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# Twenty Years of Forest Service National Environmental Policy Act Litigation

Amanda M.A. Miner, Robert W. Malmshemer, Denise M. Keele, Michael J. Mortimer

The USDA Forest Service is sued more often than any other federal agency under the National Environmental Policy Act of 1969 (NEPA). This analysis examines Forest Service land management cases initiated from 1989 to 2008 to understand how the agency fared in NEPA cases. Of the 1,064 completed cases, 671 (63.1%) involved a NEPA challenge. The agency won the final outcome of 343 cases (51.1%), lost 176 (26.2%), and settled 152 (22.7%). Case characteristic analyses indicate that case decisions peaked at the end of the 1990s, occurred mostly in the Ninth Circuit, and predominately involved vegetative management, forest planning, roads, recreation, and wildlife management activities. In addition to these general case outcomes, we conducted an in-depth analysis of the 411 cases where a judge or panel of judges specifically ruled on a NEPA challenge. The agency won the NEPA claim in 69.3% of these cases. The Forest Service was most successful litigating supplemental environmental impact statement cases and least successful in categorical exclusion cases. Most challenges to Forest Service NEPA implementation were based on environmental assessments (EAs) and environmental impact statements (EISs). The agency was more likely to win a direct and indirect effects EA challenge and a range of alternatives EIS challenge. Since the Forest Service accounts for a large portion of all NEPA litigation, this research enhances understanding of legal challenges to NEPA's implementation.

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The National Environmental Policy Act of 1969 (NEPA) (42 USC 4321–4347) requires that all federal agencies evaluate the potential environmental effects of major agency actions, including when federal agencies propose actions or otherwise permit, authorize, or fund other organizations to take actions that would significantly affect the human environment. NEPA also creates an opportunity for public participation in the decision-making process prior to a federal agency's final decision on a proposal, and requires public disclosure of potential environmental, economic, and social effects of an agency's decision.

The United States Department of Agriculture (USDA) Forest Service prepares more environmental impact statements (EISs) than any other federal agency (Broussard and Whitaker, 2009; Council on Environmental Quality (CEQ), 2009). From 1998 to 2008, the Forest Service filed an average of 147 EISs per year, with a high of 189 EISs in 2003—more than US Department of the Interior (USDOI) Bureau of Land Management, USDOI Fish and Wildlife Service, USDOI National Park Service, and Department of Defense (DOD) Army Corps of Engineers combined (CEQ, 2009).

The adequacy of the environmental review process and documents associated with that process (Figure 1) is the source of NEPA litigation. Although the Forest Service has an internal administrative appeals process that allows the public the opportunity to appeal a Forest Service decision, this process is sometimes inadequate for resolving land management disputes. After an individual or organization has exhausted the Forest Service's internal administrative appeals process, dissatisfied parties can pursue the dispute in US federal court. This happens quite often; for each year

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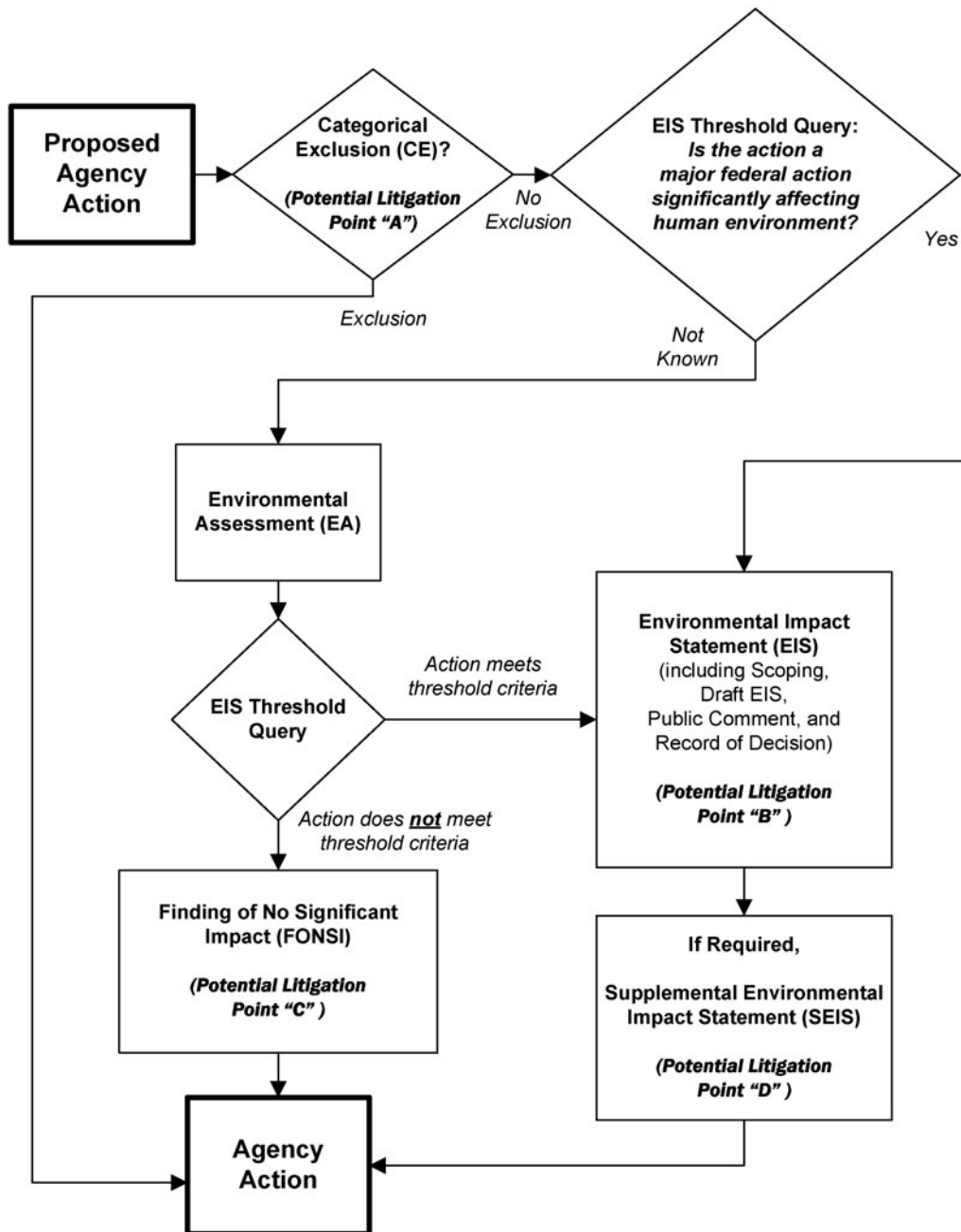


Figure 1. The National Environmental Policy Act of 1969 (NEPA) process with potential points for litigation.

from 2001 to 2008, the Forest Service was sued more often than any other federal agency under NEPA. This article examines these cases. Although others have reported on Forest Service NEPA litigation—for example, the CEQ (2009) notes that the agency accounted for 38% of all NEPA suits against federal agencies—this article provides an in-depth analysis of the characteristics of Forest Service NEPA litigation. After reviewing other NEPA litigation research, we

describe our methods. We then organize our results into two sections: (a) an analysis of all NEPA cases that examines how cases’ characteristics affected their final outcomes, and (b) an analysis of only judicially decided cases that examines how NEPA documents and their contents affected their final outcome. We conclude by discussing the implications of our results. The relative prominence of the agency’s NEPA litigation makes it the ideal agency to an-

alyze for long-term litigation trends and to provide insights and lessons for the Forest Service, other federal agencies, stakeholders, and policy makers interested in understanding NEPA's implementation and considering revisions.

## Forest Service NEPA Litigation Research

Forest Service NEPA litigation has been the subject of much research, although most of it has been tangential to the question of how well the agency fares when NEPA serves as the lawsuit's statutory basis. For example, some researchers have specifically analyzed Forest Service litigation (Jones and Taylor, 1995; Keele et al., 2006; Malmsheimer, Keele, and Floyd, 2004; Mortimer, 2002), but these studies examined the agency's success in NEPA litigation only cursorily or not at all. One study (Broussard and Whitaker, 2009) specifically analyzed Forest Service NEPA litigation, the subject of this article. However, since that study's data were restricted to published judicial opinions, the data's generalizability is limited to legal opinions in those cases where judges directed publication of the findings—which Keele et al. (2006) found to comprise only 30.2% of all Forest Service land management cases. As Keele et al. explained, research results based upon an analysis of published judicial opinions, rather than an analysis of the final outcomes of cases, creates two generalizability problems: (a) it does not locate every case based on researchers' search criteria, and (b) it often does not analyze the final outcome of cases. The remainder of this section describes research that informs and can be compared to our analysis.

Jones and Taylor (1995) examined published Forest Service opinions from 1971 to 1992 that challenged the agency's land management decisions based on NEPA and the National Forest Management Act (NFMA). The Forest Service won 42 (54.4%) of the NEPA opinions. Environmentalists initiated most (70%) NEPA-based challenges, generally to block Forest Service commodity production activities, such as timber harvesting, road-building activities, mineral/oil/gas extraction, and pesticide applications.

When Malmsheimer, Keele, and Floyd (2004) examined published Forest Service land management litigation in the US Circuit Courts of Appeals, they found that Forest Service litigation increased from 1970 to 2001 and most of the litigation involved NEPA, but that NEPA litigation was fairly evenly distributed over the three decades. They stated that NEPA's prevalence at the appellate level demonstrated the statute's importance in national forest litigation.

Unlike other NEPA litigation research, Keele et al. (2006) analyzed the *final outcome* of legal cases by examining published *and* unpublished documents—including the types of judicial opinions analyzed by every other study described in this article—in Forest Service land management cases initiated from 1989 to 2002. They found NEPA was present in 68.6% of Forest Service litigation and (as would be expected since NEPA was involved in such a large percentage of the cases) that the Forest Service's NEPA win, loss, and settlement rates mirrored the Forest Service's overall win (57.6%), loss (21.3%), and settlement (17.6%) rates.

Broussard and Whitaker (2009) specifically analyzed Forest Service NEPA litigation, examining published opinions decided from 1970 to 2001. They provide a wide range of descriptive statistics on the 291 published opinions they located, examining temporal, spatial, and decisional trends, and opinion characteristics. Importantly, unlike other studies, they provide an analysis of the NEPA basis of court decisions, coding opinions into two mutually exclusive categories: (a) no environmental assessment (EA) or EIS, or (b) inadequate EA or EIS. This analysis revealed more opinions based on inadequate EAs or EISs than on no EA or EIS. However, Broussard and Whitaker (2009) acknowledged the need for additional research to “examine unpublished as well as published court cases . . . [to] build the body of knowledge around US Forest Service NEPA litigation” (p. 140).

These studies' varying results highlight the need for longer study periods and more comprehensive databases. This research addresses their methodological shortcomings by building upon Keele et al.'s (2006) work and analyzing published *and* unpublished Forest Service land management cases involving NEPA.

## Methods

This study analyzed all federal court cases filed from January 1, 1989, to December 31, 2008, in which the Forest Service was a defendant in a lawsuit challenging a land management decision and the plaintiff claimed the Forest Service violated some aspect of NEPA. Land management cases “included all 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” (Keele et al., 2006, p. 197).

We expanded a database compiled by Keele et al. (2006), which contained land management cases based on a vari-

ety of statutes (including NEPA) filed from 1989 to 2002, to include cases filed up until December 31, 2008, and completed by June 30, 2009, an end date that provided time for cases initiated during the most recent years to conclude.

We used Keele et al.'s (2006) three-step cross-checking method to locate cases and obtain documents for cases initiated after Keele's original database's end date (December 31, 2002). We read and coded two documents for most cases: (1) the 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 other cases, the notice of withdrawal or the stipulation of voluntary dismissal. For cases that were appealed to the court of appeals, we read and coded these documents at all court levels.

To understand how case characteristics affected the outcome of cases, we coded *every* case for its case characteristics (initiation date, purpose, and management activity challenged) and its final outcome. We describe our case and statutory characteristic variables in our results. We coded cases' final outcomes into one of three mutually exclusive categories: Forest Service loss, Forest Service win, or settlement.

*Forest Service win.* We coded cases as a Forest Service win if (a) the court found that the Forest Service had *not* done anything incorrectly, (b) the plaintiff withdrew their claim prior to a decision on the case's merits, (c) the court dismissed the claim on procedural grounds, or (d) the plaintiff agreed to a voluntary dismissal of the claim (including a voluntary dismissal after a judge denied the plaintiff's request for a preliminary injunction).

*Forest Service loss.* We coded cases as a Forest Service loss (since the case at least partially altered or delayed a Forest Service land management decision) if (a) the court found that the Forest Service had done *anything* incorrectly, (b) a judge ruled against the Forest Service on procedural grounds, or (c) the Forest Service withdrew the project or plan completely prior to a judicial decision on the case's merits.

*Settlement.* We coded cases as a settlement if the parties agreed to a court-ordered stipulated agreement to settle their dispute.

To learn how the Forest Service fared when a judge or panel of judges *explicitly determined* whether the agency preformed its NEPA responsibilities correctly, we used a slightly different coding scheme that allowed us to recog-

nize that while *all* of these cases involved alleged NEPA violations, plaintiffs in some cases alleged that the agency violated NEPA and *another* statute. Since we were interested in how the Forest Service fared in judicially decided cases on *both* the NEPA claim in these cases and their final outcome, we coded these cases' NEPA claim *and* final outcome into two mutually exclusive categories (based on subsets of our three outcome case characteristic coding): Forest Service loss or Forest Service win.

*Forest Service win.* We coded these variables as a Forest Service win if a judge or panel of judges found that the Forest Service had *not* done anything incorrectly.

*Forest Service loss.* We coded these variables as a Forest Service loss (since the case at least partially altered or delayed a Forest Service land management decision) if a judge or panel of judges found that the Forest Service had done *anything* incorrectly.

## Results

From 1989 to 2008, a total of 1,160 land management lawsuits were initiated against the Forest Service, 1,064 of which were closed on June 30, 2009—we did not analyze the 96 open cases. We were unable to find complete statutory information for 127 (11.9%) of these 1,064 completed cases. Of the completed cases, 671 (63.1%) involved a NEPA challenge. The Forest Service won the final outcome of 343 (51.1%) of these 671 NEPA cases, lost 176 (26.2%), and settled 152 (22.7%).

### Case Characteristics

We coded cases for four characteristics: date, location, case purpose, and management activity. This allowed us to understand: (a) the spectrum of NEPA litigation and (b) how the Forest Service fared in cases involving these characteristics.

#### *Case initiation and closure*

The number of Forest Service NEPA cases commenced per year varied, with the number peaking in 2004 (Figure 2). The decrease in cases from 2005 to 2008 is due to the large number of open cases initiated in these years that are still being litigated—cases initiated later in the study period had less time to close than did cases initiated earlier.

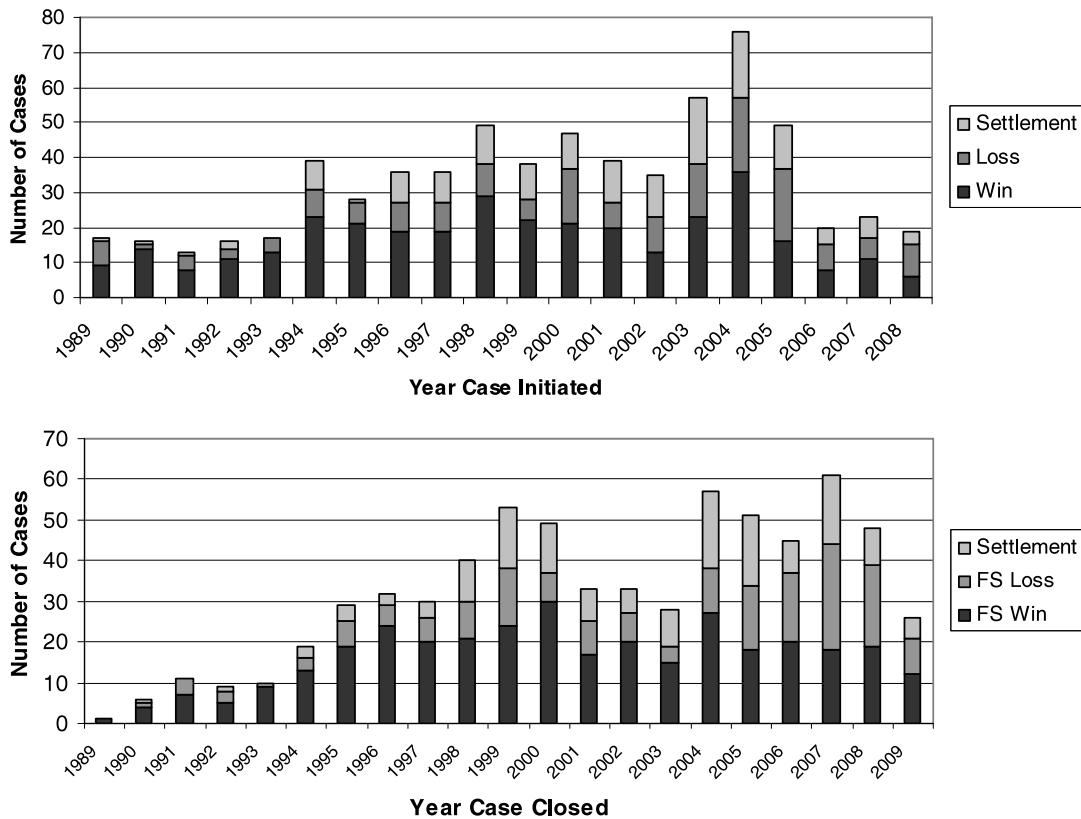


Figure 2. The number of NEPA claims, by final outcome and year of initiation (*top*) and year case closed (*bottom*) ( $N = 671$ ).

Analyzing cases based on the date cases closed, rather than when cases were initiated, reveals NEPA case decisions peaked at the end of the William J. Clinton administration and were high (compared to levels in the 1990s) throughout the middle to late George H.W. Bush administration. The Forest Service won the highest percentage (90% and 75%) of cases in 1993 and 1996, respectively, lost the highest percentage (43% and 42%) in 2007 and 2008, respectively, and settled more cases (19) in 2004 than in any other year.

### Location

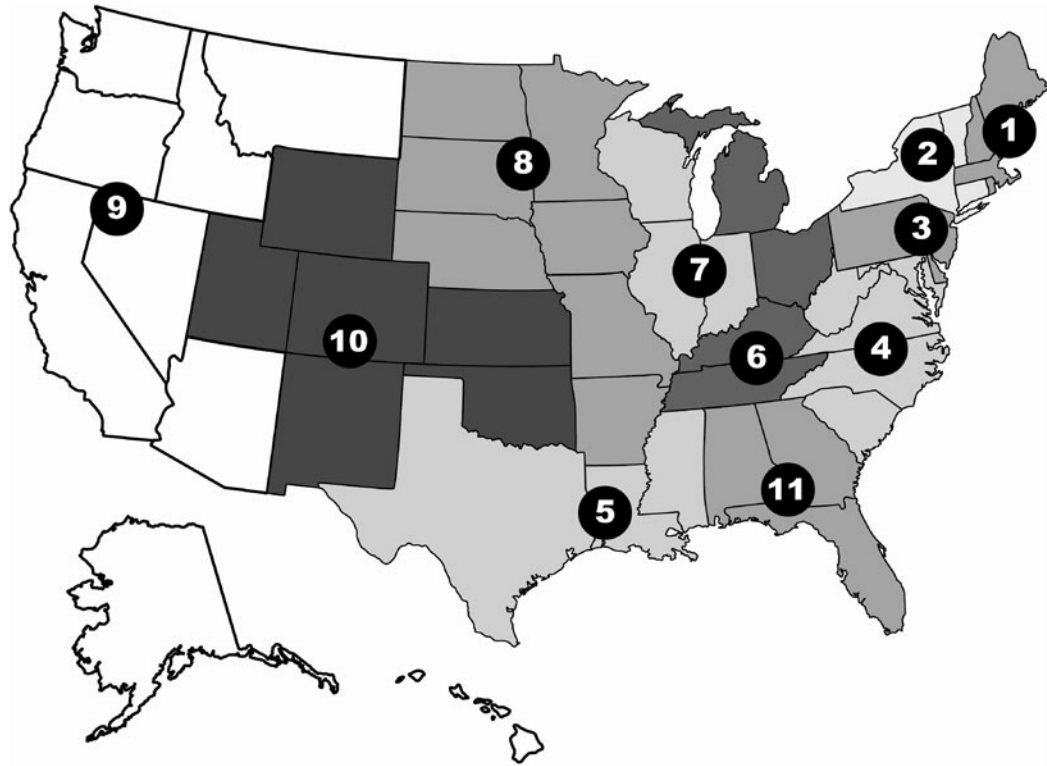
We analyzed cases' locations based on the US Court of Appeals circuit where the case was decided. The Courts of Appeals are the intermediate courts in the US court system. Eleven of the courts have limited geographic jurisdiction (Figure 3). The District of Columbia (DC) Court of Appeals circuit adjudicates cases that have national implications and do not involve specific land management projects. For example, if a plaintiff alleged that the administrative regulations the Forest Service promulgated regarding a new categorical exclusion (CE) violated NEPA

(regardless of how the Forest Service applied the CE on the project level), the DC Court of Appeals would have jurisdiction to decide that case because the ruling would affect the validity of the CE in general, not just how the agency applied the CE in a particular location.

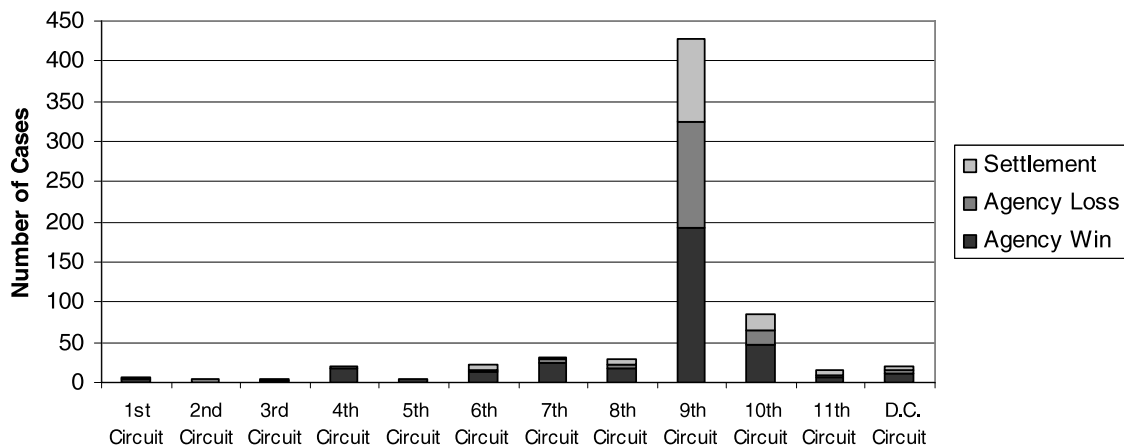
More than half (63.6%) of all cases were decided in the Ninth Circuit US Court of Appeals—the Ninth Circuit heard five times more cases than the Tenth Circuit, which heard the second most cases (Figure 4). This is not surprising since 57.2% of the National Forest System is located in this circuit (Malmsheimer, Keele, and Floyd, 2004). Only seven circuits decided an average of one or more cases per year. Of these circuits, the Forest Service was most successful in the Fourth Circuit and least successful in the Ninth Circuit. It settled a higher percentage of cases in the Sixth Circuit than in any other circuit.

### Management activity challenged

Using Keele et al.'s (2006) methods, we coded cases into 18 mutually exclusive categories. More than half of the NEPA



**Figure 3.** US Court of Appeals circuits by circuit number. Note: The District of Columbia Court of Appeals does not appear on this map; the circuit is located in Washington, DC.



**Figure 4.** Final outcome of Forest Service land management NEPA cases by US Court of Appeals Circuit ( $N = 671$ ).

cases involved vegetative management or salvage management. Of the activities that averaged one or more cases per year, the Forest Service was most likely to win (68%) a case addressing commercial development of a national forest, most likely to lose (34.5%) a wildlife case, and most likely to settle (30.4%) a grazing case (Table 1).

### Judicially Decided NEPA Claims

While a judge or panel of judges presided over all 671 cases involving a NEPA challenge, judges only made a *substantive* legal decision on the NEPA claim in 411 (61.3%)—the other 260 cases involved settlements, or wins or losses

**Table 1.** Final outcome of Forest Service land management National Environmental Policy Act of 1969 (NEPA) cases by management activity challenged in 20 or more of cases

	Vegetative management N = 253	Salvage management N = 84	Forest planning N = 57	Roads N = 36	Recreation N = 36	Wildlife N = 29	Special use permit N = 27	Commercial development N = 25	Grazing N = 23	Minerals or mining N = 21
Agency wins	124 (49.0%)	39 (46.4%)	33 (57.9%)	20 (55.6%)	20 (55.6%)	13 (44.8%)	16 (59.3%)	17 (68%)	14 (60.9%)	13 (61.9%)
Agency losses	63 (24.9%)	22 (26.2%)	18 (31.6%)	11 (30.6%)	9 (25.0%)	10 (34.5%)	4 (14.8%)	5 (22%)	2 (8.7%)	3 (14.3%)
Settlements	66 (26.1%)	23 (27.4%)	6 (10.5%)	5 (13.9%)	7 (19.4%)	7 (20.7%)	7 (25.9%)	3 (12%)	7 (30.4%)	5 (23.8%)

based on other aspects of cases, such as withdrawals or dismissals. To learn about how the Forest Service fared when a judge or panel of judges *explicitly determined* whether the agency preformed its NEPA responsibilities correctly in these 411 cases, we examined: (a) the NEPA document involved in the litigation and its content, and (b) judges' (or panel of judges') decisions on both cases' NEPA claims and their final outcome.

The Forest Service won the final outcome of 254 (61.8%) of these 411 cases and lost 157. However, the agency won the NEPA claim in 285 (69.3%) of these cases and lost the NEPA claim in 126 (30.7%) cases (i.e., in 31 cases, the agency won the NEPA claim, but lost the case because of a violation of another statute or statutes)—322 (78.3%) of the 411 cases involved plaintiffs claiming the agency violated NEPA *and* another statute. Since we only analyzed cases with a NEPA claim, this result was expected. The number of cases the Forest Service won on the NEPA claim must *always* be equal to or greater than the number of NEPA cases won overall—the agency can lose only additional cases based on the plaintiffs' other statutory allegations.

### Categorical exclusions challenges

Plaintiffs asserted the Forest Service improperly used CEs ("Potential Litigation Point A" in Figure 1) in 49 cases decided by a judge or panel of judges on the merits (Table 2). The agency did worse in CE cases than in cases based on any other NEPA document. It won the final outcome of 23 (46.9%) of these cases and lost 26 (53.1%). However, the Forest Service won the CE part of the claim in 27 (55.1%) of these cases and lost the CE claim in only 22 (44.9%). Thus, in four cases, the agency won the CE claim, but lost the case because of a violation of another statute or statutes. As we explained earlier, since this analysis includes only cases with a CE claim, this result was expected (and is found in all our analyses of NEPA documents).

### Environmental assessment challenges

Plaintiffs asserted the Forest Service improperly used EAs ("Potential Litigation Point B" in Figure 1) in 143 cases decided by a judge or panel of judges. The agency won the final outcome in nearly two thirds (66.4%) of these cases

**Table 2.** Final outcome of case and substantive judicial decision on NEPA document of Forest Service land management NEPA cases by categorical exemption (CE), environmental assessment (EA), environmental impact statement (EIS), and supplemental EIS (SEIS) claims

	Final outcome of case				Judicial decision on NEPA document			
	CE N = 49	EA N = 143	EIS N = 160	SEIS N = 56	CE N = 49	EA N = 143	EIS N = 160	SEIS N = 56
Agency wins	23 (46.9%)	95 (66.4%)	83 (51.8%)	38 (67.9%)	27 (55.1%)	104 (72.7%)	103 (64.4%)	48 (85.7%)
Agency losses	26 (53.1%)	48 (33.6%)	77 (48.2%)	18 (32.1%)	22 (44.9%)	39 (27.3%)	57 (35.6%)	8 (14.3%)

Note: The total number of CE, EA, EIS, and SEIS cases (408) is less than the total number of cases (410) substantively decided by a judge or panel of judges because 2 cases did not involve any of these four types of documents.



and the EA claim in 104 (72.7%)—in nine cases it lost the case, based on another statute or statutes.

### Environmental impact statement challenges

Plaintiffs asserted the Forest Service improperly used EISs (“Potential Litigation Point C” in Figure 1) in 160 cases decided by a judge or panel of judges. The agency won the final outcome in just over half (51.9%) of these cases and the EA claim in 103 (64.4%). Thus, in one of every eight EIS cases, the agency won the EIS claim, but lost the because of a violation of another statute or statutes.

### Supplemental environmental impact statement challenges

Plaintiffs asserted the Forest Service improperly used supplemental EISs (SEISs) (“Potential Litigation Point C” in Figure 1) in 56 cases decided by a judge or panel of judges. The agency won the final outcome in more than two thirds (67.9%) of these cases and the SEIS claim in 48 (85.7%)—the highest percent of cases based on any NEPA document.

### Types of EA and EIS challenges

Our coding scheme allowed us to analyze and compare the types of violations that plaintiffs’ alleged to Forest Service EAs and EISs (Table 3). For example, in cases decided by a judge or panel of judges, the agency was around 10% more likely to win a direct and indirect effects (D/IE) EA challenge (84.4%) and range of alternatives (RA) challenge (82.4%) than an EA cumulative impact (CI) challenge (72.7%). Conversely, for EISs, the Forest Service was more

than 10% more likely to win an RA claim (79.9%) than a CI (66.7%) or a D/IE claim (66.7%).

## Discussion

Many of our results build upon and clarify previous Forest Service litigation studies. As expected, since NEPA is involved in more than half of all Forest Service land management cases, our case characteristic findings are similar to those of Keele et al. (2006). Building on analysis by Malmshemer, Keele, and Floyd (2004), we found that most Forest Service NEPA litigation occurs in the Ninth Circuit and that the agency is least successful in that circuit, which raises the question of whether some circuits are less deferential to the agency’s findings. Our detailed analysis of NEPA challenges builds on Broussard and Whitaker’s (2009) preliminary statutory analysis and supports many of their case characteristic findings. For example, although our management activity categories differed, our analysis supports Broussard and Whitaker’s findings that most NEPA cases involve vegetative management, forest planning, roads, recreation, and wildlife.

However, our analyses of how the Forest Service fared in judicially decided cases on *both* the NEPA claims in these cases and their final outcome *and* our census of published and unpublished cases over a 20-year period allowed us to identify some characteristics of Forest Service NEPA litigation overlooked in other studies. For example, while the Forest Service won the majority of all NEPA cases (51.1%), it does much better (61.7%) in those cases judicially determined on the merits. Importantly, in nearly seven (69.3%)

**Table 3.** Substantive judicial decision of Forest Service land management NEPA cases by environmental assessment (EA) and environmental impact statement (EIS) range of alternatives, direct and indirect effects, and cumulative impact challenges

	Range of alternatives		Direct and indirect effects		Cumulative impacts	
	EA	EIS	EA	EIS	EA	EIS
Agency wins	42 (82.4%)	63 (79.7%)	27 (84.4%)	28 (66.7%)	48 (72.7%)	50 (66.7%)
Agency losses	9 (17.6%)	16 (14.3%)	5 (15.6%)	14 (33.3%)	18 (27.3%)	25 (33.3%)
Total	51 (100%)	79 (100%)	32 (100%)	42 (100%)	66 (100%)	75 (100%)

Notes:

- The number of EA range of alternatives (RAs), direct and indirect effects (D/IEs), and cumulative impact (CI) challenges adds to more (149) than the number of EA cases (143) in this table because 6 EA cases involved more than one type of challenge.
- The number of EIS RAs, D/IEs, and CI challenges adds to more (196) than the number of EIS cases (160) in this table because 36 EIS cases involved more than one type of challenge.

of every ten of those cases, judges found that the agency had prepared its NEPA documents correctly. The Forest Service's success rate may simply indicate that the agency's legal council settles and otherwise disposes of the cases effectively with the highest risk of loss for the agency at trial—the agency settles (22.7%), almost as many cases as it loses (26.2%). However, it is important to remember that repeat plaintiffs (see Gambino Portuese et al., 2009) can choose the cases with the most advantageous characteristics to litigate, which gives them a litigation advantage that should decrease the agency's success rate in cases judicially determined on the merits. In addition, as MacGregor and Seesholtz (2008) describe,

The distribution of NEPA expertise is not uniform across [Forest Service] management units. Although some ranger districts may have a key NEPA staff member, others may have to rely on either a shared resource at the [national] forest (or higher) level, while still others may have NEPA expertise that is on the margin of being outdated. (p. 20)

The agency's compliance record is notable given these factors and considering that, during these 20 years, (a) the agency undertook thousands of projects subject to NEPA, (b) NEPA case law (based on litigation involving both the Forest Service and other federal agencies) constantly changed and refined the NEPA requirements the Forest Service had to follow, and (c) NEPA legal expectations can and do differ by federal circuit.

Our most interesting findings are based upon our analysis of NEPA documents. For example, while the Forest Service won 61.7% of all NEPA cases judicially determined on the merits and 69.3% of NEPA claims in those cases, when we categorized cases by the type of NEPA document involved in the case, the agency's winning percentage in both these cases' final outcomes (46.9% to 67.9%) and their NEPA claims (55.1% to 85.7%) varied greatly (see Table 2).

Of the four types of NEPA documents we examined, the agency is more likely to lose a CE-based case than any other type of case. The Forest Service approved its CEs through notice and comment rulemaking, where it indicated that based on past experience and analyses these routine, minor, or ongoing actions do not amount to a significant effect on the human environment—thus never triggering the need for additional NEPA analysis. Despite these findings and the opportunity in the notice and comment rulemaking process for public and stakeholder input, courts are regularly unwilling to defer to agency's findings that particular projects in question can be categorically excluded. This may be the result of (a) judges' lack of

understanding of how CEs are developed and their purpose, (b) judges' discomfort with the lack of the analysis in the agency's project record or the failure of project CE findings to directly relate to the environmental analyses undertaken in the CE rulemaking, or (c) that lower courts are failing to follow the US Supreme Court's directives in *Chevron vs. NRDC* (467 US 837, 1984) and *Vermont Yankee v. NRDC* (435 US 519, 1978) to not substitute their preferences for reasonable agency decisions. However, as others have postulated, it may be based in the agency's inappropriate use of CEs. For example, MacGregor and Seesholtz's (2008) interviews with Forest Service line officers revealed that, "under some circumstances [national forest district] rangers may use the CE approach to bundle a number of small projects into an overall project that may be marginally appropriate for the CE designation" (p. 19). Moriarty (2004) argued that Forest Service efforts to expand the scope of CEs by increasing the list of categorically excluded actions (see Neznok, 2004) failed to increase the agency efficiency because it was opposed by environmental organizations that challenged this expansion in court. The agency's low success rate in CE-based cases supports Moriarty's (2004) concerns and suggests that the agency's use of CEs may sometimes add significant costs, thereby decreasing agency efficiency. Our CE results also are interesting in light of Stern et al.'s (2010) survey of Forest Service NEPA personnel where respondents ranked "Increase the range of [CEs] . . . available" as the number one option for improving the agency's NEPA processes. Either Forest Service personnel do not understand the high percentage of CE cases the agency loses, or if they do, they seem to believe that the percentage of CEs litigated is significantly less than the percentage of EAs or EISs litigated. Stern et al.'s and our findings also raise questions about whether more CEs are needed or whether the agency needs to better utilize its existing CEs.

Most challenges to Forest Service NEPA documents were based on EAs and EISs. Our 20 years of findings extend Mortimer et al.'s (in press) 10-year analysis of NEPA cases, which showed that the Forest Service was more successful in EA-based litigation than in EIS-based litigation. This contradicts agency personnel's perceptions that EISs are more legally defensible than EAs, and supports their perception that "claims of the relative defensibility of an EIS in court may be misplaced, or at least based upon an incomplete picture of the Forest Service litigation landscape" (Mortimer et al., in press, p. 13). Our results provide a foundation to understand Forest Service land management decision making and administrative appeal decisions. For example, Kaiser (2006) examined how Forest Service pref-

erences and choices were shaped by NEPA-required interaction with the public. Our document-based NEPA analysis complements Kaiser's findings by verifying the likelihood of successful litigation based on specific types of NEPA analyses. It also demonstrates how litigation research can provide litigants with information that is imperceptible without longitudinal studies and that misperceptions may cause litigants to accept beliefs that are unsupported by reality—49% of the participants in Mortimer et al.'s (in press) study indicated that one of their top three reasons for preparing an EIS as the “likelihood of litigation and appeals” (p. 11).

The Forest Service's success in EAs compared to EISs may be because EAs are (intended to be) less detailed documents and thus plaintiffs have fewer data and analyses to challenge in court proceedings. It is also interesting to note the 6.3% difference between the Forest Service's winning percentage on EAs themselves (72.7%) compared to its winning percentage in the final outcome in EAs cases (66.4%) is half the 12.6% difference in the agency's winning percentage for EISs (64.4% vs. 51.8%) (see Table 2). This indicates that the agency is more likely to lose a case because of a violation of another statute, in EIS litigation than in EA litigation. Thus, policy makers and stakeholders interested in agencies' NEPA success rates should focus their attention on the agency's success rate on the NEPA claim and not overemphasize the differences in final outcomes. These success rate differences also demonstrate why researchers interested in determining agencies' statutory success (in NEPA cases or in cases based on other statutes) should examine both the final outcome of the litigation and the decision specifically on the statute. Failure to examine the latter (and account for the fact that agencies can lose cases based on statutes being litigated) will always decrease the agency's final outcome success rate.

Our longitudinal period allowed us to investigate the Forest Service's success in EA-based and EIS-based cases involving (a) RA analyses, (b) D/IE analyses, and (c) CI analyses much more extensively than has previous research (e.g., Burriss and Canter, 1997; McCold and Saulsbury, 1996; Smith, 2006, 2007; Thatcher, 1990). Our results reveal that the Forest Service was fairly successful in litigation involving each of these analysis components, with success rates varying from 66.7% to 84.4%. These rates differ significantly from those reported by Smith (2006, 2007), who based his analyses on 10 years of (a) all Court of Appeals RA cases and (b) Ninth Circuit Court of Appeals' CI cases, respectively. This variation can be attributed to both the shorter period of Smith's research and, in the case of his 2007 report, spatial limitations (namely, analyzing only one

Court of Appeals circuit). While this does not diminish the usefulness of Smith's research, which was designed both to document litigation involving these types of NEPA analyses and to illustrate key findings, it does demonstrate the limitations of litigation research based on temporal, spatial, and other limitations.

Although data presentations, such as Table 3, focus attention on the differences between various types of EA and EIS analyses, it is important to note the similarities of the findings: namely, that the agency won more than two of every three cases in these analyses. However, there are some important differences. For example, compared to the agency's overall winning percentages on the EAs (72.7%) and EISs (64.4%) (see Table 2), the agency did much better in RA cases than in CI and D/IE cases (Table 3). The Forest Service's success in RA cases may be due to the nature of determining reasonable RAs and the agency correctly applying lessons from previous RA litigation. It could also be based on the nature of the decisions the agency must make. RAs involve decisions that are more policy based, whereas CI and D/IE involve more science-based findings. In addition, CI and D/IE analyses by their nature require the agency to conduct more speculative analyses. For example, in addition to assessing future impacts and their effects, the agency must consider the proposed action's CIs that enhance or exacerbate the impact of past, present, or foreseeable future actions (Thatcher, 1990). The Forest Service also faces time and resource constraints, and often a lack of sufficient baseline data or methods, when attempting to analyze D/IEs and CIs (Smith, 2006).

## Conclusion

This article provides an in-depth analysis of 20 years of Forest Service NEPA litigation. Our results have potential practical importance and application. For example, they can provide a starting point for the Forest Service to address NEPA implementation issues and indicate where the agency should consider investing resources to educate its personnel and leaders. Initial inquiries might focus on examining the environmental analyses and corresponding NEPA documents involved in Forest Service losses. Such a qualitative analysis would likely reveal some common errors—for example, an impact assessment or how agency personnel could present their findings more effectively for judicial review—that may be addressed with additional education. Also, given the brevity of the statute and CEQ's regulations, the longitudinal nature of this study builds upon our understanding of NEPA implementation, specif-

ically where the Forest Service has successfully and unsuccessfully implemented NEPA. After all, it is each agency's cases, and the precedent established in published cases involving an agency and other federal agencies, that guide an agency's NEPA implementation.

This comprehensive analysis of the federal agency that prepares more EISs and is involved in 38% of all NEPA litigation provides information to (a) stakeholders interested in understanding challenges to NEPA's implementation, and (b) policy makers considering revisions to the statute (e.g., Committee on Resources, 2005). Our results indicate that few of the thousands of Forest Service projects subject to NEPA are litigated, that judges (or a panel of judges) pass judgment on only a small percentage of particular NEPA documents (e.g., EAs were the subject of 34.9% of the 410 cases decided by judges; EISs were only 39%), and that in still fewer cases did judges decide the agency incorrectly administered NEPA. However, it is important to note that all of the cases analyzed for this research delayed Forest Service land management activities, and that the cases the agency lost resulted in changes to Forest Service land management decisions and often resulted in published judicial opinions that served as precedent not only for the Forest Service but for other federal agencies.

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## References

Broussard, S.R., and B.D. Whitaker. 2009. The Magna Charta of Environmental Litigation: A Historical Look at 30 Years of NEPA–Forest Service Litigation. *Forest Policy and Economics* 11(2):148–154.

Burris, R.K., and L.W. Canter. 1997. Cumulative Impacts Are Not Properly Addressed in Environmental Assessments. *Environmental Impact Assessment Review* 17(1):5–18.

Committee on Resources. 2005. *Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act: Initial Findings and Draft Recommendations*. Committee on Resources, US House of Representatives, Washington, DC,

30 pp. Available at [http://www.law.georgetown.edu/gelipi/research\\_archive/nepa/NEPATaskForce\\_FinalDraft.pdf](http://www.law.georgetown.edu/gelipi/research_archive/nepa/NEPATaskForce_FinalDraft.pdf) (accessed April 14, 2010).

Council on Environmental Quality (CEQ). 2009. *NEPANet*. CEQ, Washington, DC. Available at <http://ceq.hss.doe.gov/nepa/nepanet.htm> (accessed May 7, 2009).

Gambino Portuese, B., R.W. Malmshemer, A.M. Anderson, D.W. Floyd, and D.M. Keele. 2009. Litigants' Characteristics and Outcomes in Forest Service Land Management Cases 1989 to 2005. *Journal of Forestry* 107(1):16–22.

Jones, E.S., and C.P. Taylor. 1995. Litigating Agency Change: The Impact of the Courts and Administrative Appeals Process on the Forest Service. *Policy Studies Journal* 23(2):310–336.

Kaiser, B.A. 2006. The National Environmental Policy Act's Influence on USDA Forest Service Decision-Making, 1974–1996. *Journal of Forest Economics* 12(2):109–130.

Keele, D.M., R.W. Malmshemer, D.W. Floyd, and J.E. Perez. 2006. Forest Service Land Management Litigation 1989–2002. *Journal of Forestry* 104(4):196–202.

MacGregor, D.G., and D.N. Seesholtz. 2008. *Factors Influencing Line Officers' Decisions about National Environmental Policy Act Project Design and Development*. General Technical Report PNW-GTR-766. USDA Forest Service, Pacific Northwest Research Station, Portland, OR, 27 pp.

Malmshemer, R.W., D. Keele, and D.W. Floyd. 2004. National Forest Litigation in the US Courts of Appeals. *Journal of Forestry* 102(2):20–25.

McCold, L.N., and J.W. Saulsbury. 1996. Including Past and Present Impacts in Cumulative Impact Assessments. *Environmental Management* 20(5):767–776.

Moriarty, K.H. 2004. Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion. *New York University Law Review* 79:2312–2340.

Mortimer, M.J. 2002. The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management. *Administrative Law Review* 54(3):907–982.

Mortimer, M.J., M.J. Stern, R.W. Malmshemer, D.J. Blahna, L. Cervený, and D. Seesholtz. In press. Environmental and Social Risks: Defensive NEPA in the U.S. Forest Service. *Journal of Forestry*.

Nezcek, R. 2004. Healthy Forests Initiative and its effect on appeals. *Journal of Forestry* 102(2):5–7.

Smith, M.D. 2006. Cumulative Impact Assessment under the National Environmental Policy Act: An Analysis of Recent Case Law. *Environmental Practice* 8(4):228–240.

Smith, M.D. 2007. A Review of Recent NEPA Alternatives Analysis Case Law. *Environmental Impact Assessment Review* 27(2):126–144.

Stern, M.J., S.A. Predmore, M.J. Mortimer, and D.N. Seesholtz. 2010. From the Office to the Field: Areas of Tension and Consensus in the Implementation of the National Environmental Policy Act within the US Forest Service. *Journal of Environmental Management* 91(6):1350–1356.

Thatcher, T.L. 1990. Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act. *Environmental Law* 20:611–647.

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