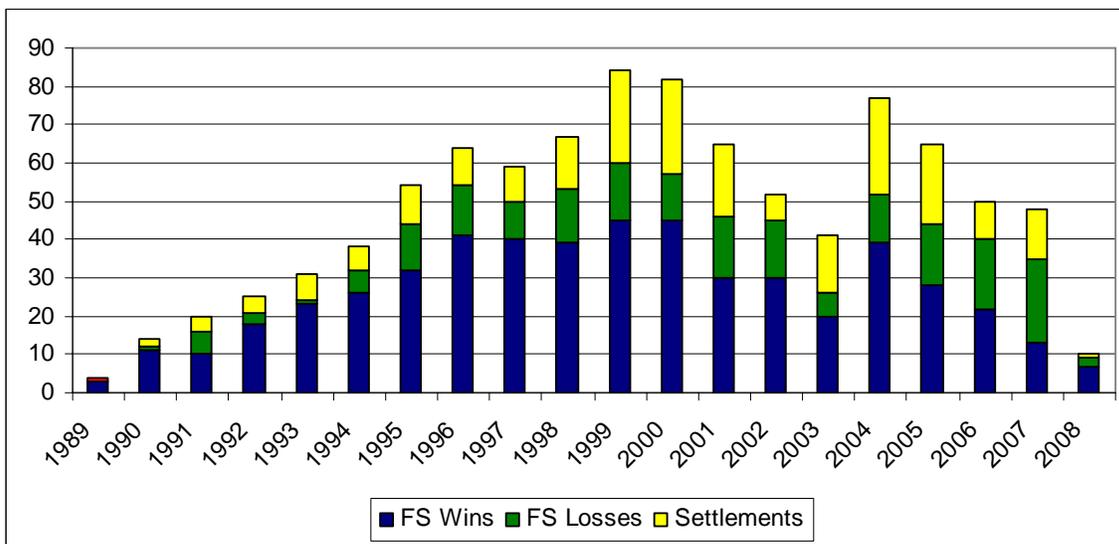
Temporal trends. An analysis of cases by date of initiation shows that land management litigation generally increased from 1989 to 2000 and then decreased during the first two years of President George W. Bush’s administration (Figure 3). Fifty-eight cases initiated during this 17 year period had not been resolved as of May 15, 2008; we did not include these cases in any analyses. The Forest Service averaged 56 cases per year, with a high of 82 cases filed in 2004. The Forest Service experienced its highest percentage of wins in cases that were initiated in 1991 (72.4%), 1992 (69.0%), and 1985 (67.7%) and it highest percentage of losses in cases that were initiated in 1994 (32.3%) and 2005 (38.5%).

Figure 3: Number of land management cases 1989-2005 and final case outcomes (as of May 15, 2008), by year case was commenced.



In addition to an analysis of the date of cases commenced, we also analyzed cases by the date the case was completed or closed (Figure 4). As expected, the number of cases increases during the first few years of our records and decreases during the last year. The early increase occurs because our records do not include cases initiated prior to 1989 and most cases that closed from 1989 to 1993 would have been initiated before this time. The significant decrease in the last year occurs because we only analyzed cases that closed as of May 15, 2008, so we only have records for five and a half months of 2008. The number of cases closed peaked in 1999 and 2000 and again in 2004. Closed cases declined from 2000 to 2003, the last two years corresponding to the decline in cases initiated in 2001 and 2002. The Forest Service won more cases early in the 17 year period: more than 70 percent of cases in 1990, 1992, and 1993 and an average of 64.9 percent of its cases each year from 1994 to 1997. Conversely, the agency won less than half of the cases in 2001, 2003, and from 2005 to 2007 – it lost nearly half (45.8%) of the cases decided in 2007. Settlement rates were higher during the end of this 17 year period, with the agency settling an average of three of every ten cases in 2000 and from 2003 to 2005.

Figure 4: Number of land management cases 1989-2005 and final case outcomes (as of May 15, 2008), by the year the case ended.



Spatial trends. Litigation varied greatly by Forest Service region (Table 1). Region 6 (Pacific Northwest) experienced the most litigation. While it represents 12.8 percent of total National Forest System (NFS) acreage, it accounted for 22.4 percent of all cases. Region 9 (Northern) also experienced a disproportionate number of cases in comparison with its percentage of national forest acreage: the region

represents only 6.3 percent of the total NFS but was responsible for 10.5 percent of all cases. Regions 2 (Rocky Mountain), 8 (Southern), and 10 (Alaska) experienced the least litigation. The Forest Service was most likely to win in Region 8 (Southern) (71.4%), Region 2 (Intermountain) (68.5%), and Region 9 (Northern) (65.0%). It was more likely to lose challenges in Region 5 (Pacific Southwest) – although a number of other regions had similar loss percentages. The agency settled the most cases in Region 3 (Southwest) (30.6%).

Table 1: Number of land management cases 1989-2005 and final case outcomes by Forest Service Region.

Forest Service Region	Acres in Thousands (Percentage of NFS)**	Number of Cases (Percentage of Total Cases)	Number of Cases Forest Service Won (Success Rate)	Number of Cases Forest Service Lost (Loss Rate)	Number of Cases Forest Service Settled (Settlement Rate)
One (Northern)	25,420 (13.2%)	120 (12.6%)	63 (52.5%)	23 (19.2%)	34 (28.3%)
Two (Rocky Mtn.)	22,063 (11.8%)	73 (7.7%)	50 (68.5%)	7 (9.6%)	16 (21.9%)
Three (Southwestern)	20,804 (10.8%)	108 (11.4%)	52 (48.1%)	23 (21.3%)	33 (30.6%)
Four (Intermountain)	32,011(16.6%)	99 (10.4%)	49 (49.5%)	24 (24.2%)	26 (26.3%)
Five (Pacific Southwest)	20,104 (10.5%)	113 (11.9%)	57 (50.4%)	31 (27.4%)	25 (22.1%)
Six (Pacific Northwest)	24,711 (12.8%)	213 (22.4%)	110 (51.6%)	53 (24.9%)	50 (23.5%)
Eight (Southern)	13,252 (6.9%)	70 (7.4%)	50 (71.4%)	6 (8.6%)	14 (20.0%)
Nine (Northern)	12,051 (6.3%)	100 (10.5%)	65 (65.0%)	23 (23.0%)	12 (12.0%)
Ten (Alaska)	21,987 (11.4%)	45 (4.7%)	21 (46.7%)	11 (24.4%)	13 (28.9%)
District of Columbia*	–	8 (0.8%)	3 (37.5%)	2 (25.0%)	3 (37.5%)
*Since cases decided by the Court of Appeals for the District of Columbia’s District Court and Court of Appeal are cases that affect the entire NFS and therefore do not involve one Forest Service Region, we could not analyze these cases by Forest Service Region.					
**Source: Forest Service Land Area Report 2001. Available at: http://www.fs.fed.us/land/staff/lar/LAR01/ .					

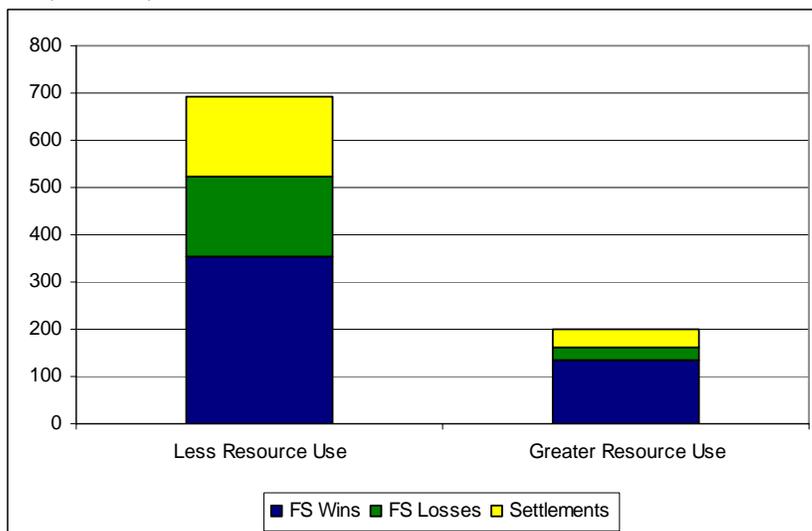
Case Characteristics

We were unable to obtain complete documentation for 149 (15.7%) cases because these cases’ folders were archived at the National Archives and Records Administration facilities. The Forest Service won 86 (57.7%) of these cases, lost 10 (6.7%), and 53 (35.6%) cases settled. While incomplete documentation did not affect our ability to analyze case outcomes, or temporal or spatial trends, it did affect (to different degrees, because we had additional documentation for some of the cases) three case characteristics. It affected 56 (5.9%) cases for our analysis of case purpose, 113 (11.9%) cases for the

activity challenged, and between 131 and 149 (13.8%-15.7%) 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 use of national forest resources (hereinafter “less resource use”) or for greater use of national forest resources (hereinafter “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.”

Figure 5: Number of National Forest management cases 1989-2005 and final case outcomes, by purpose of litigation. (N = 893)



Most litigants (72.9%) sued the Forest Service for less resource use (Figure 5). The Forest Service won 352 (50.9%) of these cases, lost 171 (24.7%), and settled 169 (24.4%); 74.8 percent of all settlements were in less resource use cases. The Forest Service won 65.4 percent of cases where the final outcome was decided by a judge or panel of judges¹ where plaintiffs sought less resource use and development. Cases seeking greater resource use accounted for 21.2 percent of all cases, of which the Forest Service won 133

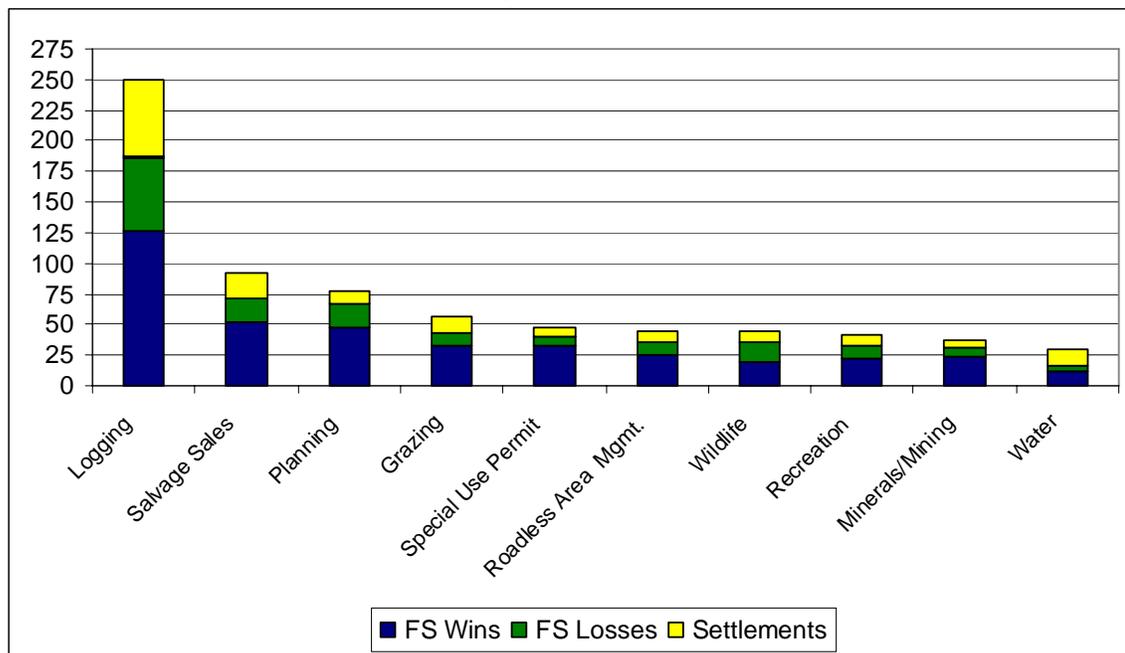
¹ As noted above, these cases include:

- The 197 Forest Service losses where the court found that the Forest Service had done anything incorrectly, and
- The 459 Forest Service wins where:
 - the court found that the Forest Service had not done anything incorrectly (366 cases),
 - the court dismissed the case on procedural grounds (65 cases), and
 - the plaintiff terminated the case after a judge denied the plaintiff’s request for a preliminary injunction (28 cases).

(66.2%), lost 28 (13.9%), and settled 40 (19.9%). The Forest Service won 81.6 percent of cases where the final outcome was decided by a judge or panel of judges where plaintiffs sought greater resource use and development.

Management activity challenged. We coded cases into 18 mutually exclusive management activity categories, based on the primary purpose of the land management activity as defined in the case’s documents.² For example, if the court documents classified a project as being primarily concerned with logging, harvesting, or a timber sale (hereinafter referred to as a “logging” case) but the project included some road building to gain access to the project site, we coded the case as a logging case. Figure 6 shows the 11 categories containing more than 3 percent of cases. The remaining categories were herbicide or pesticide use (0.9%), oil and gas development (1.1%), roadless areas (1.1%), land exchanges between the Forest Service and government or nongovernmental organizations (1.9%), access to private in-holdings or right-of-ways (2.2%), wilderness management (2.4%), and commercial development (2.6%).

Figure 6: Number of National Forest management cases 1989-2005 and final case outcomes, by management activities involved in more than three percent of cases. (N = 720)



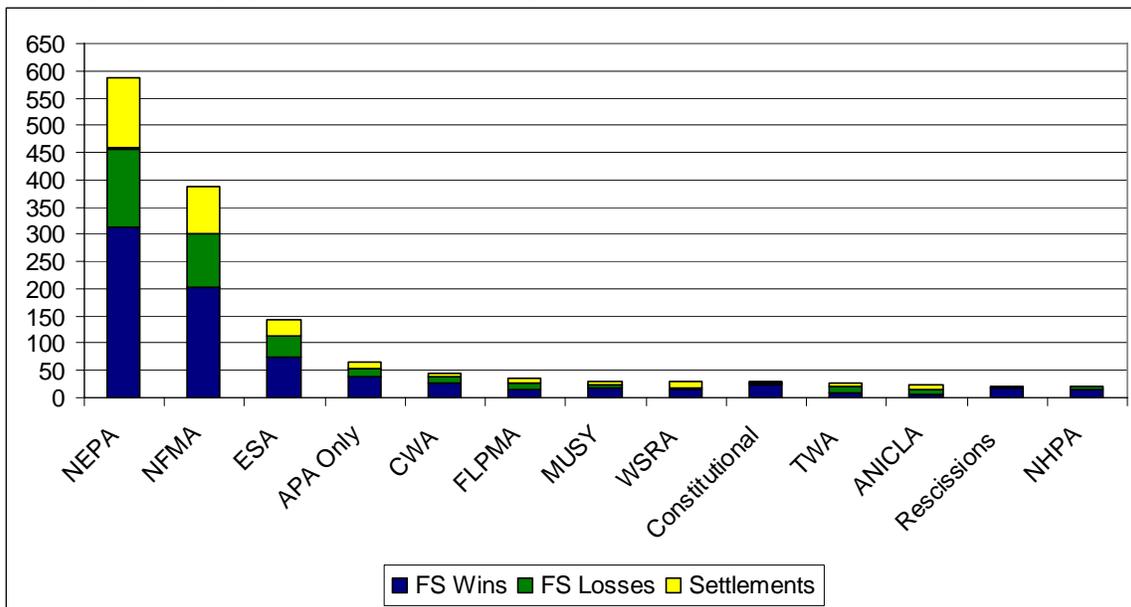
² Note: Court documents do not necessarily refer to projects the same way as the Forest Service classifies projects – for example under the PALS system. Since our data is derived from court documents, this analysis is based on those documents’ classification of projects.

Logging cases accounted for more than 25 percent of all cases. Combined, logging and salvage cases represented 35.8 percent of all cases. The Forest Service win, loss, and settlement rates involving these activities fluctuated with each challenged management activity. The Forest Service won more than 70 percent of cases involving oil and/or gas development, roadless area management, and special-use permits.³ It lost more than a quarter of its wilderness management, wildlife cases, land exchanges, herbicide or pesticides, and forest planning cases. It was more likely to settle water cases (including dams, water diversion, and riparian zones 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 7). Since 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. Since the APA is the legal basis for courts' review of every case, we coded the APA as a case's statutory basis when it was the only statute that plaintiffs said the Forest Service had violated. Importantly, the losses in Figure 7 indicate only that the Forest Service lost a case where that statute was alleged to have been violated. Our database does not currently allow us to analyze which statutes the Forest Service lost on when a plaintiff alleges that more than one statute was violated. For example, if the plaintiff alleged the Forest Service violated both NEPA and NFMA in a lawsuit and the Forest Service lost the case, we coded that case as a loss for both statutes, when in reality the court may have decided that the Forest Service violated NEPA but did not violate NFMA. We are currently coding cases to address this issue.

³ Special Use Permits are issued at the Forest Service's discretion for a wide range of activities, such as concessions, ski areas, facility use, and tour guides.

Figure 7: Final case outcomes per statute from 1989-2005, by statutes involved in an average of one or more cases per year.⁴ (N per statute = 800 to 818)



Litigants alleged that the Forest Service had violated more than 30 statutes, but three statutes dominated the cases: the National Environmental Policy Act (NEPA) (61.9% of all cases), the National Forest Management Act (NFMA) (40.9%), and the Endangered Species Act (ESA) (15.0%). Forest Service wins, losses, and settlements in NEPA and NFMA cases generally reflect the overall data. However, the Forest Service won nearly 6 percent fewer judicially decided⁵ ESA cases (64.4%) than of all judicially decided cases (70.0%) than of all cases.

Of the statutes that were the basis for litigation occurring on average at least once a year, the Forest Service was most successful in litigation involving the National Historic Preservation Act (NHPA) (88.2%), Constitutional challenges (82.8%), and the Rescissions Act (81.0%). The Forest Service won the fewest

⁴ NEPA = National Environmental Policy Act, NFMA = National Forest Management Act, ESA = Endangered Species Act, APA = Administrative Procedures Act, CWA = Clean Water Act, FLPMA = Federal Land Policy and Management Act, MUSY = Multiple Use and Sustained Yield Act, WSRA = Wild and Scenic Rivers Act, Constitutional = a provision of the US Constitution, TWA = The Wilderness Act, ANILCA = Alaska National Interests Land Conservation Act, Rescissions = Rescissions Act, and NHPA = National Historic Preservation Act.

⁵ As noted above, these cases include:

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cases defending itself against challenges based on the Alaska National Interests Land Conservation Act (ANILCA) (30.4%) and the Wilderness Act (TWA) (42.3%).

Conclusion

This report analyzed a census of legal challenges to USDA Forest Service national forest management initiated from 1989 to 2005 and allows us to make some broad conclusions. We found that three of every four cases involve parties seeking less use of national forests' resources; Region 6 (Pacific Northwest) experienced almost a quarter of all litigation; and NEPA was the statutory basis in nearly six of every ten cases. Litigation varied during these 17 years, but in general it increased; 2001 and 2002 being the only two consecutive years when the number of cases initiated decreased – perhaps coinciding with ramifications from the events of September 11, 2001. Although logging was the focus of most lawsuits, other management activities accounted for more than 60 percent of cases. Two statutes, NEPA and NFMA provided most of plaintiffs' challenges. Forest Service success varied widely based on the Forest Service activity litigated and statute involved in the lawsuit. Most importantly, like Keele, Malmshiemer, Floyd, and Perez's (2006) analysis of Forest Service litigation from 1989 to 2002, this study documented the prevalence of settlements in Forest Service land management cases; nearly a quarter of all cases resulted in a settlement.

Additional Analyses

This report summarizes information available in the Forest Service land management litigation database we have assembled during the past six years. In addition to this report and previous summary reports, we have coded and analyzed these cases to address additional issues. For example, we have published an analysis of Forest Service Wilderness Act and the Wild and Scenic Rivers Act litigation in the *International Journal of Wilderness* (Malmshiemer et al. 2008). In early 2009 the *Journal of Forestry* will be publishing a manuscript analyzing litigants' characteristics and outcomes (Gambino Portuese et al. 2009), and the *Journal of Empirical Legal Studies* will be publishing an analysis of judicial ideological effects in published versus unpublished judicial opinions (Keele et al. 2009). We anticipate submitting two

or three additional analyses for publication in 2009. If requested, we can provide Forest Service staff with customized analyses.

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Acknowledgements

This research was originally funded by a McIntire-Stennis Research Grant. The research was continued under a grant by the USDA Forest Service. We are grateful for the assistance of the USDA Forest Service, Office of General Counsel, Denise Keele, Donald Floyd, Jerome Perez, Carla Gamarra, Benjamin Walsh, Beth Gambino-Portuese, and Tammy Hnat-Comstock. The report does not reflect the opinion or a position taken by the USDA Forest Service or the U.S. government. Correspondence should be addressed to Robert W. Malmshemer.