The Magna Charta of Environmental Legislation: A historical look at 30 years of NEPA-Forest Service Litigation

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A B S T R A C T
The National Environmental Policy Act (NEPA) of 1970 changed the landscape of natural resource management by requiring federal agencies to assess the environmental consequences of their proposed actions and to include the public in their decision-making processes. Of all federal agencies in the United States, the Forest Service prepares the most Environmental Impact Statements under NEPA. The U.S. Forest Service manages the National Forest System, public forestlands comprising approximately 9% of the United States land area. The overall objectives of this study were to (1) determine the litigants, success rates, and management activities disputed for NEPA litigation involving the Forest Service from 1970 to 2001 and (2) examine differences and patterns in cases among the U.S. District, Circuit, and Supreme Courts. Methods include a historical analysis of published court cases and results show an increasing trend in the number of NEPA-Forest Service cases in the federal courts. Environmental groups were the most common litigants in NEPA-Forest Service cases and timber harvesting, management plans, and endangered species were the subject of the majority of cases in both the U.S. District Court and the U.S. Circuit Court of Appeals. The Forest Service won a preponderance of cases in which they were involved with success rates of 60% in U.S. District Court, 57% in the U.S. Circuit Court of Appeals, and 100% in the U.S. Supreme Court.

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1. Introduction

The National Environmental Policy Act (NEPA) is often considered the Magna Charta of Environmental Legislation. NEPA requires an environmental review for every major action of the federal government in the United States (42 U.S.C. Section 4321). NEPA set broad interdisciplinary goals (Section 101) and established a set of procedures to meet those goals (Section 102). NEPA goals are as follows:

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

NEPA procedures outlined in Section 102 contain the “action-forcing” provisions that ensure federal government agencies comply with the law. If a proposed action of federal government meets the threshold of a major federal action with significant environmental consequences, then an environmental analysis in the form of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) and public input are required. When NEPA was first passed it was arguably the most comprehensive environmental policy in the United States in that it resulted in a level of environmental review for all federal agency actions; however it is not without its shortcomings.

One shortcoming of NEPA is that procedural requirements of the law have overtaken the more substantive environmental and interdisciplinary goals outlined above. Some have argued that the environmental planning process under NEPA has become more about the planning process than about whether adequate information about alternatives is used to make environmentally sound decisions (Bausch, 1991; Salk et al., 1997; Bailey, 1997; Phillips and Randolph, 2000). Other criticisms of NEPA are centered on the failure to consistently and uniformly: (1) engage the public early in the planning process, (2) apply rigorous science in evaluating alternatives, (3)
achieve substantive environmental outcomes, and (4) apply a common decision analysis framework such as risk assessment or ecosystem management in the decision-making and alternative evaluation process (Salk et al., 1997; Shepherd and Bowler, 1997; Phillips and Randolph, 2000; Ugoretz, 2001; West, 2003; Fairbrother and Turnley, 2005).

Concerns have also been raised regarding the time and financial commitment involved in implementing NEPA and the consequences of those costs on managing natural environments (Jones and Taylor, 1995; USDA Forest Service, 2002; West, 2003). Limited funds and personnel time are often diverted to planning which leaves fewer resources for environmental monitoring and project management and implementation. For example, West (2003) stated that 5% of Forest Service budget is dedicated to monitoring and planning; of that, the majority of funds are used for planning to meet NEPA requirements. There is little in the way of funds to conduct ecological monitoring, which West (2003) found is deeply lacking on federal rangelands in the United States.

In the early 1970’s Cutler (1972) predicted that litigation would increase because of NEPA’s procedural requirements. This prediction has certainly materialized. While the federal government enjoys high success rates in litigation brought against it by environmental and commodity-production oriented interests (Alden and Ellefson, 1997; Jones and Taylor, 1995; Wenner, 1982; Wenner, 1983), the effects of the litigation cannot be discounted and is the subject of this paper. Courts in the United States significantly influence the interpretation of policies enacted by the U.S. Congress and carried out by federal agencies that manage 242,800,000 ha (600,000,000 acres) of public land covering 29% of the U.S. land area. One such agency, the United States Forest Service, manages public forest lands known collectively as the National Forest System. The U.S. Forest Service manages roughly 9%, or 77,290,000 ha (191,000,000 acres), of lands in the United States.

The overall objectives of this study were to (1) determine the litigants, success rates, and management activities disputed for NEPA litigation involving the Forest Service from 1970 to 2001 and (2) examine differences and patterns in cases and decision-making among the U.S. District, U.S. Circuit Court of Appeals, and U.S. Supreme Court. The federal court system of the United States court system is organized into 3 primary levels: the U.S. District Court, U.S. Circuit Court of Appeals, and U.S. Supreme Court. Federal cases begin in the District Courts and then if appealed, proceed to the Circuit Court. If the case is appealed again, the court of last resort is the U.S. Supreme Court. Analysis was conducted separately for each court level.

1.1. History of NEPA, U.S. Forest Service, and the Courts

Litigation on environmental issues was present prior to NEPA; however, passage of NEPA significantly affected the amount of such litigation. Due to its procedural requirements federal agencies were held responsible for considering alternative management methods and the environmental consequences of their actions. NEPA regulations require several levels of environmental review. The lowest level of environmental review is a categorical exclusion, where the agency determines that the proposed action will not have a significant environmental impact. If the proposed action will have a significant environmental impact, an Environmental Assessment or Environmental Impact Statement is required. An EIS, the longest and most detailed review, is required for any major federal action that can cause significant environmental impacts.

The Forest Service regularly files more EIS’s than any other federal agency of government according to a report published by the U.S. Forest Service (USDA Forest Service, 2002). While the report does not specify the time period that the average is based on, the Forest Service produces approximately 120 EIS’s/year, which is higher than the yearly average of any other federal agency (USDA Forest Service, 2002). The Forest Service must complete EIS’s for Land and Resource Management Plans for each national forest as required for management planning under the National Forest Management Act (NFMA) (16 U.S.C. 1600). Virtually all management activities that the Forest Service conducts (e.g. timber harvest, trail maintenance and construction, etc.) are tied to NEPA environmental review requirements. It is the adequacy of these environmental review documents that is the source of litigation under NEPA. The Forest Service has an Administrative Appeals process that allows the public an opportunity to appeal an agency decision to the Forest Service, prior to formal litigation in the courts. Many authors have researched the administrative appeals process, and the reader can consult these studies for further detail (see Bobertz and Fischman, 1993; Coulombe, 2004; Jones and Taylor, 1995; Mortimer et al., 2004; Teich et al., 2004). The current study does not focus on the administrative appeals process, but rather on post-administrative appeals that are legal cases in the federal court system in the United States. The current study builds upon these studies by analyzing NEPA-Forest Service Litigation in the District, Circuit, and Supreme Courts over the three decades that have passed since the laws’ inception.

To date, there have been three comprehensive studies documenting NEPA-Forest Service Litigation. Alden and Ellefson’s (1997) report looked broadly at litigation under all environmental laws affecting the Forest Service in the federal Supreme, Circuit, and District Courts. Cases involving NEPA proved to be the most common type of litigation throughout the 1980’s (Alden and Ellefson, 1997). This study showed a higher success rate for pro-environmental protection litigants than for pro-development and use litigants. However, the Forest Service had a higher success rate than the rates for all other litigant types, even when the agency represented a pro-development and/or pro-use position. Malmsheimer et al.’s (2004) study of national forest litigation focused on the U.S. Circuit Court of Appeals and six federal environmental laws, including NEPA. Court cases concerning national forest management increased over the time period of 1970 to 2001 and most were NEPA based (Malmsheimer et al., 2004). This trend was also found in Keele et al.’s (2006) study which focused on cases (1989–2002) brought against the Forest Service for land management decisions of the agency. This study found that NEPA, NFMA, and ESA (Endangered Species Act) served as the statutory basis for the majority of land management litigation (Keele et al., 2006). Despite the high success rate of the Forest Service in environmental litigation (57%) in the Circuit courts and land management litigation (58%) in the federal courts, the increasing trend in the number of court cases corresponds to increased judicial review of management decisions of the Forest Service (Malmsheimer et al., 2004; Keele et al., 2006).

1.2. Environmental litigation and interest groups

Litigation initiated by environmental interest groups, such as the Sierra Club and the Audubon Society, has increased significantly over time (Alden and Ellefson, 1997; Cutler, 1972; Jones and Taylor, 1995; Wenner, 1982; Wenner, 1983). This increase coincides with the marked growth in the total number of environmental groups nationwide, as well as membership increases since the 1970’s (Berry, 1997). Environmental groups and individual citizens are the most common plaintiffs in Forest Service environmental litigation (Malmsheimer et al., 2004). Commodity driven interests (e.g. timber, mining, and commercial fishing) have a significantly lower success rate when compared to environmental groups (Alden and Ellefson, 1997; Jones and Taylor, 1995). The Forest Service (Alden and Ellefson, 1997; Malmsheimer et al., 2004) and the federal government in general (Wenner, 1983) remain the most successful parties in environmental litigation.

Interest groups often use the judicial system to halt what they consider to be environmentally unsound projects (Blumm and Brown, 1990). The ensuing effects of litigation by interest groups have been widespread, and such litigation has been an effective means of
changes in consumptive uses (Jones and Taylor, 1995). Litigation is an
seeking non-consumptive uses of national forests than those seeking
previous research has shown that NEPA decisions favor those litigants
on which to sue. Interest groups have used NEPA to move the Forest
1972; Jones and Taylor, 1995). NEPA gave interest groups a legal basis
economic costs as well as the time associated with litigation (Cutler,
and O'Connor, 1986). Federal agencies frequently reconsider alter-
environmental groups (Alden and Ellefson, 1997; Cutler, 1972; Hassler
Wasby, 1983; Wenner, 1983). The courts have provided economic
changing U.S. bureaucracies (Barker, 1967; Jones and Taylor, 1995;
commodity production activities (Jones and Taylor, 1995, p. 332).
Successful litigation brought against the Forest Service by environ-
mental groups results in either changes in management activities of
the agency or, if the litigation is unsuccessful, it serves as a catalyst
to launch the issue into the policy arena for further resolution (Jones
and Taylor, 1995).

2. Case analysis methodology

We conducted a historical case analysis of all published federal
court cases between 1970 and 2001 in which the USDA Forest Service
was a litigant and NEPA was a subject of the litigation. While many
court options are published, published cases do not represent the
totality of cases presented before the courts (Keele et al., 2006).
Additionally, readers should note that while some Circuit Court of
Appeals cases result from published District Court cases, some do
eriginate from unpublished District Court Cases. For the purposes
of this research, we utilized published cases available from Lexis–Nexis.
A database of all cases included in the study was created and analyzed
using SPSS (Statistical Package for the Social Sciences) version 15.0
for Windows (SPSS Inc., 2006). All NEPA court cases involving the
Forest Service were coded according to six criteria: (1) Federal court
where the case was adjudicated (District, Appellate, Supreme); (2) Case
citation; (3) Type of plaintiff and defendant (litigant); (4) Manage-
ment activity or main subjects of the litigation; (5) Date; and (6)
Outcome.

Litigants, other than the Forest Service, were identified by the first
litigant listed in the case. The litigants were coded into 1 of 7
categories based on the interests they represented in the specific case:
Environmental Groups, Individuals, User Groups, Local and State
Governments, Native American Interests, Industry Interest Groups,
and Industry. Environmental Groups were dedicated to preserving
and protecting the environment such as Sierra Club, Audubon Society,
and Friends of the Earth. Individuals were people acting on their own
behalf, whether interested in preserving the environment or in using
it. User Groups were those interested in utilizing the area for
recreational purposes, such as the Utah Shared Access Alliance and
the Montana Snowmobile Association. Local and State Governments
included counties, cities, and states. Native American Interests were
parties involved or associated with Native American Tribes, such as
the Northwest Indian Cemetery Protective Association and Hopi
Indian Tribe. Industry Interest Groups, such as the Wyoming Timber
Industry Association represented the interests of industry. The
Industry category included companies with vested interests in
utilizing an area for business purposes, such as the American Timber
Company and Western Radio Services Company, Inc.

NEPA environmental planning requirements were coded as either
Inadequate EA or EIS, or No EA or EIS. The “Inadequate EA or EIS”
code usually questioned the consideration of alternative plans
of action. Litigation pertaining to failure to prepare an EA or an EIS is
represented by the category “No EA or EIS.”

The subject matter(s) disputed in each case were coded into
categories and the categories were not mutually exclusive. Manage-
ment activities were coded into 10 categories and included: Timber
Harvesting, Management Plans, Endangered Species, Roads/Trails,
Recreation, Wetlands/Water/Rivers, Wildlife Management, Mining/Oil
and Gas, Pesticides/Herbicides, and Native American Lands. Cases
were coded “Timber Harvesting” if litigation involved activities such
as old-growth timber harvesting, clearcutting, and other silvicultural
methods. The “Management Plans” code was used to classify disputes
over Land Resource Management Plans (LRMP) prepared under the
The “Endangered Species” category contained litigation concerning
Trails” code included any activity pertaining to construction or
maintenance of roads or trails. The code “Recreation” involved rights
to public lands for activities such as hunting, hiking, skiing, and
snowmobiling. “Wetlands/Water/Rivers” pertained to activities affect-
ing water resources or wetland areas in any manner, including Wild
” code was used for activities dealing with species not listed as
threatened or endangered and their habitat. For example, the cases
dealing with the cougar (Felis concolor) and black bear (Ursus
americanus) would be included under this code, while northern
spotted owl (Strix occidentalis) cases would fall under the “Endangered
Species” category. “Mining/Oil and Gas” included activities dealing
with mining or drilling permits and mineral rights. “Pesticides/
Herbicides” dealt with the use of such chemicals on natural forest
lands. Cases were coded “Native American Lands” if they concerned
proposed uses on Native American-designated sacred lands, whether
on Tribal lands or not.

Outcomes were coded into three categories: (1) Plaintiff, if the
plaintiff in the case won; (2) Defendant, if the defendant in the case
won; or (3) Other judgments, if there was a partial ruling or a reserved
ruling. The outcomes are representative of published court cases
during the time period of the study (1970–2001). Readers should note
that some cases are settled out of court, some cases are unpublished,
and some outcomes are further adjudicated in the court following a
decision. For example, a Circuit Court of Appeals decision that
overturned a District Court ruling would not be represented here if
the case was unpublished. Additionally, published cases reflect the
final outcome in the majority of cases, but note that adjudication
beyond the initial decision is sometimes possible, particularly in the
case of preliminary injunctions.

3. Results and analysis

Based on the historical case analysis, we present results related to
litigants and outcomes, management activities disputed, and trends
within the courts. There were a total of 291 published cases involving
NEPA and the Forest Service for the years 1970 through 2001 (Fig. 1).
Over this time period, 179 cases were heard in the District Courts.
There were 108 published cases in the Circuit Court of Appeals, and 4
cases were litigated in the U.S. Supreme Court.

3.1. Litigants and outcomes

Because the Forest Service was a defendant in 95% of the cases, we
present the results from the perspective of the plaintiffs bringing
lawsuits against the agency. In 16 cases the Forest Service was an
appellant, when it appealed an unfavorable outcome at the District or
Circuit Court levels. For these cases, 12 were in the Circuit Court of
Appeals and 4 were in the Supreme Court (see Fig. 2). The most
litigious groups were Environmental Groups, Individuals, and User
Groups.

Fig. 2 also provides outcomes of NEPA-Forest Service Litigation by
litigant type for plaintiffs/appellants. At the District Court level, the
Forest Service won 60%, lost 20%, and had other judgments in 20% cases brought against them. Environmental Groups were the main litigants, serving as plaintiffs in 61% of NEPA-Forest Service cases at the District Court level. Individuals were plaintiffs in 16% of the cases and User Groups in 8% of the cases. At the U.S. Court of Appeals level, the Forest Service won 57% of the cases, lost 26%, and had other judgments in 17% of cases brought against them by the plaintiffs in Fig. 2. Environmental Groups were plaintiffs in 66% of the appellate court cases. Individuals in 13%, and User Groups in 7%. Appellate court cases were centered in the Pacific Northwest and Inter-mountain West. A majority (61%) of appellate court cases were heard in the Ninth Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington), while 12% were litigated in the Tenth Circuit Court of Appeals (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming). The next highest region, the 8th Circuit Court of Appeals, had only 7% of NEPA-Forest Service cases. Four cases involving the Forest Service and NEPA have reached the U.S. Supreme Court. The agency was the appellant in and prevailed in all four U.S. Supreme Court cases. Environmental groups were appellees in three of these cases, and the Northwest Indian Cemetery Protection Association was the appellee in the fourth case.

3.2. Management activities disputed

The majority of NEPA-Forest Service cases were brought to court due to a perceived inadequacy of an EA or EIS that the Forest Service...
prepared or because an EA or EIS was not prepared by the agency (Fig. 3). At the District Court level, 36% of the cases involved an inadequate EA or EIS and 55% involved cases where plaintiffs argued that an EA or EIS should have been prepared. For appellate cases that involved NEPA environmental planning claims, 48% disputed the adequacy of a prepared EA or EIS and 35% of the cases disputed the decision not to prepare an EA or EIS. One Supreme Court case involving the Forest Service and NEPA during this study’s time period was in relation to the inadequacy of an EA/EIS. Eighteen Circuit and 16 District court NEPA-Forest Service cases did not relate specifically to an EA or EIS. In those cases, plaintiffs typically made general claims that the Forest Service violated NEPA but did not base that claim on an EA or EIS (or that one should have been prepared). Other examples of non-EA/EIS NEPA cases include a claim that the Forest Service failed to solicit input properly or cases where the date of the Record of Decision was in question due to the statute of limitations.

The top five management activities disputed in NEPA-Forest Service cases at the District Court level were Timber Harvesting (n=93), Management Plans (n=83), Endangered Species (n=31), Roads/Trails (n=23), Recreation (n=23), and Wildlife Management (n=23) (Fig. 4). Of the 179 cases at the District Court level, Timber Harvesting was the subject in 51% (n=93) of all cases, Management Plans in 45% (n=83), Endangered Species in 17% (n=31), Roads/Trails in 13% (n=23), Recreation in 13% (n=23), and Wildlife Management in 13% (n=23). Environmental Groups most often disputed Timber Harvesting (59%, n=66) and Management Plans (45%, n=50) in the cases they were involved in. Individuals disputed Timber Harvesting in 55% (n=16) and Management Plans in 52% (n=15) of the cases they litigated. User Groups were involved most often in cases concerning Recreation (53%, n=8).

For the Circuit Court of Appeals, the top five management activities were: Timber Harvesting (n=52), Management Plans (n=40), Endangered Species (n=21), Roads and Trails (n=17), and Wetlands/Water/Rivers (n=16) (Fig. 5). Environmental Groups disputed Timber Harvesting in 45% (n=34) and Management Plans in 36% (n=27) of the cases they were involved in. A majority of cases disputed by Individuals concerned Timber Harvesting (50%, n=7), Endangered Species (29%, n=4), and Management Plans (21%, n=3). User Groups most frequently litigated cases involving Management Plans (25%, n=2).

In the four Supreme Court cases, the Forest Service appealed, therefore, was an appellant in cases involving the following subject matters: Timber Harvesting (n=3), Inadequate EA or EIS (n=1), Management Plans (n=1), Roads/Trails (n=1), Wetlands/Water/Rivers (n=1), Recreation (n=1), and Native American Interests (n=1). Three of the cases involved two of the subject matters listed, while the fourth involved three of these.

Disputes concerning endangered species experienced a drop in the mid-to-late 1990’s. A total of 53 endangered species cases were included in the study, with Timber Harvesting (n=30) and Management Plans (n=14) being the most frequent management activities disputed with them. Of the 53 endangered species cases, 30 involved the following three species: the northern spotted owl (n=11), the grizzly bear (n=10), and the red-cockaded woodpecker (Picoides borealis) (n=9). The other 23 endangered species cases involved species such as the bald eagle (Haliaeetus leucocephalus) (n=2), the prairie dog (Cynomys ludovicianus) (n=1), the gray wolf (Canis lupus) (n=4), and various fish species. Cases involving three endangered species that were the subject of most NEPA-Forest Service Litigation experienced a marked decrease after 1990: the last northern spotted
5. Conclusions

Public land management continues to be a controversial arena, in particular timber harvesting decisions. While this research is consistent with previous research which has established a high success rate of the Forest Service in environmental litigation (Alden and Ellefson, 1997; Malmheimer et al., 2004; Keele et al., 2006), planning decisions are often at the center of NEPA-Forest Service Litigation. The perceived inadequacy of planning documents such as environmental assessments, environmental impact statements, and forest management plans are commonly the source of litigation brought against the Forest Service. Most cases are complex and involve multiple management activities and the most common primary litigants are environmental groups. While the courts continue to be used as a platform for resolving disputes over agency planning and management, this study confirms, as others have as well (Keele et al., 2006), that the increasing trend in Forest Service environmental litigation has been somewhat stunted during the early years of the Bush Administration. This is likely indicative of a new trajectory for environmental litigation involving the Forest Service, but only future research will reveal the true nature of this emerging trend. Additional thoughts regarding future research are detailed below.

6. Limitations and future research

Throughout this investigation into the National Environmental Policy Act and the U.S. Forest Service, it has been noted that there is still much more to learn. A study of the economic ramifications may also prove to be worthwhile in realizing the full effects of litigation. Knowing where the financial resources are distributed in management decisions and how those are diverted to litigation could be key to answering questions concerning the ongoing efforts to find a balance in the management of our National Forests. Studying the effects of litigation on actual management practices, or on-the-ground management decisions, could also aid in discovering how time

![Fig. 5. Top 5 management activities disputed in USDA Forest Service NEPA cases for U.S. Circuit Court of Appeals, 1970–2001.](image-url)
resources are allocated. Future research should also address multiple litigants in cases to provide an even broader scope of NEPA litigation; one limitation of the current study is that the methodology entailed only coding the first litigant in the court case, not all litigants that may have been involved in a particular case. Additionally, future research could examine unpublished as well as published court cases which can further build the body of knowledge around U.S. Forest Service NEPA litigation; this study only examined published court cases. Future research might also follow specific cases through the court system beginning at the District Court; this would provide researchers with a full understanding of what is occurring in the judicial system regarding NEPA and the Forest Service. Additionally, an in-depth study on the various litigant/interest groups would be beneficial. Looking at the various groups and their purposes within each plaintiff type (e.g. Environmental Groups, User Groups) could provide useful information, such as how they obtain and allocate resources such as money, time, and political influence.

References


