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A REVIEW OF APPEALS AND LITIGATION OVER TIMBER SALES BETWEEN
1999 AND 2008 ON THE LOLO NATIONAL FOREST

By

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A review of litigation and appeals over timber sales on the Lolo National Forest for the years 1999 thru 2008 revealed that of the 157 timber sales that could have been appealed or litigated, 27%, representing 55% of the timber volume in all the reviewed sales, had some form of appeal or litigation.. The categories of timber sales with the highest percentage of appeals and/or litigation in relation to their representation within the population as a whole were those that were performed to improve forest health or to meet stewardship goals. The silvicultural prescription that had the highest percentage of appeals and/or litigation in relation to their representation within the population as a whole were thin from above prescriptions while the least frequent was a clear cut. This study intends to serve as a source of information about appeals and litigation on the Lolo National Forest over timber sales by discussing reasons why environmental groups litigate and appeal timber sales. Additionally, this study hopes to give individuals, the Forest Service, private interest groups, or citizen groups involved with attempting to decrease the number of timber sales appealed or litigated as well as the volume of wood appealed or litigated, a point of comparison to evaluate the effectiveness of their efforts.

Introduction

With the passage of several statutes and acts dealing with the management of public lands in the 1960's and 1970's, such as the National Environmental Policy Act (NEPA), the public has been given a great deal of input into how the Forest Service manages the Nation's forests (Keele et. al. 2006). Added to these acts is the "emergence of a well-educated and highly motivated citizenry that has the energy, time, and money to engage the agencies in discussion and debate about the specifics of forest resource management" (Floyd 2004, p.9). The resulting combination of a public concerned about how public lands are managed and laws, statues, and acts that require agencies to include the public in the decision process of land management has led to litigation and appeals filed by the public whenever they believe that an agency, such as the Forest Service, is not following the law or is managing public lands differently than how they believe public lands should be managed.

Views on litigation and appeals over land management decisions by the Forest Service vary. A positive view is that the appeals process is an important element of public participation that allows some groups to monitor and challenge Forest Service actions as well as being a necessary step in order for these groups to gain legal standing for potential litigation of forest projects (Vaughn 2003). An example of a negative view of appeals and litigation was expressed in a 2002 Forest Service document. According to this report appeals and litigation are causing the Forest Service to operate within a statutory, regulatory, and administrative framework that has kept the agency from effectively addressing rapid declines in forest health as well as impeding nearly every other aspect of multiple-use management (USDA Forest Service 2002).

While there are differing opinions of the value of appeals and litigation, it is commonly thought that appeals and litigation slow the progress of projects that the Forest Service proposes (USDA Forest Service 2002). In addition to adding time to projects, appeals and litigation incur costs to all parties involved, such as salaries to gather information to file appeals for appellants, read thru and analyze appeals for agencies, and court costs for all parties if the courts have to get involved to decide an issue (Beckes pers. comm., Kohler pers. comm.). Additional expenses and project completion times due to appeals and litigation of Forest Service timber sales are important, because of how often timber sales are appealed and litigated. In fact, timber sales are one of the most litigated types of project that the Forest Service performs (Keele et al. 2006).

With differing views on the effects of appeals and litigation and an agency view that the Forest Service is being impeded by appeals and litigation, the topic of appeals and litigation over timber sales is an especially controversial subject (Vaughn 2003). In part, this topic is controversial because it deals with an activity, specifically timber sales, which are vital to many people and community's livelihoods. As the market for timber continues to decline and mill closures increase, people and communities often blame appeals and litigation against Forest Service timber sales as the reason why mills and other industries that rely on Forest Service timber are not able to make a profit and are being forced to close (Koehler pers. comm.). While it has been found that timber sales are a highly appealed and litigated Forest Service activity, there have yet to be any studies to identify just what percentage of timber sales are appealed or litigated and the timber volume affected by these appeals and litigation.

Previous studies have looked at the number of appeals (Cortner et al. 2003 and Teich et al. 2004) and litigation (Keele et al. 2006) on a national scale, but have not looked at litigation and appeals of timber sales on a forest scale. Looking at appeals and litigation for a particular forest is important because it will give specific numbers and reasons for appeals and litigation associated with that forest's timber sales, as well as providing a baseline for future evaluations of collaborative efforts that aim to reduce appeals and litigation over timber sales on that specific forest. The focus of this paper is analyzing ten years of timber sales, 1999 thru 2008, on the Lolo National Forest in Montana. The intention of this paper is to give the forest, and readers, an idea of the percentage of timber sales that are associated with appeals or litigation, what volume of wood that equates to, and some characteristics of timber sales that are associated with appeals or litigation. This will allow for a better understanding of what the current picture is of appeals and litigation associated with timber sales on the Lolo National Forest, as well as providing the ability to monitor changes in the number of appeals and litigation associated with timber sales over time.

After discussing the National Environmental Policy Act, Administrative Procedures Act, and Appeals Reform Act, I will discuss other studies that looked at appeals and litigation against the Forest Service, the study area, the timber sale data received from the Lolo National Forest, the results of the examination of this data, reasons why groups file appeals and litigation against the Lolo's timber sales, the costs that the Forest Service and groups filing the appeals and litigation incur from appeals and litigation, and conclude with some recommendations.

A Brief Discussion of the National Environmental Policy Act, Administrative Procedures Act, and Appeals Reform Act

The acts that enable the public to have input into the process of timber sales, appeal timber sales, and litigate timber sales are the National Environmental Policy Act (NEPA) of 1969, the Appeals Reform Act, and the Administrative Procedures Act (APA). NEPA requires government agencies, like the Forest Service, to gather public input over their management decisions of public lands. NEPA does not require agencies to necessarily act on this input, but to at least take a hard look at it. The Appeals Reform Act required the Forest Service to notify the public of pending projects, let the public comment on those projects, and required the Forest Service to have the opportunity to administratively appeal the projects before they are implemented. The Administrative Procedures Act creates a framework for regulating agencies and puts forth the standard for which courts can set aside an agency's action.

NEPA requires government agencies to create an assessment of possible environmental effects of a proposed project, as well as different options for performing a project with the goal of choosing the option that mitigates as many of the potential negative environmental impacts as possible. These assessments are called Environmental Assessments (EA) for projects with lesser anticipated impacts or Environmental Impact Statements (EIS) for projects with greater environmental impacts. In both of these assessments, due to the Appeals Reform Act, the public has a chance to comment on a project, as well as file an appeal to the agency if the agency chooses an option that the public feels is not the best one. On the Lolo National Forest, if a NEPA document is

appealed, there is a forty five day appeal period followed by another forty five day appeal review period and finally a fifteen day period from the time that the appeal decision comes up before projects can be implemented. So it's 109 days you have to wait before you can implement the project, if it's appealed. This means that when a timber sale is appealed, it is not the timber sale itself that is being appealed, but the NEPA document that created the timber sale that is appealed. If a project is going to be small enough and not going to have much of an anticipated environmental impact, it may fall under a categorical exclusion, which allows the project to go forward without an EA or EIS. If a categorical exclusion is used for a project, the public can't comment on or appeal that project.

Litigation comes about because individuals or groups feel that an agency did not correctly perform the environmental analysis, or that there was a procedural error in the creation of the EA, EIS, or categorical exclusion. The individual or group takes the agency to court, by using the Administrative Procedures Act, in the hopes that the court will require the agency to do something differently than it did. If a timber sale was developed using an EA or an EIS, a group or individual must first submit comments during the input phase of the environmental assessment, and then file an appeal to the agency before they can litigate that sale. When an appeal is filed over a Forest Service timber sale, a higher level of the Forest Service than the one that proposed the action will review the appeal to assess if the original district did indeed make an error or if their original actions were correct. If a sale was not commented on, and not appealed by an individual or group, it is unable to be litigated by that individual or group. If a sale did receive comments and an appeal was filed, then the sale can be litigated. When a timber sale is litigated, in order for the courts to rule against the Forest Service, they have to find that the Forest Service actions were arbitrary and capricious, an abuse of power, or not in accordance with the law. The courts have recently reaffirmed agency's discretion, by ruling that agencies have a deferential standard so that as long as the agencies consider the public's input and do not act in an arbitrary and capricious manner, the agencies can implement what they consider to be the best alternative (*Lands Council v. Ranotta McNair*, 2008).

Over the ten year study period analyzed in this paper there were two different regulations that affected the possibility of appeals and/or litigation being filed against the NEPA documents that created a timber sale. These regulations were categorical exclusions, as mentioned above, and a 1995 salvage rider which exempted timber salvage sales from the possibility of being appealed. If a timber sale was created under a categorical exclusion or a salvage rider, it wouldn't have been able to be appealed. This means that no public input was sought in creating timber sales under these two regulations. However, these types of sales could still be litigated, which means that they could be challenged in court.

Previous Litigation and Appeals Studies

Previous litigation (Keele et al. 2006 and Portuese et al. 2009) and appeals (Cortner et al. 2003 and Teich et al. 2004) research over Forest Service activities has taken a broad view and looked at appeals and litigation over Forest Service activities on a national level without specifically examining the effect that this litigation and appeals has

had on the specific topic of timber sales. A brief discussion about previous litigation and appeals studies will identify what topics the studies did address, as well as what issues dealing with timber sales were not addressed.

Keele et al.'s research examined litigation against the Forest Service from 1989 to 2002. Keele et al. (2006) looked at the number of litigation cases the Forest Service won, settled, or were withdrawn by year and region, if the goal of the litigation was less or greater resource use, wins and losses over specific management activities, and wins and losses against different statutes. Keele et al. does show that the most litigation in the study period was filed over logging, but does not explore characteristics of litigated timber sales such as volume associated with those litigated timber sales, the number of sales or volume that was not litigated during the studies time frame, or if there are any common characteristics in timber sales that were associated with litigation such as goals or silvicultural prescriptions of litigated timber sales. Keele et al. also does not address the issue of appeals over timber sales.

Another study that looked at litigation filed against the Forest Service was conducted by Portuese et al. (2009). This study looked at the groups that filed litigation against the Forest Service from 1989 to 2005. The most frequent parties opposing the Forest Service during the study time period were identified as were their success rates and the percentage of times that each group settled their litigation. This study does identify the Ecology Center as being the most successful litigator against the Forest Service nationally. This pertains to this study because the Wild West Institute, the environmental group used to gather information for this paper, has recently merged with the Ecology Center. While this litigation research provides us with information about who filed litigation against the Forest Service, it does not tell us what types of projects were litigated.

Cortner et al. (2003) and Teich et al. (2004) examined a database of appeals filed against the Forest Service, by region, for the years 1997 to 2002. These studies broke down appeals filed against the Forest Service at the regional level into what rule the appeal was filed under (National Forest Management Act, National Environmental Policy Act, permits or written authorization, or decisions not in NEPA documents). These studies identified Region 1, the Forest Service Region that the Lolo NF is in, as being the Region that had the greatest number of appeals reviewed over all issues. These studies also identified the number of appeals different groups filed during the study period as well as the number of appeals filed against different projects. Both studies identified the Ecology Center as the organization that filed the second most appeals nationally. While these studies briefly address the issue of appeals against documents creating timber sales, NEPA documents, they do not give an in-depth discussion of the topic. Characteristics such as volume associated with sales appealed, the number of sales not appealed, or any information about litigation over timber sales were not covered.

These previous studies give us a broad picture of how much litigation and appeals have happened in the respective study periods, however they do not go into the intricacies of appeals and litigation associated with timber sales, such as purpose and need statements or silvicultural prescriptions of timber sales associated with appeals and litigation. By not focusing on appeals and litigation associated with timber sales, characteristics of timber sales associated with appeals or litigation remain unknown. Additionally, without examining the number of sales not appealed or litigated during

each study's respective time periods, it is unclear what percentage of all timber sales these appeals or litigation are representing. This study will attempt to do what other appeals and litigation studies have not done, which is to offer a better picture of appeals and litigation associated with Forest Service timber sales.

Methods

The Study Area

The Lolo National Forest (NF) is located in western Montana, geographically surrounding the city of Missoula and bounded by other national forests and the Flathead Indian Reservation (Figure 1). The Lolo NF, created in 1906, now includes former national forests originally named the "Cabinet," "Hell Gate," "Missoula," and "Selway" National Forests. The Lolo NF is made up of five districts. These districts are the Missoula, Ninemile, Plains, Seeley Lake, and the Superior.

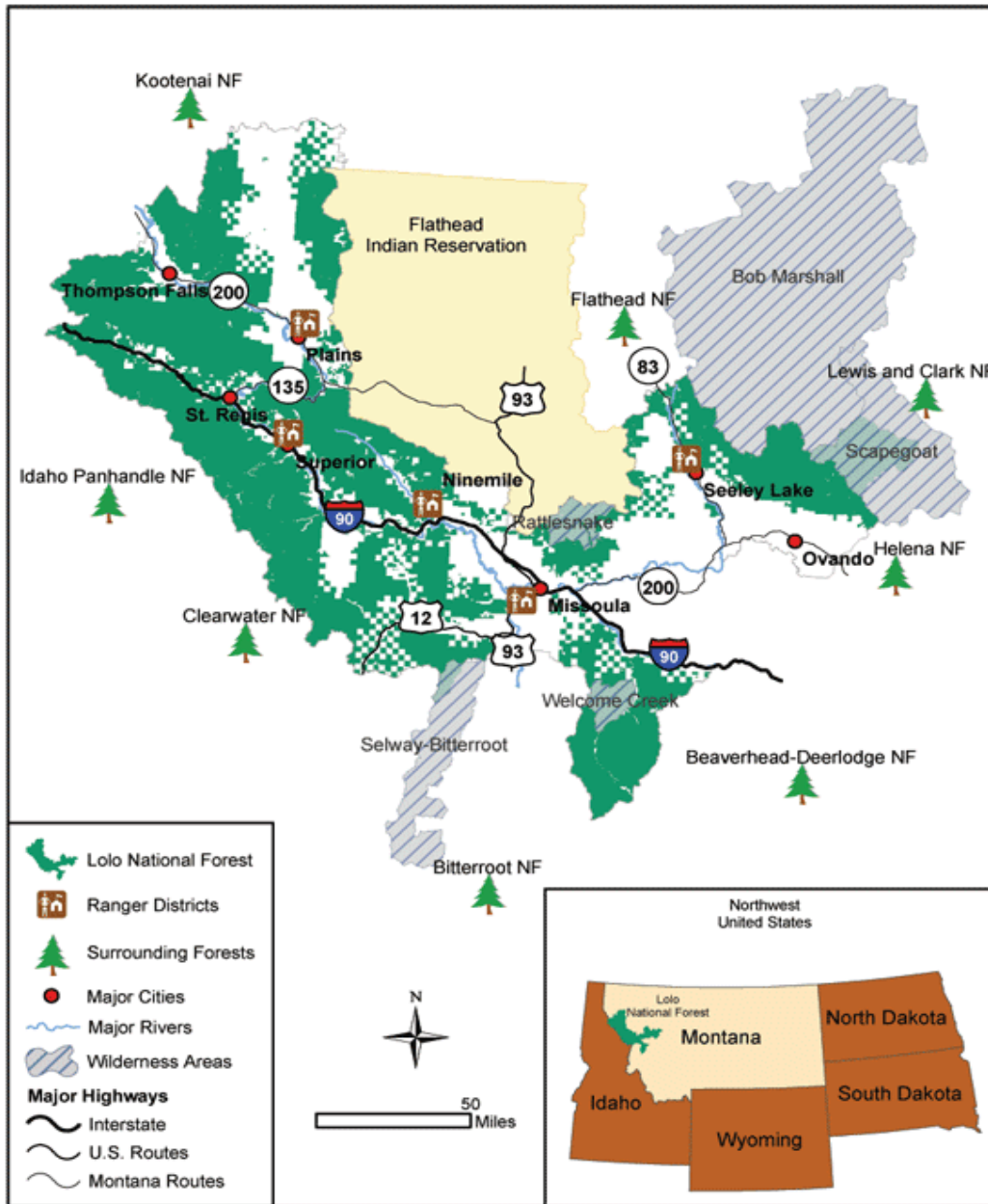


Figure 1. Lolo National Forest. Available online at <http://www.fs.fed.us/r1/lolo/about/forest-wide-map.shtml>; last accessed January 22, 2009.

Located west of the continental divide, the Lolo NF is influenced by both continental and maritime climates that provide for a wide range of environmental gradients, producing a forest of high diversity. The two million acre Lolo NF contains ecosystems that range from wet, western red cedar (*Thuja plicata*) bottoms to high alpine peaks with alpine larch (*Larix lyallii*) and whitebark pine (*Pinus albicaulis*).

All told, these diverse ecosystems are home to seventeen conifer and five hardwood tree species and an estimated 1,500 plant species, including 250 non-native plant species. The Lolo NF is home to two record-sized trees. These trees are the

Montana Champion ponderosa pine (*Pinus ponderosa*) located in the Fish Creek drainage and a national co-champion western larch (*Larix occidentalis*) near Seeley Lake.

Elevation in the Lolo NF ranges from less than 2,400 ft. on the Clark Fork River below Thompson Falls to Scapegoat Mountain at 9200 ft. within the Scapegoat Wilderness (USDA Forest Service, 2008).

Timber Sale Data Received from the Lolo National Forest

Timber sale data from the Lolo National Forest for the fiscal years 1999 to 2008 were analyzed. Each year, the five districts on the Lolo NF produce a periodic timber sale accomplishment report. These reports show all types of timber cutting performed on the district. Included is timber cutting that is done by permit (such as firewood cutting and individual Christmas tree harvesting) as well as all types of timber sales (such as stewardship contracts, salvage sales, and green sales). The report also shows the latest gate, or where at in the preparation of the sale, a sale was in at the end of the fiscal year. Volume, and any modifications made to that volume, is reported for each sale. Unfortunately, these reports don't have detailed information about the timber sales on them, such as silvicultural prescriptions or purpose and need statements of the timber sales, or what NEPA document the sale was created under.

The gates (Figure 2) that a non-permit timber sale goes through as it is being constructed are a series of steps that ensure that the creation of the timber sale is performed correctly. In the creation of a non-permit timber sale there are a series of six gates, or steps. In order to advance to the next gate, all the necessary information and processes for the current gate must be completed.

GATE	EXPLANATION
1	<i>Preliminary Environmental and Economic Feasibility (This is the most important decision step in the creation of the timber sale. Gate 1 is where the NEPA document that guides the rest of the sale is created.)</i>
2	<i>Sale Area Design</i>
3	<i>Field Layout and Sale Design</i>
4	<i>Sale Advertisement</i>
5	<i>Bid Evaluation</i>
6	<i>Sale Awarded to the Winning Bidder</i>

Figure 2. The six “gates” or steps that a timber sale progresses thru from conception to implementation. Created using FSH 2409.14 – Timber Management Information System Handbook, Amendment No. 2409.14-94-5

Only non-permit types of timber harvest were used in this analysis from the timber sale reports because permit-type sales, such as individual firewood permits, can not be appealed or litigated. Therefore firewood cutting permits, Christmas tree permits, and some other activities such as road clearings, fire line rehabilitation, or trees that were sold after they were illegally cut were excluded from this analysis. Additionally, sales

had to be at least in gate two in their preparation to be included, in other words the sale's goal has been identified and the area that this goal is going to be implemented has been identified. This is because a timber sale can not be appealed or litigated if it is not at least in gate two. To prevent a sale from being counted twice, the sale and its information were included in the analysis at the highest gate that the sale was listed at. Items listed as additional volume on the periodic timber sale accomplishment report were not used because reports for years 1999 to 2005 do not indicate which timber sale(s) this additional volume was added to.

Upon identifying all the sales from each district over the ten year time span that met the above criteria, a list was generated and given to Barb Beckes, the NEPA coordinator at the Lolo National Forest, to verify which sale's NEPA documents had been appealed and/or litigated. The Lolo's NEPA coordinator was needed for this task because timber sales are not directly challenged by an appeal or litigation. What is challenged is the NEPA document. By using the list of timber sales, Barb Beckes was able to match up each timber sale with NEPA documents and identify what sales were appealed and/or litigated. Each timber sale was assigned to one of six categories. These six categories are a combination of possible appeal and litigation activity against a NEPA document.

- Not appealed, so can't be litigated
- Appealed, but not litigated
- Appealed and litigated
- Not appealable, not litigated
- Not appealable, litigated
- Appeal and litigation information could not be found.

After the sales were broken into categories, purpose and need statements for each of the sales were identified by the NEPA coordinator, and include the following:

- Fuels, Wildlife Urban Interface (WUI)
- Fuels, non-WUI
- Wildlife Habitat Improvement
- Forest Health
- Bug Salvage
- Fire Salvage
- Blow Down Salvage
- Stewardship
- Access to Private Land
- Timber is a by-product of Intention of NEPA Document

Silvicultural prescriptions were also categorized for each timber sale and included:

- Clear Cut
- Seedtree
- Shelterwood
- Improvement Cut
- Thin From Below

- Thin From Above
- Salvage

Multiple sale purpose and need statements and silvicultural prescriptions could be identified for an individual sale. Finally, the percent of times a purpose and need statement and a silvicultural prescription was used in an appealed and/or litigated sale was found by dividing the number of timber sales appealed and/or litigated in each category by the total number of timber sales in that category.

Results

Results of Analysis of Appeals and Litigation of Lolo National Forest Timber Sales

After separating the timber sales based on the stipulations above, 157 timber sales from the Lolo NF, as well as the volume from these timber sales (Figure 3), were put into the different classifications of appeals and litigation. Of these timber sales, 46% fell into the category of not appealable and not litigated. While this category comprised a large number of timber sales, only 7%, or 11.2 MMBF, of the total timber volume in all the timber sales fell into this category. The category with the largest volume was sales that were not appealed (so they couldn't be litigated). This category included 60.8 MMBF, or 38%, of the total volume analyzed. A total of 106 timber sales (67%) on the Lolo National Forest for the years 1999 thru 2008 were not appealed or litigated. These 106 sales represent 71.9 MMBF, or 45% of the total volume. In comparison, the total number of timber sales that were appealed and/or litigated was 41, or 27% of all analyzed timber sales. The volume represented by these sales was 89.3 MMBF, or 55% of the total volume in the analyzed timber sales during the study period. From these numbers we see that most timber sales on the Lolo National Forest from the years 1999 to 2008 were not challenged by an appeal or litigation. However, over half of all the wood involved in a timber sale on the Lolo National Forest was appealed and/or litigated.

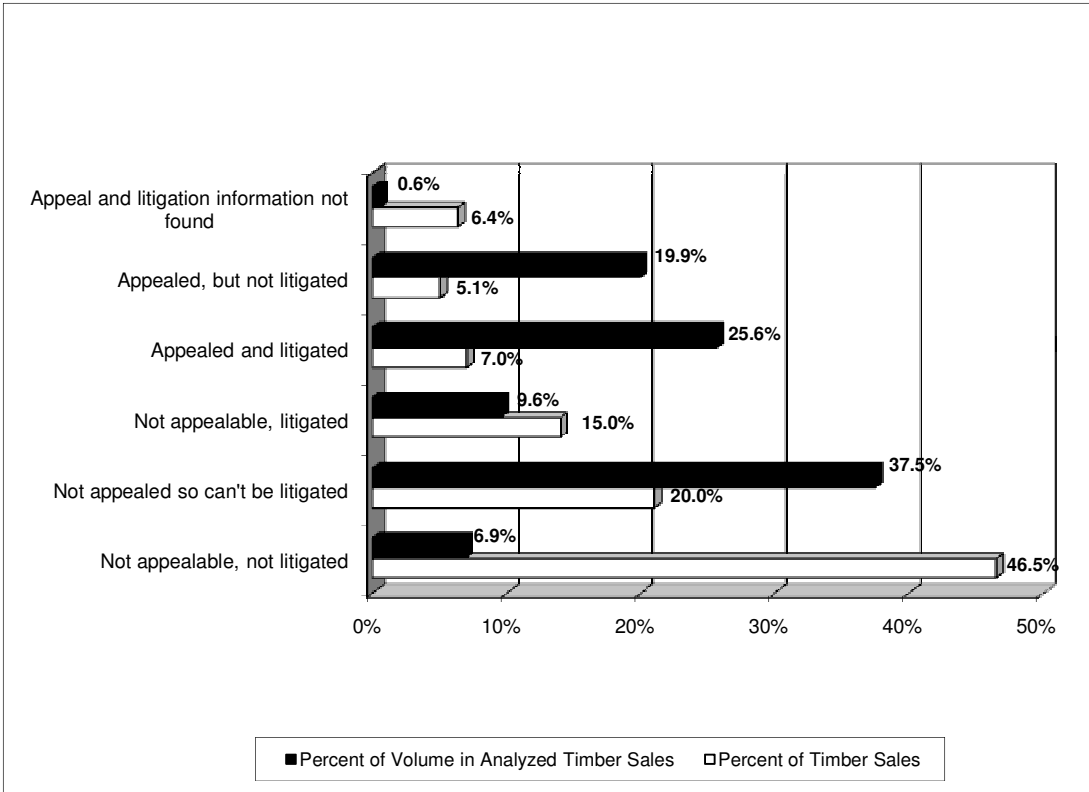


Figure 3. Percent timber sales and percent of volume of wood appealed and litigated on the Lolo NF, 1999 thru 2008.

The Appealed and/or Litigated Sales from the Lolo NF

The district that had the highest number of timber sales appealed and/or litigated was the Superior (Figure 4). Of 41 Lolo NF timber sales that were appealed and/or litigated from the years 1999 to 2008, 20 of these sales, or 50% were from the Superior district. These sales had 56% (Figure 5) of the total volume in all the sales that were appealed and/or litigated.

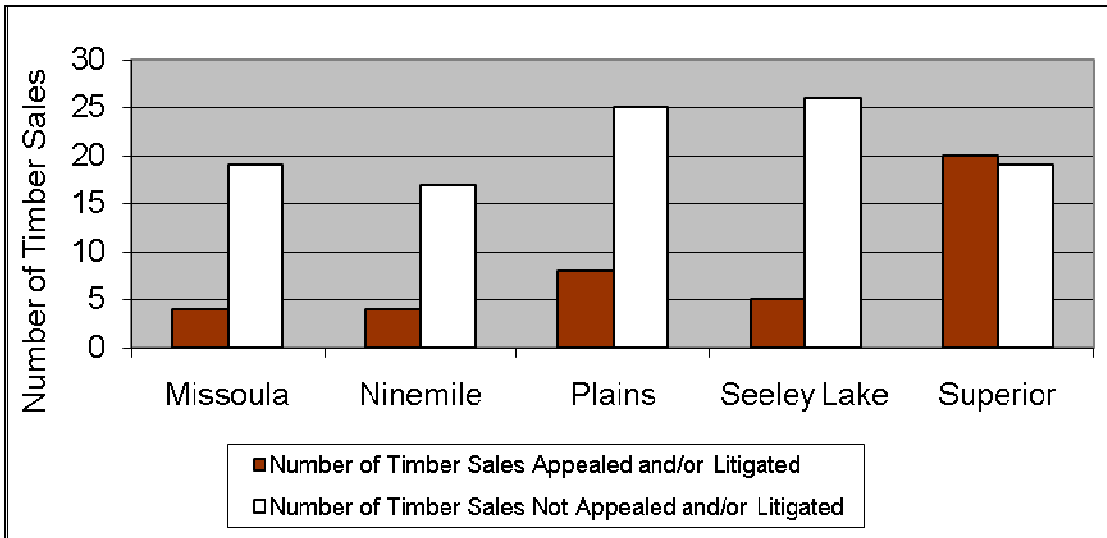


Figure 4. Number of timber sales appealed and/or litigated on each district on the Lolo NF, 1999 thru 2008.

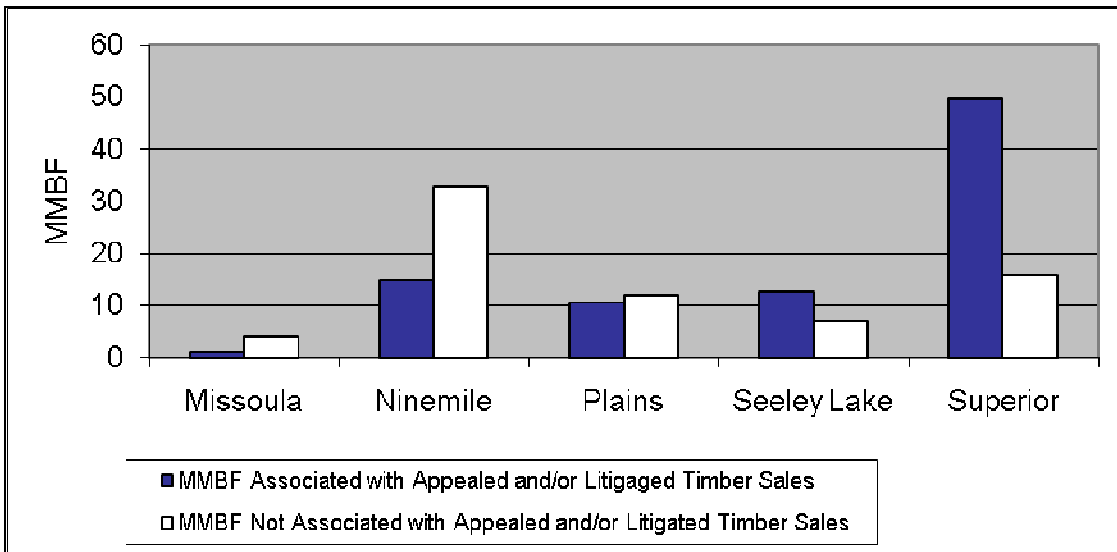


Figure 5. Volume of wood appealed and/or litigated on each district on the Lolo NF, 1999 thru 2008.

The districts that had the lowest number of timber sales that were appealed and/or litigated were the Missoula and Ninemile. Both districts had 4 challenged timber sales that each represented 10.3% of the total appealed and/or litigated timber sales. The Missoula district's appealed and/or litigated timber sale volume represented the lowest volume at 1.3% of the total litigated and/or appealed volume. The Ninemile district's appealed and/or litigated volume was larger at 16.9% of the total litigated and/or appealed volume.

Of the 41 timber sales that had NEPA documents that were challenged, 35 of the sales, or 85.3%, show their final gate as gate six, which means that they were sold and awarded to a purchaser. While these 35 sales were still able to be sold, it is unknown

what affect the appeals or litigation against these sales had on their volume during the course of their preparation. Without going thru each sale's preparation notes, it can not be determined if sale volumes were decreased due to the appeals or litigation. Six, or 14.6%, of the appealed and/or litigated timber sales final gates were shown as gate five and one timber sale, or 2.4% of the appealed and/or litigated timber sales, was last shown in gate 4. This means that seven of the 41 appealed and/or litigated timber sales were not sold to a purchaser. Without the timber sale preparation notes, it is unknown what effect being appealed and/or litigated had on the inability of these sales to sell. The volume of wood in these unsold timber sales is 5 MMBF or 5.5% all appealed and/or litigated volume. This means that only 5.5% of the 55.1%, or 3%, of the total volume of wood in the analyzed timber sales may not have been sold as a completed timber sale due to appeals and/or litigation.

The purpose and need statements for timber sales on the Lolo NF from 1999 thru 2008 that were most associated with appealed and/or litigated timber sales in relation to their representation within the population as a whole were "wildlife habitat improvement" and "stewardship sales" (Figure 6). In both of these categories of purposes and needs, each showed up one time in all analyzed sales from the Lolo over the study period, and the sales that they were in were appealed and/or litigated, making these purpose and need statements appealed and/or litigated 100 percent of the time on the Lolo NF from 1999 to 2008. The purpose and need statement that was least associated with appealed and/or litigated timber sales in relation to their representation within the population as a whole was the category "timber is a by-product of the intention of the NEPA document" followed by "access to private land".

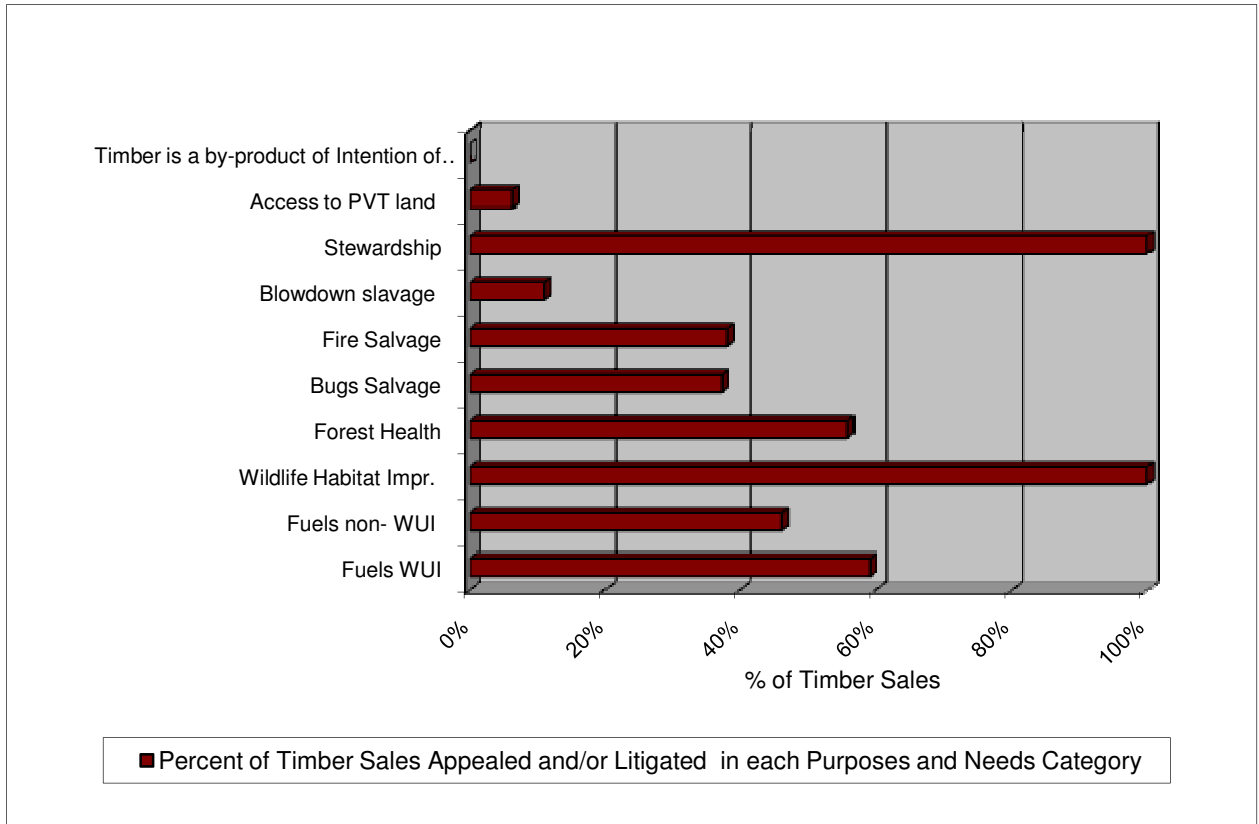


Figure 6. Percent of timber sales in each purpose and need statement’s category from the Lolo NF associated with appeals and/or litigation, 1999 thru 2008.

The silvicultural prescription for timber sales on the Lolo NF from 1999 thru 2008 that was most associated with appealed and/or litigated timber sales in relation to their representation within the population as a whole was “thin from above” (Figure 7). Thin from above was only used for parts of two sales, however each of these sales fell into the category appealed and/or litigated, making this silvicultural prescription appealed and/or litigated 100 percent of the time on the Lolo NF from 1999 thru 2008. The silvicultural prescription that appeared the least in relation to their representation within the population as a whole was “clear cut”.

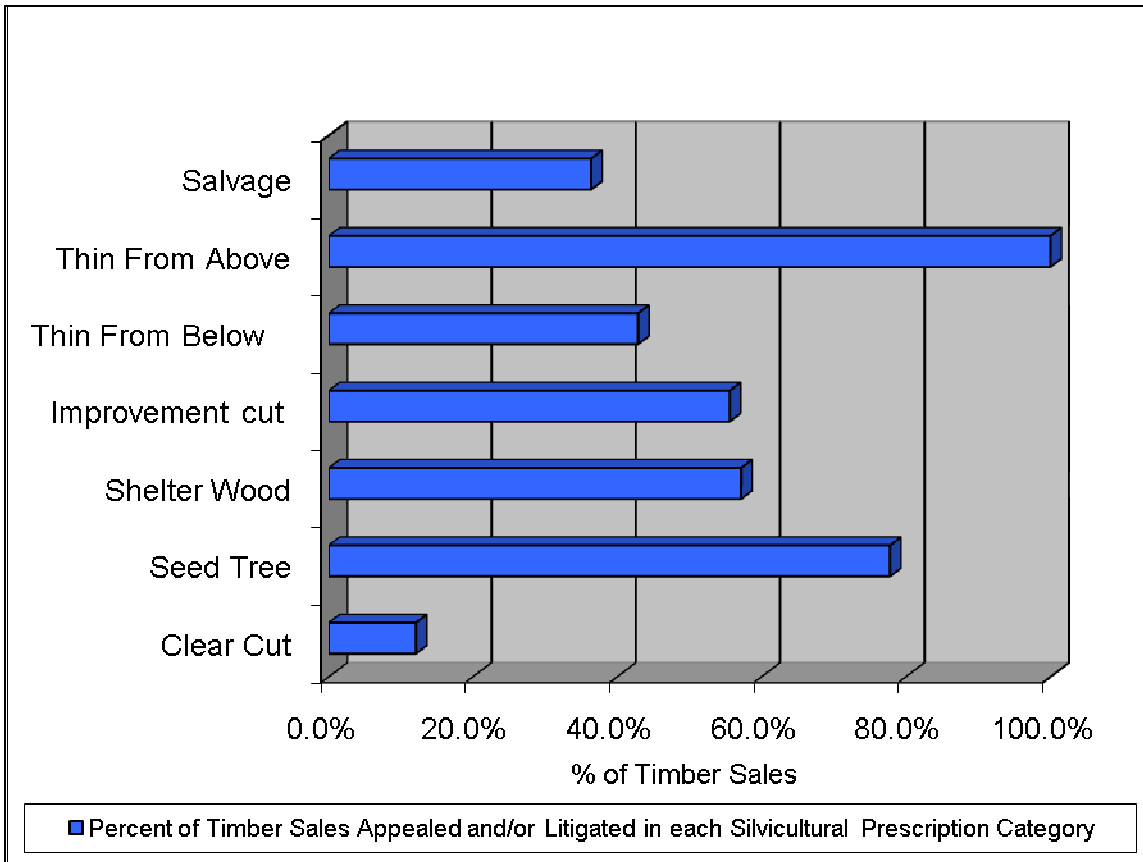


Figure 7. Percent of timber sales in each silvicultural prescription category from the Lolo NF associated with appeals and/or litigation, 1999 thru 2008.

Volume for each purpose and need statement category and each silvicultural prescription is shown in Figure 8. It is important to note that a timber sale may have multiple purpose and need statements or have multiple units utilizing different silvicultural prescriptions. For this analysis the total sale volume was assigned to each purpose and need statement or silvicultural prescription. The volumes of the categories of sales that had the highest percentage of being associated with appeals and/or litigation over the purpose and need statements categories were “wildlife habitat improvement” and “stewardship”, with 100% of the volume in these categories associated with some form of appeals and/or litigation. The volume of the sale that had the highest percentage of being associated with appeals and/or litigation over the silvicultural prescription’s categories is the “thin from above” category with 100% of the volume in this category associated with some form of appeals and/or litigation.

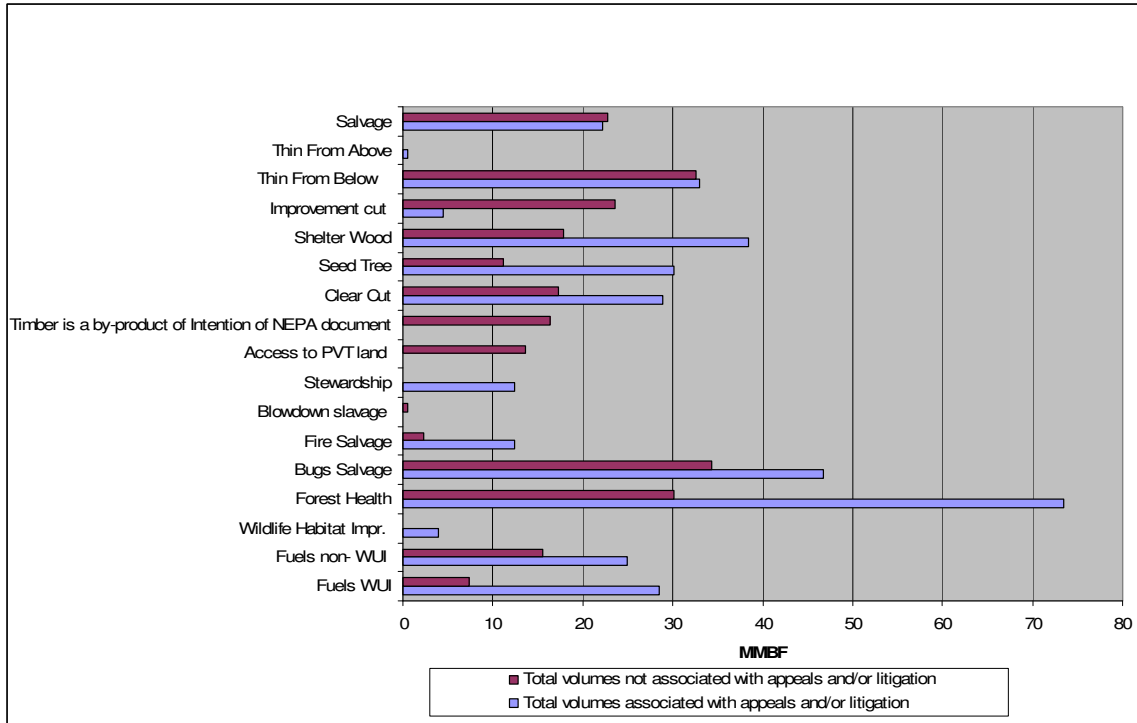


Figure 8. Volume from all the timber sales associated with some form of appeal and/or litigation compared to volume not associated with an appeal and/or litigation in each purpose and need statement's and silvicultural prescription's category.

Of the appealed and/or litigated timber sale categories, “appealed, but not litigated” and “appealed and litigated” had the largest average volume per sale (Figure 9). The categories “appeal and litigation information could not be found” and “not appealed, and not litigated” had the lowest average volume per sale. An inference that can be made from this graph and from Figure 3 is that while there aren't many timber sales getting appealed, the ones that are, are larger timber sales, and of the 12% that are getting appealed, the Lolo NF corrects just under half of these sales to satisfactory standards of the appellants, and fails to satisfactorily correct just over half of these sales, so they end up getting litigated.

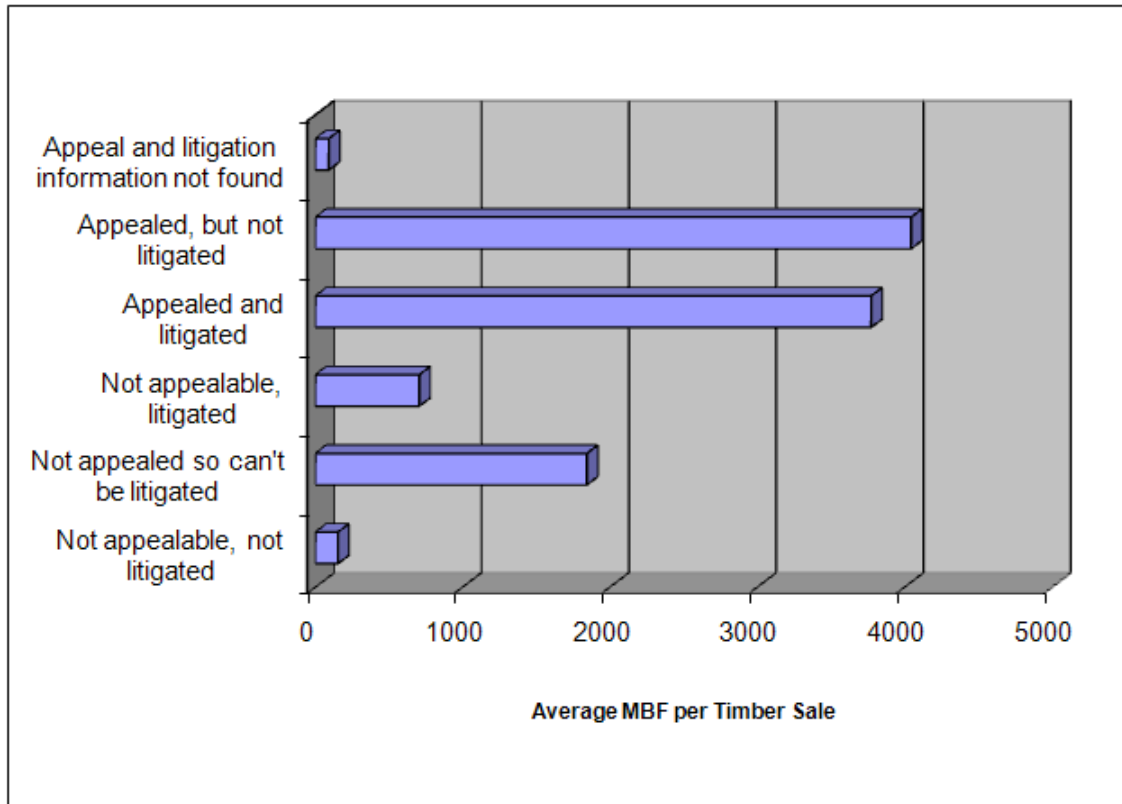


Figure 9. Average MBF per sale appealed and litigated on the Lolo NF, 1999 thru 2008.

Discussion

Discussion of Analysis of Appeals and Litigation

A possible inference that can be made from this study is that the Lolo NF's NEPA documents that create timber sales that harvest timber for wildlife habitat improvement or setup stewardship sales are not being prepared satisfactorily for environmental groups. It is not that environmental groups are challenging the Lolo NF performing wildlife habitat improvement or stewardship sales, but that in their preparation of sales with these types of objectives, the Lolo NF is not sufficiently addressing the public's concerns, resulting in appeals and/or litigation. In contrast, NEPA documents that are being created where timber is a by-product of the intention of the NEPA document are not being appealed and/or litigated, which means the public agrees with the design and implementation of these types of NEPA documents.

From Figure 7, inferences can be made that the public agrees with how the Lolo NF is creating NEPA documents that create timber sales that have the silvicultural prescription of "clear cut" in them. Contrary to the apparent acceptance of the Lolo NF's performance of the silvicultural prescription of "clear cut", how the Lolo NF is using the

silvicultural prescription “thin from above” appears to have the greatest disagreement with the public.

This study of appeals and litigation gives an idea of how many timber sales and the volume of wood that has been affected by appeals and/or litigation on an individual forest scale, as well as some characteristics of appealed and/or litigated timber sales. This is important due to the current lack of tracking of appeals and litigation of timber sale NEPA documents in Region 1 of the Forest Service, which includes the Lolo NF. Region 1 of the Forest Service currently does not track the numbers of timber sales, or the volume in those sales, that have been appealed and/or litigated. Region 1 is expected to start using PALS (Project Appeals Litigation System) sometime in the near future to track appeals and litigation. However without current tracking of the types of timber sales most associated with appeals and litigation, Region 1 and the Lolo NF will be unable to determine if appeals and litigation associated with timber sales are increasing or decreasing and if there are any common characteristics of timber sales that are consistently being appealed or litigated. This study will now give the Lolo NF the ability to determine if appeals and litigation associated with timber sales are decreasing or increasing, as well as identifying some characteristics that the Lolo NF could focus on to avoid being appealed or litigated. While this study does offer much more information about the current state of appeals and litigation on the Lolo NF, it does not inform us to what the effects of the appeals and litigation are. A much more in depth study would be needed to see what effect appeals and litigation are having on timber sales. Rather than using the periodic timber sale accomplishment reports, which only show the volume of a sale at its final gate, timber sale preparation notes from each individual sale would need to be examined to see how appeals and/or litigation affected the volume of wood in each sale. These notes are not kept in one place for each forest, like the timber sale accomplishment reports, but at each District’s office.

While this study fails to show the effect of the appeals and litigation on timber sales, it does show that the public has an interest in how the Lolo NF is managing the public’s timber, due to the association of 56% of the volume of timber in the analyzed timber sales from 1999 to 2008 with an appeal and/or litigation. Since it is evident that the public has in some way, either thru appeals or litigation, voiced a concern with the intended management of the Lolo NF, it will be useful to identify some reasons that one of the biggest appellants and litigators of Lolo NF timber sales, the Wild West Institute, has for appealing and litigating timber sales (Beckes pers. comm.).

Formerly, the Wild West Institute was two organizations, the Ecology Center and the Wild West Institute. From 1989 to 2005, the Ecology Center was the second most frequent party, nationally, opposing the US Forest Service in land management cases and the most successful in their opposition (Portuese et al. 2009). According to Barb Beckes, they have filed four lawsuits against six NEPA documents, impacting several timber sales since multiple timber sales can stem from one NEPA document.

In addition to discussing the Wild West Institute’s reasons for appealing or litigating sales, it is also useful to briefly discuss what the possible costs are to both appellants and defendants of appeals and litigation against Lolo NF timber sales. By discussing causes of appeals and litigation and the costs, this study will attempt to further inform the reader about appeals and litigation on the Lolo NF.

Reasons for Filing Appeals and Litigation in Response to Forest Service Timber Sales

According to Matthew Koehler, Executive Director of the Wild West Institute, there are two determining factors for when an environmental group chooses to challenge a sale. The first deciding factor is if the sale is, in their opinion, a large egregious timber sale that is threatening roadless areas, old growth timber, or important habitat. This deciding factor is demonstrated in Figure 9 where the two categories that had the highest average MBF per sale on the Lolo NF are the appealed category and the appealed and litigated category. One reason that larger timber sales are sought after for appeal and litigation is that the larger a timber sale is, the more purposes and goals are trying to be met and the more silvicultural prescriptions are involved and applied to a larger area of ground. This increases the odds that the timber sale's NEPA document in some way raises concerns with an environmental group as the size of the sale increases.

The second deciding factor for the Wild West Institute in choosing which NEPA documents to challenge is if by challenging a timber sale's NEPA document, issues could be raised about a large scale EIS or Forest Plan. These projects might seem like common projects but a project has to be sued in order to get at some larger issues with large scale EIS's and Forest Plans. While litigating large NEPA documents has given the Wild West Institute a better chance to bring up immediate concerns, for some of the projects that are litigated, the size of the timber sale doesn't matter as much as what types of management activities are included in the NEPA document. The Wild West Institute is more concerned about bringing up issues with Forest Plans when they litigate some smaller NEPA documents. According to Matthew Koehler, they have increased their litigation over smaller timber sale NEPA documents in the last three or four years because the Forest Service has been going through a Forest Plan revision process with new planning regulations, which the Wild West Institute has had issues with. The Wild West Institute feels that the planning regulations don't require enforceable standards in the regulations so they have been suing projects that get at those issues in hopes that new Forest Plans that come out will contain more enforceable standards.

It is useful to know the Wild West Institute's criteria for deciding what timber sale NEPA documents to challenge, because between 1989 and 2005 environmental organizations were the most frequent type of party opposing the US Forest Service (Portuese et al. 2009).

Costs Incurred by all Parties Involved in Appeals and Litigation over Forest Service Timber Sales

Regardless of the reason, when Forest Service timber sales are appealed or litigated there are costs incurred to all parties involved. The Forest Service incurs costs due to paying salaries of people working on the appeals or litigation, copying costs, legal costs and travel costs. (Riber pers. comm.). In addition, if the Forest Service has already sold the timber sale and then they aren't allowed to go forward with it, there are claims from the purchaser that the Forest Service has to pay (Beckes pers. comm.). While it is known that these costs are incurred, the Forest Service does not track these costs. This is because costs from appeals and litigation against a timber sale are funded by the project

code for that project (Riber pers. comm.). This means that a project's cost does increase due to appeals and litigation, however the magnitude of increase cannot be determined. An estimated cost for appeals and litigation on the Lolo National Forest, according to the Forest's NEPA coordinator, is on average 15 thousand dollars to respond to an appeal. The average litigation doubles that cost to about 30 thousand dollars plus court fees (Beckes, pers. comm.).

In addition to the Forest Service incurring costs due to appeals and litigation, the groups that are filing the appeals and litigation are also incurring costs. While appeals don't cost groups anything, other than normal staff time (Koehler pers. comm.), litigation can be more costly. According to Matthew Koehler, if the Wild West Institute chooses to litigate, the attorneys involved work pro-bono so the only way the attorneys ever get paid is if they win a case and they successfully petition for fee recovery thru the Equal Access to Justice Act. If the Wild West Institute loses the lawsuit they have to pay filing fees. The cost for filing fees at the District Court level for the Wild West Institute is about \$300. If the case goes to the appeals court, costs may rise to \$500 dollars. Additionally if the case goes to the appeals court the group's attorney may have to fly to San Francisco, Portland, or Seattle which incurs additional travel costs that are a few thousand dollars (Kohler pers. comm.).

Recommendations

If the goal is to reduce the amount of appeals and/or litigation associated with timber sales, then this analysis suggests two recommendations. The first is for the Lolo NF to focus on reducing the number of timber sales and the volume of timber that is associated with appeals and/or litigation on the Superior RD, since this district had the highest number of timber sales and volume associated with appeals and/or litigation. A possible solution to reducing the Superior RD's volume associated with appeals and/or litigation is to analyze the timber sale's that took place on the Superior RD and identify what issues were raised with these sales. The issues that were raised with these sales could then be focused on in future sales on the Superior RD, as well as the entire Lolo NF, to reduce the volume associated with appeals and/or litigation. The second is that when preparing NEPA documents for timber sales, make a special effort to involve environmental groups, especially when there is going to be a purpose and need statement of a "stewardship sale" or a "wildlife habitat improvement" or a silvicultural prescription of "thin from above" since 100% of sales that involved these in the study period had some form of appeal and/or litigation, which means that the environmental groups, so far, have not been satisfied with how these purpose and need statements and silvicultural prescriptions are being implemented on the Lolo NF.

If the Lolo NF wishes to reduce costs associated with preparing timber sales and not worry about increasing the number of appeals, it is recommended that the Lolo NF reduce the amount of money spent "bullet proofing" their environmental analyses. The reason for this is that a large EIS can cost the Forest Service millions of dollars, but if under half of all timber sales on the Lolo NF had some association with an appeal or litigation, and appeals and/or litigated only cost the Lolo NF an estimated fifteen thousand dollars, they could stand to deal with many more appeals for what is spent on one EIS. By reducing the time and money spent on an EIS and then focus on dealing

with the appeal, the Lolo NF could identify what issues appellants bring up in the appeal, and then spend the time and money on addressing those issues, rather than trying to cover everything and anticipate what concerns groups are going to have. This would most likely increase the number of appeals, but it would reduce the Lolo NF's costs and time associated with preparing the NEPA documents for timber sales.

Conclusion

This study shows just how active the public is in the management of one National Forest's timber management program by examining the appeals and litigation over the Lolo NF's timber sales. With 56% of the volume in timber sales from the Lolo National Forest affected by an appeal and/or litigation between 1999 and 2008, the effect of these appeals and litigation could be vary large. While further research will be needed to identify exactly what the effect of appeals and litigation are on this volume of wood or how the Lolo NF's appeals and litigation associated with timber sales compares to other National Forests, it is useful knowing the number of sales and the volume of wood affected by appeals and litigation on the Lolo NF. With the recent attempt by the Forest Service, citizen groups, and interest groups to reduce appeals and litigation by forming collaborative partnerships, this study will give everybody a benchmark to evaluate the effectiveness of such groups by giving them a point to compare future levels of appeals and litigation over Lolo NF timber sales.

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